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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2011AP002548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS M. ROCHA-MAYO,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

APPEAL FROM AN APRIL 24, 2013 DECISION OF THE COURT OF APPEALS, DISTRICT II
REVIEWING A JUDGMENT OF CONVICTION DATED NOVEMBER 5, 2010 IN KENOSHA CIRCUIT COURT
The Honorable Wilbur W. Warren, III, Presiding
Trial Court Case No. 2008CF000660

Respectfully submitted:

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ARGUMENT

I. THE WHOLE OF WISCONSIN'S BREATH TESTING REGIMEN IS MORE THAN THE SUM OF ITS PARTS.

As already noted, this case presents the question of whether the breath test regime jointly established by Wisconsin's legislature and administration will abide the use of breath test evidence, at trial and to prove intoxication, from an instrument Wisconsin does approve for evidentiary purposes. The State largely avoids the larger landscape that analysis of this issue demands, and tends to view the PBT as no different than other brands of scientific evidence for which the legislature offers no specific guidance (e.g., radar). It concedes the legislature banned PBTs from OWI trials, but narrowly views that prohibition as completely divorced from any limitations of the instrument, or lack of protocol for its use. As for the fact the legislature also established much stricter standards for breath tests it *did* expressly clear for OWI trials, or the fact the PBT does "not even come close" to meeting those standards, in the words of the state's highest authority on the subject, (R134-178), the State says nary a word. In other words, the State is content to examine the component parts of the larger framework in isolation, without ever assembling them for analytical purposes.

For example, rather than address 343.305, Stats., as an expression of the type of breath test exclusively authorized for use in OWI trials, the State tends to recast Rocha Mayo's discussion of that section as a complaint the PBT "did not meet the requirements of the implied consent law," (*see, e.g.,* State's

Brief, p. 21), as if the absence of an ITAF or exposure to a refusal charge belongs in the discussion. The problem here is not that the PBT did not meet the requirements of the implied consent law *per se*. The problem is that the PBT did not meet the requirements the legislature mandated for the type of breath test it specifically cleared as "admissible on the issue of whether the person was under the influence of an intoxicant . . . ." Section 343.305(5)(d), Stats. The principle of *expressio unius est exclusio alterius*, as applied to section 343.305(5)(d), suggests the legislature did not intend PBTs to be used for that purpose.[1]

Such a narrow reading of each component part of the larger paradigm would lead to some peculiar results. Take section 343.303 for example: while the State is correct the PBT outlined in that section is, strictly speaking, a PBT administered *by law enforcement*, it is also true the PBT outlined in that section is,

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[1]The State also cites other jurisdictions' decisions holding admissible *blood* alcohol tests taken for diagnostic purposes outside the aegis "of the implied consent law." (State's Brief, pp. 10-11). This Court has offered a similar view of *blood* tests taken via constitutional consent. *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987). It is revealing the State offers no cases affirming the principle for *breath* tests, though not surprising since the analogy the State promotes (and the trial court embraced, *see* R126-35-36) is imperfect. States have monolithic *blood* testing protocols but dualistic *breath* testing protocols. All blood tests are basically created equal. All breath tests are not. Thus, an apples-to-oranges comparison adds little to the discussion. Equally inapposite is fourth amendment jurisprudence surrounding diagnostic *blood* draws. (State's Brief, p. 12), *citing State v. Jenkins*, 80 Wis. 2d 426, 259 N.W.2d 109 (1977).

again strictly speaking, a PBT administered *for the purpose of deciding whether to arrest the person.* Should this be taken to mean, then, that any PBT administered by law enforcement "after" arrest is fair game for OWI trials on the ultimate question of intoxication? For example, are PBTs administered at the jail immediately following a blood draw for the distinct purpose of deciding where to hold the suspect, or when she might be released, also admissible during OWI trials? Can an officer with sufficient probable cause without a PBT administer a PBT right *after* the arrest and expect the results (closer to the time of operation) to be available to prove intoxication? The State's strict reading of section 343.303 would allow such uses but the State would be hard-pressed to argue the legislature intended such a result, given the bigger picture.

To the extent the State acknowledges a larger breath testing framework, it tends to focus on automatic admissibility. (State's Brief, p. 11). This case, however, is not about "automatic" admissibility, *see* section 885.235, but about threshold admissibility, *see* section 343.305(5)(d). The State, of course, is correct that Rocha Mayo's PBT was not automatically admitted, which is why that is not an issue on appeal. Rocha Mayo would hasten to add, however, that the reason the PBT was not automatically admitted is the very reason it should not have been given a *prima facie* effect.

Moreover, automatic admissibility of breath tests was a *quid pro quo* for stricter evidentiary breath test standards: a defendant faces only breath tests with enhanced accuracy and reliability in exchange for greatly relaxed foundational requirements. Thus, while reliability may not have been foremost

in the legislature's mind when it banned PBT results from OWI trials, *State v. Fischer*, 2010 WI 6, ¶25, 322 Wis.2d 265, 778 N.W.2d 629, the legislature nevertheless was acutely aware of a meaningful difference between the accuracy and reliability of a test under 343.305, Stats., versus one under 343.303. As the court of appeals observed when ruling the two-sample protocol of section 343.305 mandatory:

> It is reasonable to interpret the **statute's objective to insure an accurate and reliable test**. The chemical test procedures are mechanical in nature and consequently, intoxilyzer test results are entitled to automatic admissibility and to a prima facie presumption of accuracy to establish the defendant's blood alcohol level. We read the mandatory nature of the statute as the legislative *quid pro quo* for a driver's implied consent to testing for BAC. Furthermore, the reliance on the mechanical nature of the test and the justification for the automatic admissibility provision are severely undermined if the section is not given a mandatory reading. If the requirements of sec. 343.305(6)(c), STATS., are not strictly met, **then the assurance of accuracy is no longer present.**

State v. Grade, 165 Wis. 2d 143, 148-49, 477 N.W.2d 315 (Ct. App. 1991)(emphasis added). If the assurance of accuracy is no longer present with a single sample on an Intoxilyzer 5000, where is it with a single sample on an Alco-Sensor IV?

The State notes that failure to strictly comply with administrative requirements has been held to effect the weight, not the admissibility, of breath test results. (State's Brief, p. 8), *citing City of New Berlin v. Wertz*, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981). *Wertz*, of course, did not involve a PBT, but a section 343.305 test for which the defendant claimed the prosecution failed to prove, *inter alia*, a continuous 20 minute observation period prior to specimen collection. In rejecting that prosecutors must lay such foundations for admissibility of section 343.305 breath tests, *Wertz* relied on the language of what is now sec. 343.305(5)(d), and sec. 885.235. In short, *Wertz* merely affirmed the automatic admissibility of section 343.305 tests and held a failure to strictly follow certain administrative provisions is a defense directed to the weight of a breath test the legislature, after all, had expressly stated *is* admissible in OWI cases. *Id*. at 674. Thus, the State mostly misses the mark when it argues that:

> If failure to fully comply with the implied consent law and administrative code provisions is not fatal to admissibility even when a test is administered under the implied consent law, then such failure is surely not fatal when the test is not administered under the implied consent law.

(State's Brief, p. 9).[2]

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[2]*Wertz* noted proof of substantial compliance with code provisions: the machine operator was certified and experienced, the machine properly tested before and after the test, and strict adherence to recommended procedures for machine operation. *Id*. at fn. 10.

Finally, it is interesting to note that in its effort to exalt the status of PBT to a paragon of accuracy and reliability, the State leans much more on the testimony of the CEO of the instrument's manufacturer, (State's Brief, pp. 13, 17-18) than the Chief of its own Chemical Test Section. (*Id*. at 18-19). To listen to CEO Forrester gush about the Alco-Sensor IV, one is left to wonder why the legislature bothered to establish stricter standards for the breath tests it did authorize for use in OWI trials. Chief Hackworthy, by contrast, was far more circumspect, because she understood the binary nature of Wisconsin's breath test scheme, and testified there are devices approved for evidentiary use and devices not approved for evidentiary use, and that the PBT in this case fell into the latter category. (R124-58-66).

II. THE INSTRUCTION GIVING THE PBT A *PRIMA FACIE* EFFECT IMBUED THE PBT WITH A SPECIAL EVIDENTIARY STATUS TO WHICH IT WAS NOT ENTITLED.

In addressing the *prima facie* effect lavished on the PBT in this case, the State tends to rehash its argument on the PBT result's admissibility rather than address the weight judicially accorded it. And while the State at least mentions section 885.235, Stats., from which JI 1185 springs, it blithely ignores the legislative cross-reference between that section and section 343.305(5)d), Stats. Acknowledging that link would have required the State to examine the larger legislative intent regarding breath test presumptions in drunk driving trials.

The State next argues the instruction was valid because it was only permissive, and not mandatory. Again, this misses the

mark. Rocha Mayo has never argued the instruction created an unconstitutionally mandatory irrebuttable presumption. *See e.g.*, *Vlandis v. Kline*, 412 U.S. 441, 446 (1973)(irrebuttable presumption violates due process). Rocha Mayo's position, instead, is that the legislature never authorized or otherwise intended application of the section 885.235 presumptions to PBTs.

The legislative history of the interlocking statutes reveals as much. It is particularly instructive to examine the law surrounding the use of breath tests in OWI prosecutions before July 1, 1978, because prior to that date there were no legislative references to PBTs. The legislature had, however, already provided for the use of breath tests in OWI prosecutions, section 343.305(1) (1975-76), and to that end mandated that the division of motor vehicles establish approved techniques and methods for performing chemical analyses of the breath. Section 343.305(9)(b) (1975-76). Most importantly for purposes of this appeal, the legislature had also established that:

> At the trial of any . . . criminal action . . . arising out of the acts committed by a person alleged to have been driving . . . while under the influence of an intoxicant, **the amount of alcohol in the person's breath . . . shall be given effect as set forth in s. 885.235.**

Section 343.305(6) (1975-76).

As this Court would later observe in *State v. McManus*, 152 Wis. 2d 113, 447 N.W.2d 664 (1989), the *prima facie*

presumption of intoxication at that time nominally arose from the alcohol content in "blood," not breath, *see* section 885.235(1)(c) (1975-76), but the legislature effectively extended the presumption to breath via a blood-breath equivalency: the concentration of alcohol in 2100 cubic centimeters of deep lung or alveolar breath would equal the concentration of alcohol in one cubic centimeter of blood. Section 885.235(2)(a) (1975-76). **The *prima facie* effect for breath tests did not and could not apply to PBTs because PBTs did not exist within the legislative realm.**

The first legislative reference to a PBT appears to have arisen in Chapter 193 of the Laws of 1977 when the legislature repealed and recreated section 343.305 and in the course of doing so authorized law enforcement to request a PBT prior to arrest. 1977 Act 193, Section 7. There is nothing in that Act to suggest any intention to extend the *prima facie* presumption to PBTs. On the contrary, the only reference to PBT use was the legislative command that it not be allowed in any proceeding to prove intoxication. *Id.*

The first direct *prima facie* effect of breath tests in OWI prosecutions emerged in Chapter 20 of the Laws of 1981 when the legislature eliminated the equivalency of 2100 cubic centimeters of breath to one cubic centimeter of blood and created the per se violations of section 346.63(1)(b), Stats. As this Court observed in *McManus,* the only evidentiary value associated with breath tests prior to 1981 was the statutory presumptions in OWI-related charges as there were no per se alcohol violations (i.e.,PAC charges). *McManus* at 124, *citing* section 346.63(1) (1979-80). Importantly, the legislature simultaneously amended

section 885.235 to provide that a person with 0.1 grams of alcohol or more in 210 liters of breath was *prima facie* under the influence of an intoxicant. *McManus* at 124. Once again, the presumption was reserved for breath tests administered under the regimen of section 343.305, and not extended to PBTs.

The State, however, argues that the instruction was permissible because it did not instruct the jury that it could draw an inference of intoxication based on the test result alone. (State's Brief, p. 22). That, however, is precisely what the instruction did:

> If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 210 liters of the defendant's breath **at the time the test was taken,** you may find that the defendant was under the operation of an intoxicant at the time of the alleged operating, but you are not required to do so.

(R136-168-169)(emphasis added). The jury need only consider the PBT result to conclude Rocha Mayo was intoxicated, so it is unclear what other evidence the State believes the jury was obliged to consider.

The only chemical test evidence in this case came from the PBT. The only evidence by which the jury could find "there was .08 grams or more of alcohol in 210 liters of the defendant's breath" was the PBT result. And while the trial court allowed evidence to be presented both in favor and against the instrument, the PBT result was not treated as just another piece of evidence for the jury to consider on the question of intoxication. On the contrary, it was accorded special status and allowed to be

determinative on that question, to the exclusion of all other evidence bearing on the issue. Despite the State's efforts to uncouple the instruction from the PBT, they are inextricably connected in this case. Indeed, immediately prior to hearing about the *prima facie* effect of the PBT, the jury was told the following:

> The law states that the alcohol concentration in **a defendant's breath sample taken within three hours of operating** a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.

(R136-168)(emphasis added). This Court will recognize the "three hour" reference as one the legislature attached to tests meeting the strictures of section 343.305. *See, e.g., Village of Oregon v. Bryant*, 188 Wis.2d 680, 692, 524 N.W.2d 635 (1994).

Whether the trial court intended it or not, it elevated the PBT result as a piece of evidence to be considered as one "the law" informed was evidence of Rocha Mayo's alcohol concentration at the time of operation. And it was evidence that, in and of itself, could be used to conclude Rocha Mayo was intoxicated. Any reasonable juror would assume the PBT occupied a special status in the eyes of the law or such an instruction would never have been given. From the jury's standpoint, it was the PBT that apparently was entitled to this instruction and accompanying presumption.

Rather than address this aspect of the issue, however, the State argues:

> No reasonable juror could have believed that as a matter of law he must find the defendant was operating his vehicle while under the influence of an intoxicant if the juror found defendant had a certain breath alcohol level at the time of testing.

Once again, however, while the State is correct the instruction included words that told the jury, with regard to the presumption, that it was "not required to do so" (i.e., conclude Rocha Mayo was intoxicated), that merely signified the presumption was not mandatory and/or irrebuttable. The point is that while the jury was not told it was required to do so, it was told that it could do so. Such an instruction was not appropriate under the breath testing framework in this state.

III. THE STATE CONCEDES DR. FALCO TESTIFIED TO AN ULTIMATE FACT THAT EMBRACED A LEGAL CONCEPT FOR WHICH A DEFINITIONAL INSTRUCTION WAS REQUIRED.

The State recites Dr. Falco's testimony verbatim, presumably to establish the factual bases for his opinion that Rocha Mayo was intoxicated, an opinion he offered not just to a reasonable degree of medical certainty, but also "*scientific* certainty." The testimony reveals he relied on the smell of Rocha Mayo's breath, the clarity of his speech, the redness in his eyes, and the manner in which he ambulated. (State's Brief, p. 26). The State does not acknowledge, however, that Rocha Mayo spoke a language the doctor did not understand, or that the doctor never saw Rocha Mayo ambulate. The State then offers a cursory analysis based solely on section 907.04, Stats., and ignores, for

example, this Court's pronouncement in *State v. Nieto*, 2009 WI App 95, ¶22, 320 Wis.2d 484, 769 N.W.2d 877.

With regard to section 907.04, Stats., the State is correct that Rocha Mayo concedes the section allows testimony on an ultimate fact. Unfortunately, the State does not likewise concede what *it* should: the limitation that still precludes such testimony when it embraces "a legal concept for which a definitional instruction was required." *Nieto, supra*. Instead, the State largely ignores the principle, and completely ignores the case law upon which it rests, although it does not dispute "intoxication" is indeed a legal concept for which a definitional instruction was required (and given). The net result is an underdeveloped and circular argument bereft of any legal authority in which the State maintains Dr. Falco's testimony was acceptable because he did not mimic the definitional language in the jury instruction (i.e., ". . . less able to exercise the clear judgment and steady hand . . ."). Of course, Dr. Falco did not have to mimic that language. He testified Rocha Mayo was "intoxicated," and the jury was told what "intoxicated" meant. The jury could have ignored the definition of intoxication based on the good doctor's testimony, particularly when it was offered to a reasonable degree of scientific certainty. While Dr. Falco's observations of Rocha Mayo were fair game, his scientific certainty about a legal concept was not.

IV. THE ERRORS IN THIS CASE WERE NOT HARMLESS.

While the State does not present a Statement of Facts, claiming facts are not pertinent to the legal issues, it nevertheless argues any error in this case was harmless which, of course, requires an analysis of the facts. Thus, the State eventually offers a factual analysis, but in so doing relies, in part, on the testimony of an eyewitness (Shaunna) who fled the accident scene without talking to police. (State's Brief, p. 31). Worse, it relies on facts that are simply wrong, as when it claims Rocha Mayo offered no explanation of why he was speeding down the road if the two motorcycles were ahead of him. (*Id*. at 30). As already noted, Rocha Mayo *did* offer an explanation: he reasonably believed he had the other two members of the gang chasing him on a Harley Street Glide which, he knew, had seconds before been intentionally maneuvered onto his rear flank, which is also precisely the direction from which the violent attack immediately thereafter had come. (R132-233-234; R134-86, 93; R136-18-22, 42-45).

It cannot reasonably be argued on this record, much less beyond a reasonable doubt, that the error did not influence the jury. *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985). The jury did not endure four days of arduous deliberations and deadlocks because the evidence against Rocha Mayo was so overwhelming. Moreover, the only chemical test evidence presented placed Rocha Mayo right at the legal limit. This Court should decline the State's invitation to hypothesize a guilty

verdict that was never rendered. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).[3]

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Rocha Mayo respectfully requests this Court vacate his conviction and remand for a new trial.

Dated this 27th day of January, 2014.

/s/ Rex Anderegg
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[3]Whether Rocha Mayo was quantitatively "impaired" by alcohol would also meaningfully impact an appraisal of whether he showed utter disregard for human life and thus, the State is wrong when it claims Rocha Mayo is only entitled to a new trial on the intoxication charge. *See* (R136-197-198, 203)(State tying alleged intoxication to reckless endangerment during closing argument).

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,478 words.

Dated this 27th day of January, 2014.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the Reply Brief in *State of Wisconsin v. Luis M. Rocha-Mayo*, Appeal No. 2011AP002548-CR, which complies with the requirements of s. 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 27th day of January, 2014.

/s/ Rex Anderegg
Rex Anderegg