STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2020AP001895

COUNTY OF DUNN,

Plaintiff-Respondent,

v.

KEVIN J. CORMICAN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY, CASE NOS. 19 TR 2939 AND 19 TR 4074, THE HONORABLE JAMES M. PETERSON, PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I. Whether Deputy Pollock 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 the evidentiary chemical test?

Mr. Cormican filed a pretrial motion to suppress, arguing that Deputy Pollock had exceeded his duty under sec. 343.305(4) by providing Mr. Cormican excessive misinformation found nowhere in the Informing the Accused form and this erroneous extra information was both misleading and affected Mr. Cormican's ability to make a decision regarding chemical testing. After an evidentiary hearing, the circuit court denied the motion.

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

Mr. Cormican filed a pretrial motion to suppress, arguing that Deputy Pollock improperly incentivized and thus coerced Mr. Cormican's would-be consent. After an evidentiary hearing, the circuit court denied the motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE AND FACTS

On May 29, 2019, the County of Dunn cited Mr. Cormican with operating 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 April 13, 2020, Mr. Cormican filed a motion to suppress all direct and derivative evidence of Deputy Pollock's improper influence on Mr. Cormican's decision regarding chemical testing in this case for two reasons. (R. 23.) First, Mr. Cormican argued that Deputy Pollock exceeded his duty under Wisconsin Statutes sec. 343.305(4) by providing excessive misinformation and this erroneous extra information affected Mr. Cormican's ability to make a decision regarding chemical testing. (*Id*. at 2–6.) Second, Mr. Cormican argued that Deputy Pollock engaged in an unlawful attempt to incentivize Mr. Cormican's consent. (*Id*. at 6.) An evidentiary hearing was held on the suppression motion on July 9, 2020. (R. 56 at 1.) During the evidentiary hearing, Mr. Cormican and the deputy involved in the traffic stop testified, as set out below. (*Id*. at 3.) Additionally, portions of the DVD recording of the deputy's squad cam—specifically from the 00:46:05 mark until 00:47:06 and the 01:08:42 mark until the 01:11:32 mark—were admitted into the record. (*Id*. at 11:19–12:1, 14:5–9). A copy of the Informing the Accused form was also admitted into the record. (*Id*. at 9:12–24; R. 30.)

On May 27, 2019, Deputy Pollock arrested Mr. Cormican for operating a motor vehicle while intoxicated ("OWI"). (*Id*. at 9:1–2.) After reading the information from the Informing the Accused Form ("ITAF"), Deputy Pollock had a conversation with Mr. Cormican during which he stated that if Mr. Cormican refused the implied consent test, then the state would automatically take away his driving privileges and that he had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license. (R. 56 at 18:23–19:3, 20:22–25;

DVD of traffic stop at 01:09:39–01:09:46 and 01:10:25–01:11:13.) Specifically, Deputy Pollock advised Mr. Cormican as follows:

> I do know that, if you refuse the test, the state will just automatically take your privileges away. … [T]he bottom line is, the state [of Wisconsin], when you get your license, you kind of sign off and say that you promise that you're going to be a legal driver all the time without a substance—[B]y substance I mean alcohol. I mean, they're just saying that when you get your license, you're telling them that, "yep, I'm not going to do this." And that's what the implied consent is, is that when you get your license, you're basically implying your consent to the state [of Wisconsin], saying basically, "yep, you can test me any time; I'm not gonna be over the limit." … If you just automatically say "no," the State will just up and take [your driving privileges].

(DVD of traffic stop at 01:09:39–01:09:46 and 01:10:25–01:11:13.) As such, Deputy Pollock used the term "automatically" twice during his conversation with Mr. Cormican to imply a summary nature of the revocation proceedings. (R. 56 at 24:19–25:14; DVD of traffic stop at 01:09:06–01:09:08 and 01:11:00–01:11:04.) Notably, Deputy Pollock contrasted his erroneous claims implying a summary nature of the revocation proceedings with advising Mr. Cormican that if he consented to the evidentiary test, then "there may be some penalties involved from positive test results." (R. 56 at 29:23–1; DVD of traffic stop at 01:09:45–01:09:50) (emphasis added.)

Deputy Pollock further told Mr. Cormican that he knew individuals with commercial driver's licenses who received a first OWI offense and it was not the end of the road for them. (DVD of traffic stop at 00:46:04–00:46:29.) However, Mr. Cormican testified to the contrary, that it has "pretty much at this point" been the end of the road for him and that the fallout from this case has been severe. (R. 56 at 32:12–14.) Specifically, Mr. Cormican explained that even though he had not been to court for his case, he nevertheless had not been able to drive for his company due to the administrative suspension and subsequent disqualification of his commercial driver's license, which has cost him lost hours at work and has further resulted in his company taking responsibilities away from him because he cannot drive the company's vehicles. (*Id*. at 32:16–20.)

Importantly, while Deputy Pollock advised Mr. Cormican that he could not give him legal advice on two separate occasions, (R. 56 at 17:6–7, 19:4–6, 22:24–23:1, 26:12–16; DVD of traffic stop at 01:09:05–01:09:08 and 01:11:01–01:11:04), the deputy nevertheless deviated from simply reading the information contained in the ITAF and instead took it upon himself to misadvise Mr. Cormican that if he refused the evidentiary test then the state would automatically take his driving privileges away, (R. 56 at 18:23–19:3; DVD of traffic stop at 01:09:39–01:09:46 and 01:11:07–01:11:13). However, at the motion hearing Deputy Pollock confirmed that he is aware of refusal hearings and that the judicial branch rather than the executive branch makes the determination as to whether someone has refused under Wisconsin law. (R. 56 at 17:15–18:6.)

Deputy Pollock further agreed that to his knowledge, judges do not behave automatically, but rather they consider evidence, weigh the credibility of witnesses, and hear evidence from both sides and only then do they decide at a refusal hearing whether or not to revoke someone's driving privileges. (*Id*. at 18:7–22.) Therefore, despite stating that he could not give legal advice on two separate occasions, (R. 56 at 17:6–7, 19:4–6, 22:24–23:1, 26:12–16; DVD of traffic stop at 01:09:05–01:09:08 and 01:11:01–01:11:04), and despite being cognizant of the existence and nature of refusal-revocation proceedings in Wisconsin, (R. 56 at 17:15–18:22), Deputy Pollock nevertheless misadvised Mr. Cormican that if he refused the evidentiary test then the state would automatically take away his driving privileges, (R. 56 at 18:23–19:3; DVD of traffic stop at 01:09:39–01:09:46 and 01:11:07–01:11:13).

Additionally, while Deputy Pollock informed Mr. Cormican that he had already consented to the chemical test simply by virtue of getting his Wisconsin, (R. 56 at 20:22–25; DVD of traffic stop at 01:10:26–01:10:59), the deputy failed to explain that under Wisconsin's implied consent law, a law enforcement officer may only request a chemical test of an individual who drives or operates a motor vehicle within the state if that individual has been lawfully arrested for an OWI-related

offense after probable cause to arrest has been developed, (R. 56 at 20:7–13, 21:1–4).

Accordingly, only after Deputy Pollock had told Mr. Cormican that his driving privileges would be automatically taken away if he refused to submit to the evidentiary test and that he had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license did Mr. Cormican state that he would submit to the test. (*Id*. at 21:5–10.) Notably, upon receiving Mr. Cormican's purported consent, Deputy Pollock advised Mr. Cormican that he believed Mr. Cormican had made the right choice. (R. 56 at 21:11–13; DVD of traffic stop at 01:11:29–01:11:34.)

When specifically asked whether his conversation with Deputy Pollock affected his ability to make the choice about chemical testing, Mr. Cormican answered, "Absolutely." (R. 56 at 30:4–6.) Mr. Cormican testified that by claiming that the state would automatically take his driving privileges away if he refused the evidentiary test, Deputy Pollock effectively made Mr. Cormican believe that he did not have the option to refuse, but rather, that he had to consent to the evidentiary test. (*Id*. at 30:8–21.) This is because the deputy's comments led Mr. Cormican to believe that consenting gave him his only fighting chance at retaining his driving privileges. (*Id*.) Based on Deputy Pollock's claim, Mr. Cormican did not know there was a refusal hearing option available to him. (*Id*. at 36:8–10.)

Mr. Cormican further testified that by also claiming that Mr. Cormican had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license, Deputy Pollock likewise effectively made Mr. Cormican believe he did not have the option to refuse. (*Id*. at 31:5–22.)

After the evidentiary hearing, counsel submitted a brief in support of Cormican's suppression motion to the circuit court. (R. 32.) On October 29, 2020, the circuit court issued an oral ruling denying Mr. Cormican's suppression motion.

(R. 57 at 4:19–10:6.) On November 9, 2020, Mr. Cormican was found guilty on the OWI and PAC citations at a court trial. (R. 59.)[1]

Mr. Cormican now appeals to this Court to vacate his conviction, reverse the circuit court's order denying his suppression motion, and remand for further proceedings.

ARGUMENT

Deputy Pollock exceeded his duty under sec. 343.305(4) by providing excessive misinformation found nowhere in the Informing the Accused form and this erroneous extra information was both misleading and affected Mr. Cormican's ability to make a decision regarding chemical testing. Moreover, the excessive misinformation provided by Deputy Pollock, as well as the totality of the circumstances, deprived Mr. Cormican of his ability to make a free and unconstrained decision about chemical testing, thus rendering any consent involuntary. Therefore, this Court should vacate Mr. Cormican's conviction, reverse the circuit court's order denying his suppression motion, and remand for further proceedings.

I. Deputy Pollock exceeded his duty under sec. 343.305(4) by providing excessive information found nowhere in the Informing the Accused form and this erroneous extra information affected Mr. Cormican's ability to make a decision regarding chemical testing; therefore, the circuit court erred when it denied Mr. Cormican's motion to suppress the evidentiary chemical test in this case.

a. Introduction and standard of review.

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] Under Wisconsin Statute sec. § 346.63(1)(c), a person may be tried for both OWI and PAC arising out of the same incident, but he or she may be convicted of and sentenced for only one of the offenses. As such, pursuant to sec. 346.63(1)(c), Mr. Cormican's two citations resulted in only one conviction, that being an OWI conviction. (R. 59 at 63:25–64:4.)

> (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.

This Court applies a two-part test when reviewing the denial of a motion to suppress. ***State v. Popp***, 2014 WI App 100, ¶ 13, 357 Wis. 2d 696, 855 N.W.2d 471. A circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts are reviewed *de novo*. ***Id***.

b. Deputy Pollock exceeded his duty.

Deputy Pollock exceeded his duty under sec. 343.305(4) by providing Mr. Cormican incorrect information found nowhere on the ITAF; that is, if Mr. Cormican refused the implied consent test, then the state would *automatically* take away his driving privileges and that he had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license. (R. 56 at 18:23–19:3, 20:22–25; DVD of traffic stop at 01:09:39–01:09:46 and 01:10:25–01:11:13.) Those words are nowhere to be found on the ITAF. (*See* R. 30.) The government cannot deny this deviation in good faith.

The County may invite this Court to reach the novel legal conclusion that Deputy Pollock's monologue of 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. At best, one could say that the deputy provided contradictory information, leaving Mr. Cormican only to guess at the truth.

In short, the County would incorrectly argue that simply because Deputy Pollock 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, Deputy Pollock exceeded his duty under sec. 343.305(4) when he went beyond the mere reading of the ITAF by providing Mr. Cormican additional and incorrect information about the nature of revocation proceedings and a law enforcement's authority to request an evidentiary chemical test under Wisconsin's implied consent law. For all these reasons, the first ***Quelle*** prong is satisfied.

c. The additional information was incorrect and misleading.

This Court must find that Deputy Pollock misled Mr. Cormican when he incorrectly told Mr. Cormican that his driving privileges would be automatically taken away if he refused to submit to the evidentiary test. The deputy's misleading statements erroneously implied a summary nature of the revocation proceedings. In actuality, however, under the law Mr. Cormican is entitled to a refusal hearing. *Compare* Wis. Stat. § 343.305(9) (hearing before refusal revocation) *with* Wis. Stat. § 343.305(7)(a) ("The person's operating privilege is administratively suspended…" before a hearing after which the suspension is either rescinded or upheld).

This Court must similarly find that Deputy Pollock misled Mr. Cormican when he incorrectly told Mr. Cormican that he had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license, when in

actuality, the Wisconsin Court of Appeals in ***State v. Prado*** firmly rejected the notion that Wisconsin drivers give "implied consent" to chemical testing at the time they apply for a license—long before the search requested by an officer is contemplated. 2020 WI App 42, ¶¶ 44–49, 52–62, 393 Wis. 2d 526, 847 N.W.2d 182, *petitions for review granted* (October 21, 2020). Specifically, the ***Prado*** court rejected the notion that the consent imputed by Wisconsin's implied consent statute is "consent" in the constitutional sense, and it further declined what it viewed as the State's request to either recognize, or perhaps to establish, a warrant exception specifically for the implied consent law. ***Id***.

Moreover, under Wisconsin's implied consent law, a law enforcement officer may only request a chemical test of an individual who drives or operates a motor vehicle within the state if that individual has been lawfully arrested for an OWI-related offense after probable cause to arrest has been developed. Wis. Stat. § 343.305(4). 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). This additional erroneous information misstated the legal reality.

While Deputy Pollock 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.[2] After the

[2] 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 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.

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

Again, any argument by the County that because Deputy Pollock read from the ITAF, he stated the truth to Mr. Cormican 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, Deputy Pollock proceeded to supplement the information from the form with his own additional information. However, like the officer in ***Ludwigson,*** the additional information Deputy Pollock provided to Mr. Cormican was wrong and misleading for the reasons above. ***Id***. at 874.

Here, Deputy Pollock incorrectly informed Mr. Cormican on the nature of the revocation proceedings he faced for a refusal, as well as on the consent implications of getting a Wisconsin driver's license, in an attempt to get Mr. Cormican 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.").

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

This Court must find that the misleading statements by Deputy Pollock contributed to Mr. Cormican's decision to refuse chemical testing. ***Smith***, 2008 WI 23 at ¶ 85. Contrary to the County's likely contention, there is credible evidence that the information that Deputy Pollock provided was misleading, such that it affected Mr. Cormican's ability to make an informed decision about chemical testing. Again, Mr. Cormican explicitly stated that Deputy Pollock's claim "absolutely" affected his ability to make the choice about chemical testing. (R. 56 at 30:4–6.) By claiming that the State would just automatically take Mr. Cormican's driving privileges away if he refused the evidentiary test, Deputy Pollock effectively made Mr. Cormican

believe he did not have the choice to refuse but rather he had to consent to the evidentiary test because consenting gave him his only fighting chance at retaining his driving privileges. (*Id*. at 30:8–21.) Based on Deputy Pollock's claim, Mr. Cormican did not know there was a refusal hearing option available to him. (*Id*. at 36:8–10.)

Similarly, by claiming that Mr. Cormican had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license, Deputy Pollock effectively made Mr. Cormican believe he did not have the choice to refuse because he had a driver's license and based on Deputy Pollock's claim this meant that he had already agreed to take the test. (*Id*. at 31:5–22.)

As such, it is uncontroverted that the supplementary information provided by Deputy Pollock contributed to Mr. Cormican's decision-making process about chemical testing, so much so that upon hearing the deputy's claims, Mr. Cormican explicitly believed Deputy Pollock was not only advising him to consent, but was further informing him that he had already agreed to the test because he had a Wisconsin driver's license. The Defense has demonstrated a causal link between the misinformation and Mr. Cormican'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. Cormican's mind about chemical testing for suppression to occur. Thus, under the third ***Quelle*** prong, Mr. Cormican merely has to demonstrate that Deputy Pollock's additional information affected his ability to make his decision about chemical testing. Mr. Cormican 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).

Here, Deputy Pollock not only created a false incentive for Mr. Cormican to submit by claiming that a refusal would automatically result in the state taking Mr. Cormican's license away, but the deputy further advanced the misleading claim that

Mr. Cormican had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license in an attempt to get his "consent" to an evidentiary chemical test. Even if Mr. Cormican refused the chemical test, the loss of his driving privileges would not be automatic. Rather, Mr. Cormican has due process rights which are especially toothy in a situation where the arresting officer is misrepresenting the nature of the revocation proceedings.

Further, as made clear by the ***Prado*** court, Wisconsin drivers do *not* give "implied consent" to chemical testing at the time they apply for a license. 2020 WI App 42 at ¶¶ 44–49, 52–62. As such, Mr. Cormican has the right to exercise his Fourth Amendment right to be free from warrantless searches which again are especially toothy in a situation where the arresting officer is making the dishonest claim that Mr. Cormican had already given his consent to the chemical test simply by virtue of getting his Wisconsin driver's license. The deputy's comments affected Mr. Cormican's ability to make his decision.

Accordingly, this Court must suppress the blood test result. ***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).

II. The excessive misinformation provided by Deputy Pollock, as well as the totality of the circumstances, deprived Mr. Cormican of his ability to make a free and unconstrained decision about chemical testing, thus rendering any consent involuntary; therefore, the circuit court erred when it denied Mr. Cormican's motion to suppress all direct and derivative evidence of Deputy Pollock's improper influence on Mr. Cormican's decision regarding chemical testing in this case.

a. Introduction and standard of review.

"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. ***State v. Hughes***, 2000 WI 24, ¶ 41, 233 Wis. 2d 280, 607 N.W.2d 621. 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***.

b. Deputy Pollock improperly incentivized and thus coerced Mr. Cormican's 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, after reading Mr. Cormican the ITAF, Deputy Pollock made the misleading claims that a refusal would automatically result in the state taking Mr. Cormican's license away and that Mr. Cormican had already given his consent to the chemical test simply by virtue of getting his Wisconsin driver's license. (R. 56 at 18:23–19:3, 20:22–25; DVD of traffic stop at 01:09:39–01:09:46 and 01:10:25–01:11:13.) Deputy Pollock further strategically contrasted his erroneous claim implying a summary nature of the revocation proceedings with advising Mr. Cormican that if he consented to the evidentiary test, then "there *may* be some penalties involved from positive test results." (R. 56 at 29:23–1; DVD of traffic stop at 01:09:45–01:09:50) (emphasis added.)

Moreover, the deputy told Mr. Cormican that he knew individuals with commercial driver's licenses who received a first OWI offense and it was not the end of the road for them. (DVD of traffic stop at 00:46:04–00:46:29.) However, as Mr. Cormican testified, it has "pretty much at this point" been the end of the road for him as he has already suffered severe employment consequences. (R. 56 at 32:12–20.)

Most importantly, upon receiving Mr. Cormican's consent, Deputy Pollock informed Mr. Cormican that he believed Mr. Cormican had made the right choice. (R. 56 at 21:11–13; Ex DVD of traffic stop at 01:11:29–01:11:34.) Therefore, as made clear in his dialog with Mr. Cormican, Deputy Pollock attempted to incentivize consent by not only explicitly suggesting to Mr. Cormican that there was a right choice for him to make when answering the ITAF, but by further informing Mr. Cormican that he had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license.

Based on their exchange, this Court should conclude that Deputy Pollock's clever guidance and misleading claims objectively led Mr. Cormican to believe that the deputy was encouraging, persuading, and falsely incentivizing him to consent to a test. These suggestions are an unconstitutional misuse of authority, as Deputy Pollock is not an attorney, yet he chose to provide improper legal advice in order to obtain Mr. Cormican'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 Deputy Pollock's conduct an affront to ***State v. Blackman***. 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.").

CONCLUSION

For the foregoing reasons, Mr. Cormican respectfully requests that this Court vacate his conviction, reverse the order of the circuit court denying his suppression motion, and remand for further proceedings.

Dated this 29th day of April, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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. The length of this brief is 4,980 words.

Dated this 29th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 29th day of April, 2021.

Respectfully submitted,

Electronically signed by:

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2020AP001895

COUNTY OF DUNN,

Plaintiff-Respondent,

v.

KEVIN J. CORMICAN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY, CASE NOS. 19 TR 2939 AND 19 TR 4074, THE HONORABLE JAMES M. PETERSON, PRESIDING

DEFENDANT-APPELLANT'S APPENDIX

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INDEX TO APPENDIX

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CERTIFICATE AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of April, 2021.

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