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.

REPLY BRIEF 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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FACTS

Mr. Kugler and the state agree on the facts, for the most part. There is one area of disagreement: Trooper Schmidt's intention in having Mr. Kugler leave his van and submit to an immediate "catch and release" preliminary breath test (PBT). The state claims, "Trooper Schmidt believed that Mr. Kugler might have been impaired, and asked him to exit the vehicle. (R.20, 6: 21-25, 7:1-8; R-Ap. 6,7.)." Mr. Kugler disputes that characterization of the facts. It is a subtle, but important point.

At the time that Trooper Schmidt asker Mr. Kugler to submit to a PBT, Trooper Schmidt did not believe that Mr. Kugler was impaired. Rather, he was curious as to whether Mr. Kugler was impaired. Trooper Schmidt did not claim to be investigating a drunken driving incident until after Mr. Kugler declined the premature PBT. Nor did Trooper Schmidt claim to have probable cause to administer a PBT. Rather, Trooper Schmidt invoked his community caretaker authority. (R: 20, p.7, *passim*).

ARGUMENT

THE COMMUNITY CARETAKER PRELIMINARY BREATH TEST WAS UNREASONABLE

There Was Not Probable Cause to Believe that Mr. Kugler Was Intoxicated

The state argues that, despite Trooper Schmidt's invocation of the community caretaker authority, and his disavowal of probable cause to believe that Mr. Kugler was impaired, Trooper Schmidt had the requisite probable cause to administer the PBT. Mr. Kugler has addressed this issue in his brief-in-chief, so it bears only a summary here.

The state enumerates a set of facts that are not clues of impairment. Rather, except for the single clue of an odor of intoxicant, they were the innocent circumstances of Trooper Schmidt's encounter with Mr. Kugler. To reiterate, Mr. 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 was no evidence of any suspicious statement; in fact, the statement is not in the record. 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 state cites *State v. Felton* 2012 WI App 114, 344 Wis.2d 483, 824 N.W.2d 871 (Ct.App. 2012), to support its argument that Trooper Schmidt had probable cause to administer a PBT. *Felton* is instructive, but it undermines, rather than supports the state's argument. In *Felton*, a Whitefish Bay police officer observed the defendant commit several acts of erratic driving. His eyes were glassy and bloodshot, and he smelled of an alcoholic beverage. He admitted to drinking three beers. Moreover, he had a prior record of drunken driving. The court considered all of these factors in determining that there was probable cause to administer a PBT. In*, Felton,* field sobriety tests were administered prior to the PBT, but they did not support probable cause:

> The common-sense inquiry here is what did Sergeant Courtier know that led him to give Felton a preliminary- breath test? The Record reveals the following:
>
> - Felton' s eyes were glassy and bloodshot.
> - Felton smelled of alcohol.
> - Felton admitted to drinking three beers, two hours before Courtier stopped him.
> - As the trial court found, Courtier saw Felton "staying too long at one stop sign and then completely blowing another."
> - Courtier knew before he asked Felton to take the preliminary-breath test that Felton had other drunk-driving convictions,

> and an officer may consider a driver's prior convictions in determining whether to give a preliminary-breath test. *See* ***State v. Goss***, 2011 WI 104, ¶22, 338 Wis. 2d 72, 88–89, 806 N.W.2d 918, 926; *see also* ***Lange***, 2009 WI 49, ¶33, 317 Wis. 2d at 397, 766 N.W.2d at 557 (probable cause for arrest).
>
> *Felton*, supra, 2012 WI App 114, p.6.

The court in *Felton* emphasized five separate clues of impairment to justify a PBT, only one of which exists in this case: odor. Mr. Kugler's eyes were normal, his statement that he had "a beer," was unremarkable, there was no indication of erratic driving, and this case is a civil, first-offense drunken driving charge. *Felt*on is an example of case with many indications of impairment, notable for their absence in this case.

The "Catch and Release" PBT Was Unreasonable

Trooper Schmidt, in an *ad hoc* procedure, created the "community caretaker breath test," where a citizen who agrees to an intrusive search is thereby released, but he will be detained for investigation if he refuses. This extraordinary procedure is unreasonable and coercive, on its face. The notion that a police officer may search a citizen, 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, it is unprecedented.

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

The state argues that Mr. Kugler lacks standing to complain about the request for a PBT, since he declined to submit to it. This is mistaken; since, Mr. Kugler's lawful and appropriate declination of the PBT was improperly considered as a basis to detain, and arrest him. 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. *State v. Gibbs*, 252 Wis. 227, 31 N.W.2d 143 (1948). *Florida v. Bostick*, 501 U.S. 429 (1991).

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 Mr. 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 FORCED BLOOD DRAW WAS UNLAWFUL, AND THE RESULT SHOULD HAVE BEEN SUPPRESSED

The state concedes that the forced blood draw was unlawful under *Missouri v. McNeely,* 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). The state,

however, contends that suppression is not available to Mr. Kugler, as Trooper Schmidt was acting in good faith, on clear and settled precedent. Mr. Kugler argues that, at the time of the forced blood draw, Wisconsin law was no longer clear and settled. The state has ignored this point.

The state relies on *State v. Dearborn*, 2010 WI 84, 327 Wis.2d 252, 786 N.W.2d 97 (2010), and *State v. Bohling*, 173 Wis.2d 529, 494 N.W.2d 399 (1993). *Dearborn* held that the exclusionary rule is not a remedy, when the unlawful police action is, nevertheless, proven to have been done in good faith on well-settled case law. *Bohling* interpreted the United States Supreme Court case, *Schmerber v. California*, 384 U.S. 767 (1966). *Schmerber* allowed a warrantless, non-consensual blood draw, only under exigent circumstances. *Bohling* held that the dissipation of alcohol in a suspect's blood is an exigent circumstance. *Bohling*, however, misinterpreted *Schmerber*, as we now know from *McNeely*.

Decisions that pertain to unreasonable searches and seizures are "retroactive." The search and seizure of Mr. Kugler'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. 322, 131 S.Ct. 2419 (2011).

Trooper Schmidt's testimony as to good faith is unclear.

> 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).

Nevertheless, despite the vague nature of Trooper Schmidt's testimony, we should address the issue of Wisconsin caselaw.

Kugler's arrest occurred on December 15, 2012. Eleven months earlier, 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 explicitly rejected the argument that the Wisconsin case, *Bohling*, *supra*, correctly interpreted *Schmerber*.

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.

Mr. Kugler's blood was forcibly drawn eleven months after the Missouri court explicitly rejected *Bohling*, and while the *McNeely* case was pending before the United States Supreme Court. When Mr. Kugler was subjected to the forced blood draw, *Bohling* was no longer "clear and settled precedent." Rather, *Bohling* had been explicitly reject by the Missouri Supreme Court, and was pending before the United States Supreme Court. Therefore, the good-faith exception to the exclusionary rule does not apply to this case.

Signed and dated at Glendale, Wisconsin this _25th_ day of August 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 1,596 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 _25th_ day of August 2014.

Respectfully submitted,
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