STATE OF WISCONSIN

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

DISTRICT II

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH WIEDMEYER,

Defendant-Appellant.

AN APPEAL FROM AN ORDER DENYING A MOTION TO EXCLUDE EVIDENCE, ENTERED IN WASHINGTON COUNTY CIRCUIT COURT, HON. ANDREW T. GONRING, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

Brian Borkowicz
Law Office of John A. Best
State Bar No. 1056646
1797 Barton Ave.
West Bend, WI 53090
(262) 335-2605

Attorney for Defendant-Appellant

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INTRODUCTION

Although "[i]t is undisputed that the analyst who tested Wiedmeyer's blood for controlled substances did not have a valid permit to test blood for controlled substances," the State goes on to say "The issue is whether the analyst's lack of a permit renders the chemical analysis is [sic] inadmissible at Wiedmeyer's OWI trial." (State's Brief at 4). The analyst's lack of a permit was one issue Mr. Wiedmeyer raised, but he also argued that the lab at which the sample was tested was not approved by the Department of Health Services, and that the Department has not developed and does not administer a program for regular monitoring of the lab, all in violation of Wis. Stat. § 343.305(6)(a). (Wiedmeyer's Brief at 3-4). The State focuses on the permit requirement and ignores Mr. Wiedmeyer's other arguments.

I. DECLINING TO ADMIT THE CHEMICAL TEST RESULTS OF MR. WIEDMEYER'S BLOOD DOES NOT VIOLATE EITHER § 967.055 OR PUBLIC POLICY.

The State argues that § 967.055(1)(a)[1] "sets forth the intent of the statute" (State's Brief at 15). That intent

[1] Section 967.055(1)(a) reads: "The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her

is to "encourage the vigorous ***prosecution***" of OWI offenses. OWI offenses are prosecuted by district attorneys, not circuit courts. Section 967.055(1)(a) is a prefatory statement explaining why the substantive provisions to follow were enacted. The operative portions of the statute give effect to the legislature's intent: they prevent prosecutors from dismissing or reducing OWI-related offenses without court approval. Wis. Stat. § 967.055(2).

As the Wisconsin Supreme Court held in *State v. Brooks*, 113 Wis. 2d 347, 358-59, 335 N.W.2d 354 (1983), the legislature's intent was "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." The State's reliance on § 967.055(1) is just as flawed as the circuit court's reliance on § 967.055(2).

The State argues that Mr. Wiedmeyer's interpretation of § 343.305(6)(a) is contrary to public policy, but whether the policy is wise or not is up to the legislature.

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incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or having a prohibited alcohol concentration, as defined in s. 340.01 (46m), offenses concerning the operation of motor vehicles by persons with a detectable amount of a restricted controlled substance in his or her blood, and offenses concerning the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more."

> Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 124.

The State argues that Mr. Wiedmeyer's interpretation of the statute "is contrary to the policy behind Wisconsin's per se drug law, Wis. Stat. § 346.63(1)(am), which prohibits operating a motor vehicle with a detectable presence of a restricted controlled substance." (State's Brief at 16). This is not a restricted controlled substance case. The State's arguments about the difficulties in proving impairment are misplaced. The State always must prove impairment in prescription drug OWI cases. Declining to admit the results of the chemical analyses of Mr. Wiedmeyer's blood does not violate any statutes, nor does it violate public policy.

II. THE SCOPE OF § 343.305(6)(A) IS NOT LIMITED TO ADMINISTRATIVE SUSPENSIONS AND REVIEW HEARINGS

Next, the State argues that if the testing of a sample "is not in accordance with § 343.305(6), the person will prevail at an administrative suspension hearing (if he or she timely requests a hearing), and the test results are not automatically admissible at trial." (State's Brief at 16). However, there is no administrative suspension hearing in prescription drug OWI cases because there is no administrative suspension imposed for prescription drug OWIs. *See* § 343.305(7)(a) and (b). Further, test results for prescription drugs are ***never*** automatically admissible at trial. Section 885.235 confers automatic admissibility only in cases involving alcohol, § 885.235(1g), and restricted controlled substances, § 885.235(1k). Section 885.235(4) states that

> The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication or for determining whether a person had a detectable amount of a restricted controlled substance in his or her blood shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant, had a detectable amount of a restricted controlled substance in his or her blood, had a specified alcohol concentration, or had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 30.681 (1) (bn), 346.63 (2m) or 350.101 (1) (c).

Nothing in § 885.235 confers automatic admissibility of test results for prescription drugs, and subsection (4) only states that the statute shall not be construed as limiting evidence related to whether a defendant was under the influence of alcohol or restricted controlled substances. It does not prevent the limitation of evidence regarding whether a person tested positive for prescription drugs and does not confer automatic admissibility of the test results in this case.

If the requirements of § 343.305(6)(a) were intended to apply solely to administrative review hearings, those requirements would be found in § 343.305(8) along with the other regulations regarding administrative and judicial review of administrative license suspensions. Further, the State incorrectly asserts that an administrative suspension is imposed "if chemical testing shows a detectible amount of a controlled substance, or a prohibited alcohol concentration" (State's Brief at 7) and that "the provision applies only if a person submits to testing under the implied consent law, and the testing shows a detectable amount of a controlled substance, or a prohibited alcohol concentration" (State's Brief at 7-8). The provisions in §§ 343.305(7)(a) and (b) that the State refers to apply

only to ***restricted*** controlled substances[2] and prohibited alcohol concentrations. There is no administrative license suspension for a person—like Mr. Wiedmeyer—whose test result reveals the presence of a controlled substance that is not restricted. The Department has no authority to suspend a person's license for operating with an unrestricted controlled substance in his blood, regardless of how much or how little of the substance is present.

Because there is no administrative suspension under § 343.305(7) when a test result shows the presence of a controlled substance there is no administrative or judicial review under § 343.305(8). Under § 343.305(6)(a), analysts must have permits to test blood or urine for controlled substances, and the lab itself must be approved in order to test blood or urine for controlled substances, yet there is no administrative license suspension for persons whose blood tests positive for controlled substances. If the legislature intended § 343.305(6)(a) to apply only to

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[2] Wis. Stat. § 967.055(1m)(b) states: "Restricted controlled substance" means any of the following:
1. A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.
2. A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in subd. 1.
3. Cocaine or any of its metabolites.
4. Methamphetamine.
5. Delta-9-tetrahydrocannabinol.

administrative license suspensions and the subsequent review hearings, it would not require permits and lab approval to test for controlled substances because drivers are not subject to administrative suspension for driving with controlled substances in their system.

The State claims that the remedy for its failure to comply with § 343.305(6)(a) is that Mr. Wiedmeyer should prevail at a review hearing (which does not exist) for an administrative suspension of his license (which cannot be imposed) and that the State loses automatic admissibility of the test results at trial (which it never had in the first place). The State's interpretation renders § 343.305(6)(a) 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)).

III. SECTON 343.305(6)(A) DOES NOT AFFECT A DEFENDANT'S REQUEST FOR AN ALTERNATE TEST

The State claims that "Wiedmeyer's interpretation of § 343.305(6)(a) would enhance the rights of drunk drivers, precisely what the implied consent law is not intended to

do." (State's Brief at 17). Again, § 343.305(6)(a) has nothing to do with implied consent. All of the cases cited by the State that casually refer to § 343.305 as "the implied consent law" do so while actually discussing the manner in which samples were obtained. (*See* State's Brief at 6, 15, 17). Section 343.305(6)(a), on the other hand, has nothing to do with how the sample was obtained and nothing to do with implied consent. It covers the manner in which the samples are tested after they are obtained.

The State claims that Mr. Wiedmeyer's interpretation would render samples tested at the defendant's request inadmissible if they were not conducted in accordance with § 343.305(6)(a). (State's Brief at 17-18). The State correctly goes on to assert that "The statute cannot reasonably be read in this manner. The legislature could not have intended to provide defendants with a statutory right to have a test conducted by 'any qualified person of his or her own choosing,' but not allow evidence of the results of that test unless the analyst had a valid permit issued by the State." (State's Brief at 18). This Court has already addressed the State's concern:

> This section requires that blood analyses be performed by an individual possessing a valid permit to perform the analysis and according to methods approved by the laboratory of hygiene.

> ***This section is clearly intended to protect defendants who are given blood tests under the direction of the police.*** When a defendant requests an alternate test, as Turner did, sec. 343.305(5), Stats., is applicable. This section requires only that "any qualified person" administer the blood test. This standard permits a defendant to procure an independent test, free from the stricter requirements imposed upon the State. If this court adopted Turner's interpretation of subsection [(6)(a)] it would, in effect, arbitrarily limit a defendant's choice in choosing an alternate test and facility which is his right under subsection (5).

State v. Turner, 114 Wis. 2d 544, 548-49, 339 N.W.2d 134, 137 (Ct. App. 1983) (emphasis added). Although the provisions related to obtaining blood, breath, or urine samples from drivers are intended to facilitate the *collection* of evidence, § 343.305(6)(a) is intended to protect the defendant when he, like Mr. Wiedmeyer, was given a blood test at the direction of the police.

IV. THE STATE'S VIOLATION OF § 343.305(6)(A) RESULTS IN INADMISSIBILITY OF THE TEST RESULTS

The State contends that although § 343.305(5)(d) states that the results of tests administered "in accordance with this section" are admissible at trial, and that failure to comply with § 343.305(6)(a) renders the results invalid "under this section," this simply results in the loss of *automatic* admissibility. (State's Brief at

9). As noted above, the State never had automatic admissibility of Mr. Wiedmeyer's blood test results and the result of non-compliance cannot be that the State must forfeit something it never had in the first place.

Section 343.305(5)(d) states that results of a test administered in accordance with the statute are admissible at trial. There would be no reason for the legislature to say that test results that are in compliance with the statute are admissible if test results that are *not* in compliance are equally admissible, which would be the result under the State's interpretation of the statutes.

Section 343.305(5)(d) makes two provisions for test results administered in accordance with the statute: they are "admissible on the issue of whether the person was under the influence" and "[t]est results shall be given the effect required under s. 885.235." The results of Mr. Wiedmeyer's blood tests are not subject to § 885.235, so they are not given any effect under that statute. They are also not admissible under § 343.305(5)(d).

The State correctly points out that not every violation of a provision of § 343.305 results in automatic suppression of the chemical test results. (State's Brief at 9-10). However, the case cited by the State (*State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528;

State v. Zielke, 137 Wis. 2d 39, 403 N.W.2d 427 (1987); and *Winnebago Cnty v. Christenson*, No. 2012AP1189 (WI App Oct. 31, 2012)) all relate to the procuring of the blood sample, not its testing. Further, those courts took notice of the fact that there was nothing in the statutes they were addressing to suggest the blood results were inadmissible. (State's Brief at 9-10). Section 343.305(6)(a) does contain such language where it states that the test results are invalid "under this section."

Although the State is correct that inadmissibility of the chemical test result is not always the remedy for a blood sample that was *obtained* in violation of § 343.305, it is the remedy when the violation of § 343.305 relates to the testing of the sample. Under *State v. McCrossen*, 129 Wis.2d 277, 297, 385 N.W.2d 161 (1986), suppression of chemical test results is an appropriate sanction "for violating a defendant's statutory right to an alternative blood alcohol test" under what is now § 343.305(5)(a).

Section 343.305(6)(a) was "clearly intended to protect defendants who are given blood tests under the direction of the police," *State v. Turner*, 114 Wis. 2d 544, 548-49, 339 N.W.2d 134, 137 (Ct. App. 1983), and the State's interpretation eviscerates that protection. Exclusion of the results is the only appropriate remedy.

The State further argues that a proper foundation was laid for the admissibility of Mr. Wiedmeyer's test results because "the lab analyst testified to her qualifications and the procedures she follows in testing samples for controlled substances, and Wiedmeyer did not dispute that the analysis 'was done in accordance with all existing and appropriate protocols.'" (State's Brief at 14). The State did not establish an adequate foundation. Because there is no automatic admissibility, the State must establish relevance (and relevance of results the legislature has determined to be invalid to boot). There is no presumption of impairment and no per se violation for a restricted controlled substance in this case, and no testimony that would establish that the results would tend to prove impairment. Prescription medication differs drastically from alcohol and restricted controlled substances in that prescription medication is not designed to cause impairment. Impairment can be a side effect, but side effects for medication are notoriously unpredictable. There was no testimony from the analyst whatsoever that Mr. Wiedmeyer's test results would have indicated that he had become impaired by his medication.

Additionally, although the lab analyst testified as to her qualifications, she also testified that her proficiency

testing for controlled substances was conducted only in urine samples, not blood (38:8-9). The organization that accredits the lab and conducts the proficiency testing has certified the lab for forensic drug testing only in urine, not blood (39:4, 5). Neither the Department of Health Services nor the independent accrediting body certified the analyst to test blood samples for controlled substances. Neither her qualifications nor those of the lab have been established. Even if Mr. Wiedmeyer's test results are not automatically inadmissible, the State has still not established a foundation for them to be admitted.

CONCLUSION

For the reasons explained above and in Mr. Wiedmeyer's Brief-in-Chief, this Court should reverse the circuit court's non-final order denying Mr. Wiedmeyer's Second Motion in Limine.

Dated November 30, 2015.

Respectfully submitted,

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Brian Borkowicz
Law Office of John A. Best
State Bar No. 1056646
1797 Barton Ave.
West Bend, WI 53090
(262) 335-2605

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c) Stats. for a Brief produced with a monospaced font and consists of 13 pages. I also certify that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated November 30, 2015.

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Brian Borkowicz
Law Office of John A. Best
State Bar No. 1056646
1797 Barton Ave.
West Bend, WI 53090
(262) 335-2605