

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals Case No.
2018AP001967

vs.

JUDE W. GILES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN ONEIDA COUNTY CIRCUIT COURT,
THE HONORABLE PATRICK F. O'MELIA, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Defendant-Appellant Jude W. Giles was involved in a vehicle accident. The State charged him with Operating While Intoxicated Causing Injury, 2nd and subsequent offense, Operating with prohibited alcohol concentration causing injury, 2nd and subsequent offense, Operating a Motor Vehicle While intoxicated, 2nd offense, and, Operating a motor with a prohibited alcohol concentration, 2nd offense. Giles filed a motion in limine to allow the results of the Preliminary Breath Test (PBT) to be admitted into evidence during the jury trial. The circuit court denied the motion in limine. Did the circuit court properly deny the admission of the PBT?

The circuit court ruled the PBT results were inadmissible. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that the briefs will adequately address the issue and thus does not request oral argument. Publication is not requested.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The State agrees with the Statement of the case and statement of the facts as set forth in Defendant-Appellant brief.

STANDARD OF REVIEW

Statutory interpretation presents a question of law that this court reviews de novo. *State v. Kirch III*, 228 Wis.2d 598, 602, 587 N.W.2d 919, 920 (Wis. Ct. App.).

The admissibility of expert testimony lies in the discretion of the circuit court. This court reviews a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard. *Siefert ex rel. Scoptur v. Balink*, 2015 WI App 59, ¶ 15, 364 Wis.2d. 692, 702-703, 869 N.W.2d 493,498 (Wis. Ct. App. 2015).

ANALYSIS

“Our analysis is premised on the long-established principles of statutory construction.” *State v. Fischer*, 2010 WI 6, ¶ 24, 322 Wis.2d 265, 284, 778 N.W.2d 629, 638 (2010). But see *Fischer v. Ozaukee County Circuit Court*, 741 F. Supp. 2d 944 (2010). “Fortunately, in this case, the legislature’s policy decision regarding the absolute inadmissibility of the PBT results under these circumstances simply could not be clearer.” *Id.* ¶ 25, 284, 638. See Wis.Stat.Sec. 343.303.

Where a defendant challenges the exclusion of expert testimony evidence on the grounds that it violates his or her right to present a defense, the court evaluates the claim using the test set for in *St. George*, pursuant to the United States Supreme Court’s decision in *Scheffer*:

For the defendant to establish a constitutional right to the admissibility of the proffered expert testimony in the present case, the defendant must satisfy a two-part inquiry... This two part inquiry enables a circuit court to determine the accused's interest in admitting the evidence and to determine whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion "undermines[s] fundamental elements of the defendant's defense" *Id.* at ¶ 27, 286-287, 639.

In *Fischer*, the Wisconsin Supreme Court assumed without deciding that the defendant satisfied the first part of the test. *Id.* at ¶ 29, 287-288, 640. "Assuming Fischer has established a right to present the expert evidence in question, we nevertheless conclude for reasons given herein that his right to do so is outweighed by the State's compelling interest in excluding the evidence. Accordingly, exclusion of the evidence did not result in a violation of his constitutional right to present a defense." *Id.* at ¶ 29, 288, 640.

The Court declined to adopt a Daubert-like approach to expert testimony and make the judge the gatekeeper. *Id.* at ¶ 36, 293, 642. Although *Fischer* was decided prior to Wisconsin adopting the Daubert standard, the analysis does not change.

In this case, the circuit court ruled the PBT evidence inadmissible, based upon Wis. Stat. § 343.303 and precedent. The circuit court reasoned that a Daubert analysis was not required because the PBT evidence was inadmissible. Like *Fischer*, this court should conclude that the right to present a PBT defense is outweighed by the State's compelling interest in excluding the evidence.

CONCLUSION

For the reasons stated within, this Court should affirm Giles' judgment of conviction.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sections 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a monospaced serif font. The length of this brief is 648 words.

Dated this 7th day of February, 2019.

MICHAEL W. SCHIEK, 1041073
District Attorney
Oneida County, Wisconsin

CERTIFICATE 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 this 7th day of February, 2019.

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