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STATE OF WISCONSIN
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Appeal No. 2019AP002099 CR
Fond du Lac County Circuit Court Case No. 2019CT000351

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. PIERQUET,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE DALE L. ENGLISH, JUDGE, PRESIDING

THE REPLY BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT MICHAEL J. PIERQUET

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
11414 W Park Place Suite 202
Milwaukee, WI 53224
(414) 617-0088
(920) 390-2088 (FAX)

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ARGUMENT

The State is mistaken in its argument concerning the meaning of the *prima facie* effect. The State argues the defense got it wrong. Brief of Plaintiff-Respondent, page 7. In a convoluted argument, the State erroneously argues the presumption of accuracy language of WIS JI-CRIMINAL 2669 is actually the *prima facie* effect. In reality, the testing machine is afforded both a presumption of accuracy, and the test result is given *prima facie* effect.[1] The State is wrong.

The *prima facie* effect allows the jury to presume that a blood test result taken within three hours of operation, is the same as at the time of operation. A sample taken at some point after driving, which shows a result in excess of the legal limit is *prima facie* evidence that a person is impaired or above the legal limit at the time of driving. *see* ***State v. Mc Manus,*** 152 Wis.2d 113, 124, 447 N.W.2d 654. *Prima facie* means accepted as correct unless proved otherwise. ***Black's Law Dictionary,*** Fifth Edition. However, to be afforded said effect, the State must establish compliance with the provisions of WIS. STAT. §343.305. If the

[1] Interestingly, in part 1) of the State's brief, they properly set out the *prima facie* effect.

State establishes compliance, the court informs the jury it can rely on said test result in determining both whether the defendant was impaired at the time of driving and had a prohibited alcohol concentration. see WIS JI-CRIMINAL 2669. In fact, assuming compliance with §343.305, a jury can use the subsequently administered blood test result to find from that fact alone that a defendant was impaired and over the legal limit at the time of operation. However, the test result is not always afforded the *prima facie* effect. If it was, the provisions of WIS.STAT. §343.305(5) would be superfluous. see ***County of Ozaukee Co. Bd. Of Adj,*** 152 Wis.2d 552, 449 N.W.2d 47 (Ct.App. 1989) (a cardinal rule of construction is that no part of a statute should be rendered superfluous by interpretation.)

Thus, for a chemical test to be afforded the *prima facie* effect, it must be administered in accordance with the provisions of WIS. STAT. §343.305. A reading of the statute clearly establishes this proposition.

> At the trial in any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant…or having a prohibited alcohol concentration…**the results of a test administered in accordance with this section** are admissible on the issue of whether the person was under the influence of an intoxicant… or any issue relating to the person's alcohol

> concentration. **Test results shall be given the effect required s. 885.235.** (emphasis added).
>
> WIS. STAT. §343.305(5)(d).

The effect to be given, is the effect required pursuant to WIS. STAT. §885.235(1g)(c):

> The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.8 or more.

So, as relevant herein, the court afforded the test result the prima facie effect.[2] .

Performing a test in accordance with the provisions of WIS. STAT. §343.305 requires compliance with the provisions of WIS. STAT. §343.305(6). In fact pursuant to WIS. STAT. §343.305(6):

> (a). Chemical analyses of blood or urine **to be considered valid under this section** shall have been performed substantially according to methods approved by the laboratory of hygiene **and by an individual possessing a valid permit to perform the analyses …**
>
> WIS. STAT. §343.305(6)(a)

The above language sets forth two requirements for a test to be considered "valid". First, the test had to be "performed

[2] The jury was told the test result (.189) at the time of the blood draw alone could be used to find Mr. Pierquet had a prohibited alcohol concentration at the time of driving

substantially according to methods approved by the laboratory of hygiene, and second, and most relevant herein, "by an individual possessing a valid permit to perform the analyses." Failure to comply with the provisions of WIS. STAT. §343.305(6)(a) would render the test invalid. see ***State v. Wiedmeyer,*** 2016 WI App 46, at ¶14, 370 Wis.2d 187, 881 N.W.2d 805.

Here, the State failed to establish the analyst who analyzed Mr. Pierquet's sample possessed a permit and/or that the permit was valid on the day she analyzed Mr. Pierquet's blood. For this reason, the test result could not be considered valid, and should not have been afforded the *prima facie* effect. The State is wrong in their argument.

Without the *prima facie* effect, to gain admissibility, the State would be require establish an appropriate foundation to show the test result, taken at a time after the driving, is somehow relevant to an alcohol concentration at time of driving. see ***State v. Wiedmeyer,*** 2016 WI App 46, 370 Wis.2d 187, 881 N.W.2d 805 (the implied consent law is not the only avenue for admissibility of the test result). The state would have to show that a result of .189 at the time of the blood draw would establish Mr. Pierquet was over the legal limit at the time of the driving. Despite the state failing to show compliance with WIS.STAT.

§343.305, the Court did not require the state to establish this foundation. Furthermore, the state put forth no such testimony. This is where the trial Court erred. The Court erred in both affording the test the *prima facie* effect, and in subsequently admitting the result.

Next, the state argues the Court properly admitted the test result as expert testimony under WIS. STAT. §907.02. At trial, defense argued the expert failed to put forth foundational evidence establishing that the manner in which the expert determined the test result is accurate and is appropriate as required under said statute. (R.50:27-28/ ReplyApp. 1-2). WIS. STAT. §907.02 provides an expert can provide opinion testimony so long as "the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." Neither the state nor the expert put forth any testimony that the "peer review" process is "the product of reliable principles and methods" in terms of verifying alcohol concentrations. At a very minimum, under WIS. STAT. §907.02, the state must establish "peer review" is a valid reliable method for determining the accuracy of the test results. Because this

foundational testimony was lacking, the Court erred in admitting the test result under the purview of WIS. STAT.§ 907.02.

Finally, the error was not harmless. The party asserting harmless error has the burden of establishing no prejudice. ***State v. Harvey,*** 2002 WI 93, ¶40, 254 Wis.2d 442, 647 N.W.2d 189, citing to ***State v. Dyess,*** 124 Wis.2d 525, 370 N.W.2d 222 (1985). The State concedes that if the Court erred in admitting the result, the error cannot be harmless. Brief of Plaintiff-Respondent page 8. However, the State concludes failing to strip the test result of its *prima facie* effect is harmless. Yet because the State mistakenly confused the presumption of accuracy with the *prima facie* effect, the state argues "the jury instruction in question was merely advising the jury that the principles and methods of blood testing are scientifically sound." The state's harmless error argument misses the mark. The State has failed to meet its burden herein.

In fact, the jury was told it could find from the result of the test alone that Mr. Pierquet had a prohibited alcohol concentration at the moment of operation. The jury would not have been armed with this weapon had the Court properly stripped the test of the *prima facie* effect. Clearly, the error affected Mr. Pierquet's substantial rights.

CONCLUSION

Because the trial court erred in admitting the test result an affording said result a *prima facie* effect, and because the error was not harmless, the court should reverse the judgment of conviction.

Dated this 16th day of July, 2020.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
Piel Law Office
11414 W Park Place Suite 202
Milwaukee, WI 53224
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 14 pages. The word count is 2413.

Dated this 16th day of July, 2020.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
Piel Law Office
11414 W Park Place Suite 202
Milwaukee, WI 53224
(414) 617-0088
(920) 390-2088 (FAX)

CERTIFICATION OF COMPLIANCE WITH RULE 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 s. 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 16th day of July, 2020.

Respectfully submitted,

Piel Law Office

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of July, 2020.

Respectfully submitted,

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX