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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,
-vs-
Appeal No. 2014AP000109 CR
ANDREW J. KUSTER,
Defendant-Appellant.

In the Matter of the Refusal of Andrew J. Kuster
STATE OF WISCONSIN,
Plaintiff-Respondent,
-vs-
Appeal No. 2014AP000227
ANDREW J. KUSTER,
Defendant-Appellant.

ON APPEAL FROM JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE JAMES L. CARLSON, PRESIDING, AND FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF AND APPENDIX OF APPELLANT

Respectfully submitted,

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Defendant-Appellant

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (Continued)

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES (Continued)

PAGE

TABLE OF AUTHORITIES (Continued)

PAGE

TABLE OF AUTHORITIES (Continued)

PAGE

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. WAS THERE REASONABLE SUSPICION FOR THE STOP?

Trial Court Answered: Yes

II. WAS THERE AN OBJECTIVE BASIS TO EXPAND THE SCOPE OF THE STOP?

Trial Court Answered: Yes

III. WAS KUSTER LAWFULLY ARRESTED UNDER THE LOWER STANDARD APPLICABLE IN REFUSAL HEARINGS?

Trial Court Inherently Answered: Yes

IV. WAS KUSTER LAWFULLY ARRESTED UNDER THE HIGHER STANDARD APPLICABLE IN THE CRIMINAL TRAFFIC CASE?

Trial Court Answered: Yes

V. WAS THE RESULT OF THE TESTING DONE AFTER AN UNCONSTITUTIONAL WARRANTLESS NON-CONSENSUAL BLOOD DRAW ADMISSIBLE?

Trial Court Answered: Yes.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication.

STATEMENT ON ORAL ARGUMENT

Defendant-appellant believes oral argument affords clarification and exposition of the issues, and stands ready to provide argument if sought by the Court.

STATEMENT OF THE CASE AND FACTS

At approximately 12:14 a.m. on April 14, 2013 a City of Whitewater police officer was on routine patrol. R. 37, p. 18. He heard an engine revving in a private parking lot, looked over, and observed vehicle headlights moving towards the parking lot driveway. R. 37, p. 22. As the officer observed the vehicle exit the parking lot, he heard the engine rev loudly, and heard what he believed to be the tires spinning. R. 37, p. 23; pp. 53-54. He did not actually see the wheels spinning, and the vehicle was not burning rubber. The noise was described as tires slipping on sand and gravel. R. 37, pp. 54-55. The vehicle did not bottom out, or compress its suspension as it exited the driveway. R. 37, p. 50. The officer estimated the vehicle's speed in the parking lot to be 10-15 miles per hour. R. 37, p. 23. Looking over his shoulder as the vehicle drove away, the officer visually estimated the vehicle speed at 35 miles per hour in a 25 mile per hour zone. R. 37, p. 23; pp. 51-52. No speed measurement device was used. R. 37, p. 23. The officer turned around to pursue the vehicle, losing sight of it. R. 37, p. 26; p. 58. The vehicle the officer had observed in the parking lot was tan in color. R. 37, p. 59-60.

After turning around, the officer pulled up behind a vehicle stopped at a stop sign at T-intersection. R. 37, p. 26; pp. 59-60. Another vehicle then came to a stop behind the officer. The vehicle in front of the officer's squad remained at the stop sign for 30-45 seconds. In that time period, there was light cross traffic. R. 37, p.

28; pp. 60-62. The vehicle that the officer pulled up behind at the T-intersection was silver. R. 37, p. 60.

Believing the 30-45 seconds that had elapsed to have been an inordinate amount of time for the silver vehicle to sit waiting at the stop sign, the officer activated his red and blue lights, and shined his spotlight at the driver's side of the silver car. R. 37, p. 29; p. 62. The officer got out, and motioned the car behind him to go around, and then turned to walk up to the silver vehicle in front of him. R. 29, p. 30. The silver vehicle then executed a left hand turn, the officer got back in his car and activated his siren, and the silver car pulled over almost immediately. R. 37, pp 30-32; p. 62. The officer made contact with the driver of the silver vehicle, and asked for an explanation as to why the driver had executed the turn before pulling over. The driver responded by indicating that he had not known what the officer had wanted him to do. R. 37, pp. 62-63. There were no observed problems with the driver's speech or his eyes, nor did he have any difficulty producing his driver's license. R. 37, p. 63. The driver of the silver vehicle was identified as the appellant, Andrew J. Kuster. R. 37, p. 20.[1] The officer detected a moderate odor of intoxicants coming from the vehicle and asked the appellant how many drinks he had consumed. Kuster gave a series of inconsistent answers, from a few, to none, to one. R. 37, p. 33. This conversation occurred while Kuster was searching for his insurance card at the officer's request, which was never located. R. 37, pp. 63-64. Based on the

[1] The transcript here makes reference to a blue car and a green car. Those references are to the diagram marked as Exhibit 1 at the hearing, not the actual vehicle color.

driving behavior observed of the tan vehicle, the moderate odor of intoxicants from appellant's silver vehicle, and the fact that it was after midnight on a weekend, the officer had Kuster exit the vehicle for field sobriety tests. R. 37, p. 66. The officer did not notice Kuster to have any difficulty standing or walking normally. R. 37, p. 68. From the point at which the officer had Kuster exit his vehicle, the officer did not notice anything other than Kuster's performance on field sobriety tests that contributed to the officer's ultimate opinion that Kuster was too impaired to safely drive. ***Id***.

The officer utilized standardized field sobriety tests (SFST's), on which he had been trained approximately five and one-half years prior, having performed them "a few hundred" times during the intervening period of time. R. 37, pp. 34-35. The officer is not a certified SFST instructor. R. 37, p. 64. The first test performed in this case was the Horizontal Gaze Nystagmus test. R. 37, pp. 35-37; p. 68. The officer observed lack of smooth pursuit in both eyes. R. 37, p. 36. The officer testified that he was unable to observe nystagmus at maximum deviation, as when he requested Kuster to move his eyes out farther, appellant advised that he was looking at the stimulus in his peripheral vision. R. 37, p. 69. Finally, the officer observed the onset of nystagmus prior to 45° in both eyes. R. 37, p. 37. There is no testimony in this record as to the meaning of the officer's observations on this test, or how those reported clues objectively support the conclusion that Kuster was too impaired to safely drive.

The next test performed was the walk and turn test. R. 37, p. 37. The officer only observed one clue on this test. R. 37, p. 38; p. 70. According to the officer, the presence of one clue is not indicative of impairment. R. 37, p. 70.

The final test was the one leg stand test. R. 37, p. 38. The officer only observed one clue on this test as well. R. 37, p. 39; p. 70. The presence of one clue does not indicate impairment on this test either. R. 37, p. 70.

Upon concluding the SFST battery, the officer formed the opinion that the appellant was above .08, as well as too impaired to safely operate his vehicle, and told Kuster so. R. 37, pp. 39-40; p. 71. At that point Kuster saw another officer approaching with a preliminary breath test device, and before being asked, indicated that he knew his rights, and was not going to do it. R. 37, pp. 39-40; pp. 72-73.

Kuster was placed under arrest. R. 37, p. 41. The Informing the Accused was read in the squad car, and Kuster declined to submit to a record blood test. R. 37, pp. 41-43; pp. 77-78. Blood was then taken anyway, without a warrant. R. 37, p. 46. While appellant was restrained in the squad car, he had access to his phone, and called his mother. R. 37, pp. 73-75. Kuster's mother testified that she then spoke to the officer, who confirmed her son's assertion that he had passed his field sobriety tests. R. 37, p. 84. According to her, the officer advised her that her son was taken to the hospital for blood because he had refused the breath test. R. 37, p. 84. In response to her questioning this in light of the fact that her son had reportedly passed

his field tests, according to her, the officer said "when you get your driver's license, you give up all your rights." R. 37, pp. 84-85. No rebuttal testimony was offered.

The appellant requested a refusal hearing, and filed pretrial motions in the criminal traffic case, which were heard together on July 31, 2013. R. 37. The trial court first summarily addressed the ***Daubert*** challenge raised by appellant's Motion *in limine* – Standardized Field Sobriety Tests as filed in the criminal traffic case. R. 13. Relying upon this Court's unpublished decision in ***State v. Warren***, attached, Appendix pp. A-1, *et seq.*, the trial court adopted the standard articulated therein as persuasive. R. 37, p. 7. Defense counsel requested, and the court noted an exception for the record. R. 37, p. 9.

The trial court further summarily denied the defense motion to suppress the warrantless blood test. The trial court found that as the blood in this case was forced on April 14, 2013, and ***Missouri v. McNeely,*** ___ U.S. ___, 133 St. Ct. 1552, 185 L. Ed. 2d 696 (2013) was not decided until April 17, 2013, the officer had acted in good faith reliance on ***State v. Bohling,*** 173 Wis. 2d 529, 494 N.W.2d 399 (1993). R. 37, pp. 10-11. The trial court did not take any evidence, or directly address defense counsel's argument that ***Bohling*** ceased to be "clear and settled Wisconsin precedent" once the U.S. Supreme Court granted *certiorari* in ***McNeely***, an argument buttressed by evidence of some relevant communication from the Attorney General's office to District Attorney's offices around the State prior to ***McNeely*** being decided. R. 37, pp. 12-13; R. 13A. The trial court also summarily rejected the defense

argument that even if the blood was lawfully seized on April 14, 2013 pursuant to the good faith exception, a warrant should have been obtained prior to its post-***McNeely*** analysis at the lab. R. 37, pp. 12-16. Evidence was then taken on the refusal hearing and the probable cause motion together. R. 37, p. 15, *et seq.* At the conclusion of the hearing, the trial court found reasonable grounds for the stop, an objective basis for its expansion, and probable cause for the arrest, denying the suppression motion, and finding Kuster to have unlawfully refused. R. 37, p. 90.

In November of 2013 the criminal traffic case was tried to a jury that acquitted Kuster of operating under the influence, but hung on the PAC charge, which was subsequently resolved by change of plea. R. 31. From that conviction this appeal was taken. After determining that no appealable order had been entered in the refusal case, a proposed order was submitted to and signed by the trial court. Appeal was taken from that order as well, and the appeals were consolidated on appellant's motion. R. 39. This Court subsequently determined that both appeals were timely.

ARGUMENT

I. OBJECTIVELY, THERE WERE NOT REASONABLE GROUNDS TO STOP THE SILVER VEHICLE DRIVEN BY KUSTER.

In ***State v. Anagnos***, 2012 WI 64, ¶¶ 67-68, 341 Wis. 2d 576, 604-606, 815 N.W.2d 675, 689-690 the Supreme Court affirmed that reasonable suspicion for the stop may be challenged in a refusal hearing. Such determinations are made on an objective, not a subjective basis. Therefore, however subjectively certain the officer may have been that the silver car he stopped was the same tan car that he had seen in the parking lot, the driving behavior observed of the tan vehicle in the parking lot cannot be objectively attributed to the silver vehicle based on the officer's knowledge at the time of the stop.

As this Court previously determined in ***State v. Fields***, 2000 WI App 218, 239 Wis. 2d 38, 619 N.W.2d 279, unexplained lingering at a stop sign, even when coupled with otherwise questionable driving behavior and time of night is not sufficient, by itself, to justify an investigative stop. Should the Court agree, and find the stop unreasonable, both the refusal conviction and the PAC conviction must be reversed, mooting the remainder of the issues raised on appeal.

II. THERE WERE NOT SUFFICIENT OBJECTIVE INDICIA OF IMPAIRMENT TO JUSTIFY EXPANDING THE SCOPE OF THE ORIGINAL STOP.

Once Kuster stopped in a prompt, safe, and appropriate manner, and produced a valid driver's license, he should have been allowed to go on his way. The odor of intoxicants did nothing but verify his ultimate admission to consuming

alcohol. As the officer conceded, it is not illegal to drive after consuming intoxicants in Wisconsin, and nothing else observed by the officer upon stopping the defendant-appellant's vehicle reasonably leads to the conclusion that defendant-appellant was too impaired to safely drive that vehicle. R. 37, p. 62 *et seq.*

In this case, it is significant that the record offers no explanation as to why the officer's initial observations after the traffic stop caused him to conclude, that based upon his experience, field sobriety tests were needed. When given the chance to articulate his reasoning, other than the odor of intoxicants, the officer simply recited his earlier observations of the driving behavior and time of night. R. 37, pp. 66-67. As previously noted in ***Fields***, *supra,* these are insufficient to give rise to objectively reasonable suspicion.

The only rational inference to be drawn from the odor of intoxicants is that the defendant-appellant had been consuming intoxicants at some point earlier, a fact which he eventually admitted. It is argued that without other commonly observed indicia suggesting that defendant-appellant was impaired by that admitted consumption of alcohol, there was no basis for the officer to "conclude in light of his experience that criminal activity may be afoot. . . ." ***Terry v. Ohio***, 392 U.S. 1, 30, (1968). Experience, in a vacuum, does not provide an objective basis for a detention. ***Fields***, 2000 WI App 218, ¶ 22. Only by adding together facts which are not, on this record, necessarily connected at all did the trial court find reasonable suspicion to

conduct the traffic stop, and expand its scope to conduct field sobriety tests. R. 37, pp. 89-90.

It is respectfully argued that independently applying constitutional principles to the historical facts as found by the trial court in this case, this Court should reach the opposite conclusion.

III. ON THE TOTALITY OF THE CIRCUMSTANCES, KUSTER WAS NOT LAWFULLY ARRESTED UNDER EITHER STANDARD.

The Wisconsin Supreme Court clarified the distinction between reasonable suspicion and probable cause to arrest in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). In ***Renz***, the officer conducted five field sobriety tests before requesting a PBT, and the Supreme Court still held that probable cause to arrest did not exist without the PBT result.

> At about 2:00 a.m. on February 12, 2996, Deputy Sheriff David Drayna of the Jefferson County Sheriff's Department was on duty as a patrol officer. As he traveled west on Highway 106, a Chevy Camaro with a loud exhaust passed by heading east. Concluding that the exhaust system was in violation of the law, the officer pulled the Camaro over.
>
> When the officer approached the car, the defendant rolled down his window, presented a Wisconsin driver's license and identified himself as Christopher Renz. The officer informed him that he had been stopped for a defective exhaust, and the defendant acknowledged that the exhaust leaked and was loud. During this initial conversation, the officer smelled a strong odor of intoxicants coming from inside the Camaro.
>
> The officer returned to his squad car and ran a standard computer check on the defendant and the Camaro. The check yielded nothing of interest, and the officer returned to the driver's side window. The officer again smelled the strong odor of intoxicants. He asked the defendant to step out of the car and inquired whether he had been drinking. The defendant replied that he was a bartender at a tavern and had drunk three beers earlier in the

evening. The officer asked the defendant to submit to field sobriety tests, and he agreed.

Officer Drayna had received training on OWI detection, and during his six years with the Jefferson County Sheriff's Department he had made over 200 OWI arrests. His training was based in part on a field sobriety test manual developed by the National Highway Traffic Safety Administration and the U.S. Department of Transportation (DOT).

The first test he administered was the alphabet test. The defendant was able to recite the alphabet correctly. At no time during the test or throughout their conversations did the officer observe the defendant's speech to be slurred.

The next test was the one-legged stand. The officer instructed the defendant to stand with his feet together and his arms directly down at his sides. The defendant was then asked to raise one leg directly out in front of him about six inches off the ground and count from 1001 to 1030 while watching his foot. At 1018, he put his foot down, raised it again, and restarted his count from 1010. He was able to complete the count from 1010 to 1030 without putting his foot down again. The DOT manual lists four standard clues of intoxication to watch for on this test; the defendant only exhibited one clue, putting the foot down.

The third test was the heel-to-toe walking test. The officer instructed the defendant to walk nine steps on an imaginary line, heel to toe, with his arms directly down at his sides, then to turn back and walk another nine steps. The defendant left a half inch to an inch of space between his heel and toe on all of the steps. On his way back, the defendant stepped off the imaginary line on step seven. He then restarted and completed the test. The manual lists eight possible clues of intoxication for this test; the defendant exhibited two of these, stepping off of the line, and leaving more than a half inch between steps. The officer also observed that the defendant swayed from left to right while performing the rest, but because swaying is not one of the clues in the manual, the officer did not account for this in calculating the standardized test. He did, however, consider it to be an indicator of intoxication.

The fourth test was the finger-to-nose test. This test was not from the manual, but the officer had learned it in his recruit class and through training at the sheriff's department. He instructed the defendant to stand with his feet together, arms out to his side, with fingers extended. He was then supposed to tilt his head back, close his eyes, and touch the tip of his nose, first with his right index finger, then with his left. The defendant touched the tip of his nose with his right index finger, but touched the upper bridge of his nose with his left.

> The fifth test was another standardized test, the horizontal gaze nystagmus (HGN) test, which the officer was certified to perform after twenty-four hours of training. The test requires a subject to stand with his or her feet together and arms down and follow the tip of a pen with his or her eyes as the officer moves the pen from one side to the other. The specially trained officer watches for six "clues" of intoxication, relating to a particular kind of jerkiness in the eyes. The defendant exhibited all six clues. Based on his training, the officer believed that this indicated a blood alcohol level of at least .10.
>
> After administering these tests, the officer asked the defendant if he would submit to al PBT. The defendant agreed. The PBT indicated his blood alcohol level was .18. The officer then placed the defendant under arrest for OWI in violation of Jefferson County ordinance 83.16, adopting Wis. Stat. §346.63(1)(a).
>
> ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 296-299, 603 N.W.2d 541 (1999).

The Supreme Court construed the facts in ***Renz*** prior to the administration of the PBT to be insufficient to constitute probable cause to arrest, constituting only "the required degree of probable cause to request [Renz] to submit to a PBT." 231 Wis. 2d at 316.

The observations made by the officer in this case are more favorable to Kuster than were the law enforcement observations made of Renz. With the exception of the HGN test, Kuster passed the field sobriety tests. HGN testimony ***is*** expert testimony.

> A trial court's decision to admit or exclude expert testimony is a discretionary determination that is made pursuant to Rule 901.04(1), Stats. The decision will not be upset on appeal if it has "a reasonable basis" and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'"

> ***State v. Zivcic***, 229 Wis. 2d 119, 127, 598 N.W.2d 565 (Ct. App. 1999), *quoting* ***State v. Blair***, 164 Wis. 2d 64, 74-75, 473 N.W.2d 566, 571 (Ct. App. 1991).

Relying upon this Court's unpublished opinion in ***Warren***, Appendix pp. A-1, *et seq.*, the circuit court had already denied Kuster's motion *in limine* regarding the HGN. R. 37, p. 7, *et seq.* The ***Warren*** opinion rests entirely upon this Court's earlier decision in ***City of West Bend v. Wilkens***, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324. This is in and of itself inherently confusing. ***Wilkens*** was decided prior to 2011 WI Act 2, which adopted the ***Daubert*** standard. 2005 WI App 36 at ¶¶ 22-23. ***Wilkens*** did not involve HGN testimony, and this Court expressly decried any attempt to establish any standard for the admission of the HGN in that case. ***Id.,*** at ¶ 18, n. 3. Furthermore, in ***Wilkens***, this Court cited favorably to ***State v. Meador***, 674 So. 2d 826, 831-32 (Fla. Dist. Ct. App. 1996), expressly noting that the ***Meador*** court distinguished the HGN from the other two standard field sobriety tests. ***Wilkens***, at ¶¶ 19-20. (These distinctions were argued to the trial court in this case. R. 13; R. 37, p. 6; p. 9.)

Regardless, even under ***Warren***, the HGN is an observational tool, not a litmus test that scientifically correlates "certain types or numbers of 'clues' to various blood alcohol concentrations." ***Warren*** at ¶ 8, Appendix p. A-2, *citing* ***Wilkens*** at ¶ 17. Therefore, under the ***Warren*** standard ostensibly employed by the trial court, the observation of four clues during an incomplete HGN test is not sufficient to establish a specific alcohol concentration, and on this record there is no other articulated

conclusion to be drawn from the HGN testimony. Given that Kuster passed the remaining field tests, there simply was not probable cause for "the officer to believe [Kuster] was driving or operating a motor vehicle while under the influence . . ." as required by Wis. Stat. § 343.305(9)(a)(5)(a). This is especially so given Kuster's mother's unrebutted testimony that the officer confirmed that her son had passed his field tests.

Probable cause determinations are based on the totality of the circumstances. The totality of the circumstances is a two-edged sword, not an osmotic barrier that filters out facts favorable to the accused, and only permits those supporting a conclusion of probable cause to filter through into the determination. Looking at the totality of the circumstances requires this Court to look at the positive as well as the negative. *See* ***State v. Post***, 2007 WI 60, ¶¶ 56 and 57, 301 Wis. 2d 1, 27-28, 733 N.W.2d 634, 647, Abrahamson, *C.J.*, concurring in part and dissenting in part. Accordingly, no action should have been taken against Kuster's operating privilege on account of his refusal pursuant to Wis. Stat. §343.305(9)(d).

IV. EVEN IF THE COURT FINDS PROBABLE CAUSE TO EXIST UNDER THE LOWER BURDEN APPLICABLE IN THE REFUSAL CASE, THE SUPPRESSION MOTION IN THE CRIMINAL TRAFFIC CASE SHOULD STILL HAVE BEEN GRANTED.

As Justice Ziegler noted in her concurrence in ***State v. Anagnos***, 2012 WI 64, ¶¶ 67-68, 341 Wis. 2d 576, 604-606, 815 N.W.2d 675, 689-690, due to the different burdens of proof applicable, adverse determinations regarding the stop, detention, and probable cause to arrest for the purpose of a refusal hearing do not preclude a

different outcome on the defendant's suppression motion in the companion criminal traffic case.

Therefore, even if this Court were to conclude that the record was sufficient to find both reasonable grounds to stop and probable cause to arrest for the purposes of the refusal, and it is argued that it should not, appellant continues to assert that same record is insufficient to establish them to a reasonable certainty as required on Kuster's suppression motion. *See* ***Anagnos,*** 2012 WI 64, ¶ 67, Ziegler J., concurring, *citing* ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986). Regardless of the outcome on the refusal appeal, Kuster's prohibited alcohol concentration conviction should be reversed, as his suppression motion should have been granted. Kuster was acquitted by a jury on the impairment charge, so once the blood test result is suppressed, dismissal of the PAC charge is the only possible outcome.

V. APPELLANT'S ASSERTION OF THE RIGHT TO DECLINE A PRE-ARREST CONSENT SEARCH CANNOT CONSTITUTIONALLY GIVE RISE TO PROBABLE CAUSE TO ARREST.

The trial court did not reach this issue of whether or not an adverse influence could be permissibly drawn from Kuster's assertion of the right to decline that consent search for the purpose of establishing probable cause. R. 37, p. 90. The seizure of a sample of a person's breath is a search within the meaning of the Fourth Amendment. ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (1980); ***Skinner v. Railway Labor Executives Assoc.***, 489 U.S. 602, (1989).

Warrantless searches are presumptively unreasonable. ***Katz v. U.S.***, 389 U.S. 347, 357 (1967). Seizure of a sample of breath or urine incident to lawful arrest has, however, been held to be reasonable. ***State v. Bohling***, 173 Wis. 2d 529, 536-537, 494 N.W.2d 399, 401 (1993), *citing* ***State v. Murdock,*** 155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990). Under our Supreme Court's construction of Wis. Stat. §343.303 in ***Renz***, *supra*, the search at issue occurs pre-arrest.

It is conceded that consent also obviates the need for a warrant. There is no statutorily implied consent applicable to the preliminary breath test. As the Supreme Court has noted "... the 1981 amendments to the laws against driving while intoxicated separated the PBT provision, Wis. Stats. § 343.303, from the implied consent test provision... ." ***Renz***, 231 Wis. 2d at 314, ¶45. There is no statutory penalty for refusing to submit to preliminary breath tests under Wis. Stat. § 343.303.

Prior to our Supreme Court's construction of Wis. Stat. §343.303 in ***Renz***, this Court did address the question of whether that statute permitted an adverse inference to be drawn, indicating that it could. ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 443, 588 N.W.2d 267, 276, n. 17 (Ct. App. 1998), *reversed on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). In addition to arguably being dicta, that footnote did not address the constitutional argument raised here.

Subsequently, in ***State v. Repenshek***, 2004 WI App 229, ¶ 26, 277 Wis. 2d 780, 796, 691 N.W.2d 369, 377, this Court directly addressed, and rejected an argument that Wis. Stat. § 343.303 precluded consideration of a refusal to submit to

a PBT as going to reasonable suspicion. In that case, this Court noted specifically that Repenshek was not making a constitutional argument.

> ¶ 22. What matters here is that neither ***Renz*** nor WIS. STAT. §343.303 addresses what use may be made of a *refusal* to take a PBT when an officer does not have the requisite probable cause to request a PBT under §343.303. This distinction is key because the topic here is suppression. Repenshek seeks suppression of the results of his blood test, not based on an alleged constitutional violation, but based on an alleged violation of a statute, namely § 343.303. That Repenshek does not allege a constitutional violation is not surprising. The officer in this case no more violated the constitution when he requested that Repenshek submit to a PBT than if the officer had requested Repenshek's consent to the search of his truck. From a constitutional standpoint, there is typically no harm in asking.
>
> 2004 WI App 229, ¶ 22.

While it is agreed that an officer violates no statutory or constitutional prohibition by asking, it is argued that using the declination of a consent search by someone expressly asserting the right to do so for the purpose of drawing an adverse inference would be unconstitutional.

Consent, to have any constitutional significance, must be voluntary, ***Schneckloth v. Bustamonte***, 412 U.S. 218 (1973). Consent which is coerced is not voluntary consent. Nor is consent voluntary when it is given in acquiescence to a claim of lawful authority to search. ***Bumper v. North Carolina,*** 391 U.S. 543 (1968); ***State v. Johnson***, 177 Wis. 2d 224, 501 N.W.2d 876 (Ct. App. 1993). Only voluntary consent is constitutionally valid. If consent is to be treated as legally voluntary, the decision to consent or refuse cannot be burdened. *See* ***United States v. Alfaro***, 935 F.2d 64 (5th Cir. 1991). The legislature cannot eliminate the "right of

the people to be secure in their persons..." by expressly authorizing law enforcement officers to "request" that they submit to a search without a warrant or probable cause to arrest if a refusal of this "request" will provide grounds for an arrest. Whether viewed conceptually as authorizing a warrantless search in the context of an investigative detention, or authorizing probable cause for arrest to be based upon a suspect's exercise of the right to decline that search, the statutory scheme is inconsistent with the Fourth Amendment, unless the detainee is permitted to refuse the request without consequence.

This Court's construction of §343.303 in ***Repenshek*** therefore concludes that the legislature has created a new exception to the warrant requirement that goes far beyond any other search previously permitted in the context of an investigatory detention. Under this construction, an officer does not need a warrant to conduct this search during an ongoing investigative detention. This can only be constitutional if the subject is free to decline. Refusal by the subject to "consent" cannot constitutionally be construed to give the officer grounds to arrest where probable cause to arrest does not already exist, permitting the officer to then search incident to arrest. As one has a Fourth Amendment right to decline a consent search, an adverse inference cannot be permissibly drawn from the assertion of that constitutional right. *See* ***State v. Sayles***, 124 Wis. 2d 593, 370 N.W.2d 265, 267, n. 3 (1985). The trial court therefore correctly did not consider Kuster's assertion of his right to decline the PBT as a basis to establish probable cause, and that declination cannot

constitutionally be used to sustain the trial court's finding of probable cause on review in the refusal case or the criminal traffic case.

VI. THE RESULTS OF THE WARRANTLESS NON-CONSENSUAL BLOOD DRAW SHOULD HAVE BEEN SUPPRESSED.

A. The Record in This Case is Inadequate to Support the Summary Application of the Good-Faith Exception.

Under the analysis of the Wisconsin Supreme Court in ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, as well as that of the U.S. Supreme Court in ***Davis v. U.S.***, ___ U.S. ___, 131 S. Ct. 2419, ___ L.Ed. 2d ___ (2011), the holding of ***Missouri v. McNeely,*** ___U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696. (2013) applies, and the warrantless seizure of Kuster's blood was unconstitutional. The question then becomes whether in seizing Kuster's blood, law enforcement was acting in objectively reasonable reliance on ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). For more than one reason, this is a determination that cannot be made summarily, as was done by the trial court. It requires examination of the specific circumstances surrounding the warrantless seizure. The trial court therefore erred by summarily denying Kuster's motion, requiring reversal.

First, good-faith reliance on ***Bohling*** requires the existence of probable cause for an OWI arrest before the warrantless seizure of Kuster's blood could have been justified by reliance upon that decision. Denying Kuster's ***McNeely*** motion summarily before even taking evidence on the challenged existence of probable cause for arrest was error. Absent facts of record sufficient to sustain the warrantless

arrest on probable cause, the record is likewise insufficient to establish objectively reasonable reliance on ***Bohling***.

Independently, given the clearly unconstitutional nature of the seizure of Kuster's blood under ***McNeely***, a fact based analysis like that required to apply to the community caretaker exception is also required to establish the objective reasonableness required to apply the good-faith exception to the general rule requiring suppression of evidence obtained in violation of the warrant requirements of the Wisconsin and United States Constitutions.

In a community caretaker situation, a warrantless detention or seizure not otherwise justified by a recognized exception to the Fourth Amendment's warrant requirement can be sustained only if the officer was acting on an objectively reasonable belief that the subject in question may be in need of assistance. ***State v. Kramer,*** 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598. As with the community caretaker doctrine, the good-faith exception requires a similar balancing of the public good fostered by its application against the degree and nature of the intrusion upon the subject's protected interests. *See* ***Kramer,*** 2009 WI 14 at ¶ 40; *compare* ***Dearborn***, 2010 WI 84, ¶ 38; ***U.S. v. Leon***, 468 U.S. 897, 907; and ***Herring v. U.S.***, 555 U.S. 135, 141. Both doctrines require the record to support the objective reasonableness of the officer's belief on the totality of the circumstances presented. ***Kramer***, ¶¶ 41-45; *compare* ***Dearborn***, ¶ 36.

These are not determinations that can be made on a summary basis. Therefore, even if the Court were to sustain Kuster's stop and arrest on this record, meeting the first prerequisite for the good-faith application of ***Bohling***, the summary application of the good-faith exception to save the unconstitutional seizure of Kuster's blood must be reversed, and remanded for a full hearing and argument on the record. This is especially so given the reasoning of both this Court and our Supreme Court in ***State v. Carroll***, 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1, the facts and holding of which are discussed in more detail below. Specifically, as ***McNeely*** was decided before Kuster's blood was analyzed, there was nothing stopping law enforcement from seeking a warrant, after the fact, before testing the sample unconstitutionally seized. The fact that they chose not to do so, even after it became clear that the blood had been unconstitutionally seized, goes to the issue of good faith.

B. Even if Good-Faith Saves the Warrantless Seizure, a Warrant Was Required for the Search of the Blood Sample for the Quantitative Presence of Alcohol.

In ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, this Court reversed a circuit court order suppressing the blood test results in that case on the grounds that Thorstad's consent to testing was coerced, and therefore unconstitutional. This Court did not address ***Thorstad's*** facial challenge to the Implied Consent Law directly, instead finding the seizure and analysis of Thorstad's blood constitutional under ***Bohling.***

> ¶ 11. Even if it were clear from Thorstad's brief that he is arguing that ***Bohling*** is unconstitutional, we could not reach that question. This court cannot alter or overrule the constitutional standard set by ***Bohling***. "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook***, 208 Wis. 2d at 189. Neither do we begin our analysis by addressing the constitutionality of WIS. STAT. §343.305. "As a matter [238 Wis. 2d 674] of judicial prudence, a court should not decide the constitutionality of a statute unless it is essential to the determination of the case before it."***Maguire v. Journal Sentinel, Inc.***, 2000 WI App 4, ¶ 31, 232 Wis. 2d 236, 605 N.W.2d 881 (quoting ***Kollasch v. Adamany***, 104 Wis. 2d 552, 561, 313 N.W.2d 47 (1981)), *review denied*, 2000 WI 36, 234 Wis. 2d 176, 612 N.W.2d 732. Instead, our first task is to determine whether the requirements of ***Bohling*** were met under the circumstances of this case. If the ***Bohling*** requirements were met, our inquiry need go no further.
>
> 2000 WI App 199, ¶ 11.

This Court left no doubt that its reversal was entirely predicated on ***Bohling***.

> ¶ 17. Because the requirements of ***Bohling*** were satisfied, we conclude that Thorstad's blood test was a reasonable search under the Fourth Amendment. Because the search was constitutionally permissible, the trial court erred in granting Thorstad's amended [238 Wis. 2d 676] motion to suppress. We therefore reverse and remand for further proceedings.
>
> ***Id.,*** at ¶ 17.

Now that the U.S. Supreme Court in ***McNeely*** has done what this Court could not, ***Thorstad*** is no longer good law.

In the subsequent case of ***State v. Vanlaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, this Court rejected an argument that once a blood sample is seized, exigency no longer exists, and a warrant is required for its analysis. This Court's rejection of that "second-search" argument rested first on the premise that Vanlaarhoven's blood was lawfully seized based on ***Thorstad***, which as noted, is no longer good law. This distinguishes Kuster's case for the purpose of the remainder

of the analysis. Whether or not good faith precludes suppression of the unconstitutionally seized evidence, that seizure was clearly unconstitutional under ***McNeely***. This case is therefore also distinguishable from ***U.S. v. Snyder***, 852 F.2d 471 (9th Cir., 1988) as that case is predicated upon the blood having been lawfully obtained in the first instance. ***Snyder*** as applied in ***Vanlaarhoven*** therefore relies upon a construction of ***Schmerber v. California***, 384 U.S. 757 (1966) that has now been repudiated by ***McNeely***, which was decided before Kuster's blood was analyzed. Since this "second search" of Kuster's blood was conducted post-***McNeely***, good faith cannot save it.

The remainder of this Court's analysis in ***Vanlaarhoven*** was based on an analogy to ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991). ***Petrone*** was a case where undeveloped 35mm film seized pursuant to a valid warrant was subsequently developed without a second warrant. The Court's holding that law enforcement was free to analyze to lawfully seized film by all available methods was expressly predicated on its lawful seizure.

Kuster's situation is therefore more analogous to the situation addressed by this Court in ***State v. Carroll***, 2008 WI App 161, 314 Wis. 2d 690, 762 N.W.2d 404, a decision affirmed by our Supreme Court.[2] In ***Carroll,*** this Court affirmed the seizure of a cell phone Carroll was ordered to drop at the scene of a high risk traffic stop, for fear it might be a weapon. After viewing the image of a marijuana leaf in

[2] ***State v. Carroll,*** 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1.

plain view on the phone, police also scrolled through the image gallery on that phone, and answered incoming calls. 2010 WI 8, ¶¶ 7-9. Two days later, a warrant was sought and obtained for the cell phone. 2010 WI 8, ¶¶ 10-11. This Court did not address whether a police officer could search a cell phone's image gallery without a warrant, relying upon the untainted portions of the subsequent warrant application to have formed the basis for a valid warrant. 2010 WI 8, ¶ 13.

While affirming this Court's ruling, the Supreme Court did expressly hold that the pre-warrant search of the phone's image gallery was improper without a warrant. 2010 WI 8, ¶ 33. This circumstance is more closely analogous to the instant case. Even if the initial unlawful seizure of Kuster's blood can be sustained by good-faith reliance on ***Bohling***, the reasoning of both this Court and our Supreme Court in ***Carroll*** mandate that in absence of a subsequently obtained valid warrant, the post-***McNeely*** search of Kuster's blood for alcohol by use of a gas chromatograph was improper, and those results should have been suppressed.

CONCLUSION

Absent a basis to stop the silver vehicle driven by Kuster, and an objective basis to expand the scope of that stop, both the refusal conviction and the PAC conviction must be reversed, mooting the balance of the issues raised on appeal. Even if the stop was good, there was not probable cause for Kuster's arrest under either applicable standard, resulting in the same outcome. A determination that a warrant was required for the post-***McNeely*** analysis of Kuster's blood independently

requires reversal of the PAC conviction. This would also moot the ***McNeely*** issue, which is one not capable of summary disposition. Therefore, if not mooted, the ***McNeely*** issue also requires reversal in the CT case.

Dated at Jefferson, Wisconsin this _____ day of May, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and foot notes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,854 words.

I further 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 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: May _____, 2014.

Signed:

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APPENDIX

PAGE

APPENDIX CERTIFICATION

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

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

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

Dated: May _____, 2014.

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