STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP1317-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. VAN LINN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OCONTO COUNTY, THE HONORABLE MICHAEL T. JUDGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

The State reframes Defendant-Appellant Daniel J. Van Linn's one issue as two issues:

1. Did Van Linn forfeit his argument now on appeal, either by altering his argument previously raised in the circuit court or by failing to sufficiently articulate the basis for his requested relief in the circuit court?

This Court should answer, "Yes."

2. If his claim is not forfeited, did the exclusionary rule apply to blood alcohol concentration evidence gathered for medical treatment purposes and not at the government's direction?

The circuit court held Van Linn's test results were not privileged and were, therefore, admissible.

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument are warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

INTRODUCTION

Hospital personnel drew multiple blood samples from Van Linn while he received attention for automobile crash injuries. At least one sample of his blood was drawn only for medical treatment purposes. A police officer who responded to the hospital also ordered a warrantless blood draw to establish that Van Linn had committed his fifth impaired driving offense.

The circuit court later suppressed the results of the police-ordered blood draw, but the State subpoenaed records

of Van Linn's excessive blood alcohol concentration from the other blood sample(s)[1] drawn for medical treatment. Van Linn argued that those records were inadmissible because they were privileged and circumvented the court's prior suppression order, but the circuit court disagreed.

Van Linn now argues—under a different analysis not raised below—that this Court should reverse; Van Linn has forfeited that argument. Even if this Court disagrees, the separate medically-drawn blood results did not constitute the proverbial fruit of the poisonous tree, as they stemmed from Van Linn's treatment and not as a product of illegal government activity. The Fourth Amendment did not provide for suppression of that evidence, the circuit court properly declared the blood alcohol concentration results admissible, and this Court should affirm.

STATEMENT OF THE CASE

The crash

Deputy Nick School testified at a motion hearing that he was on duty during the early morning hours of March 26, 2017. (R. 70:4.) He was notified of a car accident just before 2:00 a.m. that morning. (R. 70:4.) Dispatch advised that two cars were involved in the crash with one person remaining entrapped in a vehicle. (R. 70:4.) Both emergency medical personnel and the fire department responded to the crash. (R. 70:6.)

With the assistance of the fire department and ambulance staff, Deputy School located a car crashed into a cabin. (R. 70:6–7.) The driver was gone, but ambulance

[1] The record is not entirely clear as to whether hospital personnel drew one or multiple blood samples from Van Linn for medical treatment purposes. However, the precise number of samples drawn from Van Linn is not determinative of the issues presented on appeal.

personnel saw a man running in the area. (R. 70:8–9.) The man was later located approximately 50 yards from the road in an open area of a yard. (R. 70:10.)

Upon locating the man, Deputy School identified him as Van Linn. (R. 70:11.) Van Linn smelled moderately of alcohol, and he admitted to consuming two beers. (R. 70:12.) Van Linn stated he was not driving and expressed unawareness concerning the crash Deputy School was investigating. (R. 70:12.) Deputy School indicated that Van Linn was going to be transported by ambulance to St. Clare's Memorial Hospital. (R. 70:13.)

Deputy School believed Van Linn's wife to be the registered owner of the crashed car, and he suspected Van Linn was the driver at the time of the crash. (R. 70:12–13.) Deputy School also discovered that Van Linn had four prior OWI convictions and was subject to a .02 prohibited alcohol concentration limit. (R. 70:13.)

Deputy School was traveling to the hospital to conduct a follow-up investigation when he learned that the ambulance was being diverted to the Shawano Medical Center. (R. 70:14.) When Deputy School arrived at the medical center, he allowed medical professionals at the hospital to treat Van Linn for his injuries before he attempted to speak with Van Linn. (R. 70:15.)

Thereafter, Deputy School advised Van Linn he was being placed under arrest for operating while intoxicated as a fifth offense, and Deputy School read to him the Informing the Accused form. (R. 70:16, 18.) Van Linn refused to submit to an evidentiary chemical test of his blood. (R. 70:18.) Because Deputy School was unaware of the time the accident occurred, knew that Van Linn was subject to a reduced prohibited alcohol concentration limit, and heard Van Linn admit to drinking only two beers, Deputy School ordered a warrantless blood draw. (R. 70:21.)

The charges

The State charged Van Linn with operating a motor vehicle while intoxicated as a fifth offense. (R. 2.) The State later charged Van Linn with an additional count of operating a motor vehicle with a prohibited alcohol concentration as a fifth offense. (R. 11.)

The motion to suppress legal blood draw results

Van Linn, through counsel, moved to suppress the evidence stemming from the blood draw ordered by Deputy School following Van Linn's refusal to submit to an evidentiary chemical test of his blood. (R. 12.) Specifically, Van Linn argued that exigent circumstances did not exist to dispense with the warrant requirement for a nonconsensual blood draw. (R. 12:4–6.) After an evidentiary hearing, the circuit court issued an order suppressing the blood result evidence, holding that there were no exigent circumstances justifying the warrantless blood draw ordered by Deputy School. (R. 18:4–5.)

The subpoena for hospital records

After the court ordered the suppression of the legal blood draw evidence, the State submitted to the court a request for subpoena for documents pertaining to Van Linn's medical records relating to his automobile crash, (R. 21), a proposed subpoena for documents, (R. 22), and a supporting affidavit ("subpoena affidavit"), (R. 23). The subpoena affidavit advised the court of the following:

Just before 2:00 a.m., Deputy School was dispatched to a two-vehicle accident with unknown injuries. (R. 23:1.) A person who identified himself as "Daniel" had called to inform police dispatch of the crash. (R. 23:1.) Police discovered the phone call came from a phone number linked to Van Linn. (R. 23:2.) Dispatch also advised officers that Van Linn owned the property located at the same address "Daniel" described when he called to report the crash. (R. 23:2.)

While attempting to find the crash, ambulance personnel found a male in the ditch on the side of the highway. (R. 23:1.) When they turned to check on him, the male took off running. (R. 23:1.) While looking for the male, Officer School located an SUV that had struck the north side of a structure in the area. (R. 23:1–2.) According to Department of Transportation records, that vehicle was registered to Lori Van Linn, who shared the same address as Daniel Van Linn. (R. 23:2.)

Rescue personnel advised they had located a male in the area, leading Deputy School to find Van Linn lying in a yard. (R. 23:2.) Van Linn's clothing was wet and dirty, and he was bleeding from the head and hands. (R. 23:2.) Deputy School asked Van Linn if he was alright and what happened, and Van Linn confirmed he was alright and asked what Deputy School was talking about. (R. 23:2.) When asked what happened to his vehicle, Van Linn replied he was not driving and did not know what Deputy School was referencing. (R. 23:2.)

When asked if he knew where he was, Van Linn stated he was at his house and "out for a walk." (R. 23:2.) Van Linn denied being involved in an accident or driving a vehicle. (R. 23:2.) Van Linn emitted a moderate odor of intoxicants. (R. 23:2.) Van Linn also admitted to drinking beer. (R. 23:2.)

The subpoena further explained that fire department personnel advised they located an area where a vehicle hit a tree west of Deputy School's location. (R. 23:2.) Vehicle parts located near the tree were consistent with the damage observed on the driver's side of Van Linn's vehicle. (R. 23:2.)

It was determined, based on tire tracks in the wet grass, that Van Linn's vehicle had struck a tree, reentered the roadway, crossed both lanes of traffic, entered the north ditch, traveled a short distance before crossing another road, drove into a field area over a hill, and struck the north side of a

building. (R. 23:2.) Deputy School found blood located on the steering wheel and on the driver's side door of the crashed vehicle. (R. 23:2.)

Deputy School learned from dispatch that Van Linn had four prior OWI convictions and was subject to a reduced alcohol concentration restriction of .02. (R. 23:2.)

An ambulance took Van Linn to the hospital due to injuries he suffered in the crash. (R. 23:2.) There, Deputy School read Van Linn the Informing the Accused form, and Van Linn refused to submit to a chemical test of his blood. (R. 23:3.) Deputy School, who believed he had insufficient time to secure a search warrant for Van Linn's blood, ordered a warrantless blood draw. (R. 23:3.)

During a subsequent interview, Van Linn explained that he thought he had hit another vehicle during the incident, and he seemed "surprised but thankful" he had not hit another vehicle. (R. 23:3.) Van Linn also explained that after the crash, he got scared and ran across the road to lie down in the yard. (R. 23:3.)

Lastly, the subpoena affidavit stated that the involuntary blood draw that occurred at Deputy School's order yielded a sample that tested for a blood ethanol concentration of 0.205 g/100 mL. (R. 23:4.)

The subpoena litigation

The circuit court authorized the subpoena for documents. (R. 24:1.) Twelve days after the court authorized the subpoena, Van Linn moved for an order quashing that subpoena on the following basis:

> In this case, the information and communications contemplated in the subpoena is necessarily related to the previously suppressed blood draw and derivative treatment. While a statutory exception exists for tests for intoxication, the Fourth Amendment protection against unreasonable searches and seizures supersedes this statutory

> provision. The information sought through the subpoena is being sought in violation of the Court's previous ruling on the Defendant's Motion to Suppress Blood Draw Results. After considering both written and oral argument, the Court ultimately decided "the blood draw which was taken from Van Linn was in violation of his Fourth Amendment rights and *all evidence derived from that blood draw* must be suppressed." (emphasis added) The exclusionary rule must extend to the information sought through the State's subpoena.

(R. 27:3.)

The circuit court concluded Van Linn's motion to quash was rendered moot because the subpoena was already authorized and served, resulting in Van Linn's medical records being disclosed to both parties. (R. 78:9.)

Van Linn then moved to suppress those results, arguing that the results were privileged under Wis. Stat. § 905.04(2) (providing for physician-patient privilege), were gathered contrary to Wis. Stat. § 343.305(3)(c) (Wisconsin's implied consent statute), and afforded him insufficient opportunity to gain independent testing in accordance with Wis. Stat. § 165.79(1). (R. 32:2–3.)

Also referencing the court's prior order suppressing the police-ordered blood draw result, Van Linn argued:

> In the present case, the State seeks to introduce privileged medical information only after the suppression of the blood draw obtained by law enforcement. If the exclusionary rule is to be given proper purpose and effect, the admission of the privileged medical information requested by the State cannot be allowed.

(R. 32:3.) Absent from Van Linn's motion was any argument that the independent source exception to the exclusionary rule would not apply. (R. 32.)

In response, the State argued:

> The blood sample obtained and tested by ThedaCare Medical Center-Shawano Hospital was done within the regular course of business of the hospital. It was done by a private organization independent of law enforcement/government officials and not at the request of a government official. The hospital's action was completely separate and independent of law enforcement's request for a blood sample under the State's implied consent law. There is no allegation that the hospital's action was illegal in any way. Simply put, results of the hospital's blood test and other circumstances should not be suppressed because it was not the result of any governmental action. The 4th Amendment against illegal search and seizures is directed at governmental action and not the action of private persons or entities.

(R. 33:3.)

The circuit court denied Van Linn's suppression motion. (R. 37:3.) In its written decision, the court held that the medical records subject to subpoena were not privileged. (R. 37:2 (citing Wis. Stat. § 905.04(4)(f)).) Making findings of fact supporting its decision, the court found, "As a part of the defendants [sic] diagnostic workup by hospital personnel a blood panel was obtained, which included blood alcohol concentration determination. Subsequently, diagnostic blood test results were obtained from the hospital as a result of a subpoena . . . ." (R. 37:1.)

The plea and sentencing

Van Linn entered into a plea agreement with the State in which he would plead no contest to the charge of operating while intoxicated as alleged in Count 1 of the Information; in return, the State would move to dismiss and read in the remaining charges. (R. 75:2.) Van Linn entered his plea, the court found him guilty, and ordered a presentence investigation. (R. 75:2, 8.)

At a later hearing, the court imposed a four-year prison sentence but stayed that sentence, placing Van Linn on probation for a period of three years with various supervision conditions and statutory penalties. (R. 51; 73:10–12.)

Van Linn now appeals. (R. 65.)

ARGUMENT

I. Van Linn forfeited his argument now on appeal.

Van Linn admits he advanced only two grounds in the circuit court supporting his motion to suppress the medical treatment blood sample(s): (1) the results were privileged under Wis. Stat. § 905.04; and (2) "the court's prior suppression of the same information should prevent the state from accessing it via different means." (Van Linn's Br. 3.)

On appeal, Van Linn now argues that the medical records were inadmissible because the State included information gained from an illegal search to establish probable cause in the subpoena application and that the State could not satisfy the independent source doctrine. (Van Linn's Br. 5.)

Van Linn was required to state with particularity the grounds for his motion and the relief sought, and he cannot fault the circuit court for neglecting claims he failed to explain prior to his appeal. He has forfeited his newly developed argument, and this Court should decline review.

A. Standard of review

Whether a defendant has properly preserved a claim for appellate review is a question of law that this Court reviews de novo. *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

B. Motion pleading requirements and the forfeiture rule

Wisconsin Stat. § 971.30(2)(c) provides that all motions—including pretrial motions—shall "[s]tate with particularity the grounds for the motion and the order or relief sought." Wis. Stat. § 971.30(2)(c); *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433. Our statutes include this requirement to ensure "notice to the nonmoving party and to the court of the specific issues being challenged by the movant." *State v. Caban*, 210 Wis. 2d 597, 605, 563 N.W.2d 501 (1997).

This rule applies to Fourth Amendment challenges. *Caban*, 210 Wis. 2d at 606; *see also State v. Radder*, 2018 WI App 36, ¶ 18, 382 Wis. 2d 749, 915 N.W.2d 180. To determine whether a defendant preserved a particular Fourth Amendment challenge, reviewing courts examine both the suppression motion and the suppression hearing. *Caban*, 210 Wis. 2d at 606.

Similarly, Wisconsin's "waiver rule," which encompasses both waiver and forfeiture principles, holds that issues "not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727. This rule is an "essential principle of the orderly administration of justice," as it provides the parties and courts with notice and a fair opportunity to address the claim, encourages attorney diligence, and prevents "sandbagging." *Id.* ¶¶ 11–12.

C. Van Linn is not entitled to appellate review of his newly developed arguments.

Van Linn forfeited the argument he raises on appeal. There is a notable difference between defense counsel arguing: (1) medical records are privileged, and to give the exclusionary rule teeth, the State should not be able to view

records of separately obtained hospital evidence; versus (2) the State used unlawfully obtained evidence to secure other inculpatory evidence constituting fruit of the poisonous tree.

Van Linn argued the former position before the circuit court, (R. 27:3; 32:3), and he advances the latter position now before this Court, (Van Linn's Br. 4–7). He never once argued—not in his motion to quash the State's subpoena, not in his motion to suppress the fruits of that subpoena, and not during any of the hearings on his subpoena motions—that the medical records were in any way fruit of the poisonous tree. (*See* R. 27; 32; 76:2–3; 77:2; 78:2–5.)

Both the circuit court pleading requirements and the forfeiture rule serve important roles, each of which are implicated here. Concerning the former, the Wisconsin Supreme Court has previously explained, in the context of a suppression motion:

> The rationale underlying [Wis. Stat.] § 971.30's particularity requirement is notice-notice to the nonmoving party and to the court of the specific issues being challenged by the movant. Both the opposing party and the circuit court must have notice of the issues being raised by the defendant in order to fully argue and consider those issues.

Caban, 210 Wis. 2d at 605.

Despite filing several written motions and offering nominal oral argument, defense counsel asserted only that Van Linn's medical records were privileged—an argument directly refuted by Wis. Stat. § 905.04(4)(f)—and the circuit court should prevent the State from accessing his medical records by other lawful means—an argument directly refuted by Wis. Stat. § 343.305(3)(c). (R. 27; 32.)

Logically, Van Linn cannot fault the circuit court for not considering arguments that he did not present, nor should he gain a windfall for an argument to which the prosecutor was never given notice of or the opportunity to respond.

The forfeiture rule also serves comparable interests. The circuit court should not face potential reversal because one of its litigants failed to properly develop his argument, nor should the State be required to aim at a moving target comprised of mutating arguments. To the extent that this Court enforces it, the forfeiture rule prevents these problems, ensuring notice and opportunity for litigants and the circuit court to address the claims without an appeal. *Huebner*, 235 Wis. 2d 486, ¶ 12.

That Van Linn's claim below involved his Fourth Amendment rights should also not lead this Court to overlook the fact he improperly pled his claim before the circuit court and forfeited his present argument before this Court.

The Wisconsin Supreme Court has reinforced that "even the claim of a constitutional right will be deemed waived unless timely raised in the circuit court." *Caban*, 210 Wis. 2d at 604. To illustrate, in *Caban*, the supreme court concluded that defense counsel failed to preserve the issue of whether there was probable cause to search Caban's vehicle despite arguing, in the circuit court, that police did not have a search warrant to search Caban's vehicle for controlled substances and no exigent circumstances justified a warrantless search. *Id*. at 604–08.

Accordingly, because Van Linn failed to properly develop or preserve his claim before the circuit court, like defense counsel in *Caban*, this Court should affirm without reaching the merits of his argument.

II. The exclusionary rule does not require suppression of medical records containing Van Linn's blood alcohol concentration.

Notwithstanding the fact that Van Linn never raised this argument below, he now claims that the circuit court should have suppressed the fruits of the State's subpoena for documents because the subpoena affidavit relied upon

suppressed evidence. (Van Linn's Br. 5.) Van Linn largely dismisses the independent source doctrine's application almost entirely based upon a Supreme Court opinion, authored nearly 100 years ago, (Van Linn's Br. 5–6.), that did not apply the test developed by the Supreme Court in *Murray v. United States*, 487 U.S. 533, 542 (1988), and adopted by the Wisconsin Supreme Court in *State v. Carroll*, 2010 WI 8, ¶ 45, 322 Wis. 2d 299, 778 N.W.2d 1.

In doing so, Van Linn fails to properly assess whether the State obtained his medical treatment records in a fashion sufficiently separated from the police's illegal conduct. (Van Linn's Br. 6–7.) But the independent source doctrine aptly applies here: the fruits of the unlawful blood search did not lead police to look for inculpatory evidence at an innocuous place, and even after excising the suppressed evidence, the subpoena affidavit still established probable cause that the medical blood draw sample would contain evidence of Van Linn's crime.

A. Standard of review

When reviewing a decision on a motion to suppress, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567.

B. The exclusionary rule and independent source doctrine

"[T]he exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure." *Carroll*, 322 Wis. 2d 299, ¶ 19. "This rule applies not only to primary evidence seized *during* an unlawful search, but also to derivative evidence acquired *as a result* of the illegal search, unless the State shows sufficient

attenuation from the original illegality to dissipate that taint." *Id.* (emphasis added).

However, the exclusionary rule is meant to "put[ ] the police in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred." *Murray*, 487 U.S. at 537 (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)). When "challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Carroll*, 322 Wis. 2d 299, ¶ 44 (quoting *Murray*, 487 U.S. at 537).

Thus, the exclusionary rule does not apply if law enforcement obtains evidence from a source independent of any constitutional violation. *Murray*, 487 U.S. at 541–42; *see also State v. Gant*, 2015 WI App 83, ¶ 15, 365 Wis. 2d 510, 872 N.W.2d 137.

To determine whether law enforcement obtained evidence via a source independent of a constitutional violation, courts look to two factors: (1) whether, absent the unlawful seizure, police would still have applied for the search warrant, and (2) whether the unlawful seizure influenced the magistrate's decision to grant the search warrant. *Gant*, 365 Wis. 2d 510, ¶ 16; *see also Murray*, 487 U.S. at 542. Concerning the test's second prong—whether the magistrate's decision was influenced—the central inquiry is whether "the untainted evidence [in the warrant application] is sufficient to support a finding of probable cause to issue the warrant." *Carroll*, 322 Wis. 2d 299, ¶ 44.

C. The independent source doctrine supported the court's order denying Van Linn's suppression motion.

Had Vin Linn argued in the circuit court, as he does now, that his blood results should be suppressed because the subpoena affidavit contained a reference to illegally obtained

evidence, (Van Linn's Br. 5–7), the circuit court would have denied his motion pursuant to the independent source doctrine.

The independent source doctrine should apply equally to subpoenas for documents issued under Wis. Stat. § 968.135 as it does for search warrants issued under Wis. Stat. § 968.12. As Van Linn correctly recognizes, (Van Linn's Br. 4–5), a court's issuance of a search warrant and affidavit for records are both conditioned upon police establishing probable cause, Wis. Stat. §§ 968.12(1), 968.135. Furthermore, the interests served by the exclusionary rule and independent source doctrine for search warrants—dissuading police misconduct while putting police in the same position absent any error or violation—would be equally served as applied to subpoenas for records. Finally, Van Linn advances no argument as to why the independent source doctrine could not apply to subpoenas for records as it applies to search warrants.

1. The independent source doctrine applies.

Applied to the facts of this case, this Court should hold that both required factors under the independent source doctrine test have been met:

First, it is important to recall that the blood sample(s) drawn from Van Linn for medical treatment purposes occurred irrespective of the police-ordered blood draw. *Gant*, 365 Wis. 2d 510, ¶ 16 (the first question is whether police would have still applied for the warrant absent the illegality). It was not the discovery of contraband by illegal police conduct that led to the hospital securing or preserving other inculpatory evidence.

Put differently, this is not a situation condemned by courts in which police were unaware of the existence of inculpatory evidence, engaged in an unlawful search, and

later applied for a search warrant based upon the ill-gotten gains.

Rather, the investigating officers had probable cause to believe Van Linn was intoxicated before he was taken to the hospital, and it was logical to assume that any blood samples drawn from Van Linn that morning—whether conducted for treatment purposes or to secure inculpatory evidence for Van Linn's prosecution—would yield proof of his intoxication. This was evidenced by the fact that, without knowing the results of the medical treatment blood test, police still arrested Van Linn at the hospital and requested that he submit a blood sample. (R. 70:15–16, 18.)

Turning to the test's second prong, had the State not listed Van Linn's police-ordered blood test results in the subpoena affidavit, that affidavit still set forth probable cause that Van Linn operated a motor vehicle while intoxicated and with a prohibited alcohol concentration when he crashed his vehicle. *Carroll*, 322 Wis. 2d 299, ¶ 45. (the second question is whether untainted evidence is sufficient to establish probable cause).

In the subpoena affidavit, the court learned: (1) Van Linn was involved in a crash just before 2:00 a.m., often branded bar time; (2) Van Linn's driving behavior was highly erratic, with police discovering that he struck a tree, reentered the roadway, crossed both lanes of traffic, entered the north ditch, crossed another road, drove into a field area over a hill, and struck a building, (R. 23:2); (3) Van Linn, who was visibly injured in the crash, insisted he was not driving, did not know about the crash, and was simply "out for a walk" at 2:00 a.m., (R. 23:2); (4) Van Linn emitted the odor of intoxicants and admitted to consuming beer, (R. 23:2); (5) Van Linn had four prior impaired driving convictions, (R. 23:2); (6) Van Linn was subject to a reduced prohibited alcohol concentration limit, (R. 23:2); (7) Van Linn later admitted he was driving, evidencing consciousness of guilt by lying to

police officers, (R. 23:3); (8) Van Linn believed he hit another car during the crash, showing his impairment rendered him incapable of knowing what he struck during his several crashes, (R. 23:3); and (9) Van Linn refused to submit to a chemical test of his blood, again displaying consciousness of guilt, (R. 23:3).

The magistrate thus had substantial proof of Van Linn's impairment and excessive blood alcohol concentration; the suppressed evidence was but a tiny fraction of the overall evidence supplied in the subpoena affidavit. Because the issuing magistrate would have properly found probable cause absent the suppressed evidence, the second prong of the independent source doctrine test has also been met. *Carroll*, 322 Wis. 2d 299, ¶ 45.

2. Van Linn's arguments to the contrary fail.

Van Linn heavily relies on *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). (Van Linn's Br. 5–6.) This case stands in stark contrast with the facts presented there.

As Van Linn aptly summarizes, (Van Linn's Br. 5–6), federal agents unlawfully entered the offices of arrested defendants to gather inculpatory records found in that location. *Silverthorne Lumber Co.*, 251 U.S. at 390–91. After the trial court determined the fruits of that initial search were obtained in violation of the defendants' constitutional rights, the government applied for subpoenas "to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Id*. at 391.

In concluding that the illegally seized evidence could not be used in such a manner, the Supreme Court recognized the independent source doctrine but found its application unsuitable given an implicit finding that the government would not have assembled the requisite evidence to obtain the subpoenas without engaging in the prior unlawful search.

Silverthorne Lumber Co., 251 U.S. at 392. In other words, the Supreme Court held that the government could not use subpoenas to obtain information it would have had no knowledge of or reason to seek out but for illegal police conduct.

Here, however, as explained above, the independent source test does not end merely upon a finding that police unlawfully gained evidence prior to an application for a search warrant or subpoena for documents. If the State can show that an unlawful search did not prompt police to look for evidence at specific places, then the causal nexus encompassed within the fruit of the poisonous tree doctrine is broken. *Gant*, 365 Wis. 2d 510, ¶ 16; *see also Murray*, 487 U.S. at 542.

Since police were aware that blood samples drawn from Van Linn would contain evidence of his crime, it was logical to assume that *any* samples it could locate would prove helpful to the prosecution. Because police would have continued to gather other inculpatory evidence found in Van Linn's blood irrespective of the unlawful search, the independent source doctrine applies. *Carroll*, 322 Wis. 2d 299, ¶ 45. Furthermore, Van Linn advances no argument suggesting that absent the inclusion of the suppressed evidence in the subpoena affidavit, the remaining evidence contained therein would have been insufficient to establish probable cause.

In sum, as the State has shown, even if this Court were to overlook Van Linn's forfeiture of the argument now on appeal, the circuit court properly denied his suppression motion. Both requirements of the independent source doctrine were met, and the exclusionary rule thus did not apply. To decide otherwise and reverse the circuit court's decision would contravene the stated purpose of the independent source doctrine by putting police in a worse—not the same—position

had they not conducted an initial unlawful search. *Carroll*, 322 Wis. 2d 299, ¶ 44. Accordingly, this Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 15th day of November 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,039 words.

Dated this 15th day of November 2019.

_____
JOHN W. KELLIS
Assistant Attorney General

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 15th day of November 2019.

_____
JOHN W. KELLIS
Assistant Attorney General