STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2020AP1734

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CRAIG R. THATCHER,

Defendant-Respondent.

APPEAL FROM AN ORDER SUPPRESSING EVIDENCE AND DISMISSING CASE, ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, THE HONORABLE SCOTT NEEDHAM, PRESIDING

PLAINTIFF-APPELLANT'S BRIEF

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TABLE OF CONTENTS

Page

ISSUES PRESENTED....1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION....1

STATEMENT OF THE CASE....1

STANDARD OF REVIEW....5

ARGUMENT....5

I. The circuit court erred in granting Thatcher's motion to suppress evidence of his chemical breath test....5

A. Trooper Wood properly satisfied his duty under Wis. Stat. § 343.305(4)....6

B. Trooper Wood did not provide any erroneous or misleading information to Thatcher....9

C. Trooper Wood's statements did not cause Thatcher to consent to an evidentiary chemical test....11

II. Thatcher freely and voluntarily consented to submit to an evidentiary chemical test of his breath....13

III. The circuit court erred in suppressing Thatcher's secondary blood test....16

CONCLUSION....19

TABLE OF AUTHORITIES

Federal Cases

Brown v. Illinois, 422 U.S. 590 (1975)……17

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)……14

Wong Sun v. United States, 371 U.S. 471 (1963)……17

State Cases

County of Ozaukee v. Quelle,
198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App.1995)
……...6, 7, 8, 9, 10, 11, 12, 13

In re Smith,
2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243……6, 8, 12

State v. Albright,
98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980) ……..9

State v. Artic,
2010 WI 83, 327 Wis. 2d 392, 786 N.W.2d 430…….…….14

State v. Blackman,
2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774…….5, 14, 15, 16

State v. Knapp,
2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899……..16

State v. Ludwigson,
212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997) ……..8, 9, 12

State v. Phillips,
218 Wis. 2d 180, 577 N.W.2d 794 (Wis. 1998)…….17, 18

State v. Robinson,
2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463……..5

State v. Shulz,
100 Wis. 2d 329, 302 N.W.2d 59 (Ct. App. 1981) ……9

State v. Tullberg,
2014 WI 134, 359 Wis. 2d 421, 857 N.W.2d 120……..5

State Statutes

Wis. Stat. § 343.30(1)……..11

Wis. Stat. § 343.30(1n)……11

Wis. Stat. § 343.305(4)…….2, 5, 6, 7, 8, 10, 12

Wis. Stat. § 343.305(4m)……..6

Wis. Stat. § 346.57……..11

Wis. Stat. § 346.63(1)……9

Wis. Stat. § 346.63(1)(a)……...…3

Wis. Stat. § 346.63(1)(b)……...…..3, 18

Wis. Stat. § 809.23(1)(b)(4) p.1……....1

ISSUES PRESENTED

1. Did the circuit court erroneously grant Thatcher's motion to suppress evidence of his chemical breath test?

The circuit court held that Thatcher's breath test should be suppressed.

This Court should reverse because Trooper Wood provided a sufficient warning to Thatcher. Moreover, in reaching its conclusion, the trial court erroneously applied *Quelle*. Instead, a Fourth Amendment examination of the voluntariness of Thatcher's consent should have been implemented. Under the Fourth Amendment, Thatcher freely and voluntarily consented to provide an evidentiary sample of his breath.

2. Did the circuit court erroneously suppress Thatcher's secondary blood test?

The trial court held that Thatcher's secondary blood test must be suppressed as fruit of the poisonous tree.

This Court should reverse because Thatcher's initial breath test was not coerced. Additionally, even if this Court determines that the breath test was coerced, there was sufficient attenuation to purge the taint of the coercive comments before the blood test was requested by Thatcher.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication is precluded by Wis. Stat. § 809.23(1)(b)(4) as this appeal shall be decided by one judge.

STATEMENT OF THE CASE

On November 2, 2019, Wisconsin State Trooper Damien Wood responded to a driving complaint of a black Cadillac SUV described as being "all over the road deviating lanes." (R. 59, 151:1–5.) After

observing a black Cadillac SUV display the same driving conduct described in the complaint, Trooper Wood initiated a traffic stop of the vehicle. (*Id.* at 151:16–21.) Trooper Wood identified the driver of the vehicle as Craig Thatcher. Upon further investigation, Trooper Wood placed Thatcher under arrest for Operating While Intoxicated ("OWI"). (*Id.* at 152:6–9.[1]) After placing Thatcher under arrest for OWI, Trooper Wood made the following statement to him:

> Okay, so just gotta [sic] do some paperwork here. So this is a first offense. It is not a crime. Traffic forfeiture, like a bad speeding ticket that nobody wants. So, what is going to happen is I have got to issue a couple citations here. I have to read you a form and depending on how all that goes, you should be able to just go to the jail and you will be able to get out tonight with a sober driver. So, sound like a plan?

(R. 18, 105.)

Approximately six minutes later, Trooper Wood read Thatcher the Department of Transportation's advisory titled Informing the Accused ("ITA Form") which contains the notice required to be provided under Wisconsin's Implied Consent law, specifically Wis. Stat. § 343.305(4). (R. 18, 106; R. 19, 108.) The following exchange occurred between Trooper Wood and Thatcher after Trooper Wood read Thatcher his rights in accordance with statute:

Thatcher:	I have a commercial driver's license
Trooper Wood:	Okay
Thatcher:	So what did you mean by that?
Trooper Wood:	Did you understand what the form said?
Thatcher:	yeah, I understand

[1] The facts leading up to Thatcher's arrest were not solicited for the record because counsel for Thatcher confirmed he was not challenging the basis of the stop or probable cause for the arrest. (R. 59, 148:8-18.)

> Trooper Wood: Cause' I can't interpret what this says. I can read what this says exactly. I can't summarize what it means, because it can change certain meanings and I don't want you to be confused by certain things. So if you would like I can read you the whole thing again.
>
> Thatcher: No, no I –
>
> Trooper Wood: Do you want me to read that part again?
>
> Thatcher: Please

(R. 18:106.) Trooper Wood then reread paragraph four of the ITA Form pertaining to a commercial driver's license. (R. 18:106–07; R. 19.) Thatcher indicated he understood the form and consented to providing a chemical test of his breath. (R. 18:106–107.) Thatcher did not ask any other questions about the ITA Form after Trooper Wood reread paragraph four of the ITA Form a second time. (*Id.*) Trooper Wood then collected an evidentiary sample of Thatcher's breath.

Thatcher also requested an secondary chemical test of his blood. Trooper Wood complied with Thatcher's request for a secondary test and transported Thatcher to Hudson Hospital to collect a sample of Thatcher's blood.[2] Subsequently, Trooper Wood issued Thatcher citations for Operating While Under the Influence, Wis. Stat. § 346.63(1)(a), and Operating with a Prohibited Alcohol Concentration-First Offense, Wis. Stat. § 346.63(1)(b).

On March 13, 2020, Thatcher, through counsel, filed a motion and accompanying affidavit, seeking to suppress the State's use of "all direct and derivative evidence of Trooper D. Wood's . . . improper influence on Mr. Thatcher's decision regarding chemical testing . . . ." (R. 8:100.) Specifically, Thatcher asserted that Trooper Wood's

[2] The record does not reflect that Thatcher requested a secondary test of his blood because the issue of suppression was brought to light after the circuit court suppressed the primary breath test. However, the State concedes Thatcher did in fact request a secondary sample of his blood.

comment that an OWI first offense is similar to a "bad speeding ticket that nobody wants" was misleading and affected his ability to make a choice about submitting to a chemical test. *Id.* at 101–02.

A motion hearing was held before the Honorable Scott R. Needham on July 13, 2020. (R. 59, 146.) After submissions of briefs, the circuit court entered a Decision and Order dated September 22, 2020 granting Thatcher's Motion to Suppress the breath test concluding the State chose to abandon its prior challenge to Thatcher's motion based upon the submission of a blank brief and declined to develop the State's argument. (R. 22, 123–24.) The State promptly filed a correspondence advising of the inadvertent submission of the wrong brief due to a technical error, along with the correct brief and requested the Court to reconsider its order accounting for the State's argument. (R. 25, 133; R. 23, 125–32.) The circuit court issued a Decision and Order dated October 1, 2020 denying the State's motion for reconsideration and affirmed its previous Decision and Order on September 22, 2020. (R. 30, 137–38.) In denying the State's motion, the circuit court simply stated, the "answer to all three questions is 'yes'" in reference to *Quelle*. (R. 30, 138.)

Following the circuit court's Decision and Order on October 1, 2020, Thatcher filed a correspondence requesting the court to also suppress evidence of Thatcher's secondary blood test based upon the fruit of the poisonous tree doctrine. (R. 28, 135–36.) Thatcher filed an additional correspondence requesting dismissal of the charge of Operating with a Prohibited Alcohol Concentration. (R. 31, 139.) Over the State's objection, the circuit court issued a third Decision and Order dated October 9, 2020 suppressing Thatcher's secondary blood test results, finding the test results were fruit of the poisonous tree and "immaterial." (R. 32, 140-41; R. 37:144.) The circuit court subsequently issued an Order dismissing the citation for Operating with a Prohibited Alcohol Concentration. (R. 38, 145.)

The State appeals.

STANDARD OF REVIEW

"[R]eview of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." *State v. Blackman*, 2017 WI 77, ¶ 25, 377 Wis. 2d 339, 350, 898 N.W.2d 774, 780 (citing *State v. Tullberg*, 2014 WI 134, 359 Wis. 2d 421, 857 N.W.2d 120). A question of constitutional fact is reviewed under a two-step inquiry. *Blackman*, 377 Wis. 2d at 780. First, the circuit court's findings of fact will be upheld unless those findings are clearly erroneous. *Id*. Second, the appellate court conducts an independent, de novo analysis of the application of constitutional principles to the facts found. *Id.* (citing *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463). Additionally, the interpretation and application of a statute is a question of law that appellate courts decide independently of the circuit court. *Blackman*, 377 Wis. 2d at 780.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING THATCHER'S MOTION TO SUPPRESS EVIDENCE OF HIS CHEMICAL BREATH TEST.

Pursuant to Wisconsin's implied consent statute, a person arrested for operating while intoxicated must be advised of the statutorily prescribed penalties if a chemical test is requested by law enforcement. Wis. Stat. § 343.305(4). Specifically, "at the time that a chemical test specimen is requested . . . the law enforcement officer shall read the following to the person from whom the test specimen is requested:"

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.
>
> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified.

Id.

In order to determine whether a law enforcement officer's warning under the implied consent law was adequate, the court must utilize a stringent three part test: (1) whether the law enforcement officer has not met, or exceeded their duty to provide information to the accused driver under Wis. Stat. § 343.305(4) and § 343.305(4m);[3] (2) whether the lack of or oversupply of information is misleading; and (3) whether the failure to properly inform the driver affected their ability to make the choice about chemical testing. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995), *abrogated on other grounds by In re Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243.

A. Trooper Wood properly satisfied his duty under Wis. Stat. § 343.305(4).

"A [law enforcement] officer's only duty under the implied consent law is to accurately deliver the information to the driver . . . " as required by Wis. Stat. § 343.305(4); *Quelle*, 198 Wis. 2d at 285. An

[3] Wis. Stat. § 343.305(4m) addressed drivers who possess a commercial motor vehicle license. The subdivision was removed from the statute in 1997 and incorporated into the language contained in § 343.305(4).

officer need not explain all the choices and possible consequences embodied within the statute. *Id.*

Trooper Wood read the ITA Form verbatim to Thatcher. (R. 18, 106; R. 19, 108.) The ITA Form, promulgated by the Wisconsin Department of Transportation, incorporates the language in Wis. Stat. § 343.305(4)[4] that the legislature requires a law enforcement officer to read when the officer requests that a driver submit to chemical testing. (R. 19, 108.) After Trooper Wood read the ITA Form in its entirety, Thatcher commented that he had a commercial driver's license. (R. 18:106.) Trooper Wood then asked if Thatcher understood what the form said, at which point Thatcher confirmed he did in fact understand. *Id.* Thereafter, Trooper Wood stated he was unable to "interpret what [the ITA Form] says . . . [and] can't summarize what it means, because . . . I don't want you to be confused . . ." (*Id.*) By way of reading the ITA Form in its entirety and Trooper Wood's remarks that he is unable to explain the form to avoid any confusion, Trooper Wood has complied with his duty under Wis. Stat. § 343.305(4) and no oversupply of information was provided to Thatcher. Rather, Trooper Wood properly advised Thatcher he was unable to explain the form. (*Id.*)

Thatcher however, claimed in his motion, that Trooper Wood's comment made prior to reading the ITA Form constituted an oversupply of information. (R. 8, 101 ¶ 4.) Specifically, Trooper Wood stated the following approximately 6 minutes prior to reading the ITA Form: "So this is a first offense. It is not a crime. Traffic forfeiture, like a bad speeding ticket that nobody wants." (R. 18, 105.)

[4] The ITA Form read by Trooper Wood also included the following additional text that is not encompassed in Wis. Stat. § 343.305(4): "In addition, your operating privileges will also be suspended if a detectable amount of a restricted controlled substance is in your blood." This statement appears to add clarity that operating privileges are also subject to penalty for use of a controlled substance in addition to alcohol. The additional language was not challenged by Thatcher in the circuit court, nor was there any evidence Thatcher consumed any controlled substances.

The State contends that the three-prong *Quelle* test is wholly inapplicable as the cases relied upon by Thatcher are distinguishable in that the oversupply of information was contemporaneous to the disclosure of the rights under Wisconsin's Implied Consent law. (R. 8, 100; R. 21, 111); *Quelle*, 198 Wis. 2d at 274 (law enforcement officer attempted to explain the form to defendant in response to questioning); *State v. Ludwigson*, 212 Wis. 2d 871, 875, 569 N.W.2d 762, 764 (Ct. App. 1997) (officer exceeded his duty and attempted to explain the form to defendant in "layman's terms."); *In re Smith*, 308 Wis. 2d at 84 (after reading the form, defendant expressed concern regarding the possible penalties and the deputy made statements regarding the licensure revocation period and ability to have a hearing within a certain period of time).

In the case before the Court, Trooper Wood's comment was not made contemporaneously to informing Thatcher of his rights or as a means of explanation for the content contained in the ITA Form, but rather a remark made six minutes prior to administering the ITA Form. Trooper Wood's commentary made prior to reading the ITA Form was not made in conjunction with his duty to advise Thatcher of Wisconsin's Implied Consent law pursuant to Wis. Stat. § 343.305(4) and did not exceed his duty in the manner *Quelle* sought to protect.

Furthermore, it cannot reasonably be inferred that *Quelle* was intended to apply to all statements made by law enforcement prior to administering the advisory. Such an expansive application would curdle the efforts of law enforcement if any statement made prior to administering the ITA Form was subject to scrutiny under *Quelle*. The purpose of the statute is to advise divers suspected of operating while intoxicated of their rights under Wisconsin law. *Quelle*, 198 Wis. 2d at 279 (" . . . the implied consent warnings are designed to inform drivers of the rights and penalties applicable to them.") The record unequivocally reflects that Trooper Wood satisfied his duty under Wis. Stat. § 343.305(4) by reading the ITA Form verbatim and refraining

from explaining the form by explicitly stating he could not summarize what the form means. (R. 18, 106.) Because Trooper Wood did not exceed his statutory duty, *Quelle* is inapplicable and the Court need only determine whether Trooper Wood's statement rendered Thatcher's consent to submit to an evidentiary breath test as involuntary. The State, however, will provide arguments regarding the remaining *Quelle* analysis should the Court find Trooper Wood exceeded his statutory duty.

B. Trooper Wood did not provide any erroneous or misleading information to Thatcher.

If the Court finds there was an oversupply of information, the court shall then consider whether the oversupply of information was misleading. *Ludwigson*, 212 Wis. 2d at 875. The Court in *Ludwigson* clarified that the term "misleading" under the second prong of the *Quelle* test is meant to be synonymous with "erroneous." *Id*. (citing *Quelle*, 198 Wis. 2d at 282).

Here, after placing Thatcher under arrest for OWI, Trooper Wood told Thatcher that it was a "first offense. It is not a crime. Traffic forfeiture, like a bad speeding ticket that nobody wants." (R. 18, 105.) An OWI first offense in Wisconsin is a noncriminal forfeiture violation. Wis. Stat. § 346.63(1); *State v. Albright*, 98 Wis. 2d 663, 673 298 N.W.2d 196, 202 (Ct. App. 1980) (stating a person's first violation of sec. 346.63(1) is not a criminal offense) *see also State v. Shulz*, 100 Wis. 2d 329, 331, 302 N.W.2d 59, 61 (Ct. App. 1981) (reasoning that the legislature removed the provision for a fine, eliminated the right to impose a prison term, and substituted a forfeiture provision, which reflected a legislative intent to establish a civil penalty).

In light of these decisions by the Wisconsin legislature and courts of appeals, it is apparent that Trooper Wood's statement to Thatcher was factually correct in the sense that an OWI first offense is not a crime. As stated in *Quelle*, an "officer's correct explanation of the

law . . . cannot be grounds for suppressing the test results." *Quelle*, 198 Wis. 2d at 283. Because Trooper Wood's remarks that an OWI first offense is a noncriminal traffic forfeiture is factually accurate under Wisconsin law, the statement cannot be considered erroneous.

Thatcher also argued to the circuit court was based upon Trooper Wood's "material omissions" when he . . .

> told [Thatcher] that all he would face is a forfeiture or fine by pleading guilty[5] when in actuality an individual who pleads guilty to an OWI-1st offense [sic] in Wisconsin is not only subject to monetary forfeiture . . . but also revocation of his or her license, disqualification of his or her commercial driver's license . . . as well as a costly and mandatory alcohol and other drug assessment.

(R. 21, 115–16.). Thatcher concluded that "[b]y material omission, Trooper Wood incorrectly informed Thatcher on the penalties he faced for his first offense in an attempt to get Thatcher to 'consent' to an evidentiary chemical test; therefore he provided definitionally [sic] misleading information." (R. 21, 116.) Thatcher's argument must fail as the record unequivocally establishes that Trooper Wood administered the ITA Form in its entirety – the content of which is identical to the language contained in Wis. Stat. § 343.305(4).

In *Quelle*, the defendant asserted that her decision not to submit to a chemical test resulted from the officer's failure "to provide a reasonable explanation" . . . after expressing confusion about why she was asked about submitting to another breath test when she already submitted to a preliminary breath test roadside. *Quelle*, 198 Wis. 2d at 284. The Court rejected *Quelle's* argument that an officer is under a duty to provide a reasonable explanation to a confused driver and emphasized that an officer only as a duty to provide the information on the form. *Id.* at 285–86. ("an officer's only duty under the implied consent law is to accurate deliver the information to the driver; an

[5] Nothing in the record, nor the transcript drafted by Thatcher, by way of counsel, reflects that Trooper Wood stated to Thatcher that the only penalty he would face was a forfeiture or fine if he pleaded guilty.

officer need not explain all of the choices (and resulting consequences) embodied within these statutes.")

Thatcher also argued to the circuit court (in the context of the third prong of *Quelle*) that Trooper Wood's statement regarding an OWI first offense is "like a bad speeding ticket that nobody wants" was misleading. (R. 21, 117.) Trooper Wood's statement can only be characterized as an opinion, rather than an assertion of fact. Regardless, the statement is not false or misleading. Wis. Stat. § 343.30(1) provides that "a court may suspend a person's operating privilege for any period not exceeding one year upon such person's conviction in such court of violating any of the state traffic laws . . . ." except for specifically enumerated provisions. Wis. Stat. § 343.30(1) authorizes said suspension for Wisconsin state laws prohibiting drivers from speeding. *See generally* Wis. Stat. § 346.57. Presumably a "bad speeding ticket that nobody wants" would include a ticket for an excessive speed, which under Wisconsin law requires courts to impose a mandatory licensure suspension. Wis. Stat. § 343.30(1n) ("A court shall suspend the operating privilege of a person for a period of 15 days upon the person's conviction by the court of exceeding the applicable speed limit . . . by 25 or more miles per hour . . . .")

Trooper Wood's statement likening an OWI first offense to a "bad speeding ticket" was not false or otherwise misleading, but rather an accurate comparison, as a speeding citation can result in the similar penalties as an OWI first offense, specifically a lengthy licensure suspension. Because Trooper did not provide Thatcher with any erroneous or misleading information, the second prong in the *Quelle* analysis cannot be answered in the affirmative.

C. Trooper Wood's statements did not cause Thatcher to consent to an evidentiary chemical test.

If the Court has determined that an officer provided additional information to an accused driver that was erroneous, the burden shifts

to the defendant to prove by a preponderance of the evidence that the erroneous information affected the driver's ability to make the choice about chemical testing. *Smith*, 308 Wis. 2d at 97 (citing *Ludwigson*, 212 Wis. 2d at 876.) The Court in *Smith* clarified that the standard of proof placed upon a defendant was applicable in cases where the officer satisfied his duty under § 343.305(4) and then provided additional erroneous information. *Smith*, 308 Wis. 2d at 98.

Here, Thatcher asserted Trooper Wood failed to provide material information to him, however, as previously stated, the record clearly reflects that Trooper Wood fulfilled his statutory duty under § 343.305(4) by reading the ITA Form in its entirety. This fact was undisputed by Thatcher during the circuit court proceedings. At the suppression hearing Thatcher was asked "[i]f [Trooper Wood] had explained the full penalties for an O.W.I. at that point in time, would you have come up with a different answer potentially?" (R. 59, 166:18–20.) Thatcher replied "ah, virtually, probably, yes." (*Id.* at 166:21.) Thatcher's response was not definitive. Moreover, as *Quelle* provides, "an officer need not explain all of the choices (and resulting consequences) embodied within [the implied consent law.]" *Quelle*, 198 Wis. 2d at 285. Therefore, Thatcher's argument regarding "material omissions" is without merit.

Thatcher also claimed Trooper Wood's statement likening an OWI first offense to a "bad speeding ticket" was additional erroneous information that affected Thatcher's to make a decision regarding chemical testing. Thus, the standard articulated in *Ludwigson* applies.

During the suppression hearing before the circuit court, Thatcher was asked how Trooper Wood's statement comparing an OWI first offense to a "bad speeding ticket" impacted his decision to submit to a chemical test. (R.59, 165–66.) Thatcher stated, "well, I just—It was just like a bad speeding ticket. I just, ah, go along with the paperwork is the way I understood it." (*Id*.) Later in the hearing, Thatcher was asked

"what are you saying affected your ability to make up your mind here?" (*Id.* at 167:13–15.) Thatcher replied, "well, just back to the beginning when he said '[i]t's no worse than a bad speeding ticket. We'll just go through some motions and you'll be back home before you know it." (*Id.* at 167:16–19.)

Thatcher's testimony was conclusory and does not sufficiently explain how Trooper Wood's statement influenced his decision, nor was Thatcher definitive in his response when he stated "virtually, probably, yes." (R. 166:21.) Furthermore, when asked if he understood the information read to him on the form, he responded in the affirmative, *twice*. (R. 18, 106.) Thatcher affirmed he understood after the ITA Form was read in its entirety and again after Trooper Wood read paragraph 4 of the ITA Form to Thatcher. (*Id.*) It follows that any mistaken perception about the seriousness of an OWI resulted from Mr. Thatcher's own subjective confusion and his "inability to interpret the form, not from improper conduct" by Trooper Wood. *Quelle*, 198 Wis. 2d at 280. (concluding that a driver's "subjective confusion" is not a recognizable defense in the context of the *Quelle* framework.) Thatcher's argument is unconvincing and fails to establish that Trooper Wood's statement caused him to consent to an evidentiary chemical test of his breath. As such, the circuit court erred in granting Thatcher's motion to suppress and should be reversed.

II. THATCHER FREELY AND VOLUNTARILY CONSENTED TO SUBMIT TO AN EVIDENTIARY CHEMICAL TEST OF HIS BREATH.

The State contends that the proper analysis for determining whether Trooper Wood's statement comparing an OWI first offense to a "bad speeding ticket" is more appropriately analyzed under the Fourth Amendment framework, rather than *Quelle*.

The Fourth Amendment to the United States Constitution requires that an accused driver's decision to consent to testing was

given in fact by words, gestures, or conduct, and that the consent was voluntary. *Blackman*, 377 Wis. 2d at 361 (citing *State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430. The State must satisfy that burden by clear and convincing evidence. *Id*. If the State establishes consent in fact, the State must prove that the consent was given voluntarily and freely. *Id*. (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). Voluntary consent must be an essentially free and unconstrained choice, not the product of duress or coercion, express or implied. *Artic*, 327 Wis. 2d at 413.

The determination of voluntariness is based on the totality of the circumstances. *Id*. In *Artic*, the court provided the following list of nonexclusive factors to consider to determine whether consent was given voluntarily, including:

> (1) whether the police informed the defendant that he could refuse consent;
> (2) whether the police threatened or physically intimidated the defendant;
> (3) whether the conditions attending the search were congenial, nonthreatening, and cooperative, or the opposite;
> (4) how the defendant responded to the request to search;
> (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and
> (6) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade them to consent.

Arctic, 327 Wis. 2d at 414.

There is no dispute that Thatcher consented in fact to the chemical test in this case. The issue is whether Thatcher's consent was free and voluntary after Trooper Wood's comment that an OWI first offense is like a "bad speeding ticket that nobody wants." (R. 18, 105.) Shortly after this statement was made, Trooper Wood read the ITA Form, which provides the option to an accused driver to submit to an evidentiary chemical test or otherwise refuse. (R. 19, 108.) None of the

facts suggest that the encounter between Trooper Wood and Thatcher involved any physical intimidation or threat of such.

Additionally, the conditions attending the search seemed to be entirely congenial. Notably, Trooper Wood fulfilled his duty by reading the ITA Form. Thatcher felt comfortable enough to ask Trooper Wood about it; he verbally acknowledged that he understood the ITA Form, going so far as to ask that a portion of it be reread. Trooper Wood did not try to rush him through it and made clear that if he was unsure about something that he could read the form again. After Trooper Wood read a portion of the ITA Form a second time, Thatcher immediately agreed to submit an evidentiary test of his breath without hesitation. There was no evidence that Thatcher was resistant to providing the breath test at the police station, but rather was cooperative with Trooper Wood. Furthermore, Trooper Wood testified that he did not have any reason to believe that Thatcher was not able to comprehend what was read to him as Thatcher stated he understood the ITA Form. (R. 59, 156:19–22.)

Thatcher's argument was largely based upon the assertion that Trooper Wood's comment made the circumstances seem less serious, which falsely incentivized him to consent to a test. (R. 21, 118–19.) Thatcher also pointed to the following statement made by Trooper Wood to support this argument: "I have to read you a form and depending on how that goes, you should be able to just go to the jail, book you through, and you will be able to get out tonight with a sober driver. So, sound like a plan?" (*Id.*) This statement was made before Trooper Wood read Thatcher the ITA Form. Trooper Wood's vague statement merely described a general outline of the procedures as they relate to OWI first offense arrests in Wisconsin. Thatcher's claim that this statement was a coercive, improper police tactic that rendered his consent to submit to a breath test involuntary is unconvincing.

In *Blackman*, the Supreme Court of Wisconsin analyzed whether the defendant's consent to submit to a blood draw was voluntary after

the officer incorrectly advised the defendant that his license would be revoked if he refused to provide a sample. *Blackman*, 377 Wis. 2d at 345. The Wisconsin Supreme Court held that the defendant was improperly coerced into consenting to provide a blood sample because the text of the form incorrectly advised that his operating privilege would be revoked, however such penalty was not applicable to the defendant under the circumstances in which he was detained. *Id.* at 364–65.

Blackman is similar to this case in the sense that the Court applied a Fourth Amendment analysis to an accused driver's consent to submit to a chemical test. However, the facts are distinguishable because Trooper Wood properly advised Thatcher of his rights under § 305.305(4); at no point did Trooper Wood misstate the law or the penalties associated with consenting to an evidentiary chemical test. Rather, Thatcher's perception was based upon his own mistaken beliefs about the penalties associated with an OWI first offense and a speeding citation, even after he was fully advised of the penalties when Trooper Wood administered the ITA Form. Thatcher's argument rests upon speculation and his own erroneous assumptions that cannot reasonably be attributed to any statement made by Trooper Wood. Nor can it be reasonably inferred that Trooper Wood coerced Thatcher's consent to submit to a chemical test.

It follows that Thatcher's choice to submit to an evidentiary chemical test of his breath was entirely free and voluntary. As a result, the circuit court erred in suppressing evidence of Thatcher's breath test.

III. THE CIRCUIT COURT ERRED IN SUPPRESSING THATCHER'S SECONDARY BLOOD TEST.

Under the fruit of the poisonous tree doctrine, secondary evidence discovered as a result of illegal government activity must be excluded. *State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 98, 700 N.W.2d 899, 905. However, if the derivative evidence was discovered

by means sufficiently distinguishable from the illegality to be purged, then it is admissible. *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). The admissibility of derivative evidence is determined by examining: (1) the temporal proximity between the arrest and the consent (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the alleged police misconduct. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975).

If the Court finds that the *Quelle* framework is not applicable and that Thatcher freely and voluntarily consented to an evidentiary chemical test of his breath, the argument regarding the fruit of the poisonous tree doctrine is moot. As previously stated, the State contends that no police misconduct occurred. Thus, there is no tainting of evidence that would give rise to fruit of the poisonous tree. However, even if this Court determined that Thatcher's initial consent was tainted, when applying the *Brown* factors, there is sufficient attenuation to purge the taint.

With respect to the temporal proximity between the initial breath test and Thatcher's independent request for a secondary blood test, it is unclear from the record at what point in time Thatcher requested a secondary blood test, however it is apparent the request was not made until sometime after Thatcher provided his primary breath test at the police station. (R. 18, 107.) The lapse in time from Trooper Wood's statement to the time Thatcher later independently requested a secondary blood test favors the state.

The United States Supreme Court has explained that when considering the factor of intervening circumstances, the court must look for an "act of free will [by the defendant] unaffected by the initial illegality." *Brown*, 422 U.S. at 603. Additionally, in the case of *State v. Phillips*, the Wisconsin Supreme Court determined that a conversation by officers with a defendant may serve as an intervening circumstance, because "it provided the defendant with sufficient information with

which he could decide whether to freely consent." 218 Wis. 2d 180, 208, 577 N.W.2d 794, 807 (Wis. 1998).

Here, Thatcher independently requested a secondary blood test by way of the information provided to him in the ITA Form, not based upon Trooper Wood's statement that an OWI first offense is like a "bad speeding ticket" – assuming the Court finds this commentary to be unlawful police misconduct. Therefore, like *Phillips*, there is a significant intervening circumstance that indicates sufficient attenuation of the taint.

The last factor examines the purpose and flagrancy of the police misconduct. In *Phillips*, the court relied on a subjective determination of whether the officer acted in bad faith. *Phillips*, 577 N.W.2d at 808. Here, there is no evidence that Trooper Wood was acting in bad faith. Trooper Wood made a factual comparison of a first offense OWI to a "bad speeding ticket." This was not intended to be misleading or deceitful and as previously discussed, was not erroneous. Based on the presence of a significant intervening circumstance and a lack of bad faith by Trooper Wood, there is sufficient attenuation to purge the taint of the allegedly coercive comments.

Ultimately, Thatcher freely and voluntarily consented to the primary breath test. His decision to request a secondary blood test came after Trooper Wood read him the ITA Form, which advised Thatcher of his right to make such request. Because Trooper Wood was required to read the ITA Form in order to comply with his statutory duty, the fruit of the poisonous tree doctrine does not apply. It follows that the circuit court erred in suppressing Thatcher's secondary blood test and issuance of a dismissal of the charge of Operating with a Prohibited Alcohol Concentration-first offense, in violation of Wis. Stat. § 346.63(1)(b).

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court to reverse the circuit court's orders suppressing evidence of Thatcher's breath and blood tests and subsequent dismissal of the charge of Operating with a Prohibited Alcohol Concentration.

Dated this 30th day of April, 2021.

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, proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 5,858 words.

Dated this 30th day of April 2021.

Electronically signed by Michelle P. Brekken
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 30th day of April 2021.

Electronically signed by Michelle P. Brekken
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CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 30th day of April, 2021.

Signed:

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