COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2025AP560-CR **Cir. Ct. No. 2024CM90**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL R. ROSSOW,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Burnett County: MELISSIA R. MOGEN, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

¶1 STARK, P.J. The State of Wisconsin appeals from a nonfinal order of the circuit court granting Michael R. Rossow's motion to dismiss Count Five of his criminal complaint, which charged him with operating a motor vehicle with a

prohibited alcohol concentration (PAC) of more than 0.02, as a third offense.[1] As relevant to this case, WIS. STAT. § 340.01(46m) provides that a driver is subject to a different PAC based on the number of "prior convictions, suspensions, or revocations" he or she has on his or her driving record, "as counted under [WIS. STAT. §] 343.307(1)." Thus, under § 340.01(46m)(a), if a person "has 2 or fewer prior convictions, suspensions, or revocations," then he or she is subject to a PAC of 0.08. If, however, the person is subject to an order under WIS. STAT. § 343.301 "or if the person has 3 or more prior convictions, suspensions or revocations," the statute reduces the applicable PAC to 0.02. Sec. 340.01(46m)(c). The issue in this appeal is whether the definition of PAC, as determined under § 340.01(46m), violates our supreme court's holding in ***State v. Forrett***, 2022 WI 37, ¶20, 401 Wis. 2d 678, 974 N.W.2d 422, by counting a person's prior revocations resulting solely from a refusal to submit to a warrantless blood draw to reduce the applicable PAC, thereby creating criminal liability and increasing criminal penalties for driving under the influence.

¶2 The State argues that it complied with ***Forrett*** by charging Rossow with operating a motor vehicle with a PAC as a third offense, rather than a fourth offense, and therefore it did not attempt to elevate or enhance Rossow's criminal charges or penalties based on his prior revocation for refusing a warrantless blood draw. However, Rossow argues that the revocation of his driving privileges resulting from his 2011 stand-alone refusal cannot be counted under WIS. STAT.

[1] We granted the State's petition for leave to appeal the circuit court's nonfinal order on April 15, 2025. *See* WIS. STAT. RULE 809.50(3) (2023-24). This appeal was then converted, on our own motion, from a one-judge appeal to a three-judge appeal under WIS. STAT. RULE 809.41(3) (2023-24).

All references to the Wisconsin Statutes are to the 2023-24 version.

§ 340.01(46m) to lower his applicable PAC to 0.02 because it uses the exercise of his constitutional right to increase his criminal penalty by changing behavior that was previously legal—i.e., driving with a blood alcohol concentration (BAC) under 0.08—to a criminal offense. *See* ***Forrett***, 401 Wis. 2d 678, ¶9.

¶3 We agree with Rossow that by operation of WIS. STAT. § 340.01(46m), the State is threatening to impose increased criminal penalties on Rossow for driving with a BAC above 0.02, rather than 0.08, based on his 2011 stand-alone refusal to submit to a warrantless blood draw. We conclude that under ***Forrett***, the State "cannot impose such a penalty." *See* ***Forrett***, 401 Wis. 2d 678, ¶9. We therefore affirm the circuit court's order granting Rossow's motion to dismiss the PAC charge.

BACKGROUND

¶4 On March 26, 2024, an officer with the Siren Police Department conducted a traffic stop on Rossow in the Village of Siren, Wisconsin. Based on observations made during that traffic stop, Rossow was eventually arrested on suspicion of operating a motor vehicle while under the influence of an intoxicant (OWI). Thereafter, Rossow was read the Informing the Accused form, and he was asked to consent to an evidentiary chemical test of his blood. *See* WIS. STAT. § 343.305(3)(a), (4). Rossow refused to submit to the blood draw.

¶5 Law enforcement then obtained a search warrant for Rossow's blood, a blood sample was collected, and a subsequent analysis yielded a BAC above the prohibited limit. Rossow was charged in a criminal complaint with five misdemeanor offenses: OWI, as a third offense; two counts of resisting or obstructing an officer; failure to install an ignition interlock device (IID); and operating a motor vehicle with a PAC of more than 0.02, as a third offense.

¶6 Rossow filed a motion to dismiss Count 5, the PAC charge.[2] At the time of his arrest, Rossow had two prior OWI convictions. Rossow's driving record also reflected a 2012 driver's license revocation resulting from his 2011 refusal to submit to a warrantless blood draw in Outagamie County. Therefore, Rossow argued that because a revocation resulting solely from a blood-draw refusal cannot be counted to determine the penalty under WIS. STAT. § 346.65(2), *see* ***Forrett***, 401 Wis. 2d 678, ¶14, "it likewise cannot be used as one of the '3 or more' revocations for purposes of [WIS. STAT. §] 340.01(46m)." The State objected to Rossow's motion to dismiss, arguing that ***Forrett***'s holding is not broad enough to encompass § 340.01(46m), and, therefore, Rossow's prior revocation for refusing a warrantless blood draw can still be counted for the purpose of determining his applicable PAC.

¶7 The circuit court held a nonevidentiary hearing on Rossow's motion. After hearing arguments from the parties, the court entered a written decision and order granting Rossow's motion to dismiss. The court determined, pursuant to the Wisconsin Supreme Court's holding in ***Forrett***, that the State was precluded from counting the prior revocation for Rossow's 2011 blood-draw refusal as one of the "3 or more" convictions, suspensions, or revocations for purposes of determining the applicable PAC under WIS. STAT. § 340.01(46m)(c). Therefore, the court concluded that Rossow was subject to a PAC of 0.08 or greater—pursuant to § 340.01(46m)(a)—and it dismissed the PAC count. We granted the State's petition for leave to appeal the circuit court's nonfinal order.

[2] We note that Rossow also moved to dismiss the IID charge, and the State conceded to dismissal of that charge in the circuit court. Therefore, we do not address that count further.

DISCUSSION

¶8 It has become a well-settled proposition in this state that while the government may impose *civil* penalties on a driver for refusing to submit to a warrantless blood draw under our implied consent law,[3] it cannot threaten to impose *criminal* penalties on a driver based on his or her refusal. *See* ***Birchfield v. North Dakota***, 579 U.S. 438, 476-77 (2016); ***Forrett***, 401 Wis. 2d 678, ¶8 n.5. Earlier this year, we decided ***State v. Sparby-Duncan***, 2026 WI App 9, 419 Wis. 2d 715, 32 N.W.3d 427, *review denied*, 2026 WI 33, which presented an alternative factual circumstance wherein the imposed civil penalty of an IID order eventually led to increased criminal penalties for violating that order.

¶9 This case presents an alternative to the ***Sparby-Duncan*** fact pattern, as the State concedes that Rossow was not subject to an IID order at the time of his arrest. Thus, as Rossow argues, he "is threatened with criminal penalties for having an alcohol concentration over 0.02 based solely upon his prior refusal conviction, which makes his case vastly different than ***Sparby-Duncan***." We agree and conclude, based on the plain language of the OWI-related statutes and ***Forrett***, that a stand-alone revocation for refusing to submit to a warrantless blood draw cannot be counted under WIS. STAT. § 340.01(46m) to lower a driver's applicable PAC.

¶10 In ***Sparby-Duncan***, we provided a detailed overview of the United States Supreme Court's decision in ***Birchfield*** and the Wisconsin Supreme Court's

[3] "Wisconsin has passed an implied consent law, which is designed to facilitate the gathering of evidence to remove drunk drivers from the road." ***State v. Prado***, 2021 WI 64, ¶20, 397 Wis. 2d 719, 960 N.W.2d 869; *see also* WIS. STAT. § 343.305.

decisions in ***State v. Dalton***, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, and ***Forrett***. We will not repeat that discussion here, except to note the general holdings of those cases as they relate to our decision. In ***Birchfield***, the Supreme Court addressed the validity of implied consent laws when they "go beyond" imposing civil penalties for a refusal to submit to a warrantless chemical test. ***Birchfield***, 579 U.S. at 444. Importantly, the decision distinguished breath tests and blood tests, explaining that "[t]he impact of breath tests on privacy is slight, and the need for BAC testing is great," while "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." ***Id.*** at 474. Thus, the Court ultimately concluded "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." ***Id.*** at 477.

¶11 Then, in ***Dalton***, our state supreme court built upon ***Birchfield***'s holding when it concluded that the circuit court "impermissibly lengthened [the defendant's] sentence because he refused a warrantless blood draw." ***Dalton***, 383 Wis. 2d 147, ¶55. Thus, the court recognized a constitutional right to refuse a warrantless blood draw and held that criminal punishment "for exercising [t]his constitutional right" was "impermissible" under "[e]stablished case law." ***Id.***, ¶61.

¶12 In ***Forrett***, our supreme court considered the constitutionality of Wisconsin's graduated-penalty scheme for OWI offenses, wherein an individual's "total number of OWI offenses is determined by counting not only OWI convictions but also 'suspensions or revocations' of a person's driving privileges resulting from a 'refusal to submit to chemical testing'" on a prior occasion. ***Forrett***, 401 Wis. 2d 678, ¶7. The court explained that the state cannot threaten or

impose criminal penalties based on an individual's stand-alone revocation resulting from a refusal to submit to a warrantless blood draw[4] and noted that "[s]uch unconstitutional criminal penalties can take several forms." ***Id.***, ¶¶9, 14. Thus, while the court identified a defendant's being "criminally charged specifically for refusing a warrantless blood draw" and being "subjected to a longer sentence 'for the sole reason that he [or she] refused to submit to a [warrantless] blood test'" as impermissible criminal penalties, the court, importantly, observed that "[t]hese two examples are illustrative but not exhaustive." ***Id.***, ¶9 (first alteration in original; citation omitted). Accordingly, our supreme court determined, "[n]o matter the form the criminal penalty takes, the [s]tate cannot impose such a penalty on a person because [he or] she exercised [his or] her Fourth Amendment right." ***Id.***

¶13 Finally, in ***Sparby-Duncan***, the defendant was subject to an IID order—a civil penalty—as a result of his refusal to submit to a warrantless blood draw in a prior case. ***Sparby-Duncan***, 419 Wis. 2d 715, ¶4. We determined that "[n]othing in ***Birchfield***, ***Dalton***, or ***Forrett*** prohibits the government from imposing criminal penalties on an individual for his or her violation of civil consequences that were imposed as a result of a refusal to submit to a warrantless blood draw." ***Sparby-Duncan***, 419 Wis. 2d 715, ¶28. While the defendant argued that he would not be subject to an IID order, and therefore not subject to a 0.02 PAC as a result of the IID, *see* WIS. STAT. § 343.301(6), but for his prior refusal to

[4] Our supreme court clarified that "[t]here is no constitutional issue, however, when the revocation and the ensuing conviction 'arise out of the same incident or occurrence.'" ***State v. Forrett***, 2022 WI 37, ¶13, 401 Wis. 2d 678, 974 N.W.2d 422 (citation omitted). The problem emerges when a driver is "criminally punished only for exercising his [or her] Fourth Amendment right to be free from unreasonable searches. That is unconstitutional." ***Id.***

submit to a warrantless blood draw, we agreed with the state that the charges in that case were based on the defendant's decision "to forgo installing the IID and to drive with a blood alcohol concentration above 0.02," "not for [his] years-earlier refusal," *see* ***Sparby-Duncan***, 419 Wis. 2d 715, ¶29. "In other words," we explained, "the charges [were] sufficiently attenuated from the refusal such that they [did] not pose any constitutional issue." ***Id.*** Accordingly, we affirmed the circuit court's denial of Sparby-Duncan's motion to dismiss. ***Id.***, ¶3.

¶14 Based on our review of these cases, we must now determine whether the definition of PAC under WIS. STAT. § 340.01(46m)—specifically as it utilizes a person's prior revocations for refusing a warrantless blood draw to lower a person's PAC—violates our supreme court's holding in ***Forrett*** by increasing criminal penalties. This appeal requires us to interpret the statutes that govern how a motorist's PAC is determined, which presents a question of law that we review de novo. *See* ***State v. Klapps***, 2021 WI App 5, ¶15, 395 Wis. 2d 743, 954 N.W.2d 38 (2020).

¶15 Statutory interpretation begins with the language of the statute. *See* ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We give statutory language its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meanings. ***Id.*** We interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." ***Id.*** (citation omitted). If, however, the statute "is capable of being understood by reasonably

well-informed persons in two or more senses," then the statute is ambiguous. ***Id.***, ¶47.

¶16 It is unlawful for an individual to drive or operate a motor vehicle upon a Wisconsin highway with a PAC. WIS. STAT. § 346.63(1)(b); *see also* WIS. STAT. § 346.65(2)(am)1.-7. (outlining the penalties). Pursuant to our statutes, as relevant here, the definition of PAC is determined by considering the number of "prior convictions, suspensions, or revocations, as counted under [WIS. STAT. §] 343.307(1)."[5] WIS. STAT. § 340.01(46m). Accordingly, "an alcohol

[5] WISCONSIN STAT. § 343.307(1) informs a circuit court what it must count as a prior conviction, suspension, or revocation "to determine the length of a revocation under [WIS. STAT. §] 343.30(1q)(b) and to determine the penalty under [WIS. STAT. §§] 114.09(2) and 346.65(2)":

> (a) Convictions for violations under [WIS. STAT. §] 346.63(1), or a local ordinance in conformity with that section.
>
> (b) Convictions for violations of a law of a federally recognized American Indian tribe or band in this state in conformity with [§] 346.63(1).
>
> (c) Convictions for violations under [WIS. STAT. §§] 346.63(2) or 940.25, or … 940.09 where the offense involved the use of a vehicle.
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.
>
> (e) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.
>
> (f) Revocations under [WIS. STAT. §] 343.305(10).
>
> (g) Convictions for violations under [§] 114.09(1)(b)1. or 1m.

concentration of 0.08 or more" is prohibited "[i]f the person has 2 or fewer prior convictions, suspensions, or revocations," but a "concentration of more than 0.02" is prohibited if the person is subject to an IID order, under WIS. STAT. § 343.301,[6] "or if the person has 3 or more prior convictions, suspensions or revocations." Sec. 340.01(46m)(a)-(c). Therefore, read together, the plain language of the statutes dictates that whether a person is subject to a 0.02 PAC is a function of the number of prior convictions, suspensions, or revocations the person has on his or her driving record, as counted under § 343.307(1), which in turn "determine[s] the penalty under … [§] 346.65(2)." Secs. 340.01(46m), 343.307(1).

¶17 Thus, it is by counting prior revocations resulting solely from a refusal to submit to a warrantless blood draw to lower the PAC threshold that the statute runs afoul of ***Forrett***. The result of the plain statutory language in WIS. STAT. § 340.01(46m) is that it either creates criminal liability and/or increases criminal penalties where the penalties either previously did not exist or were less severe under WIS. STAT. § 346.65. The ***Forrett*** court held "that WIS. STAT. §§ 343.307(1) and 346.65(2)(am) are unconstitutional to the extent that they count prior revocations resulting solely from a person's refusal to submit to a warrantless blood draw as offenses for the purpose of increasing the criminal penalty." ***Forrett***, 401 Wis. 2d 678, ¶20. It follows, then, that those prior stand-alone revocations also may not create criminal liability and/or increase criminal penalties under § 340.01(46m) by reducing the applicable PAC.

[6] As noted above, the State concedes that Rossow was not subject to an IID order, so we do not address this portion of the statute further.

¶18 Further, in contrast to ***Sparby-Duncan***, there are no facts or circumstances that separate Rossow's refusal to submit to the warrantless blood draw in 2011 from the imposition of the 0.02 PAC in this case. *See* ***Sparby-Duncan***, 419 Wis. 2d 715, ¶29. In ***Sparby-Duncan***, the defendant was subject to a 0.02 PAC because of his IID order, not based on the number of his prior countable OWI-related convictions, suspensions, or revocations. We therefore relied on the fact that the IID order was imposed as a civil consequence of Sparby-Duncan's prior refusal, and the 0.02 PAC was a further result of that civil consequence, to determine that Sparby-Duncan did not directly suffer increased criminal penalties as a result of a prior revocation resulting solely from a blood-draw refusal. As Rossow argues, and we agree, "[t]he 0.02 [BAC] restriction in this case was imposed as a *direct* result of Mr. Rossow's prior conviction for unlawfully refusing to submit to an implied consent test and *not* because he was in violation of any IID requirement," and, therefore, "[t]here is no intervening factor or event of Mr. Rossow which the ***Sparby-Duncan*** court found so central to its holding." Put another way, the 0.02 BAC restriction "result[ed] *solely from* [Rossow]'s refusal to submit to a warrantless blood draw." *See* ***Forrett***, 401 Wis. 2d 678, ¶20 (emphasis added).

¶19 The State's arguments to the contrary are not persuasive.[7] According to the State, "[t]here can be no sincere debate that Rossow has three

[7] We note that the State begins its argument by asserting that WIS. STAT. § 340.01(46m) "contain[s] what appears to be a typographical error" because the statute "cross-reference[s] WIS. STAT. § 343.307(1) as purportedly governing which convictions, suspensions, or revocations count to reduce one's prohibited alcohol concentration from 0.08 to 0.02." However, the State observes that "based on the very text of the [statute], it is … § 343.307(2)—not … § 343.307(1)—that governs which convictions, suspensions, or revocations count." The text of § 343.307(2) provides, "The court shall count the following to determine the length of a revocation under [WIS. STAT. §] 343.305(10) and to determine the penalty under [WIS. STAT. §] 346.65(2j) and to determine the prohibited alcohol concentration under [§] 340.01(46m)."

(continued)

convictions, suspensions, or revocations deemed countable under WIS. STAT. § 343.307(1) and (2), which means he is subject to a reduced 0.02 PAC"; therefore, "the circuit court improperly dismissed Rossow's PAC charge based on a flawed interpretation of ***Forrett*** and the relevant statutes." The State first argues that ***Forrett***'s "holding was limited" because our supreme court did not determine that WIS. STAT. §§ 343.307(1) and 346.65(2)(am) are unconstitutional in their entirety, "nor did it proclaim that altering a driver's PAC from 0.08 to 0.02 constituted a criminal punishment prohibited under ***Birchfield***," and neither ***Birchfield*** nor ***Forrett*** "so much as hinted at limiting the counting of unlawful blood test refusals for purposes besides enhancing criminal penalties for a later drunk-driving offense." *See* ***Forrett***, 401 Wis. 2d 678, ¶20.

¶20 We reject the State's assertions about ***Forrett***'s holding. The court's holding was written broadly to encompass any increased criminal penalties "resulting solely from a person's refusal to submit to a warrantless blood draw." ***Id.*** The court noted it could not outline in its decision every possible situation that might develop as a result of the interaction of these statutes. *See* ***id.***, ¶9. Therefore, the fact that the ***Forrett*** court did not specifically address WIS. STAT. § 340.01(46m) in its decision is not dispositive here. Importantly, the court took care to acknowledge that "unconstitutional criminal penalties can take several forms" and emphasized that its "examples [were] illustrative but not exhaustive." ***Forrett***, 401 Wis. 2d 678, ¶9.

We need not resolve the statute's alleged "typographical error," however, because, as the State admits, "both subsections count many of the same convictions, suspensions, and revocations," including "operating privilege revocations ordered under WIS. STAT. § 343.305(10) for refusing to submit to a chemical test of one's blood, breath, or urine under the state's implied consent law." Thus, this alleged anomaly, if it exists, is of form rather than substance and carries no weight to change the result here.

¶21 Second, the State asserts that when it charged Rossow in this case, "it complied with ***Forrett***." As the State explains, Rossow's driving record included a 2009 OWI conviction in Minnesota, a 2012 OWI conviction in Burnett County, and a 2012 stand-alone revocation for refusing a warrantless blood draw in Outagamie County. Therefore, argues the State, Rossow should have been subject to criminal charges and punishment for a fourth offense under Wisconsin's graduated-penalty scheme, but the State did not charge him that way to "abide[] by ***Forrett***." "In other words," the State contends, Rossow "faced the same penalties upon conviction that he would have faced had he never refused a blood test in 2011," and "[t]hat was all that ***Forrett*** demands." *See* ***id.***, ¶¶14, 20.

¶22 As we explained above, however, and based on our plain language interpretation of WIS. STAT. § 340.01(46m), we disagree with the State's claim that Rossow faced the same penalties that he would have had he never refused the warrantless blood draw in 2011. The State's stance ignores the outcome that is clearly dictated by the plain text of the statute. Section 340.01(46m) changes the definition of criminal activity—i.e., the PAC—based, at least in part, on a driver's stand-alone revocation for refusing a warrantless blood draw. The State does not appear to dispute this general assertion. Given this fact, we agree with Rossow that "[a]n increase from 'no criminal penalty' to a criminal penalty is, by definition, an *increase in criminal penalties*." By using a stand-alone revocation resulting from a refusal to submit to a warrantless blood draw to lower the PAC threshold to 0.02, the State is leveraging the defendant's exercise of his or her Fourth Amendment rights to turn a legal act into a criminal one.

¶23 In summary, Rossow faces criminal liability and/or increased criminal punishment based upon his previous act of invoking his right to refuse a warrantless blood draw because our OWI-related statutes count the revocation

based solely on that refusal in order to subject him to a 0.02 rather than 0.08 PAC. This operation of our OWI statutes violates ***Forrett*** and ***Dalton*** because "[n]o matter the form the criminal penalty takes, the State cannot impose such a penalty on a person because [he or] she exercised [his or] her Fourth Amendment right." *See* ***Forrett***, 401 Wis. 2d 678, ¶9; ***Dalton***, 383 Wis. 2d 147, ¶61.

By the Court.—Order affirmed.

Recommended for publication in the official reports.