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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019 AP 001966-CR
Green County Circuit Court Case 2019 CM 000006

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

CATHERINE CUSKEY LARGE,

Defendant-Respondent.

ON APPEAL FROM THE ORDER FOR SUPPRESSION OF EVIDENCE AND DISMISSAL ENTERED IN THE CIRCUIT COURT FOR GREEN COUNTY, THE HONORABLE JAMES BEER, PRESIDING.

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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ARGUMENT

I. THE CIRCUIT COURT IMPROPERLY SUPPRESSED ALL EVIDENCE FOLLOWING THE ADMINISTRATION OF THE PBT

A. The Circuit Court did not make a finding or base its ruling upon an analysis that Large was unlawfully seized or that her detention was unlawfully prolonged.

Large complains that the State does not use the word "seizure" or cite *Rodriguez v. United States*. 575 U.S. 1,135 S.Ct. 1609 (2015) (Defense Brief at 23.) Of course, the circuit court also never used the word seizure, cited *Rodriguez*, or stated that its ruling was that there was an "unlawful seizure" or that its ruling was based upon the defense's arguments stemming from that. Instead, the circuit court states:

> "Now the question is but for the PBT, would Lieutenant Sturdevant know that she even had a .02 or greater? He would not have. How would he have known that? Would he have had a guess? . . . . How would he have found out she was above .02 when he already made a determination that she was not operating under the influence. But was that going to be inevitable discovery? I don't know how. I just can't see how you

> make that reach that you are going to inevitably discover it. **It may be that you would discover that she was on a .02 level. How was he going to know that she was above it?"**
>
> (R. 23:4.) (emphasis added.)

The circuit court never makes findings regarding seizure or unlawful extension of the stop; he states that even if Sturdevant inevitably discovers that Large is on a .02 level restriction, he doesn't see how the officer would know Large was actually above a .02. The circuit court found that everything that followed from the PBT should be suppressed and the case should be dismissed because without the PBT result, the officer did *not have a basis for arrest*. (R. 23:4-5.)

The State mistakenly briefly cited to a per curium opinion, but does not believe that alters the analysis relevant here. With the additional information provided by dispatch that Large was subject to a .02 limit, Sturdevant had probably cause that Large was exceeding that threshold, and the principle is well-established that officers may draw reasonable inferences and are not required to negate

all other possible ones. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

B. Large's arguments on seizure, although not what the court ruled upon, still fail as the PBT was not a but-for cause of any of the remaining activity or evidence gathered and all of the evidence aside from the PBT result would have been inevitably discovered.

Contrary to the evidence and testimony, Large contends that all Sturdevant needed to do was "retrieve" the citations from his vehicle and hand them to Large. (Defense Appeal Brief at 25). She contends that there is no evidence that Sturdevant would have still discovered the restriction and arrested Large. (Defense Appeal Brief at 25.)

The actual evidence shows the opposite. Sturdevant testified that he would normally go back to his squad car and issue citations for the criminal and non-criminal offenses he was aware Large had committed up to the point of the PBT. (R.31:11.) She would not have been allowed to drive away. (R.31:12.) He would have returned to his squad car whether or not he had done the PBT, at which point he was informed by dispatch that she was under a .02

restriction. (R.31:10.) The PBT result did not change anything about what he was going to do next. (R.31:12.) The tickets aren't completed or issued until investigation of the stop is done. (R.31:16.) Issuing the tickets would have taken several minutes. (R.31:14.) When Large's attorney asked if it would be two or three minutes, he estimated probably more than that. (R.31:14). There were a lot of tickets. (R.31:14.)

It is clear from the testimony that nothing changed about the remainder of Sturdevant's actions due to the administration of the PBT, and that he would have learned of her .02 restriction well before the information for the other citations would have been put into the computer, let alone been generated and printed and issued to her and she would have found a ride and left the area. Even if the circuit court had ruled based upon the Defense's seizure argument, the fact of Large's .02 restriction and the subsequent arrest and blood test result would have occurred whether or not Sturdevant had administered the PBT.

Unlawful seizure and extension of the stop was not the basis for the court's ruling, but in any event, Large failed to elicit testimony at the hearing demonstrating that any of the remaining activity was impacted by the

administration of the PBT. To the contrary, the officer's actions and the outcome would have remained exactly the same. The seizure and citing process for the numerous criminal and civil offenses for which he had probable cause was continuing and would have continued for a longer period beyond the time frame that the officer received the additional .02 communication from dispatch. (R.31:11,14.) Once Sturdevant knew she was under the .02 restriction, Large would have legitimately been arrested for the additional .02 violation, IF Sturdevant had sufficient probable cause that she was over that .02 threshold. The State alleges he did. The Circuit Court did not believe that was the case.

Evidence should not be excluded from trial based on a constitutional violation unless the illegality is *at least* a but-for cause of obtaining the evidence and not otherwise attenuated. *Hudson v. Michigan*, 547 U.S. 586, 591-2, 126 S.Ct. 2159, 2164, 165 L.Ed.2d 56 (2006).

Defense states that "The proper remedy for an illegal seizure is the suppression of all evidence resulting from the seizure." (Defense Brief Page 4, emphasis added). But the later blood draw *did not result* from any 'illegal seizure' relating to the PBT. Only the results of the PBT

was evidence resulting from the illegal search and/or seizure. There is no basis on this record to conclude that Sturdevant's administration of the PBT affected his discovery of her .02 status, the obtaining of her blood sample, or any of the subsequent evidence beyond the result of the PBT.

The Wisconsin and U.S. Supreme Court have acknowledged that exclusion is inappropriate in cases such as this, when there is not the but-for nexus between the violation and the evidence, or when the evidence would have inevitably been discovered anyway:

> The purpose of the exclusionary rule, the Court said, is to prevent the prosecution from being "put in a better position than it would have been in if no illegality had transpired." However, it does not follow that the exclusionary rule should put the prosecution "in a *worse* position simply because of some earlier police error or misconduct." . . . .
>
> [E]xclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have

obtained the evidence if no misconduct had taken place. . . ."

State v. Jackson, 2016 WI 56 at ¶¶51-53, 369 Wis.2d 673, referencing *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501 (1984).

The circuit court acknowledged that Sturdevant may have inevitably discovered her .02 restriction. What the circuit court found would *not* have been inevitably discovered was that Large was *actually over* that .02 threshold without the PBT. (32:4.)

Large failed to meet her initial but-for causation burden; her arrest, the blood test, and everything that followed did not result from the improper PBT, but in spite of it. Large provides no basis to believe that her .02 restriction would not have been discovered and she would not have been arrested. The PBT that the officer incorrectly completed as a matter of course had no impact on anything else that occurred.

Large simply argues that anything that occurred after the unlawful PBT 'is fruit of the poisonous tree' presumably because it occurred chronologically afterward, requiring suppression of "all ongoing investigation at that

point." (Defense Brief at 25.) This is not the case, as Sturdevant did not engage in additional active investigation causing the change in circumstance, he simply returned to his vehicle in order to start creating and issuing all of the citations to Large and he was passively provided with additional information from dispatch regarding her .02 restriction, which was not 'ongoing investigation' resulting from the PBT.

Large seems to fail to understand that counterfactuals are at the heart of her claim. If the circuit court had ruled on the issue she is now claiming he did, Large was required to prove the counterfactual but-for causation issue. If she had done that, the counterfactual of inevitable discovery would have also defeated her position. However, rather than effectively obtaining the necessary testimony to meet her burden at the hearing, Large now simply argues, contrary to the evidence, that everything else was the "fruit" of the PBT and that the traffic stop would have been over before Sturdevant was told about her .02 restriction. (Defense Brief Pg. 25).

C. The Circuit Court's clear disapproval of Sturdevant's PBT violation does not allow for exclusion of unrelated evidence.

The Wisconsin Supreme Court in *Jackson* explicitly rejected the idea that suppression of evidence that would have been inevitably discovered should be used for punitive purposes. *State v. Jackson,* 2016 WI 56 at ¶ 92, 369 Wis.2d 673 at 721. Sturdevant's request for the PBT, although technically supported by the knowledge that Large was on an IID order, was not supported by the information Sturdevant actually held, since he was unaware of that restriction. Therefore, the State agreed that the result of the PBT should be suppressed.

It is clear that the Court found the administration of the PBT as a matter of course to be very 'troubling,' as did the State, which acknowledged the error. However, whether this is a systemic or widespread mistake made by the officer on multiple occasions is irrelevant to whether the remedy should extend to unrelated actions and does not support gifting a windfall to Large.

In discussing the lack of a basis for dismissal, it is true that the State noted "the remedy is suppression of the evidence subsequent to a violation," but it is eminently clear that the State did not concede that all evidence should be suppressed because it occurred chronologically after a violation. As the State cited in briefing in this

matter, if Large had ever met her initial burden to prove a but-for connection, then an attenuation analysis would have been necessary. (R.22:4.)

State v. Hogan, 2015 WI 76, 364 Wis.2d 167, 868 N.W.2d 124:

> It is important to note that attenuation analysis may not be necessary in all cases. "[A]ttenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.' " If the unlawful police conduct was not a "but-for" cause of the search, attenuation analysis is unnecessary because the consent is not tainted by the unlawful conduct in such a case.

Hogan, 2015 WI at ¶ 66, 364 Wis.2d at 192-93. (internal citations omitted.)

The circuit court simply did not address this in his ruling, and the State's brief discussed the actual ruling of the circuit court, not other issues briefed by the parties that the circuit court did not rely upon in its ruling.

D. Large fails to contest that Sturdevant did have probable cause to arrest her for a PAC violation absent the PBT result, as soon as he learned of her .02 restriction.

If a respondent does not respond to or refute an argument presented in the appellant's brief-in-chief, the argument is "deemed admitted." *State v. Chu*, 2002 WI App 98, ¶41, 253 Wis.2d 666, 643 N.W.2d 878.

It appears Large concedes that Sturdevant would have had probable cause that she was over .02 based on all of his other observations without need for the PBT result. (Defense Brief at 24.) The circuit court's question "[h]ow was he going to know that she was above it?" can be answered by all of the other observations and evidence he had prior to the administration of the PBT, and the only information needed at that point was that she was under this restriction. It appears Large does not contest that, as long as she was still on scene, Sturdevant could have and would have lawfully arrested her and obtained her blood.

Large does not address the actual basis for the circuit court's ruling, and therefore it should be deemed admitted and the ruling should be reversed.

II. IT IS UNCONTESTED THAT THE CIRCUIT COURT ERRED IN DISMISSING THE COMPLAINT

The parties are in agreement that the circuit court erred in dismissing the complaint.

CONCLUSION

Based on the above analysis, this court should reverse the trial court's suppression of evidence other than the result of the PBT and reverse the dismissal of the matters.

Dated this 24th day of February, 2020, at Monroe, WI.

Respectfully submitted:

_____

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _12__ pages.

Signed,

_____
Attorney Laura M. Kohl
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CERTIFICATION OF MAILING

I certify that on this 24th day of February, 2020, pursuant to sec. 809.80(3)(b) and (4), the original and nine copies of the Reply Brief of Plaintiff-Appellant were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Defendant-Respondent via United States first-class mail in properly addressed, postage paid envelopes.

Signed,

_____
Attorney Laura M. Kohl
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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of sec. 809.19(12) of the Wisconsin Statutes. I further certify that this brief conforms to the rules contained in Sections 809.19(12)(f) and 809.19(13)(f) of the Wisconsin Statutes that the content of the electronic copy of the Plaintiff-Appellant's reply brief is identical to the content of the paper copy of the Plaintiff-Appellant's reply brief.

Dated this 24th day of February, 2020.

Signed,

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