

RECEIVED

STATE OF WISCONSIN **08-03-2010**

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2010AP001113-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON E. GOSS

Defendant-Appellant,

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE
CIRCUIT COURT FOR EAU CLAIRE COUNTY,
HONORABLE LISA K. STARK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

PLAINTIFF ATTORNEY,
MICHAEL J. STEUER
Assistant District Attorney
State Bar No. 1000777

Attorney for Plaintiff-Respondent

Eau Claire County Courthouse
721 Oxford Avenue, Room 2330
Eau Claire, Wisconsin 54703-5493
(715) 839-4828

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ISSUES PRESENTED	1
POSITION OF ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF THE CASE.....	2
ARGUMENT	3
I. SECTION 343.303 OF THE WISCONSIN STATUTES REQUIRES THAT AN OFFICER HAVE PROBABLE CAUSE TO BELIEVE THAT THE PERSON HAS VIOLATED § 346.63(1) OF THE WISCONSIN STATUTES IN ORDER TO REQUEST A PRELIMINARY BREATH TEST. HOWEVER, BEING UNDER THE INFLUENCE OF AN INTOXICANT IS ONLY ONE OF THE CRITERIA PROHIBITED BY § 346.63(1) AND IT IS A MISSTATEMENT OR A MISREADING OF § 346.63(1) TO SAY THAT THIS SECTION IS ONLY VIOLATED WHEN THERE IS EVIDENCE OF INTOXICATION.	3
II. TO INTERPRET § 343.303 OF THE WISCONSIN STATUTES TO APPLY ONLY TO EVIDENCE OF INTOXICATION WOULD CREATE AN ABSURD RESULT.	6
CONCLUSION	7
CERTIFICATION.....	9
CERTIFICATE OF COMPLIANCE.....	10

TABLE OF AUTHORITIES

County of Jefferson v. Renz,
231 Wis. 2d 293, 603, N.W.2d 5415, 6

Lake City Corporation v. The City of Mequon,
207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997)
.....6

State v. Escalona-Naranjo,
185 Wis. 2d 168, 517 N.W.2d 157 (1994).....5

State ex rel. Kalal v. Circuit Court for Dane County
2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.....7

Zellner v. Herrick,
2009 WI 80, 319 Wis. 2d 532, 770 N.W.2d 305.....7

Wisconsin Statutes:

340.01(46m)(c).....5

343.303 1,2,3,4,5,6,7

346.634,6

346.63(1) 2,3,4,5,6,7

346.63(1) or (2m)3

346.63(1)(a).....3

346.63(1)(b).....4,6,7

346.63(1)(c).....4

346.63(1)(d).....4

346.63(1)(am).....4

Record Reference:

R36:22-25, 28-296

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2010AP001113-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON E. GOSS

Defendant-Appellant,

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE
CIRCUIT COURT FOR EAU CLAIRE COUNTY,
HONORABLE LISA K. STARK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

Did the Trial Court err when it found that § 343.303 of the Wisconsin Statutes did not require that an officer have probable cause to believe that a person was operating a motor vehicle while under the influence of an intoxicant prior requesting a preliminary breath test and denied Mr. Goss' Motion to Suppress?

The Trial Court found that probable cause of intoxication was not required under § 343.303 of the Wisconsin Statutes under the circumstances of this case. The Trial Court properly denied the Motion to Suppress because it properly found that the officer had reason to believe the defendant had violated § 346.63(1) of the Wisconsin Statutes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. Briefs of the parties should adequately address the legal issue presented. This case involved a routine application of two Wisconsin Statutes and, frankly, a misstatement of one of them by the appellant.

STATEMENT OF THE CASE

The State concurs in large part with the appellant's statement of the case, with the exception of the appellant's assertion that Judge Stark decided that the smell of alcohol alone under the circumstances was sufficient evidence for Officer O'Malley to investigate further by ordering a preliminary breath test. In fact, Judge Stark decided that the smell of alcohol, together with the knowledge that Mr. Goss had four prior convictions for Operating While Intoxicated, which meant that the legal blood alcohol content limit for Mr. Goss, if driving, would be .02, provided Officer O'Malley with sufficient reason to believe that Mr. Goss had violated § 346.63(1) of the Wisconsin Statutes by operating with a prohibited blood alcohol concentration.

ARGUMENT

- I. SECTION 343.303 OF THE WISCONSIN STATUTES REQUIRES THAT AN OFFICER HAVE PROBABLE CAUSE TO BELIEVE THAT A PERSON HAS VIOLATED § 346.63(1) OF THE WISCONSIN STATUTES IN ORDER TO REQUEST A PRELIMINARY BREATH TEST. HOWEVER, BEING UNDER THE INFLUENCE OF AN INTOXICANT IS ONLY ONE OF THE CRITERIA PROHIBITED BY § 346.63(1) AND IT IS A MISSTATEMENT OR A MISREADING OF § 346.63(1) TO SAY THAT THIS SECTION IS ONLY VIOLATED WHEN THERE IS EVIDENCE OF INTOXICATION.

Mr. Goss has misstated Statute 343.303 in his brief. He claims that evidence of intoxication is necessary in order for an officer to believe that a person has violated § 346.63(1). However, when Mr. Goss refers to and recites the Statute in his brief, he claims that § 343.303 requires that an officer believe the person is guilty of Operating While Intoxicated, contrary to § 346.63(1)(a) of the Wisconsin Statutes. (Appellant's Brief at p. 7.) This is a misquoting of the Statute. The misquote is not simply a semantic error, it restricts the meaning of § 343.303. In fact, § 343.303 of the Wisconsin Statutes begins as follows:

If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance and conformity therewith...

There is no reference to any specific sub paragraph of § 346.63(1). The Statute does not refer only to § 346.63(1)(a). Clearly, § 343.303 of the Statutes engages the entire body of 346.63(1), which states as follows:

346.63 'Operating Under the Influence of Intoxicant or other drug' (1) no person may drive or operate a motor vehicle while:

(a) under the influence of an intoxicant, a controlled substance, a controlled substance analogue or any combination of an intoxicant, a controlled substance and a controlled substance analogue, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant in any other drug to a degree which renders him or her incapable of safely driving; or

(am) the person has a detectable amount of a restricted controlled substance in his or her blood.

(b) the person has a prohibited alcohol concentration.

The Statute also contains sub paragraphs (c) and (d), which pertain to persons charged both with an intoxication and blood alcohol content charge, but sentenced to only one, and a possible defense to certain detectable controlled substances charges. Those sub paragraphs are not implicated in this case. However, it is clear that § 346.63(1) of the Statutes includes in its prohibitions both driving under the influence of an intoxicant, sub paragraph (a), and operating with a prohibited alcohol concentration, sub paragraph (b). Therefore, having probable cause to believe a person has violated § 346.63(1) of the Wisconsin Statutes, as required by § 343.303 of the Wisconsin Statutes, pertains to either probable cause to believe there was intoxication or probable cause to believe the person was

operating with a prohibited blood alcohol content, as prohibited for one in that person's situation.

In this case, Mr. Goss' situation was that he had four prior convictions for Operating While Intoxicated, thereby making any blood alcohol concentration of .02 or higher prohibited for him. 340.01(46m)(c), Wis. Stats. It is not disputed by the appellant that this .02 blood alcohol level applies to him.

Because § 343.303 covers all of § 346.63(1), Mr. Goss' assertion that evidence of intoxication was necessary for Officer O'Malley to develop reason to believe Mr. Goss was in violation of 346.63(1) is clearly inaccurate.

Because the appellant is relying on this erroneous lack of probable cause for intoxication requirement, he does not address the larger question of what is required for an officer to develop probable cause to believe that a person has exceeded a .02 blood alcohol concentration standard. This issue could have been raised but has not been, and should be considered waived. State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

I would submit, however, that County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541, provides some guidance. While Renz does not define the minimum level of proof necessary to constitute probable cause for a violation of § 346.63(1), Wis. Stats., it does hold that more proof than

is necessary to require a preliminary breath test from a commercial driver is necessary. Renz, 231 Wis. 2d at 603. The State would submit that given how low a level .02 really is, the odor of intoxicants, coupled with the knowledge that the prohibited blood alcohol concentration level is in fact .02, is enough for an officer to develop reason to believe the person driving under those circumstances may be in violation of § 346.63(1), more specifically sub paragraph (b), of the Wisconsin Statutes. This, in fact, is what the Trial Court recognized, discovered and found, and it is not erroneous. R36:22-25, 28-29.

II. TO INTERPRET § 343.303 OF THE WISCONSIN STATUTES TO APPLY ONLY TO EVIDENCE OF INTOXICATION WOULD CREATE AN ABSURD RESULT.

Obviously, the legislature intended that there be several violations that are prohibited by § 346.63, including both Operating While Under the Influence of an Intoxicant and Operating With a Prohibited Blood Alcohol Concentration. Absurd results are to be avoided. Renz, supra, quoting Lake City Corporation v. The City of Mequon, 207 Wis. 2d 155, 162, 558 N.W. 2d 100 (1997). An absurd result would be that persons who have multiple prior convictions for Operating Under the Influence but who do not have to be intoxicated under the law in order to be in violation of the OWI Statutes would not be subject to preliminary breath testing, whereas prospective offenders with little or no OWI history would be so subject.

The idea of the lesser blood alcohol content prohibition for multiple offenders is the legislature's way of assuring public safety from those persons who have already proven themselves to be dangerous to the public. To interpret § 343.303 in the manner in which the defendant desires would be to eviscerate the legislative intent to protect the public from multiple offenders by severely restricting the amount of alcohol that can legally be consumed before driving. Section 343.303 refers to the entirety of § 346.63(1). The language of a Statute should be read in the context in which it is used, *not in isolation but as part of a whole*, to avoid unreasonable or absurd results. State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, 271 Wis. 2d 633, 681 N.W. 2d 110 (emphasis added). The legislature's intent is expressed in the statutory language, Zellner v. Herrick, 2009 WI 80, 319 Wis. 2d 532, 770 N.W.2d 305 (citation omitted).

CONCLUSION

Probable cause of intoxication is not the only parameter under which an officer can develop reason to believe a person has violated § 346.63(1), Wis. Stats. Under 346.63(1)(b), the operation of a motor vehicle with a prohibited blood alcohol concentration would also be a violation. The Trial Court properly found that, under the circumstances of this case, Officer O'Malley had the requisite level of probable cause to believe that Mr. Goss had violated § 346.63(1)(b), Wis. Stats. Therefore, there was legal

authority to administer the preliminary breath test pursuant to § 343.303, Wis. Stats., and the subsequently gathered physical evidence was not derivative of any illegal law enforcement action. Therefore, the Trial Court did not err in denying the defendant's Motion to Suppress.

Dated this 30th day of July, 2010,

Respectfully submitted,

MICHAEL J. STEUER
Assistant District Attorney
State Bar No.1000777

Attorney for Plaintiff-Respondent

721 Oxford Avenue, Rm 2330
Eau Claire, Wisconsin 54703

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is (8) pages and 1,366 words.

Dated this 30th day of July, 2010,

Michael J. Steuer – Assistant District Attorney
Eau Claire County, Wisconsin

**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. § (RULE) 809-19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of July, 2010,

Michael J. Steuer – Assistant District Attorney
Eau Claire County, Wisconsin

MJS #1000777/sla

cc: Daniel J. Chapman – Attorney for Defendant-Appellant