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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 15 AP 2263 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JULIEANN BAEHNI,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON MAY 4, 2015
IN THE CIRCUIT COURT FOR SAUK COUNTY, BRANCH II,
THE HONORABLE JAMES EVENSON PRESIDING.

Respectfully submitted,

JULIEANN BAEHNI,
Defendant-Appellant

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ARGUMENT

I. Ms. Baehni's blood test results should have been suppressed because Trooper Rau violated the implied consent law by failing to provide an alternative test.

There was a factual dispute between the testimony offered by Trooper Rau and Ms. Baehni at the motion hearing on August 1, 2013. R. 43. This is made clear even by the portions of the hearing transcript cited by the State in its brief. Pl.-Resp't Br. 6-7. Trooper Rau attempted to reduce Ms. Baehni's concerns regarding the blood draw and an alternative test to a mere fear of needles. Ms. Baehni's testimony makes it clear her desire for another test went well beyond that. The dispute continued over the timing and nature of comments Ms. Baehni made even during or perhaps after the blood test was over. Trooper Rau testified that Ms. Baehni never made a request for an alternative test following the blood draw. However, this testimony is self-serving and misleading because Trooper Rau was not in a position to know what occurred after the blood draw. He simply left Ms. Baehni at the jail and never inquired whether she would still like an alternative test.[1]

The Court adopted Trooper Rau's version of events, despite the apparent contradictions and the fact that parts of his testimony lacked an adequate basis of knowledge. It was improper and erroneous for the Court to have done so. The

[1] This is just one of the challenges posed by conducting a blood draw at a jail. When the arresting agency is not the agency in control of the jail, as was the case here, the defendant really has very little opportunity to request an alternative test after the primary test is complete.

Court failed to even articulate why it would accept Trooper Rau's testimony as more credible or how that determination was made.

Even if this Court were to conclude the trial court's factual determination was adequate, the facts applied to the law still indicate an implied consent law violation. Both the Court in its written decision and the State in its brief ignore one of the three basic obligations law enforcement has as it relates to chemical testing, namely the officer must be diligent in offering and providing an alternative test. *State v. Stary*, 187 Wis.2d 266, 270, 522 N.W.2d 32 (Ct. App. 1994). Mentioning the possibility of an alternative only when gaining consent for the primary test could be fine in most cases. However, when the defendant, as Ms. Baehni did, repeatedly requested an alternative test and an officer, as Trooper Rau did, informed a defendant that an alternative test can be had once the primary test is over, it is simply not enough for an officer to leave without even discussing the possibility of an alternative test. All Trooper Rau would have had to do is check to see if Ms. Baehni still wanted the alternative test they discussed earlier. Yet, he failed to do that.

In its brief, the State argues that suppression may not be the remedy for an implied consent law violation and cites to *State v. Zielke* to support this position. 137 Wis. 2d 39, 403 N.W.2d 427 (1987). The State's reliance on this case is misplaced. Ms. Baehni cited *State v. Renard* and *State v. McCrossen* not to say suppression is the remedy for all implied consent law violations, rather suppression is the remedy when there is a failure to diligently offer and provide an

alternative test. *Renard*, 123 Wis.2d 458, 459-60, 367 N.W.2d 237 (Ct. App. 1985); *McCrossen*, 129 Wis. 2d 277, 297, 385 N.W.2d 161 (1986). That was the case in *Renard* and *McCrossen* and that is the case here. The facts of *Zielke* are easily distinguished. The defendant in that case readily agreed to submit to a blood test after being involved in a serious accident. 137 Wis. 2d 39, 43. He was not given all of the information he should have been prior to consenting to the test, but he consented without reservation nonetheless. *Id.* There was no issue with an alternative test whatsoever. *Id.*

II. Ms. Baehni's blood test results should be suppressed because her blood was not drawn by a person authorized to do so by statute and the test failed to meet the established standard for reasonableness.

The State dwells on the qualifications of Ms. Gallagher, the paramedic who drew Ms. Baehni's blood at the Sauk County Jail. However, when it comes to determining whether Ms. Gallagher was authorized to draw blood pursuant to Wis. Stat. § 343.305(5)(b) (2013), her qualifications are irrelevant unless they show her to hold one of the specific credentials listed in that statute. Ms. Gallagher is a paramedic. She might even be a good paramedic, but she not a physician, registered nurse, medical technologist[2], or physician assistant. The only remaining question in determining whether this blood draw was done in accordance with

[2] The State argues in its brief that because of other duties at a nearby hospital, Ms. Gallagher could be considered a medical technologist, even though that is not her job title, she does not have any certification for that position, and does not have any credentials from the state or even a private professional development association to indicate that is the case. This is yet another attempt by the State to render Wis. Stat. § 343.305(5)(b) (2013) meaningless so that nearly any person working in medicine could be viewed as a medical technologist in the broadest sense.

statute is whether or not Ms. Gallagher was a "person acting under the direction of a physician."

It is true that the ambulance service for which she works has a doctor, Dr. Manuel Mendoza, on staff and that he prepared some paperwork indicating he considers blood draws performed by paramedics to be under his direction. With all due respect, the doctor's conclusory statement does not make it so. Ms. Baehni has never argued that the doctor has to be standing over Ms. Gallagher's shoulder in order for her to be acting under his direction. However, there's no evidence that Ms. Gallagher was trained by Dr. Mendoza, has any (let alone regular) professional interaction with him, was asked by Dr. Mendoza to perform this blood draw, could have contacted him for assistance with this draw if there had been an issue. Instead, the evidence to support her working under his direction is mostly limited to a document that was apparently prepared by the ambulance service in consultation with the county in a conscious effort to circumvent the requirements of Wis. Stat. § 303.305(5)(b) (2013).

There is a hospital a short drive away with a bunch of people clearly qualified under this statute to conduct evidentiary blood draws. Sauk County chooses to do something different and far more questionable. The State cites to three unpublished Court of Appeals decisions on this subject for their persuasive authority. All three arise from Sauk County cases. This is not a coincidence. Sauk County is an outlier in our state for the way in which they handle blood draws. Two of the unpublished cases upheld the county's actions and one did not,

although that decision is being appealed to the Wisconsin State Supreme Court. This Court can follow the lead of two of the three judges and say that Wis. Stat. § 343.305(5)(b) (2013) meant practically nothing and even a contrived arrangement calling for paramedics to do these blood draws at a jail passes statutory muster, but Ms. Baehni respectfully asks that the words of the statute meant to protect the public be given an authentic and genuine meaning. The State points out that the statute has since been modified by the legislature to help facilitate the exact type of draw that was done here. That is true, but it is the legislators' purview to change the law, even if that erodes protections for the public. However, that is not the role of the courts. Furthermore, it would be wrong to somehow impute the 2013 legislature's legislative intent on those that came before and wrote a law to expressly limit those who could perform evidentiary blood draws.

Even if this Court were to conclude that Ms. Gallagher was acting under the direction of a physician, Ms. Baehni's blood draw was still unconstitutional because it was not done in a reasonable manner. The factors to be considered as part of this analysis were already clearly outlined in Ms. Baehni's original brief. Still it is worth pausing for a moment to comment one of the more outlandish statements in the State's brief. The State asserts that the blood draw in case "is just about as good as it gets short of a having a doctor draw blood in a hospital." Pl.-Resp't Br. 16. Having a physician assistant do the blood draw in a hospital is "just about as good," but a paramedic in a jail is nowhere near the same as a doctor in a hospital. Ms. Baehni will concede that her blood draw was more reasonable than a

hypothetically one performed by a rookie police officer outside his cruiser. On the spectrum of reasonableness, that would be near the bottom. However, what occurred here is far from the top of the spectrum. It is up to this court to decide whether the constitutional protections offered by *Bohling* and *Daggett*, are so lax as to make the procedure followed in this case acceptable. See *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993); *State v. Daggett*, 2002 WI App 32, 250 Wis. 2d 112, 640 N.W.2d 546.

III. Ms. Baehni made a prima facie showing sufficient to shift the burden to the State regarding her 1990 prior conviction.

State v. Baker holds that if a defendant presents the court with an affidavit alleging that she was not represented by counsel and that she did not at any time affirmatively waive the right to counsel, that is a sufficient prima facie showing for a collateral attack. 169 Wis. 2d 49, 77-78, 485 N.W.2d 237 (1992). In her affidavit, Ms. Baehni stated she was unrepresented; "she did not know she could have had an attorney appointed at the county's expense, regardless of whether or not she qualified for a State Public Defender;" she did not know "she could have asked for additional time [prior to her plea] during which she could have consulted with an attorney." R. 28. These statements alone are enough to make a prima facie showing under *Baker*. The burden should have shifted to the State prior to any testimony being taken.

In the alternative, her testimony illustrated a lack of awareness of fundamental information a defendant must have in order to waive her right to

counsel in a knowing, intelligent, and voluntary manner. It is true Ms. Baehni's memory was not entirely clear about certain aspects of her case, but that does not change her lack of basic requisite knowledge. Again, the burden should have shifted to the State, and the State failed to present evidence that Ms. Baehni's waiver of counsel was constitutionally valid.

IV. Evidence regarding Ms. Baehni's alleged 1992 prior conviction should not be allowed to be presented to a jury.

In its brief, the State claims that "Baehni's filings only told a partial story [regarding her alleged 1992 conviction], her driving record gave a complete picture. Pl.-Resp't Br. 26. This is not true at all. At a minimum, any rational person would agree there is confusion and uncertainty surrounding the outcome of Ms. Baehni's 1992 case. Indeed, that is what the trial court concluded.

Ms. Baehni's Illinois driving record does indicate a conviction on July 10, 1992 for an offense that occurred on May 14, 1992. R. 81. The State asserts it is possible that Ms. Baehni's charges were dismissed and later refiled resulting in a conviction. Pl.-Resp't Br. 26. Yet, this argument makes no sense given the dates on the documents provided by Ms. Baehni. They show the one charge being stricken off with leave to reinstate (the equivalent of dismissed without prejudice) on the same day she was allegedly convicted. R. 32 at 6. Another document shows the other charge being dismissed at a date after the her driving record indicates she was convicted. Id. at 7. This means the State's proffered explanation for the discrepancy between court documents and Ms. Baehni's driving record is not

possible. Given that, it is hard to see why certified court records from the actual case would not obviously trump a driving record from the Secretary of State's office in terms of reliability and accuracy.

The State is critical of Ms. Baehni's attempt to challenge the admission of evidence regarding the alleged 1992 conviction, instead of working to remove it from her driving record through a "direct proceeding" in Illinois. The time and effort that would have taken could have been very substantial. Ultimately, the State's "advice" to Ms. Baehni has no bearing on the question of whether the driving record notations regarding the 1992 offense, which appear to be erroneous given the court documents she offered, is actually relevant and admissible under Wis. Stat. § 904.01 *et seq.* Ms. Baehni urges this Court to conclude that the driving record evidence should have been excluded. The State is correct that Ms. Baehni spent a good deal of time in her initial brief arguing that the State's evidence of an alleged conviction in 1992 was clearly wrong. It is also true that at trial, the prosecution and the defense might disagree over the veracity of most of the evidence. However, that does not mean the State is allowed to present evidence that is almost certainly inaccurate leaving it to the jury to ultimately sort things out. Arguments showing the driving record to be in error matter because it goes to the document's probative value, which must be weighed against its highly prejudicial impact in order to determine admissibility. Wis. Stat. § 904.03.

CONCLUSION

For all of the reasons stated in this brief and Ms. Baehni's previous submission, the judgment of the trial court should be reversed. Ms. Baehni respectfully asks this action be remanded to Circuit Court with instructions that the blood test result in this case be suppressed and neither Ms. Baehni's 1990 prior conviction nor the alleged prior from 1992 be allowed to be used for sentence enhancement purposes.

Dated this 30th day of March, 2016.

Respectfully Submitted,

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CERTIFICATIONS

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 2,690 words.

I also certify I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stat. § 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated this Dated this 30th day of March, 2016.

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Signed,

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