STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2020AP001734

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CRAIG R. THATCHER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE AND DISMISSING CASE, ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, CASE NOS. 19 TR 4944 AND 19 TR 4946, THE HONORABLE SCOTT NEEDHAM, PRESIDING

DEFENDANT-RESPONDENT'S BRIEF

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I. Whether the State has conceded that the circuit court properly exercised its discretion when it granted Mr. Thatcher's motion to suppress as a sanction for the prosecution's failure to reply?

At the evidentiary hearing, the circuit court gave both parties additional time to file written arguments in support of or in opposition to Mr. Thatcher's motion to suppress. The State however failed to file a written argument. The circuit court therefore granted Mr. Thatcher's motion to suppress as a sanction for the prosecution's failure to reply.

II. Whether the circuit court properly granted Mr. Thatcher's motion to suppress when it found that Trooper Wood had exceeded his duty under sec. 343.305(4) such that the three-part test established in *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), was satisfied, thus requiring suppression of all direct and derivative evidence of Mr. Thatcher's evidentiary breath test?

Mr. Thatcher filed a pretrial motion to suppress, arguing that Trooper Wood had exceeded his duty under sec. 343.305(4) by providing Mr. Thatcher excessive misinformation found nowhere in the Informing the Accused Form and this erroneous extra information was both misleading and affected Mr. Thatcher's ability to decide regarding chemical testing. After an evidentiary hearing, the circuit court granted the motion. The State subsequently requested the circuit court to reconsider its decision. After considering the merits of the State's arguments, the circuit court affirmed its granting of Mr. Thatcher's suppression motion.

III. Whether the excessive misinformation provided by Trooper Wood, as well as the totality of the circumstances, deprived Mr. Thatcher of his ability to make a free and unconstrained decision about chemical testing, thus rendering any consent involuntary?

Mr. Thatcher filed a pretrial motion to suppress, arguing that Trooper Wood improperly incentivized and thus coerced Mr. Thatcher's would-be consent. The circuit court granted suppression of all direct and derivative evidence of Trooper Wood's improper influence on Mr. Thatcher's decision regarding chemical testing in this case.

IV. Whether the circuit court properly suppressed Mr. Thatcher's secondary blood test under the fruit of the poisonous tree doctrine?

Mr. Thatcher filed a pretrial motion to suppress all direct and derivative evidence of Trooper Wood's improper influence on Mr. Thatcher's decision regarding chemical testing in this case. The circuit court granted the motion, thereby rendering both Mr. Thatcher's primary breath test and secondary blood test inadmissible at trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Thatcher does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE AND FACTS

On November 8, 2019, the State charged Mr. Thatcher with operating while under the influence of an intoxicant ("OWI"), contrary to Wisconsin Statutes sec. 346.63(1)(a), and operating with a prohibited alcohol concentration ("PAC"), contrary to Wisconsin Statutes sec. 346.63(1)(b), both as first offenses.

On March 13, 2020, Mr. Thatcher filed a motion to suppress all direct and derivative evidence of Trooper Wood's improper influence on Mr. Thatcher's decision regarding chemical testing in this case for two reasons. (R. 8.) First, Mr. Thatcher argued that Trooper Wood exceeded his duty under Wisconsin Statutes sec. 343.305(4) by providing excessive misinformation and this erroneous extra information affected Mr. Thatcher's ability to make a decision regarding chemical testing. (*Id*. at 1–4.) Second, Mr. Thatcher argued that Trooper Wood engaged in an unlawful attempt to incentivize Mr. Thatcher's consent, thereby rendering it involuntary under the Fourth Amendment. (*Id*. at 4.)

The circuit court held an evidentiary hearing of the suppression motions on July 13, 2020. (R. 59 at 1.) During the evidentiary hearing, Mr. Thatcher and the trooper involved in the traffic stop testified, as set out below. (*Id*. at 2.) Additionally, portions of the DVD recording of the trooper's squad cam—specifically from the 00:00:07 mark until 00:01:06, the 00:01:36 mark until 00:05:18, and the 00:35:06 mark until 00:37:15—were admitted into the record. (*Id*. at 8:12, 10:16, 10:21; R. 17.)[1] The circuit court also received a copy of the Informing the Accused Form ("ITAF into the record. (*Id*. at 12:14–21; R. 19.)

[1] Trial counsel additionally offered a work–product transcription that he prepared of Trooper Wood's squad cam recording for demonstrative purposes. (R. 59 at 9:4–11; *see also* R. 18.) The State did not object to the offered transcript's admission for demonstrative purposes, agreeing that "a transcript would be appropriate" given that "[s]ome of [the conversation between Trooper Wood and Mr. Thatcher] is very difficult to hear." (*Id*. at 9:12–21.) The circuit court therefore received trial counsel's prepared transcript into the record for demonstrative purposes. (*Id*. at 9:22–24.)

On direct examination, Trooper Wood testified that he arrested Mr. Thatcher for OWI on November 2, 2019. (R. 59 at 7:6–9.) Prior to reading the ITAF, Trooper Wood had a conversation with Mr. Thatcher during which he attempted to explain to Mr. Thatcher what an OWI-1st offense was. (*Id*. at 14:3–7.) Mr. Thatcher was seated inside the squad car when having this conversation with Trooper Wood, who was standing outside of the squad car. (*Id*. at 21:7–11.) During this conversation, Trooper Wood specifically informed Mr. Thatcher as follows:

> So this is first offense. It is not a crime. Traffic forfeiture, like a bad speeding ticket that nobody wants.

(R. 17 at 00:36:19–00:36:27.)

While Trooper Wood claimed that all Mr. Thatcher was facing was a traffic forfeiture, which he reassured Mr. Thatcher was comparable to "a bad speeding ticket," the trooper acknowledged on cross-examination that he failed to inform Mr. Thatcher that in addition to a monetary forfeiture, he would also be subject to revocation of his Class D driver's license, disqualification of his commercial driver's license, as well as mandatory Alcohol and Other Drug Assessment ("AODA"). (R. 59 at 15:2–14.)

Importantly, Trooper Wood conceded that his law enforcement training emphasizes that law enforcement officers are not supposed to interpret the meaning of the ITAF or give legal advice. (*Id*. at 13:16–20.) Moreover, Trooper Wood even acknowledged the same at one point during his conversation with Mr. Thatcher, stating:

> 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.

(R. 17 at 00:03:32–00:03:46; R. 59 at 13:21–14:2.) Nevertheless, Trooper Wood deviated from simply reading the information contained in the ITAF and instead took it upon himself to misadvise Mr. Thatcher that a first-offense OWI is just "like a bad speeding ticket that nobody wants." (R. 17 at 00:36:19–00:36:27; R. 59 at 16:19–21.)

Trooper Wood further informed Mr. Thatcher as follows:

> I have to read you a form and depending on how all 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?

(R. 17 at 00:36:31–00:36:44.) As such, Trooper Wood incentivized cooperation by informing Mr. Thatcher that whether he was able to get out of jail that evening with a sober driver was fully dependent on how he responded to the trooper's request for inculpatory evidence at the end of the ITAF. (R. 59 at 17:12–20.)

During this initial conversation with Mr. Thatcher, Trooper Wood was neither reading off a legal form nor using legal terminology. (*Id*. at 15:18–21.) Rather, he was using "everyday person-to-person, eye contact, normal language." (*Id*. at 15:22–24.) Following this initial conversation, Trooper Wood then read Mr. Thatcher the ITAF, which contains more legal terminology. (R. 17 at 00:01:36–00:03:20; *see also* R. 19.)

When specifically asked whether his conversation with Trooper Wood affected his ability to make a decision regarding chemical testing, Mr. Thatcher answered, "Very much so." (R. 59 at 20:23–21:1.) Mr. Thatcher testified, and the circuit court found credible, (R. 30 at 2), that by claiming that a first-offense OWI is just "like bad speeding ticket that nobody wants," Trooper Wood effectively downplayed the seriousness of this incident, (R. 59 at 22:3–5). Further, Mr. Thatcher reiterated that given the position of trust that a law enforcement officer holds in our society and the fact that he was raised to trust the police, he believed Trooper Wood when the trooper claimed that this was nothing more than "a bad speeding ticket." (*Id*. at 29:8–14.)

Based on Trooper Wood's misrepresentation, Mr. Thatcher acquiesced to the evidentiary chemical breath test. (R. 17 at 00:04:31–00:04:36; R. 18 at 3.) At Mr. Thatcher's request, the trooper also administered a secondary chemical test of Mr. Thatcher's blood. (Brief of Plaintiff-Appellant at 3.)

The evidentiary hearing concluded with the circuit court giving both parties additional time to file written arguments on the two issues raised by Mr. Thatcher's suppression motion. (R. 59 at 30:15–21.)

On August 7, 2020, the State filed a document purporting to be a response brief. (R. 20.) However, the State provided no written argument or analysis in its submission. (*Id*.) Rather, the FACTS, ARGUMENT, and CONCLUSION sections of the State's response brief were entirely blank. (*Id*.)

On August 17, Mr. Thatcher filed his reply brief in support of his suppression motion. (R. 21.)

On September 22, after the parties were ordered to file their briefs, the circuit court entered a Decision and Order granting Mr. Thatcher's suppression motion. (R. 22 at 5.) In its written decision, the circuit court noted that in his reply brief, Mr. Thatcher "cross-referenced the testimony of Trooper Wood and also referred the Court to a transcript of the video that was offered as an exhibit at the July 13th hearing." (*Id*. at 4.) The circuit court ultimately concluded that the State "apparently conceded the accuracy of the video transcript *and* the issues as raised by Thatcher" by virtue of submitting its blank response brief:

> Whether an oversight or not, this blank slate and lack of analysis provided the Court with no assistance in addressing the issues raised by Thatcher in his motion. The Court can only conclude that the State chose to abandon its prior challenge to the motion. Accordingly, after considering the file, proceedings and record herein, the Court thus finds it appropriate to suppress the results of the primary alcohol test due to Trooper Wood's improper influence on Thatcher. The Court declines the opportunity to develop the State's argument.

(R. 22 at 4) (emphasis in original.)

It was only after receiving the circuit court's September 22 Decision and Order and being alerted to the fact that it had submitted a blank response brief that the State filed a "corrected" response brief on September 23. (R. 23.) This delinquent filing marked the first time that the State presented written arguments in opposition to Mr. Thatcher's suppression motion.

Two days later, on September 25, the State filed a corresponding letter with the circuit court explaining the inadvertent error it apparently made in submitting its blank brief and requesting the circuit court to reconsider its September 22 Decision and Order in light of that error. (R. 25.)

That same day, trial counsel filed a letter response asking the circuit court to stand by its ruling. (R. 24.) In his letter, trial counsel reiterated that the circuit court, in its September 22 Decision and Order, decided to grant Mr. Thatcher's suppression motion due to the State's blank submission, "whether [it was] an oversight or not":

> The State in its letter agrees that the blank brief was an oversight, but this Court stated that whether or not it was an oversight was immaterial to its decision.

(*Id*.) Trial counsel further pointed out that "for every electronic filing a party submits, it receives an automated message from CCAP, with a link to the document, which a party can click to confirm that their submission was in proper form." (*Id*.) The State allowed that claim to remain uncontroverted.

On October 1, the circuit court denied the State's motion to reconsider its September 22 Decision and Order granting Mr. Thatcher's motion to suppress. (R. 30 at 2.) "Having reviewed the arguments presented," the circuit court concluded that the State "ha[d] not submitted newly discovered evidence or established a manifest error of law or fact." (*Id*. at 1.)

In reaching this decision, the circuit court explained that its granting of Mr. Thatcher's motion to suppress was proper for two separate and distinct reasons, of which the State briefed only one in this Court. First, the granting of Mr. Thatcher's suppression motion was an appropriate sanction for the prosecution's failure to reply:

> While the Court appreciates the submission of the corrected brief and the fact that a technical error was apparently the culprit for the prior blank slate, it is noteworthy to point out that the State's brief was filed August 7, 2020 while the technical error was not discovered until September 23, 2020; the day after the Court pointed out the oversight in its Decision and Order and five weeks after the Defense submitted its brief. Though perhaps the State provided an explanation for its mistake, it is nevertheless not an excuse. As aptly noted in ***Sherman v. Heiser***, 85 Wis.2d 246,

> 254, 270 N.W.2d 397, 401 (1978), "courts cannot allow litigants to control judicial calendars." Furthermore, the Court has both statutory and inherent authority "to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders." ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273-74, 470 N.W.2d 859 (1991).

(*Id*. at 1–2.)

Second, the granting of Mr. Thatcher's suppression motion was further proper based on the merits of Mr. Thatcher's argument:

> In addition, a consideration of the merits of the State's argument does not change the outcome. To assess the adequacy of the information provided by Trooper Wood under the implied consent law, this Court must apply the following three-prong inquiry:
>
> (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m) to provide information to the accused driver;
>
> (2) Is the lack or oversupply of information misleading; *and*
>
> (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?
>
> ***County of Ozaukee v. Quelle****,* 198 Wis.2d 269, 280, 542 N.W.2d 196 (Ct.App.1995). The answer to all three questions is "yes." As such, the Court still finds it appropriate to suppress the results of the primary alcohol test due to Trooper Wood's improper influence on Thatcher.

(*Id*. at 2) (emphasis in original.)

That same day, trial counsel simultaneously filed two letters with the circuit court. In his first letter, trial counsel asked the circuit court also to suppress the results of the secondary blood test in this case on the grounds that the "fruit of the poisonous tree" doctrine precluded admission of the secondary blood test, given the circuit court's October 1 suppression Order relating to the primary breath test. He argued to the circuit court:

> In short, the primary and secondary tests, where both exist, are inextricably intertwined and interrelated. The secondary test does not come from a source independent of any primary test. Rather, the primary test is the source of the secondary test. The secondary test, where one exists, is inextricably tainted by an inadmissible primary test.
>
> …

> In light of the above, the "fruit of the poisonous tree" doctrine precludes admission of the secondary test, given the suppression order relating to the first. ***State v. Schlise***, 86 Wis. 2d 26, 45, 271 N.W.2d 619 (1978) ("[T]he fruit of the poisonous tree doctrine can be regarded as a device to prohibit the use of any secondary evidence . . . which owes its discovery to illegal government activity."). Here, the secondary blood test was "secondary evidence" which owed its discovery to the illegal activity giving rise to the first test. The secondary test only exists because the primary test exists, and it therefore must be suppressed as well.

(R. 28 at 1–2.)

In his second letter, trial counsel requested dismissal of the PAC charge based upon the circuit court's October 1 Order suppressing the breath test results, as well as trial counsel's simultaneously filed letter brief regarding the "fruit of the poisonous tree" doctrine. (R. 31.)

On October 7, the State filed a letter response objecting to trial counsel's request to suppress the results of the secondary blood test. (R. 32.)

On October 9, the circuit court entered a third Decision and Order suppressing Mr. Thatcher's secondary blood test results:

> After applying the poisonous tree doctrine to the circumstances of this case, it is clear that the consequence of suppressing the breath test is also suppression of the blood test. Contrary to the State's argument, Thatcher's request for a secondary blood test was not an independent decision sufficiently attenuated from the primary taint but rather a byproduct of the breath test under Wis. Stat. § 343.305(5)(a). In other words, it was only available as an alternative after Thatcher submitted to the primary test. But for the breath test, which the Court has suppressed, there would have not been a second test. Simply stated, the State cannot benefit from the excess information and "improper influence" of Trooper Wood. The Courts have held that the second test is best described as "material evidence relating to the prior test". ***State v. Renard***, 123 Wis.2d 458, 461 (Ct. app. 1985) and ***State v. Walstad***, 119 Wis.2d 483, 527 (1983). In this case, the prior test has been suppressed and the secondary test, as a result, is immaterial and of no evidentiary value. As such, the secondary blood test results are inadmissible as well.

(R. 37 at 2–3.) The circuit court further issued an Order dismissing the charge for PAC. (R. 38.)

On October 15, the State filed a motion to dismiss the OWI charge without prejudice, conceding that it "cannot meet its burden to due to the Court's suppression of Defendant's breath and blood test results and intends to proceed with

an appeal of the companion PAC charge." (R. 52.) The circuit court granted the State's motion over Mr. Thatcher's objection. (R. 50; R. 49.)

The State now appeals the circuit court's orders suppressing all direct and derivative evidence of Mr. Thatcher's evidentiary breath test and subsequent dismissal of the charge of PAC.

ARGUMENT

This Court should affirm the circuit court's orders suppressing all direct and derivative evidence of Mr. Thatcher's evidentiary breath test and subsequent dismissal of the charge of Operating with a Prohibited Alcohol Concentration for four reasons. First, by failing to address the issue in any manner, the State concedes that the circuit court properly exercised its discretion in granting Mr. Thatcher's motion to suppress as a sanction for the prosecution's failure to reply. Second, the circuit court correctly granted Mr. Thatcher's motion to suppress when it made factual findings and concluded that Trooper Wood exceeded his duty under sec. 343.305(4) such that the three-part test established in ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), was satisfied. Third, the excessive misinformation provided by Trooper Wood, as well as the totality of the circumstances, deprived Mr. Thatcher of his ability to make a free and unconstrained decision about chemical testing, thus rendering any consent involuntary. Finally, because Wisconsin law only grants drivers the right to a secondary test under sec. 343.305(5)(a) when they have consented to the primary test, the circuit court properly suppressed Mr. Thatcher's secondary blood test as fruit of the poisonous tree following suppression of the primary test.

I. BY FAILING TO ADDRESS THE ISSUE IN ANY MANNER, THE STATE CONCEDES THAT THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN GRANTING MR. THATCHER'S MOTION TO SUPPRESS AS A SANCTION FOR THE PROSECUTION'S FAILURE TO REPLY.

Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity. ***Sands v. Menard***, 2016 WI App 76, ¶ 52, 372 Wis. 2d 126, 887 N.W.2d 94. When an appellant refutes one ground and fails to refute an independent alternate ground, then the appellant has tacitly conceded, resulting in a confession as to the existence of the alternate ground. ***Jarrett v. Lab. & Indus. Rev. Comm'n***, 2000 WI App 46, ¶ 18, 233 Wis. 2d 174, 607 N.W.2d 326. "[W]hen an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling," this Court has held the appellant cannot complain if the ground is taken as confessed. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (when appellant ignores grounds for circuit court's ruling and appellant's briefing does not refute the ruling, specially where those grounds are asserted by opponent, court of appeals views the matter as conceded).

Further, this Court "'will not abandon [its] neutrality to develop arguments' for the parties." ***Menard***, 2016 WI App 76 at ¶ 52 (citation omitted). Moreover, on appeal it is the appellant's burden to demonstrate that the circuit court erred. ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 57, 571 N.W.2d 686 (Ct. App. 1997). Therefore, this Court should affirm the circuit court's orders suppressing all direct and derivative evidence of Mr. Thatcher's evidentiary breath test and subsequent dismissal of the charge of Operating with a Prohibited Alcohol Concentration for four reasons.

a. The circuit court granted Mr. Thatcher's motion to suppress as a sanction for the prosecution's failure to reply; however, the State fails to address this ground upon which the circuit court ruled, so it has thus conceded the validity of the circuit court's ruling.

At the evidentiary hearing, the circuit court gave both parties additional time to file written arguments in support of or in opposition to Mr. Thatcher's motion to suppress. (R. 59 at 30:15–21.) The State however failed to file a written argument. (R. 20.) The circuit court therefore granted Mr. Thatcher's motion to suppress as a sanction or the prosecution's failure to reply. (R. 30. at 2.)

This Court should conclude that the State has conceded that the circuit court properly exercised its discretion when it granted Mr. Thatcher's motion to suppress as a sanction for the prosecution's failure to reply. The circuit court clearly identified this ground in its October 1 Decision and Order:

> Though perhaps the State provided an explanation for its mistake, it is nevertheless not an excuse. As aptly noted in ***Sherman v. Heiser***, 85 Wis.2d 246, 254, 270 N.W.2d 397, 401 (1978), "courts cannot allow litigants to control judicial calendars." Furthermore, *the Court has both statutory and inherent authority "to sanction parties* for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders." ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273-74, 470 N.W.2d 859 (1991).

(R. 30. at 2) (emphasis added.)

The State's decision to ignore this ground in its appellate brief to this Court is fatal to its appeal; it constitutes a concession that the circuit court properly exercised its discretion when it granted Mr. Thatcher's motion to suppress as a sanction for the prosecution's failure to reply.

Because this single issue is dispositive, this Court need not consider any of the State's arguments regarding the merits of Mr. Thatcher's motion to suppress. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶ 1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive); *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (appellate court should decide cases on the narrowest possible grounds).

b. The circuit court acted within the bounds of its discretion in granting Mr. Thatcher's motion to suppress as a sanction for the State's failure to brief the issue.

The question of imposition of sanctions is, very simply, a matter of discretion for the circuit court. The erroneous exercise standard of review is highly deferential to the circuit court. ***Prince Corp. v. Vandenberg***, 2016 WI 49, ¶ 16, 369 Wis. 2d 387, 882 N.W.2d 371. A circuit court has discretion to impose sanctions and choose which sanctions to impose, including the granting of motions to suppress evidence. ***Industrial Roofing Services, Inc. v. Marquardt***, 2007 WI 19, ¶ 41, 299 Wis. 2d 81, 726 N.W.2d 898. If a circuit court has "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach," then a discretionary decision will be sustained. ***Id***. (citation omitted).

Here, the circuit court acted within the bounds of its discretion in granting Mr. Thatcher's suppression motion as a sanction for the prosecution's failure to reply.

This Court should therefore affirm the circuit court's order suppressing all direct and derivative evidence of Mr. Thatcher's evidentiary breath test, as well as its order dismissing the charge of Operating with a Prohibited Alcohol Concentration.

II. THE CIRCUIT COURT PROPERLY GRANTED MR. THATCHER'S MOTION TO SUPPRESS WHEN IT MADE FATUAL FINDINGS AND CONCLUDED THAT TROOPER WOOD EXCEEDED HIS DUTY UNDER SEC. 343.305(4) BY PROVIDING EXCESSIVE INFORMATION FOUND NOWHERE IN THE INFORMATING THE ACCUSED FORM AND THIS ERROENOUS EXTRA INFORMATION AFFECTED MR. THATCHER'S ABILITY TO DECIDE REGARDING CHEMICAL TESTING.[2]

In ***County of Ozaukee v. Quelle***, this Court set forth a three-part test to assess the adequacy of the warning process under the implied consent law:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under secs. 343.305(4) and (4m) to provide information to the accused driver?
> (2) Is the lack or oversupply of information misleading?
> (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* ***In re Smith***, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 (upholding the ***Quelle*** framework with respect to "excessive information" cases such as the one at bar). In this case, all factors are present.

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. ***State v. Hughes***, 2000 WI 24, ¶ 15, 233 Wis. 2d 280, 607 N.W.2d 621.

In reviewing a decision on a motion to suppress, this Court applies a two-part test. First, the Court "review[s] the circuit court's findings of historical fact, and will uphold them unless they are clearly erroneous." ***State v. Eason***, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625 (citing ***State v. Pallone***, 2000 WI 77, ¶ 27, 236 Wis. 2d 162, 613 N.W.2d 568). Second, this Court independently "review[s] the application of constitutional principles to those facts *de novo*." ***Id***.

[2] Although this Court need not address any of the State's arguments regarding the merits of Mr. Thatcher's motion to suppress or the resulting suppression of both Mr. Thatcher's primary breath test and secondary blood test, Mr. Thatcher does so briefly to fully respond to the State's brief.

a. Trooper Wood exceeded his duty.

The circuit court found as a matter of fact that the record satisfied the first ***Quelle*** prong. (R. 30 at 2.) Again, a circuit court's factual findings will be upheld unless they are clearly erroneous. ***State v. Turner***, 186 Wis. 2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994).

This Court should therefore uphold the circuit court's factual determination that Trooper Wood exceeded his duty under sec. 343.305(4) by providing Mr. Thatcher incorrect information found nowhere on the ITAF; that is, that pleading guilty to an OWI-1st offense in Wisconsin is simply a "[t]raffic forfeiture, like a bad *speeding ticket* that nobody wants." (R. 17 at 00:36:19–00:36:27) (emphasis added.) Those words are nowhere to be found on the ITAF. (*See* R. 19.) The government cannot deny this deviation in good faith.

The State invites this Court to reach the novel legal conclusion that Trooper Wood's wrong legal advice is somehow cured by the fact that he did, at one or more points, read the language from the ITAF when he was not providing that additional inaccurate information. (Brief of Plaintiff-Appellant at 7.) At best, one could say that the trooper provided contradictory information, leaving Mr. Thatcher only to guess at the truth.

In short, the State incorrectly argues that simply because Trooper Wood read from the ITAF some other point in time, as opposed to doing so contemporaneously with the misinformation, he met his duty under sec. 343.305(4), and as such, the first ***Quelle*** prong is not satisfied. This assertion is contrary to established case law, as the first ***Quelle*** prong is satisfied whenever a law enforcement officer has gone beyond simply reading the ITAF. ***Smith***, 2008 WI 23 at ¶ 78 ("*After* discharging his duty under § 343.305(4) by reading the Department of Transportation's Informing the Accused Form verbatim to the defendant, Deputy Sutherland went on to provide additional information to the defendant … The first prong of the three-prong ***Quelle*** inquiry is answered in the affirmative." (emphasis added.)).

Therefore, Trooper Wood exceeded his duty under sec. 343.305(4) when he went beyond the mere reading of the ITAF by providing Mr. Thatcher additional and incorrect information about the penalties for a first offense OWI in Wisconsin. For all these reasons, the first ***Quelle*** prong is satisfied.

b. The additional information was incorrect and misleading.

The circuit court likewise found as a matter of fact that the record satisfied the second ***Quelle*** prong. (R. 30 at 2); *see* ***Turner***, 186 Wis. 2d at 284 (a circuit court's factual findings will be upheld unless they are clearly erroneous)

This Court should therefore uphold the circuit court's factual determination that Trooper Wood misled Mr. Thatcher when he told him that all he would face is a forfeiture or fine by pleading guilty, when in actuality, an individual who pleads guilty to an OWI-1st offense in Wisconsin is not only subject to monetary forfeiture pursuant to Wisconsin Statutes sec. 346.65(2)(am)1, but also revocation of his or her license, disqualification of his or her commercial driver's license, pursuant to Wisconsin Statutes sec. 343.305, as well as a costly and mandatory alcohol and other drug assessment.

The term "misleading" in the second ***Quelle*** prong was meant by the Wisconsin Court of Appeals to be synonymous with the term "erroneous," and requires no showing of bad faith. ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997). These material omissions misstated the legal reality.

While Trooper Wood read the ITAF, he, like the officer in ***Ludwigson***, chose to go beyond simply reading the form by giving *additional* information to the accused. ***Id***. at 874. After reading the provisions of the ITAF, the officer in ***Ludwigson*** then exceeded his duty under sec. 343.305(4) and also attempted to explain the form to Ludwigson in "layman's terms." ***Id***. But the additional information the officer provided to Ludwigson was wrong. ***Id***. at 874 n.1.[3] After the

[3] The officer told Ludwigson that the normal penalty for refusing to submit to a chemical test is a one-year revocation of driving privileges. This was incorrect as Ludwigson had a prior OWI

officer read and explained the form to Ludwigson, she still refused to submit to the test. ***Id***. at 874.

Again, any argument by the State that because Trooper Wood read from the ITAF, he stated the truth to Mr. Thatcher because the form recites proper information, and as such, the second ***Quelle*** prong is not satisfied would be incorrect. This contention ignores the fact that following his reading of the ITAF, Trooper Wood proceeded to supplement the information from the form with his own additional information. However, like the officer in ***Ludwigson,*** the additional information Trooper Wood provided to Mr. Thatcher was wrong and misleading for the reasons above. ***Id***. at 874.

By material omission, Trooper Wood misinformed Mr. Thatcher on the penalties he faced for his first offense in an attempt to get Mr. Thatcher to "consent" to an evidentiary chemical test; therefore, he provided definitionally misleading information. ***Id***. at 875. On these facts, the second ***Quelle*** prong is satisfied. ***Id***. ("We hold, as a matter of law, that the police officer exceeded his duty under § 343.305(4), STATS., and the information given to Ludwigson was erroneous, thereby meeting the first two prongs of the ***Quelle*** test.").

c. The false information affected Mr. Thatcher's ability to make his decision regarding chemical testing.

Finally, this Court should refrain from disturbing the circuit court's factual finding, which was based on its firsthand observations of the testimony, that Trooper's misleading statements affected Mr. Thatcher's decision about chemical testing. ***Smith***, 2008 WI 23 at ¶ 85. The trial judge is the "ultimate arbiter of the credibility of a witness." ***Posnanski v. City of West Allis***, 61 Wis. 2d 461, 465, 213

conviction and her revocation period would be two years. The officer also told Ludwigson that if she was not satisfied with her initial test, she could request an alternative test at her own expense. This was also incorrect. Under secs. 343.305(2) and (5), law enforcement agencies are required to administer an alternative chemical test at their own expense.

N.W.2d 51 (1973). Contrary to the State's contention, the circuit court specifically credited Mr. Thatcher's testimony in finding, as a matter of fact, that Trooper Wood's extraneous comments affected Mr. Thatcher's ability to decide about chemical testing. The circuit court credited that testimony in finding, as a matter of fact, that Mr. Thatcher satisfied the third ***Quelle*** prong. (R. 59 at 20:23–21:1; R. 30 at 2.)

By claiming that a first-offense OWI is just "like bad speeding ticket that nobody wants," Mr. Thatcher confirmed that Trooper Wood effectively downplayed the seriousness of this incident. (*Id*. at 22:3–5.) Further, Mr. Thatcher reiterated that given the position of trust that a law enforcement officer holds in our society and the fact that he was raised to trust the police, he believed Trooper Wood when the trooper claimed that this was nothing more than "a bad speeding ticket." (*Id*. at 29:8–14.)

As such, it is uncontroverted that the supplementary information provided by Trooper Wood contributed to Mr. Thatcher's decision-making process about chemical testing, so much so that upon hearing the trooper's claims, Mr. Thatcher believed Trooper Wood was advising him to consent. This is especially true because Trooper Wood conditioned Mr. Thatcher's timely release on the outcome of what he said in response to the ITAF's ultimate question. (R. 17 at 00:36:31–00:36:44.) The Defense has demonstrated – and the circuit court credited Mr. Thatcher's testimony regarding – the causal link between the misinformation and Mr. Thatcher's ultimate acquiescence to the chemical test. On these facts, the third ***Quelle*** prong is satisfied.

Importantly, the law requires only an influence on the decision. The law does not require the deputy to have subjectively changed Mr. Thatcher's mind about chemical testing for suppression to occur. Thus, under the third ***Quelle*** prong, Mr. Thatcher merely has to demonstrate that Trooper Wood's additional information affected his ability to make his decision about chemical testing. Mr. Thatcher has made such a showing. *See* ***Quelle***, 198 Wis. 2d at 280 (holding that the inquiry under

the third prong considers whether the misinformation "affected" the driver's ability to make a choice).

One type of improper influence exists in this situation, where the trooper made either option sound like a less serious matter than it was in fact. Mr. Thatcher has due process rights which are especially toothy in a situation where the arresting officer is misrepresenting potential penalties and offering to let him out of jail more efficiently if he chooses the option towards which he is being steered. The trooper's comments affected Mr. Thatcher's ability to make his decision.

Accordingly, this Court must affirm the circuit court's orders suppressing all direct and derivative evidence of Mr. Thatcher's evidentiary breath test and dismissing the charge of Operating with a Prohibited Alcohol Concentration. ***Quelle***, 198 Wis. 2d at 280 (establishing that a claim that the law enforcement officer exceeded his duty under sec. 343.305(4) by providing the accused incorrect information found nowhere in the ITAF and this incorrect information was both misleading and affected the accused's ability to make a decision regarding chemical testing is grounds for suppression of a chemical test result).

III. EVEN UNDER A FOURTH AMENDMENT ANALYSIS, SUPPRESSION OF ALL DIRECT AND DERIVATIVE EVIDENCE OF TROOPER WOOD'S IMPROPER INFLUENCE ON MR. THATCHER'S DECISION REGARDING CHEMICAL TESTING IS WARRANTED AS THE EXCESSIVE MISINFORMATION PROVIDED BY TROOPER WOOD, AS WELL AS THE TOTALITY OF THE CIRCUMSTANCES, DEPRIVED MR. THATCHER OF HIS ABILITY TO MAKE A FREE AND UNCONSTRAINED DECISION ABOUT CHEMICAL TESTING, THUS RENDERING ANY CONSENT INVOLUNTARY.

"A warrantless search is presumptively unreasonable." ***State v. Tullberg***, 2014 WI 134, ¶ 30, 359 Wis. 2d 421, 857 N.W.2d 120. The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution allows for warrantless searches pursuant to only a few established exceptions. ***Katz***

v. United States, 389 U.S. 347, 357 (1967). One such exception is a search made pursuant to voluntary consent. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 248 (1973). The government bears the high burden of proving consent by clear and convincing evidence. ***State v. Stankus***, 220 Wis. 2d 232, 237–38, 582 N.W.2d 468 (Ct. App. 1998).

As stated in ***State v. Blackman***, voluntary consent must be "an essentially free and unconstrained choice, not the product of duress or *coercion*, express or implied." 2017 WI 77, ¶ 56, 377 Wis. 2d 339, 898 N.W.2d 774 (citations omitted) (emphasis in original). The test for voluntariness asks whether consent was given in the "absence of *actual coercive, improper police practices designed to overcome the resistance of a defendant*." ***State v. Clappes***, 136 Wis. 2d 222, 245, 401 N.W.2d 759 (1987) (emphasis added). In making this determination, no single factor is dispositive. ***Hughes***, 2000 WI 24 at ¶ 41. Rather, this Court must examine the totality of the circumstances and place special emphasis on the circumstances surrounding the consent and the characteristics of the defendant. ***Id***.

Again, when reviewing a trial court's ruling on a motion to suppress evidence, a reviewing court will uphold any factual findings unless clearly erroneous. ***State v. Washington***, 2005 WI App 123, ¶ 11, 284 Wis. 2d 456, 700 N.W.2d 305. The reviewing court, however, independently decides whether the facts establish that a particular search or seizure occurred, and, if so, whether it violated constitutional standards. ***Id***.

a. Trooper Wood improperly incentivized and thus coerced Mr. Thatcher would-be consent.

Coercive conduct or improper pressures may come not only in the form of overt or explicit means but also in the form of subtleties. ***Schneckloth***, 412 U.S. at 224–228. As the United States Supreme Court said in ***Schneckloth***:

> *But the Fourth and Fourteenth Amendments require that a consent not be coerced,* by explicit or *implicit means,* by implied threat or covert force*. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a*

> *pretext for the unjustified police intrusion against which the Fourth Amendment is directed.*

Id. at 228 (emphasis added). Thus, no matter how subtle coercion is applied, any resulting consent is no less a pretext for an unjustified intrusion under the Fourth Amendment. ***Id***.

Again, in his dialog with Mr. Thatcher, Trooper Wood attempted to incentivize consent by explicitly suggesting to Mr. Thatcher that there was a right choice for him to make when answering the ITAF. Trooper Wood gave the following subtle suggestion that was strategically made to persuade Mr. Thatcher to consent, specifically:

> I have to read you a form and *depending on how all 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?*

(R. 17 at 00:36:31–00:36:44) (emphasis added.) Further, the trooper proceeded to provide Mr. Thatcher with improper legal advice making this all sound like a less serious matter than it is in fact. (R. 17 at 00:36:19–00:36:27.)

Based on their exchange, this Court should conclude that Trooper Wood's clever guidance objectively led Mr. Thatcher to believe that the trooper was encouraging him and falsely incentivizing him to consent to a test. These suggestions are an unconstitutional misuse of authority, as Trooper Wood is not an attorney, yet he chose to provide improper legal advice in order to obtain Mr. Thatcher's acquiescence to what would have otherwise been a nonconsensual search. "Subtle suggestions, strategically made, may amount to deception or trickery where the intent is a misrepresentation of authority." ***State v. Giebel***, 2006 WI App 239, ¶ 19, 297 Wis. 2d 446, 724 N.W.2d 402, *abrogated on other grounds by* ***State v. Brar***, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499.

Accordingly, this Court should additionally find Trooper Wood's conduct an affront to ***State v. Blackman*** and therefore suppression of all direct and derivative evidence is appropriate. 2017 WI 77 at ¶ 56 (holding that voluntary consent must be "an essentially free and unconstrained choice, not the product of duress or coercion,

express or implied.") (citations omitted). Therefore, this Court must suppress all direct and derivative evidence discovered pursuant to the warrantless search. ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963); *see also* ***Mapp v. Ohio***, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

IV. BECAUSE WISCONSIN LAW ONLY GRANTS DRIVERS THE RIGHT TO A SECONDARY TEST UNDER SEC. 343.305(5)(a) WHEN THEY HAVE CONSENTED TO THE PRIMARY TEST, THE CIRCUIT COURT PROPERLY SUPPRESSED MR. THATCHER'S SECONDARY BLOOD TEST AS FRUIT OF THE POISONOUS TREE FOLLOWING SUPPRESSION OF THE PRIMARY TEST.

The exclusionary rule prohibits admissibility of both tangible and intangible evidence and also excludes derivative evidence via the fruit of the poisonous tree doctrine, if it "is the product of the primary evidence, or that it is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint. ***Murray v. United States***, 487 U.S. 533, 536–37 (1988). The fruit of the poisonous tree doctrine "in its broadest sense, can be regarded and has been in fact applied as a device to prohibit the use of any secondary evidence which is the product of or which owes its discovery to illegal government activity." ***State v. Schlise***, 86 Wis. 2d 26, 45, 271 N.W.2d 619 (1978), and ***Wong Sun***, 371 U.S. at 485–88.

This Court should affirm the circuit court's conclusion that the secondary blood test was fruit of the primary breath test's poisonous tree The interrelationship between primary and secondary chemical tests is evident. Without a primary test, no secondary test can occur. In Wisconsin, the arresting officer gets to designate whether the primary test will be of blood, breath, or urine. Wis. Stat. § 343.305(3)(a). Only after submitting to the primary test does Wisconsin law give drivers the right to request a secondary test. Wis. Stat. § 343.305(5)(a). Wisconsin

courts have held that the second test is best described as "material evidence relating to the prior test." ***State v. Renard***, 123 Wis. 2d 458, 461, 367 N.W.2d 237 (Ct. App. 1985). This description makes sense because (1) the secondary test serves to confirm or challenge the results of the first test, (2) as stated above, a driver only gets the second test once they submit to the first test, and (3) a person requests a second test only in hopes that it will cast doubt upon the first test.

In short, the primary and secondary tests, where both exist, are inextricably intertwined and interrelated. The secondary test does not come from a source independent of any primary test. Rather, the primary test *is* the source of the secondary test. The secondary test, in those rare cases where one exists, is inextricably tainted by an inadmissible primary test. As such, the circuit court correctly rejected the State's claim that Mr. Thatcher's secondary blood test was an independent decision sufficiently attenuated from the primary taint. (R. 37 at 2.)

In light of the above, the "fruit of the poisonous tree" doctrine precludes admission of the secondary test, given the suppression order relating to the first. ***Schlise***, 86 Wis. 2d at 45 ("[T]he fruit of the poisonous tree doctrine can be regarded as a device to prohibit the use of any secondary evidence . . . which owes its discovery to illegal government activity."). Here, the secondary blood test was "secondary evidence" which owed its discovery to the illegal activity giving rise to the first test. The secondary test only exists because the primary test exists, and it was therefore proper for the circuit court to suppress Mr. Thatcher's secondary blood test as well.

CONCLUSION

For the foregoing reasons, Mr. Thatcher respectfully requests that this Court affirm the circuit court's orders suppressing all direct and derivative evidence of Mr. Thatcher's evidentiary breath test and subsequent dismissal of the charge of Operating with a Prohibited Alcohol Concentration.

Dated this 21st day of September, 2021.

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 7,582 words.

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