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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2015 AP 001581

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

v.

ALPESH D. SHAH,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DATED JULY 1, 2015, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable John Siefert, Presiding
Trial Court Case No. 2013TR015163

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ARGUMENT

I. THE COUNTY TAKES UNWARRANTED LIBERTIES WITH THE RECORD IN AN EFFORT TO MAKE IT APPEAR THAT *BOHLING* SPOKE WITH SPECIFICITY TO THE PARTICULAR FACT SITUATION OF THIS CASE.

The County's approach in this case is interesting. It does not deny that "sticky" THC remains in the bloodstream for a protracted period of time or that its own expert *in this very case* testified it will remain for a period of nine to twelve hours. (R17-62). It does not deny it failed to demonstrate any *de facto* exigency in this case, a notable observation since *it* bore and bears the burden of proof. *State v. Hughes*, 2000 WI 24, ¶¶ 17–18, 233 Wis. 2d 280, 607 N.W.2d 621. It does not deny that it failed to establish any impediment or delay attendant to obtaining a warrant. And it does not deny that by his own testimony, Deputy Leranth knew that unlike alcohol, THC remains in the system for a long time, a critical concession for purposes of a good faith exception to the exclusionary rule.

Instead, the County seeks, entirely via unsupported conjecture, to manufacture a *de jure* exigency to justify reliance on *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). In so doing, it relies principally on *State v. Malinowski*, Appeal No. 2010AP1084-CR, an unpublished case decided several years before *Missouri v. McNeely,* 569 U.S. —— (2013), and a case which examined a factual situation so sharply in contrast to this case that it actually supports Shah's

position on appeal. And along the way, the County simply ignores the very recent position taken by Wisconsin's Attorney General: that reliance on *Bohling* for a warrantless blood draw seeking evidence of THC (the only controlled substance reasonably at play in this case) would not be justified:

> What I am saying is that because this really good evidence, this really probative evidence dissipates so quickly, at least in the case of heroin, and the public defender brought up some other drugs like marijuana and things like that, this is a whole different animal. **I agree if this is a marijuana case, we would be done. We would be done because marijuana being a natural substance . . . it doesn't break down.**

State v. Parisi, 2016 WI 10, *Id.* at ¶73, 367 Wis. 2d 1, 875 N.W.2d 619 (emphasis added: dissenting opinion, J. Bradley).

A. Shah Was Not Arrested For, Nor Ever Charged With, Operating *Under The Influence,* But Instead, Operating With A Detectable Amount Of A Controlled Substance In His System.

The County's first bit of prestidigitation is to attempt to alter the charge for which Deputy Leranth was seeking evidence when he forced blood from Shah. For example, in its Statement of the Case, the County states that only after the blood test results came back was Shah "*later* issued a citation for Operating a Motor Vehicle with a Restricted Controlled Substance . . . contrary to section 346.63(1)(am), Stats." (County's Brief, p. 3)(emphasis added). In other words, the

County tries to distance the arrest and purpose for the warrantless blood test from section 346.63(1)(am) by falsely claiming the charge under that section was not issued until *after* the blood test results came back. In fact, that charge was issued and personally served on Shah immediately after the arrest, and before Shah's blood was extracted. (R1; R2; *see also* citation number referenced on Blood/Urinalysis Form at page 109 of County's Appendix). *See also* (R17-14)(citations issued to Shah before blood draw).

In a civil forfeiture case such as this one, the uniform traffic citation is the charging document that institutes the proceedings. *State v. Mudgett,* 99 Wis. 2d 525, 526, 299 N.W.2d 621 (Ct. App. 1999). In *Swisse v. City of Sheridan*, 561 P.2d 712, 713-14 (Wyo. 1977), the Wyoming court discussed the purpose of the use of uniform traffic citations as charging documents:

> The purpose behind uniform traffic citations is to provide for the speedy and effective disposition of traffic offenses. With such an informal procedure it is not necessary that the charge be set forth with the same technical precision and formality as required in an information or verified complaint. All that is required is that the accused be informed of the nature of the offense with which he is charged. Such a requirement can be fulfilled by stating the commonly used name of the offense and the statute or ordinance violated. . ..

Here, the arresting officer issued multiple uniform traffic citations, all of which were filed in the circuit court. Notably

absent from the citations issued by Deputy Leranth is any citation for Operating Under the Influence, contrary to section 346.63(1)(a), Stats.

On the other hand, notably present is the citation setting forth the charge for which Shah was prosecuted, and which forms the bedrock of this appeal: Operating with a Detectable Amount of THC in his system, contrary to section 346.63(1)(am), Stats. The County now argues that Deputy Leranth was just getting evidence that would later be carefully vetted to determine what charges should be issued. This *post hoc* attempt to remake what actually happened is contradicted by the fact Shah was also issued a citation for Operating with a Prohibited Alcohol Concentration, despite the fact no alcohol was detected in his blood. (See County's Brief, p. 4, fn 1; *see also County of Milwaukee v. Alpesh Shah,* Case No. 2013 TR 15164). No careful thought was given to ferret out citations issued. Instead, there was a blanket filing of all charges issued pursuant to the arrest, not one of which was Operating Under the Influence, the charge upon which the County now wishes to hang its hat. The absence of the very charge for which the County now wishes to argue Shah was arrested is telling.[1]

The best and strongest proof of this fact is the form that Deputy Leranth filled out in conjunction with the warrantless blood draw. (*See* County's Brief, p. 109). That form contains a filed entitled "Offense Information" and asks the officer to

[1] The County cannot point to any document in the record to substantiate this claim. The only charging document in the record was for Operating with a Detectable Amount of a Restricted Controlled Substance. (R1; R2). A review of CCAP also confirms the absence of an Operating Under the Influence charge. The penalties for either charge are the same.

"specify" the offense underlying the blood draw. (*Id*.). In that field, Deputy Leranth checked the box for section 346.63(1)(am), Stats., which is the statutory section for Operating with a Detectable Amount of a Controlled Substance. (*Id*.). In that same field he inserted the citation number corresponding to that exact same offense, the citation the deputy issued Shah after arresting him.

Moreover, the record belies the idea that Shah was "under the influence" of anything, which further explains the absence of the charge. He responded immediately and appropriately to the squad car's emergency lights and pulled his vehicle over in a safe fashion. (R17-20). Nothing about the interactions with all of the deputies on the scene suggested Shah was in any way impaired. Shah did not manifest any balance problems, nor did he have slurred speech or any difficulty understanding and following the deputies' instructions and directions. The one field sobriety test the deputy insisted on administering was one Shah completed perfectly. Shah did appear in any way to be impaired. His pupils were not dilated. It is therefore not surprising that Shah was arrested for, and issued a citation for, Operating with a Detectable Amount of a Controlled Substance in his system. This is the backdrop against which the legal issue presented by this case must be examined.

B. The *Only* Controlled Substance Deputy Leranth Believed Shah Had Ingested Was THC.

The County also seeks to introduce into the analysis the possibility of other substances Shah might have ingested by referencing powders found in the glove compartment of Shah's vehicle. The record, however, completely contravenes this transparent attempt to inject the specter of other controlled substances into the mix. As the County itself recognizes, the substances were *field* tested and found to be innocuous sacraments used for religious purposes. (*See* County's Brief, p. 11; R16-24-25). Moreover, when filling out the Blood/Urinalysis Form where Deputy Leranth was called upon to inscribe what drugs he suspected, he only inserted "THC." (County's Appendix, p. 109).

This is an appropriate juncture to examine how the County's reliance on the unpublished *Malinowski* opinion is misplaced. In *Malinowski*, the suspect's behavior smacked of severe impairment and the arresting officer had no clue what drug or combination of drugs may have been causing the impairment. The defendant in *Malinowski* seemed to have fallen asleep at a green light, then wove between lanes, and was confused and lethargic when stopped. (County's Appendix, p. 102). The defendant needed six commands to produce his driver's license before he was able to do so. (*Id.*). He did not know where he had been going to and had prolonged difficulty even remembering where he lived. (*Id.*). He stumbled as he exited the vehicle and had to be held up by the arresting officer and was unable to complete any of the field sobriety tests. (*Id.* at 102-03). He had "extreme difficulty" understanding and following the officer's instructions. (*Id.* at 103). Not

surprisingly, and most importantly, the defendant in *Malinowski* was arrested for Operating *Under the Influence* of a Controlled Substance (there being no evidence of alcohol). (*Id.*).

This case stands in stark contrast to *Malinowski* where, as already noted, there was no evidence to believe Shah was "under the influence," but rather, only that he had a detectable amount of a controlled substance in his system. To that end, *Malinowski*'s discussion of *Bohling* is both interesting and instructive. *Malinowski* noted that one of the prerequisites set forth in *Bohling* for a per se warrantless blood draw was: "there is a **clear** indication that the blood draw will produce evidence of **intoxication**." *Malinowski* at ¶10, *citing State v. Bohling*, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993)(emphasis added). (*See* County's Appendix, p. 104). Indeed, the defendant in *Malinowski*, actually stipulated the officer had probable cause to arrest him for "operating under the influence." *Malinowski* at fn. 5. Had *Malinowski* been published, it too would have been abrogated by *McNeely*. Because it was unpublished, what as effectively been abrogated by *McNeely* is any of its persuasive value.[2]

In short, the entirety of the County's argument is belied by the record in this case. The County would have this Court believe Deputy Leranth could have reasonably believed Shah

[2] It should also be noted that *Malinowski* involved a criminal charge and that at the time of Shah's arrest, section 968.13, Stats., only authorized search warrants for seizure of blood in *criminal* cases. That section was only recently amended to allow search warrants in civil cases under section 346.63, Stats. There do not appear to be any published opinions that extended *Bohling* to civil forfeiture cases.

might have been under the influence of a veritable cornucopia of controlled substances, to include cocaine, heroin, methamphetamine, etc. (County's Brief, p. 8). The problem is that the record does not support any of this conjecture, only that the deputy could have had, and actually only did have, a basis to believe Shah may have had a detectable amount of THC in his system.

C. The County's Attempt To Introduce The Possibility of Ethyl Alcohol Into The Analysis Is Controverted By The Facts Of Record.

The County also attempts to introduce the possible discovery of alcohol into the analysis of the issue on appeal. This red herring can be disposed of quickly because, as already noted, this was never, from the inception, an "operating under the influence" case. Moreover, not one of the deputies on the scene ever testified to having noticed an odor of alcohol on Shah. On the contrary, the deputies who did testify expressly stated they did *not* notice any odor of alcohol on Shah. Not surprisingly, such was confirmed by the blood test.[3]

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[3] The County also points to the Blood/Urinalysis form as evidence the deputy suspected alcohol because he checked the box requesting testing for both drugs *and* alcohol. (County's Brief, p. 13). A close examination of that form, however, reveals there is no box to check that does not include alcohol, and therefore no box to request testing only for drugs. (County's Appendix, p. 109). In other words, the deputy was obliged to check a box including alcohol. Accordingly, the only thing instructive about that form, in addition to the already noted fact that Deputy Leranth only listed "THC" as the suspected controlled substance, is that Deputy Leranth did *not* check the box that would have alleviated the need for drug testing if Shah's sample contained a level of ethyl alcohol over the legal limit. (*Id*.).

Instead, all of the County's hand-wringing about alcohol is nothing more than an effort to push the square peg of this case into the round whole of *Bohling*. The County is trying to create the specter of the possible presence of alcohol when the record establishes nothing but its absence. Indeed, so obvious was it that Shah did not have any alcohol in his system that the deputies never bothered to ask Shah to submit to a preliminary breath test pursuant to section 343.303, Stats. It is true Shah admitted having a few drinks the previous evening. It is also true, however, that Shah stated he had stopped drinking nearly eight hours earlier. Given the complete absence of any indicia of alcohol on the scene, it is disingenuous for the County to tether this desperate argument to the putative proposition that Shah was forthcoming and credible about his consumption of alcohol the night before, but evasive and not credible about when he stopped drinking.[4]

D. The County's Attempt To Hypothesize That The Deputies Did Not Suspect Shah Of Having Just Recently Smoked Marijuana Is Not Credible.

Finally, the County endeavors to manufacture an exigency by arguing that perhaps there was a basis for the deputies to believe a lengthy period of time had passed since Shah had smoked marijuana. Once again, the County is arguing against the heavy grain of the record. The evidence the County introduced at trial was that emanating from the vehicle was the

[4] It should also be noted that the arrest occurred around 8:30 a.m. on a Sunday morning, and not near bar time as is so often the case in operating under the influence cases. Interestingly, the citation states the offense occurred at 9:50 a.m. (R1; R2).

overwhelming odor of marijuana, immediately detectable even when Shah only had his window rolled down a couple of inches. Shah was the only occupant of the vehicle. (R16-12). The odor of marijuana was, in the deputy's alternate words, "overpowering." (R16-29). And contrary to the County's claim, Deputy Leranth testified that he smelled an odor of marijuana on Shah as he was walking Shah to his squad car before arresting him. (R16-27). Moreover, the deputy testified he found "freshly burnt" marijuana in the console of the vehicle and that he believed Shah "had *just* smoked marijuana from that pipe in his vehicle before [he] pulled him over." (R17-25)(emphasis added).[5]

[5] The County makes much of its claim that the marijuana pipe found in Shah's vehicle was not warm to the touch. (*See, e.g.,* County's Brief, p. 11). Its representation in this regard is not entirely true. Defense counsel attempted to elicit from the deputy that the pipe was not warm to the touch, but the deputy was unwilling to testify to that fact. Instead, the deputy would only state he did not include such in his report, even when explicitly asked to concede the absence of such from his report was because the pipe was *not* warm to the touch. (R16-24). Later, he would only concede that he did not recall it being warm, perhaps because he was wearing gloves. (R17-25). The County has also uncovered an ambiguity in the record as to whether the deputy's testimony that "it was smoky" was a reference to what Deputy Leranth saw or smelled. (County's Brief, p. 11, fn 4). Once again, given the County's burden of proof by clear and convincing evidence, *State v. St. Martin*, 2011 WI 44, ¶ 19, 334 Wis. 2d 290, 800 N.W.2d 858, this ambiguity should be visited upon the County, not Shah.

CONCLUSION AND RELIEF REQUESTED

The good faith exception to the exclusionary rule should only be employed when the case upon which law enforcement purports to rely has "spoken with specificity in a particular fact situation." *State v. Dearborn*, 2010 WI 84, ¶46, 327 Wis. 2d 252, 786 N.W.2d 97. *Dearborn* noted that the vast majority of cases, particularly in a fact-intensive Fourth Amendment context such as this case, will not fall into this category. *Id*. *Bohling* did not speak with specificity to the particular fact situation posed by this case. It involved the dissipation of *alcohol*. It was limited to cases where evidence of "impairment" was sought and needed. It addressed the need to "quantify" the level of alcohol, not the need to simply demonstrate the mere presence of a substance. It addressed the metabolism of alcohol, not THC, and Deputy Leranth recognized and understood the distinction. It was also a criminal case, not a civil forfeiture action, and the County's own expert testified the THC would be detectable in Shah's blood for at least nine, and possibly up to twelve hours.

For all of the foregoing reasons, the appellant respectfully requests this Court vacate the judgment and remand the matter for a new trial with instructions that the results of the warrantless blood draw be suppressed.

Dated this 18th day of July, 2016.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,958 words.

Dated this 18th day of July, 2016.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the reply brief in *County of Milwaukee v. Shah*, Appeal No. 2015 AP 1581, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of July, 2016.

/s/ Rex Anderegg
Rex Anderegg