STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 2005AP001954

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELLISSA JACOBSON,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE ANNETTE ZIEGLER, PRESIDING

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

One issue presented by his appeal is recurring and is not controlled by existing law; therefore, the appellant recommends both oral argument and publication.

STATEMENT OF THE ISSUE

I. Did the trial court abuse its discretion in denying the defendant-appellant's ("Mellissa")[1] motion to dismiss the refusal case where the evidence was that the State in fact obtained a blood draw in a timely fashion?

ANSWERED BY THE TRIAL COURT: No.

II. Did the trial court err in finding that Mellissa illegally refused to submit to an implied consent blood draw where she briefly indicated that she was not inclined to submit to the test but then did so without any undue delay?

ANSWERED BY THE TRIAL COURT: No.

III. Did the trial court err in finding that at the refusal hearing the State established probable cause to arrest Mellissa for a violation of Sec. 346.63(1)(a), STATS (operating under the influence of alcohol) where there were no witnesses that she was driving or operating the car in question; Mellissa denied driving the car; Mellissa's husband, Todd, admitted to driving; and the only circumstantial evidence to the contrary was a hair embedded in a crack in the windshield on the driver's side which police say matched Mellissa's hair color and the arresting officer's claim that Mellissa had a bruise on her left

1 The defendant-appellant, Mellissa Jacobson will be referred to as "Mellissa" in order to distinguish her for her husband, Todd Jacobson, who also plays a prominent role in this case.

shoulder[2]

ANSWERED BY THE TRIAL COURT: No.

SUMMARY OF THE ARGUMENT

I. VINDICTIVE PROSECUTION. The purpose of the Implied Consent Law is to facilitate the taking of tests for the presence of alcohol in persons arrested under suspicion of operating under the influence of alcohol. Where such a test is taken in the timely manner the purpose of the law is satisfied and, therefore, a prosecution for an alleged refusal is vindictive.

II. NO REFUSAL OCCURRED. The facts were undisputed at the hearing that after being read the informing the accused form Mellissa said that she was not going to do any of the officer's tests. She then crossed her arms. Moments later, though, when the medical technician arrived, Mellissa submitted to the blood draw without incident. The issue at a refusal hearing is whether the defendant "refuses to permit" a blood draw. Here, blood was drawn in a timely manner and, therefore, no "refusal" occurred.

III. NO PROBABLE CAUSE TO ARREST. Implicit in the trial court's finding that Mellissa unlawfully refused to submit to a test of her blood is the trial court's finding that there was probable cause to arrest Mellisa for operating under the influence of alcohol. Such a finding is erroneous, though, because to only way a finding of probable cause is plausible is if one either ignores the evidence that both Jacobsons said that Todd was driving or if sufficient circumstances exist to reasonably infer that the Jacobsons were

2 Suggesting that the shoulder belt she was wearing at the time of the collision went from her left shoulder to her right hip (i.e. she was in the driver's seat)

lying. Here, no such facts exist. The officer testified that she observed a bruise on Mellissa's left shoulder. It is a matter of common knowledge that it takes several days after the injury for a bruise to appear on human skin. Thus, the fact that the officer saw a bruise on Mellissa's shoulder is virtually incontrovertible evidence that the injury did not occur in the automobile accident which had happened only minutes before the officer examined Mellissa. Moreover, because this was a roll-over accident (as opposed to a head-collision), no inference as to where Mellissa was seated at the time of the accident may be drawn from the fact that a hair consistent with her hair color was found in a windshield crack on the driver's side.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Mellissa was charged with illegally refusing the submit to a legal draw of her blood for the presence of alcohol. *See, generally,* Sec. 343.305, STATS (the "Implied Consent Law"). Mellissa timely demanded a hearing into the alleged refusal. Prior to the hearing Mellissa filed a motion to dismiss the case for the reason that she had submitted to a draw of her blood in a timely fashion and, therefore, issuing the refusal charge amounted to vindictive prosecution. (R:2)

The trial court took the motion under advisement and, on April 13, 2005, a refusal hearing was held.

Again, at the conclusion of the hearing, Mellissa renewed her motion to dismiss on the grounds of vindictive prosecution and she

also argued that the State failed to establish that probable cause existed to arrest her for a violation of Sec. 346.63(1)(a), STATS (operating under the influence of alcohol); and, further, as a factual matter Mellissa argued that she did not refuse to submit to the test (as evidenced by the fact that blood was drawn and an analysis successfully completed on the blood).

The trial court denied Mellissa's motion to dismiss and found that she did illegally refuse to submit to the test and, therefore, the court revoked Mellissa' operating privileges. (R:9)

II. FACTUAL BACKGROUND

On January 30, 2005 Village of Germantown police officer Toni Olson was dispatched to the hospital regarding an automobile accident. (R:5-12) There was no testimony as to the time the accident occurred. On the way to the hospital Olson drove past the scene of the accident and saw a car in the ditch with other officers at the scene. (R:5-14) It appeared that this was a rollover accident. (R:5-15) Olson got to the hospital and interviewed both Todd Jacobson and Mellissa Jacobson. (R:5-21) Olson at first arrested Todd because both parties told Olson that Todd was the driver. (R:5-34)

Olson read Todd the Informing the Accused form. At about that point Olson got a call from an officer at the scene who said that the driver's door was not jammed (as Todd had told them) and they saw footprints in the snow coming out of the driver's door. (R:5-21, 22) Also, they claimed to have found a burgundy colored hair (Mellissa's hair is burgundy) in a crack on the windshield toward

the driver's side of the vehicle. (R:5-21)

Olson claimed that she then checked for a seat belt bruise on Mellissa and found one on her left shoulder (with the inference being that the chest belt crosses the driver's left shoulder whereas the passenger chest belt crosses the right shoulder). (R:5-24) Mellissa never admitted to driving.

Olson then changed her mind and arrested Mellissa (R:5-27).

Olson then read Mellisa the Informing the Accused form. (R:5-29) Mellissa said she would not "cooperate" with "their tests" and crossed her arms over her chest. (R:5-29, 30) Olson informed Melissa that blood going to be taken anyway. At this point the med tech had already been summoned or was summoned shortly thereafter. (R:5-38) He came and, after no more than five minutes, Mellissa put her left arm out and the blood was drawn. (R:5-31, 38) The officer admitted that Mellissa's comment did not delay the process. (R:5-38)

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MELLISSA'S MOTION TO DISMISS THE REFUSAL ON THE GROUNDS OF VINDICTIVE PROSECUTION.

The purpose of the Implied Consent Law is to facilitate the taking of tests for the presence of alcohol in persons arrested under suspicion of operating under the influence of alcohol. Where such a test is taken in the timely manner the purpose of the law is satisfied and, therefore, prosecution for an alleged refusal is vindictive.

In, ***State v. Brooks***, 113 Wis. 2d 327, 335 N.W.2d 354 (1983),

the defendant was charged with OWI and also with a refusal. The defendant pleaded guilty to the OWI and then moved to dismiss the refusal prosecution. Over the State's objection, the trial court dismissed the refusal prosecution finding that because the defendant was convicted of OWI there was no longer any reason to proceed with the refusal. The State appealed the dismissal.

On appeal, the Supreme Court expressed the question presented by the case as follows:

> The fundamental question posed and at issue between the parties is whether the legislature intended to require the courts to see to it that the refusal hearing in all circumstances be tried to a conclusion, because it served a purpose unrelated to the prosecution of an OWI case. 356-57

The Supreme Court concluded that it was not the intent of the legislature that a refusal prosecution be *entirely* independent of the OWI prosecution nor that, regardless of what happens in the OWI prosecution, the State may proceed to judgment with the refusal. The court said,

> **[T]*he purpose of the law (is) to obtain the blood-alcohol content in order to obtain evidence*** to prosecute drunk drivers. Such evidence was needed to improve the rate of convictions so that those who drive while intoxicated would be punished and so that others are deterred from driving while drunk. 335 N.W.2d at 358 (emphasis provided)

The ***Brooks*** court concluded that the trial court properly exercised its discretion, therefore, in dismissing the refusal prosecution, even over the State's objection. The trial court concluded that, since the evidence of the refusal was no longer needed (because the defendant pleaded guilty to the OWI case) there was no legitimate reason to prosecute the defendant for the

refusal.

Thus, ***Brooks*** grants a trial court the discretion to dismiss a refusal prosecution, even if the State objects, where the court can conclude that there is no longer any reason for the refusal. Here, because the State has obtained the evidence which the Implied Consent Law was designed to produce (i.e. a test result), there is absolutely no reason to proceed with the refusal prosecution. For this reason alone, the trial court should dismiss this case.

Additionally, though, there are constitutional due process reasons to dismiss the refusal in this case.

It should be mentioned at this point that the Implied Consent Law came into being when the status of the law in Wisconsin was that a person's blood could not be drawn, without a warrant, against his or her consent purely as an incident to an arrest for O.W.I. *See,* ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) for a discussion of the history of the law pertaining to warrantless draws of a person's blood. The only exception to this rule was that there could be a warrantless draw of a person's blood without consent where there was a clear indication that the draw would result in evidence of intoxication and there existed exigent circumstances. The Implied Consent Law, then, as the court mentioned in ***Brooks***, was designed to facilitate the gathering of such evidence by punishing the person who refuses to provide the evidence by consent. The Implied Consent Law clearly assumed that once a person refused to consent the blood would not be drawn and the State would be left without the evidence.

The Supreme Court, in ***Bohling***, held that the dissipation of

alcohol in a person's blood is, itself, a sufficient exigent circumstance. The court said,

> [W]e hold that under the foregoing circumstances the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw. Consequently, a warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (FN1) (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. 494 N.W.2d at 400.

Thus, the implicit assumption of the Implied Consent Law that if a person refuses to submit to a chemical test that the State will be left without the evidence is no longer valid. The holding in ***Bohling*** permits the State to obtain the evidence without the defendant's consent and without a warrant in every case except where the "[A]rrestee presents (a) reasonable objection to the blood draw." Given the attitude of the public, of the courts, and of law enforcement personnel toward the prosecution of drunken drivers, one can scarcely conceive of what might be considered a reasonable objection. Thus, ***Bohling*** effectively makes the Implied Consent Law meaningless. There is no longer any need for it since the State will obtain the chemical evidence in every case, whether or not the arrestee consents, except in that minute fraction of cases where the arrestee can present a reasonable objection.

Here, Mellissa intially said she would not consent to a test of her blood; however, when threatened by the arresting officer to have the blood drawn without consent, Jacobson offered no resistance. Nonetheless, for having uttered the words, "I refuse", the police

officer charged Jacobson with a refusal.

This represents the superlative example of vindictive prosecution. There no longer exists any valid purpose to the Implied Consent Law, the State in fact obtained (without resistance from the defendant) the very evidence they were seeking but, due to Jacobson's unfortunate choice of words, the officer saw fit to levy this additional charge against him.

In discussing the prosecutorial discretion of a district attorney (whom the court noted to be a "constitutional officer"), the court in ***Locklear v. State,*** 86 Wis. 2d 603, 273 N.W.2d 334, 336 (1978), observed,

> While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and **this does not per se require** prosecution in all cases where there appears to be a violation of the law **no matter how trivial.** (emphasis provided)

Where a prosecution is motivated by personal vindictiveness on the part of a prosecutor or the responsible member of the administrative agency recommending prosecution it violates the due process clause. ***United States v. Bourque***, 541 F.2d 290, 293 (1st Cir. 1976).

Here, the decision to charge Mellisa with a refusal is not even made by a district attorney, who is a "constitutional officer" and an elected official. The decision was made by the arresting officer when she completed the Notice of Intent to Revoke. A police officer is neither a constitutional officer charged with the same standard of professional ethics as is a district attorney; nor is a police officer accountable to the public, through election to office, for his

"charging decisions". Thus, a police officer certainly lacks the same broad discretion that a district attorney has in deciding whether to issue a charge.

It is easily concluded, then, that the officer's decision to charge Mellissa with a refusal in this case is hardly entitled to same sort of deferential treatment that a decision of a district attorney is entitled to. The officer is not the district attorney; the officer is personally involved in the situation; there is no valid basis for the refusal prosecution when the officer must know in his own mind that he will force a blood test regardless of what the defendant says. It is a dangerous proposition, indeed, to vest this type of discretion in a police officer and to then require the refusal prosecution to proceed to a hearing even where no reason exists for the charge.

II. MELLISSA DID NOT REFUSE TO SUBMIT TO A TEST OF HER BLOOD AND, THEREFORE, THE TRIAL COURT'S FINDING OF FACT THAT SHE DID IS CLEARLY ERRONEOUS.

The facts were undisputed at the hearing that after being read the informing the accused form Mellissa said that she was not going to do any of the officer's tests. She then crossed her arms. Moments later, though, when the medical technician arrived, Mellissa submitted to the blood draw without incident. The issue at a refusal hearing is whether the defendant "refuses to permit" a blood draw. Here, blood was drawn in a timely manner and, therefore, no "refusal" occurred.

The officer issued Mellissa a notice of intent to revoke her operating privileges (i.e. the officer "charged" Mellissa with a

refusal). Mellissa timely requested a refusal hearing under Sec. 343.305(9), STATS. At a so-called "refusal hearing" the only issues to be decided are: "(1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol; (2) whether the officer complied with the informational provisions of § 343.305[(4)]; (3) ***whether the person refused to permit*** a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol." ***State v. Wille***, 185 Wis. 2d 673, 679, 518 N.W.2d 325 (Ct.App. 1994). If Mellissa prevails on at least one of the four issues "the court shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question." § 343.305(9)(d), STATS.

The requirements of the Implied Consent law are created by statute. Furthermore, the legal "issues" at a refusal hearing are set forth by statute. *See,* 343.305(9)(a)1, STATS. The trial court's determination of what Mellissa did, or did not do, are factual and will be upheld unless they are clearly erroneous. Whether the undisputed facts and those found by the circuit court satisfy the statutory requirements is a question of law that the appellate court decides *de novo.* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct.App. 1994)

Here, although Melissa at first *said* that she would not cooperate with the officer's tests this is not, in fact, what actually occurred. This threat was made when the hospital was not ready to actually draw the blood (i.e. the med tech was not yet present) Once the med tech arrived, though, Mellissa permitted the test of

her blood.

At a refusal hearing the issue is not whether the defendant *threatens* to not permit the test. Rather, Sec. 343.305(9)(a)5.c, STATS., establishes that the issue is, "Whether the person refused to permit the test."

Here, Melissa did not refuse to permit the test. The blood was drawn without delay and it was, in fact, tested. Therefore, no refusal occurred.

III. THERE WAS NO PROBABLE CAUSE TO ARREST MELLISSA FOR OPERATING UNDER THE INFLUENCE OF ALCOHOL.

Implicit in the trial court's finding that Mellissa unlawfully refused to submit to a test of her blood is the trial court's finding that there was probable cause to arrest Mellisa for operating under the influence of alcohol. Such a finding is erroneous, though, because to only way a finding of probable cause is plausible is if one either ignores the evidence that both Jacobsons said that Todd was driving or if sufficient circumstances exist to reasonably infer that the Jacobsons were lying. Here, no such facts exist. The officer testified that she observed a bruise on Mellissa's left shoulder. It is a matter of common knowledge that it takes several days after the injury for a bruise to appear on human skin. Thus, the fact that the officer saw a bruise on Mellissa's shoulder is virtually incontrovertible evidence that the injury did not occur in the automobile accident which had happened only minutes before the officer examined Mellissa. Moreover, because this was a roll-over accident (as opposed to a

head-collision), no inference as to where Mellissa was seated at the time of the accident may be drawn from the fact that a hair consistent with her hair color was found in a windshield crack on the driver's side.

In ***Babbitt***, *supra,* the Court of Appeals described the standard governing the determination of probable cause for arrest at a refusal hearing:

> In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe . . . that the defendant was operating a motor vehicle while under the influence of an intoxicant." Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]."

188 Wis. 2d at 356-357.

"The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." ***Wille***, 185 Wis. 2d at 681. To establish probable cause at a refusal hearing, the State needs to show only that the officer's account is "plausible." *Id*. A court does not weigh evidence for and against probable cause or determine the credibility of witnesses. *Id.*

Here, the totality of the circumstance known to the officer at the time she arrested Mellissa are as follows: An car accident had occurred in which the Jacobson's car wound up in a ditch with a cracked windshield. There were footprints in the snow coming out of the driver's door. Todd Jacobson told police that he was the driver and that the driver's door was jammed. Both Mellissa and

Todd were taken to the hospital. Todd was initially arrested for operating while under the influence of alcohol[3] and he was read the informing the accused form. Shortly thereafter, the arresting officer received a call from the another officer at the scene who informed her (arresting officer) that the driver's door was not jammed and that burgundy colored hair was found embedded in a crack in the windshield on the driver's side of the car. When the officer talked to Mellissa she denied driving and Todd never changed his story that he was the driver. The officer claims that Mellissa had a bruise on her left shoulder.

The issue on this appeal is whether the arresting officer's account that Mellissa was the driver is plausible.

Firstly, it must be emphasized that the arresting officer never testified at the refusal hearing as to her "account" of what occurred here. It is difficult to evaluate the plausibility of an account which was never recited.

Inferentially, the officer's account of the events is most likely that the Jacobsons are lying about who was driving. What really occurred is that Mellissa was driving, Todd was in the passenger seat, and then the accident occurred. During the collision Mellissa was thrown forward, struck her head on the windshield on the driver's side and, in the process, the driver's side shoulder belt bruised Mellissa's left shoulder. Mellissa then got out of the driver's side (accounting for the footprints) and Todd slid behind the wheel.

The question is whether this "version" of the events is

3 There is no dispute that there was probable cause to believe that each Jacobson was under the influence of alcohol. The issue here is driving or operating the motor vehicle.

plausible.

The only way it is plausible is if there is sufficient evidence to permit a reasonable inference that both Jacobsons are lying about who the driver was or if we simply ignore the statements of the Jacobsons.

Because what is involved here is a "totality of the circumstances" test it is not possible, by definition, to simply ignore available evidence (i.e. the statements of the Jacobsons). In other words, if one ignores certain relevant circumstances then the test is not truly a *totality* of the circumstances. Any proposition of fact can be made instantly "plausible" if one is permitted to pick and choose which evidence to accept and to ignore the rest. For example, it is plausible that the moon is made of green cheese if one is permitted to ignore evidence that a number of astronauts claim to have gone there and they say that the moon is made of rock. There is no reason to believe that these astronauts are lying.

Thus, the only remaining question is whether there was sufficient evidence available to permit the officer to conclude that both of the Jacobsons were lying about who was the driver.

Here, there is not.

The arresting officer drew the conclusion that the Jacobsons were lying about Todd being the driver based upon the "maroon colored hair" found in the crack in the windshield, because a bruise was observed on Mellissa's left shoulder, and because there were footprints coming out of the driver's side of the vehicle.

A reasonable inference is an inference for which a reason can be given. What reason is there to believe that any bruise on

Mellissa's left shoulder was caused by the driver's side shoulder belt during the collision? For one, it happens to be in the correct location for such bruise. But, again, in order to draw this inference we would have to simply ignore what is a matter of common knowledge- bruises typically require several days before they are visible on one's skin. Therefore, the fact that the officer saw a bruise on Mellissa's left shoulder is practically incontrovertible evidence that the injury was ***not*** sustained in the car accident which had occurred only minutes before the officer encountered Mellissa in the hospital.

What, then, about the maroon hair in the windshield? This was a rollover accident. It was not a straight-on collision. Perhaps if this had been a straight-on collision one reasonable inference might be that, because what was apparently Mellissa's hair was located in a crack in the windshield on the driver's side, Mellissa was in the driver's seat when the collision occurred. Since it was not a straight-on collision, and more particularly since it was a roll-over accident, no such inference is available.

For these reasons, the officer's "inference" that the Jacobsons were lying about who was driving is nothing more than mere guess-work. It does not even rise to the level of being a suspicion. Therefore, the trial court's finding that probable caused existed to arrest Mellissa is erroneous.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Court of Appeals reverse the trial court's judgment finding that

Mellissa unlawfully refused to submit to a chemical test of her blood.

Dated at Milwaukee, Wisconsin, this _____ day of November, 2005.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4359 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated at Milwaukee, Wisconsin, this
_____ day of November, 2005.

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
COURT OF APPEALS
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STATE OF WISCONSIN,

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APPELLANT'S BRIEF AND APPENDIX

A. Record on Appeal

B. Trial court's order on refusal