STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT 2

Appeal No. 2015AP000579 CR
Washington County Case No. 14CF144

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH A. WIEDMEYER,

Defendant-Appellant.

AN APPEAL FROM THE DENIAL OF THE DEFENDANT-APPELLANT'S SECOND MOTION IN LIMINE, ENTERED BY THE HONORABLE ANDREW T. GONRING, WASHINGTON COUNTY CIRCUIT COURT

DEFENDANT-APPELLANT'S AMENDED BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented in this appeal involves statutory interpretation. Oral argument is unlikely to be of assistance to the Court and is not being requested. However, the issue is one that affects numerous cases statewide. As such, the Defendant-Appellant is requesting publication.

STATEMENT OF THE ISSUE

I. DID THE CIRCUIT COURT ERR IN DENYING MR. WIEDMEYER'S SECOND MOTION IN LIMINE?

STATEMENT OF THE CASE

A criminal complaint was filed on April 4, 2014 charging Mr. Wiedmeyer with OWI – Fifth Offense and Operating after Revocation in violation of Wis. Stat. §§ 346.63(1)(a) and 343.44(1)(b) (1:1). The OWI charge was based on his admission to taking prescription medication (1:3). He had a preliminary hearing on June 20, 2014 and was bound over for trial (9:1). An Information was filed reflecting the same charge (13:1).

This case was scheduled for a jury trial on November 3, 2014. However, Mr. Wiedmeyer, through counsel, filed a Motion for Change of Venire due to the publicity surrounding the case and the fact that his son, Keith L. Wiedmeyer, killed a woman in a drunk-driving accident on Christmas Eve 2012 (18:1). That accident occurred near the scene where Keith A. Wiedmeyer, the Defendant-Appellant, was arrested in this case (which also involved an accident) (18:1). The media consistently mentioned Mr. Wiedmeyer's son and the homicide he was convicted of in many of the stories about this case (18:1). At the hearing on the motion for an out-of-county jury, Mr. Wiedmeyer instead waived his right to a jury altogether and requested a court

trial (24:1). The request was granted and a court trial was scheduled for January 5, 2015.

In late October 2014, undersigned counsel was reviewing the Implied Consent statute, Wis. Stat. § 343.305, and came across the requirements contained in section 343.305(6)(a):

> Chemical analyses of blood or urine ***to be considered valid under this section*** shall have been performed substantially according to methods approved by the laboratory of hygiene and by an individual possessing a valid permit to perform the analyses issued by the department of health services. The department of health services shall approve laboratories for the purpose of performing chemical analyses of blood or urine for alcohol, controlled substances or controlled substance analogs and shall develop and administer a program for regular monitoring of the laboratories. A list of approved laboratories shall be provided to all law enforcement agencies in the state. Urine specimens are to be collected by methods specified by the laboratory of hygiene. The laboratory of hygiene shall furnish an ample supply of urine and blood specimen containers to permit all law enforcement officers to comply with the requirements of this section.

(emphasis added). Mr. Wiedmeyer's blood was tested several times at the State Crime Laboratory in Milwaukee. One analyst tested it for alcohol and it was negative. Analyst Leah Macans then tested the sample twice more for drugs and obtained positive results for morphine and zolpidem, both prescription medications. After reviewing § 343.305(6)(a), counsel checked the Department of Health Services website

and was unable to find a permit issued for the testing of blood for anything other than alcohol. An open-records request confirmed that Ms. Macans has a valid permit to test blood for alcohol but does not have a permit to test for anything else (*See* 35:4-7).

On December 2, 2014 Mr. Wiedmeyer through counsel filed a Second Motion in Limine asking the court not to admit the lab report or Ms. Macans' testimony unless the State proved compliance with the requirements of § 343.305(6)(a) (35). A hearing was held on January 5, 2015 and Ms. Macans testified that she does not have a permit to test blood for controlled substances or other drugs (38:6). She only holds a permit to analyze blood samples for alcohol (38:6). The court ordered the State to provide a written argument on the issue within three weeks and Mr. Wiedmeyer was given three weeks to respond to the State's brief, with an oral ruling on the matter scheduled for February 23, 2015.

The State in its brief conceded that Ms. Macans did not have a permit to perform the analyses she performed on Mr. Wiedmeyer's blood (39:1, 2). However, the State also admitted that the lab itself is not approved for performing chemical analyses of blood for controlled substances or controlled substance analogs (39:1). Further, the

Department of Health Services has not developed and does not administer a program for monitoring the laboratory (39:1). All of these are required by § 343.305(6)(a) and none of these legislatively imposed safeguards are in place. There is no oversight of the lab whatsoever with regards to the testing of blood samples for controlled substances. Pursuant to the statute, Mr. Wiedmeyer argued that the chemical analyses of his blood are invalid.

Following briefing on the issue, the Washington County Circuit Court, Hon. Andrew T. Gonring presiding, issued an oral ruling denying the motion (41). The court provided several grounds for its denial. First, the court held that § 343.305(6)(a) is irrelevant in an OWI prosecution (41:6-8). Second, the court found that the legislature's intent to encourage vigorous prosecutions of OWI offenses expressed in Wis. Stat. § 967.055 conflicts with the requirements of § 343.305(6)(a) and leads to an absurd result (i.e., the inadmissibility of evidence that would otherwise be admissible) (41:8-10). Third, the court found that § 343.305(6)(a) "might be inoperative for want of a subject" (41:10). The court then offered to allow Mr. Wiedmeyer to seek a permissive appeal (41:12-13). Mr. Wiedmeyer did so, this Court granted the Petition, and this appeal follows.

I. ARGUMENT

Standard of Review

"This case requires statutory interpretation, and the standard of review for statutory interpretation is de novo." *Ho-Chunk Nation v. Wi. Dept. of Revenue*, 2009 WI 48, ¶ 11, 317 Wis.2d 553, 766 N.W.2d 738.

A. SECTION 343.305 HAS APPLICATIONS IN A CRIMINAL OWI PROSECUTION

The court found that section 343.305(6)(a) by its terms specifically applies to section 343.305, and that Mr. Wiedmeyer is not being prosecuted under section 343.305 (41:6-7). Because of that, "the Court does not see where 343.305(6)(a) applies in the first place. It says 'valid under this section.' We are not dealing with that section. So the Court denies the motion on that ground, on the grounds that section 343.305(6)(a) is irrelevant to the issue before the Court." (41:8).

Wis. Stat. § 343.305 is not wholly divorced from a criminal OWI prosecution as held by the trial court. The statute itself discusses one of its applications to admissibility of evidence in criminal trials. Section 343.305(5)(d) states that "the results of a test

administered in accordance with this section are admissible on the issue of whether a person was under the influence . . . ." This is true "[a]t the trial of any civil *or criminal* action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence . . . ." Wis. Stat. § 343.305(5)(d). The results "shall be given the effect required under s. 885.235." *Id.* Section 885.235 addresses the admissibility and weight to be given to chemical tests for intoxication. However, it does not cover chemical tests for controlled substances or other drugs (apart from restricted controlled substances) unless alcohol is also present in the sample. *See* Wis. Stat. § 885.235(1g)(a)(alcohol level greater than 0.0 but less than 0.08 is admissible to prove impairment by a combination of alcohol and drugs).

Although Section 343.305 is commonly referred to as the implied consent statute—and it does contain the State's implied consent law—the issue of implied consent is not the statute's sole focus. The actual title to the statute is "Tests for intoxication; administrative suspension and court-ordered revocation." The implied consent portion of the statute deals with *obtaining* the sample from the driver (and the consequences of refusing to submit such a sample).

Section 343.305(6)(a) has nothing to do with implied consent. It pertains solely to regulating the analyses of samples once they have been taken-whether consent was given or not. Obviously, by the time the sample is analyzed the suspect has long since either consented or refused the testing. The manner in which the sample was obtained has no bearing whatsoever on the qualifications of the analyst who tests the sample or the credentials of the lab at which testing occurs.

Further, the results of chemical analyses of blood are wholly irrelevant in a refusal prosecution. The presence—or, indeed, absence-of intoxicants, controlled substances, controlled substance analogs, or other drugs in the defendant's blood has nothing to do with whether a refusal to submit to the test was proper. The only way a refusal is proper is if probable cause did not support the arrest, the suspect was not properly advised under the implied consent law, or the suspect refused the test due to a physical inability to submit to the test. *See* Wis. Stat. 343.305(9)(a)5a, b, c. The *only* time the results of a chemical analysis of a defendant's blood, breath, or urine are relevant is in a civil or criminal prosecution for an intoxication-related offense, including all OWI-related offenses. Section 343.305(6)(a) sets the standards that

determine the validity of such chemical analyses. It necessarily applies to the only proceedings in which the analyses are relevant. If Section 343.305(6)(a) has no application in a criminal prosecution for OWI then it has no application anywhere-the entire subsection is rendered superfluous, and "[i]t is a cardinal rule of construction that no part of a statute should be rendered superfluous by interpretation." *State v. Ozaukee County Bd. Of Adjustment*, 152 Wis.2d 552, 449 N.W.2d 47 (Ct. App. 1989) (citing *State v. Morse*, 126 Wis.2d 1, 5, 374 N.W.2d 388, 390 (Ct.App.1985)).

The only case to squarely address the admissibility of test results as related to what is now Section 343.305(6)(a) is *State v. Peotter*, 108 Wis.2d 359, 321 N.W.2d 265 (1982). The relevant facts and discussion are set forth below:

> A drug and alcohol analyst with the State Laboratory of Hygiene, Thomas C. Doran, was called to testify as the state's last witness. Doran received the defendant's blood sample on June 24, 1980, and performed a gas chromatography technique on the specimen which revealed a blood ethanol level of 0.171 percent by weight. Although Doran testified as to his educational and employment history, there was no proof or correlative objection at that time that he possessed a valid permit pursuant to sec. 343.305(10)(a), Stats.[1]

[1] Section 343.305 was repealed and rewritten in 1987, and the section containing the permit requirement was renumbered from 343.305(10)(a) to 343.305(6)(a).

The case was tried without a jury. The defendant was found guilty and appealed. The court of appeals reversed the conviction. In this review the state alleges that the court of appeals has exceeded its scope of review in predicating its reversal on the existence of a possible, rather than a reasonable, hypothesis of innocence. Correspondingly, the defendant cross-appeals, contending that the state failed to prove, beyond a reasonable doubt, that the defendant committed the offense. Additionally, the defendant alleges that the chemical analysis of his blood was improperly considered by the trial court in the absence of proof that the analyst possesses a valid permit, pursuant to sec. 343.305(10)(a), Stats.

Doran, a technician with the State Laboratory of Hygiene, testified that his analysis revealed that the defendant's blood ethanol level was 0.171 percent by weight. The defendant did not interpose a timely objection to Doran's testimony; however, he mentioned in his closing argument that failure to comply with the statutory requisites contained in sec. 343.305(10)(a), Stats., rendered the results of the chemical analysis invalid. Conversely, the state contends, and we agree, that the defendant's failure to object to the admissibility of these results constituted a waiver on this issue of admissibility.

The defendant contends that the mandatory language contained in sec. 343.305(10)(a), Stats., requires that, for the court to give any weight to the testimony of the technician performing the chemical analysis, the party offering the testimony must introduce evidence that on the date the test was conducted the technician possessed a valid permit issued by the Department of Health and Social Services. Although a literal reading of the statute is susceptible to the defendant's interpretation, his failure to object to the admissibility of the analyst's results in a timely fashion precludes him from raising this objection on appeal. *See*

> *Bennett v. State*, 54 Wis.2d 727, 735-36, 196 N.W.2d 704 (1972) (adversary's failure to object at the introduction of objectionable testimony results in a waiver of any contest to that testimony).
>
> We hold that the dispute regarding the validity of the technician's permit in this case focuses on the foundational nature rather than the admissibility of his testimony. We adhere to the well-established principle that "[a] rule of Evidence not invoked is waived." 1 Wigmore, Evidence, sec. 18 at 321 (3d ed. 1940) (emphasis in original). Dean Wigmore, in his treatise on the law of evidence, discusses the necessity of a timely objection.
>
> "s 18. The Objection. The initiative in excluding improper evidence is left to the opponent,--so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is waived."
>
> *Id.* (emphasis in original). *E.g.*, *Bennett v. State*, 54 Wis.2d at 735-36, 196 N.W.2d 704; *Nadolinski v. State*, 46 Wis.2d 259, 267-68, 174 N.W.2d 483 (1970). We adhere to the well-established principle in Wisconsin and traditional evidentiary law in holding that the defendant's failure to object to the absence of foundational testimony precludes him from asserting his objection on appeal.

Peotter, 108 Wis.2d at 364–67 (footnotes omitted). The Court's holding was that, absent an objection to a lack of foundation for the evidence, the State does not have to affirmatively establish compliance with § 343.305(6)(a) for

the analyst's testimony to be admissible.[2] Hence, the Court referred to the dispute as one focused on the foundational nature rather than admissibility in that particular case.

A dispute over the foundation for evidence is not the same as a dispute over the weight the evidence should be given by the factfinder. Foundational evidence is "[e]vidence that determines the admissibility of other evidence." BLACK'S LAW DICTIONARY (8th ed.) 597. The Supreme Court in *Peotter* stated that the requirements of 343.305(6)(a) are foundational. In order for the evidence in this case to be admissible the State must establish the following:

1. The analyses were performed substantially according to methods approved by the laboratory of hygiene;

2. The analyst had a valid permit to perform the analyses issued by the Department of Health Services;

3. The laboratory was approved by the Department of Health Services for the purpose of performing

[2] Peotter failed to object for good reason; the analyst in question did, in fact, have a valid permit. *Id.* at n. 6. The State never established that because Peotter never questioned it. His attorney merely mentioned in closing that no permit was presented at trial and that the results were therefore invalid (without having made a timely objection). Mr. Wiedmeyer made a timely objection to the admissibility of the lab report and Ms. Macans' testimony.

chemical analyses of blood or urine for alcohol, controlled substances or controlled substance analogs; and

4. The Department of Health Services administers a program for the monitoring of the labs.

The State conceded that it cannot lay the statutorily required foundation. The test results are invalid and the evidence is not admissible.

There has also been litigation related to the admissibility of evidence in OWI prosecutions due to noncompliance with other subsections of Section 343.305. Although there is case law stating that suppression would "not necessarily be" the remedy for an officer's failure to reasonably convey the informing the accused warnings under § 343.305(4), the logic behind those rulings does not apply to violations of § 343.305(6)(a). *See State v. Piddington*, 2001 WI 24, ¶¶ 34-36, 241 Wis.2d 754, 623 N.W.2d 528; *State v. Zielke*, 137 Wis. 2d 39, 51, 403 N.W.2d 427 (1987) ("[E]ven though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility of results and use of the fact of refusal, nothing in the

statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats. [now § 343.305(4)], prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle.").

Violations of § 343.305(6)(a) are different in that there *is* language in the statute that specifically says that the chemical test evidence is valid only if taken in accordance with its terms. *See Winnebago Cnty. v. Christenson*, 2012 WI App 132, ¶ 20, 345 Wis.2d 63, 823 N.W.2d 841 (referring to violations of Section 343.305(6)(a) as rendering test results "automatically inadmissible.")[3]; *State v. Felton*, 2012 WI App 114, ¶ 12, 344 Wis.2d 483, 824 N.W.2d 871 (holding that Section 343.305(6)(a) provides the assurances of accuracy necessary for blood test results to be received as evidence at trial). Section 343.305(4) does not contain such language and the *Piddington* and *Zielke* Courts therefore declined to suppress the results.

Still, even these cases show that Section 343.305 is not irrelevant in criminal OWI prosecutions: even absent

[3] *Winnebago Cnty. v. Christenson* is an unpublished decision and is being cited for persuasive authority only pursuant to Wis. Stat. (Rule) § 809.23(3)(b). A copy of the opinion is included in the Appendix.

the language referring to validity in Section 343.305(6)(a), the State loses the automatic admissibility of the test results and cannot use evidence of the refusal at trial when the defendant was not properly read the informing the accused form. *Zielke*, 137 Wis. 2d at 51. When the State cannot rely on automatic admissibility of the test results, "the State would have to establish the admissibility of the blood test, *including establishing a foundation*." *Piddington*, 2001 WI 24, ¶ 34 (emphasis added). The *Peotter* Court specifically held that Section 343.305(6)(a) is the foundation that must be laid for test results to be admissible.

For the reasons stated above, the circuit court erred in finding that Section 343.305(6)(a) is irrelevant in a criminal OWI prosecution.

B. SECTION 343.305(6)(a) IS NOT VOID FOR LACK OF SUBJECT MATTER

The trial court next found that Section 343.305(6)(a) "might be inoperative for the want of a subject." (41:10). For this analysis, the court relied on *State ex rel Spaulding v. Elwood*, 11 Wis. 17 (1860), which was a case discussing a statute creating a popular vote over the issue

of whether the City of Ripon should be annexed from Fond du Lac County to Green Lake County. The Court held that if the voters disapproved of the annexation, the statute would cease to have any further effect because there would be nothing upon which the other provisions of the law could operate due to the fact that Ripon would not be annexed. *Id.* at 24-25. That is not the case with Section 343.305(6)(a).

Section 343.305(6)(a) tasks the Laboratory of Hygiene with approving the methods used to analyze blood and urine samples, requires the analyst to have a permit to perform that analysis issued by the Department of Health Services, and requires the Department of Health Services to approve the labs and develop and administer a program for regular monitoring of the labs. The subject matter of the statute is intact. We still have laboratories and analysts who conduct testing of blood and urine samples, and we still have a Department of Health Services that is supposed to be issuing permits and approving and monitoring the labs. The analyst in this case, Ms. Macans, never applied for a permit to test samples for controlled substances (38:14) so we do not know what the Department of Health Services would have done if she had. The Department has not developed and does not administer a program for regular monitoring of the

labs, and the lab used in this case is not approved by the Department of Health Services for the testing of blood samples for controlled substances. However, the fact that Section 343.305(6)(a) is not being complied with does not in any way mean that it lacks a subject. The subject is clearly the regulation of the analysts and laboratories that conduct analyses of blood and urine for alcohol, controlled substances, controlled substance analogs, and other drugs. There have been no developments, such as the election in *Spaulding*, that would render Section 343.305(6)(a) inoperative. The statute does not lose its subject matter simply because Ms. Macans and the Department of Health Services failed to comply with it. The circuit court's denial of the motion based on *Spaulding* was also erroneous.

C. SECTION 343.305(6)(a) IS NOT PREEMPTED BY SECTION 967.055

The court's third reason for denying the motion was that the legislature's intent to encourage vigorous prosecutions of OWI offenses expressed in Wis. Stat. § 967.055 conflicts with the requirements of § 343.305(6)(a). Section 967.055 has no effect on Section 343.305(6)(a), nor does it affect the manner in which statutes are to be

interpreted. It places no restrictions on trial courts whatsoever:

> The very statute leads to the contrary inference. It is not the court's discretion that is limited but the prosecutor's. The statute requires the prosecutor to apply to the court, "if the *prosecutor* seeks to dismiss or amend a charge." (Emphasis supplied.) . . . The court's discretion to dismiss is unfettered by the statute upon which the state relies. While sec. 967.055(2) was apparently not in effect at times pertinent to this case, the state appears to argue that it declares the legislature's presently intended limitation on trial court discretion. As pointed out above, it does nothing of the kind. To the extent sec. 967.055(2) is relevant at all, it shows a legislative intent to curtail a *prosecutor's* right to seek a dismissal. It has nothing to do with the power of a court in an instance when general discretionary facts could trigger a dismissal by the court.

State v. Brooks, 113 Wis.2d 347, 358-59, 335 N.W.2d 354 (1983). The same reasoning applies in this case. Section 967.055 places restrictions on prosecutors, and has nothing to do with the court's interpretation of another statute or the admissibility of evidence. The trial court erred in denying Mr. Wiedmeyer's motion on the ground that the requirements of Section 343.305(6)(a) conflict with Section 967.055.

CONCLUSION

For the reasons stated above, the circuit court erred in denying Mr. Wiedmeyer's Second Motion in Limine and he

respectfully requests that this Court reverse the decision and order the results of the chemical analyses of his blood and the analysts testimony excluded from use at trial.

Respectfully submitted this ___ day of August, 2015

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c) Stats. for a Brief and Appendix produced with a monospaced font and consists of ___ pages.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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.

I further certify that the electronic and paper copies of this brief are identical.

Dated this ___ day of August, 2015.

_____
Brian M. Borkowicz

APPENDIX

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