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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE MISSES THE DE FACTO ERROR INHERNT IN DEPUTY NERAT'S DISCUSSION OF THE PBT.

The starting point for any analysis of whether prejudicial error occurred in this case must begin with the fact that Wis. Stat. § 343.303 prohibits the admission of PBT results at trial. The State argues that this statute acts merely to bar the admission of the test result, but not the mention of a PBT being administered. Applying the Socratic method to the State's position, one must ask: "What sense does that make?" The short answer is, "None."

There is no reason for the Wisconsin Legislature to permit the administration of a PBT to a suspected drunk driver to come in as evidence at trial but not then also want the results of the test to be admitted. The reason is simple: the admission of evidence related to PBT administration makes no sense to a jury without also knowing the result. It must, therefore, have been the legislature's intention to *exclude* evidence of the administration of the PBT as well. If the administration of the test was permissibly allowed in as evidence without the test result itself, it does not provide any additional "context" to the evidentiary story of the suspect's arrest and processing. What it does do, however, is create problems exactly like that at issue in this case, namely: it allows for the jury to speculate as to what the results were. If any mention of the test was permissible under the statute without allowing for the results of the same to be admitted as well, the legislature would only have been creating an environment in which speculation by the jury was encouraged. It is not a stretch of the imagination to wonder how many *hundreds* of cases would be on appeal because jurors sent back questions to the trial judge about whether the PBT corroborated the actual test results from an Intoximeter EC/IR or from a blood panel. This is not what the legislature could have intended, and therefore, the only thing which makes sense under § 343.303 is that the PBT results *along with* the administration of the test were intended to be excluded.

The State helps to make Mr. Delvoye's point about how speculative it is to allow for the admission of PBT evidence regarding the jury's deliberation. The State posits that because the jury asked "why" the PBT was administered in this case, it must have been more concerned about "answering whether Officer Nerat though [Mr. Delvoye] was intoxicated" as opposed to whether the jury had any concern for its relation to the prohibited alcohol concentration count. State's Brief at 11. This very argument, however, demonstrates that the prejudicial effect of the admission of the PBT evidence cannot be measured, and therefore, the mistrial should have been granted. The State is *speculating* as to why the jury asked "why" the test was administered without also asking about the result. Mr. Delvoye would proffer that the opposite is true, *i.e.*, that the jury asked "why" the test was administered because it was concerned about the PAC count—because it wanted to know whether there was corroborating evidence for the test result. The very fact that the parties themselves can offer two perfectly reasonable interpretations—or, more correctly, "speculations"—as to why the jury was engaged in its deliberations about the PBT test demonstrates that there must have been some influence, whether interpreted one way or another, that the administration of the PBT was having upon the jury, and the point of this appeal is that there should have been *no influence* of the PBT administration upon the jury's verdict. The only way in which this end could have been accomplished is if the PBT had not been mentioned at all *as the court's pretrial order required*.

The State further posits that the jury's question regarding the PBT test could not have had any prejudicial affect on the jury's verdict because the defendant "was more than 60% above the legal limit . . . ." State's Brief at 13 (emphasis deleted). Disregarding for the moment that this argument is an insult to every defense attorney who ever had a verdict of Not Guilty returned in the face of test results 100%, 200%, and yes, even 300% or more over the legal limit, it remains purely speculative. Juries throughout Wisconsin have returned verdicts of Not Guilty in hundred of cases over the decades in which test results were much higher than Mr. Delvoye's. If verdicts were to be delivered based solely upon how much an accused's test result is over the limit, then what should

that cut-off be? Should it be 10%? 50%? 100%? It makes no sense to permit a conclusion to be drawn solely upon a percentage over the legal limit, and again, makes Mr. Delvoye's point that the parties are *speculating* as to the PBT's influence, and therefore, the safest thing to do to protect and preserve due process would be to permit a retrial on the PAC count in which the PBT is excluded as evidence.

Finally, as expected, the State attempts to discount the value of the acquittal upon the prejudice which may have occurred by admitting the PBT evidence on the PAC count. The State correctly observes that juries can, and sometimes do, deliver "split verdicts." This case is different than the "typical" split in that the jury found that Mr. Delvoye was not impaired—hence, the Not Guiltly verdict on that count—but found him guilty on the PAC count after hearing evidence that a PBT test had been administered and then, obviously, having engaged in some speculation—and the parties cannot state with 100% accuracy what that speculation was. The question for Mr. Delvoye becomes this: Is it better to have a verdict returned in a PAC case in which the testimonial portion is "clean," *i.e.*, free from the mention of any PBT *as the court ordered*, or is justice better served by allowing a verdict to stand in which the parties cannot be certain that there was no prejudicial effect from the PBT? Mr. Delvoye posits that it is better to have an untainted verdict than one which is clearly questionable.

CONCLUSION

Based upon the foregoing arguments, Mr. Delvoye respectfully requests that this Court find that the trial court should have granted his request for a mistrial, and reverse his conviction and remand the case to the trial court for further proceedings consistent therewith.

Dated this 24th day of January, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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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 1,575 words. I hereby certify that I have submitted an electronic copy of this brief 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 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 January 24, 2018. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 24th day of January, 2018.

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