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September 10, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1066-CR State of Wisconsin v. Rachel C. Mulholland
(L.C. # 2018CF1395)

Before Fitzpatrick, P.J., Kloppenburg, and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The State of Wisconsin appeals a Dane County Circuit Court order granting Rachel C. Mulholland's motion to suppress evidence obtained following a blood draw conducted with Mulholland's consent after she was read the Informing the Accused form upon her arrest for

operating while intoxicated (OWI).[1] The State contends that the court erred in granting Mulholland's motion to suppress blood draw evidence, based on what the State characterizes as the court's erroneous conclusion that a person has a constitutional right to refuse a blood draw. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Based on this court's decision in ***State v. Levanduski***, 2020 WI App 53, __ Wis. 2d__, __ N.W.2d__ (petition for review pending), we reverse the circuit court.

The following facts are undisputed. Rachel C. Mulholland was arrested for operating while intoxicated. The arresting officer read to Mulholland the Informing the Accused form, in compliance with WIS. STAT. § 343.305(4). The form reads, in pertinent part:

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

WIS. STAT. § 343.305(4). The officer then requested a blood sample, and Mulholland consented to the blood draw.

[1] The "Informing the Accused" form contains a statutory script that provides information about the legal consequences of consenting to chemical testing and the legal consequences of refusing. *See* WIS. STAT. § 343.305(4) (2017-18).

All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Based on the blood test results, the State charged Mulholland with OWI as a fourth offense. OWI as a fourth offense is a criminal offense in Wisconsin. *See* WIS. STAT. § 346.65(2)(am)4. Mulholland moved to suppress the evidence obtained from the blood draw, contending that the Informing the Accused form that the arresting officer read to Mulholland "misrepresented the law" in informing her that if she refused to submit to a blood draw, the refusal could be used against her in a criminal proceeding. Mulholland argued that recent controlling precedent recognizes a constitutional privilege to refuse a blood draw, the exercise of which privilege cannot be commented on at a criminal trial. Accordingly, Mulholland argued, the officer's reading of the form threatened to hold her constitutional privilege against her unless she complied with the request, rendering her consent to the blood draw coerced and involuntary.

The circuit court agreed with Mulholland, ruling that controlling United States Supreme Court and Wisconsin Supreme Court precedent direct the suppression of the blood draw evidence. The court reasoned as follows. First, ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016), recognizes a Fourth Amendment right to refuse to consent to a warrantless blood draw, and ***State v. Dalton***, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, establishes that it is a violation of that right for a court to explicitly increase a criminal sentence because the defendant refused to consent to a blood draw. Second, under ***State v. Banks***, 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526, "it is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search," and "a defendant's invocation of a constitutional right cannot be used to imply guilt." ***Banks***, 328 Wis. 2d 766, ¶24. Accordingly, the circuit court concluded that "[i]f Ms. Mulholland enjoyed a constitutional right to refuse the warrantless blood test, then ***Banks*** commands that she enjoyed a constitutional right to not have her refusal introduced at trial as evidence of guilt." The court

further concluded that the voluntariness of Mulholland's "consent" to submit to the warrantless blood draw was negated by her having been told that the exercise of her constitutional right (i.e., refusing to submit to a warrantless blood draw) could be used against her in court. For these reasons, the court granted the motion to suppress.

"We review constitutional questions, both state and federal, de novo." ***State v. Lagrone***, 2016 WI 26, ¶18, 368 Wis. 2d 1, 878 N.W.2d 636 (quoting ***State v. Schaefer***, 2008 WI 25, ¶17, 308 Wis. 2d 279, 746 N.W.2d 457). The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures.[2] ***State v. Eason***, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625. The "taking of a blood sample or the administration of a breath test" is a search. ***Birchfield***, 136 S. Ct. at 2173. Warrantless searches are presumptively unreasonable unless an exception to the warrant requirement applies. ***State v. Tullberg***, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120. One such exception, for "exigent circumstances," may apply in drunk driving investigations, subject to a case-by-case analysis of whether "all of the facts and circumstances of the particular case" support exigency. ***Missouri v. McNeely***, 133 S. Ct. 1552, 1556, 1560 (2013); ***Birchfield***,

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2 The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Article I, § 11 of the Wisconsin Constitution contains substantially the same language, and, with exceptions that do not apply in this case, we ordinarily interpret it "consistent with the Fourth Amendment of the United States Constitution." ***State v. Scull***, 2015 WI 22, ¶18 n.3, 361 Wis. 2d 288, 862 N.W.2d 562.

136 S. Ct. at 2174. Another exception to the warrant requirement is voluntary consent. ***State v. Artic***, 2010 WI 83, ¶29-30, 327 Wis. 2d 392, 413, 786 N.W.2d 430.

The Wisconsin Court of Appeals recently issued its opinion in ***State v. Levanduski***, __ Wis. 2d__, ¶11, addressing the identical issue on nearly identical pertinent facts as those presented in this case. Like Mulholland, the defendant in ***Levanduski*** was charged with OWI as a second offense or above and faced mandatory incarceration if she was convicted. ***Id.***, ¶2; *see* WIS. STAT. § 346.65(2)(am). Like Mulholland, the defendant in ***Levanduski*** consented to the blood draw after she was read the Informing the Accused form and learned that her refusal could be used as evidence of guilt in a subsequent OWI criminal trial. ***Levanduski***, __ Wis. 2d__, ¶2. Like Mulholland, the defendant in ***Levanduski*** then moved to suppress the blood test results, arguing that "her consent to the blood draw was involuntary because she had a constitutional right to refuse to submit to a blood draw and the officer violated that right by misinforming her that if she refused to submit to it, the fact that she refused could be used against her in court." ***Id.***, ¶3.

Reversing the circuit court's order suppressing the evidence, the court of appeals in ***Levanduski*** interprets the U.S. Supreme Court in ***McNeely***, 133 S. Ct. 1552, to have held that "using the fact of a defendant's refusal against the defendant in a subsequent criminal prosecution" is "an acceptable legal tool." ***Levanduski***, __ Wis. 2d__, ¶11 (quoted source omitted). The ***Levanduski*** court also interprets the U.S. Supreme Court in ***Birchfield***, 136 S. Ct. 2160, to have held, and the Wisconsin Supreme Court in ***Dalton***, 383 Wis. 2d 147, to have affirmed, that "a State may not make a drunk-driving suspect's refusal a crime itself, but *may* impose civil penalties and 'evidentiary consequences' on such refusals." ***Levanduski***, __

Wis. 2d__, ¶12 (emphasis added). Accordingly, the ***Levanduski*** court concludes that the Informing the Accused form read to Levanduski did not misstate the law when it indicated that her refusal could be used against her in court, including in a criminal case, and, therefore, her consent to the blood draw was voluntary and the results of the blood test could legally be used against her in court. ***Id.*** at ¶15.

Levanduski is controlling authority and we are bound to follow it. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[P]ublished opinions of the court of appeals are precedential."). As stated above, the court of appeals in ***Levanduski*** determines that using a person's refusal to consent to a warrantless blood draw against the person in court, including in a criminal case, is not an inherent constitutional violation. Therefore, we are constrained to rule that the officer's warning to Mulholland did not inaccurately state the law and that Mulholland's consent was voluntary. Accordingly, we reverse the circuit court's order suppressing the blood draw evidence.

IT IS ORDERED that the order is summarily reversed, and the cause remanded for further proceedings, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

KLOPPENBURG, J. (*concurring*). I agree that we are bound to reverse because ***Levanduski*** controls our analysis. However, I write separately to state my belief that ***Levanduski*** is wrongly decided. *See* ***Cook***, 208 Wis. 2d at 189-90 (This court "is not powerless if it concludes that a prior decision of the court of appeals or the supreme court is erroneous. It may … decide the appeal, adhering to a prior case but stating its belief that the prior case was wrongly decided."). As I explain, and as recognized by the circuit court here, a close reading of

the case law on which the ***Levanduski*** court relies appears to compel a conclusion opposite to that reached by the ***Levanduski*** court.

I begin by clarifying the issue. The Fourth Amendment provides the right to be secure against unreasonable searches, and a person exercises that right when the person refuses to consent to an unreasonable search. ***Birchfield***, 136 S. Ct. at 2184. A warrantless blood draw incident to a lawful drunk driving arrest, unsupported by any exceptions to the warrant requirement, is an unreasonable search. ***Id.*** at 2185 n.8. Of course, consent is a valid exception to the warrant requirement. ***Artic***, 327 Wis. 2d 392, ¶29. But that consent must be voluntary. ***Id.***, ¶30. The question here is whether the Informing the Accused form, which advises a person that refusal to consent can be used against the person *in a criminal case*, renders the person's consent involuntary. In answering that question, I proceed to set forth an alternative analysis to that in ***Levanduski*** and then identify two potential infirmities in the ***Levanduski*** analysis.

A. Alternative Analysis

In 1980, the Wisconsin Court of Appeals first ruled that a defendant's refusal to take a *breath* test is relevant at trial and that "use of [the refusal] for the purpose of showing [the defendant's] consciousness of guilt is constitutionally permissible." ***State v. Albright***, 98 Wis. 2d 663, 669, 298 N.W.2d 196 (Ct. App. 1980). That court also noted that "[t]he only rationale for a rule prohibiting comment on a refusal would be that *there is a right to refuse the test*." ***Id.*** (emphasis added). In 1985, the Wisconsin Supreme Court affirmed the rationale of the ***Albright*** court and, addressing the defendant's refusal to submit to a *blood* draw, held that "[t]he State may submit the relevant and, hence, admissible evidence that [the defendant] refused the test for blood alcohol content." ***State v. Bolstad***, 124 Wis. 2d 576, 585, 370 N.W.2d 257 (1985).

In 1983, prior to ***Bolstad***, the United States Supreme Court ruled that "the admission into evidence of a defendant's refusal to submit to [a blood draw] does not offend the [constitutional] right against self-incrimination." ***South Dakota v. Neville***, 103 S. Ct. 916, 918 (1983). The Court reasoned:

> the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace … that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. [This is not a case] where the State has subtly coerced respondent into choosing the option it had no right to compel[.]

Id. at 922 (emphasis in original). Addressing an earlier U.S. Supreme Court case, ***Griffin v. California***, 85 S. Ct 1229 (1965), which "held that a prosecutor's or [circuit] court's comments on a defendant's refusal to take the witness stand impermissibly burdened the defendant's Fifth Amendment right to refuse," the ***Neville*** Court stated that "[u]nlike in ***Griffin***, a person suspected of drunk driving has *no constitutional right to refuse* to take a blood-alcohol test." ***Id.*** at 921 n.10 (emphasis added). The ***Neville*** Court concluded by observing, "Respondent's right to refuse the blood-alcohol test … is simply a matter of grace bestowed [by Respondent's state] legislature." ***Id.*** at 923.

In 2016, in ***Birchfield v. North Dakota***, the U.S. Supreme Court granted certiorari to determine "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." ***Birchfield***, 136 S. Ct. at 2172. The Court stated that the taking of a blood sample or the administration of a breath test is a search. ***Id.*** at 2173. After "balancing … individual

privacy interests and legitimate state interests to determine the reasonableness of [each type of] warrantless search", it held that "the Fourth Amendment allows warrantless breath tests, but as a general rule does not allow warrantless blood draws, incident to a lawful drunk-driving arrest." ***Id.*** at 2185 n.8.

After determining that the Fourth Amendment does not permit warrantless blood draws incident to drunk driving arrests, the Court stated:

> Our prior opinions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.
>
> It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test.

Id. at 2185. Addressing the facts before it, the Court concluded "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." ***Id.*** at 2186.

In 2017, the Wisconsin Supreme Court stated that "the [United States] Supreme Court has clarified in ***Birchfield*** that 'the Fourth Amendment permits warrantless *breath* tests incident to arrests for drunk driving,'" and that, "[i]n contrast … a *blood* test could not 'be administered as a search incident to a lawful arrest for drunk driving.'" ***State v. Lemberger***, 2017 WI 39, ¶34 & n.12, 374 Wis. 2d 617, 893 N.W.2d 232 (emphasis added).

In 2018, the Wisconsin Supreme Court in ***Dalton*** concluded that a circuit court impermissibly burdened a defendant's constitutional right to refuse a blood draw when it imposed a harsher sentence based solely on the fact of the defendant's refusal to submit to a

warrantless blood draw. ***Dalton***, 383 Wis. 2d 147, ¶¶60-61 (stating that "[p]ursuant to the circuit court's unequivocal sentencing remarks, Dalton was criminally punished for exercising his constitutional right").

In light of the constitutional right to refuse a blood draw recognized in ***Birchfield*** and ***Dalton***, I turn, as the circuit court here did, to ***Banks***, 328 Wis. 2d 766, ¶24, which holds that "it is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search," and that "a defendant's invocation of a constitutional right cannot be used to imply guilt." I conclude this part of my analysis by again quoting from the circuit court here: "[i]f Ms. Mulholland enjoyed a constitutional right to refuse the warrantless blood [draw], then ***Banks*** commands that she enjoyed a constitutional right to not have her refusal introduced at trial as evidence of guilt." Therefore, like the circuit court, I conclude that Mulholland's consent to submit to the warrantless blood draw was not voluntary because she consented on pain of having her refusal used against her in a criminal case.

*B. The **Levanduski** Analysis*

I now address two potential infirmities in the contrary approach and analysis of the ***Levanduski*** decision. *See* ***Cook***, 208 Wis. 2d at 189-90. I conclude that the ***Levanduski*** court a) relies on faulty interpretations of ***Birchfield***, ***Dalton***, and ***McNeely*** to conclude that states may constitutionally use a driver's refusal to submit to a warrantless blood draw as evidence of guilt in a criminal case; and b) mistakenly relies on portions of ***Neville*** and its subsequent case law that are superseded by ***Birchfield***.

1. Faulty interpretation of ***Birchfield, Dalton, and McNeely***

The ***Levanduski*** court is wrong to read ***Birchfield***, ***Dalton***, and ***McNeely*** as holding that the state may constitutionally use a driver's refusal to submit to a warrantless blood draw as evidence of guilt in a criminal case. *See* ***Levanduski***, __ Wis. 2d__, ¶13 n.5 ("Criminal penalties for refusal under an implied consent law impermissibly burden and penalize [a defendant's right to be free from warrantless searches and seizures]; civil penalties and evidentiary consequences do not …. Thus, criminal penalties are beyond the constitutional 'limit' of one's consent under an implied consent statute, but civil penalties and evidentiary consequences are not."). I address these precedential cases one-by-one.

First, ***Birchfield*** did not consider the constitutionality of implied consent laws that impose evidentiary consequences on the refusal to submit to a warrantless blood draw in a criminal case. Therefore, ***Birchfield*** cannot have been said to have insulated these laws from a constitutional challenge based on involuntariness of consent. "General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." ***Arkansas Game & Fish Comm'n v. United States***, 133 S. Ct. 511, 520 (2012) (quoted source omitted).

The ***Levanduski*** opinion, ***Levanduski***, __ Wis. 2d__, ¶¶12-13, relies on the following language from ***Birchfield*** to conclude that evidentiary consequences in criminal cases are constitutionally *permissive* restraints on a person's Fourth Amendment rights:

> Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.

> Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.
>
> It is another matter, however, for a State to not only insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test.

Birchfield, 136 S. Ct. at 2185. I do not see a basis for the ***Levanduski*** court's conclusion in this quoted ***Birchfield*** language.

Rather, I see the Court in ***Birchfield*** remarking that, because the petitioners did not challenge the constitutionality of implied consent laws that threaten evidentiary consequences in criminal cases, the Court did not pass judgment on those specific laws' constitutionality. In fact, without an analysis of *specific* implied consent laws attaching evidentiary consequences in criminal cases to a refusal, applied to specific litigants and their facts, the Court in ***Birchfield*** cannot be read to have approved of those laws' constitutionality.

The ***Birchfield*** Court confined its holding to apply to the imposition of criminal penalties when someone exercises his or her constitutional right to refuse a warrantless blood draw, and the Court invalidated such criminal penalties as unconstitutional because the facts of the cases before it directly concerned specific real or threatened criminal penalties.

Thus, the ***Levanduski*** court paints with too broad a brush when it characterizes this ***Birchfield*** language as "reiterat[ing] the lawfulness of implied-consent laws that impose 'civil penalties and evidentiary consequences' on motorists who refuse to submit to a blood draw." ***Levanduski***, __ Wis. 2d__, ¶12 (quoting ***Birchfield***, 136 S. Ct. at 2185), and including within that language the lawfulness of implied consent laws that impose evidentiary consequences in criminal cases. Nothing in the language quoted above iterates any *lawfulness* of implied consent laws that impose evidentiary consequences in criminal cases on drivers to who refuse to submit

to a blood draw. There is a logical difference between ***Birchfield***'s holding that something has breached a constitutional limit (criminal penalties imposed for exercising a constitutional right) and the ***Levanduski*** court's asserting that evidentiary consequences in criminal cases fall on the *permissible* side of that constitutional limit.

The fact that the evidentiary consequences here would apply in a criminal case is significant. Even if the language in ***Birchfield*** could be read as approving implied consent laws that impose "civil penalties and evidentiary consequences" on refusal, it is not clear whether the word "civil" modifies only the word "penalties," or whether it also modifies the words "evidentiary consequences." If the latter, the Court with this phrase only recognized its awareness of its own prior opinions acknowledging state laws that impose *civil* penalties and *civil* evidentiary consequences on motorists who refuse to submit to a blood draw. In this sense, the Court was not acknowledging any reference to the evidentiary use of a refusal against a person in a criminal proceeding.[3]

Second, ***Levanduski*** relies on ***Dalton*** for the premise that evidentiary consequences in criminal cases are constitutional: "Criminal penalties are beyond the constitutional 'limit' of one's consent under an implied consent statute, but civil penalties and evidentiary consequences are not" (citing ***Dalton***, 383 Wis. 2d 147, ¶58). ***Levanduski***, __ Wis. 2d__, ¶13 n.5. I do not

[3] The ***Levanduski*** court states that Levanduski "does not explain what else the ***Birchfield***[] Court could have meant by 'evidentiary consequences' if it did not mean 'use of refusal as evidence.'" ***State v. Levanduski***, 2020 WI App 53,__ Wis. 2d__, __N.W.2. __ ¶12 n.4. The ***Levanduski*** court skirts the consideration of whether the refusal evidence is presented in a civil or criminal case. In Wisconsin, operating while intoxicated as a first offense is charged in a civil proceeding, and the "refusal hearing" that may be held prior to revocation is also a civil proceeding. Thus, the refusal evidence could be used in both these civil proceedings, as well as in criminal cases charging operating while intoxicated as a second or subsequent offense, as in ***Levanduski*** and in this case. *See* WIS. STAT. §§ 346.65(2), 343.305(8)-(9).

see the support in ***Dalton*** that the ***Levanduski*** court sees. ***Dalton*** at ¶58 states that the "***Birchfield*** [C]ourt acknowledged that 'prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply," and "[y]et, the [C]ourt emphasized that criminal penalties may not be imposed for a refusal."

I understand from this quoted language only an acknowledgement that the United States Supreme Court had previously "referred approvingly" to a "general concept" of implied consent laws imposing civil penalties and evidentiary consequences. I do not see any indication that evidentiary consequences in criminal cases are somehow *within* a constitutional "limit"; only that criminal penalties, i.e., those penalties actually assessed in the cases before the Court in ***Birchfield***, have been held to exceed that limit.

The ***Levanduski*** court is also wrong to read either ***Birchfield*** or ***Dalton*** as having "held … that a refusal to submit to a blood test cannot be the basis for a *separate* criminal charge." ***Levanduski***, __Wis. 2d__, ¶12 (emphasis added). The ***Birchfield*** Court said that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense"; it did not cabin this phrase to only prohibiting "separate" criminal charges. ***Birchfield***, 136 S. Ct. at 2186. Further, the Wisconsin Supreme Court in ***Dalton*** explicitly stated that:

> the fact that refusal is [or is not] a stand-alone crime does not alter our analysis. This is not a distinction the ***Birchfield*** Court drew. Although ***Birchfield*** states that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense[,]" it also addresses the wider impermissibility of criminal penalties for refusal, not only criminal charges.
>
> ….
>
> The fact that Dalton could not be charged with a separate crime does not change the fact that he explicitly received a stiffer

> sentence based solely on his refusal to submit to an evidentiary blood test.

Dalton, 383 Wis. 2d 147, ¶¶63-64 (emphasis in original). ***Levanduski*** impermissibly narrows the holding of both cases by insisting that the prohibition on criminal penalties applies only to "separate" criminal charges.

Third, the ***Levanduski*** court relies on ***McNeely***, 133 S. Ct. 1552, to support its conclusion that refusal to consent to a blood draw may be used as evidence of guilt in a criminal case. *See* ***Levanduski***, __ Wis. 2d__, ¶11 ("Thus, the ***McNeely*** Court recognized as an acceptable 'legal tool[]' using the fact of a defendant's refusal against the defendant 'in a subsequent criminal prosecution.'"). But ***McNeely*** did not address the issue of whether evidentiary consequences in a criminal case for refusal are constitutional. Rather, ***McNeely***, in the course of holding that dissipation of alcohol is not on its own a per se exigent circumstance, noted that "states have a broad range of legal tools" to enforce implied consent laws, and that "most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." ***McNeely***, 133 S. Ct. at 1565-66. This remark from the Court that States "have" such tools did not differentiate whether those tools were permissible regarding *breath* or *blood* tests, and this remark also did not "recognize" those State laws as "acceptable," contrary to the ***Levanduski*** court's characterization.

In sum, ***Levanduski*** relies on faulty interpretations of ***Birchfield***, ***Dalton***, and ***McNeely*** to uphold the constitutionality of the imposition of evidentiary consequences in a criminal case of a refusal to submit to a warrantless blood draw.

*2. Faulty application of **Neville** and its subsequent case law*

The ***Levanduski*** court is wrong to rely on certain parts of pre-***Birchfield*** cases, including ***Neville***, that were premised on the now-defunct assumption that no constitutional rights attach to refusing a warrantless blood draw. ***Birchfield***'s holding that a warrantless blood draw incident to arrest for drunk driving violates the Fourth Amendment appears to supersede pertinent parts of pre-***Birchfield*** cases upon which the ***Levanduski*** court relies. Specifically, I address ***Levanduski***'s faulty reliance on ***Neville*** and on a Wisconsin case interpreting ***Neville***, ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987).

South Dakota v. Neville: In 1983, the U.S. Supreme Court held "that the admission into evidence of a defendant's refusal to submit to a [blood draw] does not offend the right against self-incrimination." ***Neville***, 103 S. Ct. at 918. The Court stated that, in ***Schmerber v. California***, 86 S. Ct. 1826 (1966), it held that "the [Fifth Amendment] privilege bars the State only from compelling 'communications' or 'testimony.' Since a blood test was 'physical or real' evidence rather than testimonial evidence, we found it unprotected by the Fifth Amendment privilege." ***Neville***, 103 S. Ct. at 920.[4] The Court distinguished the case before it from ***Griffin v. California***, 85 S. Ct. 1229, as follows:

> ***Griffin*** held that a prosecutor's or [circuit] court's comments on a defendant's refusal to take the witness stand

[4] In ***Schmerber***, the Supreme Court concluded that exigent circumstances rendered "the attempt to secure evidence of blood-alcohol content … appropriate incident to petitioner's arrest," and as a result, "that the present record shows no violation of the petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record." ***Schmerber v. California***, 86 S. Ct. 1826, 1835-36 (1966).

> impermissibly burdened the defendant's Fifth Amendment right to refuse. Unlike the defendant's situation in ***Griffin***, *a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test.*

Neville, 103 S. Ct. at 921 n.10 (emphasis added). The ***Neville*** Court concluded that "the right to silence underlying the ***Miranda*** warnings is one of constitutional dimension, and thus cannot be unduly burdened," but "Respondent's right to refuse the blood-alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota legislature." ***Id.*** at 923.

I question the continued authority of the ***Neville*** remarks regarding the constitutionality of a warrantless blood draw. The ***Birchfield*** Court held that a person arrested incident to drunk driving has a Fourth Amendment privilege to refuse to submit to a blood draw. ***Birchfield***, 136 S. Ct. at 2185 n.8. As we concluded in ***State v. Prado***, this holding means that blood draws performed pursuant to Wisconsin's implied consent law must follow the same rules as any other Fourth Amendment search: police need either a warrant or a valid warrant exception. ***State v. Prado***, 2020 WI App 42, ¶51, __ Wis. 2d__, 947 N.W.2d 182. Because there is a constitutional right to refuse to consent for other warrantless Fourth Amendment searches, this principle must apply as well to OWI blood draws. *See* ***Banks***, 328 Wis. 2d 766, ¶24 ("[I]t is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search … a defendant's invocation of a constitutional right cannot be used to imply guilt."). ***Birchfield***'s holding appears at least to qualify the ***Neville*** Court's declaration that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." ***Neville***, 103 S. Ct. at 560 n.10.

Moreover, in 2018, the Wisconsin Supreme Court in ***Dalton***, in declaring the dissent's reliance on ***Neville*** "misplaced," expressly stated that:

> ***Neville*** was decided pre-***McNeely*** and pre-***Birchfield***. Both [those cases] have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment ***Neville*** case on which [the] dissent relies.

Dalton, 383 Wis. 2d 147, ¶61 n.10. Thus, according to our Supreme Court in ***Dalton***, this part of ***Neville*** has been superseded. The ***Levanduski*** court was wrong to rely on it.

State v. Zielke, 137 Wis. 2d 39: In ***State v. Zielke***, the circuit court suppressed blood test results based on a failure of the police to comply with procedures in the implied consent law. ***Zielke***, 137 Wis. 2d at 40-41. The Wisconsin Supreme Court reversed, stating that:

> the implied consent law is … not designed to give greater fourth amendment rights to an alleged drunk driver than those afforded any other criminal defendant. It creates a separate [civil] offense that is triggered upon a driver's refusal.… It does not, however, prevent the State from obtaining chemical test evidence by alternative constitutional means. Suppressing the *constitutionally obtained* evidence in this case would frustrate the objectives of the law, lead to absurd results, and serve no legitimate purpose.

Id. (emphasis added). The blood draw in ***Zielke*** was "constitutionally obtained" because the circuit court found the existence of two exceptions to the warrant requirement—exigent circumstances and actual consent. ***Id.*** at 40-41. Nevertheless, the ***Zielke*** court also stated that there was "no constitutional impediment" to using the fact of refusal in a subsequent OWI prosecution. ***Id.*** at 50. To the extent the court intended such a broad holding, it has been superseded by the explicit recognition in ***Birchfield*** and ***Dalton*** of the Fourth Amendment privilege inherent in refusing a blood draw. ***Zielke*** may not be relied upon to support the conclusion that refusal of a warrantless blood draw may be used in a criminal case as evidence of guilt.

In sum, I see no pertinent and meaningful instruction in the 1983 ***Neville*** decision and the 1987 ***Zielke*** language that "there was no constitutional impediment to using the fact of refusal in the subsequent prosecution," given the 2016 ***Birchfield*** holding, confirmed in ***Dalton***, that a person has a Fourth Amendment right to refuse to submit to a warrantless blood draw. Instead, as noted in the analysis above, I repeat the rationale of the Wisconsin Court of Appeals in 1980 when it noted that "[t]he only rationale for a rule prohibiting comment on a refusal would be that there is a right to refuse the test." ***Albright***, 98 Wis. 2d at 669. Under ***Birchfield*** and ***Dalton***, there is such a right.

CONCLUSION

For these reasons, I believe that ***Levanduski*** is "wrongly decided," but I concur with the majority that its ruling binds this court and compels reversal in this case. *See* ***Cook***, 208 Wis. 2d at 189-90.

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