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STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT IV

CASE NO. 2019AP002185 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN L. STERNITZKY,

Defendant-Appellant.

APPEAL FROM THE ORDER DENYING MOTION TO SUPPRESS AND THE JUDGMENT OF CONVICTION, THE HON. THOMAS T. FLUGAUR, PRESIDING, IN THE PORTAGE COUNTY CIRCUIT COURT IN CASE 2017CT000344

PLAINTIFF-RESPONDENT'S RESPONSE BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

The State reframes the issues as follows:

1. In the course of this lawful traffic stop, did Deputy Hamilton develop sufficient probable cause, as required by sec. 343.303 Wis. Stats, to request that Sternitzky provide a breath sample for a preliminary breath test?

The circuit court answered yes.

2. Did Deputy Hamilton properly "request" that Sternitzky provide the breath sample for the preliminary breath test?

The circuit court answered yes.

3. Even if Deputy Hamilton lacked sufficient probable cause to request the breath sample for the PBT or the request was somehow statutorily deficient, would exclusion of the PBT result from the probable-cause-to-arrest analysis be an available remedy?

The circuit court did not address this question.

4. Did Deputy Hamilton have sufficient probable cause to arrest Sternitzky for OVWI 3rd offense and OVWPAC 3rd offense?

The circuit court answered yes.

5. After the test of Sternitzky's blood was received into evidence at trial without objection from Sternitzky, was the use of Wisconsin Criminal Jury Instruction, including the language entitled, "How to Use the Test Result Evidence," a correct application of the law to the facts of this case?

The circuit court answered yes.

STATEMENT OF THE CASE

Sternitzky appeals the denial of his pretrial motion in which he'd sought to suppress the evidence due to insufficient probable cause for his arrest. Sternitzky also appeals his conviction for Operating a Motor Vehicle with a Prohibited Alcohol Concentration (OVWPAC) 3rd Offense after a jury trial. Notably, Sternitzky did not appeal the Circuit Court's pretrial ruling that "the language in the Informing the

Accused is still accurate. It's not coercive and it did not violate this individual's Fourth Amendment right and I'm going to deny the motion to suppress the blood test".

(R.79:15 Supp. App. 135 LL12-17). Furthermore, Sternitzky did not object to the admission of the blood test into evidence at trial. The State has reframed the statement of the issues and the statement of facts in order to more completely address the legal principles that apply to the facts of the case.

This case is about whether, in the course of a lawful traffic stop, the arresting officer developed sufficient probable cause to request that Sternitzky provide a breath sample for a preliminary breath test and to ultimately arrest Sternitzky for OVWI? Second, did Sternitzky waive any objection to the use of the Informing the Accused when he failed to object to the admission of the blood test result into evidence at his trial and then failed to appeal the circuit court's pretrial ruling that the Informing the Accused had been properly administered? Third, once the trial court had ruled pretrial that the Informing the Accused had been properly administered and then the blood test result was received into evidence at trial without objection, is the State nonetheless still obligated to present to the jury evidence that the Informing the Accused had been read to Sternitzky in order to get the presumption of accuracy language allowed in JI 2669?

STATEMENT OF FACTS

On 11/19/2017 at approximately 1:00AM, Deputy Robert Hamilton of the Portage County Sheriff's Department was on routine patrol when he observed a

pickup truck proceeding toward him on County Trunk HH. Deputy Hamilton ran the plate and learned that the registered owner, Steven Sternitzky, had a suspended driver's license.(R78:5 App. 090)

Deputy Hamilton turned his squad around, caught up with and stopped the pickup truck because the registered owner had a suspended driver's license. (R78:6-7 App. 091 L19- 092 L7). The driver, Steven Sternitzky, admitted that his license was suspended. (R78:6 App. 091 L22-23).

Although Sternitzky was smoking a cigarette, Deputy Hamilton could still discern an odor of intoxicants and observed Sternitzky "clumsily dropped" his cigarette (R78:6-7 App. 091 L24-092 L4). Deputy Hamilton then asked Sternitzky how much he'd had to drink and Sternitzky admitted to consuming "two wines." (R78: 8 App. 092 L 6-7). Deputy Hamilton testified that a "very, very large percentage" of the motorists he had previously arrested for OVWI had initially claimed to have only consumed a "couple of drinks." (R78:8 App. 092 L8-14).

Deputy Hamilton then returned to his squad, confirmed that Sternitzky's operating privileges were suspended, and also learned that Sternitzky had two prior convictions for Operating a Motor Vehicle While Under the Influence of an Intoxicant (OWI) (R78:9 App. 093 LL17-20). Deputy Hamilton then asked Sternitzky to step back toward his squad car in order to perform some field sobriety tests. Sternitzky agreed to do this and, while standing in front of the squad, Sternitzky conceded he'd actually consumed "three wines" and then finally acknowledged consuming "six wines." (R78:9 App. 093 L 7-13).

Deputy Hamilton then conducted the field sobriety tests. Sternitzky revealed six out of six clues of intoxication on the Horizontal Gaze Nystagmus (HGN) test. Four or more clues indicate a "significant probability of intoxication." (R78:16 App100 LL7-10). Sternitzky only exhibited one clue in the "walk and turn" test and one clue in the "one-leg stand" test. However, Deputy Hamilton testified that he'd seen a number of "very heavily impaired" persons do well on the walk and turn and the one leg stand tests but do poorly on the HGN. (R78:15 App. 099 L8-11).

After completing these field sobriety tests Deputy Hamilton testified "I showed him the PBT. I showed him it registering no alcohol. I said what I would need him to do is blow long and steady through the tube. And I said, 'okay?' and he agreed and said, 'okay.'" (R78:12 App. 096 LL18-23). The PBT reflected Sternitzky scored a .134. (R78:16 App. 100 LL19-20)

Prior to trial, the defendant filed a Motion to Suppress all of the evidence "derived from unlawful arrest." (R78 App. 007.).

In his Motion and brief Sternitzky argued:

1. "At the time of the arrest, there was no probable cause to believe the defendant had committed an offense and there was no warrant." (R78:1 App. 007).

2. That the PBT test result must be excluded from the probable cause analysis because "the deputy never asked the defendant for consent and never made a request for the defendant to voluntarily submit a sample." (R78:2-3 App. 009 – 010).

In his motion, Sternitzky also references the level of probable cause that is required before a PBT may be requested (R78:5 App. 012), and at the hearing he argued there was insufficient probable cause to support a request for a PBT in this case. (R78:107-108 App. 114 L24-115 L2).

After an evidentiary hearing, listening to arguments of counsel and reviewing the video/audio recording of the squad camera of the officer's body microphone, the Circuit Court denied the defendant's motions.

Sternitzky then filed another motion, this time seeking to exclude the blood test on the grounds that the Informing the Accused form Deputy Hamilton read to Sternitzky prior to the blood draw "contained language which violated the defendant's constitutional right to refuse a blood draw." (R 39:1 Defendant-Appellant's Supplementary Appendix 101)).

On 3/12/19, the State filed a response brief (State's Response to Defendant's Motion to Suppress Evidence Derived From [Alleged] Violation of Right to Refuse Blood Draw) (R41:1 Supp. App. 110). The motion was argued at the Status Conference on 4/18/19.

After reviewing the parties' briefs and considering arguments from counsel, the Court found that the Informing the Accused form that was read to Sternitzky properly informed him and denied Sternitzky's Motion to Suppress the Blood Test. (R79:9 Supp. App. 135 LL9-17).

This matter was tried by a jury on 6/26/19. Deputy Hamilton testified to the circumstances preceding Sternitzky's arrest and then testified that he transported

Sternitzky to a local hospital where a sample of Sternitzky's blood was drawn approximately 50 minutes after Sternitzky had been stopped. (R76:142 Plaintiff-Respondent's Appendix 006 LL 2-4). The blood was drawn by medical laboratory scientist. (R76:123 Resp. App. 005) The blood was tested by Diane Kalscheur, a forensic chemist with the Wisconsin State Laboratory of Hygiene. (R76:98 Resp. App. 001 L20 – 002 L1).

Sternitzky's blood test result was .140 grams of alcohol per 100 milliliters of blood. (R76:104 Resp. App. 004 LL 5-6). This blood test result was received into evidence without objection from Sternitzky. (R76:143 Resp. App 007 LL 5-9).

Neither the State nor Sternitzky offered any evidence at trial pertaining to Sternitzky's position on a blood alcohol curve. On cross examination, Deputy Hamilton did disclose that he had read the "Informing the Accused" to Sternitzky. (R76:173 Resp. App. 008 L7).

After the close of evidence, but before closing arguments, the trial judge convened a jury instruction conference with the parties. (R76:191 Resp. App. 009 L25-010 L5). In the course of this conference Sternitzky objected to (what he termed) "the automatic admissibility language" because, "the State did not properly put in the defendant was read the 'Informing the Accused.'" (R76:194 Resp. App. 011 LL 15-23).

Sternitzky argued that if "the Informing the Accused is not read, 343.05, automatic admissibility cannot be used." (R76:195 Resp. App. 012 LL 5-7). The State replied that the Informing the Accused had nothing to do with the use of the

disputed language and asserted, "That language is to be used unless there is some challenge to the blood test based on the blood alcohol curve or some other attack." (R76:195 Resp. App. 012 LL 18-21).

In the course of further argument, the State argued:

> There is nothing that the jury does with the Informing the Accused. The jury is not concerned with the Informing the Accused. That's something that is brought up in pretrial motions. It was in this court and this court has already ruled that the blood test result is admissible. In other words, you denied the defendant's motion to suppress the blood test result based on the Informing the Accused. (R76:200 Resp. App. 013 LL 11-20).

Sternitzky then cited State v. Zielke, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), in support of his argument. The Court took a brief recess to read that case.

The Circuit Court reconvened on the record and overruled Sternitzky's objection finding that, as the State had argued, this was a pretrial issue. (R76:201 Resp. App. 014 LL 4-20).

The Court then read to the jury the instructions which included the substantive instruction, Wis. Crim. J.I. 2669. The court included the passage to which Sternitzky objected. The Substantive Jury Instructions were also sent into the jury room with the jury for them to use during their deliberation. The language at issue provided:

> How to Use the Test Result Evidence
>
> 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 .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 are here to decide these questions on the basis of all the evidence in this case, and you should not find 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. (R53:59 App. 053)

The jury acquitted Sternitzky of Operating a Motor Vehicle While Under the Influence of an Intoxicant as charged in Count One and returned a verdict of Guilty on the charge of Operating a Motor Vehicle with a Prohibited Alcohol Concentration as alleged in Count Two. The Circuit Court polled the jury and then entered judgment in accordance with the verdict. (R76:256 Resp. App. 015) The Court sentenced Sternitzky to 50 days in jail, imposed a fine and costs of $1,807 + $26.45 for the blood draw and revoked his driving privilege for 27 months. The Court then stayed the sentence pending this appeal.(R76:269 Resp. App. 017)

STANDARDS OF REVIEW

When this court reviews a circuit court's denial of a motion to suppress, "we accept the circuit courts findings of historical fact unless they are clearly erroneous." State v. Schloegel, 2009 WI App 85, 319 Wis. 2d 741, 747, 769 N.W.2d 130. However, the "determination of whether the facts in this case meet the appropriate legal standard presents a question of law which we may decide independently of the circuit court." State v. Armstrong, 223 Wis. 2d 331, 353, 585 N.W.2d 606 (1999).

This court reviews questions of waiver de novo… whether jury instruction from the circuit court deprives a defendant of his right to due process is a question of law which we review de novo. State v. Trammel, 2019 WI 59, 387 Wis.2d 156, 169, 928 N.W.2d 564.

The proper standard for Wisconsin Courts to apply when a defendant contends that the interplay of challenged instructions impermissibly misled the jury is whether there is a reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution. State v. Lohmeier, 205 Wis.2d 183, 186, 556 N.W.2d 90, 93.

ARGUMENT

I. In the course of this lawful traffic stop, Deputy Hamilton developed sufficient probable cause to request that Sternitzky provide a breath sample for the preliminary breath test (PBT).

The Circuit Court found that Deputy Hamilton had sufficient "reasonable suspicion" to extend the traffic stop and to request that Sternitzky perform field sobriety tests including the PBT. (R78:45 App. 129 LL2-10).

After hearing the testimony of Deputy Hamilton, reviewing the dash camera video/audio recording of the traffic stop and hearing the arguments of counsel, the Circuit Court judge observed:

> …. What we have here is a number of facts and each fact, as you go along the way, is important because what you have in these OWI arrests is what I would consider a building block for officers to go further and under this concept of extended detention" (R78:37 App. 121 LL3-9).

This is a correct application of the relevant legal principles to this case. State v. Betow, 226 Wis. 2d 90, 94-95, 592 N.W.2d 499 (Ct. App. 1999).

The Circuit Court then made the following "findings of historical fact":

A. "Sternitzky was driving down the highway" (R78:37 App. 121 L14)

B. "There was no bad driving" (R78:37 App. 121 LL14-16)

C. "The officer did run the license plate and was informed the registered owner of that vehicle had a suspended driver's license" (R78:37 App. 121 LL19-22)

D. Sternitzky "was driving the vehicle" (R78:38 App. 122 L8)

E. "It's after 1:00 am" (R78:38 App. 122 L25)

F. "The time of day is important" (R78:39 App. 123 L3)

G. "There was the smell of alcohol, despite the smell of smoke" (R78:39 App.123 LL9-10)

H. Sternitzky "clumsily dropped his cigarette, and then picked it up" (R78:39 App.123 LL13-14)

I. Sternitzky at first "admitted to have two wines" (R78:39 App.123 LL15-16)

J. Deputy Hamilton then "confirms…. That the license is suspended and he also learns of the two prior OWI's." (R78:39-40 App. 123 L24 – 124L1)

K. Deputy Hamilton then asked Sternitzky "why don't you step out by – my car, and we are going to do some field sobriety tests?"

L. Sternitzky replied, "okay." (R78:40 App. 124 L13)

At this point, the Circuit Court judge noted "the law is clear that the officer has to have reasonable suspicion that the driver is impaired before he can conduct field sobriety tests." (R78:42 App. 126 LL20-23) This observation aptly describes the holding in Betow, 226 Wis. 2d at 94-95:

> If during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officers intervention in the first place, the stop may be extended and a new investigation began.

The circuit court then noted that after the field sobriety test had been requested, but before they had begun there was:

M. The changing of the stories from two wines to three wines (R78:43 App. 127 LL16-17)

N. That ultimately became "six" (R78:34 App.118 L 14)

The Circuit Court then concluded "you put all that together and it was not…. It's not an unreasonable suspicion at this point to move to the next layer, (R78:45 App. 129 LL2-5):

O. The circuit court found that Sternitzky had done reasonably well on the "walk and turn" and "one-legged stand" and then observed

P. "but the HGN, the officer testified to , that there were six out of six clues and that's evident to him of a significant impairment" (R78:45 App. 129 LL20-23)

The Court had explicitly cited (R78:43 App. 127 LL5-100) to the case of County of Jefferson v. Renz, 231 Wis. 2d 293, 314, 603 N.W.2d 541 (1999). *Renz* construed the "probable cause to believe" requirement in sec. 343.303 to mean "a level of proof greater than the reasonable suspicion necessary to justify an investigative stop but less than that required to establish probable cause for arrest."

Applying these legal principles to the facts in this case, the Circuit Court concluded that Deputy Hamilton had a level of proof sufficient to request that Sternitzky provide a breath sample for the PBT. The Circuit Court applied the correct legal standard and his findings of historical fact were not "clearly erroneous." Accordingly, this Court should also find that Deputy Hamilton had sufficient probable cause to ask Sternitzky to blow into the PBT.

II. **Deputy Hamilton did "request" that Sternitzky provide a breath sample for the PBT**.

The precise exchange between Deputy Hamilton and Sternitzky on this point is indisputable since the entire exchange was audio/video recorded on Deputy Hamilton's squad car camera and his body microphone. This recording was repeatedly reviewed by both counsel and the trial court at the motion hearing. It was also received into evidence and played to the jury at Sternitzky's trial. This is the exchange that occurred between Deputy Hamilton and Sternitzky immediately after Sternitzky had completed the HGN, walk-and-turn and one-leg stand tests:

Hamilton: As you can see this is registering no alcohol at this time. Do you have anything in your mouth at all?

Sternitzky: No.

Hamilton: Let me take a look real quick. What you're going to do for this test is take a deep breath and blow a long and steady into this tube. Okay?

Hamilton: Blow, blow, blow, blow, blow, hard blow, hard blow, blow hard. Ok, there you go. You can pull that tube off of there then.

Hamilton: Steve, do you know what the alcohol limit is in Wisconsin for an OWI?

Sternitzky: .08?

Hamilton: It's .08.

Hamilton: You had a 134 tonight, ok? With that result, we'll be placing you under arrest for an OWI, ok?

Sternitzky: No, it's not ok.

Hamilton: Yeah, I know it's just

Sternitzky: Ah, can I move my truck?

Hamilton: We'll take care of that for ya. If you can hang on, I'm going to double lock this for you. (R36 Exhibit #P-1)

The circuit court judge ruled: "I'm going to find that the officer's use of the word 'okay' does translate this into a request. And this was a voluntary submission and that therefore, the motion to suppress is denied." (R78:48 App. 132 LL 18-22). Whether this court reviews this *de novo* or by the "clearly erroneous" standard, it is clear that Deputy Hamilton concluded his description of how to do the PBT with the question "Okay?" and therefore, this court should affirm the circuit court's decision

that Deputy Hamilton properly and adequately "requested" that Sternitzky provide a breath sample for the PBT.

Furthermore, the continuation of the exchange clearly shows that Sternitzky understood that a simple declarative sentence followed by the question "Okay?", constituted a request or a question. In the next exchange after the PBT, Deputy Hamilton asked Sternitzky if he knew the prohibited alcohol concentration in Wisconsin and Sternitzky provided an accurate reply. When Deputy Hamilton then explained since Sternitzky's BAC was almost twice that amount he was going to arrest Sternitzky for OVWI, Deputy Hamilton asked the (apparently rhetorical) question "Okay?" and Sternitzky replied "No, it's not okay." If he had made that reply after Deputy Hamilton's description of the PBT procedure, we would not have had a preliminary breath test in this case. Unlike the PBT, Deputy Hamilton did not need Sternitzky's consent to arrest him and so, notwithstanding Sternitzky's objection, Deputy Hamilton arrested him.

III. **Even if Deputy Hamilton lacked sufficient probable cause to request the breath sample for the PBT or the request was somehow statutorily deficient, exclusion of the PBT result from the probable-cause-to-arrest analysis is not an available remedy**

"Suppression is only warranted when evidence has been obtained in violation of a defendant's constitutional rights or if a statute specifically provides for suppression as a remedy." State v. Straehler, 2008 WI App 14, 307 Wis. 2d 360, 368, 745 N.W.2d 431.

Here, even if this court were to find there was insufficient "probable cause" under Wis. Stats. Sec. 343.303, as that term was defined in Renz, or that the request was somehow statutorily deficient, that would not constitute a violation of Sternitzky's *constitutional* rights since that additional step of investigation was warranted under the totality of the circumstances under Terry v. Ohio, 392 U.S. 1 (1968), as construed in State v. Betow (supra).

Wis. Stats. Sec. 343.303 does not provide as a remedy that the PBT result is to be suppressed or excluded from the probable-cause-for-arrest analysis. Thus, even if this court were to find that Deputy Hamilton either lacked sufficient probable cause to make the request or that his request was in some other way statutorily deficient, suppression or exclusion of the PBT result from the probable-cause-to-arrest analysis would not be an available remedy. Accordingly, the information available to Deputy Hamilton at the time of the arrest, including the PBT result of .134, was sufficient to establish probable cause to arrest Sternitzky for OVWI 3rd Offense and OVWPAC 3rd Offense.

IV. **Deputy Hamilton had sufficient probable cause to arrest Sternitzky for OVWI 3rd Offense and OVWPAC 3rd Offense**.

For an officer to arrest based on probable cause, " the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." State v. Secrist, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "The probable cause requirement 'deals with probabilities' and must be sufficient 'to lead a

reasonable officer to believe that guilt is more than a possibility.'" State v. Blatterman, 2016 WI 46, ¶ 35, 362 Wis. 2d 138, 864 N.W.2d 26.

Here, Deputy Hamilton testified that, in his experience, the HGN was the most reliable indicator of whether or not a suspect was impaired or not. He related that he had seen many impaired motorists who had done reasonably well on the walk-and-turn and one-leg stand tests but who did poorly on the HGN test and later proved to be highly intoxicated. His experienced assessment of the defendant's condition was also informed by his observations of the defendant prior to asking him to submit to the field sobriety tests. These include the defendant's apparent effort to conceal the odor of intoxicants about his person by smoking a cigarette, his deficient motor skills as evidenced by him dropping that cigarette, his two prior OVWI convictions, his admission that he had consumed two, then three, then six wines, the time of day and Sternitzky's thick-tongued speech. This information, even without the PBT result, was sufficient to lead a reasonable officer to "believe that guilt is more than a possibility."

Furthermore, Deputy Hamilton was justified in considering the PBT result of .134 in his analysis. First, he did have sufficient probable cause to support the request for the breath sample and second, he did "request" the breath sample. However, even if a reviewing court were to subsequently decide that he didn't have sufficient probable cause or that his "request" was somehow inadequate, that would be no reason to exclude the PBT result from the probable cause analysis since that statute does not provide for such a remedy.

V. Use of Criminal Jury Instruction 2669 was a correct application of the law to the facts of this case; the circuit court had already denied Sternitzky's pretrial motion to suppress the blood test; Sternitzky waived any objection to the admission of the blood test result at trial by allowing it to be received without objection and Sternitzky waived any objection to the Informing of Accused or admission of the blood test before this Court by failing to appeal the circuit court's pretrial ruling denying his motion to suppress the blood test and it's holding that the Informing the Accused had been properly read to him.

The Wisconsin Supreme Court has stated that "there are two types of challenges to jury instructions: (1) 'those challenging the legal accuracy of the instructions'; and (2) 'those challenging that a legally accurate instruction unconstitutionally misled the jury.'" State v. Burris, 2011 WI 32, ¶ 44, 333 Wis. 2d 87, 797 N.W.2d 430; State v. Trammell, 2019 WI 19, 387 Wis. 2d 156, 186, 928 N.W.2d 564, 579.

In his brief, Sternitzky does not specify which type of challenge he is mounting here and it's not clear that Sternitzky's challenge falls into either of those two categories. Rather, it appears as though Sternitzky is arguing that a factual predicate to the use of the disputed language in Crim J.I. # 2669 had not been met and therefore, the Court was not allowed to so instruct the jury. However, two months before the trial in this matter, the Circuit Court *denied* Sternitzky's motion to suppress the blood test due to the use of the Informing the Accused. At trial, Sternitzky then waived any objection that he had to the introduction of the blood test result when it was received into evidence without any objection from Sternitzky. Furthermore, Sternitzky chose to not appeal the pretrial ruling of the Circuit Court

that Sternitzky had been properly read the Informing the Accused form and thus, he has waived that argument before this court as well.

The gravamen of Sternitzky's appeal seems to be that the State is required to present to the *jury* evidence that Sternitzky had been read the Informing the Accused in order to be entitled to the language entitled, "How to Use the Test Result Evidence."

At the jury instruction conference, Sternitzky had raised this same argument. At that time the State had correctly noted that the use of this language in Criminal Jury Instruction 2669 had nothing to do with the Informing the Accused and that the Circuit Court had already denied the defendant's pretrial motion seeking suppression of the blood test on that basis. When pressed by the Circuit Court for some case law that would support his position, Sternitzky cited the case of State v. Zielke, 137 Wis. 2d 39, 403 N.W.2d 427 (1987). The Circuit Court took a short recess in order to read that case and, when it came back on the record, overruled Sternitzky's objection, finding that, as the State had argued, this was a pretrial issued that related to the admissibility of the blood test results and it was not an issue for the jury. (Resp. App. 014).

Sternitzky has apparently now abandoned the *Zielke* case as support for his argument since he did not cite it in his brief. Now, he cites to State v. Piddington, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, a case that is equally unavailing to his argument. Sternitzky correctly notes *Piddington* stands for the proposition that "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." (p. 8 Sternitzky's brief). The problem here is that Sternitzky had never claimed to the Circuit Court that the warnings in the Informing the Accused were not reasonably conveyed to him. For that matter, Sternitzky does not make that claim before this Court either. Therefore, the holding in *Piddington* has nothing to do with the issues before this Court.

In his pretrial motion to suppress the blood test, Sternitzky asserted that the Informing the Accused had improperly informed him about an alleged "right" to refuse the blood test. The Circuit Court, after reviewing Sternitzky's brief and the State's response brief and hearing arguments of counsel, had extensively referenced the Jury Instruction Committee guidance on this issue. The Circuit Court then ruled: "I'm going to find that, -- for the reasons I have already given in the court record, that the language in the Informing the Accused is still accurate. It's not coercive and it did not violate this individual's Fourth Amendment rights. *And I'm going to deny the motion to suppress the blood test*." (R79:16 Supp. App. 135 LL 9-17) (emphasis supplied).

At the time of trial, this ruling was the law of the case. The State did not introduce the Informing the Accused form into evidence at the trial. The State had no reason to present to the *jury* evidence pertaining to the Informing the Accused form because the Circuit Court had already ruled, two months earlier, that the Informing the Accused had been properly read to Sternitzky, and, in that hearing the Court denied Sternitzky's motion to suppress the blood test on those grounds. The

State did present to the jury evidence that was relevant to the "prima facie presumption of reliability" of the blood test. *See* the Criminal Jury Instruction Committee Note in Wis. JI Criminal Instruction # 2600:

> "The Committee concluded that the jury should not be instructed in terms of a 'presumption' but should simply be advised that the validity of the underlying scientific principles need not be established. However, the jury must be satisfied that the test procedure was proper and that the operator was qualified, and the defendant may challenge the test results on those grounds. West Allis v. Rainey, 36 Wis. 2d 489, 496, 153 N.W.2d 54 (1967)." (WIS JI Criminal 2600 OPERATING WHILE INTOXICATED: INTRODUCTORY COMMENT, P.19).

To that end the State presented evidence to the jury that: the blood sample had been obtained within 3 hours of Sternitzky's operation of his motor vehicle; it had been properly drawn by a qualified medical technologist (R76:123-124 Resp. App. 005 L. 11 to 006 L.23), utilizing a test kit provided by the State Lab of Hygiene; it had been properly sealed, packaged and mailed to the State Lab of Hygiene where it was properly opened, inventoried and tested by an experienced forensic analyst. In short, the State presented to the *jury* all of the evidence that was a *factual* predicate for the jury to be instructed in the manner contemplated in Wis. JI Criminal # 2669 of the testing process and result:

> [A] method or process for testing which is expressly authorized by statute is entitled to a prima facie presumption of correctness of purpose. In

> such a case, all that needs to be proved is that the method was followed. A scientific … method not recognized as acceptable in the scientific … discipline as accurate does not enjoy the presumption of accuracy …But tests by recognized methods need not be proved for reliability in every case of violation. Examples [include] … Breathalyzer [tests] tests by recognized methods need not be proved for reliability in every case of violation. State v. Trailer Services, Inc., 61 Wis. 2d 400, 407-08, 21 N.W.2d 683 (1973)

The jury had been presented with all of the evidence it needed in order to be instructed as to the presumptive accuracy of the test as contemplated in Crim. J.I # 2669. The circuit court had been presented with Sternitzky's arguments regarding the Informing the Accused at the 4/18/2019 Status Conference and had already denied Sternitzky's motion to suppress the test results on those grounds. Consequently, the blood test results were received into evidence without objection by Sternitzky.

Sternitzky offers no case law and no argument for the proposition that, after litigating and losing his motion to suppress the blood test result before trial and after failing to object to its admission into evidence, he should be allowed to relitigate the matter after close of the evidence at trial. Furthermore, he offers no case law and no argument as to why he should not be deemed to have waived this issue in this appeal, since he did not appeal the pretrial ruling that the Informing the Accused had been read to him and his motion to suppress the blood test had been denied.

CONCLUSION

In the course of this lawful traffic stop, the arresting officer developed sufficient probable cause to properly request that Sternitzky provide a breath sample for a preliminary breath test. Even if, according to the provisions of sec. 343.303 Wis. Stats., there had been insufficient probable cause to make that request or the request was in some other way improper, since suppression of the PBT result from the probable cause analysis is not statutorily provided, the PBT result should still be considered in the probable cause to arrest analysis. In any event, with or without the PBT result, Deputy Hamilton did have sufficient probable cause to arrest Sternizky for operating a motor vehicle while under the influence of an intoxicant and for operating a motor vehicle with a prohibited alcohol concentration and thus, his pretrial motion to suppress the evidence for an arrest without probable cause was properly denied by the circuit court. Sternitzky has waived any objection he may have had about the Informing the Accused by failing to appeal the circuit court's pretrial ruling denying his motion to suppress the blood test result on those grounds. He waived any objection to the admission of the blood test result at trial since he did not interpose an objection at the time it was moved into evidence at trial. Accordingly, this court should affirm the lower court decision.

Dated this day _____

Signed: _____

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