STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. **2016AP2052-CR**

GERALD J. VANDERHOEF,

Defendant-Appellant.

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

REPLY BRIEF OF THE DEFENDANT-APPELLANT

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Statement of the Case and Facts

The Court should not rely upon the following facts presented in the State's brief. The State claims the following:

> On July 24, 2013, at around 2:00am, a citizen observed a truck fail to stop at a red light, leave the roadway, and go about 50 yards into a field. (R. 1:2) The citizen saw a person, later identified as Vanderhoef, exit the truck and stand in the middle of the road. (R 1:2), State's Brief, p. 2.

However, the facts in the Record from the January 14, 2014 show:

> A [Officer Amy Schnering]: He stated that he had seen a male driver is what he said to me. Excuse me. He stated that he started turning,
> Q [Prosecutor]: I'm sorry, Who started turning, the subject or the -- Mr. Proeber you're talking about on the phone?
> A [Officer]: Mr. Proeber. …. The witness stated that he was turning to go westbound on Highway 100 and he lost visual of the truck…. …that's when he saw in his rearview mirror a white male subject wearing shorts and a T shirt standing ni the middle of the intersection.
> (R 45:21-22.)

> Q [Prosecutor]: …did Robert Proeber tell you he saw the vehicle involved in an accident?
> A [Officer]: No.
> Q [Prosecutor]: What did Robert Proeber tell you related to an accident?
> A: [Officer]: That he saw the vehicle in the area where the accident had occurred and then he saw the vehicle in the field.
> (R 45:36.)

> **A [Officer]: "The person observed to drive/operate the vehicle by a citizen witness, Robert Proeber, observed Gerald J. Vanderhoef driving eastbond on Highway 100." That's not correct.**
> **Q [Prosecutor]: What's not correct about that?**
> **A [Officer]: He does not know who Gerald J. Vanderhoef is and could not state that it was him driving.**
> (R 45:37 emphasis added.)

> **Q [Defense]: You would agree that you did not -- that neither you nor any citizen witnesses you've spoken to could identify Mr. Vanderhoef as having been behind the wheel of the vehicle, correct?**
> **A: [Officer]: Yes.**
> **Q [Defense]: Nor could anyone identify Mr. Vanderhoef as having been inside the vehicle even, correct?**
> **A: [Officer]: Correct.** (R 45:56 emphasis added.)

The State claims in it's Brief that when the officer was reading the Informing the Accused form to Vanderhoef he stared at the wall and refused to answer. State's Br. at p. 2. This too is inaccurate:

> A [Officer]: Officer Luell was already at the hospital with Mr. Vanderhoef. I asked Officer Luell if Mr. Vanderhoef had said anything. he said no, all -- all i could observe Mr. Vanderhoef doing was sitting ni the bed staring at the wall at that point.
> Q [Prosecutor]: Did you have personal contact with Mr. Vanderhoef at the hospital?
> A [Officer]: Yes.
> Q [Prosecutor]: Tell me the nature of that. What -- What started out?
> A [Officer]: I went into his room and I asked him if he was driving his vehicle. He just stared blankly at the wall, he didn't respond to me. 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 obviously to continue with the operating while intoxicated portion.
> Q [Prosecutor]: And did you read that form to him from beginning to end?[1]
> A [Officer]: Yes.
> Q [Prosecutor]: Did he make any statement after you read that form to him?
> A [Officer]: No.
> Q [Prosecutor]: Did you ask him at that point if he would consent to providing a breath or blood sample?
> A [Officer]: Yes.
> Q [Prosecutor]: Did he answer?
> A [Officer]: No.
> Q [Prosecutor]: He didn't refuse to give a blood sample?
> A [Officer] No. (R 45:26-27.)
>
> Q [Prosecutor]: Did you ask him… will you submit to a chemical test of your blood?
> A [Officer]: Yes, several times.
> Q [Prosecutor]: Did he answer yes or no?
> A [Officer]: No, he did not make a statement.
> Q [Prosecutor]: But you wrote refusal and checked the no box, correct?
> A [Officer]: Correct. (R 45:28.)
>
> Q [Prosecutor] Now, after you had determined that he wasn't verbally consenting to a blood draw, what did you do?
> A [Officer]: I had called my sergeant and advised him that 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. (R 45:29.)

[1] The Informing the Accused Form used by Officer Schnering is Exhibit 2 from the January 14, 2014 hearing. (R 56.)

> Q [Prosecutor]: And in drawing -- And did the defendant appear to be conscious when you were talking to him and asked him to -- whether he would consent to a blood or breath test?
> A [Officer]: Yes.
> (R 45:29.)

The State notes the District Attorney's Office "obtained" the results of the urine test, (State's Brief at p. 3, 13,) which obfuscates relevant facts.

> Vanderhoef's urine was drawn at the hospital for diagnostic purposes, because he had been tased, and medical personel had to determine how to treat him. (*See* R. 52:13; Vanderhoef's Br. 22-24.) Analysis of the urine sample showed that it contained metabolites of cocaine. (R. 57:13.) The State otained the hospital record showing cocaine in the urine. (R. 19).
> State's Br. 13.

The urine test results were never requested by the State or its agents, nor subpoenaed - only hospital blood test results were subpoenaed by the District Attorney's Office. Even the arresting officer did not request a urine test under Wis. Stat. § 343.305.

- On January 31, 2014, upon review of an Affidavit in Support of a Subpoena prepared by the Oak Creek Police Department, the circuit court authorized a subpoena requiring the Custodian of Records at Wheaton Franscican hospital to produce "blood test results for Gerald J. Vanderhoef… drawn on 7-24-2013 at Wheaton Franciscan Hospital." (R 19:2.)

- In response, Wheaton Franciscan Healthcare provided to the Oak Creek Police Department a "Release of Information Certification Letter" dated February 10, 2014, and six pages of records characteried as "LAB RESULTS FROM 7-24-2013." Id.

- The scope of the subpoena was exceeded when Wheaton Franciscan included urine test results in its returned information, despite the subpoena only requesting blood test results.

- The first four pages of the results cover the blood drawn and do not provide any information on illegal substances. Id. 11.

- The final two pages, which relate only to urine test results done as part of Vanderhoef's medical clearance, and which clearly exceeded the scope of the State's subpoena, is the only document in the hospital records indicating a positive result for cocaine. Id.

The State initially claimed it would not use the results, but ultimately requested the Court deny the defense motion to suppress the evidence, and received permission to use the urine records in it's case in chief.

> I would note for the Court's information, defense, I don't anticipate using the hospital records at this point. …Unless there is something unusual happens, I am not going to attempt to move in or have the court take judicial notice of the certified medical records.
> (R 50:4-5.)

> [Prosecutor]: So these records, this blood and urine was taken by the hospital as part of being medically cleared. They were not -- the results were normally not turned over to the police, but we did serve the hospital with a search warrant for them.
> (R 52:12.)

> [Prosecutor]; But we are not claiming they were taken pursuant to a search warrant or a specific action by the police. It was done as part of medically clearing him as part of medical treatment that we believe is an exemtion to the doctor/patient privilege.
> (R 52:13.)

> [Defense]: …Mr Vanderhoef did not consent to any of the treatment at the hospital. In essence, we are concerned that when a defendant is to be taken to the hospital as part of apparently a standard procedure after being tased is included in the police action, that that brings in the Fourth amendment. (R 52:14-15.)

> [Court]: … At this point, based on the State stipulation, the Court will receive Exhibit No. 4, which essentially indicates that the defendant did not consent or authorize any release of any medical records. (R 52:15.)

> [Court] 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. (R 52:13.)

Argument

I. "Saying nothing sometimes says the most." - Emily Dickenson. SILENCE IS A REFUSAL

The State's Brief misleads this Court into reviewing Mr. Vanderhoef's refusal to respond as evidence of an "incapability" to respond. This is not an implied consent case. This is a medical privilege case.

Unlike the cases cited by the State, including *State v. Disch*, 129 Wis.2d 225, 385 N.W.2d 140 (1986), *State v. Howes*, 2017 WI 18, 373 Wis.2d 468, 893 N.W.2d 812 and *State v. Mitchell,* 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151, Mr. Vanderhoef was not unconscious or dying at when located by police. Mr. Vanderhoef was on his feet, "walking all over the place" when located by Officer Schnering (R 45:18), and was conscious and physically and intellectually capable of speaking at the time that Officer Schnering read him the Informing the Accused Form at the hospital at 3:00 a.m. (R 56:2). The State's own arguments illustrate that from 2:43 a.m. and onward Mr. Vanderhoef was consistentently noted as fully verbal but unwilling to talk. State's Br. at p. 10-11. A clear fact from the Record is that medical staff and Officer Schnering, whom were both in the room with Mr. Vanderhoef, observed his behavior to be that of a man who was choosing

not to speak. (R 45:26-29, R 32:54-58.) These facts are not disputed by the State. State's Br. at pp. 10-11.

- Emergency department charts indicate he was "fully verbal". R32:56.[2]
- "Normal, Oriented-Place, Oriented-Time, Oriented-Events" R32:58
- Both left and right eyes were reactive and skin normal. Id.
- Fire Department records note Mr. Vanderhoef "denies any injuries besides being tased" and that after confirming he was physically fine "would not answer any more of our questions." Id.
- Officer Schnering testified "…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 considered his silence a refusal. Id.
- Officer Schnering believed he was conscious when she spoke to him. Id.
- He received "verbal instruction and/or educational material relating to their pain, its treatment goals, expectations, and care. The patient verbalized understanding." R32:57.
- "remains silent - still not giving any information. Police remain at bedside." Id.
- urinated voluntarily when told by hopsital staff he would be catherterized if he did not do so. R 32:57.
- "Pt. still does not talk but shakes his head yes and no." Id.
- "would not talk and it is impossible to get a history from him." Id.
- "alert" and his neurologic condition was "normal" Id.
- Milwaukee Behavioral Health Department found "No sign of Delirium." R32:54.

The State agrees that Wisconsin precendent holds that "…silence can constitute a refusal, and a withdrawal of implied consent." State's Br. at p.12. "Any failure to submit" to a request for a sample "constitutes refusal and triggers the statutory penalties" for an improper refusal. *State v. Reitter,* 227 Wis.2d 213, 234, 595 N.W.2d 646 (1999) (citing *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). Yet the State argues that silence is not a refusal, and in effect spins the argument to say that

[2] Medical charts show Mr. Vanderhoef was "fully verbal" at 2:53 am. R 32:56. Seven minutes before the officer read the Informing the Accused form to Mr. Vanderhoef. R 56:2.

silence is a non-withdrawing of consent. Such a ruling would require this Court to rule in conflict with precedent in *State v. Reitter*, 227 Wis.2d 213, 595 N.W..2d 646, *State v. Rydeski*, 214 Wis.2d 101 and *State v. Bozyskowski*, 123 Wis.2d 185, 366 N.W.2d 506 (Ct. App. 1985), cases where the courts have consistently held that non-verbal responses, silence, or failure to physically submit to tests constitutes a refusal. *Rydeski*, 214 Wis.2d at 106.

The court's application of constitutional principles to historical facts is reviewed de novo. *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). The circuit court's finding that Mr. Vanderhoef was "delirious" at the time of the reading of the Informing the Accused form and the blood draw is supported by **no** facts present in the Record from that time. The circuit court ruled that the defendant consented to the blood draw by remaining silent, citing no facts in the Record, and specified that Vanderhoef consented to the *blood draw* by not refusing.[3]

The State's argument conflicts with Wisconsin precedent and is inconsistent with the facts in the Record. This Court, relying upon the facts from the record and the existing clear body of law, should hold that silence

[3] The circuit court's order was specific to the blood draw ordered by the police department and did not specify that urine testing of any type was authorized or requested.

is a refusal, and suppress the warrantless blood draw obtained from Vanderhoef.[4]

II. Tests for Medical Clearance are Protected by Privilege

The Court should not rely on the facts presented by the State as they omit key details as noted in the facts section above. The urine test results the State obtained were never requested by the State. (R 19.) The urine was taken by the hospital for diagnostic purposes, (R 52:13) & State's Br. at 13, not by police, or at police direction, as those conducted as part of chemical testing. The circuit court found that Mr. Vanderhoef never waived privilege. R 52:15.

The State incorrectly applies *State v. Kelty,* 2006 WI 101, 294 Wis.2d 62, 716 N.W.2d 886. Mr. Vanderhoef is not requesting remand for a fact-finding hearing before the circuit court. The issues of medical privilege, lack of waiver of privilege, and motion to suppress the medical reports was litigated and preserved. Sufficient facts exist in the Record for this Court to decide the matter. The right to appeal exists as a matter of legislatively estabblished public policy. *State v. Riekkoff,* 112 Wis.2d 119, 125, 332 N.W.2d 744, 748 (1983). "The guilty-plea-waiver rule is a rule of

[4] The State failed to establish that the blood drawn from Mr. Vanderhoef was obtained through a legal search and conceded the warrant was defective. "I will not argue at this point that the search warrant itself is valid." R 45:70. Upon finding the warrant defective at a motion hearing the State thereafter argued the blood draw consensual.

administration. It does not deprive an appellate court of jurisdiction over an appeal." State's Br. at 14 quoting *State v. Kelty*, 294 Wis.2d 62. Vanderhoef's claim of medical privilege remains properly before this court.

The State does agree that the medical clearance test results fall under Wis. Stat. § 905.04(4)(f). State's Br. at 15.[5] Unable to legally establish that 905.04(4)(f)'s exception for "intoxication" includes anything other than alcohol, the State goes on to argue for a new, judicially created exemption from the privilege statute.

> Section 905.04(4)(f) provides an exception for chemical tests "for intoxication." That term is not defined in section 905.04 or in section 340.01(1v). But it is well established that "intoxication" is not limited to intoxication by alochol. It includes intoxication by other substanes, including cocaine."
> State's Br. at 16.

The State argues what it feels "intoxication" should mean, attempting to create an exemption by citing to a number of Wisconsin Statutes that do not deal with chemical tests conducted on individual's receiving private medical treatment. State's Br. 16-17. The State would have this Court create a new exception, asking it to hold that **any** chemical test that results in locating a controlled substance in an individual's system is a "chemical test for intoxication" and thus not protected by any medical privilege. State's Br. at 17. (emphasis added). This holding would also render all carefully

[5] Vanderhoef continues his argument that the records are confidential patient health care records under Wis. Stat. § 146.82 and that they are also privileged under Wis. Stat. § 905.04.

deliniated requirements of Wis. Stat. § 343.305 meaningless, resulting in an absurd holding far outside that deliniated by Wisconsin laws.

III. PROPER REMEDY

Vanderhoef would have demanded a jury trial had the suppression motions been granted by the Circuit Court. (R 32.) His no-contest plea was entered solely because of the Circuit Court's rulings and was made on the day of trial when the court made it's final rulings denying Vanderhoef's motions. (R 52.) This Court should decide both the suppression issues and grant Vanderhoef's plea-withdrawal, based on the fact and arguments now before the Court.

CONCLUSION

Vanderhoef continues his request that this court ***reverse*** the Circuit Court's denial of his motions to suppress the illegal blood draw and the privileged hositpal records obtained by the State, ***vacate*** Vanderhoef's conviction and no-contest plea, and ***remand*** the case to the Circuit Court for further proceedings without the evidence obtained violating Vanderhoef's Constitutional rights under the United States and Wisconsin Constitutions.

Dated at Pewaukee, Wisconsin this 12th day of December, 2018.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b) & (c)

I hereby certify that this brief conforms to the rules contained in 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,926 words.

_____
Kathleen A. Lindgren

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that the text of the electronic copy of this brief is identicial to the text of the paper copy of the brief as required in § 809.19(12).

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.

_____
Kathleen A. Lindgren