STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP001718-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ZACHARY W. SWAN,

Defendant-Appellant.

Appeal from the Judgment Entered in the La Crosse County Circuit Court, the Honorable Todd W. Bjerke, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Did the arresting officer have probable cause to request a preliminary breath test (PBT) when the officer could not detect the odor of alcohol on the defendant, the defendant displayed no signs of intoxication, and the defendant stated that he had not consumed alcohol, but the officer knew the defendant was subject to the absolute sobriety law and observed a half-empty liquor bottle in the back seat of the defendant's car?

The trial court concluded that the arresting officer had probable cause to request a PBT.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Because this is a one-judge appeal, the court's opinion will not be published. Wis. Stat. § 809.23(1)(b)4. Oral argument is not requested.

STATEMENT OF THE CASE AND FACTS

On May 15, 2015, Zachary W. Swan pleaded guilty to operating a motor vehicle with a prohibited alcohol concentration (PAC), his second such offense within the previous ten years. (29:6). That same day, Circuit Court Judge Todd Bjerke sentenced Swan to ten days in jail. (29:19-20; 14). The court then stayed that sentence pending appeal. (13). In this appeal, pursuant to Wis. Stat. § 971.31(10), Swan challenges the court's denial of his suppression motion.

This case has a rather unusual procedural history. The police arrested Swan for the instant offense on July 16, 2012. (3). Swan was initially issued municipal citations for, among other things, violating the "absolute sobriety law," Wis. Stat. § 346.63(2m), and first-offense operating a motor vehicle with a PAC. (10:Exh. 3:1, 21-23).[1]

Swan moved the municipal court to suppress the evidence the police obtained after ordering him to submit to a PBT. Swan argued that the arresting officer lacked probable cause to request the PBT. City of La Crosse Municipal Judge Dennis Marcou heard the motion on December 6, 2012, and granted it on January 25, 2013. (10:Exh. 2). Because Judge Marcou suppressed the evidence supporting the two above-referenced municipal violations, he found Swan not guilty of those violations.

The city appealed to the La Crosse County Circuit Court. (10:Exh. 1:21-23). The appeal (La Crosse County Case No. 13-CV-415) was assigned to Judge Bjerke. Swan filed another suppression motion, raising the same argument he had raised in municipal court. (10:Exh. 1:3-5). On July 30, 2013, Judge Bjerke heard that motion. (10:Exh. 1).

The only witness at the suppression hearing was La Crosse Police Officer Trenton Bowe. Bowe testified to the following facts.

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[1] Record Document 10 contains the "State's Response Brief to Defendant's Motion to Suppress," as well as four exhibits which were admitted at the April 21, 2015, hearing on Swan's suppression motion. The brief and exhibits comprise of 49 pages, but the clerk failed to assign the exhibits consecutive page numbers. For the court's convenience, Swan will refer to the exhibits by their exhibit number, followed by the page number of the exhibit at which the referenced fact may be found.

On July 16, 2012, at about 2:36 a.m., Officer Bowe was dispatched to respond to a home entry in progress. (10:Exh. 1:5-6). Bowe spoke with the owner, who stated that her grandson, Cody A. Soos, had entered her house in violation of a no contact order. (10:Exh. 1:6).

As Officer Bowe was speaking with Soos's grandmother, Soos left the residence through the back door. Bowe gave chase. (*Id.*). Once outside, Soos approached a vehicle that was idling in the back alley. Swan was seated in the driver's seat of the vehicle. Soos told Swan to "get out of here" and then ran away. (10:Exh. 1:6-7; 10:Exh. 4:1). Bowe instructed Swan not to leave and demanded the keys from the ignition. (10:Exh. 1:7). Swan complied. (*Id.*). Bowe then continued after Soos, whom two other officers caught and arrested only ten-to-fifteen feet away. (*Id.*).

After returning to the car, Officer Bowe asked Swan to step out of the vehicle and show his identification. Bowe learned that Swan was born on August 12, 1992, and was therefore just 19 years old. (10:Exh. 1:7-8). Bowe then asked Swan several questions about what he and Soos were doing at Soos's grandmother's house. (10:Exh. 1:8).

Swan stated that he and Soos had come from a friend's house; that he had agreed to give Soos a ride to his grandmother's house and to wait for him; and that as he was waiting, Soos ran up and told him to "just go." (*Id.*). Swan explained that he did not know Soos was not allowed to visit his grandmother. (*Id.*).

Officer Bowe testified that as he was questioning Swan, Swan appeared "really nervous," "kind of stuttered," and spoke in short, "muffled" sentences. (10:Exh. 1:8-9, 18). In addition, Swan was smoking a cigarette and Officer Bowe

stated that he knew cigarettes could "cover up the smell" of alcohol. (10:Exh. 1:9, 12).

Officer Bowe conceded that Swan's speech was not slurred and that he was "speaking and talking fine, except for being nervous." (10:Exh. 1:18; 10:Exh. 4:1). Bowe also admitted that he could not detect the odor of alcohol on Swan's breath, nor did Swan's eyes appear glossy or bloodshot. (10:Exh. 1:9, 16-18).

While speaking with Swan, Officer Bowe observed a half-empty liquor bottle in the back seat of Swan's car. (10:Exh. 1:9-10, 18-19). After noticing the liquor bottle, Bowe asked Swan several times if he had been drinking. (10:Exh. 1:9-10, 12-13; 10:Exh. 4:1). Swan consistently replied that he had not been drinking and explained that the bottle belonged to Soos. (*Id.*). Bowe testified that he knew Soos had "been in trouble several times for underage alcohol," that he had smelled alcohol on Soos's breath that night, and that he knew Soos was intoxicated. (10:Exh. 1:12, 20).

Nevertheless, Officer Bowe believed Swan might have been drinking and asked him to submit to a PBT. (10:Exh. 1:11-13). Swan did so, and it registered at .167. (10:Exh. 1:13).

After administering the PBT, Officer Bowe again asked Swan whether he had been drinking. (10:Exh. 4:1). Swan stated that he had been drinking at a friend's house prior to driving Soos to his grandmother's house. (*Id.*). Bowe immediately arrested Swan and transferred him to the police department. (10:Exh. 1:13; 10:Exh. 4:1). There, Swan submitted to an Intoximeter test, which registered at .14. (10:Exh. 1:14; 10:Exh. 4:1). While in the Intoximeter room,

Swan again admitted to drinking and said he had "screwed up." (10:Exh. 4:2).

Based on Bowe's testimony and subsequent briefing by the parties, Judge Bjerke denied Swan's suppression motion in a written decision dated November 26, 2013. (10:Exh. 3; App. 105-11). The court concluded that Officer Bowe had probable cause sufficient to request a PBT from Swan, reasoning as follows:

> In this case, Bowe knew that Swan was underage and subject to the absolute sobriety law. Bowe knew that *any* amount of alcohol would put Swan over the limit with respect to the absolute sobriety law. In addition, it was approximately 2:36 a.m. Bowe knew that Swan had been at a friend's house with Soos, who had just entered his grandmother's house without permission and whom Bowe knew was underage, intoxicated, and had prior alcohol-related offenses on his record. Bowe observed Swan smoking cigarettes, which he knew from training and experience is used by suspects to mask the odor of intoxicants. Swan spoke in short, muffled sentences and appeared nervous to Bowe. Bowe had observed the half-empty bottle of rum in the back seat of the vehicle, within reach of Swan. Although Swan asserted that the bottle belonged to Soos, it was within Swan's reach and Swan admitted that he knew it was back there.

(10:Exh. 3: 6; App. 110).

On September 26, 2013—between the suppression hearing and the circuit court's decision on the suppression motion—Swan committed another operating while intoxicated (OWI) violation. (3:2). Swan was convicted of that offense on May 7, 2014, before the instant municipal citations were resolved. (*Id.*). Thus, the city no longer had jurisdiction to charge Swan with the instant PAC offense and the court granted the prosecutor's motion to dismiss the

municipal citations. (10:3). *See* ***County of Walworth v. Rohner***, 108 Wis. 2d 713, 718, 324 N.W.2d 682 (1982) (because second-offense OWI is a crime, and crimes can only be prosecuted by the State, the trial court lacked jurisdiction over municipal citation charging second-offense OWI).

On October 28, 2014, the State charged Swan with second-offense PAC. (3). Swan, now represented by appointed counsel, again moved to suppress the evidence and statements obtained as a result of what he contended was an unlawful PBT. (9). The State opposed the motion, arguing that Swan was precluded from relitigating the same motion Judge Bjerke had denied in the appeal from the municipal proceeding. (10:1-6).

Judge Bjerke found it unnecessary to either conduct another suppression hearing or reconsider his earlier ruling. (28:6-9; App. 101-04). At a motion hearing on April 21, 2015, he stated as follows: "This Court did hear testimony from Officer Bowe[ ], and as a result rendered a seven-page written decision that well establishes this Court's position on the facts here." (28:6; App. 101). He further observed that

> [i]f there was a need to appeal anything, I assume that there's a mechanism by which the CV case [the appeal from the municipal court decision] can be brought into this case to have the appropriate transcripts and other exhibits brought in so Mr. Swan's rights are still in existence, even though he may not have appealed that decision.

(28:7; App. 102).

With Swan's appellate rights in mind, the court marked as exhibits the suppression hearing transcript, the police report introduced at that hearing, the court's prior written decision on Swan's earlier suppression motion, and

the municipal judge's written decision on Swan's initial motion. (*Id.*; 10:Exh. 1-4). The court then stated that it would be "appropriate" if appellate counsel "is able to appeal [the court's prior written] decision and go forward at that point and still have the court of appeals look at that decision as necessary down the road." (28:7; App. 102). When Swan pleaded guilty two weeks later, the court expressly acknowledged that Swan was reserving his right to appeal the suppression ruling. (29:4, 13).

Swan now renews the arguments he made in the municipal and circuit courts. He contends that Officer Bowe lacked probable cause to request the PBT.

ARGUMENT

Officer Bowe Lacked Probable Cause to Request A PBT from Swan and Thus the PBT Was Unlawful. All Evidence and Statements Derived from the Unlawful PBT Should Be Suppressed.

A. Standard of review.

A two-part standard of review applies to a circuit court's denial of a defendant's motion to suppress. ***State v. Popp***, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 741. A reviewing court will uphold the circuit court's findings of fact unless they are clearly erroneous, but will independently determine whether those facts warrant suppression. ***Id.***

B. An officer must have probable cause to believe that an underage driver was drinking to request a PBT from that driver.

Wisconsin Statute § 343.303 provides in relevant part that a law enforcement officer may request a PBT from a non-commercial driver if the officer has "probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m)." Officer Bowe believed that Swan was violating § 346.63(2m). That provision, known as the absolute sobriety law, prohibits a person who has not attained the legal drinking age from operating a motor vehicle while he or she has an alcohol concentration of between 0.0 and 0.08.[2]

Within the context of § 343.303, the phrase "probable cause to believe" refers to "a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999).

Courts examine the totality of the circumstances to determine whether a particular PBT was supported by probable cause. ***State v. Goss***, 2011 WI 104, ¶9, 338 Wis. 2d 72, 806 N.W.2d 918. The circumstances sufficient to provide probable cause to request a PBT will vary based on the PAC

[2] There are several other circumstances, not relevant to the present case, under which a law enforcement officer can request a PBT. *See* Wis. Stat. § 343.303. For example, a law enforcement officer can request a PBT if the officer "detects any presence of alcohol" on an individual operating a commercial motor vehicle. *Id.*

to which the driver is subject. ***Id.*** at ¶¶24-26. No published Wisconsin case has specifically considered what facts establish probable cause for a PBT when the driver is subject to the absolute sobriety law.

C. Officer Bowe lacked probable cause to believe that Swan had been drinking.

A careful review of Officer Bowe's observations prior to requesting the PBT demonstrates that the standard of probable cause set forth in ***Renz*** and ***Goss*** was not fulfilled in the instant case.

As stated previously, it was around 2:36 a.m. when Officer Bowe encountered Swan. (10:Exh. 1:5-6). Prior cases have established that the time of night can support probable cause in OWI cases. *See, e.g.*, ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (probable cause to arrest defendant for OWI based in part on the time of night). Though it is not a weighty factor, the late hour of the incident in the instant case is admittedly somewhat suspicious.

In contrast, Swan's nervous behavior and short, "muffled" sentences are not suggestive of drinking. (10:Exh. 1:8-9). When Bowe questioned Swan, Swan was a 19-year-old with no criminal record. Swan had just been confronted by a police officer who had demanded his keys, had chased down and arrested his friend, had instructed him to step out of his car, and was inquiring about his activities that night. (10:Exh. 1:7-8). Under these circumstances, who wouldn't be nervous? Swan's behavior was only natural; it did not indicate alcohol consumption.

Nor did the fact that Swan was smoking a cigarette suggest that he had been drinking. (10:Exh. 1:9). Judge Bjerke's written decision states that "Bowe observed Swan

smoking cigarettes, which he knew from training and experience is used by suspects to mask the odor of intoxicants." (10:Exh. 3: 6; App. 110). But Bowe never actually said he "knew from training and experience" that cigarettes can serve as a masking agent. He simply stated that cigarettes could cover up the smell of alcohol, and despite two sustained objections to the foundation for this testimony, never explained *how* he "knew" that. (10:Exh. 1:9, 11-12). In any event, at best, the fact that Swan was smoking merely diminishes the significance of the absence of the odor of alcohol on Swan's breath. It does not constitute affirmative evidence that Swan had been drinking.

Judge Bjerke also cited Officer Bowe's knowledge that Swan had been at a friend's house with Soos as a factor supporting probable cause. (10:Exh. 3: 6; App. 110). But the record is unclear regarding whether Bowe knew Swan had been at a friend's house when Bowe requested the PBT. In his police report, Bowe states that Swan "advised that he had been drinking at a friend's" *after* the PBT was administered. (10:Exh. 4:1). Furthermore, it is unclear what inference can be drawn from this fact. Swan had to have driven from somewhere. Whether Swan had come from a friend's house, his own house, or a business establishment of some kind is not indicative of whether he had consumed alcohol.

The half-empty liquor bottle in the back seat of Swan's car is perhaps the most suspicious evidence Bowe gathered prior to requesting the PBT. However, as the municipal court opinion granting Swan's initial suppression motion correctly states, the presence of a liquor bottle in the vicinity of the driver means that "the driver had a possible opportunity to consume alcohol," not that the driver in fact consumed alcohol. (10:Exh. 2:3). Something more—namely, some evidence indicating that the driver has actually been drinking from the bottle—is required to elevate an officer's suspicions to the level of probable cause. *See* ***State v. Graske***, Nos. 2009AP1933-CR, 2009AP1934, unpublished slip op. (Wis. Ct. App. Mar. 24, 2010) (App. 112-19) (no probable cause to arrest driver for operating a motor vehicle with a controlled substance in his system where officer smelled burnt marijuana in car but car had multiple occupants and there was no admissible evidence indicating which occupant had smoked marijuana).[3] Yet, when he asked Swan to submit to a PBT, Officer Bowe had not uncovered any evidence specifically suggesting that Swan had consumed alcohol from the bottle in his car. On the contrary, Swan had informed Bowe that the bottle was Soos's, Bowe had smelled alcohol on Soos earlier that night, and Bowe believed Soos had "been in trouble several times for underage alcohol." (10:Exh. 1:12). The evidence therefore tended to show that Soos, not Swan, had been drinking from the bottle in Swan's car.

Swan's age was also relevant to Officer Bowe's probable cause analysis. However, the fact that Swan was under 21 at the time of this incident did not suggest that he had consumed alcohol—if anything, an underage suspect is

[3] This authored, unpublished opinion is cited for its persuasive value pursuant to Wis. Stat. § 809.23(3)(b), and is reprinted in the Appendix at 112-119.

less likely to have consumed alcohol than someone of legal drinking age. Rather, Swan's age was relevant because it meant Swan was subject to a PAC of 0.0 and thus any alcohol at all would have pushed him over the legal limit. *See* Wis. Stat. § 346.63(2m).

In contrast to the relatively paltry evidence that Swan *had* been drinking, there was substantial evidence that Swan had *not* been drinking.

Officer Bowe's police report and his testimony before Judge Bjerke both make clear that Bowe did not smell alcohol on Swan's breath or person prior to requesting the PBT. (10:Exh. 1:9, 17-18). The odor of alcohol is a key factor supporting probable cause in many, if not most, OWI cases. *See, e.g.*, ***Goss***, 338 Wis. 2d 72, ¶26. Thus, its absence in the instant case is telling—especially considering that Bowe reported smelling alcohol on Soos. (10:Exh. 1:12, 20).

Bowe's police report and testimony also reveal that Swan did not have glossy or bloodshot eyes. (10:Exh. 1:9, 16-17). *Compare with* ***State v. Begicevic***, 2004 WI App 57, ¶¶9-10, 270 Wis. 2d 675, 678 N.W.2d 293 (defendant's bloodshot and glassy eyes supported probable cause for the PBT). Nor was Swan slurring his speech. (10:Exh. 1:18; 10:Exh. 4:1). *Compare with* ***State v. Kasian***, 207 Wis. 2d 611, 691-92, 588 N.W.2d 687 (Ct. App. 1996) (defendant's slurred speech supported probable cause to arrest defendant for OWI). Further, although Bowe asked Swan to step out of his car and then questioned Swan for some time before requesting the PBT, Bowe did not report that Swan seemed unsteady, lost his balance, or displayed any kind of impaired movement. *Compare with* ***Renz***, 231 Wis. 2d 293, ¶¶49-51 (defendant's unsteadiness supported probable cause for the PBT). Taken

together, the absence of these common signs of alcohol consumption suggests that Swan had not been drinking.

The circumstances of Swan's initial detention by Officer Bowe are also significant. Bowe did not observe Swan driving (erratically or otherwise) and Swan did not get into an accident. Rather, Swan's car was idling when Bowe confronted him. (10:Exh. 1:6-7; 10:Exh. 4:1). Thus, there was no evidence of impaired driving. *Compare with* ***State v. Felton***, 2012 WI App 114, ¶¶9-10, 344 Wis. 2d 483, 824 N.W.2d 871 (defendant's erratic driving supported probable cause for the PBT).

Nor was there evidence that Swan had a history of underage drinking or any prior OWI convictions. (10:Exh. 1:7-8). *Compare with* ***Goss***, 338 Wis. 2d 72, ¶17 (four prior OWI convictions considered as part of the court's determination that the officer had probable cause for the PBT). In contrast, Bowe believed that Soos had been in trouble for underage drinking in the past. (10:Exh. 1:12, 20).

Finally, in response to questions from Officer Bowe, Swan repeatedly and consistently denied drinking. (10:Exh. 1:9-10, 12-13; 10:Exh. 4:1). *Compare with* ***Felton***, 344 Wis. 2d 483, ¶¶9-10 (officer had probable cause for the PBT based in part on defendant's statement that he had consumed alcohol earlier that morning). Swan stated that the liquor bottle in his car belonged to Soos—a plausible claim, given that Bowe knew Soos was intoxicated. (10:Exh. 1:9-10, 12-13, 20; 10:Exh. 4:1).

In view of all these circumstances, there was insufficient objective evidence that Swan had consumed alcohol to provide Officer Bowe with probable cause for the PBT. Bowe merely had a hunch that Swan had been drinking. A hunch is not enough to fulfill the standard for probable

cause set forth in ***Renz*** and ***Goss***, particularly when substantial evidence contradicts it.

D. Because Officer Bowe lacked probable cause for the PBT, all evidence derived from the PBT should be suppressed.

When a PBT is unsupported by probable cause and thus violates Wis. Stat. § 343.303, the result of the PBT and "all subsequently obtained evidence" should generally be suppressed. ***Goss***, 338 Wis. 2d 72, ¶5 n.6. This consequence is consistent with the general rule that evidence obtained on account of a government officer's statutory violation is subject to the exclusionary rule "via the fruit of the poisonous tree doctrine." ***State v. Knapp***, 2005 WI 127, ¶24, 285 Wis. 2d 86, 700 N.W.2d 899.

In the instant case, because Bowe lacked probable cause to request a PBT from Swan, the PBT result should be suppressed,[4] as should all evidence derived therefrom. This includes the Intoximeter test result and the statements Swan made about drinking shortly after the PBT was administered and in the Intoximeter room.

E. The erroneous denial of Swan's suppression motion was not harmless.

"In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." ***State v. Semrau***, 2000 WI App 54, ¶22,

[4] Section 343.303 provides that PBT results are not "admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or rested . . . ."

233 Wis. 2d 508, 608 N.W.2d 376. The erroneous admission of disputed evidence contributed to the conviction if there is a reasonable probability that but for the error, "the defendant would have refused to plead and would have insisted on going to trial." ***State v. Sturgeon***, 231 Wis. 2d 487, 504, 605 N.W.2d 589 (Ct. App. 1999). "Only if the error contributed to the conviction must a reversal…result." ***Semrau***, 233 Wis. 2d 508, ¶21.

In the instant case, the erroneous denial of Swan's motion to suppress clearly contributed to Swan's conviction. Virtually all of the State's evidence was derived from the unlawful PBT. Had that evidence been suppressed, the State would have had no case. It is highly unlikely that Swan would have pleaded guilty to charges that the State would have been unable to prove. Accordingly, the circuit court's denial of Swan's suppression motion must be reversed, and Swan must be given the opportunity to withdraw his guilty plea.

CONCLUSION

For the reasons set forth, Zachary W. Swan respectfully urges the court to vacate the judgment of conviction and remand the case to the circuit court with instructions to suppress all evidence and statements derived from the unlawful PBT and to afford Swan the opportunity to withdraw his guilty plea.

Dated this 2nd day of November, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,825 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 2nd day of November, 2015.

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CERTIFICATION AS TO 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 § 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 one or more initials or other appropriate pseudonym or designation 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.

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