OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

July 15, 2021

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
Electronic Notice

Lynn M. Hron
Clerk of Circuit Court
Dodge County Justice Facility
Electronic Notice

Margaret Anne Kunisch
Electronic Notice

Michael C. Sanders
Electronic Notice

Todd A. Snow
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You are hereby notified that the Court has entered the following opinion and order:

2020AP567-CR State of Wisconsin v. Joseph Scott Chancellor (L.C. # 2019CT160)

Before Blanchard, 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).

Joseph Scott Chancellor appeals a judgment of conviction for operating with a prohibited alcohol concentration (PAC) as a second offense. Chancellor challenges as unconstitutional Wisconsin's statutory scheme permitting the use of his prior refusal to submit to a warrantless blood draw (referred to as a "blood test refusal") to increase the penalty for his current offense. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition.[1] *See* WIS. STAT. RULE 809.21. We summarily reverse and remand for further proceedings.

Chancellor was charged with Operating While Intoxicated (OWI) and PAC, both as a second offense based on Chancellor's prior blood test refusal after an arrest for OWI. Chancellor argued that WIS. STAT. § 343.307(1)(f), the statute that allowed use of a prior blood test refusal to be counted for determining the potential criminal penalty, unconstitutionally increased his punishment based on a blood test refusal. Chancellor moved for the court to exclude the prior refusal for counting purposes and to order that this case proceed as an OWI/PAC first offense. The circuit court denied the motion. Chancellor was convicted of operating with a PAC as a second offense following a jury trial.

While briefing was underway in this case, we issued a decision in ***State v. Forrett***, 2021 WI App 31, __Wis. 2d__, __N.W.2d__, addressing a similar constitutional challenge to WIS. STAT. § 343.307(1)(f). We concluded that increasing Forrett's penalty for an OWI conviction by counting his prior refusal to submit to a warrantless blood draw violated his Fourth Amendment right against an unreasonable search under ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016), and ***State v. Dalton***, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. ***Forrett***, 2021 WI App 31, ¶¶3, 5.

We cited the Supreme Court's holding in ***Birchfield***, 136 S. Ct. at 2186, that, under implied consent laws, "motorists cannot be deemed to have consented to submit to a blood test

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[1] This appeal was converted from a one-judge appeal to a three-judge appeal under WIS. STAT. RULE 809.41(3) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

on pain of committing a criminal offense." ***Forrett***, 2021 WI App 31, ¶10-11. We stated that, under ***Birchfield***, "criminalizing refusal to a warrantless blood draw with criminal penalties exceeds the defendant's implied consent, and thus, impermissibly burdens or penalizes a defendant's Fourth Amendment right to be free from an unreasonable warrantless search." ***Id.***, ¶11. We then cited our supreme court's holding in ***Dalton***, 383 Wis. 2d 147, ¶¶58-60, which had relied on ***Birchfield*** to conclude that an increased sentence for OWI "for the sole reason that [Dalton] refused to submit to a blood test" was unconstitutional. ***Forrett***, 2021 WI App 31, ¶14. We noted that, under ***Birchfield*** and ***Dalton***, "criminal penalties may not be imposed for a refusal" and "[a] lengthier jail sentence is certainly a criminal penalty." ***Id.***, ¶12. We stated that, regarding the constitutional right under the Fourth Amendment to be free from unreasonable searches, we saw no difference "between the threat of a penalty at the time of the refusal, and the threat of future criminal penalties either at sentencing for a related OWI or in the event of an additional OWI conviction." ***Id.***, ¶15.

We rejected the State's arguments "that the use of a refusal to enhance penalties in a subsequent case merely punishes the offender for recidivism and does not rise to the level of a criminal penalty" and "that using the prior revocation to increase criminal penalties in a subsequent case is no different than using a revocation as evidence in an OWI proceeding." ***Id.***, ¶¶16, 18. Rather, we concluded, "[a]n increased penalty for the warrantless blood draw refusal revocation is an increased penalty—regardless whether it takes place in the same proceeding or a later proceeding, it impermissibly burdens or penalizes a defendant's Fourth Amendment right to be free from an unreasonable warrantless search." ***Id.***, ¶19.

Nothing in the State's brief distinguishes this case from the dispositive analysis in ***Forrett***, which we conclude controls here.[2] Accordingly, we reverse and remand for the circuit court to commute Chancellor's conviction to a first offense PAC, and to impose a penalty within the maximum allowed for that offense.

Therefore,

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

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

Sheila T. Reiff
Clerk of Court of Appeals

[2] We observe that we addressed the constitutional challenge in ***State v. Forrett***, 2021 WI APP 31, ¶6 & n.4., __Wis. 2d__, __N.W.2d__, as a facial challenge, stating that, "as it pertains to revocations for refusal to consent to warrantless blood draws under Wisconsin law, we see no circumstances in which counting the same would be constitutional." Here, Chancellor describes his challenge as being an as-applied challenge, arguing that WIS. STAT. § 343.307(1)(f) is unconstitutional as applied to his case because it increased his punishment for refusal to consent to a warrantless blood draw. However, we discern no reason to conclude that this difference means that our analysis in ***Forrett*** is not dispositive here.