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DISTRICT II

July 23, 2025

To:

Hon. Phillip A. Koss
Circuit Court Judge
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
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Michael C. Sanders
Electronic Notice

George Tauscheck
Electronic Notice

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

2023AP1575-CR State of Wisconsin v. Ketura C. Wanless (L.C. #2020CF29)

Before Gundrum, P.J., Neubauer, and Lazar, 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).

Ketura C. Wanless appeals from a judgment of conviction for third-offense operating while under the influence (OWI) and an order denying postconviction relief. 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 (2023-24).[1] For the following reasons, we summarily affirm.

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

Wanless stood trial in 2020 after being charged with third-offense OWI (and other charges not relevant to this appeal). The State relied on an operating privilege suspension in 2015 and a previous OWI conviction in 2008 (both in Illinois) as predicates to the charge. Wanless objected to being charged with a third offense, arguing that her 2015 operating privilege suspension[2]—due to her refusal to take a breath test—should not be counted as a second offense. Without that second offense in 2015, Wanless argued that the 2008 offense extended beyond a ten-year lookback period in the relevant statutory punishment scheme, making the 2020 offense count as a first-offense OWI.

It is undisputed that the 2015 refusal that Wanless sought to challenge for counting purposes occurred after an unlawful traffic stop. Although the evidence obtained from the stop was suppressed and the corresponding OWI prosecution dismissed, the 2015 breath refusal suspension was never vacated. Outside the jury's presence, the trial court counted the 2015 suspension as a second offense for counting purposes over Wanless's objection.

Ultimately, the jury found Wanless guilty. The trial court sentenced her to 270 days in jail and a $1,200 fine for the third OWI conviction under WIS. STAT. § 346.65(2)(am)3. Wanless filed a postconviction motion, again arguing that the trial court improperly counted her 2015 breath refusal suspension from Illinois as a prior OWI offense and that her conviction should be amended to reflect a first-offense OWI instead of a third offense. The court denied Wanless's motion.

[2] This 2015 operating suspension shall be referred to as the "breath refusal suspension" or the 2015 suspension.

On appeal, Wanless renews her argument that the trial court erred as a matter of law by counting, under WIS. STAT. § 346.65(2)(am)3., a refusal that resulted from an unlawful police stop. She contends that counting this breath refusal suspension renders Wisconsin's enhanced OWI penalty scheme unconstitutional as applied to her.

The constitutionality of applying a prior OWI (even for a refusal to take a breath test stemming from an unlawful police stop) as an enhancement on a subsequent OWI is a question of law that we review de novo. *See* ***State v. Martwick***, 2000 WI 5, ¶¶16-17, 231 Wis. 2d 801, 604 N.W.2d 552. We also review de novo whether a defendant has satisfied her burden to establish beyond a reasonable doubt that a statute is unconstitutional. ***State v. Wood***, 2010 WI 17, ¶¶13, 15, 323 Wis. 2d 321, 780 N.W.2d 63. Statutes are presumed constitutional, and if there is any doubt about a statute's constitutionality, it must be resolved in favor of constitutionality. ***State v. Ninham***, 2011 WI 33, ¶44, 333 Wis. 2d 335, 797 N.W.2d 451. "In an as-applied challenge, the challenger must prove that the statute as applied to him or her is unconstitutional beyond a reasonable doubt." ***State v. Heidke***, 2016 WI App 55, ¶18, 370 Wis. 2d 771, 883 N.W.2d 162.

We conclude that counting Wanless's 2015 suspension for sentence-enhancement purposes was proper. WISCONSIN STAT. § 346.65(2)(am)3. establishes that the penalty for an OWI can be enhanced if a defendant has two prior OWI convictions. WISCONSIN STAT. § 343.307(1)(e) states that "[o]perating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing" will be counted as offenses under the enhanced penalty framework. In this case, Wanless's Illinois suspension was based on her refusal to take a breath test, not an OWI conviction. As noted by the trial court,

while Wanless provided evidence that her 2015 OWI charge was dismissed, she presented no evidence that her breath refusal suspension was vacated.

Wanless has not proved beyond a reasonable doubt that WIS. STAT. §§ 346.65(2)(am)3. and 343.307(1)(e) are unconstitutional as applied to her. She argues that breath tests resulting from illegal stops raise Fourth Amendment privacy concerns similar to those implicated when refusing a warrantless blood test, citing ***State v. Forrett***, 2022 WI 37, ¶20, 401 Wis. 2d 678, 974 N.W.2d 422, for the proposition that a substantial intrusion into a person's privacy rights cannot be used as the basis for escalating punishment under Wisconsin's OWI scheme. ***Id***. However, the holding in ***Forrett*** is explicitly limited to blood draws; breath tests do not involve a significant privacy interest like blood tests do because they are far less intrusive and "exhaled air 'is not part of [one's] body' and the test's 'physical intrusion is almost negligible.'" ***Id.***, ¶8 (citation omitted). There is nothing in ***Forrett*** to suggest that breath test refusals cannot be used for the purpose of sentence enhancement, even if the breath test resulted from an unlawful stop.

Moreover, Wanless has not pointed to any authority for the proposition that her still-standing breath suspension should not be counted in another proceeding in another state. In both Illinois and Wisconsin, a refusal hearing is conducted to give an individual the right to challenge the suspension or revocation.[3]

In Illinois, a person has 90 days to request a hearing on a suspension for a refusal. 625 ILL. COMP. STAT. 5/2-118.1(b) (West 2022). If the person fails to make a timely request for the

[3] *See* WIS. STAT. § 343.305(9)(a)5.a.; 625 ILL. COMP. STAT. 5/2-118(d) and 5/2-118.1(b) (West 2022). *See also* ***State v. Anagnos***, 2012 WI 64, ¶42, 341 Wis. 2d 576, 815 N.W.2d 675 ("As part of this inquiry [at the hearing], the circuit court may entertain an argument that the arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion.").

hearing pursuant to the statute and the rules of civil procedure, the suspension stands. ***People v. McClure***, 843 N.E.2d 308, 316 (Ill. 2006) (The Illinois "legislature has specifically directed that the license suspension proceedings are to be swift and of limited scope." (citation omitted)). Additionally, it is possible for operating privileges to not be restored even if the suspension is contested at the refusal hearing. 625 ILL. COMP. STAT. 5/2-118.1(b). Therefore, even though an unlawful stop may be grounds for rescinding the suspension at a refusal hearing, a person must request the hearing in a timely manner and make their case in a contested refusal hearing before the suspension can be removed from their record. Counting operating privilege suspensions or revocations for sentence enhancement is constitutional because of the opportunity that a person has to challenge his or her suspension in a contested refusal hearing, and Wanless has directed us to no authority that says otherwise.

Since Wanless has failed to show that the statute authorizing the use of breath test refusals for sentence enhancement is unconstitutional as applied to her, and since she failed to provide any evidence that her suspension of operating privileges was challenged successfully in a refusal hearing, the trial court properly dismissed her challenge and appropriately counted her 2015 suspension for sentence enhancement with respect to the current OWI.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals