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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

CASE NO. 2019AP002185 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN L. STERNITZKY,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

APPEAL FROM THE ORDER DENYING MOTION TO SUPPRESS BASED ON UNLAWFUL ARREST ON NOVEMBER 15, 2019 AND THE JUDGMENT OF CONVICTION FILED ON JUNE 27, 2019, THE HON. THOMAS T. FLUGAUR, PRESIDING, IN THE PORTAGE COUNTY CIRCUIT COURT IN CASE 2017CT000344

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STATEMENT OF THE ISSUES

1. Whether the police had probable cause to arrest the defendant Steven L. Sternitzky for operating his motor vehicle under the influence of an intoxicant?

   The circuit court answered yes.

2. Whether the presumption of intoxication language should be included in Jury Instruction 2669 when there is no testimony from the arresting officer that Sternitzky was read the informing the accused during the OWI arrest?

   The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Sternitzky does not believe that oral argument will assist the Court in considering the issues presented in this appeal; the facts are not complex and can be sufficiently argued in brief format.

Sternitzky does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well settled rules of law and controlling precedent, with no call to question or qualify said precedent. Additionally, Sternitzky herein appeals from a misdemeanor conviction. He has not moved for a three-judge panel, and the case will most likely be decided by one judge. Thus, this case is likely not appropriate for publication and no such request is being made.

STATEMENT OF THE CASE

This case is about whether the defendant Steven L. Sternitzky's rights under the Wisconsin and US constitutions which require police to have probable cause to arrest a person without a warrant were

violated when Sternitzky was arrested for OWI Third Offense without a warrant. Additionally, this case is about whether the State is afforded the presumption of intoxication and automatic admissibility language in Jury Instruction 2669 despite the fact that there was no evidence at trial regarding the officer reading the defendant the informing the accused. The circuit court denied Sternitzky's motion to suppress evidence based upon unlawful arrest. (R.74:1; APP084). The circuit court overruled Sternitzky's objection to the addition of the presumption of intoxication language in Jury Instruction 2669 despite the fact that there was not evidence at trial that the officer read the defendant the informing the accused. (R.76:201; APP148). Sternitzky contends herein that the circuit court's findings were erroneous. The following facts are relevant to the Court's understanding of the issue presented herein.

On November 19, 2017, Sternitzky was arrested for OWI Third Offense by Deputy Robert Hamilton of the Portage County Sheriff's Office. (R.5:1; APP003). Deputy Hamilton conducted the stop of Sternitzky's vehicle because he had reason to believe Sternitzky's drivers license was suspended. (R.78:9; APP094). Deputy Hamilton observed no factors that can be considered facts of impairment with Sternitzky's actual driving of his vehicle. (R.78:10; APP095A). Deputy Hamilton observed an unspecified odor of alcohol and observed Sternitzky drop his cigarette and admit to consuming alcohol and thus requested Sternitzky perform field sobriety tests which Sternitzky agreed to perform. (R.78:7; APP092). Deputy Hamilton observed six clues of impairment on the HGN but only observed one clue of impairment on the walk and turn test and only one clue of impairment on the one leg stand test. (R.78:13-16; APP097-APP100). Deputy Hamilton then administered a preliminary breath screening test without properly requesting the defendant to submit to a PBT. (R.78:12; APP096).

Sternitzky was subsequently charged with Operating a Motor Vehicle While Intoxicated (3rd Offense) in the Portage County Circuit Court. (R.8:1; APP003). He filed a motion to suppress blood test evidence based upon unlawful arrest. (R.29:1; APP007). The motion was heard by the Portage County Circuit Court, Branch 3, Judge Thomas Flugaur presiding, on October 18, 2018. (R.78:1; APP086). The circuit court denied Sternitzky's motion to suppress evidence based upon unlawful arrest. (R.74:1; APP086). The court based its decision on the rationale that there was enough facts in the totality of the circumstances to justify the arrest. (R.78:48; APP132).

Sternitzky had a jury trial on June 26, 2019 in which a jury found him guilty of Operating with a Prohibited Alcohol Concentration, Third Offense. (R.61; APP001). At this trial, the court allowed the presumption of intoxication language in the jury instructions from Jury Instruction 2669 despite the fact that there was no testimony in the record that police had read Sternitzky the informing the accused. (R.76:201; APP148). The court sentenced Sternitzky to 50 days of jail, $1,833.45 fine plus costs, AODA Assessment, 27 month license revocation and 27 months of Ignition Interlock Device. (R. 61:1; APP001). Sternitzky appeals from the court's adverse ruling on his motion to suppress evidence based upon unlawful arrest and the court's decision overruling his objection to the presumption of intoxication language being included in the jury instructions. Sternitzky argues herein that the blood test results should be suppressed because his arrest for OWI Third Offense was not based upon probable cause and that the court should have sustained his objection to the presumption of intoxication language being included in the jury instructions because the State did not meet its burden of proof that Sternitzky was read the informing the accused.

ARGUMENT

I. THE WARRANTLESS ARREST OF STERNITZKY WAS NOT BASED UPON PROBABLE CAUSE AND THUS THE EVIDENCE IT PRODUCED SHOULD HAVE BEEN SUPPRSSED

A. Standard of Review

An arrest by police without a warrant requires probable cause to be considered lawful. *State v. Lange*, 317 Wis.2d 383, 766 N.W.2d 551 (2009). Probable cause to arrest a person for operating a motor vehicle while intoxicated refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* The burden is upon the State to prove that there was probable cause. *Id.* On review this, court will uphold the trial court's findings of fact unless they are clearly erroneous. *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541, 316 (1999). Whether those facts satisfy the standard of probable cause if a question of law that this court reviews de novo. *Id.*

B. The Facts Within Deputy Hamilton's Knowledge at the Time of Sternitzky's Arrest Do Not Amount to Probable Cause to Arrest Sternitzky for OWI

Whether probable cause to arrest exists in a particular case must be judged by the facts of that case. *State v. Secrist*, 224 Wis.2d 201, 212, 589 N.W.2d 387, 212 (2001). There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof of beyond a reasonable doubt or even that guilt is more likely than not. *Id.*

In the instant case, the circuit court should not have concluded that there are enough facts in the totality of circumstances to hold that there was probable cause to arrest Stenitzky for OWI Third Offense on November 19, 2017. Deputy Hamilton did not observe any clues of impairment with the defendant's vehicle in motion, as Deputy Hamilton testified that he did not observe any clues of impairment from the defendant's driving history. (R.78:10; APP095A). The Deputy based the stop of the defendant's vehicle solely on the fact that the defendant's drivers license was suspended for failure to pay a fine. (*Id.)*. Deputy Hamilton made contact with Sternitzky and upon contact observed Sternitzky exhibit an unspecified odor of alcohol and also drop the cigarette he was smoking. (R.78:7; APP092). Sternitzky was asked multiple times by Deputy Hamilton throughout the arrest process how much alcohol Sternitzky had consumed prior to driving his vehicle and Sternitzkly ultimately admitted to consuming a total of six glasses of wine while at his parent's house and his friend's house throughout the evening prior to driving his vehicle. (R.78:43; APP127). Sternitzky agreed to perform field sobriety tests and Deputy Hamilton observed six out of six clues on the Horizontal Gaze Nystagmus test, but admitted that he is unaware if excessive use of nicotine can be a cause of nystagmus. (R.78:13-16; APP097-APP100). Deputy Hamilton only observed one clue of impairment on the walk and turn test which requires two out of eight clues for the officer to consider the test results to be helpful in determining intoxication. (*Id.)* Deputy Hamilton only observed one clue of impairment on the one leg stand test, which requires two out of four clues for the officer to consider the test results to be helpful in determining intoxication. (*Id.*). These facts in the totality of circumstances do not equate to probable cause to arrest for OWI. Additionally, there was a PBT result which Deputy Hamilton used as probable cause to arrest the defendant, but this court should consider the PBT result as not weighing against the defendant as probable cause because at the hearing Sternitzky demonstrated that the PBT device was not timely

calibrated. (R.78:49; APP133). Additionally, this court should not consider the PBT result as probable cause evidence based on the following two arguments.

C. The PBT Result Should Not be Considered as Evidence of Probable Cause to Arrest Sternitzky for OWI Because Deputy Hamilton never made a 'request' to Sternitzky for a PBT Sample

After the three standardized field sobriety tests were administered, Deputy Hamilton administered a preliminary breath screening test to Sternitzky and the result was 0.134. (R.78:16; APP100). This result should not be considered by this court as a factor of probable cause to arrest the defendant because the officer did not follow the protocol of Wis. Stat. §343.303 which is the statute authorizing admissibility of PBT results at OWI arrest motion hearings which relevant portions states

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1)…the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1)…and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under x. 343.305(3)...

Wis. Stat. §343.303. The plain language of this statute demands that the officer make a request to the person suspected of OWI for a breath sample from a PBT prior to an arrest. The use of the word 'request' in this statute should be interpreted by this court as requiring that the officer ask the person for consent to submit a breath sample into the PBT. If an officer

does not request the person's consent to submit a PBT sample, the sample should not count as evidence of probable cause to arrest under Wis. Stat. §343.303. There does not need to be a specific script that the officer needs to read to gain a person's consent to submit a PBT sample from a person suspected of OWI. This court should find though there does need to be a finding by the court that the officer made a request for the defendant to voluntarily submit to the PBT.

In the instant case, Deputy Hamilton testified at the motion hearing that he did not ask for Sternitzky's consent to submit a PBT sample in a straightforward manner, by simply asking will you or will you not, but rather Deputy Hamilton testified that he showed Sternitzky the PBT device, showed him that it was registering no alcohol, and then told Sternitzky that he needs Sternitzky to blow long and steady and through the tube, the Deputy then says the word okay and then proceeds to administer the PBT to Sternitzky. (R.7812; APP096). The exact words and actions the Deputy used are contained on the squad video which was admitted into evidence as exhibit 1 and viewed by the court and considered by the circuit court when deciding this motion. (R.9; APP043). The circuit court found at the motion hearing that the Deputy's words and actions constituted a 'request' for the defendant to submit a breath sample into the PBT as opposed to a 'directive' and thus the court used the 0.134 PBT result as evidence of probable cause to arrest the defendant. (R.78:38; APP132). The defense urges this court to find that Deputy Hamilton's words and actions constitute a directive to submit to the PBT and not a 'request' and should not consider the results of the PBT as probable cause to arrest the defendant for OWI. The Deputy admitted on the stand he did not ask the defendant for consent to submit a PBT sample in straightforward manner, and the reason he admitted this is because he did not ask for consent at all. Deputy Hamilton instructed Sternitzky how to submit a sample and then asked if Sternitzky understood his instructions by saying the word okay in the form of a question after Deputy Hamilton instructed Sternizky

how to submit a sample. The interpretation by the circuit court that the word okay in the form of a question by Deputy Hamilton turned the Deputy's words and actions into a 'request' should be held by this court to be clearly erroneous because this interpretation doesn't make sense. Deputy Hamilton used the word okay in the form of a question to ask the defendant if he understood the instructions on how to go about actually submitting his breath sample into the PBT, there was no dialogue about the defendant having a choice to submit to the PBT prior to the word okay being used by Deputy Hamilton in the form of a question.

Without a PBT result being considered by this court as evidence of probable cause to arrest the defendant for OWI, this court should find the arrest in this matter was unlawful for lack of probable cause.

D. There was not probable cause to believe Sternitzky was impaired and thus the PBT result should not be considered

In *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999) the Supreme Court of Wisconsin concluded that in order for a law enforcement officer to lawfully request a PBT prior to an OWI arrest, the officer needs to have probable cause to believe the person is impaired under Wis. Stat. §343.303 which refers to a quantum of proof that is greater than reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest. *Id.* at 317. The *Renz* court found based upon the facts of that case that the officer did have the required degree of probable cause to request the defendant to submit to a PBT. *Id.* The *Renz* court made this finding based on facts that showed the defendant in *Renz* appeared unsteady on the walk and turn test and also did not perform well on the one leg stand test and finger to nose test that he was administered. *Id.* at 316.

Distinguishable from the facts of *Renz*, in the instant case the factors of impairment that Deputy Hamilton had knowledge of were not enough to find there was probable cause to believe the defendant was impaired, as the defendant exhibited no clues of impairment with his actual driving and only one clue of impairment on both the walk and turn and one leg stand tests. (R.78:13-16; APP097-APP100). Thus this court should find the PBT should not have been requested by Deputy Hamilton and that there was not probable cause to arrest the defendant for OWI.

E. This Court Should Suppress the Evidence

This court should order that the evidence in this matter that was generated from the unlawful arrest should be suppressed, which includes but is not limited to the blood test results.

> The exclusionary rule provides for the suppression of evidence that "is in some sense the product of the illegal government activity." *State v. Knapp*, 2005 WI 127, ¶ 22, 285 Wis.2d 86, 700 N.W.2d 899 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct 2501, 81 L.Ed.2d 377 (1984)). "The primary purpose of the exclusionary rule 'is to deter future unlawful police conduct.;" *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)). It is a judicially created rule that is not absolute, but rather requires the balancing of the rule's remedial objectives with the 'substantial social costs exacted by the exclusionary rule." *Id.* ¶¶ 22-23 (quoting *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed2d 364 (1987)). This rule extends to both tangible and intangible evidence that is the fruit of the poisonous tree, or, in other words, evidence obtain "by exploitation of" the illegal government activity. *Id.*, ¶ 24 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

State v. Felix, 339 Wis.2d 670, 811 N.W.2d 775, 690 (2012). Accordingly, because the arrest in this matter was unlawful, the blood test which resulted directly from the unlawful arrest should be suppressed.

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE

STATUTORY PRESUMPTION OF INTOXICATION AND AUTOMATIC ADMISSIBILITY OF CHEMICAL TEST RESULT LANGUAGE IN JURY INSTRUCTION 2669

A. The State Had a Duty to Present Evidence that Sternitzky was Read the Informing the Accused to be Entitled to the Statutory Presumption of Admissibility and Intoxication Language in Jury Instruction 2669

At the close of evidence in this matter the parties were discussing the substantive jury instructions which were to be submitted to the jury to assist in deliberation and Defense Counsel objected to the inclusion of the presumption of intoxication and automatic admissibility language being included in jury instruction 2669 on the basis that the State had not provided any evidence that Sternitzky was read the informing the accused. (R.76:194; APP141). The language that was objected to is the section 'How to Use the Test Result Evidence' in Jury Instruction 2669

> The law states that the alcohol concentration in a defendant's blood sample taken within three hours of driving a motor vehicle is evidence of the defendant's alcohol concentration at the time of driving.
> If you are satisfied beyond a reasonable doubt that there was 0.08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving, or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving, or both, unless you are satisfied of that fact beyond a reasonable doubt.

Jury Instruction 2669. (*Id.*). The court made a finding that the State had in fact not presented evidence that Sternitzky was read the informing the accused. (R.76:196; APP143). The circuit court decided to overrule Defense Counsel's objection and included the language. (R.76:201; APP148).

This objection should have been granted as the law in Wisconsin does not allow the State to be entitled to the statutory presumption of intoxication and automatic admissibility language without the State providing evidence by a preponderance of evidence that the informing the accused form was read to the defendant. If a law enforcement officer does convey the implied consent warnings contained in the informing the accused, the resulting evidence is not subject to suppression but the State does lose the benefits of automatic admissibility and presumption of intoxication in Wis. Stat. §§343.305(5)(d) and 885.235. *State v. Piddington*, 2001 WI 24, ¶ 67, 241 Wis.2d 754, 623 N.W.2d 528. Additionally, the State has the burden to show by a preponderance of the evidence that the warning in the implied consent law contained in the informing the accused form were reasonably conveyed to the defendant. *Id.* at ¶ 22. Therefore, the decision to include this language of the presumption of intoxication and automatic admissibility of the chemical test result was erroneous.

This aforementioned presumption of intoxication and automatic admissibility language in Jury Instruction 2669 included by the circuit court was prejudicial to the defendant and was not harmless error. The language informed the jury that the jury has the right to disregard any argument against the credibility of the blood test result raised by Defense Counsel and simply find from the fact that a blood test result was admitted into evidence against the defendant that is above the 0.08 grams or more of alcohol in 100 milliliters of blood threshold that the jury can simply find the defendant guilty of operating with a prohibited alcohol content. In this case the lab report was admitted into evidence against the defendant which showed a blood

test result of 0.140 grams of alcohol in 100 milliliters of blood. (R.53, APP073). The jury found the defendant guilty of operating with a prohibited alcohol content despite Defense Counsel's arguments against the credibility of the blood test result and despite the fact that the jury found the defendant not guilty of operating a motor vehicle while under the influence of an intoxicant. Therefore, it is undeniable that the challenged jury instruction language which was erroneously admitted to the jury had a prejudicial effect on the jury's decision-making ability and was not harmless error and therefore this court should order the judgment in this matter vacated and remand the proceedings.

CONCLUSION

For the aforementioned reasons, Sternitzky asks this court to hold that the circuit court should have suppressed the evidence resulting from unlawful arrest and the circuit court erred in allowing the presumption of intoxication and automatic admissibility language in jury instruction 2669. He further requests that the court remand his case for proceedings consistent with this holding.

Dated at Milwaukee, Wisconsin on July 16, 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **2,932** words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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.

Respectfully submitted this 16th day of July, 2020.

John Bayer
State Bar No. 1073928

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 § 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 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.

Respectfully submitted this 16th day of July, 2020

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.40(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on July 16, 2020. I further certify that the brief will be correctly addressed and postage prepaid. Three copies will be served by the same method on ADA Robert Jambois, Portage County District Attorney's Office, 1516 Church Street, Stevens Point, WI 54481.

Dated this 16th day of July, 2020.

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STATE OF WISCONSIN
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CASE NO. 2019AP002185 - CR

STATE OF WISCONSIN,

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DEFENDANT-APPELLANT'S SHORT APPENDIX

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