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OF WISCONSIN**

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2010AP1113-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON E. GOSS,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF AN UPUBLISHED
DECISION AND ORDER AND DENIAL OF MOTION
FOR RECONSIDERATION OF THE WISCONSIN COURT
OF APPEALS DISTRICT III/IV, HONORABLE JUDGES
VERGERONT, LUNDSTEN, AND BLANCHARD
PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-
PETITIONER

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ISSUES PRESENTED

1. Whether Wis. Stat. Section 343.303 requires more than merely the detection of the odor of intoxicants in order to find that there is probable cause to believe that a noncommercial driver has violated the OWI laws and request that the driver submit to a preliminary breath screening test when that driver has previously been convicted of four OWI offenses and his prohibited alcohol concentration is 0.02.

The Court of Appeals decided the issues as follows:

1. The Court of Appeals held that the odor of intoxicants alone provides probable cause to believe that a noncommercial driver has violated the OWI laws when that driver has four prior OWI convictions and the 0.02 Blood Alcohol Concentration limit is in effect.

Position on Oral Argument and Publication

Publication is recommended because this case involves an opportunity to clarify the law and applies a rule of law to a factual situation significantly different from those in published opinions.

The Defendant-Appellant-Petitioner takes no position on the need for oral argument, but it may be helpful to provide the Court an opportunity to ask questions of counsel.

Statement of the Case

On October 14, 2008, Jason Goss was charged with one count of Operating While Intoxicated as a 5th offense contrary to Wis. Stats. § 346.63(1)(a). R1:1. The matter was scheduled for a Preliminary Hearing on December 16, 2008. At that hearing, the State presented one witness, Officer Jason O'Malley, Mr. Goss's certified driving record, and a report from the State Hygiene Laboratory with the results of Mr. Goss's blood test. See *Generally* R33. Based on this

evidence, Mr. Goss was bound over for further proceedings. R33:14.

Mr. Goss moved the court pursuant to Wis. Stat. § 971.31(3) for an order suppressing certain statements and all other evidence derived from those statements because the statements were obtained as the result of a custodial interrogation conducted without informing Mr. Goss of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). R11. An evidentiary hearing was held on March 6, 2009, and the issue was briefed by both parties.

In her oral ruling, Judge Stark ruled that Mr. Goss's statements to Officer O'Malley that he was on probation and that he had consumed two beers were the result of a custodial interrogation and that they were suppressed. R37:18-

19. She also ruled that the State had not met its burden of proving that Officer O'Malley learned that Mr. Goss was on probation independent from the illegal interrogation, and the fact that Officer O'Malley learned that Mr. Goss was on probation at the time was suppressed as well. R37:24.

Judge Stark decided that Officer O'Malley was legally permitted to investigate further by ordering a preliminary breath test pursuant to Wis. Stat. § 343.303 because the smell of alcohol alone constituted probable cause to believe Mr. Goss had operated a motor vehicle with a prohibited alcohol concentration when the officer knew that Mr. Goss had four prior convictions for operating while intoxicated. R37:25. Therefore, the result of that test was

not the fruit of the illegal interrogation and could be considered in favor of probable cause for further testing or Mr. Goss's arrest. Id.

On January 4th, 2010, Jason Goss pleaded guilty to Operating While Intoxicated as a 5th offense as charged in the information. R40:18. His sentence was withheld, and he was placed on probation for a period of three years. This appeal followed. R40:25

In its unpublished decision below, the Court of Appeals initially held that Officer O'Malley had probable cause to administer the preliminary breath screening test because Mr. Goss had admitted drinking two beers, which could cause him to be operating with a prohibited alcohol concentration. *State v. Goss* 2011 WI App. ____ at p. 3. In

response to the Defendant-Appellant's Motion to Reconsider, however, the Court of Appeals acknowledged that Mr. Goss's admission that he had consumed alcohol was not considered by the trial court because it was given in response to a custodial interrogation without the benefits of *Miranda* warnings. The only facts considered by the trial court to determine whether probable cause existed to administer the preliminary breath test were that Officer O'Malley smelled alcohol while securing Mr. Goss in the squad car and that Mr. Goss had four prior convictions for Operating While Intoxicated. The Court of Appeals held, however, that the odor of intoxicants alone was probable cause to request a preliminary breath screening test if the driver has previously been convicted of

four OWI offenses and has a prohibited alcohol concentration of 0.02. See Order Denying Motion for Reconsideration dated 1/7/2011 at p. 2.

Facts

The facts of this case were established through the testimony of Officer Joshua O'Malley at a Preliminary Hearing on December 16, 2008 and at an evidentiary Motion Hearing on March 6, 2009.

Officer Jason O'Malley was an officer of the Eau Claire Police Dept. with nearly five years of experience at the time these events took place. R36:10. On approximately 8:30 P.M. on the evening of October 12, 2008, Officer O'Malley performed a traffic stop on a

vehicle operated by Jason Goss because he had difficulty reading the rear license plate. R36:6. The vehicle had a defective plate lamp, and the plate itself was excessively dirty. R33:4.

Officer O'Malley made contact with the driver and identified Jason Goss by his Wisconsin Identification card. R33:5. Mr. Goss admitted that his driver's license was revoked in Wisconsin. After this was confirmed when Officer O'Malley "ran him through headquarters," Mr. Goss was asked to exit his vehicle and placed under arrest. *Id.*

After Mr. Goss was taken into custody and while Officer O'Malley was securing him in the rear seat of the squad car, Officer O'Malley detected an odor of intoxicants. R36:7. Notably, the odor was not described as strong or

as coming from Mr. Goss's breath. See *Id.* He began to question Mr. Goss about whether he had consumed intoxicants. *Id.* In response to this questioning, Mr. Goss admitted that he had consumed two beers and stated that he was currently on probation. R33:6. Mr. Goss was not advised of his rights pursuant to *Miranda v. Arizona* prior to this interrogation.¹

Officer O'Malley administered a preliminary breath test on Mr. Goss, which revealed a blood alcohol concentration of .084. R36:8. After seeing the results of the preliminary breath test, he then had Mr. Goss perform field sobriety tests, the results of which are not in evidence. R33:7; R36:9. Finally, Mr. Goss was arrested and taken

¹ The statements elicited by Officer O'Malley's questions were suppressed and not considered by either the Trial Court or the Court of Appeals in determining whether there was probable cause to require a preliminary breath screening test under § 343.303 Wis. Stats.

to Luther Hospital in Eau Claire where a sample of his blood was taken as evidence. R33:7. A chemical test of that blood sample revealed a blood alcohol concentration of .080g/ml. R8.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS BECAUSE WIS. STAT. SECTION 343.303 REQUIRES MORE THAN MERELY DETECTING ANY PRESENCE OF ALCOHOL BEFORE AN OFFICER MAY REQUIRE A PRELIMINARY BREATH TEST FROM A NON-COMMERCIAL DRIVER, EVEN WHEN THE SUBJECT HAS MULTIPLE PRIOR CONVICTIONS FOR OPERATING WHILE INTOXICATED AND IS SUBJECT TO A REDUCED PROHIBITED ALCOHOL CONCENTRATION.

This Court should reverse the decision of the Court of Appeals and hold that the smell of alcohol alone is not sufficient to satisfy the probable cause requirement of Wis. Stat. § 343.303 to order a preliminary breath screening

test, even when the subject has been convicted of multiple prior OWI-related offenses and is subject to a reduced prohibited alcohol concentration under Wis. Stat. § 340.01(46m)(c). The lower courts' finding that the smell of alcohol alone constitutes probable cause to administer a preliminary breath test under these circumstances is unsupported by either the language of § 343.303 Wis. Stats. or this Court's interpretation of the statute in *County of Jefferson v. Renz*, 231 Wis.2d 293 (1999). Whatever quantum of evidence the legislature intended by its requirement of probable cause, it must be greater than merely detecting the presence of alcohol, which is required by the same statute for a more heavily regulated class of drivers. This Court should reaffirm its holding in

Renz and hold that "probable cause to believe" a person has violated § 346.63(1) means more than merely detecting the presence of alcohol.

Statutory interpretation is a question of law and is subject to *de novo* review. *County of Jefferson v. Renz*, 231 Wis.2d 239, 301 (1999). The ultimate objective is to "discern and give effect to the intent of the legislature." *Id.* To do so, the Court should look first to the plain language of the statute. The Court should look beyond the statutory language to determine the legislature's intent only if the language of the statute is ambiguous or unclear. *Id.* at pp. 301-02. A statute is ambiguous if it is capable of being understood in different ways by reasonably well-informed people. *Id.* at p. 302.

Section 343.303 Wis. Stats. governs when a law enforcement officer may request a sample of a person's breath to be tested for the presence of alcohol using a preliminary breath screening test (PBT). In relevant part, § 343.303 Wis. Stats says:

343.303 Preliminary breath screening test. 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 in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of

his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.

The language of § 343.303 says that a law enforcement officer may utilize a preliminary breath screening test when there is "probable cause to believe" that a person has violated § 346.63(1). The language of the statute is ambiguous because "probable cause" does not refer to a uniform degree of proof, and its precise meaning varies at different stages in a criminal proceeding. *Renz*, 231 Wis.2d at 307. Because the language used by the legislature to define the quantum of evidence necessary to request a preliminary breath test is ambiguous, the Court should look to sources outside the text of the statute to discern its meaning.

This Court previously examined the meaning of Wis. Stats. section 343.303 in *County of Jefferson v. Renz*, 231 Wis.2d 293 (1999). In that case, Christopher Renz was stopped by a law enforcement officer for an excessively loud exhaust. *Id* at p. 297. The officer smelled a "strong" odor of intoxicants upon initial contact with Renz and when he returned to the Defendant's window after running a computer check. *Id.* Renz admitted drinking three beers earlier in the evening and agreed to perform field sobriety tests. *Id* at p. 296-98. The results of the field sobriety tests were inconclusive, so the officer requested a preliminary breath test, which led to Renz's arrest for Operating While Intoxicated. *Id.* After examining the context, history, and purpose of the

statute in question in order to determine the intent of the legislature, this Court held that "'probable cause to believe' refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for an arrest. *Renz*, 231 at p. 316.

Although this Court has had no opportunity to define the minimum requirements of the § 343.303 probable cause requirement, the reasoning of *County of Jefferson v. Renz* 231 Wis.2d 293 (1999) provides guidance. "Probable cause to believe" must mean more than simply detecting the presence of alcohol

because the legislature reserved that lower evidentiary threshold for operators of commercial vehicles. See 343.303 Wis. Stats. The only logical reason for the legislature to require "detect[ing] any presence of alcohol" for commercial vehicle operators and "probable cause" for non-commercial drivers is that the legislature intended "probable cause" to mean more than merely detecting the presence of alcohol. Wis. Stat. §343.303.

Statutes should be interpreted so that every word is given effect and no portion of the statute is rendered superfluous. *Renz*, 231 Wis.2d at 305. If the statutory requirement of "probable cause to believe" that a non-commercial driver has violated the OWI laws could be satisfied by merely detecting any

presence of alcohol, then the subsequent clause concerning commercial motor vehicle operators would be rendered superfluous.

Additionally, the legislative history and purpose of Wis. Stat. § 343.303 suggest a legislative intent to require a lower threshold of evidence to administer a preliminary breath test on commercial motor vehicle operators. Wis. Stat. § 343.303 was amended in by 1989 Act 105 to include the provisions dealing with operators of commercial motor vehicles. See 1989 a. 105 § 173. 1989 Act 105 implemented the Federal Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. 2701-2716, by increasing the regulation of commercial motor vehicles in the interest of promoting public safety. See 1989 a. 105 § 1. New

regulations for commercial motor vehicle operators created by 1989 Act 105 included special licensing requirements (See Wis. Stat. § 343.05(2); 1989 a. 105 § 49) and strict disqualification from operating a commercial vehicle for OWI convictions. See Wis. Stat. § 343.315(2)(a); 1989 a. 105 § 215. An interpretation of Wis. Stat. § 343.303 that allows for greater scrutiny of commercial motor vehicle operators as opposed to all other drivers would be consistent with the purpose of the legislative act.

The complete lack of any indicia of intoxication distinguishes the facts of the case at hand from those in *County of Jefferson v. Renz*. In *Renz*, the totality of the circumstances considered by the Court included an admission to drinking

three beers and a series of field sobriety tests that indicated possible intoxication. Here, there are no statements by Mr. Goss that should be considered because the trial court suppressed those statements as the product of an *unmirandized* custodial interrogation. There were no additional tests conducted to look for possible signs of intoxication prior to the request for a preliminary breath test. Despite the fact that Mr. Goss had four prior convictions for operating while intoxicated and was subject to the reduced prohibited alcohol concentration of Wis. Stat. § 340.01(46m)(c), the officer lacked probable cause to believe Mr. Goss had violated § 346.63(1). The results of the preliminary breath test

should be suppressed as a violation of Wis. Stat. § 343.303.

CONCLUSION

This Court should reverse the decision of the Court of Appeals in this matter and hold that the § 343.303 requirement of "probable cause to believe" a person has violated § 346.63(1) before a law enforcement officer may request a preliminary breath screening test requires more than merely detecting the smell of alcohol, even when the subject has multiple prior convictions for operating while intoxicated. This Court should remand the matter to the trial court with an order to suppress the results of the preliminary breath screening test because it was taken in violation of Wis. Stat. § 343.303.

Dated this 11th day of May, 2011

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify, pursuant to Rule 809.19(12)(f), that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: monospaced font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of characters per line. The text is 13 point type and the length of the brief is 23 pages (2,731 words).

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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A P P E N D I X

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