STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CITY OF NEW BERLIN,

Plaintiff-Respondent,

v.

Court of Appeals case nos.:
2016AP000239

BRYON R. HRIN,

Defendant-Appellant.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A GUILTY VERDICT IN THE
CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH 8,
THE HONORABLE MICHAEL P. MAXWELL PRESIDING

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I. Because The Result Of A Preliminary Breath Screening Test Is Not Admissible In A Trial, The Fact That A Preliminary Breath Screening Test Has Been Administered Is Also Inadmissible In A Trial Because It Is Irrelevant, Unfairly Prejudicial, And Misleading

Wis. Stat. §343.303 expressly and unequivocally limits the circumstances where the result of a preliminary breath screening test may be admissible. "The result of the preliminary breath screening test shall not be 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 requested of a person under s. 343.305 (3)." A jury trial where a defendant is not challenging probable cause for the arrest or whether a chemical test was properly administered under Wis. Stat. §343.305(3) is a legal proceeding where the result of a preliminary breath screening test is not admissible.

The City would have the Court focus solely on the word "result" while interpreting the statute at issue. However, Wis. Stat. §343.303 repeatedly and exclusively uses the term "preliminary breath screening test" when referring to the law enforcement test commonly known as a PBT. It is conceded that the term "preliminary" and "breath" do not require further

scrutiny for this appeal, however "screening" and "test" require inspection as both words necessarily imply a search for a result. "If the legislature does not assign a technical meaning to a statutory word, §990.01(1), STATS., provides that these words 'shall be construed according to common and approved usage.'" *State v. Shea*, 585 N.W.2d 662, 221 Wis.2d 418 (Wis. App., 1998). Wis. Stat. §340.01 defines words for the Wisconsin general vehicle code, and Wis. Stat. §343.01 contains the definitions specific to the code as it relates to operators' license. Neither statute contain a definitions of either "screening" or "test," and thus the legislature intended that they be construed according to their common and approved usage. Dictionaries are recognized as appropriate sources for common and approved usage. *Id*. The court need not conclude that the statutory language is ambiguous before consulting the dictionary definition of a word. *Id*. The Oxford University Press Dictionary gives several definitions for "test," all of which imply that a result is an objective of a test (a procedure intended to establish the quality, performance, or reliability of something, a short written or spoken examination of a person's proficiency or knowledge, an event or situation that reveals the strength or quality of someone or something by putting them under strain,

etc.)[1] The definition most applicable to a preliminary breath screening test is 1.4, which relates to a chemical test. This definition states that a test is "[a] procedure employed to identify a substance or to reveal the presence or absence of a constituent within a substance." There is no definition of "test" which implies that a test is an end unto itself. It is always to determine a result of some sort. Similarly, the relevant definition of "screening" is '[t]he testing of a person or group of people for the presence of a…condition."[2] Without a result, a screening test is meaningless.

Evidence is only relevant where it has 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. Relevant evidence is generally admissible. Wis. Stat. §904.02. Evidence which is not relevant is not admissible. *Id*. Relevant evidence is also excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Wis. Stat. §904.03. The Wisconsin legislature enacted Wis. Stat. §343.303, expressly limiting the admissibility of the results of portable breath screening tests, and enacted evidence laws

[1] http://www.oxforddictionaries.com/us/definition/american_english/test
[2] http://www.oxforddictionaries.com/us/definition/american_english/screening

limiting or excluding evidence which is irrelevant or prejudicial or misleading.

Courts are not to interpret statutes in a vacuum. They must examine statutes within the context of the full statutory scheme and must harmonize statutes so as to apply the law reasonably and give it full effect. The Wisconsin Supreme Court stated this principle, saying:

> statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.

State ex rel. Kalal v. Circuit Court, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110 (Wis., 2004). Wis. Stat. §343.303 must be read in the context of Wis. Stats. §904.01, 904.02, and §904.03, as it is defining the evidentiary usage of the preliminary breath screening test. It must be interpreted reasonably, and to avoid absurd and unreasonable results. It must also be read to give effect to every word, not just one word. The fact that a screening test was performed is not relevant without a result. A screening test is, by definition, searching for a result. Without a result, the fact that a test was performed does not make any fact related to intoxicated driving

more or less probable, and thus the fact that a preliminary breath screening test has been administered, absent a result, is irrelevant, and must be excluded under Wis. Stat. §904.02. Even if there is some minimal relevance to a preliminary breath screening test being performed absent a result, its probative value is strongly outweighed by its potential prejudice. Revealing that a preliminary breath screening test has been administered inappropriately invites the jury to speculate as to the result, which is precisely the information Wis. Stat. §343.303 intends to prevent the jury from considering. In order to give every word in Wis. Stat. §343.303 effect, and to avoid absurd and unreasonable results, the statute must be interpreted to render inadmissible the fact of a preliminary breath screening test where the statute renders the result inadmissible.

Here, the uncontroverted evidence is that on direct examination by the city, officer Saddy testified that he administered a preliminary breath screening test to Bryon Hrin. The fact that a preliminary breath screening test was administered does not make it more or less probable that Hrin was, in fact, intoxicated, but does invite the jury to speculate that the result of the screening test was above the legal limit, which is the exact information

Wis. Stat. §343.303 forbids from being introduced outside of probable cause and refusal hearings.

II. The Court Did Not Properly Use Its Discretion Because It Did Not Apply The Proper Standard of Law

In analyzing the trial court's application of law, the City correctly notes that all published case law interpreting the statute at issue deal with an older version of the statute. While the City concedes that the published case law is directly on point, Hrin concedes that it is, in fact, interpreting an older version of the statute. However, the City goes on in its brief to argue that the court "took into consideration persuasive case law" in exercising its discretion. This is incorrect, as the court improperly took into consideration cases which it is expressly forbidden from considering, even as persuasive and improperly uncitable case law. Wis. Stat. §809.23 provides that "An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case." The statute was amended in 2009 to allow citation to unpublished opinions issued on or after July 1, 2009 for their persuasive value. *Id*. Any unpublished opinion issued prior to that date may not be cited as precedent or authority. Wis. Stat. §809.23 The court of appeals has interpreted this statute in the context

of a party appropriately and legally citing to a circuit court decision, and then inappropriately and illegally citing to the unpublished court of appeals decision affirming the circuit court. *Kuhn v. Allstate*, 181 Wis.2d 453, 510 N.W.2d 826 (1993). In *Kuhn*, Allstate argued that it had done nothing wrong because it "neither recited the language or content from [the] unpublished decision nor attached a copy to its brief." The court unequivocally rejected this argument, saying Allstate's "invitation to this court to consider its unpublished decision, or even the naked reference to it, violates both the letter and the spirit of Wis. Stat. §809.23(3). The adverse party may well be compelled to search out and review the decision." The court proceeded to Allstate for its inappropriate citation. The Wisconsin Supreme Court has also unequivocally rejected attempts to cite to unpublished opinions, fining the offending party and stating that "violations of the noncitation rule will not be tolerated." *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis.2d 536, 327 NW 2d 55 (1982).

In the present case, the circuit court found that there is no published case law interpreting Wis. Stat. §343.303, however, it cited as persuasive two unpublished cases, both of which were issued prior to July 1, 2009, and explicitly found those cases persuasive. R 35, pg. 191, 8-16. The court

recounted the facts of both cases, and then ruled on Hrin's case, denying his mistrial motion. R 35, pg. 191-193. This was inappropriate, and in direct contravention of the noncitation statute. As the court of appeals alluded to in *Kuhn*, where noncitable cases are relied upon, the adverse party is at a disadvantage, because it may or may not have access to the cases. If the adverse party does not have access to the cases, as Hrin's counsel here did not, then there is no fair opportunity to distinguish the facts of those cases or argue the misapplication of the law. The circuit court relied upon noncitable cases in making its ruling on Hrin's motion. The Supreme Court and the court of appeals have made clear that even suggesting a court rely upon such decisions is contrary to the letter and the spirit of the law, and will not be tolerated. Therefore the circuit court applied the wrong standard of law, and improperly used its discretion.

CONCLUSION

Because a preliminary breath screening test is irrelevant without a result, and admission of the result is explicitly inadmissible, the court should hold that Wis. Stat. §343.303, in combination with Wis. Stats. §904.01-904.03, forbids the admission of any evidence that preliminary breath screening test outside of the narrow admissibility outlined in the

statute. Further, the court should hold that the circuit court impermissibly relied upon noncitable case law, and applied the wrong legal standard in denying Hrin's motion for a mistrial. For these reasons and the reasons in Hrin's initial brief, the court should reverse the circuit court's decision, and remand the case for further proceedings not inconsistent with its ruling.

Signed and dated this _10_ day of August, 2016.

Respectfully submitted,
Mishlove & Stuckert, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

CERTIFICATION

I certify that this reply brief and appendix conform to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 2,969 words.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this _10_ day of August 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
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APPENDIX

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