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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Appeal No.: 2015AP001834-CR

ROBERT A. SCHOENGARTH,

Defendant-Respondent.

RESPONSE BRIEF OF DEFENDANT – RESPONDENT

An appeal from the circuit court for La Crosse County, Honorable Ramona A. Gonzalez presiding.

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STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT ERRONEOUSLY EXERCISE ITS DISCRETION BY EXCLUDING, AT TRIAL, TESTIMONY REGARDING DEFENDANT-RESPONDENT'S PERFORMANCE ON TWO OF THREE VOLUNTARY FIELD SOBRIETY TESTS WHICH DEFENDANT-RESPONDENT AGREED TO PERFORM CONDITIONED UPON THE SAME BEING VIDEOTAPED SO AS TO PRESERVE EXCULPATORY INFORMATION WHERE THE QUALITY OF THE VIDEOTAPE IS SO POOR AS TO EFFECTIVELY RENDER IT "USELESS" TO DEFENDANT-RESPONDENT.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent 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 in Limine 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 (6:1-7: R-App. 101-107). Defendant-Respondent entered not guilty pleas to both counts.

Defendant-Respondent moved the trial court for an order *in limine* excluding from use at trial testimony or evidence of any kind by Investigator Chad Marcon of the Onalaska Police Department related to the performance of Defendant-Respondent, Robert Schoengarth, on field sobriety tests, specifically, the "Walk- and-Turn" test and the "One-Leg-Stand" test (10). The motion was predicated upon the Affidavit of Robert Schoengarth (11:1-2; R-App. 108-109).

The State offered no testimony or evidence in opposition to Defendant-Respondent's Motion at the hearing on December 2, 2014 (22). No facts or evidence were offered by the prosecution in opposition prior to the hearing (22). The subject videotape was viewed by the trial court and counsel (22:8-11). The trial court, the Honorable Ramona A. Gonzalez presiding, granted Schoengarth's motion at the hearing (22) and subsequently issued a written order consistent with its oral ruling (18) from which the State now appeals (19-1).

STATEMENT OF FACTS

Defendant-Respondent does not dispute the Statement of Facts presented by Plaintiff-Appellant as the same represents an accurate paraphrasing of the Criminal Complaint.

Conspicuous, by its absence, is any reference by the State to the Affidavit of Robert Schoengarth (11:1-2; R-App. 108-109). The Affidavit of Robert Schoengarth constitutes the only "facts" before the trial court at the time of the motion hearing on December 2, 2014. Further missing from the State's Statement of Facts is the "fact" that the court reviewed the subject video prior to entering its ruling (22:8-11).

Lastly, the State offered no evidence in opposition to the Defendant-Respondent's motion.

Defendant-Respondent specifically agreed to perform voluntary field tests at the request of Investigator Chad Marcon with the understanding that his performance on the field sobriety tests would be videotaped based upon Mr. Schoengarth's belief that the same would result in exculpatory information (11:1-2; R-App. 108-109). Defendant-Respondent was positioned by Investigator Marcon between the patrol vehicle and his vehicle for what Mr. Schoengarth believed to be videotaping purposes in accordance with Defendant-Respondent's consent and request (11:1-2; R-App. 108-109).

The State, in responding to Defendant-Respondent's discovery demand, produced a videotape of the field sobriety tests. The videotape did not include the

performance of Defendant-Respondent on the Walk-and-Turn test and One-Leg-Stand test (11:1-2; R-App. 108-109).

Defendant-Respondent did not participate in the videotaping process and had no control over the videotape resulting in its lack of evidentiary value (11:1-2; R-App. 108-109).

Defendant-Respondent moved the trial court for an order *in limine* excluding from use at trial testimony or evidence of any kind by Investigator Chad Marcon of the Onalaska Police Department related to the performance of Defendant-Respondent, Robert Schoengarth, on field sobriety tests, specifically, the "Walk-and-Turn" test and the "One-Leg-Stand" test (10). The motion was predicated upon the Affidavit of Robert Schoengarth (11:1-2; R-App. 108-109).

On December 2, 2014, the circuit court had a hearing on Defendant-Respondent's motion (22). At the conclusion of the motion hearing, the circuit court granted Schoengarth's motion (22) and subsequently issued a written order consistent with its oral ruling (18) from which the State now appeals (19:1).

ARGUMENT

I. DID THE TRIAL COURT ERRONEOUSLY EXERCISE ITS DISCRETION BY EXCLUDING, AT TRIAL, TESTIMONY REGARDING DEFENDANT-RESPONDENT'S PERFORMANCE ON TWO OF THREE VOLUNTARY FIELD SOBRIETY TESTS WHICH DEFENDANT-RESPONDENT AGREED TO PERFORM CONDITIONED UPON THE SAME BEING VIDEOTAPED SO AS TO PRESERVE EXCULPATORY INFORMATION WHERE THE QUALITY OF THE VIDEOTAPE IS SO POOR AS TO EFFECTIVELY RENDER IT "USELESS" TO DEFENDANT-RESPONDENT.

STANDARD OF REVIEW

The admissibility of evidence is within the trial court's discretion. *State v. Peters*, 192 Wis.2d 674, 685, 534 N.W.2d 867 (Ct.App. 1995). This Court reviews the circuit court's evidentiary decisions for an erroneous exercise of discretion. The trial court is within its discretion so long as it examined the relevant facts, applied a proper legal standard and reached a conclusion that a reasonable judge could reach through a demonstrated, rational process. *City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis.2d 643, 693 N.W.2d 324; *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264.

The order of the trial court should be affirmed as the record fails to demonstrate an erroneous exercise of discretion.

Defendant-Respondent Schoengarth does not dispute that evidence of standardized field sobriety testing is relevant and probative to the issue of whether a driver is impaired as articulated in *City of West Bend v. Wilkens*, 2005 WI App

36, 278 Wis.2d 643, 693 N.W.2d 324. However, as noted in *City of West Bend v. Wilkens*,

> The admissibility of evidence is within the trial court's discretion. *State v. Peters*, 192 Wis.2d 674, 685, 534 N.W.2d 867 (Ct.App. 1995). We will not overturn its decision absent an erroneous exercise of such discretion. *Id.* The trial court is within its discretion so long as it examined the relevant facts, applied a proper legal standard, and reached a conclusion that a reasonable judge could reach through a demonstrated rational process. *Id. supra. City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis.2d 643, 693 N.W.2d 324.

The State would have this Court believe that factually this case involves nothing more than a "routine" OWI defendant consenting to the performance of standardized field sobriety testing and then objecting to the results being offered at trial such as was the case in *City of West Bend v. Wilkens* where the underlying scientific basis of standardized field sobriety testing was challenged. *Id.* The State failed to mention the only evidence presented to the trial court in advance of the motion hearing and at the motion hearing was the Affidavit of Robert Schoengarth (11:1-2; R-App. 108-109) and the subject videotape (22:8-11). The Criminal Complaint (6:1-7; R-App. 101-107), referenced by the State as its only factual basis in support of its Statement of the Case, states in pertinent part,

> I then returned to the vehicle and asked the driver Robert Schoengarth, if he would be willing to perform field sobriety tests. He agreed and walked to the back of his vehicle. (6:3; R-App. 103).

Further, Mr. Schoengarth completed field sobriety testing as requested (6:3; R-App. 103). However, what takes this case out of the realm of "routine" is the fact that Mr. Schoengarth specifically requested, as a condition of securing his

consent to voluntary standardized field sobriety testing, that the results of his performance of the testing be secured by way of videotape for future evidentiary use if necessary (11:1-2; R-App. 108-109). Schoengarth's Affidavit was submitted to the trial court with the motion and, as indicated, was the only evidence presented prior to and at the time of the motion. The trial court requested the review of the videotape and based upon the trial court's review of the facts submitted at the time of the motion as well as the evidence being sought to be excluded, in the absence of the submission of evidence by the State or any written opposition to the motion, granted Schoengarth's request.

The State cites this Court to *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264, as the "Standard of Review" in the case at bar. Factually, the issues presented in *Munford* are substantially akin to the issues presented in this case. *Id.*

In *Munford*, the defendant appealed a judgment of conviction for a first degree intentional homicide case arguing that his due process rights were violated when the State destroyed evidence with apparent exculpatory value. Specifically, Munford claimed that his due process rights were violated when the State destroyed his van before his criminology expert was able to examine it and that the van's purported exculpatory value should have been apparent to the State at the time the van was destroyed. Munford further claimed that his criminology expert was unable to obtain other comparable evidence by reasonable means. *Id.*

The Court of Appeals in *Munford* conducted an in depth "due process analysis" articulating the general rule that,

> The due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the State to preserve exculpatory evidence." *State v. Greenwold*, 181 Wis.2d 881, 885, 512 N.W.2d 237 (Ct.App. 1994) (*Greenwold* ***269 I)*.

The Court further articulated the *Greenwold* analysis by noting that,

> The State's destruction of evidence violates a defendant's due process rights 'if the police: (1) failed to preserve ... evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory'. *State v. Greenwold*, 189 Wis.2d 59, 67, 525 N.W.2d 294 (Ct.App. 1994) (*Greenwold I I)*.

As noted in *Munford*, since Munford admitted the "difficulty of determining bad faith", Munford argued only to the Court of Appeals that the State "failed to preserve apparently exculpatory evidence". *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264.

The *Munford* Court identified the standard of review relative to a claim that evidence was lost or destroyed in violation of due process noting that the Court "independently apply the constitutional standard to the facts as found by the trial court". *Id.*

In *Munford*, the Court identified those factors which Munford needed to demonstrate in order to establish that the State violated his due process rights by destroying apparently exculpatory evidence. The Court, citing *State v. Oinas*, 125 Wis.2d 487, 490, 373 N.W.2d 463 (Ct.App. 1985) (emphasis omitted), indicated that,

> Munford must demonstrate that: (1) the evidence destroyed "possess[ed] an exculpatory value that was apparent to those who had custody of the evidence ... before the evidence was destroyed," and (2) the evidence is "of such a nature that the defendant [is] unable to obtain comparable evidence by other reasonably available means". *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264.

In this case, prior to the evidence, to-wit: the videotape, even being obtained by the State, Defendant-Respondent advised of his belief that the same would be exculpatory and consented to otherwise voluntary testing with the express condition that the same be videotaped to preserve the exculpatory value. Clearly, the value was apparent to those who had custody of the evidence before the evidence was destroyed.

Moreover, the videotaped performance of the tests which clearly is the "best evidence" of the Defendant-Respondent's performance as opposed to a biased description by law enforcement is and was clearly "of such a nature that the defendant is unable to obtain comparable evidence by other reasonable means".

While Plaintiff-Appellant cites the Court to Wis. Stat. § 904.02 in its opening commentary relative to "relevant evidence", Wis. Stat. § 904.03 specifically provides for the exclusion of relevant evidence. Section 904.03 states in pertinent part:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion f the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (emphasis added).

As identified by Plaintiff-Appellant, the Defendant-Respondent's Motion in Limine was to exclude two of three standardized field sobriety tests typically employed by law enforcement for the purpose of establishing probable cause to arrest and subsequently offered at trial to support an officer's opinion that the defendant's ability to drive his automobile was impaired. The results of standardized field sobriety testing combined with observed indicia of intoxication and driving conduct "typically" constitutes the basis of the opinion.

In the absence of the Walk-and-Turn test and One-Leg-Stand test, the Court is still capable of determining probable cause based upon the performance of the Horizontal Gaze Nystagmus testing which, of course, as identified in this case, resulted in a total of six clues, the maximum available in the performance of the test (6:5; R-App. 105). Had the Defendant-Respondent had a hip, knee or back problem that would have prevented the performance of the Walk-and-Turn test and/or the One-Leg-Stand test, probable cause would have been supported by HGN testing coupled with driving conduct and indicia of intoxication.

In this case no probable cause challenge was made by Defendant-Respondent.

At trial the State is entitled to offer evidence related to driving conduct, indicia of intoxication as articulated in the Complaint and what the State will argue as a "complete failure" of Horizontal Gaze Nystagmus testing as a basis for the arresting officer's opinion that the Defendant-Respondent's ability to drive a motor vehicle was impaired. As such, evidence regarding the Walk-and-Turn test

and One-Leg-Stand test is in fact "cumulative evidence" as defined by Wis. Stat. § 904.03 offered solely for the purpose of "bolstering" the arresting officer's opinion at trial.

Moreover, in light of the facts presented to the trial court, specifically, that law enforcement "negotiated" the consent of the Defendant-Respondent to submit to voluntary standardized field sobriety testing based upon an agreement to videotape the same, the loss or destruction of the videotape relative to its useful value is unfairly prejudicial as defined by Wis. Stat. §904.03 in that it eliminates Defendant-Respondent's ability to cross examine the arresting officer and the assisting officer with the videotape and further mandates that the Defendant-Respondent testify to explain the circumstances surrounding the videotape, i.e., "conditional consent" and to rebut allegations regarding performance by law enforcement, effectively forcing Defendant-Respondent to testify where he would otherwise not be required to do so.

Exclusion of evidence under Wis. Stat. § 904.03 is clearly within the discretion of the trial court. *Jones v. State*, 70 Wis.2d 41, 233 N.W.2d 430 (1975). The ruling of the trial court in this case is clearly consistent with Wis. Stat. § 904.03.

To argue that the Defendant-Respondent is not unfairly prejudiced as a result of the Court's ruling, the State has advanced the argument that Schoengarth could "call as a witness in his defense the passenger in his vehicle". (Brief of Plaintiff-Appellant; Page 11).

As no facts were presented by the prosecution at the hearing on the Defendant-Respondent's motion in opposition to Defendant-Respondent's motion, the only reference to a passenger is included in the Criminal Complaint wherein the Complaint identifies a single passenger in the vehicle who had not been consuming alcohol (6:3; R-App. 103).

Assuming, arguendo, that the passenger was seated in the right front passenger seat given the Complaint referencing the operation of a "blue truck" the ability of a passenger to be able to make observations from the cab of a truck to the rear of the truck and observe walking/standing tests conducted between the rear of truck and the front of a patrol vehicle is questionable at best. Further, foundationally, even if the passenger were able to make observations regarding performance, foundation for the passenger to "critique" the performance would be lacking. Lastly, the credibility challenge to the testimony of the passenger based upon the foregoing coupled with the passenger's relationship to the Defendant-Respondent clearly renders any observations which the passenger might have made as "useless" as the videotape.

CONCLUSION

It is clear that the trial court examined the undisputed relevant facts presented by Defendant-Respondent at the hearing on December 2, 2014 and applied a proper legal standard consistent with Wis. Stat. § 904.03 and the conclusion reached by the trial court is, under the circumstances of this case, a

conclusion that any reasonable judge could reach through an identical demonstrated rational process.

Accordingly, Defendant-Respondent, Schoengarth, respectfully requests that this Honorable Court affirm the Order of the circuit court granting Defendant-Respondent's Motion.

Dated this 23rd day of December, 2015.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the rules contained in Wis. Stats., sec. (Rule) 809.19(8)(b) and (c) for a brief and appendix produced with a Proportional Serif Font. The length of this brief is 2,733 words.

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief and appendix 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 14 day of December, 2015.

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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 § 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 21 day of December, 2015.

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CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. § 809.80(4) on December 28, 2015, I deposited in the United States mail for delivery to the Clerk by first-class mail the original and ten copies of the Defendant-Respondent's Response Brief and Appendix.

Dated this 28th day of December, 2015.

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