No. 123385

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAKSH N. RELWANI, Defendant-Appellant.	On Petition for Leave to Appeal from the Illinois Appellate Court, Third District, No. 3-17-0201 There Heard on Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois No. 16-DT-1285 The Hon. Carmen Goodman *Judge Presiding*

REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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ARGUMENT

A. The Implied Consent Statute Does Not Apply Because There Is No Evidence Establishing Mr. Relwani Drove A Car At The Time Of His Arrest Or Shortly Before.

This Court should bar the State from raising an issue that is not before this Court, and the State's brief relating to this argument should be stricken. The Petition for Leave to Appeal filed by Mr. Relwani asked this Honorable Court to grant review to resolve the conflict between the decision below and other appellate decisions regarding the amount of evidence a petitioner must put forth to establish a *prima facie* showing for rescission under the implied consent law with respect to the private property exception. The State, as is their right, chose not respond to the Petition for Leave to Appeal or to ask this Honorable Court to consider any other issues. On May 24, 2018, this Honorable Court granted Mr. Relwani leave to appeal on this single issue.

In his brief before this Court, Mr. Relwani indicated that the "issue in this case is what amount of evidence a petitioner must put forth to establish a *prima facie* case for rescission under the private property exception to the implied consent law." (Relwani Brief, page 2) The State agreed and indicated in its brief, "The issue is whether the trial court correctly denied defendant's motion to rescind because he failed to make a *prima facie* showing that the parking lot was not a 'public highway.'" (State's Brief, page 1)

Nevertheless, the State now urges this Honorable Court to affirm on the basis that Mr. Relwani drove his vehicle on a public highway at some point in time prior to his arrest in the Walgreens parking lot. (State's Brief, pages 6-9) This Honor Court should not consider an issue which has not been properly presented to this Court, and should strike

this argument from the State's brief. *See Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218, 242 (2006) (This Court allowed an issue to be raised which was not included in the initial petition for leave to appeal only because the other party filed a separate petition for leave to appeal in order to raise the issue).

In the event this Honorable Court considers this issue, we submit that the State failed to establish a timely *nexus* between the unsupported allegation that Mr. Relwani drove his vehicle on a public highway and his arrest at 3:00 a.m. in the Walgreens parking lot. The State urges this Court to find that the implied consent statute applies nonetheless, on the belief that circumstantial evidence arguably supports the inference that Mr. Relwani drove his vehicle on a public roadway at some point in time prior to his arrest. (State's Brief, pages 6-9) The short answer is that Mr. Relwani's statement to the police officer that he had been driving home "with his family" from a restaurant in Chicago several hours earlier in the evening is woefully short of establishing that *he* drove his vehicle on a public highway while under the influence *at the time of his arrest or shortly before*.

Although driving on a public highway may be proved by circumstantial evidence, such evidence must show that the petitioner was driving at the time of his arrest or shortly before. *See People v. Kloke*, 193 Ill.App.3d 101, 103 (3rd Dist. 1990); *People v. Foster*, 170 Ill.App.3d 306 (2nd Dist. 1988); and *People v. Kissel*, 150 Ill.App.3d 283, 285. The reference to "his family" also does not establish the familial relationship the State assumes. The record is devoid of any evidence indicating whether Mr. Relwani is married, has children, and which family members his drove with. Furthermore, the record does not indicate who actually drove the vehicle to Joliet after having dinner in Chicago several hours earlier, or if Mr. Relwani was dropped off at the Walgreens parking lot because he

parked his car there earlier. The State had the opportunity to cross-examine Mr. Relwani on these specific issues but chose not to.

The State contends that the possibility that Mr. Relwani's family left him at the parking lot "does not withstand scrutiny." (State's Brief, page 8, footnote 3) Yet, a strikingly similar situation occurred in *People v. Kloke*, 193 Ill.App.3d 101 (3rd Dist. 1990). In *Kloke*, the defendant had been out drinking the night before with two friends, the Alstrands. Mr. Alstrand drove Kloke's car, with Kloke riding in the passenger seat, to a country club while Mrs. Alstrand followed in a separate vehicle. The Alstrand's then left Kloke in his car and the Alstrands headed home. Around 2:15 a.m., a police officer found Kloke asleep in his car. *Id* at 101-102

The State also contends that "there is no reasonable possibility that defendant became intoxicated only after arriving at the parking lot. The arresting officer discovered only one open bottle of beer in the center console." (State's Brief, page 8, footnote 3) Of course, the State's contention fails to take into consideration that Walgreens sells alcohol and that Mr. Relwani could have purchased alcohol at the Walgreens, consumed it, and discarded his empty bottles before he fell asleep. Another likely scenario is that Mr. Relwani dozed off in his car after he ingested heroin and clozapine. Regardless of the scenario, the officer did not observe Mr. Relwani drive his vehicle on a public highway at any time. Rather, the officer observed Mr. Relwani asleep in his car at 3:00 a.m., so the temporal *nexus* of having dinner in Chicago is completely inconsistent and irrelevant.

In *People v. Kissel*, 150 Ill.App.3d 283, 285 (2nd Dist. 1986), the State argued that the "implied consent statute applies to any person shown to have driven at any time in the past on a public highway, . . . and does not require that a defendant be shown to have

actually been on a highway *immediately prior to or at the time of his arrest.*" (Emphasis added.) The Panel in *Kissel* rejected the State's contention and held, "In the present cases the trial courts considered that the implied consent statute requires a *nexus* between driving upon a public highway at the time or shortly before his arrest and being subjected to the requirements of the statute at the request of an officer. We agree with that conclusion and reject the State's contrary arguments in these cases." *Kissel*, 150 Ill.App.3d at 285.

Here, there is no evidence that Mr. Relwani drove a car at all. Despite being asleep in his car by the Walgreens, the record is devoid as to how and when he arrived and entered the car that was parked in the Walgreens parking lot. Thus, even if this Honorable Court considers this issue, it should reject the State's argument.

B. The Trial Court Erred When It Denied Mr. Relwani's Petition To Rescind His Statutory Suspension Because He Established A *Prima Facie* Case For Rescission Under The "Private Property" Exception To The Implied Consent Law.

The State contends that Mr. Relwani failed to make a *prima facie* showing that he was not on a "public highway" when he was arrested in the parking lot of the Walgreens drug store in Joliet. (State's Brief, page 10) Put another way, the State attempts to foist upon this Court the belief that it is not reasonable to infer that the Walgreens parking lot in this case is "privately owned." (State's Brief, page 11)

On appeal, the majority opinion of the panel held, "to establish a *prima facie* case for rescission, he must present some evidence that the parking lot in question did not constitute a public highway under the law. (Cite omitted.) That is, he must present some evidence that the parking lot was on privately owned property ***and*** was privately maintained." *Relwani,* 2018 IL App (3rd) 170201, ¶ 17. (Emphasis added.)

In his dissenting opinion, Justice Lytton wrote, "I disagree with the majority that defendant had to prove that the parking lot where he was arrested was ***both*** privately owned and privately maintained in order to establish a *prima facie* case for rescission. A motorist establishes a *prima facie* case for rescission by showing that he was operating or in control of his automobile in the parking lot of a private business. (Relying on *Kissel* and *Ayres*). The burden should then shift to the State to present evidence that the private parking lot is publicly maintained and, therefore, falls within the definition of a 'highway' under the Code." *Relwani,* 2018 IL App (3rd) 170201, ¶ 38. (Emphasis added.)

Justice Lytton added, "Because Walgreens is a private business, defendant established that he was in a private parking lot when he was in control of his vehicle. See *People v. Montelongo*, 152 Ill.App.3d 518, 523 (1987) (restaurant parking lot private); *Kissel*, 150 Ill.App.3d at 284 (hotel, apartment house, and shopping center parking lots private); *People v. Kozak*, 130 Ill.App.3d 334, 334-36 (1970) (grocery store parking lot private). Thus, he made a *prima facie* showing for rescission. (Citations omitted.) The burden then should have shifted to the State to present evidence that the Walgreens parking lot was publicly maintained." *Relwani,* 2018 IL App (3rd) 170201, ¶ 39. Justice Lytton found that it "places an undue burden on defendants to prove that private property is not publicly maintained," and that "the State is in a much better position to know if a parking lot is publicly maintained," and therefore, "the burden should be on the State to come forward with such evidence." *Relwani,* 2018 IL App (3rd) 170201, ¶ 40.

The State disagrees and asserts that Justice Lytton's "concern is unfounded." (State's Brief, page 12) The State goes on to argue that *Kissel* and *Ayres* are distinguishable

because "[t]he parties in *Ayers* (sic) and *Kissel* did not dispute the issue of private ownership; this fact was presumed to be true in each case." (State's Brief, page 14)

Even the most cursory review of the transcript from the January 4, 2017 hearing unequivocally demonstrates that the State in this case did not dispute the issue of private ownership of the Walgreens parking lot when the State moved for a directed finding. The transcript further reflects that the State's only argument in support of its motion for a directed finding was that circumstantial evidence established that Mr. Relwani drove his car on a public roadway at some point in time earlier in the evening. (January 4, 2017, pages 20-21) The privately-owned nature of the Walgreens parking lot was not in question until the trial court erred in its interpretation of the statute. This is clearly evidenced by the trial court's holding, "Here, privately-owned parking lots are – is really referring to if you're in your own driveway and they see people sitting in their own driveway and they walk out to their car." (January 4, 2017, page 28) The majority and Justice Lytton, however, correctly agreed that the trial court erroneously concluded that Mr. Relwani "failed to establish his right to rescission because 'privately owned' means 'your own driveway.'" *Relwani,* 2018 IL App (3rd) 170201, ¶¶ 20, 40.

At the hearing before the trial court, the State never dispute the private ownership of the parking lot by Walgreens, or assert, let alone establish, that the City of Joliet maintained the paving, cleaning, and plowing of the Walgreens parking lot, as in *People v. Culbertson,* 258 Ill.App.3d 294, 630 N.E.2d 489, 491 (2nd Dist. 1994). The State now asks this Court to hold that Mr. Relwani had the burden of proving who maintained the Walgreens parking lot. (State's Brief, page 12-13). The authority relied upon by the State, however, is not applicable or can be distinguished from the case at bar.

In *People v. Tibbets*, 351 Ill.App.3d 921, 924 (5th Dist. 2004), the defendant claimed that he refused to provide law enforcement officials a blood sample because he had a fear of needles. The court held that the defendant did not present any "medical evidence" to support his aversion of needles. *Id.* at 929. In *People v. Bank*, 251 Ill.App.2d 187, 191(5th Dist. 1993), the defendant claimed he could not refuse consent based on a physical disability. As in *Tibbets*, the court held that the burden was on the defendant to present "medical testimony" establishing that he could not refuse consent because of his physical disability and simply stating feared giving blood does not excuse refusal to take the blood test. *Id.* at 929. *Tibbets* and *Bank* present classic examples where the burden was properly placed upon the defendant where the "medical evidence" was exclusively known and in the control of the defendant. In addition, the State would be prohibited from procuring such "medical evidence" related to the defendants under the Health Insurance Portability and Accountability Act ("HIPAA"), which provides for the security and privacy of health information from dissemination.

The situations in *People v. Montelongo*, 152 Ill.App.3d 518 (1st Dist. 1987); and *People v. Kozak*, 130 Ill.App.2d 334, 334-35 (1st Dist. 1970), are readily distinguished from the case at bar. In *Kozak*, the testimony indicating that the property was privately owned was established in a bench trial in which the State called several police officers to testify regarding their investigation into an automobile accident. *Kozak* at 334-335. In *Montelongo*, the testimony indicating that the property was privately owned was established by the State who called its witnesses first, and also after the defendant moved for a directed finding. *Montelongo* at 518-521. Here, the prosecution relied solely upon its

cross-examination of Mr. Relwani at the rescission hearing and did not contest that the Walgreens parking lot was privately owned or maintained.

In *People v. Culbertson*, 258 Ill.App.3d 294 (2nd Dist. 1994), the defendant introduced the lease for the Metra parking lot, which showed that the parking lot at the Metra train station was owned by a railroad. However, the lease also indicated that the railroad leased the parking lot to the City of Wood Dale, and that the city was responsible for maintain the Metra station parking lot. *Id.* at 296. At the hearing, the officer also testified on cross-examination that the city of Dale maintains the Metra lot. *Id.* at 295. The court noted that the issue was not the ownership, but the maintenance of the Metra station parking lot. *Id.* at 297. Significantly, this case was not decided on a motion for a directed findings by the state. *Id.* at 295.

Here, unlike in any of the cases cited by the State, the issue advanced by the State is whether a private citizen such as Mr. Relwani should bear the burden of proving that the Walgreens parking lot was not maintained by the City of Joliet. This begs the question, who is in the better position to prove or disprove this fact? Mr. Relwani submits that the State is in the better position to prove or disprove whether the Walgreens parking lot was maintained by the City of Joliet where the State would have such knowledge. In *Southwest Federal Savings & Loan Ass'n of Chicago v. Cosmopolitan National Bank of Chicago*, 23 Ill.App.2d 174, 181-82 (1959), the court held, "although the burden of proof usually rests with the party making the affirmative pleading, such burden may be placed upon the opposing party in instances where such party has knowledge of the subject matter at issue which is not available to the party making the allegation." (*See also Hussein v. Cook County Assessor's Office*, 2017 IL App (1st) 161184, ¶ 27, for the proposition that the

burden of proof should be on the party who had greater access to information needed to prove or disprove a disputed fact.) In *Harper v. Owen H. Fay Livery Co.*, 264 Ill.459, 464 (1914), this Court held that the burden of producing evidence which is chiefly, if not entirely, within the control of an adverse party, rests upon such party if he were to deny the existence of the claimed facts. *See also Belding v. Belding*, 358 Ill. 216, 220 (1934) ("It is a rule well recognized that where the evidence to prove a fact is chiefly, if not entirely, in the control of the adverse party and such evidence is not produced, his failure to produce the evidence tends to strengthen the probative force of the evidence given to establish such claimed fact."); and *Butler v. O'Brien*, 8 Ill.2d 203, 214 (1956) (the failure to produce evidence within their control justifies the presumption that it would be adverse to them).

Accordingly, this Honorable Court should reverse and remand for a new rescission hearing where the State may present evidence regarding the maintenance of the parking lot. If the State fails to present evidence that the parking lot was publicly maintained, the trial court should grant defendant's petition to rescind.

CONCLUSION

Based upon the reasons set forth above and in Mr. Relwani's opening brief, this Honorable Court should find that a motorist who petitions to rescind his summary suspension on the basis of being arrested on private property need not show that the subject property is also privately maintained in order to establish a *prima facie* case for rescission. In so doing, Mr. Relwani asks that this Honorable Court to reverse the judgment of the Third District Appellate Court, and grant Mr. Relwani's petition to rescind his summary suspension or remand the case for further proceedings.

Dated: September 24, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

/s/Gal Pissetzky
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CERTIFICATE OF SERVICE

I, Gal Pissetzky, an attorney, certify that I caused a copy of the attached Reply Brief and Argument of Defendant-Appellant to be filed by electronic means on the Clerk's Office, and caused a copy of the attached Reply Brief and Argument of Defendant-Appellant to be served on the person named below at the address by placing said copies in the United States mail with proper postage prepaid on September 24, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/Gal Pissetzky
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CERTIFICATE OF MAILING

The undersigned hereby certifies that he is the attorney for defendant-petitioner and that he filed the foregoing **Reply Brief and Argument for Defendant-Appellant** by causing the original of the Notice of Filing and 13 copies of the Brief to be delivered to a third-party commercial carrier at Chicago, Illinois, before the hour of 5:00 p.m. on September 24, 2018 for overnight delivery to the Clerk of the Court. Delivery charges were prepaid, and the package was addressed to:

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