STATE OF WISCONSIN

COURT OF APPEALS

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

REPLY BRIEF 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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ARGUMENT

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

In his filed response, Schoengarth fails to recognize the apparent difference between the destruction of exculpatory evidence and the failure of law enforcement to gather inculpatory evidence in the specific form he desires.

Because he supposedly negotiated with law enforcement for his performance on standardized field sobriety testing to be recorded, and because his performance was not captured due to the darkness of night and the location of the only camera on scene, Schoengarth maintains that the State should be precluded from introducing evidence that could potentially have been captured on video (Schoengarth's Br. at 12).

In support, Schoengarth directs this court's attention not to the preserved squad video which captured audible contact between law enforcement and Schoengarth – evidence which Schoengarth deems the "best evidence" of what transpired during his traffic stop – but rather a self-serving affidavit prepared after criminal charges were filed for the sole purpose of supporting his motion to exclude evidence (Schoengarth's Br. at 12).

Even more perplexing, Schoengarth now advances on appeal a different argument as to why the trial court should have excluded evidence of his standardized field sobriety test performance. *See State v. Van Camp*, 213 Wis.2d 131, 144, 569 N.W.2d 577, 584 (1997) (appellate courts need not address arguments raised for the first time on appeal).

Schoengarth advanced only two alternative arguments to the trial court in support of his motion: (1) that a squad video would be the best possible evidence of his field sobriety test performance, and (2) that a lack of squad video capturing his field sobriety test performance would eliminate his ability to impeach testifying witnesses (22:3-4; A-Ap. 104-05). The State shall not restate its entire argument in response and rather directs this court to pages 6-12 of its filed Brief-in-Chief.

On appeal, Schoengarth advances a new argument never presented before the trial court: that the evidence excluded by the trial court was otherwise inadmissible pursuant to Wis. Stat. § 904.03 as its probative value was substantially outweighed by the danger of undue prejudice and needless presentation of cumulative evidence (Schoengarth's Br. at 10-11). Despite Schoengarth's failure to present such argument to the trial court, the State addresses each claim in turn.

Addressing Schoengarth's first claim, the sole "undue prejudice" Schoengarth describes is the inability to use squad video footage to impeach officers involved in his impaired driving investigation (Schoengarth's Br. at 12). While

characterized by Schoengarth to the trial court as a "right to cross-examine with that video," Schoengarth offered neither the trial court nor this court any authority supporting a proposition that impaired motorists possess a constitutional or statutory *right* to a police squad video (22:6; A-Ap. 107).

The cases which Schoengarth cites in support of his argument, *State v. Oinas*, 125 Wis.2d 487, 373 N.W.2d 463 (Ct. App. 1985) and *State v. Munford*, 2010 WI App 168, 330 Wis.2d 575, 794 N.W.2d 264, each addressed the destruction of tangible exculpatory evidence that already existed – an automobile in *Munford* and a wallet bearing fingerprints in *Oinas*. *Munford*, ¶ 19, *Oinas*, 125 Wis.2d at 489.

In contrast with the instant case, the evidence which Schoengarth argues the State failed to preserve – a squad video capturing his standardized field sobriety test performance – was not only never destroyed, it never captured his performance on the tests due to the location of the camera and the darkness of night.

As a result, Schoengarth asks this court to establish a bright-line rule that members of law enforcement shall be precluded from testifying to the results of field sobriety testing if a driver's performance is not captured on video – an illogical rule not grounded in any authority offered to the trial court or this court and certainly not supported by *Oinas* or *Munford*.

Addressing Schoengarth's second claim, Schoengarth cites no authority supporting the proposition that because law enforcement utilize three standardized field sobriety tests to determine if a driver is impaired (routinely referenced as the Horizontal Gaze Nystagmus, Walk-and-Turn, and One-Legged-Stand tests), the results of two of three tests are inadmissible due to their cumulative use of determining if an individual is impaired.

To adopt such a rule would inherently establish an unfair and irrational precedent whereby defendants could seek to exclude evidence of specific standardized field sobriety tests from trial to inevitably argue to a jury that an officer inexplicably failed to utilize all three standardized field sobriety tests prescribed by his or her training.

Ultimately, even if this court were to ignore the fact that the preserved squad video and Schoengarth's affidavit describing his traffic stop are materially inconsistent, even if this court were to adopt a never before recognized "right to cross-examine officers with the assistance of a video," and even if this court were to declare that police officers are precluded from testifying to the results of all three standardized field sobriety tests, the trial court in no way "examined the relevant facts, applied a proper legal standard and reached a conclusion that a reasonable judge could reach through a demonstrated, rational process," all if which must be satisfied for this court to affirm the trial court's decision. *See City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 13, 278 Wis.2d 643, 649, 693 N.W.2d 324, 327.

To the contrary, the trial court articulated no findings of fact based on the evidence before it, the trial court referenced no case law, statute or other authority it was applying to the facts before it, and the trial court ruled without elaboration:

> 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).

This trial court's unexplained, summary ruling created confusion as to what authority or reasoning supported its decision to exclude evidence from trial which Schoengarth concedes is relevant and probative to whether he operated a motor vehicle while intoxicated (Schoengarth's Br. at 6).

Schoengarth's arguments on appeal, the majority of which were formulated *after* the trial court's ruling on his motion, attempt to make sense of the trial court's ruling after-the-fact. However, Schoengarth's claims establishing a never before recognized "right to cross-examine with a video" and a rule precluding the State from introducing into evidence two-thirds of the standardized field sobriety test battery are unfounded in the law, even had the trial court applied such theories to the facts of this case.

CONCLUSION

For the reasons explained above as well as those set forth in the State's Brief-in-Chief, the State respectfully requests that this court reverse the order of the circuit court granting Schoengarth's motion to exclude evidence.

Dated this 12th day of January, 2016.

Respectfully submitted,

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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 1,193 words.

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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 12th day of January, 2016.

_____

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on January 12, 2016, 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 reply brief.

Dated this 12th day of January, 2016.

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John W. Kellis
Assistant District Attorney