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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP001737-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. LUEDTKE,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II,
Affirming 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-PETITIONER

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TABLE OF CONTENTS

CASES CITED

STATUTE CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. The Restricted Substance Charge Must Be Construed to Include a Threshold *Scienter* Element.

Luedtke is not asking this Court to declare Wis. Stat. § 346.63(1)(am), unconstitutional. Rather, this provision should be construed in a manner that saves its constitutionality and comports with longstanding "principles of Anglo-American criminal jurisprudence." ***Staples v. United States***, 511 U.S. 600, 605 (1994). This can be easily achieved by construing the statute to include a minimal *scienter* element requiring a driver to at least know he has ingested a restricted substance. An unimpaired driver should not be punished based on facts he is unable to know.

The mere absence of an express *scienter* element is not dispositive of whether the legislature intended to create a strict liability offense. ***Staples v. United States***, 511 U.S. at 605 ("[S]ilence on this point does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element . . . ."); ***State v. Polashek***, 2002 WI 74, ¶28, 253 Wis. 2d 527, 543, 646 N.W.2d 330 ("[T]he mere fact that there is no mention of a mental state in the statute does not inevitably lead to that conclusion"). The State does not mention ***Staples*** or the rulings in ***State v. Alfonsi***, 33 Wis. 2d 469, 147 N.W.2d 550 (1960), and ***State v. Collova***, 79 Wis. 2d 473, 255 N.W.2d 581 (1977), wherein statutes were construed to include a *scienter* element not specified in the statute.

The legislative history of 2003 Assembly Bill 458 reveals the Legislature elected to address the problem of drugged driving by eliminating the need to prove impairment.

The accompanying Legislative Reference Bureau analysis explained that "[t]he bill prohibits a person from operating a motor vehicle . . . if he or she has a detectable amount of a restricted controlled substance in his or her blood, regardless of whether the person's ability to operate the motor vehicle . . . safely has been impaired." There is no indication the legislature considered, much less intended, to punish drivers who were not even aware they had ingested a restricted substance.

The decision to eliminate an impairment requirement is understandable. The accompanying Legislative Council Memo noted: "It is often difficult to prove a person who has used a restricted controlled substance was "under the influence" of that substance." Don Dyke, Wis. Legislative Council Act Memo, 2003 Wisconsin Act 97, Operating Vehicle or Going Armed With a Detectable Amount of a Restricted Controlled Substance (December 16, 2003). A reliable correlation between a particular level of drug consumption and a resulting blood level or degree of impairment remains elusive. ***State v. Smet***, 2005 WI App 263, ¶17, 288 Wis. 2d 525, 536, 709 N.W.2d 474. While countless studies have addressed the impact of alcohol consumption, for obvious ethical and legal reasons and the multitude of potential variables, comparable testing of controlled substances is not possible. Tina Wescott Cafaro, ***Slipping Through the Cracks: Why Can't We Stop Drugged Driving?*** 32 W. New Eng. L. Rev. 33, 47-50, 69 (2010).

The State's interest in deterring drugged driving is not advanced if a driver is not even aware he ingested a restricted substance. Even the article cited by the State that endorses zero tolerance laws appears to assume the law would only punish the knowing use of illegal drugs. Noting that such drug use necessarily violates the law, the author observes that

"a zero tolerance law puts drivers on notice that they must abstain from any illegal drug use prior to driving or face arrest." ***Slipping Through the Cracks***, at 46.

Citing ***State v. Jadowski***, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810, the State correctly reports that strict liability offenses are not unknown in the law. However, ***Jadowski*** also recognizes the absence of a *mens rea* requirement "is a significant departure from longstanding principles" and "[i]t 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." ***Id.***, at 438-439, ¶¶42-43. [1]

The absence of a *scienter* element in ***Wis. JI-Criminal 2664B*** (2011), is not dispositive of whether § 346.63(1)(am), properly creates a strict liability offense. The Jury Instructions Committee's views are "not infallible" and "not precedent." ***State v. Beets***, 124 Wis. 2d 372, 383, n. 7, 369 N.W.2d 382 (1985); ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 258-260, 261-262, 648 N.W.2d 413; ***State v. Perry***, 215 Wis. 2d 696, 707, n.3, 573 N.W.2d 876 (Ct. App. 1997).

In his brief-in-chief, Luedtke outlined why the ***Jadowski*** factors do not support imposing strict liability upon unimpaired drivers who unknowingly ingest restricted substances. The fact that some other jurisdictions have passed *per se* drugged driving laws does not resolve the

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[1] ***State v. Schutte***, 2006 WI App 135, ¶50, 295 Wis. 2d 256, 289, 720 N.W.2d 469, does not, as the State suggests, confirm Wis. Stat. § 346.63(1)(am), is a strict liability offense. Schutte was not prosecuted under this provision. Schutte characterized the statute as a strict liability provision in challenging the admission of evidence reporting THC in her blood to show impairment. Unlike this case, there was independent evidence Schutte smoked marijuana before the accident.

narrow concern presented in this case. The State offers no authority supporting the proposition that the State may lawfully punish unimpaired drivers who unknowingly ingest detected substances. Luedtke renews his contention that to construe § 346.63(1)(am), to authorize punishment based on facts the driver does not and could not know violates due process. Again, this constitutional shortcoming can be avoided by construing the statute to include a *scienter* requirement.

Although ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), involved a possession charge rather than a driving offense, ***Griffin*** recognizes the mere presence of a drug in defendant's system is insufficient to establish knowing possession because drugs can be unwittingly ingested. When, as here, considerable time passes before charges are filed, it will be practically impossible for a defendant to reconstruct his activities to identify how he may have unwittingly contacted the restricted substance. In his initial brief Luedtke cited articles reporting cocaine has been detected on currency and in lakes.[2] More significantly, due to

[2] The alarmingly high percentage of currency tainted with cocaine does not mean all such currency was used to ingest drugs or came into contact with currency used in this fashion. Cocaine residue is readily transferred through currency counters. Steve Down, ***Cocaine on Currency: Higher levels associated with criminality***, (John Wiley & Sons, Inc. 2014) www.spectoscopynow.com/details/ezine/13e5ba80c91/Cocaine-on-currency-Higher. A study at the University of New Haven detected cocaine substances on fuel pump buttons, ATM machines, grocery store shopping carts, and shopping mall and academic building entrance doors. Frederick P. Smith and Kevin R. McGrath, ***Cocaine surface contamination and the medico-legal implications of its transfer***, Egyptian Journal of Forensic Sciences, Vol. 1, p. 1-4 (March, 2011). www.sciencedirect.com/science/article/pii/S2090536X11000050 . See also, Christian G. Daughton, ***Illicit Drugs: Contaminants in the***

its soluble character, powder cocaine is capable of being unsuspectingly ingested in a cola or other beverage. ***Drugs Testing Book***, (2014), Chapter 12, Interpretation of Results: Unknowing Ingestion of Cocaine in Adults, drugstestingbook.com/cocaine/interpretation.of.results.

Based on the court's instructions and the prosecutor's arguments, even if the jury believed Luedtke's testimony that he did not knowingly use cocaine, it was authorized to find him guilty if a restricted substance was detected in his blood. In ***State v. Gonzalez***, 2011 WI 63, 335 Wis. 2d 270, 802 N.W.2d 454, a new trial was ordered because the jury was not adequately instructed that in order to find defendant guilty of exposing a child to harmful materials it must find defendant knowingly exhibited the harmful material to the child. A new trial is similarly required here. Luedtke's jury was not asked to consider whether he knowingly ingested a restricted substance.

The State refers to evidence that could circumstantially suggest Luedtke knowingly ingested cocaine. For instance, there was testimony indicating Luedtke hid syringes in a sewer and that additional syringes, a spoon and a pill container were found in the vehicle he was driving. This was not, however, Luedtke's car. Luedtke was driving a vehicle owned by the woman for whom he was working. (102:164-168, 181-182, 187). Luedtke explained he hid the syringes he observed on the floorboard following the collision because he was concerned about getting in trouble. (102:168-169,177-179, 181-183). There was no evidence of chemical testing linking any of these items to cocaine.

Environment and Utility in Forensic Epidemiology www.epa.gov/esd/bios/daughton/Illicit_Drugs_Contaminents_in_the_Environment.pdf (Broadly addressing the presence of drugs in the environment).

Certainly the trial court's postconviction remark "that Mr. Luedtke of all people knows what he ingested" is not, as the State suggests, a finding of fact entitled to deference. (105:18). Whether Luedtke knowingly ingested cocaine was a question of fact for the jury, not a question to be decided in the first instance by a reviewing court. It is improper 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).

II. The Post-charging Destruction of Luedtke's Blood Sample Violated Due Process.

In his brief-in-chief Luedtke explained why the "bad faith" test of ***Arizona v. Youngblood***, 488 U.S. 51 (1988), is inadequate to safeguard the reliability of the fact-finding process and protect defendants from prosecutorial "tunnel vision." When destroyed evidence consists of a blood sample, potential fingerprint or some other trace evidence whose exculpatory value can only be ascertained through further testing, it will be virtually impossible for a defendant to satisfy either prong of the ***Youngblood*** test. Continued adherence to the ***Youngblood*** "bad faith" test must be reexamined in light of this Court's conclusion in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 173, 699 N.W.2d 582, that the Due Process Clause of the Wisconsin Constitution provides greater protection than the federal constitution.

Simply because ***Dubose*** involved an identification procedure does not foreclose application of the underlying due process principles in addressing the reliability concerns presented here. ***Dubose*** recognized the balance between the

investigatory needs of the government and due process concerns of the defendant shifts once the government focuses on a particular suspect. Consistent with this balance of interests, once the State initiates formal charges it has a duty to refrain from destroying potentially exculpatory physical evidence without first providing notice to the defense and/or seeking approval from the court. The State should not be permitted to unilaterally foreclose the opportunity for independent defense testing that might reveal exculpatory trace evidence that could not otherwise be discovered.

The State nevertheless insists this Court should adhere to the minimal due process requirements approved in ***State v. Ehlen***, 119 Wis. 2d 451, 351 N.W.2d 503 (1983), ***State v. Disch***, 119 Wis. 2d 461, 351 N.W.2d 492 (1984), and ***State v. Walstad***, 119 Wis. 2d 483, 351 N.W.2d 469 (1984), and the "bad faith" test subsequently employed in ***State v. Pankow***, 144 Wis. 2d 422 N.W.2d 913 (Ct. App. 1988), ***State v. Greenwold***, 181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App. 1994)(***Greenwold I***), and ***State v. Greenwold***, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994)(***Greenwold II***). Although Luedtke did not specifically mention the five ***Bartholomew***[3] factors in his brief-in-chief, he explained why: (1) the ***Youngblood*** "bad faith" test is inadequate to safeguard the reliability of the fact-finding process, (2) adherence to ***Youngblood*** should be reevaluated under the Wisconsin Constitution in light of ***Dubose***, and (3) consistent with ***Dubose,*** a check on the unilateral authority to destroy physical evidence serves the interests of both the accused and the public by reducing the risk of an erroneous conviction.

[3] ***Bartholomew v. Patients Comp. Fund***, 2006 WI 91, ¶33, 293 Wis. 2d 38, 717 N.W.2d 216.

The legal precedent the State seeks to defend is neither well founded nor firmly established. In ***Ehlen***, ***Disch***, ***Walstad***, ***Pankow***, and ***Greenwold I***, the reviewing courts did not address whether the Wisconsin Constitution provided greater due process protection than the federal constitution. In ***Greenwold II***, the court operated under the faulty premise that "the due process clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution." ***Greenwold***, 189 Wis. 2d at 71.

A restricted substance charge raises concerns not present in the typical alcohol related prosecutions addressed in ***Ehlen***, ***Disch*** and ***Walstad***. In each of these cases the Court observed that the driver's right to due process was protected by the offer of an alternative alcohol test. ***Ehlen***,[4] 119 Wis. 2d at 452-453, 457; ***Disch***,[5] 119 Wis. 2d at 463, 470-471, 480; ***Walstad***,[6] 119 Wis. 2d at 524-527. In each case the driver had reason to know authorities would be testing for alcohol. If they had not consumed alcohol, or believed the amount they consumed was not sufficient to violate BAC restrictions or produce impairment, these drivers could easily weigh the potential benefit of seeking an alternative test. Unlike the *detectable amount* prohibition for restricted substances, it is practically impossible for a driver

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[4] In ***Ehlen***, there was actually no state action as the blood sample was destroyed by the hospital not the State. ***Ehlen***, at 452, n. 2, 453-454.

[5] In ***Disch***, the Court declined to address whether the State's discovery obligations under Wis. Stat. § 971.23(4) and (5) would apply when a blood sample was tested for controlled substances rather than alcohol. ***Disch***, at 478-479, n. 6.

[6] ***Walstad*** involved the destruction of a breathalyzer ampoule. The Court concluded there had been no destruction of evidence because the ampoule was not susceptible to retesting. ***Walstad***, at 486, 527-528.

to unwittingly ingest sufficient alcohol to exceed BAC limits or produce impairment.

A screening test for drugs, unlike testing for alcohol, is not specific in scope. An unimpaired driver who has either not ingested or has unwittingly ingested a restricted substance will have no reason to request a second test to refute the possible detection of a substance he is unaware might be at issue.

The narrow rule proposed herein does not place any additional responsibility on the State to gather or test evidence. Rather, consistent with ***Dubose***, once the State elects to file charges it is merely prohibited from destroying physical evidence before providing notice to the defense and/or securing approval from the court.

Prohibiting the unilateral post-charging destruction of blood samples would assure that defendants facing a restricted substance charge would have the potential opportunity to demonstrate reported test results were inaccurate. As Justice Bablitch recognized, this is not the only potential benefit of independent testing. Identification testing could establish the sample, though accurately tested, originated from another source. ***Ehlen***, 119 Wis. 2d at 459 (Bablitch, J. concurring). Justice Bablitch concluded a duty to preserve blood samples "is consistent with due process requirements, and is necessary for the sound administration of the criminal justice system." ***Id.***, at 458.

The filing of charges constitutes a clear demarcation between the investigatory and prosecutorial phases of the process, and provides clear notice that henceforth the State

may not unilaterally destroy evidence.[7] By electing to file charges, the State itself selects the point at which this responsibility attaches.

Seeking to limit the due process principle announced in ***Dubose***, the State refers to three subsequent identification cases, ***State v. Hibl***, 2006 WI 52, 290 Wis.2d 595, 714 N.W.2d 194, ***State v. Drew***, 2007 WI App 213, 305 Wis. 2d 641, 740 N.W.2d 404, and ***State v. Ziegler***, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238. All three cases are easily distinguished. ***Hibl*** did not involve state action, but rather, a witness' "spontaneous" identification resulting from an inadvertent view of the suspect in the hallway outside the courtroom. Drew's attempt to challenge a photo array was understandably rejected inasmuch as ***Dubose*** identified "a lineup or photo array" as the preferable alternative to a showup. ***Ziegler*** did not involve an initial identification at all, but rather, the prosecutor's use of a photograph at trial to confirm the witness' prior identification of defendant, who she identified by name.

Stare decisis is not a "straightjacket." A court does "more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." ***Johnson Controls v. Employers Ins. of Wausau***, 2003 WI 108, ¶100, 264 Wis. 2d 61, 121, 665 N.W.2d 257. In the civil context, altering precedent is understandably approached with caution because citizens may have patterned their professional and economic activities in reliance upon prior rulings. When liberty is at

[7] When the State's destruction of potentially exculpatory evidence occurs *prior* to the filing of charges, the State's conduct would continue to be scrutinized under the ***Youngblood*** "bad faith" test.

stake, adherence to a rule that increases the risk of an unreliable outcome defies justification.[8]

Finally, contrary to the State's suggestion, Luedtke's inability to secure independent testing was not attributable to defense counsel's delay in requesting the blood sample. Nearly seven months passed from seizure to testing of the sample for drugs on November 18th, 2009. (94:5). Although charges were filed on December 18th, it was not until Luedtke made his first appearance on May 24, 2010 that he received notice of the test results. (2; 85; 94:4-5, 9, 10, 11, 16; 102:179, 183). By then, it was already too late for independent testing. Luedtke's blood sample was discarded three months earlier, not because it had deteriorated or was compromised, but simply pursuant to lab policy. (25; 94:2-3, 6). At a minimum, Luedtke should receive a new trial with a missing evidence instruction.

[8] To avoid unreliable outcomes the State should also refrain from destroying blood samples in alcohol related prosecutions. Nevertheless, given the practical differences between restricted substance and alcohol related prosecutions, ***Dubose*** could be reasonably applied in this case without overruling ***Ehlen*** and ***Disch***.

CONCLUSION

Luedtke renews his request to reverse and remand.

Dated this 19th day of December, 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 2,991 words.

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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 19th day of December, 2014.

Signed:

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