

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2018AP001967 - CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

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.

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.

The State relies on the analysis in *State v. Fischer*, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629 to argue that

the preliminary breath test should be inadmissible. In *Fisher*, the defendant's preliminary breath test was .11 and the defendant's blood test showed a blood alcohol concentration of .147. *Fischer*, 2010 WI 6, ¶ 8. The margin of error for a preliminary breath test is .04. (R 83: 46). With the margin of error, Fisher's preliminary breath test ranges from .07 to .15 and Fisher's blood test showed his blood alcohol concentration was within that margin. In this case, Mr. Giles preliminary breath test was .07 and his blood test showed his blood alcohol concentration was .144. (R 82: 10, R 87: 251). With the margin of error, Mr. Giles preliminary breath test showed his blood alcohol concentration ranged from .03 to .11. Mr. Giles blood test showed his blood alcohol concentration was higher when his blood was drawn than when the preliminary breath test was conducted, taking into account the margin of error. (R 83: 46).

Mr. Giles, unlike the defendant in *Fischer*, did not intend to introduce the preliminary breath test as reliable to determine what his blood alcohol concentration was at the time of his arrest. Mr. Giles acknowledged that the preliminary breath test was unreliable and looked at the results considering the margin of error. The preliminary breath test is relevant to show that Mr. Giles's blood alcohol concentration was increasing at the time of his arrest. Without the results of the preliminary breath test, Mr. Giles was not able to offer evidence to show that his blood alcohol concentration was increasing at the time of his arrest. The evidence that Mr. Giles alcohol concentration was increasing at the time of his arrest 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.

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: March 15, 2019

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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 1,130 words.

Dated: March 15, 2019

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: March 15, 2019

Kristopher Ellis
State Bar No. 1094245

CERTIFICATION OF MAILING

Pursuant to Wis. Stat. § 809.80, I certify that the Reply Brief of Defendant-Appellant was deposited in the US Mail as Priority Mail on March 15, 2019.

Dated: March 15, 2019

Kristopher Ellis
State Bar No. 1094245