STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2017AP001811

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BLAKE LEE HARRISON,

Defendant-Respondent.

ON APPEAL FROM ORDERS FINDING WIS. STAT. § 346.63(1)(AM) UNCONSTITUTIONAL AND DISMISSING A CITATION ISSUED UNDER THE SAME, BOTH ENTERED IN ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE ERIC J. LUNDELL, PRESIDING

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

STATEMENT OF THE ISSUE

Is Wisconsin Statute § 346.63(1)(am), which prohibits the operation of a motor vehicle with a detectable amount of a restricted controlled substance in a person's blood, unconstitutional?

The trial court ruled it is unconstitutional, contrary to opinions from the Wisconsin Supreme Court and Court of Appeals.

This Court should conclude that the statute is constitutional and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal.

The State takes no position on publication of this Court's decision and opinion.

STATEMENT OF THE CASE

The State of Wisconsin appeals a circuit court order granting Blake Lee Harrison's Motion to Dismiss a citation for Operating With a Restricted Controlled Substance ("OWRCS"). The Honorable Eric Lundell, St. Croix County Circuit Court, granted Harrison's motion and found Wisconsin Statute § 346.63(1)(am) unconstitutional by written Order filed March 16, 2017. (R. 7.) The trial court then dismissed the citation. (R. 8.) The State appeals these Orders.

STATEMENT OF FACTS

On October 21, 2015, Wisconsin State Trooper Jody Wood initiated a traffic stop on a vehicle driven by Blake Lee Harrison in the town of Cady, St. Croix County, Wisconsin. (R. 32.) Trooper Wood smelled an odor coming from Harrison that he believed, based on his training and experience, to be burnt marijuana. *Id.* at 2. Harrison did admit that the odor was marijuana and told Trooper Wood that he had "maybe half a gram" of marijuana in a bag in the center console of the vehicle. *Id.* ¶ 3. Harrison also stated that there

was a pipe in the center console as well. *Id.* Trooper Wood asked Harrison when he last smoked marijuana to which Harrison replied "about 30 minutes ago." *Id.* ¶ 4. When Trooper Wood "asked Harrison if he understood the consequences of smoking marijuana and then driving" Harrison replied that he knew marijuana "impairs his ability to drive" but was unaware of the legal consequences. *Id.*

During a search of the vehicle, Trooper Wood located two metal pipes, two glass pipes, one grinder, one dugout, and a total of 14 grams of THC. *Id.* at 3. Trooper Wood conducted field sobriety tests on Harrison, finding one clue on the walk and turn. *Id.* at 4. Harrison consented to a blood draw, which revealed he had 3.0 nanograms per milliliter of delta-9 THC in his system. (R. 35.)

The Trooper initially issued Harrison a citation for Operating While Intoxicated, 15TR5230, and upon receipt of the blood results, sent him a citation for OWRCS. This citation was not given a case number and was never actually entered into CCAP, but all parties proceeded under the impression that 15TR5230 was the OWRCS citation.

Harrison filed a Motion claiming Wis. Stat. § 346.63(1)(am) is unconstitutional, because it is a strict liability offense and, he argued, it should not be. (R. 5.) The State responded by citing binding opinions of the Wisconsin Supreme Court and the Wisconsin Appeals Court finding the statute constitutional. (R. 4.)

In a written Decision and Order, Judge Lundell agreed with Harrison, finding that Wis. Stat. § 346.63(1)(am) is indeed unconstitutional and that the rulings in the cases the State cited "were incorrect." (R. 7 at 3.) The court stated, "[t]here is no rational basis for the legislature to conclude that the way to combat driving while under the influence of marijuana is to enforce a strict liability, zero-tolerance approach." *Id.* ¶ 5. The court opined that the statute is "fundamentally unfair" because a person may have THC in

their system but not be impaired. *Id.* at 4. The court noted that some states have legalized marijuana use, asserting that it is unfair for a person who legally uses it to be punished in Wisconsin for driving in Wisconsin after using in a state where marijuana use is legal. *Id.* Furthermore, the court suggested that the legislature should designate a level of impairment for THC, and highlighted that our neighbor state, Minnesota, excludes THC from its operating while impaired laws. *Id.* at 5. Finally, the court found that the statute could lead to absurd results given that the amount of THC that is "detected" depends on a variety of factors. *Id.* at 5, 6.

Following the circuit court's finding that Wis. Stat. § 346.63(1)(am) is unconstitutional, the court dismissed the citation. (R. 8.)

The State now appeals from the court's orders finding Wis. Stat. § 346.63(1)(am) unconstitutional and dismissing the citation.

ARGUMENT

THE TRIAL COURT ERRED IN FINDING THAT WIS. STAT. § 346.63(1)(AM) IS UNCONSTITUTIONAL.

A. STANDARD OF REVIEW.

The constitutionality of a statute presents a question of law that this Court reviews *de novo*. *State v. Cole*, 2003 WI 112, ¶ 19, 264 Wis. 2d 520, 665 N.W.2d 328. Statutes are presumed constitutional. *Id.*

B. WIS. STAT. § 346.63(1)(AM) IS CONSTITUTIONAL AS ALREADY DECIDED BY THIS COURT AND OUR SUPREME COURT.

This Court and the Wisconsin Supreme Court have found Wis. Stat. § 346.63(1)(am) constitutional. In *State v. Smet*, the defendant was convicted of operating a motor vehicle with a detectable amount of restricted controlled substance, in violation of Wis. Stat. § 346.63(1)(am). *State v. Smet*, 2005 WI App 263, ¶ 1, 288 Wis. 2d 525, 709 N.W.2d 474. The defendant challenged the constitutionality of this statute, arguing that this statute "exceeds the scope of the legislature's police power," which the defendant alleged violated due process. *Id.*, ¶ 1. Specifically, the defendant argued that the statute is unconstitutional because the statute makes it unlawful to drive or operate a motor vehicle with a "detectable amount of a restricted controlled substance in his or her blood." *Id.*; Wis. Stat. § 346.63(1)(am).

The Wisconsin Court of Appeals rejected the defendant's arguments. The court held that the purpose of the statute is to protect public safety, which is a legitimate public interest. *Smet*, 288 Wis. 2d 525, ¶ 16. This Court reasoned:

> [T]he legislature reasonable and rationally could have determined that, as a class, those who drive with unprescribed illegal chemicals in their blood represent a threat to public safety...[or] could have concluded that the proscribed substances range widely in purity and potency and thus may be unpredictable in their duration and effect...or that, because no reliable measure of illicit drug impairment exists, the more prudent course is to ban any measure of marijuana metabolites in a driver's system.

Id. ¶¶ 16-17. Thus, this Court found Wis. Stat. § 346.63(1)(am) to be constitutional due to the numerous rational reasons which justify the need to protect the public from individuals operating motor vehicles with restricted controlled substances in their system.

The Wisconsin Supreme Court has also upheld the constitutionality of this statute. *See State v. Luedtke*, 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592. In *Luedtke*, the defendant also challenged the constitutionality of Wis. Stat. §

346.63(1)(am). Similar to the decision in *Smet*, the supreme court found that the statute is "rationally related to achieving public safety." *Luedtke*, 362 Wis. 2d 1, ¶ 77. In support of this holding, the court cited multiple reasons to support the constitutionality of the statute:

> We agree with the court of appeals that "[i]n addressing the problem of drugged driving, the legislature could have reasonably and rationally concluded that 'proscribed substances range widely in purity and potency and thus may be unpredictable in their duration and effect.'" Though it may be more difficult to deter people from driving after unknowingly ingesting a restricted controlled substance, such drivers are at least as dangerous as those who knowingly ingest a restricted controlled substance.

Id. (internal citations omitted). The Wisconsin Supreme Court also cited *Smet* and agreed that the legislature could "rationally conclude that a strict liability, zero-tolerance approach is the best way to combat drugged driving" because "no reliable measure of impairment" exists for many drugs. *Id.* ¶ 77; *citing Smet*, 288 Wis. 2d 525, ¶ 17. Therefore, the court held that Wis. Stat. § 346.63(1)(am) is not fundamentally unfair, does not violate due process, and is constitutional. *Id.*

In addition to Wisconsin, eleven other states have per se prohibitions on driving with THC in one's blood. *See* Governor's Highway Safety Association, Table on Marijuana-Related Laws, current as of 1/12/18, found at https://www.ghsa.org/sites/default/files/2018-01/marijuanalaws_jan2018.pdf.

Wisconsin courts have found Wis. Stat. § 346.63(1)(am) constitutional. Statutes are presumed to be constitutional. *State v. Cole*, 2003 WI 59, ¶ 11, 262 Wis. 2d 167, 663 N.W.2d 700. "[T]he party raising the constitutional claim . . . must prove that the challenged statute is unconstitutional beyond a reasonable doubt." *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63.

When a court addresses the issue of whether or not a statute passes constitutional muster, the presumption is automatically in favor of constitutionality. Respect for a co-equal branch of government demands that statutes must be presumed to be constitutional, and will not be found to be unconstitutional unless their invalidity is established beyond a reasonable doubt. *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶¶ 16-18, 279 Wis. 2d 169, 694 N.W.2d 344; *State v. Cole*, 2003 WI 112, ¶¶ 11, 17. A court must indulge every presumption and resolve every doubt in favor of sustaining the law. *Ponn P.*, 2005 WI 32 at ¶ 17; *Cole*, 2003 WI 112 at ¶ 11. When faced with a claim that a statute which reflects the considered will of the people is unconstitutional, a court cannot become mired with the merits of the legislation, but must instead afford due deference to the determination of the Legislature. *State v. Cole*, 2003 WI 112, ¶ 18.

Harrison has not met his burden of proving Wis. Stat. § 346.63(1)(am) unconstitutional beyond a reasonable doubt. He cannot do so, because as the Wisconsin Supreme Court and this Court have concluded, the statute is constitutional. *Luedtke*, 362 Wis. 2d 1, ¶¶ 8, 80; *Smet*, 288 Wis. 2d 525, ¶¶ 1, 29.

CONCLUSION

Wisconsin courts have consistently found this statute to be constitutional because imposing strict liability on drivers who have detectable amounts of a controlled substances in their system is rationally related to the legitimate government interest of public safety. Here, Harrison argues, and the circuit agreed, that the decisions in *Luedtke* and *Smet* are not controlling because they are incorrect. (R. 5; R. 7 at 3.) As stated above, Harrison needs to show that the statute is unconstitutional beyond a reasonable doubt. Harrison has not met that burden. The holdings in *Luedtke* and *Smet* are controlling. This Court cannot overrule those holdings in order to rule in favor of Harrison.

Therefore, this Court should reverse the circuit court's decision, re-open the citation, and remand to the circuit court so that the matter may proceed.

Dated this 16th day of March, 2018.

Respectfully submitted,

ALEXIS S. MCKINLEY
Assistant District Attorney
State Bar No. 1069737

1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
alexis.mckinley@da.wi.gov
Attorney for Plaintiff-Appellant

CERTIFICATION AS TO FORM AND LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,791 words.

Dated this 16th day of March, 2018.

Signed:

ALEXIS S. MCKINLEY
Assistant District Attorney
State Bar No. 1069737

1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
alexis.mckinley@da.wi.gov

Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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.

Dated this 16th day of March, 2018.

Signed:

ALEXIS S. MCKINLEY
Assistant District Attorney
State Bar No. 1069737

1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
alexis.mckinley@da.wi.gov

Attorney for Plaintiff-Appellant

INDEX TO APPENDIX

Page