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STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case No. 2015AP001834-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT

v.

ROBERT A. SCHOENGARTH,

DEFENDANT-RESPONDENT.

APPEAL FROM ORDER EXCLUDING EVIDENCE
ENTERED IN THE CIRCUIT COURT OF LA CROSSE
COUNTY, THE HONORABLE RAMONA A. GONZALEZ,
PRESIDING

BRIEF AND APPENDIX OF THE
PLAINTIFF-APPELLANT

JOHN W. KELLIS
Assistant District Attorney
State Bar #1083400

Attorney for Plaintiff-Appellant

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601-3296
(608) 785-9604
(608) 789-4853 (Fax)
john.kellis@da.wi.gov

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ISSUE PRESENTED

Did the circuit court err by ordering the exclusion from trial all evidence concerning Schoengarth's performance on two of three field sobriety tests because the tests were not captured by an officer's squad vehicle video camera?

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

The State does not request oral argument or publication. This case may be resolved by applying established legal principles to the facts of this case.

STATEMENT OF THE CASE

The plaintiff-appellant, State of Wisconsin, appeals an order granting a motion to exclude evidence. The defendant-respondent, Robert S. Schoengarth, was charged in the criminal complaint with operating a motor vehicle while under the influence of an intoxicant, contrary to Wis. Stat. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat. § 346.63(1)(b), each as a second offense (6:1-2).

Schoengarth moved in limine to exclude all evidence concerning his performance on the latter two standardized field sobriety tests, specifically the “Walk and Turn” and “One Leg Stand” balance tests (10). The trial court, the Honorable Ramona A. Gonzalez presiding, granted Schoengarth’s motion after a hearing (22:13; A-Ap. 114). The trial court subsequently issued a written order consistent with its oral ruling (18; A-Ap. 117). The State now appeals (19-1).

STATEMENT OF FACTS

Because this case is before this Court on appeal of a pretrial motion, most of the facts the State relies upon are taken from the criminal complaint.

During the evening hours of July 3, 2014, Investigator Chad Marcon of the Onalaska Police Department, while on patrol observed a blue truck straddle lane divider lines, swerve within its lane of travel, cross a fog line and ultimately cross the center line (6:3). Investigator Marcon activated his vehicle's emergency lights, stopping the vehicle on State Highway 35 near Kramer Road in the City of Onalaska, La Crosse County, Wisconsin (6:3).

Investigator Marcon made contact with the driver of the blue truck, identified as Robert A. Schoengarth (6:3). Upon detecting the odor of intoxicants emitting from the vehicle and garnering an admission from Schoengarth that he had consumed one beer two hours prior, Investigator Marcon asked Schoengarth to exit the vehicle to perform standardized field sobriety tests (6:3).

Investigator Marcon then administered the three standardized field sobriety tests, observing all six possible clues of impairment in the Horizontal Gaze Nystagmus test, all eight possible clues of impairment in the Walk-and-Turn test, and at least three clues of impairment during the One Leg Stand test before the testing was terminated (6:3). Schoengarth's test performance was not captured on video due to the darkness of night and the location of the only squad vehicle on

scene equipped with a camera (22:3-4; A-Ap. 104-05).

After submitting to a preliminary breath test yielding a .14 breath alcohol concentration result, Schoengarth was arrested for operating a motor vehicle while under the influence of an intoxicant (6:3). The State subsequently charged Schoengarth in the criminal complaint with operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration, each as a second offense (6:1-2).

Schoengarth moved *in limine* to exclude from trial all testimony or evidence related to his performance on the Walk-and-Turn and One Leg Stand field sobriety tests (10, A-Ap. 101).

On December 2, 2014, the circuit court convened a hearing on Schoengarth's motion (22, A-Ap. 102). At the conclusion of motion hearing, the circuit court, the Honorable Ramona A. Gonzalez presiding, granted Schoengarth's motion (22:13, A-Ap. 114). After granting Schoengarth's motion in an oral ruling, the circuit court entered a written order granting the motion (18; A-Ap. 117). The State now appeals the circuit court's order excluding evidence (19-1).

ARGUMENT

I. THE CIRCUIT COURT ERRED BY ORDERING EVIDENCE EXCLUSION OF SCHOENGARTH'S FIELD SOBRIETY TEST PERFORMANCE AT TRIAL.

A. Standard of Review.

This court reviews the circuit court's evidentiary decisions for an erroneous exercise of discretion. *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264.

B. Evidence of standardized field sobriety testing performance is relevant and probative to the issue of whether a driver is impaired.

All relevant evidence is deemed admissible at trial, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by the rules set forth in Chapters 901 through 911, or by other rules adopted by the supreme court. Wis. Stat. § 904.02.

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Wis. Stat. § 904.01.

This court previously recognized that evidence of standardized field sobriety test performance is relevant and probative as to whether an individual is operating while intoxicated. *See e.g. City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis.2d 643, 693 N.W.2d 324.

C. An officer's testimony describing a driver's field sobriety test performance should be admissible at trial regardless of whether a squad video corroborates that testimony.

Schoengarth argued during the hearing on his motion that the State should be precluded from admitting officer testimony describing his performance on the Walk-and-Turn and One-Leg-Stand standardized field sobriety tests because a squad video -- not officer testimony -- would be the best evidence of the field test performance and because a lack of video evidence eliminates Schoengarth's ability to impeach testifying officers during cross-examination using a video (22:3-4; A-Ap. 104-05).

Schoengarth advanced no argument that Investigator Marcon's expected testimony concerning the latter two field sobriety tests would be irrelevant or lack probative value concerning the jury's finding of whether Schoengarth operated a motor vehicle while under the influence of an intoxicant (22:2-4; A-Ap. 103-05).

Schoengarth offered to the circuit court no authority supporting the argument that a

prerequisite to the State's ability to offer evidence of a driver's standardized field sobriety test results hinges upon the existence of a squad video capturing the driver's performance on those tests in a well-lit area, free of obstructions (22:2-4; A-Ap. 103-05).

Schoengarth did not argue that Investigator Marcon's testimony describing performance on the latter two field sobriety tests would fall within any other evidentiary rule¹ requiring the exclusion of the officer's testimony, other than to argue that video footage would be the best possible evidence² to show how the test was performed (22:2-4; A-Ap. 103-05).

Schoengarth did not argue that the State actually, intentionally or maliciously destroyed any evidence concerning his performance on standardized field sobriety tests or that officers intentionally focused the squad video camera in a direction so as to avoid capturing his performance on video (22:2-4; A-Ap. 103-05).

¹ Schoengarth's written motion purportedly relied upon Wis. Stat. §§ 910.01 (establishing general definitions as used in the subsequent statutory subsections) and 910.02 (requiring the use at trial of an original writing, recording or photograph to prove the content of that writing, recording or photograph) as allegedly supportive of his request to exclude Investigator Marcon's testimony. Neither Schoengarth's written motion nor oral argument offered at the December 2, 2014 hearing on Schoengarth's motion explains how either statutory section would guide the circuit court's decision or otherwise require exclusion of evidence concerning field sobriety testing.

² There is no dispute that video footage capturing the commission of a crime would prove highly beneficial in criminal prosecution. However, the State is unaware of any authority, including the "Best Evidence Rule," which would prohibit the State from introducing testimony at trial simply because those intending to testify could have possibly captured their observations on video.

Schoengarth did not argue that a defendant's constitutional rights to confront his accusers, remain silent, or require the State to prove his guilt was violated because his performance on field sobriety tests was not captured on video (22:2-4; A-Ap. 103-05).

The circuit court even questioned the logic underlying Schoengarth argument during the motion hearing, inquiring as to what prevented defense counsel at trial from simply cross-examining the State's witnesses and making appropriate arguments:

THE COURT: If I don't have anything to show that they nefariously clipped the video or did anything that was an intentional misconduct, I think I let it all in. Let the jury decide which way to go.

MR. KOBY: But he loses –

THE COURT: They can see the video.

MR. KOBY: He loses his right to cross-examine with that video, and, of course, this could have been –

THE COURT: How does he lose his right to cross-examine with the video?

MR. KOBY: Because the video – he – Marcon is gonna come in and testify this is how he performed the test. That's what he's gonna say.

(22:5-6; A-Ap. 106-07).

Notwithstanding Schoengarth's failure to assert in his written motion or advance any such argument during the motion hearing, the circuit court then *sua sponte* invited a new claim on Schoengarth's behalf that a lack of squad video would force him to testify at trial to rebut testifying officers' testimony:

THE COURT: Right. And you're gonna say, your guy agreed to be videotaped; the videotape was under their control; this is what they came up with; ladies and gentlemen, my guy will – will testi – will test – has testified – oh, I see what you're saying. Then he has to testify.

MR. KOPY: He loses his right to cross-examine with that video.

The Court: And he has to testify.

Mr. Koby: That's the best evidence, and they lost it.

The Court: And that's –

Mr. Koby: Schoengarth didn't do anything.

The Court: 'Cause then that forces your guy to testify.

Mr. Koby: It does.

(22:5-6; A-Ap. 106-07)

Despite the lack of authority supporting his argument, the circuit court granted Schoengarth's motion initially in an oral ruling:

MS. VASUPURAM: Well, Judge, I'll stick to my, um, initial statement that, you know, there's no evidence collected here that was destroyed in bad faith. I think the officers were working with what they were able to do in the circumstances that they found themselves in. They were on a busy highway. The cars were parked where they were able to park, and, um, the video was set up to the best of their ability to capture what they could; and this is what we have. Um, so, I – you know, essentially I feel that this is in some ways questioning the officer's credibility as far as what they would testify to as far as the results of the field sobriety tests.

The Court: And that's his right to do so, and I don't have to accept that, um, the credibility of the officers is a given. Um, I will exclude the – the conversations or any testimony with regard to the walk-and-turn test and the one-legged stand.

Mr. Koby: Thank, Your Honor.

The Court: The motion in limine is granted.

(22:12-13; A-Ap. 114).

The State maintains that by ordering the exclusion of the evidence at trial, the circuit court erroneously exercised its discretion in four ways.

First and foremost, the circuit court failed to articulate any reasoning underlying its decision or reference any authority supporting its decision, other than a conclusory assumption that Schoengarth may feel compelled to testify in his defense in the absence of a video capturing his test performance (22:6, 13; A-Ap. 107, 114).

The evidence which the State sought to admit at trial is relevant and probative to determinations of whether a driver is impaired as recognized in *Wilkins*, relevant evidence is deemed admissible at trial by Wis. Stat. § 904.02 unless otherwise provided by statute, rule or the constitution, and neither Schoengarth nor the circuit court were able to point to any applicable authority preventing the introduction of the State's evidence or holding that a criminal defendant's right to remain silent is violated simply because he may wish to testify contrary to evidence offered against him.

Second, the circuit court recognized that the State did nothing improper to destroy or alter evidence, nor has Schoengarth argued that the State took any steps to distort the quality of the preserved video, and as such, no evidence spoliation issues were present (22:5-6; A-Ap. 106-07). A video of the traffic stop exists and is available to both the State and Schoengarth, even if less than helpful to either party.

Third, the circuit court recognized that a lack of squad video did not leave Schoengarth without recourse to mount a defense at trial: he is free to attack the credibility of testifying officers at trial, argue that a video would have been the most credible evidence, call as a witness in his defense the passenger in his vehicle, and argue that officers intentionally failed to capture his test performance on video in attempts to prove an innocent man guilty (22:5-6, A-Ap. 106-07).

Fourth, and perhaps most importantly, to affirm the circuit court's exclusion of evidence would establish an illogical precedent whereby

numerous law enforcement officers could make first-hand observations of a suspect engaging in any number of crimes yet be precluded from describing to a jury what occurred unless the incident(s) were not only captured on video but captured on video in a well-lit area, free of any weather conditions or other obstructions that may interfere with the jury's ability to see clearly what present officers observed.

Ultimately, the State's witnesses, Schoengarth's witness(es), and Schoengarth himself could offer testimony at trial concerning field sobriety test performance notwithstanding the lack of video footage. The circuit court recognized this fact, undoubtedly predicted the evidence's value to the State, but erroneously exercised its discretion by excluding the strongest evidence of alcohol impairment possessed by the State. The circuit court's decision shall significantly hinder the State from meeting its burden at trial, and that decision was made without the circuit court articulating any basis for its decision supported by law.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court reverse the order of the circuit court granting Schoengarth's motion to exclude evidence.

Dated this 25th day of November, 2015.

Respectfully submitted,

John W. Kellis
Assistant District Attorney
State Bar #1083400

Attorney for Plaintiff-
Appellant

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601-3296
(608) 785-9604
(608) 789-4853 (Fax)
john.kellis@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,360 words.

John W. Kellis
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 at La Crosse, Wisconsin, this 25th day of November, 2015.

John W. Kellis
Assistant District Attorney

APPENDIX CERTIFICATION

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 Wis. Stat. § 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.

Dated this 25th day of November, 2015.

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on November 25, 2015, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-appellant's brief and appendix.

Dated this 25th day of November, 2015.

John W. Kellis
Assistant District Attorney