STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP001737-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. LUEDTKE,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction
and Order Denying Postconviction Motion,
Entered in the Circuit Court, Winnebago County,
the Honorable Karen L. Seifert, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Luedtke was Denied Due Process when the Restricted Substance Charge was Submitted Without a Scienter Element.

A. Wisconsin Statute § 346.63(1)(am), must be construed to include a knowledge requirement.

Citing a Legislative Council memo and ***State v. Smet***, 2005 WI App 263, 288 Wis. 2d 525, 709 N.W.2d 474, the State repeatedly asserts the "detectable amount" statute eliminated the need to prove a driver was "under the influence." This proposition is not in dispute. Luedtke agrees § 346.63(1)(am), was designed to address the problem of drugged driving.[1] Luedtke also agrees a person who *knowingly* ingests drugs and drives can be prosecuted under § 346.63(1)(am), regardless of whether he was impaired. However, before criminal sanctions may be imposed the accused driver must, in the absence of actual impairment, at least know he has ingested a restricted substance. The State's interest in protecting the public and deterring drugged drivers is not advanced by the rigid application of § 346.63(1)(am), if the accused is not aware he ingested a restricted drug.

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[1] The State's reference to 8,600 annual deaths attributable to drugged driving appears inflated. (State's brief, p.8-9). According to the Census Bureau, for the last reported year of 2009, the number of traffic fatalities nationwide was 33,808. www.census.gov/compendia/statab/2012/tables/12s1105.pdf. Thus, even using the 20% estimate proposed in the article cited by the State, based on Census data the annual number of fatalities attributable to drugged driving is closer to 6,762.

Anyone who drives while impaired by a restricted substance may be prosecuted under the standard OWI provision even if he/she unknowingly ingested the drug. Everyone who drives is expected to recognize whether their ability to drive is impaired. This case presents a much different situation. A person who unknowingly ingests a restricted substance (an amount that does not impair the driver) cannot know the substance is in his/her blood. Consistent with ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), it is unreasonable to permit a conviction under § 346.63(1)(am), based solely on the presence of a detectable amount of a restricted substance in the driver's blood without requiring proof the driver knew he ingested the substance.

The State correctly reports "[s]trict liability crimes are known to law. ***State v. Jadowski***, 2004 WI 68, ¶44, 272 Wis. 2d 418, 680 N.W.2d 810." ***Jadowski*** also recognizes:

> Substantive due process protects citizens against arbitrary or wrongful state actions, regardless of the fairness of the procedures used to implement them.
>
> It is a fundamental principle of law that an actor should not be convicted of a crime if he had no reason to believe that the act he committed was a crime or that it was wrongful. An intent requirement was the general rule at common law. The absence of a mens rea requirement in a criminal statute is a significant departure from longstanding principles of criminal law.

Jadowski, at 438-439, ¶¶42-43 (footnotes omitted).

Strict liability is appropriate only if the accused has the opportunity to recognize his/her conduct is prohibited. Accordingly, ***Jadowski*** further observed:

> In general, when strict liability is imposed, the actor is deemed to have sufficient notice concerning the risk of penal sanction inherent in the prescribed activity that it is not unjust to impose criminal liability without the necessity of proving moral culpability.

Id. at 439, ¶44. A person who unwittingly ingests a restricted substance cannot know he has engaged in prescribed activity.

Due process limits the government's authority to impose punishment when the defendant could not know his conduct is prohibited. In ***Lambert v. California***, 355 U.S. 225 (1957), the Court struck down a municipal ordinance that required convicted felons living in Los Angeles to register with the police. Concluding Lambert's conviction for failing to register could not stand, the Court noted it was highly improbable Lambert was aware of her obligation to register. The Court declared: "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." ***Lambert***, at 229.

In ***State v. Dinkins***, 2012 WI 24, ¶¶5, 63, 339 Wis. 2d 78, 82, 101, 810 N.W.2d 787, the Court similarly concluded Wisconsin's sex offender registration law did not authorize punishment of a homeless inmate for failing to provide an address where he would be living following his release "when he is unable to provide this information." Correspondingly, a driver who unwittingly ingests a restricted substance should not be punished based on information he does not, and could not, know.

Neither the Legislative Council memo cited by the State, nor the decision in ***Smet***, suggests § 346.63(1)(am), was designed to punish unimpaired drivers who were unaware they had ingested drugs. The State neglects to

mention ***State v. Gardner***, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720, wherein the court's analysis implicitly assumes § 346.63(1)(am), addresses the knowing use of controlled substances. Reaffirming that it is unnecessary to establish any causative link between the presence of a restricted substance and impairment, ***Gardner*** observes:

> With the enactment of this statute, the legislature is sending a clear message: do not do illegal drugs and drive, because if you do and the operation of your motor vehicle causes injury, you can be held criminally responsible

Gardner, at 695, ¶21. This "message" can hardly be clear when the driver is not even aware he ingested illegal drugs.[2]

The State correctly notes that ***State v. Alfonsi***, 33 Wis. 2d 469, 147 N.W.2d 550 (1960), ***State v. Collova***, 79 Wis. 2d 473, 255 N.W.2d 581 (1977), and ***State v. Petrone,*** 161 Wis. 2d 530, 468 N.W.2d 676 (1991), did not address whether § 346.63(1)(am), must be construed to include a knowledge element. However, these cases reaffirm that a scienter requirement is the rule rather than the exception.

The State's attempt to distinguish ***Collova*** rests on a flawed comparison. In ***Collova***, the Court, citing the potential harshness of a misdemeanor conviction, (a minimum ten day jail sentence), concluded the OAR statute must be construed

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[2] Even the article cited by the State proposing a zero tolerance law appears to assume this law would punish the knowing use of drugs. Noting drug use violates the law, the author observes: "Proponents also assert that a zero tolerance law puts drivers on notice that they must abstain from any illegal drug use prior to driving or face arrest." Tina Wescott Cafaro, ***Slipping Through the Cracks: Why Can't We Stop Drugged Driving?*** 32 W. New Eng. L. Rev. 33, 46 (2010).

to include a scienter element. Ignoring the fact Luedtke was convicted of a Class G felony, the State compares ***Collova*** to a first offense OWI charge, implying that any unfairness in punishing a driver's unknowing ingestion of drugs is mitigated by the fact a first offense is only a forfeiture. (State's brief, p.7-8). Regardless of what his prior record may be, a driver who unknowingly ingests a restricted substance should not be punished for conduct for which he is unaware.

The fact that some other driving statutes also lack an express knowledge element provides no guidance in assessing whether § 346.63(1)(am), may be applied without a scienter element. (State's brief, p.5-6). First of all, there is no case law addressing the propriety of omitting a scienter element from any of these provisions. Second, a "prohibited alcohol concentration" charge is easily distinguished in that it establishes a minimum quantitative level of consumption that is unlikely to be achieved unknowingly. Third, the State's reliance on the underage drinking and driving statute, § 346.63(2m), and the commercial vehicle statute, § 346.63(7)(a), is misplaced as neither of these provisions carry a potential sanction of imprisonment. Rather, violation of these provisions merely permits a suspension of driving privileges or a civil forfeiture. *See*, Wis. Stat. § 346.65(2u).

The State cites Pennsylvania and Indiana decisions that upheld restricted substance statutes notwithstanding the absence of any impairment requirement. ***Pennsylvania v. Etchison***, 916 A.2d 1169 (Pa. Super. Ct. 2007)(Noting "there is no constitutional right to the use of marijuana prior to driving," the majority rejected overbreadth and equal protection claims challenging the absence of an impairment requirement); ***Shepler v. Indiana***, 758 N.E.2d 966 (Ind. Ct. App. 2001)(rejecting equal protection and due process claims complaining the statute did not quantify the amount necessary

to cause impairment). However, neither case specifically addressed whether an otherwise unimpaired driver may be punished even if he unknowingly ingested the detected substance.

Luedtke wanted his blood sample retested insisting "I don't ever do cocaine." (102:179-180, 183-184). This declaration necessarily incorporates a claim that any cocaine in his system was unknowingly ingested. Notwithstanding this declaration, the State, without any supporting authority, suggests Luedtke failed to sufficiently allege he unwittingly ingested cocaine. (State's brief, p.11). The State offers no authority identifying the magic words Luedtke needed to employ to sufficiently make this claim.

In a similar fashion, the State attempts to thwart review by repeatedly asserting, notwithstanding the absence of any direct evidence supporting this claim, that "Luedtke knowingly ingested cocaine," "Luedtke intentionally took cocaine prior to operating his vehicle," and "Luedtke intentionally took cocaine." (State's brief, p.11-12). The State's invitation to usurp the fact-finding function of the jury must be rejected.

To support its claim that Luedtke knowingly ingested cocaine, (an issue the jury never addressed), the State points out that Luedtke hid syringes in the sewer, puncture marks were observed on Luedtke's hand, and a brown-colored prescription bottle with powder residue and a metal spoon were found in the car. (State's brief, p.11). What the State neglects to mention, however, is that there was absolutely no chemical testing or other evidence linking these items to cocaine. The State asserts three syringes, a prescription bottle and spoon were found "in Luedtke's car," but it was not Luedtke's car. Luedtke was driving a vehicle that belonged

to a woman for whom he was working. (102:164-168, 181-182, 187)

The jury was not asked to decide if Luedtke knowingly used cocaine. Based on the prosecutor's argument and the court's instructions, it simply didn't matter whether Luedtke unwittingly ingested cocaine. It is, of course, improper for a reviewing court to sustain a conviction on a factual or legal theory the jury never considered. ***Chiarella v. United States***, 445 U.S. 222, 236 (1980); ***Dunn v. United States***, 442 U.S. 100, 106 (1979); ***State v. Wulff***, 207 Wis. 2d 143, 152, 557 N.W.2d 813 (1997).

Curiously, in an apparent attempt to mitigate the harshness of the strict liability provision it endorses, the State, in seeming contradiction to the remainder of its argument, asserts: "A defendant can raise a defense of accidental exposure at trial." (State's brief, p.10). The jury, however, was never instructed or advised of any such defense. If, as the State now asserts, a defendant facing a restricted substance charge can raise a defense of accidental exposure, this case should be remanded for a new trial wherein a jury would be appropriately instructed regarding this defense. Resolution of this issue is properly a question of fact for the jury, not a question of law to be decided in the first instance by a reviewing appellate court.

B. The failure to submit a scienter/knowledge element deprived Luedtke of effective counsel or necessitates a new trial in the interests of justice.

Luedtke submits § 346.63(1)(am), must be construed to include a knowledge element. There can be no reasonable strategic justification for trial counsel's failure to request an instruction that included a knowledge element, particularly

inasmuch as Luedtke insisted he did not use cocaine. If, as the State asserts, Luedtke could have raised a defense of accidental exposure to cocaine, counsel was similarly ineffective for failing to request a jury instruction presenting this defense.

If counsel's failure to request a scienter or accidental exposure instruction is not considered deficient performance because this specific issue has not been previously addressed in a published case, a new trial should be ordered in the interests of justice. The real controversy—whether Luedtke knowingly ingested cocaine—was not fully tried.

II. The Lab's Destruction of Luedtke's Blood Sample Violated Due Process.

A. The State's responsibility to preserve evidence must be reexamined in light of ***Dubose***.

The State devotes considerable time addressing the due process test outlined in ***Arizona v. Youngblood***, 488 U.S. 51 (1988), and ***State v. Greenwold***, 181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App. 1994), *affirmed*, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994). As Luedtke explained in his brief-in-chief, not only has the application of the ***Youngblood*** test been criticized, continued adherence to this test must be reconsidered in light of ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. In ***Dubose***, the Court concluded the due process clause of the Wisconsin Constitution provides greater protection than is required under the federal constitution. Although ***Dubose*** concerned the use of show-ups, ***Dubose*** implicitly recognizes that the government has a greater responsibility to safeguard the reliability of the fact-finding process once an investigation progresses to the prosecution of a particular suspect.

In this case, unlike ***Youngblood*** and ***Greenwold***, the state did not just inadvertently fail to preserve potentially exculpatory evidence for future testing, it affirmatively destroyed Luedtke's blood sample before he received notice of the restricted substance charge. Thomas Neusser's testimony revealed there is a procedure available that would have allowed the State to preserve the blood sample until after Luedtke received notice of the charge. Blood samples are generally discarded six months after submission unless the submitting agency requests the lab to preserve the sample longer. (102:145-146). The government apparently made no such request to preserve Luedtke's blood sample even though it was clear by December 18, 2009, that it was relying on the blood test results to charge Luedtke with a restricted substance charge.

Curiously, the State speculates that although Luedtke's blood sample was capable of supplying reliable test results when analyzed on November 18, 2009, Luedtke's sample would have deteriorated to the point of uselessness by December 28, 2010, when Luedtke's counsel filed a motion to suppress. (State's brief, p.30). The issue here, of course, is not whether Luedtke's blood could still be tested in December of 2010, (although there is absolutely no evidence indicating it could not), but rather, whether the sample could have been tested back on May 24, 2010, when Luedtke was first apprised of the restricted substance charge. Significantly, Luedtke's blood sample was destroyed not because it had deteriorated or was compromised, but simply pursuant to lab policy. (25; 94:2-3, 6).

B. Unlike alcohol related offenses, a restricted substance charge presents unique concerns that compel greater protection.

Citing ***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 (1983), the State insists Luedtke's due process rights were adequately protected because he was afforded the chance to request an additional or alternative test at the time of his arrest and had the opportunity to challenge the reliability of the lab results during trial. Luedtke renews his contention that the safeguards identified in ***Disch*** and ***Ehlen*** are inadequate when a driver subsequently faces a restricted substance charge.

Disch and ***Ehlen*** involved the typical OWI scenario arising from the consumption of alcohol. Indeed, at the time these two cases were decided, there was no provision authorizing a prosecution for operating with a detectable amount of a restricted substance. At the time of their arrests Disch and Ehlen plainly knew the seized samples would be tested for alcohol. A subsequent test to ascertain whether there might be a detectable amount of a restricted substance is a far more complicated proposition.

A screening test for the presence of restricted substances is much broader in scope. Indeed, a substance ultimately detected may not have even been suspected when testing commenced. Moreover, since § 346.63(1)(am), prohibits driving with even a "detectable amount" of a restricted substance, the detected substance could have been unknowingly ingested by the driver. A driver who, at the time of arrest, has either not ingested or has unwittingly ingested a restricted substance, will have no reason to request

a second test to refute the subsequent detection of a substance he is unaware might be present.

C. Alternatively, a new trial should be ordered wherein Luedtke would be entitled to a lost evidence instruction.

If the Court concludes the destruction of his blood sample does not require dismissal of the restricted substance charge, Luedtke renews his alternative request that the case be remanded for a new trial wherein he would be entitled to a ***Youngblood*** lost evidence instruction. Contrary to the State's suggestion (p. 33, 35), "Arguments by counsel cannot substitute for an instruction by the court. Arguments by counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law." ***State v. Perkins***, 2001 WI 46, ¶ 41, 243 Wis. 2d 141, 164, 626 N.W.2d 762. *See*, ***Carter v. Kentucky***, 450 U.S. 288, 304 (1981)("[A]rguments of counsel cannot substitute for instructions by the court.").

Contrary to the State's characterization, the decision in ***State v. Huggett***, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675, did not reject the use of a ***Youngblood*** type instruction when, as here, potentially exculpatory evidence has been destroyed. (State's brief, p.34). Rather, the court merely concluded a missing evidence instruction was inadequate to vindicate Huggett's rights. In ***Huggett***, the trial court dismissed the homicide charge because officials failed to preserve voice-mail recordings of the victim's calls to Huggett and his girlfriend. On appeal, the state proposed an alternative instructional remedy to mitigate the impact of the lost evidence without dismissing the charge. ***Id.***, at 800, ¶26. The court declined to adopt the State's proposal and upheld the order dismissing with prejudice. ***Id***., at 801-802, ¶¶27-28.

CONCLUSION

Luedtke renews his request that the judgment and order be reversed and the case remanded.

Dated this 15th day of January, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif 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 60 characters per line of body text. The length of the brief is 2,983 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 15th day of January, 2014.

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