

RECEIVED

12-18-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2018AP001967 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

Vs.

JUDE W. GILES,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED
ON MARCH 3, 2018 IN THE CIRCUIT COURT FOR
ONEIDA COUNTY, THE HONORABLE PATRICK F.
O'MELIA PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

Kristopher Ellis
State Bar No. 1094245

995 Applegate Rd., Suite 3
Madison WI 53713
Phone: 608-852-7774
AttorneyKristopher@gmail.com

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITES.....3

ISSUE PRESENTED.....4

CIRCUIT COURT’S RULING.....4

POSITION ON ORAL ARGUMENT
AND PUBLICATION.....4

STATEMENT OF THE CASE AND
STATEMENT OF FACTS.....4

ARGUMENT.....6

 I. Mr. Giles’ Constitutional Rights to Present a
 Defense, a Fair Trial, and Due Process of Law
 were Violated when the Circuit Court Ruled Mr.
 Giles’ Preliminary Breath Test was Inadmissible
 per Wis. Stat. § 343.303.....6

 A. Circuit Court Ruling.....6

 B. Standard of Review.....6

 C. Applicable Legal Standard.....6

 D. Legal argument.....7

 E. Summary.....8

CONCLUSION.....9

CERTIFICATION AS TO FORM AND LENGTH.....10

CERTIFICATION OF COMPLIANCE WITH WIS.
STAT. § 809.19(12).....10

APPENDIX.....100

CERTIFICATION AS TO APPENDICES.....126

TABLE OF AUTHORITES

| Cases | Page |
|---|-------------|
| <i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)..... | 4, 5, 6 |
| <i>State v. St. George</i> , 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777..... | 6, 7 |
| <i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)..... | 7 |
| <i>State v. Pulizzano</i> , 155 Wis. 2d 633, 456 N.W.2d 325 (1990)..... | 7 |
| Statutes | Page |
| Wis. Stat. § 343.303..... | 4, 6, 7 |
| Wis. Stat. § 346.63..... | 5 |
| Wis. Stat. § 346.65..... | 5 |
| Wis. Stat. § 907.02..... | 4, 5 |

ISSUE PRESENTED

- I. Was Mr. Giles' Constitutional Rights to Present a Defense, a Fair Trial, and Due Process of Law Violated when the Circuit Court Ruled Mr. Giles' Preliminary Breath Test is Inadmissible per Wis. Stat. § 343.303?

CIRCUIT COURT'S RULING

- I. The circuit court ruled the preliminary breath test is inadmissible per Wis. Stat. § 343.303. (R 84: 12-13). The circuit court ruled the preliminary breath was inadmissible without a Daubert hearing, per Wis. Stat. § 907.02. (R 84: 13).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted to clarify a defendant's right to present a defense by disclosing the results of a preliminary breath test with the language of Wis. Stat. § 343.303. Mr. Giles does not request oral argument.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On April 3, 2016, Mr. Giles was staying at a friend's residence in Oneida County. (R 88: 73-74). Mr. Giles then got into an argument with another person at the residence. (R 88: 75-79). After the altercation, Mr. Giles drank alcohol, specifically two mixed drinks with vodka. (R 88: 79-80). After two or more hours later, Mr. Giles left his friend's residence intending to go to his parent's residence, which is about a five-minute drive from his friend's residence. (R 88: 83-84, 87). Immediately prior to driving to his parent's residence, Mr. Giles drank an additional six to eight shots of vodka. (R 88: 87). On the way to his parent's house, Mr. Giles rear-ended another vehicle. (R 88: 101-102). After the accident, police were dispatched to the scene. (R 85: 277). One of the witnesses told the officer that she smelled intoxicants on Mr. Giles. (R 85:283). The officer was then able to smell intoxicants

on Mr. Giles as well. (R 85: 284). After Mr. Giles failed the field sobriety tests, the officer arrested Mr. Giles for operating while intoxicated. (R 85: 297-301). Prior to arresting Mr. Giles, the police had Mr. Giles submit a preliminary breath test. (R 23: 1). The results of the preliminary breath test was .07 Breath Alcohol Concentration. (R 82: 10). After Mr. Giles was arrested, the police withdrew his blood to test the blood alcohol concentration. (R 87: 251). At that time, Mr. Giles blood alcohol concentration was .144. (R 87: 251). It takes about an hour to an hour and a half for a dose of alcohol to be absorbed into the bloodstream. (R 88: 29).

On April 4, 2016, the State charged Jude Giles with Operating While Intoxicated Causing Injury – 2nd and Subsequent Offense, in violation of Wis. Stat. §§ 346.65(3p) and 346.63(2)(a)1. (R 2: 1). On February 27, 2018, in the third and final amended information, the State amended the charges to Operating While Intoxicated Causing Injury – 2nd and Subsequent Offense, in violation of Wis. Stat. § Wis. Stat. §§ 346.65(3p) and 346.63(2)(a)1, Operating with Prohibited Alcohol Concentration Causing Injury – 2nd and Subsequent Offense, in violation of Wis. Stat. §§ 346.65(3p) and 346.63(2)(a)2, Operating a Motor Vehicle while Intoxicated – 2nd offense, in violation of Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)2, and Operating with Prohibited Alcohol Concentration – 2nd offense, in violation of Wis. Stat. §§ 346.63(1)(b) and 346.65(2)(am)2. (R 38).

Mr. Giles, by his attorney, filed a Motion in Limine on September 22, 2017. (R 23). The Motion in Limine included Motion in Limine number five, requesting the circuit court allow the defense to admit evidence of Mr. Giles Preliminary Breath Test results taken on April 3, 2016. (R 23: 2-3). The defense then filed a brief in support of the Motion in Limine number five. (R 28). After hearing arguments from both parties, the circuit court ruled the preliminary breath test is inadmissible per Wis. Stat. § 343.303. (R 84: 12-13). The circuit court ruled the preliminary breath was inadmissible without a *Daubert* hearing, per Wis. Stat. § 907.02. (R 84: 13).

After a jury trial, Mr. Giles was found guilty of Operating While Intoxicated as charged in count three of the information, and guilty of operating with a prohibited alcohol concentration as charged in count four of the information. (R 89: 110-111). The jury was unable to reach a verdict on counts one and two of the information. (R 89: 110). On August 20, 2018, based on the State's motion, the circuit court dismissed counts one, two, and four. (R 68). The circuit court then sentenced Mr. Giles to 30 days jail, a fine of \$1,570, and thirteen-month license revocation. (R 91: 38).

ARGUMENT

II. Mr. Giles' Constitutional Rights to Present a Defense, a Fair Trial, and Due Process of Law were Violated when the Circuit Court Ruled Mr. Giles' Preliminary Breath Test was Inadmissible per Wis. Stat. § 343.303.

A. Circuit Court Ruling.

The circuit court ruled the preliminary breath test is inadmissible per Wis. Stat. § 343.303. (R 84: 12-13). The circuit court ruled the preliminary breath was inadmissible without a *Daubert* hearing, per Wis. Stat. § 907.02. (R 84: 13).

B. Standard of Review.

This Court determines a question of constitutional fact independently of the circuit court. *State v. St. George*, 2002 WI 50, ¶ 16, 252 Wis. 2d 499, 514, 643 N.W.2d 777, 782.

C. Applicable Legal Standard.

According to Wis. Stat. § 343.303, "The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of

a person.” However, this Court’s inquiry does not end with the examination of the statute. *St. George*, 2002 WI 50, ¶ 14. The confrontation and compulsory process clauses of the Sixth Amendment of the U.S. Constitution and Article I, Section 7 of the Wisconsin Constitution “grant defendants a constitutional right to present evidence.” *Id.* The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. *Id.* (citing *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325, 330 (1990) and *Chambers v. Mississippi*, 410 U.S. 284, 294–95, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). The compulsory process clause grants defendants the right to admit favorable testimony. Compulsory. *St. George*, 2002 WI 50, ¶ 14. Even with these constitutional guarantees, a defendant's right to present evidence is not absolute. *Id.* at ¶ 15. The compulsory process clause only grants a defendant the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect. *Id.* Therefore, preventing a defendant from presenting evidence under Wis. Stat. § 343.303 does not necessarily violate a defendant's constitutional right to present evidence. See *Id.* In some circumstances, the evidence may be so relevant and probative that the defendant’s right to present it is constitutionally protected under the compulsory process clause. See *Id.*

D. Legal Argument

Few rights are more fundamental than that of an accused to present evidence in his own defense. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973). Mr. Giles intended to present the results of this preliminary breath test to support his claim that he consumed a large amount of alcohol immediately prior to operating his vehicle, and then got into an accident within minutes after consuming the alcohol. Mr. Giles intended to drive to his parent’s residence, which was about a five minute drive from his friend’s residence. (R 88: 83-84, 87). During the drive that took a few minutes, Mr. Giles rear-ended another vehicle. (R 88: 101-102). The accident that led to Mr.

Giles' arrest occurred within minutes from his consuming the alcohol and it takes about an hour to an hour and a half for a dose of alcohol to be absorbed into the bloodstream. (R 88: 29). During the time the police arrived, spoke with witnesses, had Mr. Giles perform a field sobriety test, and then submit a preliminary breath test, the alcohol Mr. Giles consumed was still entering his blood stream. At the time Mr. Giles submitted a preliminary breath test, the alcohol was beginning to enter his blood stream, but was not completely absorbed. At that time, his alcohol concentration was .07. (R 82: 10). After the police arrested Mr. Giles and some more time passed, the police withdrew Mr. Giles blood. At that time, Mr. Giles alcohol concentration was .144. (R 87: 251). The two tests together show that Mr. Giles' alcohol concentration was rising even after the police arrived on the scene, and supports the claim that Mr. Giles was not intoxicated at the time of the accident.

Evidence of the preliminary breath test is relevant to show that Mr. Giles was not intoxicated at the time he was operating the vehicle, but instead was intoxicated at the time his blood was drawn. The relevance of the preliminary breath test substantially outweighs any possible prejudicial effect. Without the results of the preliminary breath test, Mr. Giles was not able to offer evidence to show that he was intoxicated at the time his blood was drawn, but he was not intoxicated at the time he operated his vehicle. The evidence of Mr. Giles alcohol concentration close to the time he operated the vehicle is so relevant and probative, that Mr. Giles was not able to effectively present his defense without it. Since Mr. Giles was not able to effectively present his defense without the results of his preliminary breath test, Mr. Giles was denied his constitutionally protected rights under the compulsory clause.

E. Summary.

In some cases, a preliminary breath test may be so relevant and probative that the defendant's right to present it is constitutionally protected under the

compulsory process clause. In this case, evidence of the preliminary breath test is relevant to show that Mr. Giles was not intoxicated at the time he was operating the vehicle, but instead was intoxicated at the time his blood was drawn. The evidence of Mr. Giles alcohol concentration close to the time he operated the vehicle is so relevant and probative, that Mr. Giles was not able to effectively present his defense without it. Mr. Giles, by his attorney, submitted a motion to permit the results of the preliminary breath test. The circuit court ruled the preliminary breath was inadmissible without a *Daubert* hearing, per Wis. Stat. § 907.02. Denying Mr. Giles the right to present the preliminary breath test, denied Mr. Giles his constitutionally protected rights under the compulsory clause.

CONCLUSION

For the forgoing reasons, Mr. Giles respectfully requests that this Court find the circuit court violated Mr. Giles' constitutional rights to present a defense, a fair trial, and due process of law, reverse his conviction, and remand this case back to the circuit court for a new trial with instructions to permit Mr. Giles to present the results of his preliminary breath test.

Dated: December 18, 2018

Kristopher Ellis
State Bar No. 1094245
995 Applegate Rd., Suite 3
Madison WI 53713
Phone: 608-852-7774
AttorneyKristopher@gmail.com
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM AND LENGTH

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 the brief is 2,237 words.

Dated: December 18, 2018

Kristopher Ellis
State Bar No. 1094245

**CERTIFICATION OF COMPLIANCE WITH WIS.
STAT. § 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. § 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: December 18, 2018

Kristopher Ellis
State Bar No. 1094245