STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2014AP000220

v.

WALTER J. KUGLER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION OF THE
CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH 9,
THE HONORABLE DONALD HASSIN, JR., PRESIDING

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STATEMENT OF THE CASE

On December 15, 2013, Walter Kugler (Kugler) had an encounter with Wisconsin State Patrol Trooper David Schmidt (Schmidt) that led to Kugler's arrest. Kugler was charged with operating a motor vehicle while under the influence of an intoxicant, in violation of Wis. Stat. §346.63(1)(a), (OWI); operating a motor vehicle with a prohibited alcohol concentration, in violation of Wis. Stat. §346.63(1)(b), (PAC); and, refusal to submit to a chemical test, in violation of Wis. Stat. §343.305 (refusal). All three charges were alleged to be first offenses, and are, therefore, civil in nature.

Kugler filed a motion to suppress evidence derived from an unlawful arrest and unlawful detention, as well as a motion for suppression of defendant's blood test result based upon a warrantless blood draw.

On August 20, 2013, a hearing was held on the two motions to suppress evidence, which were both denied. On January 14, 2014, Kugler proceeded to trial by jury. The jury found Kugler guilty of OWI and PAC. The state moved for judgment on the OWI charge, and the PAC charge and the refusal charge were dismissed.

Kugler appeals the denial of the motion to suppress evidence derived from an unlawful detention and arrest, and the denial of the motion to suppress evidence derived from an unlawful warrantless blood draw.

STATEMENT OF FACTS

The Community Caretaker Breath Test and the Arrest

Walter Kugler is a native of Illinois. On December 15, 2013, he and a female companion traveled to Milwaukee to attend a professional basketball game, the Milwaukee Bucks versus the Los Angeles Clippers. After the game the couple planned to travel to Janesville, Wisconsin, but they didn't make it. (R: 20, pp. 5-6; p.7, ll. 11-13.)

While the record is silent, we can safely surmise that Kugler drove from the Bradley Center arena, home of the Milwaukee Bucks, on I94, missing the turn off for I894 to I43 south to Janesville. Thus, Kugler continued west out of Milwaukee County into Waukesha County on I94. At least, that is the simplest explanation for the facts of record.

Realizing that he was off-course, Kugler, pulled his van onto the the shoulder of the highway and activated his emergency flashers, so that he could safely find his bearings.

It was then that Kugler encountered Trooper Schmidt, who was on his way home, as his shift had just ended. (R: 20, p.4, l. 20). Schmidt driving a State Patrol squad car, pulled onto the shoulder behind Kugler's van and activated the squad's emergency lights. Schmidt was not suspicious of any offense at this time; but he was checking to see whether the motorist needed assistance. In other words, this was a classic community caretaker vehicle stop. (R: 20, p.7, l. 20).

Schmidt approached the van from the passenger side, and found himself face to face with the less than coherent female passenger. She identified herself and volunteered, in boozy breath, that they were on their way to Janesville but had gotten off course. (R: 20, p. 6, *passim*). Schmidt asked Kugler if he, too, had been drinking. Schmidt could not recall Kugler's answer; but, he, nevertheless, felt that it was a "deflection" of the question. Schmidt repeated the question, and Kugler stated that he had had one beer. (R: 20, p.7, l.7). Schmidt ordered Kugler out of the vehicle. (R: 20, p.6, l. 21). Kugler identified himself and produced a driver's license and proof of insurance, without difficulty. R: 20, pp. 26-27).

Schmidt did not, at this point, claim to be investigating a drunken driving incident. Nor did he claim to have probable cause to administer a preliminary breath test. Although Kugler smelled of an alcoholic beverage, there was no other indication that Kugler was intoxicated (e.g., there was neither slurred speech nor bloodshot eyes). Rather, Schmidt claimed to be acting under his community caretaker authority, concerned for Kugler's welfare and the safety of the public. (R: 20, p. 7, *passim*).

Schmidt then instituted a novel procedure, that we call a community caretaker preliminary breath test. Schmidt asked Kugler to give a breath sample, prior to any field sobriety investigation. If Kugler gave a sample, he would not be arrested, no matter what the result of the breath test. Schmidt would have allowed Kugler to arrange a ride and have the car towed. On the other hand, if Kugler

refused to give an immediate preliminary breath sample, a drunken driving investigation would ensue, with Kugler's refusal to cooperate with the premature breath test would be considered as part of the totality of circumstances for further detention and arrest. (R: 20, pp. 7-8).

Kugler refused the premature preliminary breath test. Schmidt detained Kugler for a drunken driving investigation. Kugler was subsequently arrested. (R: 20, pp. 5-8).

The Warrantless, Forced Blood Draw

Kugler's encounter with Trooper Schmidt occurred shortly before 11:00 p.m., on December 15, 2012. (R: 20, p. 4, l.20); and his blood was forcibly drawn in an ordinary time period following his arrest. (R: 20, p.19, l.15).

As this case turns on the applicability of the good faith exception to the exclusionary rule, a chronology of the law is appropriate, at this point.

On January 17, 2012, the Missouri Supreme Court issued their decision in *State of Missouri v. McNeely*, 358 S.W.3d 65 (Mo. 2012). The Missouri court specifically rejected the state's position that (*inter alia*) a Wisconsin case, *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), created a *per se* rule allowing forced, warrantless blood draws.

The State of Missouri filed a petition for a writ of certiorari, asking the United States Supreme Court to review the Missouri decision. On September 25, 2012, the United States Supreme Court granted the petition for a writ of certiorari.

Kugler's arrest occurred on December 15, 2012, while the *McNeely* case was pending before the United States Supreme Court.

Schmidt ordered a warrantless, forced draw of Kugler's blood. In doing so, he relied on his understanding of the state of the law at the time. The record is a bit confusing:

> Q: Was a blood draw done that evening?
>
> A: Yes, it was.
>
> Q: And why did you ask for a blood draw to be done when he had refused?
>
> A: Based on Wisconsin case law, my understanding is that it isn't allowable on the offense of OWI to take the blood after the fact due to the exigent circumstance.
>
> (R: 20, p 19, ll. 15-22).

Further explaining, Schmidt testified:

> A: Its not a department policy its based on caselaw .
>
> (R: 20, p.40 l. 7).
>
> A: Based on the training and experience that I had, the legal updates from AGA (*sic*) Dave Perlman who gives us our legal updates for the patrol.
>
> (R: 20, p. 40, ll. 13-15).

STATEMENT OF ISSUES

1. Was the "community caretaker preliminary breath test" constitutionally reasonable?
    a. The trial court answered, yes.
2. Was the Wisconsin case law on involuntary warrantless blood draws sufficiently well-settled, on December, 2012, that it provided a basis for a good faith exception to the exclusionary rule?
    a. The trial court answered, yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant has no position on oral argument and publication. We leave that to the sound discretion of the court.

We note, however, that the so-called "community caretaker breath test" is a novel issue, giving rise to significant sub-issues of constitutional jurisprudence. Also, the issue of the application of the good faith exception to the exclusionary rule, to cases that occurred while review of similar police conduct was pending before the United States Supreme Court, is one of importance; and it has not been previously addressed.

ARGUMENT

THE COMMUNITY CARETAKER PRELIMINARY BREATH TEST WAS UNREASONABLE

There Was Not Probable Cause to Believe that Kugler Was Intoxicated

Preliminary breath tests are searches that are subject to the restrictions of the Fourth Amendment to the United States Constitution. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989). The standard for the permissibility of a preliminary breath test is well-known: whether there is probable cause to believe that the subject is impaired. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999); and Wis. Stat. §343.303.

Renz, supra, clarified that the statutes require probable cause to believe: a middle level of probable cause, higher than mere reasonable suspicion, but less than probable cause to arrest.

In this case Schmidt, himself, did not claim to have probable cause to believe that Kugler was intoxicated. Rather, Schmidt claimed to have a community caretaker breath test procedure. Schmidt's rationale, of a community caretaker justification for the intrusive request for a breath sample, belies the lack of probable cause to believe that Kugler was impaired.

Nevertheless, the trial court considered the issue, as may this court. [1]

[1] The trial court held that there were "a bevy of indices" of intoxication, supporting a reasonable suspicion to detain Kugler for investigation,

There was no bad driving or operation of the vehicle, including its location. While the trial court considered the location sinister, the record contradicts that conclusion. In fact, Kugler behaved laudably in pulling to a safe spot to check his directions, rather than attempting to do it while his van was in motion. His emergency flashers were lit, suggesting mental coherence; and, he was lawfully parked. Certainly, there was a basis for Schmidt to check on Kugler's welfare, but little or nothing about Kugler's manner of operation and parking his vehicle was, in any way, indicative of impairment. Of course, that is why Schmidt did not suspect impairment when he first arrived on the scene.

Next, the fact that Kugler's passenger was, obviously, intoxicated is only the slightest clue. The constitution requires an individualized and particularized determination of probable cause. *Ybarra v. Illinois*, 445 U.S. 85 (1979). In *Ybarra*, police officers searched bar patrons, based on a tip that the bartender possessed and was selling heroin. The Supreme Court rejected the vicarious rationale for the search. Wisconsin recently addressed the issue in *State v. Gordon*, 2014 WI App 44.

> Further, "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a

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independent of the request for the PBT. Here, we will consider the trial court's enumeration of those indices in the context of whether they support an inference of probable cause to believe that Kugler was intoxicated, thus justifying the request for the PBT. We will address the issue of whether Schmidt had an independent basis to detain Kugler herein, when we address whether the unlawful PBT request tainted the detention and arrest.

> constitutional search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). See also *Michigan v. Summers*, 452 U.S. 692, 699 n.9 (1981). Thus, circumstances must not be so general that they risk sweeping into valid law-enforcement concerns persons on whom the requisite individualized suspicion has not focused. *Bailey v. United States*, 568 U.S. ___, 133 S.Ct. 1031, 1039–1040 (2013) (Police may not detain persons leaving a building that was the target of a search warrant when those persons were "beyond the immediate vicinity of the premises to be searched.").
>
> *Gordon, supra*, p.12.

The condition of Kugler's passenger could not be imputed to Kugler. Schmidt knew this; which is why he requested that Kugler get out of his van.

Schmidt placed great importance on Kugler's "deflection" of the question of whether he had been drinking. This may have been an indice worthy of consideration, but only if Schmidt was able testify to Kugler's statement. Despite repeated questioning, and attempts to refresh his recollection, Schmidt was unable to recall a single word in the statement that he concluded was a deflection. Schmidt's conclusion that Kugler "deflected" the question was unsupported, unless there was some evidence of the statement itself. Similarly, Schmidt's opinion was of no evidentiary weight; as, there was no evidence of the statement itself. The rules of evidence resolve this issue. Lay opinion testimony, is admissible under Wis. Stat. §907.01:

> **Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:

> **(1)** Rationally based on the perception of the witness.
> **(2)** Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
> **(3)** Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1).

This statute was amended in 2011, to correspond to FRE 701. 2011 Wi. Act 2. The commentary to FRE 701, therefore, states:

> The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

Thus, the commentators suggest that as a matter of evidentiary law, a court should not merely acquiesce to a witness who has "chosen sides."

Moreover, this issue goes beyond the fact that Schmidt's testimony about the statement is of no weight. A court has a duty to independently make findings of fact as to issues of probable cause. It is improper for a court to blithely accept a police officer's conclusory testimony or opinion evidence, in the absence of any factual support. The Constitution places a duty on the court to independently assess the facts. The issue was addressed by the Supreme Court in *Johnson v. United States*, 333 U.S. 10 (1948).

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the

> support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Although Kugler smelled as though he had been drinking, there was no other evidence of impairment. Nothing suggests that Kugler's speech was slurred, slow and abnormal. Nothing suggests that Kugler's balance was abnormal. There was no evidence that Kugler's eyes were red or glassy.

The trial court enumerated a "bevy" of indices of impairment, upon which Schmidt's actions were based: The location of the van, the condition of the woman, Schmidt's opinion of Kugler's statement, and the odor of an intoxicant, possibly amounted to a reasonable suspicion to detain Kugler. They certainly did not amount to the requisite probable cause to believe that Kugler was impaired. The evidence suggests that Schmidt, of course, knew that, which is why he deigned to proceed as a community caretaker.

The "Catch and Release" Breath Test was Unreasonable

Schmidt, in an *ad hoc* procedure, created the "community caretaker breath test," where an OWI suspect who agrees to an intrusive search is thereby released, but he will be detained for investigation if he refuses. Schmidt claimed that this

"catch and release" preliminary breath test was routine in his practice; although, Schmidt admitted that it was not a matter of department procedure.

We believe the entire procedure to be unreasonable and coercive, on its face. The notion that a police officer may search a suspect, without probable cause, using the excuse that his subjective intention was to release him, is not only an unreasonable intrusion into the liberty of the subject, but also an abdication of the officer's duty to the community. Far from being a caretaker, the officer was a "community enabler."

The law of the community caretaker power is well-developed but still controversial. In *Cady v. Dumbrowski*, 413 U.S. 433 (1973), the United States Supreme Court first used the term "community caretaker." Dumbrowski had a single car accident near West Bend, Wisconsin. He was found by the police drunken and dazed in his damaged rental car, and thereafter arrested for drunken driving. The car was towed, and stored outside in an unsecure lot. When the police learned that Dumbrowski was also an off-duty policeman, they decided to search the car to secure his service revolver. They also, however, found the bloody remnants of a murder in the car. The Supreme Court held that the search was reasonable, even though it was done in the absence of a warrant or probable cause to search. The police were not, at that, time investigating any offense. They were acting as community caretakers, seeking only to secure a dangerous weapon, to prevent harm to the public.

Wisconsin has interpreted and expanded the community caretaker doctrine in a number of cases. There is, however, no authority that supports the Schmidt's unusual "catch and release" interpretation of the community caretaker authority.

Wisconsin considered the community caretaker doctrine in *State v. Kramer*, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598; and, *State v. Pinkard*, 327 Wis. 2d 346 (2010). This court looks at "the totality of the circumstances as they existed at the time of the police conduct." Under *Kramer* and *Pinkard*, the analysis of the community caretaker doctrine, for purposes of the Fourth Amendment to the United States Constitution, is the same as the analysis under the Wisconsin Constitution. The touchstone for all analyses under the community caretaker doctrine is constitutional reasonableness. In *Pinkard*, the court laid out a three-step test, with four relevant factors in deciding the third step, placing the burden of proof on the state:

1. Whether a search or seizure within the meaning of the Fourth Amendment has occurred;
2. If so, whether the police were exercising a bona fide community caretaker function; and
3. If so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

In examining the third step, "we balance the public interest or need that is

furthered by the officers' conduct against the degree and nature of the intrusion on the citizen's constitutional interest." Four factors considered in this balancing test:

1. The degree of the public interest and the exigency of the situation.
2. The attendant circumstances surrounding the search, including time, location, the degree of overt authority and force displayed.
3. Whether an automobile is involved.
4. The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

An instructive unpublished case is *State v. Ultsch*, 2010 Wisc. App. Lexis 1048. In *Ultsch*, the defendant's damaged SUV was found near the roadway and near a long driveway. Having observed some damage to the vehicle and reasoning that an injured occupant may have gone to the nearby house, the police engaged in a community caretaker entry to the house. The court of appeals noted that the damage to the SUV, while significant, was not enough to infer that the occupant was injured. Hence, the community caretaker power could not be invoked. By contrast, in *State v. Gracia*, 2013 WI 15, the Wisconsin Supreme Court allowed a community caretaker entry into the defendant's bedroom, largely because of severe damage to the vehicle found outside the residence.

Similarly, the following cases all involve factors indicating a present need of assistance. None of these cases, however, support the "community caretaker preliminary breath test, and you'll get a ride home" procedure. *State v.*

Fitzgibbons, 2009 WI App 110, 320 Wis. 2d 704, 771 N.W.2d 929; *State v. Reinwall*, 2010 WI App 19, 323 Wis. 2d 279, 779 N.W.2d 725; *State v. Rice*, 2010 WI App 71, 325 Wis. 2d 401, 786 N.W.2d 489; and, *State v. Toliver*, 2011 WI App 27; 795 N.W.2d 493.

Therefore, although the unusual set of facts presented does not fit neatly into the listed categories, we must consider these factors and subfactors in the context of this case:

1. The request for the preliminary breath test was not a completed search. It was, however, an attempted search, that led to investigative consequences. Schmidt considered Kugler's refusal to submit to the PBT as evidence of guilty knowledge, and improperly considered it in his decision to arrest Kugler. (R: 20, p. 37, ll. 2-12). [2]
2. Was the request for a PBT in this context a bona fide community caretaker function? The answer is no, for all of the reasons addressed in this brief.
3. We must balance the intrusion into Kugler's privacy versus the public interest. We must consider the four factors used in the balancing test.
    a. The degree of public interest and exigency. Here, the public interest was in a less intrusive, but ultimately more

[2] We will address the impropriety of consideration of Kugler's refusal to submit to the PBT in a separate section, *infra*.

consequential, field sobriety investigation. There was no exigency that prevented Schmidt from doing so; and in fact, it subsequently occurred without difficulty.

b. The attendant circumstances. The salient fact is the officer's subjective intent to use the search as a "catch and release" mechanism. From a constitutional perspective, that is just plain unreasonable. Even though the officer never communicated this to Kugler, the notion that citizens should be subjected to "catch and release" searches is an unprecedented intrusion into our privacy.

c. An automobile was involved, (in this case, a van). This presented a potential danger that could have been handled differently, and properly.

d. Were there less intrusive alternatives? The answer is, clearly yes. If Schmidt had a "hunch"[3] that Kugler was impaired, and Schmidt, indeed, did not want to investigate, but rather simply arrange a ride for Kugler, then Schmidt should simply have done so. There are two problems with the request for the preliminary breath test. First, it was an unlawful, unauthorized

[3] By "hunch" we mean a suspicion that does not rise to the level of a reasonable suspicion justifying an exercise of police authority.

> intrusion into Kugler's right to be free from an unreasonable search. Second, it was an unprecedented and improper exercise of police discretion. If Schmidt had a "hunch" that Kugler was impaired, but he did not want to investigate or arrest Kugler, then he should have proceeded as such. He should have told Kugler that he had to arrange a ride, and that his vehicle would be towed. If he needed to investigate further before arriving at the conclusion that Kugler was intoxicated, he should have done so properly, by developing facts in a reasonable way, such as is done in almost every drunken driving case. The community caretaker doctrine was not meant, and has never been held, to be a substitute for a proper investigation, in order to release a suspect.

Consideration of Kugler's Refusal to Give a Preliminary Breath Test Tainted the Investigation and Arrest

No law requires a subject to consent to a preliminary breath test. Even if Schmidt's request for a preliminary breath test was lawful, Kugler had an absolute right to decline to cooperate. In this instance, given the unusual circumstance of the request for a breath sample, Kugler's right to decline was magnified.

Courts have long held that a routine refusal to consent to a search may not be used as evidence of guilt, nor may it be considered as supporting a

determination of probable cause. Wisconsin has long followed this rule. *State v. Gibbs*, 252 Wis. 227, 31 N.W.2d 143 (1948). In *Gibbs*, the court squarely held that refusal to consent to a search cannot be used as a basis to support probable cause to search. The United States Supreme Court addressed a similar issue in *Florida v. Bostick*, 501 U.S. 429 (1991). In *Bostick*, the Supreme Court considered the permissible scope of a random interaction between police and a citizen on a bus, where the police asked for consent to search. The Supreme Court approved these types of random drug interdiction efforts, only when the citizen is advised of his right to refuse to consent to the detention and search. In summary, Kugler has a right to refuse to give a breath sample. It was improperly held against him.

The trial court's ruling implied that the request for a PBT, and Kugler's refusal to submit, were inconsequential, as Schmidt had a reasonable suspicion to detain Kugler for investigation, independent of the preliminary breath test incident. Thus, the trial court deftly sidestepped the issue. We disagree with the trial court for two reasons: first, there were insufficient facts to support even a reasonable suspicion to detain Kugler; and second, the unlawful "catch and release preliminary breath test" tainted the entire series of subsequent events.

Schmidt's initial contact with Kugler was to provide assistance to a distressed motorist. The nature of that interaction was as a community caretaker. Schmidt had the authority, as he would in any interaction with a citizen, to ask

routine questions, and make routine observations. See, e.g. *Bostick*, supra. Under normal circumstances, having separated a subject from his passenger, a police officer would ask the passenger where he had been, where he was going, and what, if anything, he had been drinking. The officer would listen to the answers and observe the subject, to determine whether he had a reasonable suspicion to detain the subject for further investigation, that may include field sobriety testing. That is the normal, and reasonable, sequence of events. Of course, each case is different and must be decided on a case-by-case view of the totality of the circumstances. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634 (2007). We submit, however, that when the initial contact with a citizen is to assist a distressed motorist, the transition to an investigation of wrongdoing ought to be carefully scrutinized.

The trial court noted a "bevy of indices," of intoxication. The evidence, however, contradicts the trial court's conclusion. Although the trial court enumerated a set of facts, they were not indices of impairment. Rather, except for the single clue of an odor of intoxicant, they were merely the innocent circumstances of Schmidt's encounter with Kugler. To reiterate, Kugler lawfully and safely pulled over on the shoulder of the highway. The explanation that they were looking for the route to Janesville was entirely reasonable. His emergency flashers were lit. Although his passenger was intoxicated, there was no indication that Kugler was impaired; his eyes, speech and balance were normal. Although

Schmidt believed that Kugler "deflected" his question about drinking, there is no evidence of any inculpatory or suspicious statement; in fact, the statement is not in evidence. Kugler promptly and effectively provided his driver's license and proof of insurance. The single and insufficient clue was the odor of an intoxicant that was apparent after Kugler got out of his van. This, alone, did not rise to the level of a reasonable suspicion that Kugler was intoxicated.

The thornier issue is that Schmidt proceeded to detain Kugler, because he refused to give a breath sample. Although the trial court attempted to untangle that fact from the totality of circumstances, it is inextricably woven into the knot of facts. Schmidt admitted as much:

> Q: So now he didn't want to give you the preliminary breath sample. At that point, you determined to administer field sobriety tests?
>
> A: At that point it went from community caretaker to an investigation as to whether or not he was impaired to drive to release him.
>
> Q: Okay. And was that because he – he refused to give the preliminary breath test?
>
> A: It was because of all the answers up to that point.
>
> (R: 20, p. 37, ll. 2-12).

Evidence that is derived from an unreasonable exercise of police authority under the Fourth Amendment is subject to the exclusionary rule. Evidence that is acquired as a result of the unlawful police activity is "fruit of the poisonous tree," and is also excluded. *Wong Sun v. United States*, 371 U.S. 471 (1963).

The request for a preliminary breath test was unlawful. The consideration of Kugler's refusal to give a breath sample was unlawful. This tainted all subsequent events. The evidence derived as a result should have been suppressed.

THE WARRANTLESS, FORCED BLOOD DRAW WAS UNLAWFUL

The Fourth Amendment to the United States Constitution ensures "[t]he right of the people to be secure in their person…against unreasonable searches and seizures." The United States Supreme Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject to only a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). An exception to the general rule requiring a search warrant is when exigent circumstances are present. *United States v. Cisneros-Gutierrez*, 598 F. 3d 997, 1004 (8th Cir. 2010). Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence. *Id*.

Every Fourth Amendment analysis requires the balancing of two competing interests: (1) The right of the individual to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures; and (2) society's interest in discovering and eliminating criminal activity. *Schmerber v. California*, 384 U.S. 767 (1966). In *Schmerber*, the defendant was driving a vehicle that skidded off the road. He and his passenger were injured and taken to

the hospital for treatment. At the hospital, the defendant was arrested, and without his consent or a warrant, an officer directed a physician to take a sample of the defendant's blood. Analysis of the blood sample revealed that the defendant's blood alcohol content was above the legal limit. The defendant objected to the trial court's receipt of the blood sample evidence, contending that the warrantless blood draw violated his Fourth Amendment right to be free from unreasonable searches and seizures.

The *Schmerber* court reasoned that drawing an individual's blood for evidentiary purposes is a search that implicates the Fourth Amendment. *Id* at 769-70. Ordinarily, a search warrant would be required to perform a blood draw when a person does not consent. *Id*. The circumstances in *Schmerber*, however, led the Supreme Court to carve out a very limited exception to the warrant requirement for a blood draw in alcohol-related cases. The limited exception of *Schmerber* ultimately rested on certain "special facts" that might have caused the officer to reasonably believe he was faced with an emergency situation in which the delay in obtaining a warrant would threaten the destruction of evidence. The threat of evidence destruction was caused by the fact that the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops and, because there was a serious accident in *Schmerber*'s case, additional time was required to both transport the defendant to the hospital and to investigate the scene of the accident. *Id*. Given those "special facts" the Supreme Court

concluded that the warrantless search was valid incident to the defendant's arrest. *Id* at 771. Although *Schmerber* couched its limited exception to the warrant requirement in terms of a search incident to arrest, it has since been read as an application of the exigent circumstances exception to the warrant requirement. *United States v. Berry*, 866 F. 2d 887, 891 (6th Cir. 1989).

Thus, since 1996 *Schmerber* has stood for the proposition that if there is probable cause to believe that blood contains evidence of a crime, and there are exigent circumstances that make it impractical for law enforcement to obtain a warrant, then the police may direct a nonconsensual, warrantless blood draw.

The Wisconsin Supreme Court reviewed *Schmerber* and the issue of warrantless, nonconsensual blood draws in *State v. Bohling* (*supra)*. The *Bohling* decision holds that the dissipating nature of blood alcohol evidence alone constitutes a sufficient exigency to dispense with the warrant requirement in alcohol-related cases. *Bohling*, 494 N.W.2d at 402.

Bohling, however, misinterprets S*chmerber*. *Schmerber* requires more than the mere fact that alcohol naturally dissipates in the blood stream to justify a warrantless, nonconsensual blood draw. Rather, *Schmerber* requires a showing of "special facts" to provide an exigency to conduct a warrantless bodily intrusion. *Schmerber*, at 770-71. The "special facts" present in *Schmerber* included the time delay created by the investigation of the accident as well as the transportation of the defendant to the hospital. These "special facts" might have caused the officer

in *Schmerber* to reasonably believe he was faced with an emergency situation in which any further delay in obtaining a warrant would threaten the destruction of evidence. Under this *limited* fact situation, the *Schmerber* court held that a nonconsensual, warrantless blood draw was permissible under the Fourth Amendment. In fact, the *Schmerber* court rejected a *per se* exigency based solely on the dissipation of alcohol in the blood stream and explicitly warned against such expansive interpretations:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the constitution does not forbid the state's minor intrusions into an individual's body under *stringently limited conditions* in no way indicates that it permits…intrusions under other conditions. (Emphasis added.)

Thus, *Schmerber* requires some exigency beyond the mere natural dissipation of blood alcohol evidence. The *Schmerber* court explicitly found that the time delay that resulted from both the accident investigation and the transportation of the defendant to the hospital were "special facts" that authorized the warrantless blood draw under the Fourth Amendment. *Id* 770-71. To allow a warrantless blood draw in the absence of "special facts" would be to ignore the Supreme Court's statement in *Schmerber* that the constitution in no way permits warrantless blood draws "under other conditions." *Id* at 772.

The *Schmerber* decision reaffirms that warrantless intrusions of the body are not to be undertaken lightly and that exigency is to be determined by the

unique facts and circumstances of each case. *Schmerber* directs lower courts to engage in a totality of the circumstances analysis in determining whether exigency permits a nonconsensual, warrantless blood draw. It requires more than the mere dissipation of the blood alcohol evidence to support a warrantless blood draw in an alcohol-related case. Officers must reasonably believe that they are confronted with an emergency where the delay in obtaining a warrant would threaten the destruction of evidence. The question of whether an emergency exists to sufficiently trigger the exigent circumstances exception to the warrant requirement heavily depends on the existence of "special facts" and must be determined on a case-by-case basis. In routine drunk driving cases in which no special facts exist other than the natural dissipation of alcohol in the blood, a warrant must be obtained before such evidence is gathered. This requirement ensures that the inferences to support the blood draw be made by a neutral and detached judge "instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *State v. Johnson*, 744 N.W. 2d 340 (Iowa 2008). The warrant requirement is especially important when the issue is "whether or not to invade another's body in search of evidence of guilt." *Schmerber*, 348 U.S. at 770

Missouri v. McNeely

On January 17, 2012, the Missouri Supreme Court issued their decision in State of *Missouri v. McNeely, supra.*

In that case, the Missouri court specifically rejected the state's position that the *Bohling* case allowed for a *per se* rule, that dissipation of alcohol in the blood, alone, constitutes an exigent circumstance. The Missouri court stated:

> *C. This Court Disagrees with Jurisdictions That Have Adopted a Per Se Exigency Analysis*
>
> In contrast to the forgoing, Wisconsin, Oregon, and Minnesota have adopted the rationale that the rapid dissipation of alcohol alone constitutes a sufficient exigency to draw blood without a warrant. *State v. Bohling*, 494 N.W.2d 399, 406 (Wis. 1993) …
>
> *Id,* at p.13
>
> This Court cannot agree with these interpretations of *Schmerber.*
>
> *Id,* at p. 15.

Missouri sought review by the United States Supreme Court, of the decision of its supreme court. Missouri argued that its supreme court was in error. On September 25, 2012, the United States Supreme Court granted certiorari. Thus, from that date, *Bohling* was "in play;" its rule was no longer well-settled. In fact, on April 17, 2013, the United States Supreme Court issued its decision, affirming the Missouri court.

*Missouri v. McNeely***,** 133 S. Ct. 1552; 2013 U.S. LEXIS 3160, clarified *Schmerber,* and rejects *Bohling.* In *McNeely,* the United States Supreme rejected

the argument that *Schmerber* authorizes nonconsensual, warrantless blood draws in OWI cases, solely on the basis of the dissipation of alcohol in the blood of a subject due to the passage of time. That fact, alone, is insufficient for a finding of exigency.

The Court further stated, "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely v. Missouri,* majority opinion. A warrantless search of a person is reasonable only if it falls within a recognized exception. One recognized exception applies when "the exigencies of the situation" make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. *Id.* Courts are to determine whether exigency exists on a careful case by case assessment of exigency looking to the totality of the circumstances. *Id.*

Thus, *McNeely* entails that *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399, 406 (Wis. 1993) is overbroad; *Bohling* improperly expands the reach of *Schmerber*. In a 4-3 decision, the Supreme Court of Wisconsin stated:

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime-as opposed to taking a blood sample for other reasons, such as

> to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.
>
> *Bohling*, 494 N.W.2d at 402.

In *Bohling*, the Wisconsin court reasoned that the exigency in *Schmerber* was caused "solely" by the fact that alcohol dissipates in a person's blood stream over time. *Id.* *Bohling* further held that a warrantless blood draw is permitted when a person is lawfully arrested for a drunken-driving related crime and there is a clear indication that the evidence obtained will produce evidence of intoxication. *Id* at 406. It asserted a *per se* rule that exigency exists in every drunk-driving case "based solely on the fact that alcohol rapidly dissipates in the bloodstream," *Id.* at 402. It reaffirmed that assertion in *State v. Faust*, 682 N.W.2d 371, 383 n.16 (2004), but did so with a caveat, emphasizing that its holding was limited to "*the facts of this case,*". "[W]e reiterate that the reasonableness of a warrantless nonconsensual test [for blood alcohol content] . . . will depend upon the totality of the circumstances of each individual case." *Faust*, 682 N.W.2d at 383, n.16. The court suggested, for instance, that "[t]here may well be circumstances where the police have obtained sufficient evidence of the defendant's level of intoxication that a further test would be unreasonable under the circumstances presented." *Id* at 383. *Bohling*, thus, incorrectly equated the warrantless forced blood draw exception that was permitted in *Schmerber* to any and all Wisconsin OWI arrests,

even first offense civil cases, relying on the per se exigency rule that has now been overtly rejected in *McNeely*.

Application of *McNeely* to a Pending Case

Decisions that pertain to unreasonable searches and seizures are "retroactive." The search and seizure of Wagamon's blood was unlawful, in the absence of exigent circumstances. Whether or not the police acted in good faith, on well-settled precedent, is an issue of fact in which the state bears the burden of proof. *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419 (2011).

Although decisions that pertain to unreasonable searches are retroactive, the state may, nevertheless, claim that a good faith exception to the exclusionary rule. *State v. Reese*, 2014 WI App 27. In *Reese*, the court applied the holding of *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (2010). While *Dearborn* dealt with a good faith exception to the exclusionary rule in the case of unlawful automobile searches, *Reese* specifically applied the good faith exception to *McNeely.*

Reese, however, is easily distinguishable from the instant case. The arrest and warrantless, forced blood draw in *Reese* occurred on June 18, 2009. This was several years before the Missouri Supreme Court specifically rejected *Bohling*, and years before the United States Supreme Court took the matter under review. By contrast, when Kugler's blood was forcibly drawn, *Bohling* was in question; as, the Supreme Court had granted review in *McNeely* case almost three months

earlier. Thus, it cannot be said that *Bohling* was "clear and settled precedent" at the time of Kugler's forcible blood draw. Thus, *Reese* does not apply to this case; and, there is no basis for a good faith exception to exclusion of Kugler's blood test.

CONCLUSION

The unlawful request for a preliminary breath test, and the improper consideration of Kugler's refusal to give that breath sample, tainted the investigation and arrest. The evidence derived as a result ought to have been suppressed.

The warrantless, forcible blood draw was unlawful. Further, because the *Bohling* case had been specifically rejected by the Missouri supreme court, and that decision was under review by the United States Supreme Court, *Bohling* was no longer clear settled precedent. Thus, there was no basis for a good faith exception to exclusion of the blood.

Therefore, the defendant-appellant respectfully prays that the decision of the circuit court for Waukesha County be reversed, the evidence ordered suppressed, and the matter remanded for further proceedings.

Signed and dated at Glendale, Wisconsin this _30_ day of June 2014.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Andrew Mishlove
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 7,074 words.

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 Wis. Stats. §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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated at Glendale, Wisconsin this _30_ day of June 2014.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Andrew Mishlove
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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 Wis. Stat. §809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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.

Signed and dated at Glendale, Wisconsin this _30__ day of June 2014.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

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APPENDIX

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