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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DALE R. DELVOYE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, BRANCH VII, THE HONORABLE TIMOTHY A. HINKFUSS PRESIDING, TRIAL COURT CASE NO. 2014-CT-1419

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

WHETHER A MISTRIAL SHOULD HAVE BEEN GRANTED BY THE CIRCUIT COURT WHEN, AT TRIAL AND BEOFRE THE JURY, THE ARRESTING OFFICER IN THIS CASE TESTIFIED THAT MR. DELVOYE SUBMITTED TO A PRELIMINARY BREATH TEST?

> Trial Court Answered: NO. The circuit court concluded that because the jury never heard the actual result of the preliminary breath test, but rather merely heard the fact that Mr. Delvoye had been asked to submit to a preliminary breath test, the testimony did not run afoul of Wis. Stat. § 343.303 which precludes the result of a preliminary breath test from being administered.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents questions of law based upon a set of uncontroverted facts. The issues presented herein are of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Delvoye believes publication of this Court's decision is warranted because if it is not published, prosecutors throughout the state, or at least those in Brown County, would conclude that it is permissible during the course of a trial for an alcohol-related driving offense to question law enforcement officers about whether the suspected drunk driver submitted to a preliminary breath test. This question, without the result being admitted before the jury, is highly prejudicial because it would lead the average juror to conclude that the defendant must have failed the test or s/he would not be on trial in the first place. It would be unreasonable to conclude that a juror would think a defendant passed the

preliminary breath test when that same defendant is on trial for the offense of Operating a Motor Vehicle While Intoxicated. This Court, therefore, needs to send a clear and unequivocal message to prosecutors and judges throughout the State of Wisconsin that § 343.303, the Due Process Clauses of both the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution, and Wisconsin Rules of Evidence 904.02 and 904.03, all preclude not only the admission of a preliminary breath test result, but also preclude even the mention of the accused's being asked to submit to the same.

STATEMENT OF THE CASE AND THE FACTS

On July 9, 2014, while operating his motor vehicle in the Village of Howard, County of Brown, the above-named Defendant-Appellant, Dale R. Delvoye, was stopped, detained, and arrested by Deputy Nicholas Nerat of the Brown County Sheriff's Department for Operating a Motor Vehicle While Under the Influence of an Intoxicant-Second Offense [hereinafter "OWI"], contrary to Wis. Stat. § 346.63(1)(a).[1] (R3.)

During the course of his initial detention, Deputy Nerat asked Mr. Delvoye to submit to a preliminary breath screening test [hereinafter "PBT"] pursuant to § 343.303. Mr. Delvoye complied with this request, and the PBT yielded a result of .122%. (R3.) Mr. Delvoye was thereafter arrested.

Subsequent to his arrest, an additional charge of Operating a Motor Vehicle With a Prohibited Alcohol Concentration-Second Offense [hereinafter "PAC"] was also issued when his blood test returned a value of .130. (R3.) Mr. Delvoye pled Not Guilty to both the OWI and PAC charges. (R4.)

Mr. Delvoye's case was tried to a jury of his peers on December 21 & 22, 2016, the Honorable Timothy A. Hinkfuss, presiding. (R61 & 62.) Mr. Delvoye was acquitted on the OWI

[1] All references herein to the Wisconsin Statutes are to the 2015-2016 version unless otherwise noted.

charge, but was found guilty on the PAC charge. (R41; D-App. at 101.)

Prior to trial, at the circuit court's conference on the parties' Motions *in Limine*, the State asked for an order prohibiting the admission of the PBT evidence and precluding the defense from using the same in any manner. (R30 at 2; D-App. at 103.) Counsel for Mr. Delvoye did not object to the same and, in fact, indicated that it was a "good idea" to keep the PBT evidence from the jury. (R46 at 2.) The Court consented to the parties' request and ordered that evidence of Mr. Delvoye submitting to a PBT be precluded from presentation to the jury.

Despite the foregoing order, during the course of trial Deputy Nerat testified on direct examination that he "asked [Mr. Delvoye] if he'd submit to a preliminary breath test or PBT as we call it." (R62 at 74:2-6 ; D-App. at 104.)

Immediately after the foregoing testimony was offered by the deputy, counsel for Mr. Delvoye objected and a § 901.04(3)(d) hearing outside the presence of the jury was had to discuss how the violation of the court's pretrial order was to be handled. (R62 at 74-85.) Counsel for Mr. Delvoye requested a mistrial, which request was denied by the court. (R62 at 84:13-14.) The trial continued into a second day at which time the case went to the jury.

Approximately thirty-three minutes after the case was submitted to the jury, the jury foreperson sent a written question to the court which inquired: "Why was a breathalizer [sic] (breath test) administered?" (R63 at 8:7-11; D-App. at 105.)

Subsequent to the receipt of this note, counsel for both parties had a conference with the trial court at which time counsel for Mr. Delvoye again requested a mistrial explaining that the PBT was obviously a concern for the jury and was therefore potentially affecting its judgment. (R63 at 8-20.) This request was again denied by the court. (R63 at 19:14-15.)

Despite repeated requests for a mistrial, after conviction on the PAC count, the circuit court sentenced Mr. Delvoye to five days jail, a thirteen month license revocation, twelve months of ignition interlock, and a fine plus costs totaling over $1,300.00. (R41; D-App. at 101.) The court also refused to stay Mr. Delvoye's sentence pending appeal. (R47.)

It is from the adverse decision of the circuit court denying Mr. Delvoye's repeated requests for a mistrial that Mr. Delvoye now appeals to this Court. (R40.)

STANDARD OF REVIEW ON APPEAL

The decision whether to grant a mistrial lies within the discretion of the trial court. *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122, citing *Haskins v. State*, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). When a party alleges error on appeal, the trial court's decision whether to grant a mistrial will only be reversed upon "a clear showing of an erroneous use of discretion by the trial court." *Ross*, 2003 WI App 27, ¶ 47, citing *Johnson v. State*, 75 Wis. 2d 344, 365, 249 N.W.2d 593 (1977).

ARGUMENT

I. THE LAW IN WISCONSIN AS IT RELATES TO THE GRANTING OF A MOTION FOR MISTRIAL.

Wisconsin jurisprudence holds that a mistrial must be granted when, in the determination of the trial court, an alleged error becomes prejudicial to a party's case. *Oseman v. State*, 32 Wis. 2d 523, 528, 145 N.W.2d 766 (1966). While it is true that a trial court must first seek to remedy the alleged error by some means less drastic than declaring a mistrial, the common law recognizes that no amount of remedial correction will be able to repair the damage done in some cases. *Id.*

Mr. Delvoye presents just such a circumstance of irreversible harm on this appeal. More specifically, unlike other

cases wherein which a reviewing court must speculate whether a particular harm befell an allegedly aggrieved party, Mr. Delvoye presents a case for review in which it can be discerned with absolute certainty that harm befell him the very moment the arresting officer testified that he asked Mr. Delvoye to submit to a PBT.

First, the question about whether the testifying officer's comment regarding the PBT played a role in the jury's deliberation is settled by the fact that during the course of its deliberations, it sent a note out to the judge inquiring "why" the PBT had been administered to Mr. Delvoye. This note demonstrates that (1) the jury was paying attention to the presentation of the evidence; (2) at some point during its deliberations, the panel must have discussed the PBT or the question never would have been sent out to the judge; and (3) the jury felt the PBT was relevant to it decision or it would not have taken the time to send the question out to the judge. The note is, in a very definite sense, a "*res ipsa loquitur*" on each of these three points. The State will be hard pressed indeed to attempt to explain how the officer's comment regarding the PBT was not a concern for the jury.

Second, the prejudice inherent in the jury's concern over the administration of a PBT to Mr. Delvoye is magnified by the fact that the jury found Mr. Delvoye *not guilty* of the companion charge of Operating While Intoxicated [hereinafter "OWI"]. That is, the count upon which the administration of the PBT has a direct impact is, obviously, the Prohibited Alcohol Concentration [hereinafter "PAC"] charge. The companion count of OWI, which concerns whether Mr. Delvoye was "less able to exercise the clear judgment and steady hand necessary to safely operate a motor vehicle" goes to the question of impairment. *See* Wis. JI Crim.-2663 (20??). The PAC charge, however, requires no proof of impairment as it is a *per se* violation based solely upon a number. The jury herein, in finding Mr. Delvoye not guilty of the OWI count, felt that he was not less able to safely control his motor vehicle due to the consumption of intoxicants. Yet, they did find him guilty on the PAC count *while speculating as to why the PBT was administered.*

The foregoing facts eliminate any need for the parties, and this Court for that matter, to speculate regarding whether the PBT testimony was prejudicial to Mr. Delvoye's case. It obviously was.

II. MR. DELVOYE'S REQUEST FOR A MISTRIAL SHOULD HAVE BEEN GRANTED GIVEN THAT PALPABLE HARM PREJUDICING MR. DELVOYE'S CASE OCCURRED AS DEMONSTRATED BY THE JURY'S OBVIOUS CONSIDERATION OF THE PBT EVIDENCE DURING ITS DELIBERATION.

A. As a General Rule, PBT Evidence Is Excluded From Consideration by the Jury.

Wisconsin Statute § 343.303 provides in pertinent part that "[t]he result of the preliminary breath screening test shall not be admissible in any action . . . except to show probable cause for an arrest, ..." This language acts as a nearly absolute bar to the admission of any evidence related to the preliminary breath test [hereinafter "PBT"]. Wisconsin courts have adopted an interpretation of § 343.303 which stringently precludes the admission of the PBT except in the most rare of circumstances. *See, e.g.*, *State v. Fischer*, 2010 WI 6, ¶ 4, 322 Wis. 2d 265, 778 N.W.2d 625 (principles of statutory construction make it clear that § 343.303 bars the admission of PBT results in an OWI trial), *abrogated on other grounds*, *Fischer v. Ozaukee County Circuit Court*, 741 F. Supp. 2d 944 (E.D. Wis. Sep. 29, 2010). In essence, § 343.303 closes a lid on the admission of such evidence which is, for all intents and purposes, nearly air-tight.

When the testifying officer in the present case expressly averred that he asked Mr. Delvoye to submit to a PBT, not only did he violate the clear statutory prohibition against the admission of PBT evidence and the trial court's order precluding admission of the same, but additionally, he created a circumstance in which one "cannot unring the bell." That no amount of curative instruction or warning could "unring" that bell is demonstrated by the very fact of the jury's inquiry into why the PBT had been administered. It is exactly this type of speculation which § 343.303, the State's

motion *in limine*, and the lower court's pre-trial order, all were designed to avoid.

B. When Cognizable Prejudice Is Demonstrated As a Matter of Indisputable Fact, a Defendant Suffering Irreparable Prejudice Must Be Granted a Mistrial.

Notably in *Oseman*, one of the factors which the Wisconsin Supreme Court found relevant in assessing whether a mistrial ought to be granted was whether the evidence admitted in error was adduced in a case which was "extremely weak . . . " for the opposing party. *Oseman*, 32 Wis. 2d at 529. In fact, the *Oseman* court expressly stated that when assessing the appropriateness of granting a mistrial, the inquiry should necessarily "center primarily around the facts [of the] case." *Id*.; *see also*, Matysik v. Schipke, 2009 WI App 141, ¶ 7, 321 Wis. 2d 477, 774 N.W.2d 476.

The case at bar is exactly the type of "extremely weak" circumstance to which the *Oseman* court alluded as demonstrated by the jury's verdict of not guilty on the count of OWI. With this verdict, the jury passed its judgment on the strength of the State's case. The jury obviously felt the State's case was weak in that it failed to prove Mr. Delvoye was guilty beyond a reasonable doubt of operating a motor vehicle while he was impaired. In fact, there is no stronger proof of a "weak case" than a verdict of not guilty. Thus, the prejudicial affect of the erroneously offered PBT testimony has a heightened impact in a case such as Mr. Delvoye's wherein the jury is already doubtful about whether the State has met its burden.

When the error alleged herein is examined in light of the foregoing, it is clear that a mistrial ought to have been granted. The jury's concern regarding why a PBT was administered, and then its returning a verdict of guilty on the PAC count alone, demonstrates that the PBT had an affect on the PAC count.

There exists myriad ways in which the erroneously admitted PBT result could have had a negative effect (from the defendant's perspective) on the PAC verdict. The jury may likely have speculated that a PBT was administered with a non-passing result which supported a finding of guilt on the PAC count.

Alternatively, it could have assumed that Mr. Delvoye refused to submit to the PBT because he knew he would be over the legal limit, and then used this as proof of consciousness of guilt to arrive at a guilty verdict on the PAC count. Also within the realm of possibility is a scenario in which the jury concluded that because Mr. Delvoye's counsel immediately objected when the deputy began to testify about the administration of the PBT, it was only through some "fancy legal maneuvering" by counsel that it was kept from hearing evidence of Mr. Delvoye's guilt. It is thus evident that there are several numbers of ways in which the jury's deliberation could have been affected by the deputy's testimony. There is literally no plausible scenario in which reference to the PBT in front of the jury would be helpful to Mr. Delvoye's chances of prevailing on the PAC charge.

What the foregoing demonstrates is that there can be no confidence that the guilty verdict in the PAC case was *not* tainted by the mention of the PBT. Since no member of the judiciary—whether it is the trial court or this Court—participated in the deliberation in Mr. Delvoye's case, there can be no certainty regarding how the verdict might have been affected by the erroneous mention of the PBT evidence. By the same token, there can be no certainty that the verdict went unaffected. What does exist, however, are notions of fundamental fairness and due process which compel that we have confidence in the verdicts our system of justice delivers. This confidence is not merely undermined in Mr. Delvoye's case, it is utterly absent no matter how the record is construed.

CONCLUSION

Because the jury in this case obviously considered the administration of the PBT relevant to its deliberation—as evidenced by the note it sent to the court during its deliberation—there is no way in which an "actual harm" conclusion can be avoided. The circuit court should, therefore, have granted Mr. Delvoye's motion for a mistrial. In the absence of such an action by the circuit court, Mr. Delvoye petitions this Court to relieve him from the operation of a Judgment of Conviction clearly tainted by

the prejudice inherent in the jury's concern over evidence which was not relevant for it to deliberate upon.

Dated this 24th day of October, 2017.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

Dennis M. Melowski
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Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,716 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. 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 notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on October 24, 2017. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 24th day of October, 2017.

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_____

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APPENDIX

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