STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP2052 CR
Milwaukee Co. Case: 2013CF3370

GERALD J. VANDERHOEF,

Defendant-Appellant.

ON APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND ORDER PARTIALLY DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD PRESIDING

BRIEF OF DEFENDANT-APPELLANT

Respectfully submitted,

KATHLEEN A. LINDGREN
Attorney for Defendant-Appellant
State Bar No. 1059518

Lakeland Law Firm, LLC
N27 W23957 Paul Road, Suite 206
Pewaukee, WI 53072
(262)347-2000

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Constitutions, Rules, and Statutes

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Issues Presented

1. Is a driver's silence when read the Informing the Accused consent?

CIRCUIT COURT ANSWER: Yes. At first the circuit court ruled it was a refusal. After the circuit court ruled that the search warrant to obtain the defendant's blood was invalid, the court ruled silence is consent.

2. When a warrant to obtain a blood sample from a driver is ruled invalid, can the State subpoena and introduce the driver's medically privileged records at trial?

CIRCUIT COURT ANSWER: Yes.

Position on Oral Argument and Publication

Mr. Vanderhoef welcomes the opportunity to provide argument or clarification of the facts or issues if the Court so requests. Publication may assist other Defendant's in positions similar to Mr. Vanderhoef, thus the Defendant believes publication is appropriate.

Facts of the Case

On July 24, 2013 at 2:10 a.m., Officer Ashley Schnering of the Oak Creek Police Department responded to call of a vehicle in a field at S. Chicago Road and Ryan Road. R32:21-22. A citizen witness, saw in his mirror, a truck go off the road and called 911; he reported seeing an individual standing in the intersection, but the witness did not stay at the scene. R45:19, 22. The citizen witness could not identify Mr. Vanderhoef as the driver. R45:38. When Officer Schnering arrived, she found Gerald Vanderhoef on standing on the road, a traffic control

light down and a 2001 Ford Truck 50 feet off the road in a field. R45:20. Mr. Vanderhoef kept saying "just shoot me." R45:18. Officer Schnering shot Mr. Vanderhoef with her taser. R45:64. The officers placed Mr. Vanderhoef "into custody" and then Officer Schnering searched the truck, finding a glass pipe with a "Chore boy" in the end of it. R45:13, R32:22.

The next stop was the hospital, where Mr. Vanderhoef's blood was drawn for chemical testing purposes. R32:22. Mr. Vanderhoef spoke to the nurses and other medical staff, but refused to speak to the officer while at the hospital. R45:26-27; R32:56-57. Hospital staff found that Mr. Vanderhoef was not delirious. R32:56-57. Officer Schnering read Mr. Vanderhoef the Informing the Accused Form several times. R45:26. Mr. Vanderhoef did not respond to the officer's request for consent to draw his blood. Id. The officer marked on the Informing the Accused Form that Mr. Vanderhoef refused because he did not answer her. R45:28. She provided a Notice of Intent to Revoke to Mr. Vanderhoef, R45:27, and obtained a warrant for his blood. R45:29. That warrant was later found invalid. R46:12.

Because Mr. Vanderhoef was tasered, he received medical treatment. R52:12. This medical care included a urine test, which is standard procedures when a patient has been shot with a taser. Holder, E. et. al., *Study of Deaths Following Electro Muscular Disruption*: *10: Post-Event Medical Care*, Nat'l. Inst. of Just. U.S. Dept. of Just. May, (2011) (App. pp.239-244).

Procedural History

Mr. Vanderhoef was charged with Operating While Intoxicated 5th or 6th Offense contrary to Wis. Stat. §346.63(1)(h).[1] R32:22. The circuit court ruled that Mr. Vanderhoef's silence at the hospital was a refusal. R46:12. The circuit court ruled that the search warrant used to obtain Mr. Vanderhoef's blood was invalid, because it was not properly sworn (R45:60), which the State conceded (Id.). Days later the State subpoenaed the hospital to obtain Mr. Vanderhoef's medical records related to being tasered. R19:2. Specifically, the subpoena requested "blood test results" for Gerald J. Vanderhoef, drawn the night of July 24, 2013. Id. In response, Wheaton Franciscan Healthcare provided the Oak Creek Police Department a release and certification letter and six pages of records characterized as Lab Results from July 24, 2013. Id.

At the hearing held on the defendant's Motion to Suppress Hospital Records, the circuit court suppressed the urine test results as they were medically privileged, but stated "the State would have to make arguments with respect to how it's that these records are admissible" if the issue arose later. R50:11.

On the day of trial, the circuit court made certain rulings at the request of the State and the trial attorney. R52:8-15, 17 & 20. Following the court's ruling, the defendant entered a no-contest plea. R52:22-31. The Court ruled that the State would have been able to use the privileged urine results with respect to whether

[1] Wis. Stat. § 346.63(1)(h) (2011-12). All references to Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

the defendant was or was not under the influence. R52:13. The Court ruled that the State's expert could testify with respect to blood tests done at the State Crime Lab, (R52:8) as well as Mr. Vanderhoef's medical tests from Wheaton Franciscan Hospital. (R52:10). The Court ruled that the medical privilege did not apply to Mr. Vanderhoef's medical records. R52:13-14. The Court also ruled that the defendant's silence was consent, holding that the defendant's silence meant he was incapable of withdrawing consent. R52:20.

After the circuit court denied Mr. Vanderhoef's motions he pled no-contest to one count of Operating While Intoxicated (5^{th} or 6^{th}) in violation of Wis. Stat. § 346.63(1)(a). R52:31. Mr. Vanderhoef was sentenced to five and a half years of Wisconsin State Prison, broken down into two and a half years of initial confinement, followed by three years of extended supervision. R53:21. The sentence was run concurrent to any other sentence. R53:23.

ARGUMENT

I. MR. VANDERHOEF'S SILENCE IN RESPONSE TO AN OFFICER'S REQUEST FOR CHEMICAL TESTING WHEN THE DEFENDANT IS ABLE BOTH PHYSICALLY AND INTELLECTUALLY ABLE TO RESPOND IS NOT CONSENT.

A. Applicable legal principles and standard of review

The court of appeals will uphold a circuit court's factual determinations unless they are clearly erroneous, but the interpretation of a statute and the

application of facts to a particular statutory standard are questions of law the Court of Appeals decides independently from the circuit court. *See* County of Jefferson v. Renz, 231 Wis.2d 293, 301, 316, 603 N.W.2d 541.

A motion to suppress is reviewed under a two-step analysis. State v. Robinson, 2009 WI App 97, ¶ 9, 320 Wis.2d 689, 770 N.W.2d 721. The circuit court's findings of historical fact will be upheld unless clearly erroneous, but the application of constitutional principles to the facts found presents a question of law that is reviewed de novo. Id. Evidence that is obtained pursuant to an unlawful search will be suppressed, subject to some exceptions. State v. Dearborn, 2010 WI 84, ¶¶15-16, 30-49, 327 Wis.2d 252, 786 N.W.2d 97.

"'Whether evidence should be suppressed is a question of constitutional fact."' State v Johnson, 2007 WI 32, ¶ 13, 299 Wis.2d 675, 729 N.W.2d 182 (*quoting* State v. Knapp, 2005 WI 127, ¶ 19, 285 Wis.2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical facts, and its application of these historical facts to constitutional principles." Id. (*citing* State v. Turner, 136 Wis.2d 333, 343-44, 401 N.W.2d 827 (1987)). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. Id. An appellate court, however, is "in just as good a position as the trial court to make factual inferences based on documentary evidence and …need not defer to the trial court's findings." Cohn v. Town of Randall, 2001 WI APP 176, ¶ 7, 247 Wis.2d 118, 633 N.W.2d 674.

B. SILENCE IS A REFUSAL

Mr. Vanderhoef remained silent when asked to submit to a blood test. R45:28. His silence was a refusal. To hold otherwise misinterprets Wisconsin law.

The circuit court's factual determinations will be upheld unless they are clearly erroneous, but the interpretation of a statute and the application of facts to a particular statutory standard are questions of law the Court of Appeals decides independently from the circuit court. *See* County of Jefferson v. Renz, 231 Wis.2d at 316.

In Wisconsin silence is a refusal. An individual who told an officer he was not refusing was found a to have refused because his actions, when after having been read the Informing the Accused form multiple times, were considered uncooperative and belligerent when the defendant refused to answer the Deputy's repeated question. State v. Reitter, 227 Wis.2d 213, 236, 595 N.W.2d 646, 658 (1999). Mr. Vanderhoef was read the Informing of the Accused multiple times. R45:28. Also like Mr. ***Reitter*** he did not respond to the officer's question. Id. "*[A]ny failure to submit* to such a test" constitutes a refusal and triggers statutory penalties. State v. Rydeski, 214 Wis.2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997) (emphasis added). "A verbal refusal is not required. The conduct of the accused may serve as the basis for a refusal." Id.

In **Rydeski**, the defendant initially agreed to take an intoxilyzer test and was advised that there was a twenty-minute observation period required prior to its administration. Id. at 104. When the defendant asked to use the bathroom he was

told he could wait until after the test or use the restroom under the supervision of the officer. Id. The defendant agreed to wait. Id. At the end of the twenty-minute observation period the officer repeatedly asked the defendant to submit to the test, the defendant refused and proceeded to use the restroom. Id. at 107. The Court of Appeals decided because the defendant did not comply with the officer's instructions the defendant's behavior was a refusal. Id. at 109.

Similarly, conduct considered "uncooperative" or that prevents an officer from taking a sample results in a refusal regardless of whether words are involved. "[I]t is the reality of the situation that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal." Village of Elkhart Lake v. Borzyskowski, 123 Wis.2d 185, 192, 366 N.W.2d 506 (Ct. App. 1985) (*quoting* Beck v. Cox, 597 P.2d 1335, 1338 (Utah, 1979)). In ***Borzyskowski***, the defendant agreed to take a breathalyzer test but when asked to actually perform the test he repeatedly failed to cooperate. Id. at 190-91. The Court of Appeals found that this uncooperative conduct was a refusal. Id. at 191.

Additional cases cover behavior ranging from silent to obstructive actions - all of which have been deemed refusals. In general, it is not the defendant answering "no" that determines whether a refusal has occurred, it is that the officer followed the law to convey the implied consent warnings and whether the individual responded cooperatively or not regardless of speaking. In ***State v. Piddington,*** the Wisconsin Supreme Court held that as long as the State can prove that implied consent warnings and rights have been conveyed to an individual by

an officer, through reasonable methods, then an individual has received due process under the law. 241 Wis.2d 754, 623 N.W.2d 528 (2001). Thus, once the officer has conveyed the warnings and penalties: "any failure to submit to such a test" constitutes a refusal and triggers statutory penalties. Rydeski, 214 Wis.2d at 106.

Mr. Vanderhoef's case is similar to ***Rydeski***, ***Reitter***, and ***Bozyskowski***. In all of these cases, the individual being informed of his right to refuse a test chose to not verbally answer the officer's question either yes or no. In all four instances the officers offered multiple opportunities for response and compliance. In all of the cases, as in Mr. Vanderhoef's case, the individual refused to provide actual physical and verbal consent. In ***Rydeski***, ***Reitter***, and ***Bozyskowski***, the holding was that the individual's failure to answer the officer's question meant that the individual had refused.

Prior to being taken to the hospital Mr. Vanderhoef was treated by the Oak Creek Fire Department. R32:58. The report indicates that at 2:33 a.m., twenty minutes after having been tased,[2] Mr. Vanderhoef's mental status was: "Normal, Oriented-Place, Oriented-Time, Oriented-Events," both his left and right eyes were "Reactive" his skin "normal." Id. The Fire Department spoke with Mr. Vanderhoef who "denied any injuries besides being tased" after confirming he was

[2] This brief contains the proprietary term "Taser" to refer to conducted electrical weapons (CEW) or devices (CEDs) because this is the most commonly known term. Tasers are hand-held devices designed to deliver short high-voltage, low currant energy pulses by means of twin barbs attached to fine wires with the aim of temporarily paralyzing a person by causing painful muscular contraction. O'Brien, A.J., Thom, K., *Police use of Tasers in mental health emergencies: A review*, Int'l J.L. & Psychiatry (2014), http://dx.doi.org/10.1016/j.ijlp.2014.02.014

physically fine, the report indicates that Mr. Vanderhoef then "would not answer any more of our questions." Id.

Mr. Vanderhoef arrived at the Emergency Room at Wheaton Franciscan Healthcare at 2:48a.m. Id. While at the hospital being medically cleared, Officer Schnering approached Mr. Vanderhoef who was sitting in his hospital bed staring at the wall. R45:26. Officer Schnering asked Officer Luell whether Mr. Vanderhoef had said anything, he told her no. Id. Officer Schnering observed Mr. Vanderhoef sitting up in his bed, staring at the wall. Id. Officer Schnering approached Mr. Vanderhoef and asked him if he had been driving his vehicle. Id. He refused to respond. Id. Officer Schnering told the District Attorney that "At that -- at that point I had a feeling that he wasn't gonna answer any of my questions so I – I read him the informing the accused form…." Id. Officer Schnering read the Informing the Accused form from beginning to end. Id. Mr. Vanderhoef did not make a statement after she read the form. Id. At the end of the form she asked him if he would consent to providing a breath or blood sample. R45:27. He did not answer. Id. The officer testified that she asked Mr. Vanderhoef the question: "will you submit to a chemical test of your blood" several times, and that he did not make a statement. R45:28. The officer filled out the paperwork as a refusal, writing "wrote refusal and checked the no box" on the Informing the Accused form. Id. The officer filled out the Notice of Intent to Revoke and provided copies to Mr. Vanderhoef. R45:28-29. The form communicates to an individual that he or she has been considered to have refused.

After determining that Mr. Vanderhoef would not verbally consent to a blood draw the officer called her sergeant and advised him "it was going to be a refusal because he did not give a statement yes or no and that we needed a warrant to get his blood now." R45:29. The officer's sergeant spoke with the officer for several minutes gathering information that would be placed in the affidavit to obtain a warrant. R45:29-30. When asked if the defendant appeared to be conscious when she was talking to him and asked him to consent she answered with an unqualified "Yes." R45:29. Officer Schnering remained at the hospital until a warrant was conveyed to her personally. R45:31. Ultimately medical personnel arrived to draw the blood sample, which was taken in the officer's presence. R45:66.

While the officer was completing her investigation, and obtaining a warrant Mr. Vanderhoef was being treated by emergency room personnel. R32:56-57. Mr. Vanderhoef's medical charts from the emergency room indicate there was no language barrier, (R32:56), "[a]ppears in no acute distress. Fully verbal" (Id.); the patient had received "verbal instruction and/or educational material relating to their pain, its treatment goals, expectations, and care. The patient verbalized understanding" (R32:57). At 2:53 a.m. Mr. Vanderhoef "would not answer any questions. Will not talk to staff." Id. It was noted that he was a poor historian because "pt. is not talking or answering questions." Id. At 3:47 a.m. it notes "Pt. remains silent – still not giving any information. Police remains at bedside." Id. At 4:51 a.m., the medical records note that "[u]rine obtained when told he would have

to be cathed if he could not void. Pt. voided in urinal with assist of staff holding urinal." Id. At 6:15 a.m. "Pt. still does not talk but shakes his head yes and no." Id. The report also notes that Mr. Vanderhoef "would not talk and is impossible to get a history from him." Id. The medical record further indicates that his general condition was: "alert," and his neurologic condition was: "normal." Id. At 7:05 a.m. he was released from the emergency room and sent to Milwaukee Mental Health Complex. Id.

Mr. Vanderhoef was assessed by a nurse at the Milwaukee Behavioral Health Department at 8:54 a.m. R32:54-55. On the line for: "No sign of Delirium:" the nurse wrote "correct." R32:54. It listed no Neurologic, or in fact any other type of concerns." R32:54-55.

Based upon this overwhelming evidence, it is clear that Mr. Vanderhoef had chosen not to speak to those providing his treatment, asking him questions about an investigation, or the officer seeking to get his permission for chemical testing.[3] The fire department, hospital staff and Milwaukee Behavioral Health Department's nurse all believed he was refusing to communicate. There are no indications that any medical professional or the police officer who concluded Mr. Vanderhoef refused chemical testing believed that he was incapable of answering yes. He simply remained silent.

[3] A suspect's right of refusal is limited to the right to refuse to submit to a voluntary blood draw. State v. Marshall, 2002 WI App. 73, ¶ 18, 251 Wis.2d 408, 423, 642 N.W.2d 571, 578.

Officer Schnering and her sergeant both clearly believed that a warrant was required. "[E]vidence of an officer's subjective belief… may assist a court in analyzing whether facts known to an officer meet the objective standard." State v. Leutenegger, 2004 WI App 127, 275 Wis.2d 512, 685 N.W.2d 536. Subjectively, and objectively, Officer Schnering questioned, reacted to, and treated Mr. Vanderhoef as an individual capable of understanding and responding to her, but who was remaining silent instead.

Interpreting Mr. Vanderhoef's silence as consent would mean any suspected drunk driver that refused to answer questions regarding the investigation of a crime, after having been read the Informing the Accused Form, after being provided a Notice of Intent to Revoke Operating Privileges, and being informed he was considered to have refused to give consent along with the resulting possible penalties, and after waiting for the police to obtain a warrant and then being told the police had obtained a legal warrant for the blood draw, the individual may or may not have consented to chemical testing. It would also mean that all a lawyer needs to advise his clients to do to avoid refusals and their punishments is to remain silent.

Mr. Vanderhoef did not consent to the blood draw verbally or physically. The officer that observed his silence and actions first-hand considered his silence and actions a refusal and followed appropriate procedures based upon a refusal. Wis. Stat. § 343.305. No additional actions or words from Mr. Vanderhoef should have been necessary to invoke his right to refuse to consent to the blood draw.

This Court should follow the holdings of ***Reitter***, ***Rydeski***, and ***Bozyskowski*** and hold that Mr. Vanderhoef's choice to remain silent resulted in a refusal.

C. CIRCUIT COURT'S DECISION THAT MR. VANDERHOEF WAS "DELIRIOUS" IGNORES OVERWHELMING MEDICAL PROVIDER INFORMATION THAT SHOWED HE DENIED INJURY AND WAS ASSESSED AS "ALERT," "NORMAL," AND SHOWED NO SIGN OF DELIRIUM.

The Court held a motion on the Defendant's Motion to Suppress Evidence, (R5), but did not issue a decision because the State failed to establish that the blood drawn from Mr. Vanderhoef was obtained through a legal search warrant that complied with the requirements of the Fourth Amendment of the United States Constitution, and conceded the warrant was defective. "I will not argue at this point that the search warrant itself is valid." R45:70.

Two months later, when the court actually ruled on the Defendant's Motion to Suppress evidence, the court ruled:

> All right. I will concede that with respect to the blood draw, that this case is an unusual situation because we have, essentially, the police officers who – whether subjective or even their objective belief was that the defendant refused; otherwise, they wouldn't have gotten the warrant; otherwise, they wouldn't have taken the steps they did to indicate that the defendant refused.
>
> The issue becomes under those circumstances – Let's assume that the officers went the other route and took the position that the defendant did not refuse; that all he was saying was, shoot me. Essentially, he was under a – and I would characterize it as a state of delirium because no rational person would insist that the police shoot him.
>
> So the issue that the Court has to resolve is; were the steps by the officers – At least with respect to the blood draw, it's clear they needed a warrant, even though legally the State made the argument that no warrant was necessary.
>
> R53:9-10.

At this point the lower court made a finding that it was satisfied there was probable cause to arrest the defendant for operating while under the influence of an intoxicant. The court then returned to the issue of the warrant and the blood draw:

> And, therefore, this Court finds that, even though the officers were under this subjective belief that they needed a search warrant in this case, that there was no refusal, that essentially the Defendant was acting in a state of delirium, and there was no need to obtain a warrant, and the officer was well within their right to obtain a blood draw, even though they operated under this mistaken belief that they needed a warrant, and even though the warrant clearly in this case was defective, the Court finds that the Defendant did not refuse given his state of delirium.

R53:11-12. The Court later clarified, when asked whether it was ruling that Mr. Vanderhoef was incapable of refusing or did not in fact refuse, the court clarified "He did not in fact refuse; that he essentially was operating under a state of delirium." R53:14. The court did not find that he was incapable of refusing.

The lower court denied a Motion to Reconsider filed by the defendant, holding:

> All right. Then on the Motion to Reconsider, the Court at this time, and as I indicated, I previously made my ruling. Essentially the Court's prior ruling is going to be the law in the case that will govern with respect to the motion on the consent, or at least the issue surrounding whether or not it was, there was consent given. Therefore, the Court at this time is going to deny the Motion for Reconsideration.
> R50: 11.

The lower court's ruling is based upon the mistaken belief that evidence existed in the record that Mr. Vanderhoef was acting "delirious" while at the hospital. This ruling is factually inaccurate.

A motion to suppress is reviewed under a two-step analysis. State v. Robinson, 2009 WI App 97, ¶ 9, 320 Wis.2d 689. The circuit court's findings of historical fact will be upheld unless clearly erroneous, but the application of constitutional principles to the facts found presents a question of law that is reviewed de novo. Id. Evidence that is obtained pursuant to an unlawful search will be suppressed, subject to some exceptions. State v. Dearborn, 2010 WI 84, ¶¶15-16, 30-49, 327 Wis.2d 252.

"'Whether evidence should be suppressed is a question of constitutional fact."' State v Johnson, 2007 WI 32, ¶ 13, 299 Wis.2d 675. (*quoting* State v. Knapp, 2005 WI 127, ¶ 19, 285 Wis.2d 86. Constitutional facts consist of "the circuit court's findings of historical facts, and its application of these historical facts to constitutional principles." Id. (*citing* State v. Turner, 136 Wis.2d at 343-44). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. Id.

An appellate court, however, is "in just as good a position as the trial court to make factual inferences based on documentary evidence and …need not defer to the trial court's findings." Cohn v. Town of Randall, 2001 WI APP 176, ¶ 7, 247 Wis.2d 118.

The officers' testimony regarding Mr. Vanderhoef's behavior at the hospital primarily focused on Mr. Vanderhoef's refusal to answer her questions. R45:26-31. None of the facts suggest that Mr. Vanderhoef's refusal to answer questions was anything other than a volitional choice to remain silent.

As discussed earlier, the Oak Creek Fire Department's report indicates that twenty minutes after having been tased, Mr. Vanderhoef's mental status was: "Normal, Oriented-Place, Oriented-Time, Oriented-Events," both his left and right eyes were "Reactive" his skin "normal." R32:58. The Fire Department spoke with Mr. Vanderhoef who "denied any injuries besides being tased" after confirming he was physically fine, the report indicates that Mr. Vanderhoef then "would not answer any more of our questions." Id.

At the emergency room, Officer Schnering believed "At that -- at that point I had a feeling that he wasn't gonna answer any of my questions so I – I read him the informing the accused form…." Id. She asked him if he would consent to providing a breath or blood sample. R45:27. He did not answer. Id. The officer filled out the paperwork as a refusal, writing "wrote refusal and checked the no box" on the Informing the Accused form. Id. She wrote refusal and checked the box no. Id. The officer filled out the Notice of Intent to Revoke and provided copies to Mr. Vanderhoef. R45:28-29.

After determining that Mr. Vanderhoef would not verbally consent to a blood draw the officer called her sergeant and advised him "it was going to be a refusal because he did not give a statement yes or no and that we needed a warrant to get his blood now." R45:29. When asked if the defendant appeared to be conscious when she was talking to him and asked him to consent she answered with an unqualified "Yes." Id.

The emergency department charts indicate that he was "Fully verbal." R32:56. That the patient had received "verbal instruction and/or educational material relating to their pain, its treatment goals, expectations, and care. The patient verbalized understanding." R32:57. Then Mr. Vanderhoef "would not answer any questions. Will not talk to staff." Id. It notes "Pt. remains silent – still not giving any information. Police remains at bedside." Id. At 4:51 "Urine obtained when told he would have to be cathed if he could not void. Pt. voided in urinal with assist of staff holding urinal." Id. If he was delirious as the circuit court found, he would not have understood the nurse's threat to use a catheter and would not have voided. The medical record further states that "Pt. still does not talk but shakes his head yes and no." Id. The report also notes that Mr. Vanderhoef "would not talk and is impossible to get a history from him." Id. The report indicates that his general condition was: "alert," and his neurologic condition was: "normal." Id. At 7:05 he was released from the emergency room and sent to Milwaukee Mental Health Complex. Id.

Milwaukee Behavioral Health Department found "No sign of Delirium." R32:54.

None of these facts support the lower court's ruling that Mr. Vanderhoef was delirious and incapable of withdrawing consent.

D. CIRCUIT COURT'S DECISION THAT MR. VANDERHOEF WAS "DELIRIOUS" FAILS TO PROPERLY CONSIDER THE OFFICER'S SUBJECTIVE AND OBJECTIVE BELIEF AS TO WHETHER A WRRANT WAS NECESSARY BASED UPON HER FIRST-HAND IMPRESSION OF HIS ACTIONS AND DEMEANOR.

In addition to relying on facts not in the record, the circuit court also did not properly consider the officer's subjective belief as to whether a warrant was necessary based upon their first-hand impression of Mr. Vanderhoef's actions and demeanor which misapplies the law. Officer Schnering clearly believed that Mr. Vanderhoef was conscious, alert and refusing chemical testing, thus was required to obtain a blood sample. "[E]vidence of an officer's subjective belief… may assist a court in analyzing whether facts known to an officer meet the objective standard." State v. Leutenegger, 275 Wis.2d 512.

When determining "reasonableness" under the Fourth Amendment the courts frequently rely upon an officer's observations. *See* State v. Jackson, 147 Wis.2d 824 at 831, 434 N.W.2d 386, State v. Guzy, 139 Wis.2d 663, 675-76, 407 N.W.2d 548, **cert. denied**, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987). In doing so courts determine whether the actions of the officers are reasonable under the circumstances. Guzy, 139 Wis.2d at 679. In doing this, courts are asked to apply a common-sense question, which strikes a balance between the importance of individual privacy and the societal interest in allowing police a reasonable scope of action in discharging their responsibilities. State v. Waldner, 206 Wis.2d 51, 54, 556 N.W.2d 681 (1996).

"'Whether evidence should be suppressed is a question of constitutional fact.'" State v Johnson, 2007 WI 32, ¶ 13, 299 Wis.2d 675 (*quoting* State v. Knapp, 2005 WI 127, ¶ 19, 285 Wis.2d 86.). Constitutional facts consist of "the circuit court's findings of historical facts, and its application of these historical facts to constitutional principles." Id. (*citing* State v. Turner, 136 Wis.2d at 343-44.). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. Id.

An appellate court, however, is "in just as good a position as the trial court to make factual inferences based on documentary evidence and …need not defer to the trial court's findings." Cohn v. Town of Randall, 2001 WI APP 176, ¶ 7, 247 Wis.2d 118.

The circuit court did not consider Officer Schnerig's observations or testimony. Nor did the court properly review or rely upon the medical documentation from the fire department, emergency room or Milwaukee Mental Behavioral Health nurse. After reviewing the documentation and testimony ignored by the circuit court, it is clear Mr. Vanderhoef was not delirious at the time he refused to consent to chemical testing.

II. MR. VANDERHOEF'S MEDICALLY PRIVILEGED RECORDS UNDER WIS. STAT. §§ 146.81(4) and 905.04(2) CANNOT BE USED IN PLACE OF A CHEMICAL TEST THAT MEETS THE REQUIREMENTS SET BY STATUTE.

After first granting the defendant's motion to suppress medical records on the basis of privilege, (R50:11), the lower court over-ruled its decision and held the medical records would be allowed in the State's case in chief:

> with respect to the presentation of whether or not the defendant was under the influence, or whether or not there was an intoxicant present. And the defendant, and that the defendant at the time of his operating the motor vehicle, it's clear that the defendant, at least there is cocaine in his system.
>
> R52:13.

Resolution of this issue requires statutory interpretation. When interpreting a statute, a reviewing court "begins with the plain language of the statute." State v. Dinkins, 2012 WI 24, ¶ 29, 339 Wis.2d 78, 810 N.W.2d 787 (*citing* State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." Id. (*citing* Kalal, 271 Wis.2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results." Id. (*citing* Kalal, 271 Wis.2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." Id. (*citing* Kalal, 271 Wis.2d 633, ¶ 49).

The records that were obtained by the State clearly fall under the "patient health care records" term as defined in Wis. Stat. § 146.81(4). Under Wis. Stat. §

146.82, patient health care records remain confidential and cannot be released without patient consent. Mr. Vanderhoef's test results are also privileged pursuant to the protections of Wis. Stat. § 905.04(3), and none of the statutes enumerated exceptions applies. The District Attorney has no right to obtain and disclose confidential communications or information obtained for the purpose of diagnosis or treatment without the consent of Mr. Vanderhoef. Pursuant to § 905.04(2), Mr. Vanderhoef has the right to prevent the District Attorney from disclosing these communications and information.

These were medical records under Wis. Stat. §146.81(4) created when Mr. Vanderhoef was being treated for being tased, and contain medically privileged information under Wis. Stat. §905.04(2):

> GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's podiatrist, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

Wis. Stat. § 905.04(2). (Emphasis added).

The circuit court originally suppressed the documents. R50:11. The Court held:

> With respect to the Motion For Suppression of Hospital Records, the Court at this time is going to grant the motion. I will indicate if there is an issue that arises where we need to revisit that, then the State would have to make arguments with respect to how it is that these records are admissible.

Id.

The circuit court's initial ruling was correct.

While on the scene Officer Schnering shot Mr. Vanderhoef with her taser. R45:39 & 52. He was taken to Wheaton Franciscan Hospital in Franklin, at about 2:48 a.m. for emergency medical care related to being tased. R32:56. Mr. Vanderhoef's medical records note: "Presents with complaint of being tazed by OCPD….Remains in police custody and here to be medically cleared." Id. A blood draw pursuant to a warrant was obtained from Mr. Vandehoef.[4] R45:66. Mr. Vanderhoef's medical records indicate that he received "verbal instruction and/or educational material relating to their pain, its treatment goals, expectations, and care. The patient verbalized understanding." R32:57. Mr. Vanderhoef's blood was drawn by Wheaton Franciscan staff to make sure Mr. Vanderhoef was not injured from being tased. R32:56. Throughout Mr. Vanderhoef was silent, but "alert" and his neurologic condition was "normal." Id.

When a patient is tased, "Some form of medical screening is recommended… starting at the scene of the incident." Holder, E. et. al., *Study of Deaths Following Electro Muscular Disruption*: *10: Post-Event Medical Care*, Nat'l. Inst. of Just. U.S. Dept. of Just. May, (2011) (App. 239-244). Because patients who have exhibited abnormal behavior or mental status have an increased risk for sudden cardiac arrest and death, additional monitoring is recommended. Id.

[4] For clarity, the first blood draw discussed in Section I was conducted pursuant to a warrant after Mr. Vanderhoef refused chemical testing and was not associated with the blood and urine tests taken by the hospital for Mr. Vanderhoef's treatment, by different medical staff, which are the records Mr. Vanderhoef asserts are medically privileged in Section II.

> Medical personnel both in the field and in the hospital setting are encouraged to assess and document vital signs including body temperature and oxygen saturation levels, cardia rhythm, neurological status and physical findings. Sinal precautions and diagnostic findings. Blood and urine samples should be obtained early for laboratory studies, which may include serum glucose, electrolytes, pH, lactate levels, cardiac enzymes, urine toxicology screen and urine myoglobin, among others.

Id. At the motion hearing the State noted:

> The officers would testify that any time somebody is tased, before they can be taken either to Jail or taken out to mental health on a Chapter 51 proceedings they have to be medically cleared. So these records, this blood and urine was taken by the hospital as part of being medically cleared. They were not – the results were not normally turned over to the police….

R52:12.

Doctors run these tests because of the risk of sudden death after exposure, and because: "Ongoing monitoring of suspects while in custody is strongly recommended. Changes in physical condition or mental status / behavior may occur due to the effects of drugs (which may have been ingested or undergone continued absorption), medical conditions, or as a result of head trauma or internal injuries." Further, individuals that have an implanted cardiac device (pacemaker or implanted defibrillator) are at serious risk of having issues with the implanted devices. Holder, E. et. al., *Study of Deaths Following Electro Muscular Disruption*: *10: Post-Event Medical Care*, Nat'l. Inst. of Just. U.S. Dept. of Just. May, (2011) (App. 239-244). Mr. Vanderhoef fell into the category of patients more at risk for medical complications, because his behavior was abnormal. Officers informed the Fire Department on site of Mr. Vanderhoef's behavior and the tasing. The second blood test, and urine test, were taken not for chemical testing but for diagnosis and treatment. As well as individuals who have been hurt

by the barbs of the taser hitting vulnerable areas such as the face, eyes, neck, groin, or genitals. Id.

Concerns can be classified into three broad categories; 1) sudden deaths; 2) injuries and adverse effects including and not limited to ocular perforation, pharyngeal perforation, compression fractures of the spine, seizures, especially to those with preexisting factors such as high blood pressure, obesity, cardiac and respiratory disease, people with severe mental illness, those using or having recent exposure to alcohol or other substances; and 3) the potential for electrical energy of a Taser discharge to cause disruption to cardiac function. O'Brien, A.J. & Thom, K., *Police use of Tasers in mental health emergencies: A review*, Int'l J.L. & Psychiatry (2014), http://dx.doi.org/10.1016/j.ijlp.2014.02.014. (App. 232-238).

Two months after its correct ruling, and on the same day that Mr. Vanderhoef was to go to trial, the lower court over ruled its previous order and held that the privileged documents would be admissible.

> All right, then at this time with respect to the urine results, at least the medical records that were received based on those results…. The Court will find that the State would have been able to use this document in its case-in-chief with respect to the presentation of whether or not the defendant was under the influence, or whether or not there was an intoxicant present. And the defendant, and that the defendant at the time of his operating a motor vehicle, it's clear that the defendant at least there is cocaine in his system."
>
> R52:13.

The court presumably reversed its own earlier suppression order based upon the State's argument, on March 9, 2015, that the records were not privileged, stating:

> And based on the waiver of doctor/patient privilege statute, I believe the hospital correctly turned them over. And they would then be usable because there is an exception for evidence of intoxication or drugs, I guess, or alcohol concentration.

R52:13.[5]

The circuit court's ruling ignores the language of the privilege statute which does not have an exception for controlled substances.

Wis. Stat. § 905.04(4)(f) states:

> there is no privilege concerning the results of or circumstances surrounding any chemical test for intoxication or alcohol concentration, as defined in §340.01(1v).

Wis. Stat. § 340.01(1v) also does not provide for controlled substances, stating:

> "alcohol concentration" means "any of the following: (a) The number of grams of alcohol per 100 milliliters of a person's blood (b) The number of grams of alcohol per 210 liters of a person's breath."

Wis. Stat. § 340.01(1v). The only results in the current case to which this exception applies, indicates a complete absence of alcohol.

There is no evidence the court relied upon or considered the specific language of these statutes when coming to its decision. It certainly did not note that the language of Wis. Stat. §§ 905.04(4)(f) and 340.01(1v) do not extend to controlled substances. The circuit court did not go into detail regarding the basis for its decision or the facts upon which it relied. Nor is there information to suggest that the court based its decision on a review of the facts or law regarding privilege. While the circuit court's rulings are generally upheld unless clearly

[5] The State also conceded they were not obtained pursuant to a search warrant or a specific action taken by the police. Id.

erroneous, an appellate court is "in just as good a position as the trial court to make factual inferences based on documentary evidence and … need not defer to the trial court's findings." Cohn v. Town of Randall, 2001 WI App. 176, ¶ 7, 247 Wis.2d 118.

Upholding the circuit court's ruling would mean that henceforth urine tests taken for medical treatment are admissible, and creates a judicially proclaimed exception to the privilege statute. The legislature has already written numerous exceptions into the privilege statute. None apply to Mr. Vanderhoef's tests taken when taken for medical clearance after being tased by police.

Ruling urine tests taken for medical treatment are admissible encourages officers to tase drivers. If blood or urine tests, routinely run on individuals that have been tased to diagnose medical conditions, is always an exception to medical privilege, officers will not need a warrant or to comply with the Wis. Stat. § 343.305 testing procedures. An officer would avoid the time and energy of getting a warrant, avoid the cost of lab kits and blood testing, avoid the time, energy and cost of sending samples to the State Crime Lab for testing, and avoid the State Crime Lab's procedures and protocols, simply by tasking drivers and taking them to the emergency room for treatment.[6]

Allowing the lower court's ruling to stand also creates an exception to the requirements of Wis. Stat. §343.305 and the safety and reliability of State Crime

[6] It was Mr. Vanderhoef who paid for the blood and urine draws and the medical tests, that the District Attorney subpoenaed after the separate blood test done for chemical testing was suppressed as a result of the invalid warrant.

Lab procedures and protocols. No second sample is kept for the defendant to test or have tested by their own expert violating the defendant's right under §343.305(5)(a).[7] The record shows no evidence concerning the procedures used to draw the samples, the testing procedures used on the samples, or the specific training or specialization of the individual who drew the urine sample much less whether those details met the requirements of § 343.305(6).

Finally, upholding the circuit court's ruling would impermissibly relieve the State of the burden of proving that the urine draw and testing methods met the requirements of a reasonable search in light of the Fourth Amendment. Despite the fact that combatting drunk driving remains a very important goal, that goal does not justify disregarding the Constitutional protections afforded by the Fourth Amendment.

A blood draw conducted at the direction of police is a search subject to the Fourth Amendment requirement that all searches be reasonable. Schmerber v. California, 384 US 757, 767 (1966).[8] "Blood draws ordered by police officers qualify as "searches" under the Fourth amendment, which means they may occur only with consent, a warrant, or probable cause and exigent circumstances."

[7] The Wisconsin Supreme Court has approved the suppression of blood alcohol test results as a sanction for violating a defendant's statutory right to an alternative blood alcohol test. In ***State v. Walstad***, 119 Wis.2d at 527, 351 N.W.2d 469, the Court noted the second test helps assure fairness. The Court refused to limit the right to a second test to circumstances where the tests could show exculpatory evidence, stating such limits were a legislative determination. The Court strictly enforced the right to a second test and suppressed blood test results obtained by the State without providing for a second sample for the defense. State v. McCrossen, 129 Wis.2d 277, 385 N.W.2d 161 (1986).

[8] The language of the Fourth Amendment and Article I Section 11 of the Wisconsin Constitution are substantially similar, and Wisconsin Courts follow the United States Supreme Court's interpretation of the Fourth Amendment when construing Article I Section 11 of the Wisconsin Constitution. *See* State v. Richardson, 156 Wis.2d 128, 137, 456 N.W.2d 830 (1990).

Missouri v. McNeely, 133 S.Ct. 1552, 1563, 185 L.Ed 696 (2013). Warrantless searches are per se unreasonable and therefore unlawful, subject to a few well delineated exceptions. State v. Williams, 2002 WI 94, ¶18, 255 Wis.2d 1, 646 N.W.2d 834. The State has failed to meet its burden establishing that the search of Mr. Vanderhoef, which occurred when the hospital drew his blood and urine for medical treatment, outside of any direction from law enforcement, complied with the requirements of the Fourth Amendment, or in the alternative met the requirements of one of the delineated exceptions.

The State provided a copy of the lab as an exhibit to the circuit court, but failed to provide any testimony from experts or Wheaton Franciscan staff to explain them.[9] R52. The State also did not provide answers for why the reports from Wheaton Franciscan note that there was no supervising doctor. Nor did the State explain why the reports indicate: "For medical screening purposes only. Not medicolegally accessioned or confirmed." Id. Because the State did not supply testimony or evidence to meet its burden there is no explanation for why the State, or the lower court, felt these records were automatically admissible under the rigorous requirements of Wis. Stat. § 343.305 and caselaw regarding the "reasonableness" of testing methods and procedures.

There was no testimony presented regarding the method of the urine or blood draw done by the hospital, the testing procedures utilized, the cleanliness or

[9] The State argued it had presented the defendant with a certified copy of the medical reports more than 40 days before trial and thus had no obligation to have someone from the hospital testify. R52:11. We disagree that such notice trumps privilege or the reasonableness requirement for searches under the Fourth Amendment.

procedures utilized by the lab doing the testing, whether the machines or processes used were calibrated or licensed, the storage, seals or chain of custody of the sample, or the specifics of its storage. There is also no testimony regarding whether the urine sample was collected voluntarily or at the threat of force. No evidence as to the safeguards currently employed to ensure the reasonableness of a testing procedure were provided by the State or considered by the court. The failure of the State to address these significant aspects of the statute's scientific precautions should, alone, forfeit any potential presumption of admissibility of the test results obtained from these samples.

CONCLUSION

But for the Circuit Court's decision, on the day set for his trial, denying both suppression motions and allowing the State to use blood and urine test results obtained in violation of Mr. Vanderhoef's Constitutional, and statutory rights, (R52), Mr. Vanderhoef would have insisted on proceeding to jury trial. For the reasons provided above, Mr. Vanderhoef respectfully requests this Court ***reverse*** the Circuit Court's denial of his motions to suppress the illegal blood draw and the privileged hospital records obtained by the State, to ***vacate*** Mr. Vanderhoef's conviction and no-contest plea, and ***remand*** the case to the Circuit Court for further proceedings without the evidence obtained by violating Mr. Vanderhoef's Constitutional rights under the United States and Wisconsin Constitutions.

Dated at Pewaukee, Wisconsin this 10th day of September, 2018.

Respectfully submitted,

KATHLEEN A. LINDGREN
Attorney for Defendant-Appellant
State Bar No. 1059518

Lakeland Law Firm, LLC
N27 W23957 Paul Road, Suite 206
Pewaukee, WI 53072
(262)347-2000

WIS. STAT. (RULE) 809.19(8)(d) 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 7,194 words.

I also certify I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wisconsin Statutes section 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 10th day of September, 2018.

Signed,

_____
Kathleen A. Lindgren
State Bar. No. 1059518

CERTIFICATE OF MAILING – RULE 809.80(4)

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 10th day of April, 2017, I caused 10 copies of the Brief and Appendix of Defendant-Appellant, Gerald J. Vanderhoef, to be delivered to the Wisconsin Court of Appeals, 110 E. Main Street, Suite 215, Madison, Wisconsin 53703.

Dated this 10th day of September, 2018.

Signed,

_____

Kathleen A. Lindgren
State Bar. No. 1059518

CERTIFICATE OF APPENDIX – RULE 809.19(2)(a)

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 Wis. Stat. § 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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of September, 2018.

Signed,

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Kathleen A. Lindgren SBN: 1059518