STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP218-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSICA M. WEISSINGER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, THE HONORABLE SANDY A. WILLIAMS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Jessica M. Weissinger, appeals a judgment convicting her of injury by intoxicated use of a motor vehicle, and operating a motor vehicle while under the influence of a controlled substance (80). Weissinger was convicted after a jury found her guilty of both crimes.

The charges against Weissinger stemmed from an incident on July 6, 2009, in which a vehicle she was driving struck a motorcycle, leaving the operator of the motorcycle seriously injured (97:11-13). Police did not suspect Weissinger of being under the influence of an intoxicant (97:22-24). Weissinger was not arrested (97:22-24). A police officer asked her if she would consent to give a blood sample (100:141-42). Weissinger gave consent (100:142). Another officer took Weissinger to the hospital, without arresting her, and without handcuffing her (97:24-25, 49). At the hospital, Weissinger gave the blood sample (97:26).

The blood sample was received at the Wisconsin State Laboratory of Hygiene on July 10, 2009, and it was tested on July 13, 2009 (100:224, 237). A test of the blood revealed no alcohol (100:192, 237-38).

The blood was initially screened for drugs on August 7, 2009 (100:244). The test revealed a detectable amount of THC (100:194-95). A secondary screen run on the blood on September 14, 2009 revealed a detectable quantity of oxycodone, fluoxetine, and norfluoxetine (100:97-99, 246).[1] The blood was tested again on October 9, 2009, to quantify the amount of fluoxetine (100:246). The blood was tested again on January 28, 2010 to confirm the quantity of oxycodone (100:263).

[1] Weissinger had prescriptions for the oxycodone, fluoxetine, and norfluoxetine, and the amount in her blood was in or near the therapeutic range (100:197-201, 248-50). She was not charged with operating with a detectable amount of these drugs in her blood.

On February 24, 2010, the blood was tested again, this time for THC (100:264, 67). A report dated March 7, 2010 confirmed the presence of THC in Weissinger's blood (100:271). The blood sample was discarded sometime near the end of April, 2010, because it was outside of the six-month retention period for blood samples (100:275-76).

On May 24, 2010, Weissinger was charged with causing injury while having a detectable amount of a controlled substance (THC) in her blood, and operating a motor vehicle while having a detectable amount of a controlled substance (THC) in her blood (1).

On May 24, 2011, Weissinger moved to retest the sample (23). She also moved to dismiss the charges against her, on the ground that the blood sample had been destroyed, and that she was denied the right to retest the sample (24). The State moved to preclude the defense from questioning the State's witnesses about the destruction of the blood sample (38). The circuit court held a hearing on the motion (96), and then denied both Weissinger's motion to dismiss, and the State's motion to preclude questioning about the destruction of the blood sample (96:29).

On November 11, 2011, the prosecutor informed Weissinger's defense counsel that the blood sample that was tested for drugs had been destroyed by the lab of hygiene before the charges had been filed against Weissinger (45:2). Weissinger again moved to dismiss (45; 50). The court held another hearing (99), and again denied both Weissinger's motion to dismiss, and the State's motion to preclude questioning about the destruction of the blood sample (99:11-15).

Weissinger was tried to a jury (97; 100). At trial, she exercised her constitutional right not to testify (97:7). The jury found Weissinger guilty of both charges (97:166-67), and the circuit court imposed judgment of conviction (80). Weissinger now appeals. As respondent, the State

of Wisconsin will set forth additional facts as appropriate in the argument section of this brief.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED WEISSINGER'S MOTION TO DISMISS AND PROPERLY ADMITTED INTO EVIDENCE TESTIMONY ABOUT THE RESULTS OF A TEST OF WEISSINGER'S BLOOD.

A. Introduction.

Weissinger moved to dismiss the charges against her on the ground that the blood sample had been destroyed before she had an opportunity to retest it (22; 24; 45; 50). She asserted that this violated her right to retest the blood sample under Wis. Stat. § 971.23(5), and also that by failing to preserve exculpatory evidence, the State violated her right to due process (50:4).

The circuit court denied Weissinger's motion to dismiss after multiple hearings and briefing. The court also denied the State's motion to prohibit the defense from cross-examining State witnesses regarding the destruction of the blood sample. The court explained its ruling as follows:

> number one, the defendant has the right to request their own blood test. . . . Now, this is a unique case because they weren't operating under the statutes where if they have probable cause, they can ask for blood, and if they do, they have to read the Informing the Accused to say, we're asking you to submit to a blood test, and you can request a different alternative test.
>
> So this particular defendant didn't have that option. So this court has to now weigh basically a sense of fairness. Because I don't think State v. [Ehlen], it doesn't address this particular case. Because it talks about you have to have the statutes under and with the implied consent to cover the

defendant's due process. And quite frankly, this is a unique situation. And a difficult situation for this Court because all the other due process rights are there.

Now, Mr. Boyle might disagree, but our Supreme Court has given us the direction. Your cross-examination -- and you know, as an aside, I've witnessed you cross-examine experts. And it can bring out an awful lot of information that's helpful to defense. Ms. Wabitsch had talked about that the defense has not come back and said, well, it would have been a different result, but it's hard to prove a number because Mr. Boyle doesn't even have to say, let's see that vial, was the person's name the same as this defendant that you were testing. He doesn't have that ability. Because the vial is now destroyed with the blood.

So what I have to do is kind of weigh , and it goes [part] and parcel. Does this Court allow Mr. Boyle full and free reign of cross-examination, which is what the State has filed originally that precipitated this new motion. And that is the State wanted to limit Mr. Boyle's ability to ask some of those questions. And I think this Court out of fairness should allow Mr. Boyle to ask all those kinds of questions.

Now, Mr. Boyle says, well, how can I even bring in an expert to say I'd have to test the blood. Well, no necessarily. An expert can talk about the chain of evidence or the type of machines that this particular lab used, whether or not it was accurate, and I think one of the big questions I'm sure Mr. Boyle's going to ask is how do you know it was my client's blood, do you have the vial to show that that's the same vial you tested, and did that vial actually have my client's name on it. And I think that's fair. I don't know the answer.

However, I'm supposed to sit up here and give complete directions, and I don't know the answer. And that's what I'm weighing because we don't -- we're not operating under the statute where she could have asked for a different alternative test. And that's why I'm having difficulty, had she been provided full due process. But when you think of all the other due process rights she'll have in testing it

> through cross-examination, I think that will outweigh the fact that she did not have the ability to ask for a second alternative test.
>
> And coupled with this Court's ruling against the State then in limiting Mr. Boyle's ability to cross-examine the witnesses as requested. He's going to have full range he's going to ask. Did you destroy the blood, when did you destroy the blood, was it before my client was even charged. I think that's all fair game. And who knows what the hygiene lab's answers are going to be, but I think that is protecting the defendant's rights as well as protecting the State and being able to pursue a case, and quite frankly, a serious case.
>
> I have these concerns even if there wasn't any injury, if it was merely going on an operating with a detectable amount of controlled substance. Because I think when weighing both of those issues, how the Court has now fashioned its ruling allowing that the test result is admissible but also denying the State's request [] hamstringing Mr. Boyle is his cross-examination. So all those things that Mr. Boyle wanted to bring out I'm going to allow. But I'm not going to suppress the blood test result, and I think fashioned that way I have also protected the defendant's due process rights.

(99:11-15.)

On appeal, Weissinger argues that the circuit court erred in allowing the State to present evidence of the blood test results, because § 971.23(5) gave her the right to retest the blood sample (Weissinger Br. at 8, 11, 24), and because the failure to preserve the blood sample denied her due process (Weissinger Br. at 13-25).

However, as the State will explain, the circuit court's ruling denying Weissinger's motion to dismiss the case was correct, and can be affirmed on a number of grounds. First, Weissinger had no right to test the blood sample under Wis. Stat. § 971.23(5), because the blood sample was not going to be introduced into evidence at trial. Second, Weissinger has not shown that the blood sample was material evidence at the time she sought to

retest it. Third, Weissinger has not shown that the destruction of the blood sample violated due process because she has not shown that the blood sample was "apparently exculpatory," or that the State acted in bad faith. Finally, Weissinger's right to due process was not violated because she had the opportunity to have another blood sample taken and additional tests performed, and because the ruling fashioned by the circuit court afforded her the opportunity to challenge the test results on cross-examination at trial.

B. The blood sample taken with Weissinger's consent was not subject to discovery or inspection under Wis. Stat. § 971.23.

Weissinger moved to dismiss the charges against her on the ground that her due process rights were violated when the blood sample taken from her consensually was destroyed after testing (22; 24; 45; 50). She asserted in her "second motion to renew motion to dismiss" that "Sec. 971.23(5) absolutely gives the defendant the right to inspect scientific evidence" (50:4). She added that "[w]hen an agency of the State destroys that scientific evidence before a defendant has a chance to have it inspected, let alone destroys evidence even before charges, the case is so fraught with due process violations that it must be dismissed" (50:4). In her brief on appeal, Weissinger argues that Wis. Stat. § 971.23 "clearly provided a defendant an opportunity to inspect and perform tests on any physical evidence the State had in its possession with approval of the court" (Weissinger Br. at 8).

However, § 971.23(5) does not provide for inspection or testing of a blood sample if the blood itself is not going to be introduced into evidence. The statute provides as follows:

971.23 Discovery and inspection.

> **(5)** SCIENTIFIC TESTING. On motion of a party subject to s. 971.31 (5) the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes.

Contrary to Weissinger's assertion that § 971.23(5) gave her the "absolute" right to retest the blood sample, the Wisconsin Supreme Court has concluded that § 971.23(5) gives a defendant the right to inspect reports of the results of blood tests, but not the blood sample itself.

The supreme court addressed precisely this issue in *State v. Disch*, 119 Wis. 2d 461, 351 N.W.2d 492 (1984), and *State v. Ehlen*, 119 Wis. 2d 451, 351 N.W.2d 503 (1984). In *Disch* and *Ehlen* the defendants moved to suppress blood test results because the blood samples were destroyed before the defense could retest the samples. The defendants in both cases argued that they had the right to test the samples under Wis. Stat. § 971.23(4) and (5) (1979-80), which provided that:

> **(4)** INSPECTION OF PHYSICAL EVIDENCE. On motion of a party subject to s. 971.31 (5), all parties shall produce at a reasonable time and place designated by the court all physical evidence which each party intends to introduce in evidence. Thereupon, any party shall be permitted to inspect or copy such physical evidence in the presence of a person designated by the court. The order shall specify the time, place and manner of making the inspection, copies or photographs and may prescribe such terms and conditions as are just.
>
> **(5)** SCIENTIFIC TESTING. On motion of a party subject to s. 971.31 (5), the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes. The court may also order the production of reports or results of any scientific tests or experiments made by any party

> relating to evidence intended to be introduced at the trial.

Wis. Stat. § 971.23(4) and (5) (1979-80).

The supreme court explicitly rejected the defendants' assertion that § 971.23 provided for retesting of blood samples. The court in *Disch* stated:

> Sections 971.23(4) and (5), Stats. 1979-80, place a duty of preservation of physical evidence which the state intends to introduce in evidence or which it intends to introduce at trial for scientific analysis. A blood sample, however, is not to be introduced at trial. The result of the blood alcohol analysis is to be introduced into evidence. Under the statutes, the blood test results are admissible. The disclosure by the state of the blood alcohol analysis and the names of the technician(s) who drew or analyzed the blood comports with the concern that the trial be "more a 'quest for truth' than a 'sporting event.'" *United States v. Bryant*, 439 F.2d 642, 644 (D.C. Cir. 1971). The disclosure of the analysis, reports, and names of the technicians also comports with this court's recognition that surprise should be avoided with respect to scientific proof and testimony of experts. [*Wold v. State*, 57 Wis. 2d 344, 351, 204 N.W2.d 482 (1973)]. With such information in hand, the defense can test or rebut the accuracy or credibility of the blood analysis.

Disch, 119 Wis. 2d at 478-79 (footnote omitted).

In *Ehlen*, the supreme court concluded that a blood sample is not "evidence intended, required, or even susceptible of being produced by the state under the provisions of sec. 971.23(4) and (5) Stats." *Ehlen*, 119 Wis. 2d at 451.

The supreme court in *Disch* and *Ehlen* therefore made explicit that blood test results, and reports of the results, are subject to discovery and inspection under § 971.23. The blood samples themselves are not subject to discovery and inspection.

The current discovery statute uses precisely the same language as the 1979-80 version applicable under *Disch* and *Ehlen*. Both versions of the statutes provide that "the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis." Wis. Stat. § 971.23(5), and Wis. Stat. § 971.23(5) (1979-80). As the supreme court has concluded, this does not include blood samples if the blood sample itself is not going to be introduced into evidence at trial.

In *Disch*, the court explained in a footnote that its decision concerned blood tests for alcohol, rather than those for controlled substances. It stated:

> Because of the fact that the legislature has directed that the various blood test results are to be admissible and the blood samples *per se* will not be introduced as evidence at trial, it is clear that the production of blood samples for inspection for the purpose of testing for alcohol at the request of a defendant is not a due process requirement for admission. We have, however, no occasion in the present review to explore whether or not secs. 971.23(4) and (5), Stats., are inapplicable where there is a demand to produce for analysis other types of substances which will not be physically produced by the prosecution as evidence at trial, but in respect to which evidence of their nature or composition (*e.g.*, controlled substances), will be offered in evidence and there is no express statutory direction that the test results are admissible. We do not in this case intend to foreshadow or predict the holding of this court in the event such question were presented.

Disch, 119 Wis. 2d at 478 n.6.

The court's reasoning was that blood tests results for alcohol were admissible *per se*. Under the then-applicable version of Wis. Stat. § 885.235, "Chemical tests for intoxication," "evidence of the amount of alcohol in such person's blood at the time in question as shown by chemical analysis of a sample of his breath, blood or urine

is admissible on the issue of whether he was under the influence of an intoxicant if such sample was taken within 2 hours after the event to be proved." Wis. Stat. § 885.235(1) (1979-80). The statute had no similar admissibility provision for controlled substances.

The current version of § 885.235 provides that chemical evidence of a detectable amount of a controlled substance in a person's blood is prima facie evidence. It provides that:

> In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

Wis. Stat. § 885.235(1k). The jury instructions committee has concluded that "the statement 'the court shall treat the analysis as prima facie evidence' strongly implies that the analysis is admissible." Wis. JI—Criminal 1266 (2011) at 6.

The issue of admissibility in a given case concerns only whether the analysis is relevant to the issue of whether the person had a detectable amount of controlled substance in his or her blood. *Id.* In this case, there is no dispute that evidence of the blood test for controlled substances was relevant to proving whether Weissinger had a detectable amount of a controlled substance in her blood. The blood test results were admissible. However, under *Disch* and *Ehlen*, the blood sample itself was not subject to discovery or inspection under § 971.23(5).

Weissinger's motion to dismiss in this case was based on her motion for inspection of the blood sample

under § 971.23(5). Pursuant to *Disch* and *Ehlen*, and § 971.23(5), she had no right to inspect the blood sample. She had a right to inspect the report of the results and to learn of the names of the persons involved in the analysis. She was afforded those rights. Because Weissinger was not denied inspection of anything to which she had the right of inspection, her due process rights were not violated. The circuit court therefore correctly denied her motion to dismiss the case, and correctly allowed the State to admit evidence of the blood test results.

C. Weissinger has not shown that the blood sample was material evidence at the time she moved to inspect it.

As explained above, the blood sample that Weissinger sought to inspect was not subject to inspection under § 971.23(5). In addition, the "failure" to preserve the blood sample did not violate Weissinger's right to due process because she has not shown that the blood sample was material evidence at the time she sought to inspect it.

The supreme court addressed precisely this issue in *Disch*, 119 Wis. 2d 461, in which the defendant was charged with homicide by intoxicated use a motor vehicle. *Id.* at 462. The defendant's blood was drawn pursuant to the implied consent law. *Id.* at 463, 470, 472. A blood test revealed that her blood alcohol concentration was .121. *Id.* at 464. The blood was then tested for controlled substances, and the test failed to reveal the presence of a controlled substance. *Id.* at 464-65.

Before trial, the remainder of the blood sample was turned over to the defense *Id.* at 465. However, the quantity was insufficient for a test. *Id.* The defense moved to suppress the blood test on the ground that the State destroyed the blood sample depriving the defense of discovery. *Id.* The circuit court granted the motion to suppress evidence, concluding that the defendant's due process rights were violated. *Id.* at 465-66.

The court of appeals affirmed, concluding that the blood sample was material evidence, and that its destruction, which resulted in the defendant's inability to test it, violated the defendant's right to due process. *Id.* at 466-67.

The Wisconsin Supreme Court reversed. *Id.* at 462. The court first concluded that the defendant had not shown that the blood sample, which was six months old when the defendant sought to test it, was material evidence. *Id.* at 467-70. The court stated that:

> It cannot seriously be contended that the failure of the state to produce a six-month-old specimen of blood that was not in any way demonstrated to be material to the defendant's guilt or innocence deprived, or would deprive-since this is a pretrial suppression order-a defendant of a fair trial. Its production or nonproduction is irrelevant.

Id. at 470.

The supreme court noted that the defendant had not shown that the blood sample, which was material when it was initially drawn and tested, remained material or even testable six months later when the defendant sought it in discovery, for testing purposes. The court stated that:

> there is no scientific basis for concluding or presuming that a blood sample remains material for a period in excess of six months. The application of the presumption to a blood sample, insofar as the record reveals, is totally without scientific foundation and is unsupported by any expert opinion or any evidence. Nor do we conclude that a court-this one or the court of appeals-can take judicial notice that an item of physical evidence, such as blood, which is originally capable of testing and is therefore a source of material evidence at a particular time presumptively continues for an indeterminate time in the future to be testable for BAC and to be a source of evidence that is material.

Id. at 468.

The supreme court concluded that:

> Even were this aged sample capable of retesting for BAC, its nonproduction would not deprive a defendant of a fair trial, and, in no event, should the results of the original test be suppressed. Under the statutes, the blood test derived from a properly authenticated sample by legislative fiat is admissible. Sec. 885.235(1), Stats. Whether the result is to be given credence by a finder of fact is dependent upon the exercise of a whole panoply of due process safeguards that protect a defendant's right to a fair trial, whether or not at a particular time a sample of blood is retestable for BAC.

Id. at 470.

In this case, Weissinger voluntarily gave the blood sample on July 6, 2009 (97:11, 26). The report indicating the presence of THC was dated March 7, 2010 (100:271). Weissinger moved for testing of the sample on May 4, 2011 (23). Weissinger has not asserted, and has certainly not proved, that the blood sample would have been capable of retesting on May 4, 2011, nearly 22 months after the blood was drawn. She therefore has not shown that the blood sample was material evidence. *See Disch*, 119 Wis. 2d at 468. Accordingly, the "failure" to preserve the blood sample did not violate Weissinger's right to due process.

D. Weissinger's due process rights were not violated because she has shown neither bad faith by police, or that the blood sample was "apparently exculpatory."

Weissinger argues on appeal that her due process rights were violated by the State's failure to preserve the blood sample. She asserts that the State was required to preserve the blood sample and that without the ability to retest the blood, she had no defense. Weissinger relies on

State v Hahn, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. Ap. 1996) (Weissinger Br. at 20-23).

However, as the State will explain, *Hahn* does not help Weissinger, because the United States Supreme Court rule that *Hahn* relied upon has been "refined," and under current law, to show a due process violation by the failure to preserve evidence a defendant must show either bad faith by police, or that the evidence was "apparently exculpatory." Because Weissinger has not made and cannot make either showing, she cannot show a due process violation.

In *Hahn*, the defendant drove a truck which overturned, killing a passenger. *Hahn*, 132 Wis. 2d at 354. The defendant was charged with homicide by intoxicated use of a motor vehicle. *Id.* Defense counsel informed the district attorney that a defense expert wanted to examine the truck. *Id.* However, the truck had been dismantled, and some of its parts had been sold. *Id.* The defendant moved to dismiss the case because the State had destroyed exculpatory evidence. *Id.* at 355. The circuit court dismissed the case. *Id.*

The court of appeals affirmed. It relied on *California v. Trombetta*, 467 U.S. 479 (1984), which concluded that:

> "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

Hahn, 132 Wis. 2d at 356 (quoting *Trombetta*, 467 U.S. at 488-89 (footnote and citation omitted)).

The court of appeals in *Hahn* applied the *Trombetta* rule that "[t]he state's duty to preserve exculpatory evidence is limited to evidence that 'might be expected to play a significant role in the suspect's defense.'" *Id.* at 358. The court concluded that in light of the defendant's assertion that the truck's steering mechanism had a defect, and testimony from a passenger in the truck that the defendant did not turn the steering wheel in a way that would have caused the crash, the truck "had an apparent exculpatory value which the state recognized." *Id.* at 360. It therefore concluded that the State had a duty to preserve the evidence. *Id.* The court of appeals affirmed the circuit court's exercise of discretion in dismissing the case. *Id.* at 362-63.

Weissinger asserts that, like in *Hahn*, her due process rights were violated when the State destroyed the blood sample (Weissinger Br. at 20-23).

However, Weissinger's reliance on *Hahn* is misplaced, because as the court of appeals later explained, the *Trombetta* rule relied upon in *Hahn*, that "the due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the State to preserve exculpatory evidence," was "refined" in *Arizona v. Youngblood*, 488 U.S. 51 (1988). *State v. Greenwold*, 181 Wis. 2d 881,885, 512 N.W.2d 237 (Ct. App. 1994) (citing *Hahn*, 132 Wis. 2d at 355-56).

The court of appeals explained in *Greenwold* that:

> *Youngblood* "hold[s] that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* 488 U.S. at 58, 109 S.Ct. at 337. *Youngblood* distinguished "potentially useful" evidence from "exculpatory" evidence. It observed that the due process clause makes the good or bad faith of the State irrelevant when the State fails to disclose material exculpatory evidence. *Id.* at 57-58, 109 S.Ct. at 337. "But we think the Due Process Clause requires a different result when we deal with the

> failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57, 109 S.Ct. at 337. Therefore, unless the evidence was apparently exculpatory, or unless the officers acted in bad faith, no due process violation resulted.

Greenwold, 181 Wis. 2d at 885.

In *Greenwold*, the defendant was involved in a one-car accident in which the other person in the vehicle died. *Id.* at 882. *Greenwold* was charged with OWI and homicide by intoxicated operation of a motor vehicle. *Id.* He asserted that he was a passenger, and the deceased person was the driver. *Id.* at 883-84. The vehicle had blood spots on the interior, but the State did not collect samples. *Id.* at 883. Five months later, blood samples were collected. *Id.* However the vehicle had been stored in a manner that could have had a detrimental effect on the samples, and other people had touched fabric from which the samples were drawn. *Id.* As a result, blood tests were inconsistent, and did not indicate a particular blood type. *Id.*

The defendant moved to dismiss. *Id.* The circuit court granted the motion, relying on *Hahn*, concluding that the State failed to preserve potentially exculpatory evidence. *Id.* 883-84. The State appealed, and the court of appeals reversed. *Id.* at 884. The court of appeals concluded that under *Youngblood*, the blood samples were not "apparently exculpatory" evidence, but rather "potentially useful" evidence. *Id.* at 885-86. The court noted that, like in *Youngblood* "'this evidence was simply an avenue of investigation that might have led in any number of directions.'" *Id.* at 885 (quoting *Youngblood*, 488 U.S. at 56 n.*). The court of appeals therefore remanded to the circuit court to determine whether the defendant could establish bad faith on the part of police. *Id.* at 886.

On remand, the circuit court found bad faith. *State v. Greenwold*, 189 Wis. 2d 59, 63, 525 N.W.2d 294 (1994). The court of appeals reversed. It noted that under *Youngblood:*

> A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory.

Id. at 67-68 (citing *Youngblood*, 488 U.S. at 57-58). The court explained that "if the State fails to disclose or preserve materially exculpatory evidence, the defendant's due process rights are violated under the first prong of the test." *Id.* at 68 (citing *Youngblood*, 488 U.S. at 57). It further explained that:

> under *Youngblood* and the cases interpreting its standard, the second prong requiring bad faith can only be shown if: (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence.

Id. at 69 (citation omitted).

Under the standard adopted by this court in both *Greenwold* cases, Weissinger's due process rights were not violated. Weissinger has not shown that the blood sample was "apparently exculpatory" evidence. Quite the opposite, defense counsel's affidavit, accompanying the motion for scientific testing and the motion to dismiss, states that affiant "recognizes the potential of 'contraproductivity' of testing if the testing does not assist the defendant and if tested, that the results of such testing might be made known to the prosecution" (24:2). The affidavit further acknowledged that "[i]f the retest of the blood were to show that the active ingredient was present, the defendant would have absolutely no defense" (24:3). The affidavit added that a retest could "hopefully find that the test of the blood was not correct" (24:3).

Moreover, the blood test that showed a detectable amount of a controlled substance is, by statute, prima facie evidence that she had a detectable amount of a controlled substance in her blood. Wis. Stat. § 885.235(1k). There is no reason to believe that the test was not performed correctly, or that the result was not accurate, and defense counsel had an opportunity on cross-examination to cast doubt on the procedure and the results.

At most, the blood sample was "potentially useful" rather than "apparently exculpatory" evidence. Therefore, to show a due process violation because of the destruction of the evidence, Weissinger must show that the State acted in bad faith in failing to preserve the evidence. This requires her to show that "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." *Greenwold*, 189 Wis. 2d at 69 (citation omitted).

Weissinger has made no such showing. She has not even hinted that anyone associated with the State was aware that the blood sample, a test of which showed a detectable amount of a controlled substance, was potentially exculpatory. She has not even hinted that anyone associated with the State "acted with official animus or made a conscious effort to suppress exculpatory evidence." Instead, the only evidence is that the hygiene lab disposed of the blood sample, under its policies, after it completed the test for controlled substances.

Weissinger has therefore made no showing that by destroying the blood sample and failing to preserve it, the State violated her right to due process. The circuit court order denying her motion to dismiss should therefore be affirmed.

E. Weissinger's dues process rights were not violated because she had the opportunity to have additional tests, and the opportunity to challenge the test results on cross-examination at trial.

The final reason that Weissinger has not shown a due process violation is that she could have had additional tests and she had the opportunity to challenge the blood test on cross-examination at trial. As the supreme court has concluded in cases involving blood draws under the implied consent law, this is sufficient to insure due process even if the blood sample is later destroyed.

Weissinger acknowledges in her brief that in cases such as *Ehlen*, 119 Wis. 2d 451, Wisconsin courts have made clear that when a blood sample is drawn under the implied consent law, and the sample is tested and then destroyed before the defendant can retest it, there is no due process violation[2] (Weissinger Br. at 14-19). Weissinger asserts that the cases that have reached this conclusion do not apply in this case because her blood was not drawn under the implied consent law, but instead was drawn with her express consent (Weissinger Br. at 19). Weissinger relies on the fact that an officer requesting a blood sample under implied consent is required to inform the person that he or she has the right to an alternative test at state expense, and to additional tests by a qualified person of the defendant's choosing, at the defendant's expense (Weissinger Br. at 19). However,

[2] In her brief, Weissinger also explains why she believes *State v. Nienke*, 2006 WI App 244, 297 Wis. 2d 585, 724 N.W.2d 704, does not govern this case (Weissinger Br. at 13, 17). *Nienke* is unpublished, and was decided before July 1, 2009. It may not be cited as precedent or authority. Wis. Stat. § 809.23(3). The State acknowledges that it relied on *Nienke* in the circuit court (27:3). However, the State later realized that the case is unpublished, and withdrew its argument based on the case (99:5-6).

here the officer did not inform Weissinger that she could have an additional test.

The State maintains that only real difference between the blood draws under the implied consent law in *Ehlen* and *Disch*, and the consensual blood draw in this case, is that in *Ehlen* and *Disch*, the defendants were informed of their right to an additional test at state expense. Weissinger, just like the defendants in *Ehlen* and *Disch*, had the opportunity to have additional tests by a qualified person of their choice, at her own expense.

In *Ehlen* and *Disch*, the supreme court concluded that the defendants were not denied due process when their blood samples were destroyed and were not available for retesting, because they had an opportunity for an additional test, and had the opportunity to challenge the test results on cross-examination.

In *Disch*, the court noted that because the defendant's blood was drawn pursuant to the implied consent law, she also had the right to another test at the state's expense, and "the suspect, at his or her own expense, may demand that the test be administered by any qualified person, which we construe as meaning any qualified person selected by the suspect." *Disch*, 119 Wis. 2d at 470.

The supreme court further noted that:

> In addition to having another test furnished upon request at state expense as a due process safeguard, the defendant may challenge the test results on the basis of the lack of the authentication of a test sample, *i.e.*, the chain of custody. If a test is not proved to be the test performed on the sample that came from the defendant's person, it can be suppressed. This is an unlikely turn of events, but the weight and credence to be given to the results can be tested by various components of due process: Was the test conducted in the manner directed by statute, *e.g.*, were the proper admonitions and options afforded; was the defendant under arrest;

> was a citation served upon him; was the procedure utilized in taking the test appropriate to accepted medical and scientific standards; was the test performed within the time period allowed by statute; was the person who performed the test a qualified person as required by the statutes; was the person who performed the test analysis qualified under the statute and did he or she have the necessary qualifications as an expert to testify with credibility. Other due process inquiries can explore such questions as: What is the experience of the operator who drew the blood and the analyst who reached a conclusion in respect to the BAC; what was the nature of the test or analysis itself; was the machine (usually a gas chromotograph testing device) properly tested and balanced before and during the analysis; and was it an approved type of testing device.

Id. at 471-72 (footnote omitted).

The supreme court concluded that "[i]n each case, the correctness of the result is ultimately dependent upon the training, skill, and attention to the analysis given by the operator. This is best revealed by the utilization of that great engine for the truth-cross-examination. Thus, can it best be determined whether due process is afforded." *Id.* at 472. The supreme court also concluded that even if there were an issue with due process, the blood test results would be admissible under Wis. Stat. §§ 343.305(7) (1979-80) and 885.235(1) (1979-80). *Id.*

In *Ehlen*, the defendant was charged with causing death by negligent operation of a motor vehicle while under the influence of an intoxicant. *Ehlen*, 119 Wis. 2d at 453. A blood sample was taken pursuant to the implied consent law. *Id.* A test revealed a blood alcohol concentration of .233. *Id.* The sample was destroyed two to seven days after the test. *Id.* at 453-54.

The defendant moved for discovery, or to suppress the blood test results. *Id.* at 454. The circuit court suppressed the test results, concluding that the blood sample was material evidence. *Id.* at 455. The court of

appeals reversed, concluding that the blood sample was not material evidence. *Id.*

The supreme court affirmed, concluding that the blood test results were admissible, and that the destruction of the blood sample did not violate the defendant's right to due process. The court concluded that:

> The proceedings at the preliminary hearing recounted above exemplify the factual basis which must be established by the prosecution if due process is to be assured. The preliminary examination, *prima facie* at least, revealed the circumstances of the arrest and the facts that established probable cause for the arrest. There was extensive testimony in respect to the taking of the blood sample and the procedures used for testing, including the procedures utilized by the pathologist who performed the tests to assure that false readings were not obtained.
>
> All of these assertions of the state's witnesses may be again subject to scrutiny at trial. All the mechanisms of due process or fair trial, cross-examination, production and confrontation of witnesses, credibility, and the offer of counter-evidence can then come into play. It is error to so minimize these great tools of the common law as to conclude due process will be violated if a blood test is not suppressed merely because a portion of the sample-even if it were retestable-could not be produced for further tests.

Id. at 456-57. The court also noted that the defendant had additional due process, under the implied consent law, because she had "the right to demand and to receive an additional or alternate type of an alcohol test." *Id.* at 457.

The court explained that:

> due process is afforded, not only by the statutory right to have access to test reports prior to trial, but, more important, the statutes afford a defendant the right to an additional blood test at the time of arrest. Most important, however, the defendant is afforded the whole panoply of due-process protections at

> trial: The right to cross-examine witnesses and experts for the state, the right to impeach by use of the separate blood or breath analysis results, and the right to attack the credibility of the state's witnesses.

Id. at 452-53.

The supreme court added that "[t]he importance of the production of the original breath ampoule or a portion of the blood sample as the *sine qua non* of due process is a myth that should not be perpetuated." *Id.* at 453.

Weissinger asserts that *Disch* and *Ehlen* do not apply to this case, because the officer in this case did not tell her "of her right to demand or to receive an additional or alternative type of alcohol test" (Weissinger Br. at 19).

However, there was no reason to give Weissinger this information because she was not under arrest or in custody, and was allowed to leave at any time. She could have had her blood drawn and tested by a qualified person at her own expense whether or not she consented to a blood draw.

Under the implied consent law, an officer is required to inform the person that he or she has the right to an additional test, after the officer informs the person that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." Wis. Stat. § 343.305(4).

The officer then informs the person that:

> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You may also have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

Wis. Stat. § 343.305(4).

In this case, Brent Smith, the officer who obtained Weissinger's consent, testified that he asked Weissinger if she would consent to a blood draw (96:4-5). She gave consent (96:5). Weissinger rode to the hospital in a police car because her car was not drivable (96:5). She was not arrested, and she was not handcuffed (96:5). At the hospital, the officer directed her to the emergency room (96:5-6). After the blood draw, Weissinger's mother took her home (96:6).

Officer Smith testified that he did not read Weissinger the informing the accused information, because she was not under arrest (96:8-9). He testified that if Weissinger had not consented to the blood draw, he would not have been able to obtain a blood sample (96:10-11).

The officer in this case was not required to give Weissinger "informing the accused" information under the implied consent law, because she gave consent voluntarily, rather than choosing not to withdraw consent she had impliedly given under the implied consent law.

The officer correctly did not tell Weissinger that her operating privilege would be revoked if she refused chemical testing, because she had not already given implied consent to a blood draw. He did not offer Weissinger a free alternative test, because, since the officer was not requesting a test under the implied consent law, Weissinger had no right to a free alternative test. He did not inform Weissinger that she could have a test conducted by a qualified person of her choice at her expense, because Weissinger was not in custody, and was not under arrest. She could leave at any time, and she could have her blood drawn by anyone, qualified or unqualified, whenever she wanted. As Officer Smith testified, Weissinger was at the hospital, and could have asked for an additional blood draw for testing (96:15).

That the officer did not tell Weissinger that she could have an additional test at state expense did not

violate her right to due process. The opportunity for an additional free test under the implied consent law is a recognition that under the implied consent law, an officer requests a test from a person who is under arrest for an OWI-related offense. The officer is asking for a sample to give the State evidence to use against the person. The officer has already placed the person under arrest, and obviously believes that the blood sample will provide incriminating evidence.

Under the implied consent law, "Wisconsin drivers are deemed to have given implied consent to chemical testing as a condition of receiving the operating privilege." *State v. Reitter*, 227 Wis. 2d 213, 225, 595 N.W.2d 646 (1999) (citations omitted). Drivers accused of operating a vehicle while intoxicated therefore have no "right" to refuse a chemical test. *Id.* (citation omitted).

The implied consent law recognizes that a person cannot simply choose not to consent without serious consequences. The officer is therefore required to tell the person that if he or she refuses, his or her operating privilege will be revoked. The law then affords even more process, by requiring the officer to inform the person that if the person submits to testing, he or she may have an alternative test at State expense, and also an additional test at the person's expense. This is required because the person has been arrested and is in custody.

In contrast, here Weissinger was not arrested, was not in custody, and the officer did not believe that a blood sample would give the State incriminating evidence. Weissinger could have simply chosen not to give consent to a blood draw, or given consent but then withdrawn it at any time prior to giving the sample, with no revocation of her operating privilege. She could have given additional samples and had additional tests. Unlike under the implied consent law, here Weissinger controlled the situation. If she had been arrested and the officer requested a sample under implied consent, she may well have remained in custody until it was too late to have

another blood sample drawn, and a test taken on the additional sample. Instead, Weissinger gave voluntary consent to a blood draw, and could have had additional tests taken. Apparently she did not have another blood sample drawn and submitted for an additional test. That she did not do so does not violate due process.

Weissinger also seems to assert that because she was not offered an additional test, she was unable to subject the blood that was drawn to a second test. She implies that under the implied consent law, the officer alerts the accused of "his or her ability to have a second test done on the blood taken" (Weissinger Br. at 15-16). She adds that because her blood was not drawn under implied consent, she was unable to "have the blood tested after she was arrested" (Weissinger Br. at 19).

However, regardless of whether her blood had been drawn under implied consent, or her voluntary consent, an additional test would not have been a second test on the blood sample that was drawn. Under implied consent, when the officer informs a person of the right to have an additional test, the officer does not mean that the person can take the blood sample and have it tested by a qualified person of his or her choosing. The officer is telling the accused that he or she can give *another* blood sample, and have that sample tested by a qualified person of the accused's choosing. In this case, Weissinger had exactly the same opportunity to give another blood sample and have it tested by a qualified person of her choosing.

More importantly, as the supreme court stated in *Ehlen*, due process is not violated when a blood sample is destroyed before the defendant has an opportunity to retest it because "the defendant is afforded the whole panoply of due-process protections at trial: The right to cross-examine witnesses and experts for the state, the right to impeach by use of the separate blood or breath analysis results, and the right to attack the credibility of the state's witnesses." *Ehlen*, 119 Wis. 2d at 453.

Here, Weissinger's defense counsel cross-examined the witnesses and experts for the state, and challenged the tests and the results. In this case, Weissinger had even more protections that those found sufficient in *Ehlen*, because the circuit court allowed defense counsel to question the State's witnesses about the destruction of the blood sample, and to argue to the jury about the "unfairness" of the destruction of the sample before trial, and before charging. The court allowed these questions and this argument, even though, as explained above, Weissinger had no statutory right to retest the blood sample, she did not show that the blood sample was material evidence at the time she moved to retest it, she did not show that the blood sample was apparently exculpatory evidence or that the State acted in bad faith in not preserving it, and she had the opportunity for additional blood samples and additional tests. Under these circumstances, Weissinger has not shown that her due process rights were violated.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment convicting the defendant-appellant Jessica M. Weissinger of injury by intoxicated use of a motor vehicle, and operating a motor vehicle while under the influence of a controlled substance.

Dated this 28th day of August, 2013

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,517 words.

Dated this 28th day of August, 2013.

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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 28th day of August, 2013.

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