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 REPLY BRIEF

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ARGUMENT

THIS COURT SHOULD NOT ADDRESS HARRISON'S NEW CONSTIUTIONAL ARGUMENT, AND IF IT DOES, IT SHOULD FIND WIS. STAT. § 346.63(1)(AM) CONSTITUTIONAL.

I. THIS COURT SHOULD NOT ADDRESS HARRISON'S NEW CONSTITUTIONAL ARGUMENT.

For the first time in this case, in his response brief, Harrison argues that Wis. Stat. § 346.63(1)(am) is unconstitutionally vague. Harrison did not raise this issue in his motion alleging that Wis. Stat. § 346.63(1)(am) is unconstitutional. He asserted that the statute is unconstitutional because it is a strict liability offense and lacks a scienter element. (R. 5:5-8.) He further argued it is unconstitutional because it prohibits driving with any delta-9 THC in a person's system, but does not require that the delta-9 THC impairs the person's ability to drive safely. (R. 5:8-10.) Harrison argued that the cases rejecting the same arguments he was making, *State v. Luedtke*, 2015 WI 42, 363 Wis. 2d 1, 863 N.W.2d 592, and *State v. Smet*, 2005 WI App 263, 288 Wis. 2d 525, 709 N.W.2d 474, are incorrect. (R. 5:2, 6-10.)

Because Harrison did not challenge the statute as void for vagueness, the circuit court did not find the statute void for vagueness—it found the statute unconstitutional because it has "no rational basis." (R. 7:6.) And, the court concluded that the cases that found the statute has a rational basis—*Luedtke* and *Smet*— "were incorrect." (R. 7:3.)

Because Harrison did not raise a void for vagueness challenge in the circuit court, and the circuit court did not find the statute void for vagueness, the State did not address that issue in its initial brief. Instead, it addressed the basis of the circuit court's ruling—that because the statute prohibits driving with a "detectable amount" of a restricted controlled substance, rather than a specified level other than "any," the statute has no rational basis and is therefore unconstitutional. (R. 7:6.)

In his brief, Harrison argues that *Luedtke* and *Smet* are not controlling because he is raising a void-for-vagueness challenge. (Br. at 19-22.) But he does not point to any part in which he raised such a challenge.

This Court will generally not consider an issue raised for the first time on appeal, especially if the issue is the unconstitutionality of a statute. *City of Mequon v. Hess*, 158 Wis. 2d 500, 506, 463 N.W.2d 687, 690 (Ct. App. 1990) (citing *Wirth v. Ehly*, 93 Wis. 2d 433, 443–44, 287 N.W.2d 140, 145 (1980) and *Tomah–Mauston Broadcasting Co. v. Eklund*, 143 Wis. 2d 648, 657–58, 422 N.W.2d 169, 173 (Ct. App. 1988)).

This Court does have discretion to consider the constitutionality of the statute on a new ground if it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue, and if there are no factual issues that need resolution. *In re Baby Girl K*, 113 Wis. 2d 429, 448, 335 N.W.2d 846, 856 (1983).

While there are no disputed factual issues, the State's only opportunity to respond is in this reply brief. Furthermore, Harrison has not shown why it is in the best interests of justice for this Court to decide his constitutionality claim in this setting. This Court should therefore decline to address it.

If this Court does address Harrison's void-for-vagueness challenge to the statute, it should reject the challenge because the statute is not unconstitutionally vague.

II. WIS. STAT. § 346.63(1)(am) IS NOT VAGUE.

If this Court decides to address Harrison's new challenge, it should find that Wis. Stat. § 346.63(1)(am) is not vague and is constitutional. Wisconsin Statute § 346.63(1)(am) prohibits the operation of a motor vehicle with a detectable amount of a restricted controlled substance in the driver's blood. Harrison takes issue with the phrase "detectable amount" and argues that it is vague. (Br. 6.)

The Court must begin its analysis by looking to the plain language of the statute. *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787. Because there is no statutory definition for the term "detectable amount," the Court must look to other sources to obtain the definition, and give "words and phrases their common, ordinary, and accepted meaning." *Id.* "Detectable" is defined in Merriam-Webster's Dictionary as "1. To discover the true character of; *detecting* drug smugglers. 2. To discover or determine the existence, presence, or fact of; *detect* alcohol in the blood." https://www.merriam-webster.com/dictionary/detectable. It is clear from the plain language of the statute that the legislature intended that any amount whatsoever of a restricted controlled substance that could be detected in a driver's blood is prohibited. This language is clear. Therefore, in looking at the plain language of the statute, Harrison's argument fails.

This Court found a related statute to be constitutional in *State v. Gardner*, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720. In *Gardner*, this Court addressed the constitutionality of Wis. Stat. § 940.25(1)(am) (causing great bodily harm by operation of a motor vehicle while having a detectable amount of a restricted controlled substance in the blood). The defendant made several claims against the statute's constitutionality, each of which were struck down by the court. This Court stated that,

> [T]he people of this state, through their legislature, have determined that the operation of a vehicle by one who has a detectable amount of a restricted controlled substance in his or her blood is a risk that will not be tolerated. Section 940.25(1)(am) represents the legislature's decision to set a zero tolerance level for driving after using illegal drugs and, as a result, imposes a penalty when someone disregards the rules of the road when his or her driving causes great bodily harm to another human being.

Id. ¶ 19.

The statute at issue here is not vague and is similar to a number of other statutes, like Wis. Stat. § 346.63(1)(b), which prohibits the operation of a motor vehicle with a "prohibited alcohol concentration." If this Court subscribes to Harrison's argument, the same subscription could be made to Wis. Stat. § 346.63(1)(b): How could a person know when they have

reached their limit? The problem with this subscription is that this argument was already made, in a case cited by Harrison: *State v. Muehlenberg*, 118 Wis. 2d 502 (Ct. App. 1984). (Br. 14.)

In *Muehlenberg*, the court's short analysis was a common sense one that acknowledged that "any person with common sense will know when consumption is *approaching* a meaningful amount." *Id.* at 509.

As Harrison outlined, a statute is constitutionally vague if it does not provide "fair notice" of the prohibited conduct and "an objective standard for enforcement." *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74, 83 (1993).

With regard to the first prong of the void-for-vagueness doctrine, the phrase "detectable amount" is straight-forward. To a person with common sense, that would mean zero, even if the legislature did not say "zero." "Detectable amount" is not an obscure phrase. "All that is required is a fair degree of definiteness." *State v. Tronca*, 84 Wis. 2d 68, 86, 267 N.W.2d 216, 224 (1978). "In order to be void for vagueness under the first element, the statute must be so ambiguous that one who is intent upon obedience cannot tell when proscribed conduct is approached." *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d, 714, 719 (1976). Thus, people with common sense wishing to abide by the law, particularly the statute at issue here, will not operate a motor vehicle if they suspect they have any amount of delta-9 THC in their system. If the legislature wanted to allow people to drive with some delta-9 THC in their blood, that would have been clear. Instead, the legislature chose to prohibit driving and operating with any detectable amount, perhaps giving some leeway to the labs detecting restricted controlled substances. Regardless, a "detectable amount" is clear to anyone with common sense.

In fact, a Louisiana Court of Appeals decided that, "the word 'detectable,' as used in the statute, has a distinct meaning. Any reasonable person can understand that . . . *any* amount of cocaine or its related substances is prohibited." *State v. Wilson*, 588 So. 2d 733, 734 (La. Ct. App. 1991). This Court should use the same reasoning and make the same finding.

The statute also satisfies the second prong negating vagueness. The standard is consistent enforcement. Contrary to Harrison's assertion, law enforcement does not have discretion on what is detectable. (Br. at 16.) "[A] statute is vague only if a trier of fact must apply its own standards of culpability rather than those set out in the statute." *Courtney*, 74 Wis. 2d at 711. Here, there is no room for the trier of fact to apply its own standards in a case alleging a violation of Wis. Stat. § 346.63(1)(am): the restricted controlled substance was either detected in the blood or it was not. The standard is "for those who enforce the laws and those who adjudicate guilt." *State v. Popanz*, 112 Wis. 2d 166, 173, 332 N.W.2d 750, 754 (1983).

A laboratory neither enforces laws nor adjudicates guilt. The labs simply detect and quantify substances that are in the blood. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972). The fact that a lab may have different levels of detectability is a nonissue and there is no evidence presented by Harrison to support that allegation. This law is not vague because law enforcement, judges, and juries know how to apply it. If there is any delta-9 THC or other restricted controlled substance detected in the blood, there is a violation. Wisconsin Statute § 346.63(1)(am) is not void for vagueness and should be upheld as constitutional.

CONCLUSION

This Court should proceed without considering Harrison's new void-for-vagueness argument. If this Court considers Harrison's new argument, this Court should still find Wis. Stat. § 346.63(1)(am) constitutional. Statutes are presumed constitutional and may be voided for vagueness upon a showing of reasonable doubt. *State v. Cole*, 2003 WI 112, ¶ 19, 264 Wis. 2d 520, 665 N.W.2d 328; *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. Harrison has not met this burden at any point in this case on any ground. Once again, this Court should reverse the circuit court's decision, re-open the citation, and remand to the circuit court so the matter may proceed.

Dated this ___ day of July, 2018.

Respectfully submitted,

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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, from the body of the argument through the conclusion, is 1,733 words.

Dated this ____ day of July, 2018.

Signed:

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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 ____ day of July, 2018.

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CERTIFICATE OF MAILING

I certify that this brief will be deposited into 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 July 20, 2018.

I further certify that on July 20, 2018, I will serve three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief will be correctly addressed and postage will be pre-paid.

Dated this ____ day of July, 2018.

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