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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2018AP951 CR

v.

JESSE J. KAIN
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT
THE HONORABLE SCOTT C. WOLDT, PRESIDING

Christian A. Gossett
District Attorney
State Bar No. 1040212

Attorneys for Plaintiff-Appellant

Adam J. Levin
Assistant District Attorney
State Bar No. 1045816

Winnebago County Dist. Atty's Office
240 Algoma Boulevard, Beach Building
P O Box 2808
Oshkosh, WI 54903-2808
(920) 236-4977

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I. Statement of Issues Presented for Review

- 1) Whether Officer Mulroy's Request for a PBT was lawful?

Trial Court Answered: Yes.

- 2) Whether Officer Mulroy had probable cause to arrest and obtain a forensic blood sample?

Trial Court Answered: Yes.

II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument, as this matter involves only the application of well-settled law to the facts of the case.

III. Statement of the Case

The State believes Mr. Kain's recitation of the facts of the case is sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

The State agrees that *County of Jefferson v. Renz*, 231 Wis.2d 293 (1999) controls administration of a PBT. "[P]robable cause to believe refers to a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to

believe' necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest." 231 Wis.2d at 219.

As Mr. Kain points out, the Supreme Court has held that "probable cause exists to request a PBT breath sample when the driver is known to be subject to a .02 PAC standard, the officer knows it would take very little alcohol for the driver to exceed that limit, and the officer smells alcohol on the driver." *State v. Goss*, 2011 WI 104, ¶ 28. Mr. Goss argues his claim that he had an interlock negates this probable cause. *Br. of Appellant-Respondent*, pp 7-8.

The State disagrees. First, the record at the motion hearing is silent about whether there was an interlock device on the defendant's car. Second, the record is silent about whether if such an instrument was in the defendant's car, what the threshold for "no start" is – 0.0? 0.08? The defendant's blood came back at 0.06, R3:P7 (record number 3: page 7), so we know conclusively he could drive his car with a BAC of 0.06 or greater. Third, the record is silent about whether there are cheat techniques to allow a driver to bypass or have an alcohol free person blow or a balloon or other mechanisms to manipulate the device to allow a driver to operate an

interlock equipped vehicle notwithstanding a positive alcohol concentration.

The trial court correctly found the smell of intoxicants about the defendant, and his refusal to submit a PBT sample created probable cause to arrest. R39:P22. A blood draw based on probable cause to believe the defendant was over 0.02 was lawful. 343.305(3)(a) (“Upon arrest of a person for violation of ... 346.63(1), ... a law enforcement officer may request the person to provide one or more samples of his breath, blood or urine[.]”).

V. Conclusion

For the reasons set forth above, Officer Mulroy had the requisite probable cause to request a PBT of Mr. Kain, the ensuing blood draw was lawful, and the Court committed no error in admitting blood results at trial.

Dated at Oshkosh, Wisconsin this __ day of August, 2018.

By: _____
Adam J. Levin
WSBA No. 1045816
Assistant District Attorney
Winnebago County, Wisconsin
Attorney for the Respondent

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 494 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief

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 person, 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.

I further certify that on the date of signature I routed this brief to our office station for first class US Mail Postage to be affixed and mailed to:

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110 East Main Street, Suite 215
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500 W Silver Spring Drive, K-200
Milwaukee, WI 53217

Dated this ____ day of August, 2018 at Oshkosh, Wisconsin by:

Adam J. Levin
Bar No. 1045816
Assistant District Attorney
Winnebago County, Wisconsin