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 REPLY BRIEF

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ARGUMENT

I. THE CIRCUIT COURT DID NOT GRANT THATCHER'S MOTION TO SUPPRESS AS A SANCTION AGAINST THE STATE.

Thatcher argues that the State "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." (Resp't Br. 17.) Thatcher mischaracterizes the circuit court's ruling as the circuit court already granted Thatcher's motion to suppress without

any reference to sanctions against the State. (R. 22.) Rather, the circuit court simply concluded:

> . . . 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.

(*Id.*)

The circuit court made no mention of sanctions in granting Thatcher's motion to suppress. (*Id.*) It wasn't until the circuit court's second Decision and Order, *after* the State discovered the inadvertent error, that the circuit court mentioned sanctions. (R. 30.) Even then, the circuit court simply resuscitated its authority to impose sanctions and failed to articulate the proper standard of law or identify the reasons for reaching its conclusion. (*Id.*). Additionally, the circuit court concluded that Thatcher still prevails on his motion to suppress based upon the merits. As such, the State contends the circuit court clearly did not base its decision to suppress evidence of Thatcher's breath test as a sanction against the State. Even if the Court finds the lower court did clearly order a sanction against the State, the State argues that the circuit court was erroneous in its exercise of discretion.

A. The circuit court abused its discretion by failing to make a proper record and apply a proper standard of law.

The State does not dispute that its initial brief submission to the circuit court regarding Thatcher's Motion to Suppress was a "blank brief." (R. 20.) In the circuit court's initial Decision and Order, the court made no mention of sanctions, but rather simply stated that it could "only conclude that the State chose to abandon its prior challenge to the motion" and "declin[ed] the opportunity to develop the State's argument." (R. 22.)

Upon discovery of the error, the State promptly filed the correct brief along with a correspondence to the court explaining the circumstances:

> After reviewing the Decision and Order, it has become apparent a *prior draft* of the State's Brief was *inadvertently* submitted without argument. Because *this was a technical error*, the State respectfully requests the Court to reconsider its Decision and Order *in light of the error*. The *correct version of the brief was immediately filed* for the Court's review, as it was *timely completed* and *unfortunately not properly uploaded to CCAP*. The Court's consideration would be appreciated in light of the *mistaken filing*.

(R. 25.)[1]

The circuit court subsequently issued an order recognizing that the State's submission was a "technical error" that was the "culprit for the prior blank slate" and went on to conclude that while the State provided an "explanation for its mistake, it [was] nevertheless not an excuse." (R. 30.) The circuit court then pointed out its authority to sanction parties for "failure to prosecute . . . comply with procedural statutes or rules, and for failure to obey court orders." (*Id.*) The circuit court did not expressly state it was imposing a sanction against the State, but rather *only identified its authority to do so*. (*Id.*) Furthermore, the circuit court stated in its order that "a consideration of the merits of the State's argument does not change the outcome." (*Id*.) Therefore, the State contends the circuit court did not expressly grant Thatcher's

[1]Thatcher also claimed that the State could have discovered the technical error sooner by pointing 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." (Resp't Br. 12.) While this may be true for defense counsel, that is not the case for prosecutors with heavy caseloads. This point was not refuted with the circuit court as courts are well aware that prosecutors do not receive personal notifications for every case filing. The State concedes that this fact is not part of the record, however it is unreasonable to assume that prosecutors would receive the same notifications on every filing made through the circuit court.

motion to suppress as a sanction against the State. Regardless, even if the Court finds the circuit court did impose a sanction against the State, the circuit court failed to properly issue a sanction in accordance with applicable case law.

A "discretionary decision will not be disturbed 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." *Matter of Sanctions in State v. Rodgers*, 219 Wis. 2d 1, 9, 578 N.W.2d 633, 636 (1998). "For a reviewing court to determine whether the sanctions imposed in a particular case are just, the circuit court must make a record of the reasons for imposing sanctions in that case." *Id.* "A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion." *Id.* at 11.

In *Rodgers*, the Wisconsin Supreme Court held the circuit court abused its discretion in ordering counsel to pay $50 for being eight minutes late to court due to the court's failure to demonstrate how an attorney's tardiness affected the court's ability to proceed with two trials that day or "caused any problems for jurors, victims, witnesses, law enforcement officers or court staff." *Id.* (explaining that the "record must address the disruptive impact on the court's calendar resulting from the attorney's late arrival . . . ."). The Court noted that the trial court judge merely stated the attorney was late, that the court had two jury trials that day and that it was important to start trials at 8:30. *Id.* Because the record "failed to demonstrate that the circuit court examined the relevant facts, applied a proper standard of law or used a demonstrated rational process to reach a conclusion that a reasonable judge could reach," the Court upheld the Court of Appeals reversal of the circuit court's order and remanded the matter with directions to vacate the order imposing a fine against counsel. *Id.*

Similar to *Rodgers*, the circuit court here failed to articulate the reasoning behind its decision. In fact, the circuit court made *no mention* of sanctions in its initial Decision and Order granting Thatcher's motion to suppress. (R. 22.) The circuit court simply stated it could "only conclude that the State chose to abandon its prior challenge to the motion" and "declin[ed] the opportunity to develop the State's argument." (*Id.*) After the State advised the circuit court of the inadvertent filing, the Court cited the technical error may have been an "explanation for its mistake" but stated it was "nevertheless not an excuse." (R. 30.) The circuit court merely stated "courts cannot allow litigants to control judicial calendars" without explaining how the States inadvertent filing controlled the judicial calendar. (*Id.*) Because the circuit court failed to make a sufficient record of findings or apply a proper standard of law, the imposition of any sanctions should be reversed.

B. Even if the Court finds the circuit court issued sufficient findings, the imposition of sanctions was an abuse of discretion.

The imposition of sanctions under these circumstances is a clear abuse of discretion. "A court should use caution in imposing sanctions against attorneys." *Rodgers*, 219 Wis. 2d at 9. "Mistakes by attorneys can often be corrected without sanctions if they are isolated mistakes resulting from inexperience, inadvertence or misunderstanding." *Id.* "Circuit courts should tailor sanctions to the severity of the misconduct." *Id.* The Wisconsin Supreme Court opined that

> Arbitrary action by a circuit court undermines attorney and public confidence that they will receive fair treatment by the circuit court . . . . the conduct of those . . . particularly on the bench, must be such as to warrant the respect of the public and the confidence of litigants that they will be treated fairly, impartially and considerately.

Id. at 10.

Respectfully, the circuit court's reference of sanctions against the State for inadvertently submitting a previous draft of a brief is a clear abuse of discretion. The State did submit a timely brief that was unfortunately the wrong draft, however upon discovery of the error, the State supplied its corrected brief and an explanation for the mishap. (R. 23; 25.) In response, the circuit court merely stated that while the State "provided an explanation for its *mistake*, it [was] nevertheless not an excuse." (R. 30.) The circuit court itself characterized the State's initial brief submission as a "mistake," but however proceeded to cite its authority to impose sanctions against parties. (*Id*.)

Specifically, the circuit court cited *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 470 N.W.2d 859 (1991), *overruled by Indus. Roofing Servs., Inc. v. Marquardt*, 299 Wis. 2d 81, 726 N.W.2d 898 (2007) for its statutory and inherent authority to sanction a party. (R. 30.) In *Johnson*, the Wisconsin Supreme Court upheld the circuit court's dismissal of the cause of action due to the plaintiff's persistent non-compliance with the court's scheduling order for a period of two years. *Id.* at 277. Before dismissing the cause of action, the circuit court had entertained numerous motions regarding plaintiff's failure to obey deadlines set by the court and imposed sanctions in the form of attorney's fees. *Id.* at 277-78. In dismissing the matter, the court characterized plaintiff's conduct as "egregious" and without a "justifiable excuse." *Id.* at 272-73.

Here, the State's technical error in its initial brief submission is substantially distinguishable from *Johnson* where the sanctioned party perpetually disobeyed court orders without justification. The State made a timely submission, unfortunately with an incorrect drafted, but then acted promptly to correct the error after it was discovered. The State's isolated mistake cannot be reasonably characterized as a failure to prosecute or conduct that warranted sanctions.

Because the Wisconsin Supreme Court has clearly stated that isolated mistakes by attorneys resulting from inadvertence can be corrected without sanctions, it cannot be said that a reasonable judge, using a demonstrated rational process would reach the same conclusion as the circuit court. As such, the circuit court's imposition of sanctions should be reversed as an abuse of discretion.

II. THE CIRCUIT COURT FAILED TO MAKE INDEPENDENT FACTUAL FINDINGS SEPARATE FROM LEGAL CONCLUSIONS IN GRANTING THATCHER'S MOTION TO SUPPRESS.

Thatcher argues that this Court should "uphold the circuit court's *factual determination* that Trooper Wood *exceeded his duty* . . . by providing Mr. Thatcher incorrect information . . . ." (Resp't Br. 20.) The circuit court's ruling failed to make such distinction. In its first Decision and Order issued, the circuit court made no independent factual findings, but rather only stated that "the State apparently conceded . . . the issues as raised by Thatcher . . ." due to the inadvertent submission and granted Thatcher's motion to suppress. (R. 22.) After the State submitted a corrected brief, the circuit court again failed to make any proper findings of fact. Rather, the circuit court simply outlined Thatcher's argument and the three-prong inquiry under *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995) and stated "[t]he answer to all three questions is 'yes'" without any analysis as to how the circuit court reached its conclusion. (R. 30.) "[C]ircuit courts must expressly make independent factual findings on the record, separate from any legal conclusions." *Matter of D.K.*, 2020 WI 8, 390 Wis. 2d 50, 89, 937 N.W.2d 901, 920.

Under the first prong in the *Quelle* analysis, the court is to inquire whether the law enforcement officer has not met *or* exceeded his or her duty under Wis. Stat. § 343.305(4) to provide information to the accused driver. *Quelle*, 198 Wis. 2d at 280. The circuit court's blanket conclusion that the answer to the first prong of *Quelle* is "yes"

fails to properly identify whether the court concluded Trooper Wood failed to satisfy his duty *or* exceeded his duty under the statute. (R. 30.) As such, Thatcher's conclusion that the circuit court made a "factual determination that Trooper Wood exceeded his duty" is inaccurate. (Resp't Br. 20.)

III. TROOPER WOOD WAS NOT REQUIRED TO ADVISE THATCHER OF ALL THE POSSIBLE PENALTIES FOR A FIRST OFFENSE OF OPERATING WHILE INTOXICATED.

Thatcher argues that the first prong of *Quelle* is satisfied because "Trooper Wood exceeded his duty under sec. 343.305(4) . . . ." (Resp't Br. 20-21.) However with respect to the second prong of *Quelle*, Thatcher argues that he was misled by way of a "material omission" of the "penalties" for a first offense of operating while intoxicated ("OWI"). (*Id.* at 22.) In support of his argument Thatcher cites to *State v. Ludwigson*, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997), a case where the officer attempted to explain the Informing the Accused Form ("ITA Form") to the defendant in "laymans" terms. (Resp't Br. 22-22.) The facts in *Ludwigson* are distinguishable from the current case before the Court. Here, Trooper Wood made *no efforts* to interpret the ITA Form – he did just the opposite when he properly informed Thatcher he was unable to "interpret what the form says" and proceeded to re-read portions of the form aloud for Thatcher. (R. 18.)

Despite the fact that Trooper Wood made no efforts to explain the ITA Form, Thatcher argues that by "material omission" Trooper Wood "misinformed Mr. Thatcher on the penalties he faced" including "monetary forfeiture . . revocation of his license . . . disqualification of . . . commercial driver's license . . . and a mandatory alcohol and other drug assessment." (Resp't Br. 21-22.) As the Court of Appeals has "repeated stated, an officer's only duty under the implied consent law is to accurately deliver the information to the driver; an officer need not explain all of the choices (and resulting consequences) embodied

within [the] statute." *Quelle*, 198 Wis. 2d at 285. The record is clear – Trooper Wood read the ITA Form verbatim, which contains the language required under Wis. Stat. § 343.305(4); Trooper Wood was not obligated to advise Thatcher of additional consequences not identified in the ITA Form. (R. 18.)

Thatcher further claims that Trooper Wood's statements left him only to "guess at the truth" and believed Trooper Wood was "advising him to consent" and "offering to let him out of jail more efficiently." (Resp't Br. 20, 23-24.) Thatcher's assertions are not supported by the record or by the testimony he provided the circuit court. Furthermore, Thatcher also misstates the record by stating that the circuit court made a "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*." (*Id.* at 21.) Not only does Thatcher fail to cite to the record, but nothing in the record supports the assertion that Trooper Wood told Thatcher the only consequence he would face is a forfeiture or fine by pleading guilty. If Thatcher made an assumptions regarding the possible penalties based upon Trooper Wood's likening of an OWI first offense to a bad speeding ticket, it is the product of his own confusion and not the conduct of Trooper Wood. A motorists subjective confusion regarding the warnings under implied consent law is not a recognized defense as the Court of Appeals has expressly rejected "any assessment of 'the driver's perception of the information delivered to him or her.'" *In re Refusal of Kliss*, 2007 WI App 13, ¶ 16, 298 Wis. 2d 275, 287, 728 N.W.2d 9, 15 *citing Quelle*, 198 Wis. 2d at 280. "Even when a defendant claims confusion about the provisions of the 'Informing the Accused' Form, repeated readings of its 'clear and unequivocal language' trump a confusion defense. *State v. Reitter*, 227 Wis. 2d 213, 229, 595 N.W.2d 646, 654 (1999) citing *State v. Neitzel*, 95 Wis. 2d 191, 206, 289 N.W.2d 828, 836 (1980). In sum, Thatcher's argument is without merit.

CONCLUSION

For the reasons herein and outlined in the State's brief-in-chief, the State respectfully requests this Court to reverse the circuit court's erroneous 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 27th day of October, 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 2,760 words.

Dated this 27th day of October 2021.

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