STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

Appeal No. 14AP000823-CR

JESSICA ANN STOFFLET,

Defendant-Appellant.

OPENING BRIEF AND COMBINED APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR SAUK COUNTY, THE HONORABLE PATRICK TAGGART, PRESIDING

Respectfully submitted,
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1. Stofflet was pulled over for alleged lane deviations and speed fluctuations. Her eye was bloodshot, her speech was slow, and there was a moderate odor of intoxicants coming from her car. She admitted to drinking five and one-half hours earlier. Given the rainy conditions, law enforcement immediately administered a preliminary breath test ("PBT"). Did the Circuit Court err when it held that there was probable cause to administer the PBT?

2. If the PBT was illegally administered, should all evidence following its use have been suppressed? The Circuit Court made no explicit ruling on this issue, as it held that there was probable cause to administer the PBT.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant is not requesting oral argument or publication.

STATEMENT OF THE CASE AND FACTS

On June 9, 2013 Trooper Andrew J. Rau of the Wisconsin State Patrol observed a vehicle, the operator of which was later determined to be Stofflet,

traveling eastbound on I90/94. 38:7. Trooper Rau testified that the vehicle "swerve[d] over the white fog line and onto the shoulder." *Id.*; 38:21. Trooper Rau testified that the vehicle then "deviated within its lane and it also crossed over the white dotted line separating the right lane from the left lane." 38:8. According to Trooper Rau, the vehicle crossed onto the white dotted line three times. *Id.*

Trooper Rau stated on cross-examination that he did not remember and "didn't count" how many times Stofflet veered outside the lane, but ultimately testified "I said at least three, yeah. I remember at least three different times." 38:23. Trooper Rau's earliest observations were not recorded on video, including the alleged lane deviations. 38:21.

According to Trooper Rau, the vehicle was also varying its speed. *Id.* Immediately before being pulled over, the vehicle slowed to a speed of 35 miles per hour. *Id.*

Trooper Rau activated his emergency lights and stopped the vehicle. 38:9. The vehicle stopped safely on the side of the road. 38:25. Trooper Rau then made contact with the driver, Stofflet. 38:9. Stofflet told Trooper Rau that "[he] had scared her and she thought that [he] was following her, that she had somebody stalk her or follow her the other night." 38:10.

Trooper Rau testified that he detected a "moderate" odor of intoxicants coming from the vehicle and that Stofflet's speech was "a little slow, slurred." *Id.* On cross-examination, Trooper Rau conceded that he had never previously referred to Stofflet's speech as "slurred" in his reports—only as "slow." 38:28.

This was his first interaction with Stofflet and he had no frame of reference for how her voice would usually sound. 38:28.

Trooper Rau asked Stofflet how much she had to drink that evening. *Id.* Stofflet indicated that she had a "couple." *Id.* Her last drink, she told the officer, was at 11 o'clock that evening—five and one-half hours earlier. *Id.* She also stated that a drink had been spilled on her bag. *Id.* Trooper Rau testified that he observed her right eye to be bloodshot and glassy. 38:11. When asked where she was coming from, she indicated "Wisconsin Dolls." *Id.* On Exhibit One from the motion hearing, the video of the stop, she can be heard telling Trooper Rau she is a "dancer"—meaning she is a worker and not necessarily a patron of the establishment. 31.

Trooper Rau returned to his squad car. 38:29. On the video, he can be heard telling dispatch that it is his intention to give a PBT in order to determine whether further investigation is necessary. 31. At the motion hearing, Trooper Rau said he did not recall making this statement. 38:29. Although he contacted dispatch, Trooper Rau neglected to ask for a driver's license check at that time. 38:30.

Trooper Rau then returned to Stofflet's vehicle. 38:31. He informed Stofflet that he was going to give her a PBT in order to determine if further investigation was necessary. 38:31. Trooper Rau testified that his decision to give the PBT at this stage was motivated primarily by the existence of "inclement weather." 38:11. Trooper Rau testified that the PBT was a replacement for "coming out and doing field sobriety tests in the rain." *Id.* He described this as a "courtesy" to Stofflet. *Id.*

Trooper Rau believed that he had sufficient evidence to request field sobriety tests at that point and was under the impression that a "PBT is also a field sobriety test." 38:34.

Following the PBT result, Stofflet was *then* asked to do field sobriety tests. 38:12. Stofflet informed Trooper Rau that she was blind in one eye and had a pinched sciatic nerve. 38:15-16. Trooper Rau went ahead with the tests. *Id.* Trooper Rau then observed alleged "clues" which he believed to be indicative of intoxication. *Id.*

Following the field sobriety tests, Trooper Rau asked for another PBT. 38:19. He was not able to obtain an adequate sample. *Id.* Trooper Rau then arrested Stofflet for OWI. *Id.* Stofflet subsequently filed a motion to suppress evidence based on an unlawful administration of the PBT. 18:1-2.

At the motion hearing, Stofflet argued that there was insufficient evidence based on Trooper Rau's testimony to conclude that the statutory threshold for administration of a PBT—probable cause to believe that an OWI offense was occurring—had been met. 38:40-39-50. The statute, Stofflet argued, does not contain an exception for inclement weather. 38:48. Stofflet argued that because the State had failed to comply with the law, the test and all evidence subsequently derived from it should be suppressed. 38:49-50.

The State supported its position—that there was probable cause to administer the test—by repeatedly citing to an unpublished per curiam decision.

38:13, 50, 55-56.[1] It argued that the PBT was appropriate given both the evidence gathered by Trooper Rau and the existence of bad weather. 38:54. ("[E]xactly the sort of situation in which a PBT proves extremely useful.") Even if the PBT was suppressed however, the State argued that the resulting arrest—and other derivative evidence—was still valid. 38:57.

The Circuit Court then ruled in favor of the State, denying Stofflet's motion. 38:59. It held that the Wisconsin Supreme Court has created what can be labeled as "probable cause light" or "reasonable suspicion heavy" in assessing whether there is a proper basis to administer a PBT. *Id.* The Court focused largely on Stofflet's driving, and held that that standard had been satisfied:

> And the Court agrees with the State to the extent that the driving here was erratic and I give it significant weight here in the officer's determination that there was enough here for him to take the PBT.

38:59-60. The Circuit Court attributed to Stofflet an argument that the "inalterable" procedure in Wisconsin" is that field sobriety tests must always be given before a PBT. 38:60. It disagreed with that interpretation of the case law. *Id.* It held that "there are circumstances where field sobriety tests aren't appropriate" and that this was such a scenario. *Id.*

The Circuit Court then discussed the driving again, stating "And this is a situation where the officer had more than enough and the driving is a significant part of it." *Id.* While the Circuit Court did not observe what the officer testified to in its independent viewing of the video, it found Trooper Rau's testimony credible

[1] A violation of WIS. STAT. 809.23(3)(b).

as to events that were not captured on video. *Id.* It also held that *some* of the allegedly bad driving was captured on video. 38:61.

As to Trooper Rau's testimony concerning the driving, the Court stated "It wasn't established here as to whether the officer, when he was saying over the dotted line or over the fog line, was referring to crossing it or being upon it in some sense. I don't know." 38:61.

Regarding Stofflet's alleged speed fluctuations, the Court stated that "It's a little—it is hard to determine actually whether or not speeding up or slowing down is being caused by the traffic ahead of the defendant, but I ascribe that to inherent problems with video and the difference between what the video depicts and what an experienced officer is able to see as he is actually observing the conduct." *Id.*

The Circuit Court also gave some weight to the time of night which it believed was after bar time. 58:62. ("it's after bar time, it's a couple hours after, I think.") The Circuit Court did not give "much weight" to the testimony regarding Stofflet's slurred or slow speech. *Id.*

Even though Stofflet had provided a "fairly detailed statement" regarding her stalking experience and how and why it affected her driving—as well as how and why the odor of intoxicants was present in the vehicle—the Circuit Court held that Trooper Rau had no obligation to believe those explanations over an alternative explanation consistent with guilt. 38:63.

The Circuit Court then ruled as follows:

> Now, I haven't gone through the well-known statements of reasonable suspicion and the well-known statements of what it takes to have probable cause to arrest. I think they're so well-known and counsel are experienced enough to know what they are without my repeating them, but those are what I'm applying here to find, while not an easy measure ever because it's somewhere in between those two, I find there's more than enough probable cause of the sort called for by the *Renz* case for the administration of the PBT.

(38:63.)

Regarding the PBT's impact on the rest of the investigation, the Court stated that "at that point, given all of what had gone on before, the totality of the circumstances were that the officer had probable cause to arrest" Stofflet. *Id.* The additional tests following the PBT were "unnecessary." *Id.*

Stofflet pled guilty following the adverse decision and promptly appealed.

SUMMARY OF ARGUMENT

Before an officer can administer a PBT, they must have probable cause that "the person is violating or has violated" an OWI offense. WIS. STAT. § 343.303. Probable-cause in this context "refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop...but less than the level of proof required to establish probable cause for arrest." *Cnty. of Jefferson v. Renz*, 231 Wis.2d at 293, 316, 603 N.W.2d 541 (1999).

The PBT is a tool intended to assist law enforcement, in the scope of a properly conducted OWI stop, to bridge the gap between reasonable suspicion and probable cause to arrest. *See State v. Fischer,* 2010 WI 6, ¶ 32, 322 Wis.2d 265,

778 N.W.2d 629; *State v. Begicevic*, 2004 WI App 57, ¶ 10, 270 Wis.2d 675, 678 N.W.2d 293.

The case law therefore explicitly delineates between the amount of evidence required before an officer can make a suspect submit to field sobriety tests and the amount of evidence needed to take the next, more intrusive, step of requiring a PBT. *See Renz*, 231 Wis.2d at 310.

Here, the officer lacked sufficient evidence to require Stofflet to submit to a PBT. He chose to use the PBT anyway, taking a shortcut that is not authorized by statute. As a result, the PBT should obviously have been suppressed at the Circuit Court. Moreover, because Trooper Rau's testimony evinces at best a willing ignorance of the legal standards he is supposed to uphold and apply (and at worst a willing disregard of them) this case calls out for the judicial sanction of exclusion of evidence. In the alternative, evidence derived as a result of an unlawfully extended investigative detention should be suppressed under the "well-known" Fourth Amendment law discussed in the Circuit Court's oral ruling. *See Renz*, 231 Wis.2d at 310, *Florida v. Royer*, 460 U.S. 491, 500 (1983). As a final alternative, the PBT should be viewed as an illegal search, resulting in its suppression all derivative evidence.

STANDARD OF REVIEW

The application of a statute to a set of undisputed facts raises only a question of law that should be decided without deference to the trial court. *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 853, 434 N.W.2d 773 (1989). Constitutional issues are likewise reviewed de novo. *State v. Turner*, 136 Wis.2d 333, 344, 401 N.W.2d 827 (1987).

ARGUMENT

I. The Circuit Court erred when it held that Trooper Rau had probable cause to administer the PBT.

A. The legal standard

The administration of a PBT is controlled by statute, meaning that the legislature has put intentional limitations on when the PBT can and cannot be used. Specifically, our legislature has unequivocally stated that an officer *must* have probable cause before they subject a motorist to a PBT. WIS. STAT. § 343.303.

When asked to interpret the statute's use of the phrase "probable cause," the Wisconsin Supreme Court couched their analysis in context of a wide-ranging discussion about a properly conducted *overall* OWI investigation. *See Renz*, 231 Wis.2d at 310. The Court explicitly referenced what could be termed an 'ideal' OWI stop, one in which the Officer's escalating level of suspicion matches up neatly with an escalating law enforcement intrusion. *See Id.*

Thus, to stop an alleged drunk driver, police require "reasonable suspicion" that a violation is occurring or has occurred. *Renz*, 231 Wis.2d at 310. Only then are they allowed to conduct preliminary questioning and to make observations of the driver in a close setting. If, after making contact with the driver, the officer picks up further clues (but is still unsure as to whether a crime probably occurred) they can ask the driver to do field sobriety tests. *Id.* If after these tests the officer is still on the fence as to whether probable cause to arrest exists, they are empowered to use a PBT "to assist" in making that decision. *Id.* The PBT is thus designed to help law enforcement bridge the gap between reasonable suspicion and probable cause to arrest. See *State v. Fischer*, 2010 WI 6, ¶ 32, 322 Wis.2d 265, 778 N.W.2d 629.

In fact, the Wisconsin Supreme Court, after scrutinizing the legislative history, concluded:

> Thus, the overall scheme of these provisions is to allow officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed, if the arrest is challenged. This scheme makes the most sense if the officer may request a PBT before establishing probable cause for an arrest, to help determine whether there are grounds for arrest.

Renz, 231 Wis.2d at 304.

The PBT thus occupies a special place in the OWI investigation. Because it is intended to be used to help make an officer make a decision regarding arrest—arguably the most important decision from a liberty-preservation perspective—it requires a greater degree of evidentiary justification than the less-intrusive investigative techniques that have preceded it.

Compare, for example, the level of proof needed for a PBT to the level of proof required for field sobriety test (which in turn requires a greater level of proof than is needed to conduct the initial stop). In order to escalate a stop and to order a suspect to complete field sobriety tests, the officer must be able point to "information that [makes] it reasonable to investigate further" *Cnty. of Dane v. Campshure*, 204 Wis.2d 27, 32, 552 N.W.2d 876 (Ct. App. 1996); *see also Renz*, 231 Wis.2d at 310; *State v. Burmeister*, No. 2013AP106-CR, ¶ 9, unpublished slip. op. (Wis. Ct. App. Sept. 17, 2013).

In contrast, in order to take the next step and require that a defendant give a roadside sample of their breath, the officer needs something more—probable cause to believe that a crime is likely being committed. *Renz*, 231 Wis.2d at 310.

The idea that a PBT is intended to help officers make the decision, following a properly conducted investigation, whether there is sufficient evidence to arrest comes directly from the statute itself and is embodied in the ensuing case law. For example, in *State v. Felton*, the Court of Appeals embraced the view of a PBT as a kind of 'final step' that could be used by officers to tip the scales toward arrest in a situation where the evidence had surely risen above reasonable suspicion but had not *quite* risen to the level of probable cause to arrest. *State v. Felton*, 2012 WI App 114, ¶ 10, 344 Wis.2d 483, 824 N.W.2d 871.

Both the Circuit Court and the State are therefore mistaken if they believe that Stofflet's position is that a PBT must *always* follow field sobriety tests. If one views the legal tests properly—as standing for the concept that we are aiming at a

specific 'triggering' amount of evidence that allows the administration of the PBT—there will always inevitably be cases where the evidence at hand rises to that level *without* field sobriety tests being conducted.

For example, a highly suggestive accident and an egregiously intoxicated driver would likely eliminate the need for field sobriety tests. Courts facing that kind of fact pattern have therefore held that the administration of a PBT is proper absent field sobriety tests. *See for example Village of Grafton v. Schlegel*, No. 2013AP2521, unpublished slip op. (Wis. Ct. App. May 7, 2014); *Cnty. of Fond du Lac v. Niquette*, No. 2012AP2708, unpublished slip op. (Wis. Ct. App. April 25, 2013); *Dane Cnty. v. Koehn*, No. 2012AP1718, unpublished slip op. (Wis. Ct. App. Jan. 10, 2013); *State v. Hamilton*, No. 2011AP1325-CR, unpublished slip op. (Wis. Ct. App. Nov. 23, 2011).

In contrast, many of the other cases interpreting the PBT standard—including *Felton*—give analytical weight to field sobriety tests and other indicia above and beyond the kind of rote observations at issue in this case. *See for example State v. Litke*, No.2103AP1606-CR, unpublished slip op. (Wis. Ct. App. Mar. 11, 2014) (driving vehicle with headlights off on Friday night, admission of drinking just a few blocks away and "wobble" during field sobriety tests); *State v. Brinkmeier*, No. 2013AP15-CR, unpublished slip op. (Wis. Ct. App. August 1, 2013) (erratic driving including a failure to obey traffic signals and multiple clues on field sobriety tests); *Village of Muscoda v. Anderson*, No. 2012AP2216, unpublished slip op. (Wis. Ct. App. May 16, 2013) (failure to perform walk and

turn test and the presence of half-empty, partially hidden vodka bottle in car).

This idea of 'weighing' evidence to ascertain whether some trigger point has been met is explicitly discussed in *In re Roberts*, in which the Court of Appeals held that even if the evidence from the field sobriety tests did not contribute *a lot*, they contributed *something* and it is that *something* that helps law enforcement over the probable cause 'hump.' *See In re Roberts,* No. 2010AP2899, unpublished slip op. (Wis. Ct. App. June 30, 2011).

B. Trooper Rau's conduct does not satisfy the legal standard.

In contrast, this case presents no strong evidence supporting probable cause to administer the PBT. For example, there was no accident, Stofflet was not egregiously drunk, and she was certainly not trying to conceal half-empty vodka bottles in her car.

Rather, the Circuit Court held that probable cause could largely be derived from her driving. *See* 38:59-60. Thus, it credited the testimony of Trooper Rau on this point (who failed to record those driving behaviors that are arguably most egregious, only disclosed them when testifying, and even then could not accurately recall how many times Stofflet is alleged to have touched or crossed the center line) despite also holding that "it wasn't established" exactly what her driving behaviors were. 38:61.

Thus, Stofflet's alleged lane deviations—coupled with the variable speed (recalling also that the Court stated it was unable to accurately discern from the video whether those fluctuations were caused by traffic patterns) were the

deciding pieces of evidence in the Circuit Court's oral ruling. *See* 38:59-60.

Clearly, poor driving *might* support a stop—but undersigned counsel is unable to find a single case where bad driving alone was sufficient evidence capable of skipping past all intervening levels of reasonable suspicion and going straight to probable cause to administer a PBT. *Cf. State v. Post*, 2007 WI 60, ¶ 2, 301 Wis.2d 1, 733 N.W.2d 634 (swerving within lane does not in and of itself automatically create reasonable suspicion supporting traffic stop). Setting aside the fact that the Court's oral ruling inadvertently highlights glaring issues with that evidence in and of itself, it should be self-evident that poor driving alone does not create probable cause to administer a PBT.

So what evidence *did* Trooper Rau have after pulling Stofflet over? Simply put, he had an admission of drinking five and-one-half hours earlier, an odor,[2] the later hour, and a bloodshot and glassy eye. These are not clear-cut indicia of intoxication—and are therefore clearly not sufficient for probable cause to administer to a PBT, especially in light of other facts and circumstances weighing against probable cause.

That is, Trooper Rau also had innocent explanations for at least some of these factors—and while the Court is correct that the Trooper is not *required* to accept her explanations at face value, he is still after all supposed to act "reasonably" during the stop of her person. One would after all hope that a

[2] Importantly, the odor was coming from her vehicle generally and not specifically her person. She also had an innocent explanation for the odor. This is not in and of itself greatly suspicious behavior. *See State v. Gonzalez*, unpublished slip op., (Wis. Ct. App. May 8, 2014).

"reasonable" officer would seek to verify their suspicions in light of all the facts and evidence they have acquired, not just leap to inappropriate and unwarranted conclusions.

In any event, Trooper Rau's own words on Exhibit 1 indicate he was himself unsure whether there was sufficient evidence to proceed further—telling both dispatch and Stofflet that the purpose of the PBT was to determine whether further investigation was necessary. 31.

An argument that there was somehow probable cause to administer the PBT based on this low quantum of evidence therefore threatens to make a mockery of the standard discussed in *Renz*. The State cannot escape the fact that Trooper Rau gave the PBT here *not* because there was any objective justification, but because he was hoping for an excuse to stay out of the rain. For the State to come in after the fact and call that "probable cause" is a laughable distortion of enshrined precedent in the Courts of this State.

Because there was no probable cause to support the administration of the PBT, it should have been suppressed. The Circuit Court was egregiously mistaken—inasmuch as it even bothered to give any legal basis for its decision[3]—when it held otherwise. Accordingly, the defense motion should have been granted.

[3] See for example the Court's decision not to explicitly discuss the legal grounds for its decision because they were so "well-known." 38:63.

II. Following the unlawful administration of the PBT, any derivative evidence must likewise be suppressed.

The Circuit Court held that once the PBT was conducted, further investigation was "unnecessary" as probable cause to arrest existed following the PBT. 38:63.

In a sense, this is an implicit ratification of Trooper Rau's words on the tape—that the PBT was the *sole* reason for this investigation to proceed further. 31. The State is therefore incapable of meeting its burden that any "independent source" exists for that evidence obtained following the illegally administered PBT. *See State v. Carroll*, 2010 WI 8, ¶ 45, 322 Wis.2d 299,778 N.W.2d 1 (citing *Murray v. United States*, 487 U.S. 533, 540 (1988)). The decisions to conduct more field sobriety tests, to do another PBT and ultimately to arrest Stofflet were a response to the initial, unlawfully obtained PBT result.

If illegal law enforcement activity occurs, this Court must suppress *all* evidence "obtained by exploitation of that illegality." *State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis.2d 86, 700 N.W.2d 899 (citing *Wong Sun v. United States*, 371 U.S. 471, 485-488 (1963)). That rule applies to statutory violations, *Knapp*, 2005 WI 127, ¶ 25. An argument that the statute does not expressly provide for exclusion or suppression—and that these remedies are therefore unavailable—is not supported by case law. To the contrary, the Wisconsin Supreme Court has held "that evidence obtained in violation of a statute (or not in accordance with the statute) may be suppressed under the statute to achieve the objectives of the

statute, even though the statute does not expressly provide for the suppression or exclusion of the evidence." *State v. Popenhagen*, 2008 WI 55, ¶ 62, 309 Wis.2d 601, 749 N.W.2d 611. Here, it is clear that the objective of the statute—striking a balance between the privacy of individuals and the detection of intoxicated driving—are served by exclusion.

Furthermore, the "judicial remedy" of exclusion involves, at its core, a policy-centric decision. *See State v. Dearborn*, 2010 WI 84, ¶ 15, 327 Wis.2d 252, 786 N.W.2d 97 (2010). That remedy should be utilized when there is a compelling argument that suppression will have a deterrent effect on future improper police conduct. *See Dearborn,* 2010 WI 84, ¶ 35.

Exclusion in this case is responsive to precisely these kinds of concerns. After all, Trooper Rau's testimony evinces ignorance of the law and a willful desire to take shortcuts that are not legislatively authorized. The law he violated expresses the idea that citizens should not have testing devices jammed into their mouths by armed agents of the State while alone on the side of the road without at least *some* compelling argument as to why that intrusion is warranted. Even suspected drunk drivers have rights, whether they be created by statute or enshrined in the Constitution. Agents of the State should not be encouraged to so easily violate them, as they did here.

At the same time, public policy is on Stofflet's side in a broader sense. If law enforcement can use the PBT on the barest suspicion of OWI, then what sense is there to the careful framework laid out in *Renz*? Why would law enforcement

ever administer field sobriety tests, check someone's license, or do any kind of real work if all that is needed, per the State's view, is a simple PBT? Such a result would erode the carefully constructed OWI enforcement scheme in this State, one that seeks to balance the rights of individuals against public safety concerns.

Accordingly, suppression is warranted on policy as well as legal grounds.

III. In the alternative, the evidence should be suppressed as it was derived from an unreasonable extension of an otherwise lawful "investigative detention."

The stop itself is also governed by basic legal protections derived from both the State and Federal Constitution—namely that both the initial stop and that stop's ensuing scope *must* be reasonable. *Renz*, 231 Wis.2d at 310, *Florida v. Royer*, 460 U.S. 491, 500 (1983).

"The State has the burden to show that any seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope." *State v. Gammons*, 2001 WI App 36, ¶ 11, 241 Wis.2d 296, 625 N.W.2d 623 (citing *Royer*, 460 U.S at 500). Law enforcement may not use the traffic stop as a means of conducting open-ended investigation that is not linked to a reasonable suspicion of wrongdoing. See *Id.* ¶ 24.

In addition, for an investigative detention to pass Constitutional muster, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicions in a short period of time." *Royer*, 460 U.S. at 500. The Wisconsin Court of Appeals has therefore held

that "[i]n assessing the permissible length of a stop, we must determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person." *State v. Quartana*, 213 Wis.2d 440, 448, 578 N.W.2d 618 (Ct. App. 1997) (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (emphasis added).

In this case, Trooper Rau's testimony displays that he was engaged in an impermissibly "open-ended" investigation. To the extent that he lacked sufficient evidence to continue the investigation properly, Trooper Rau made a choice to use the *more* invasive technique of a PBT in order to determine whether further investigation was necessary. This was a violation of settled law regarding the scope of an investigative detention.

In any case the remedy is the same: exclusion of the PBT and all derivative evidence. *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Knapp*, 2005 WI 127, ¶ 24.

IV. As a final alternative, Stofflet invites this Court to consider whether a preliminary breath test is a search for purposes of the State and Federal Constitution.

To this date, courts of this state have largely punted on the issue of whether a PBT is a search, the administration of which therefore requires the application of constitutional protections. *See Renz*, 231 Wis.2d 293, 311 fn. 14.

That holding is out of touch with the case law of other States and is in tension with language in controlling US Supreme Court case law. For example, in *Skinner v. Railway Labor Executives' Assn.* the Court compared breath tests to blood tests and stated that:

> Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber,* should also be deemed a search…

Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617 (1989).

Following that language to its logical conclusion, the Supreme Court of Kansas held in 2005 that at least *some* PBTs are searches for purposes of the Fourth Amendment. *State v. Jones*, 279 Kan. 71, 106 P.3d 1 (Kan. 2005). The Court held that if one accepts the common-sense proposition that a "search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed" then it makes sense to conclude that a procedure which forces a subject to give a sample of deep-lung air 'not normally held out to the public" is a search. *Id.* Most recently, Minnesota has also embraced the view that a PBT can constitute a search. *See State v. Netland*, 762 N.W.2d 202 (Minn. 2009) (applying exigent circumstances exception to PBT). Alaska had already embraced this view many years prior to the *Renz* decision. *See Leslie v. State,* 711 P.2d 575 (Alaska Ct. App. 1986) (PBT is a search for purposes of Fourth Amendment).

If this Court is prepared to conclude that a PBT is a search for the purposes of the Fourth Amendment, the outcome is clear: there was no warrant, no exigent circumstances, no consent, and no probable cause. Accordingly, the PBT

was an illegal search and all derivative evidence following it must be suppressed. *See Wong Sun*, 371 U.S. 471 (1963); *Knapp*, 2005 WI 127, ¶ 24.

CONCLUSION

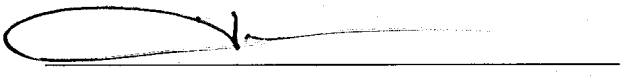
For the reasons explained here, Stofflet respectfully asks that the order denying the defense motion be reversed, and the requested evidence be excluded.

CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in Wis. Stat. sections 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 footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 5,235 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to Wis. Stat. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

Dated this 23 day of June, 2014.



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CERTIFICATION OF APPENDIX

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:

I. a table of contents;
II. judgment of circuit court, and
III. 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 conclusion 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 notion that the portions of the record have been so reproduced to preserver confidentiality and with appropriate references to the record.

Jonas B. Bednarek
State Bar No. 1032034

CERTIFICATION OF SERVICE

I hereby certify that on this 23 day of June, 2014, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 23 day of June, 2014.

Amber Ritschard

Amber Ritschard