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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NO. 2020AP002147 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KODY R. KOHN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

APPEAL FROM THE ORDER DENYING MOTION TO SUPPRESS EVIDENCE ON FEBRUARY 7, 2020 AND THE JUDGMENT OF CONVICTION FILED ON SEPTEMBER 28, 2020, THE HON. PAUL V. MALLOY, PRESIDING, IN THE OZAUKEE COUNTY CIRCUIT COURT IN CASE 2019CT000090

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   The circuit court answered yes.

2. Whether Kohn was obligated under the discovery statute Wis. Stat. § 971.23(2M) to serve upon the State documents reflecting the data generated from the State's test of Kohn's blood sample for blood alcohol concentration conducted by the State's analyst at the Wisconsin State Lab of Hygiene?

   The circuit court answered yes.

3. Whether the trial court should have granted Kohn's motion for dismissal at the end of the State's case of the Bail Jumping charge on the grounds that Kohn cannot legally be convicted of Bail Jumping under the theory that he violated the condition of bail that he not commit another crime for being cited for a first offense OWI forfeiture level offense that got converted to a second offense OWI criminal misdemeanor at a future date by virtue of Kohn being found guilty of a separate pending first offense OWI?

   The circuit court answered no.

4. Whether the trial court should have granted Kohn's motion for judgment notwithstanding the verdict of the Bail Jumping guilty verdict on the grounds that Kohn cannot legally be convicted of Bail Jumping under the theory that he violated the condition of bail that he not commit another crime for being cited for a first offense OWI forfeiture level offense that got converted to a second offense OWI criminal misdemeanor at a future date by virtue of Kohn being found guilty of a separate pending first offense OWI?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Kohn does not believe that oral argument will assist the Court in considering the issues presented in this appeal; the facts are not complex and can be sufficiently argued in brief format.

Kohn believes that publication is likely to provide needed guidance to litigants and courts throughout Wisconsin on the proper application of standards and procedures for requesting evidentiary blood samples from suspects arrested of OWI under

the implied consent law and to assist courts in ruling properly on State's objections to defendant's attempting to cross examine State's Analysts with their own data and to assist courts in deciding whether defendants can be accused of Bail Jumping for committing a second first offense OWI that gets converted to a second offense OWI at a future date due to a separate OWI conviction occurring after the date of the alleged Bail Jumping.

STATEMENT OF THE CASE

This case is about whether the defendant Kody R. Kohn's consent to the evidentiary blood draw was rendered involuntary by the Informing the Accused form's warning to the defendant that his refusal to the blood draw will subject him to other penalties. (R.13:2; APP020). The circuit court denied Kohn's motion to suppress evidence based upon unlawful consent to blood draw. (R.21:1; APP049). Kohn contends herein that the circuit court's findings were erroneous.

Additionally, this case is about whether three legal arguments that were heard by the court at Kohn's Jury Trial on September 8, 2020 were properly decided by the trial court against Kohn. The first argument is regarding whether the court properly granted the State's objection to Kohn's attempt at using exhibits to assist in the cross examination of the State's blood test analyst. (R.72:137; APP234). The exhibits Kohn was attempting to use to cross examine the State's analyst were documents reflecting the data regarding the test that the State's analyst generated when testing Kohn's blood sample to determine the blood alcohol concentration in the sample. (R.72:132-137; APP229-234). The State objected to Kohn's use of these exhibits on the ground that Kohn had not turned over these documents to the State per the State's discovery demand. *Id.* The court sustained the State's objection and denied Kohn the ability to cross examine the State's analyst regarding the testing of his blood sample with the exhibits. (R.72:137; APP234). Kohn

contends herein that the circuit court's findings were erroneous.

The second and third legal arguments that were heard by the court at Kohn's Jury Trial on September 8, 2020 were a motion for dismissal at the close of the State's case and motion for judgment notwithstanding the verdict. (R.72:244; APP341). The State's theory of prosecution for the Bail Jumping charge was that Kohn violated a condition of bond he was under that he not commit another crime and the basis of the crime he was alleged to have committed was the OWI Second Offense Kohn was on trial for at Kohn's Jury Trial which was originally a first offense OWI when Kohn committed the offense on November 30, 2018. (R.72:246; APP343). Kohn moved to dismiss the Bail Jumping charge and moved for Judgment Notwithstanding the Verdict and argued that there is no basis for this charge under this theory of prosecution by the State because at the time the OWI was committed it was a first offense traffic level forfeiture offense and not a criminal misdemeanor second offense OWI. (R.72:245; APP342). The OWI was converted to a second offense criminal misdemeanor OWI at a future date due to the fact that Kohn was convicted of a separate OWI first offense citation. (R.72:246; APP343). When Kohn actually committed the OWI offense that was the subject of the Bail Jumping charge it was a traffic offense and not a crime, thus Kohn argued that the State did not provide a proper basis for which a jury could find him guilty of violation of this condition of bond and requested the court grant his motion to dismiss and motion notwithstanding judgment on the verdict. (R.72:245; APP343). The court denied Kohn's motion. (R.72:246; APP343). Kohn contends herein that the circuit court's findings were erroneous.

The following facts are relevant to the Court's understanding of the issues presented herein.

On November 30, 2018, Kohn was arrested for OWI and Operating with Prohibited Alcohol Concentration First Offense by Officer Ryan Hurda of

the City of Port Washington Police Department. (R.23:2; APP004). Officer Hurda first observed Kohn's vehicle traveling above the speed limit in a City of Port Washington road and also observed a damaged/missing passenger side tail/brake light and observed the vehicle drifting within its lane. *Id.* Officer Hurda conducted a traffic stop on the vehicle and identified Kohn as the driver of this vehicle. *Id.* Officer Hurda observed factors that Kohn may be impaired and requested Kohn perform standardized field sobriety tests. *Id.* Officer Hurda concluded that Kohn did not perform satisfactory on the standardized field sobriety tests and placed Kohn under arrest for OWI. *Id.* Subsequent to the arrest for OWI, Officer Hurda read Kohn the Informing the Accused form and requested Kohn to consent to an evidentiary chemical test of his blood. (R.67:6; APP080). A standard warning on this Informing the Accused form that was read to Kohn warned Kohn that if he refuses to consent to the blood draw voluntarily that Kohn will be subject to other penalties. (R.38:1; APP070). After being apprised of the warnings in the Informing the Accused form, Kohn agreed to consent to a chemical test of his blood. (R.67:10; APP084). Kohn's blood was drawn at the Aurora Medical Center and the sample was sent to the Wisconsin State Laboratory of Hygiene for analysis. (R.24:2; APP004). The result of the analysis showed that Kohn's blood contained 0.086 % weight of alcohol. *Id.*

Kohn was convicted of an OWI First Offense from a separate matter with a violation date of November 25, 2018 and conviction date of February 15, 2019. *Id.* As a result of the conviction, the OWI in the instant case became an OWI Second Offense misdemeanor case and a criminal complaint was filed on February 28, 2019 charging Kohn with OWI Second Offense and Operating with PAC Second Offense. (R.1:1-2; APP001-APP002). On June 8, 2020 the State filed an amended criminal complaint charging Kohn with Misdemeanor Bail Jumping. (R.23:2; APP004). The State's theory of prosecution on the Bail Jumping charge was that Kohn violated a

bond condition he was under that Kohn shall not commit another crime which condition stemmed from a bond from Ozaukee County case 2018CM000499 in which Kohn was released on bond on November 26, 2018. *Id.* At the conclusion of Kohn's Jury Trial in the instant case on September 8, 2020, Kohn moved to dismiss the Bail Jumping charge and Moved for Judgment Notwithstanding Verdict on the Bail Jumping charge arguing that there is no factual basis for a jury to find Kohn guilty of Bail Jumping because at the time Kohn committed the OWI offense on November 30, 2018 it was a first offense OWI and therefore it was not a crime and it only later became a criminal misdemeanor second offense OWI after Kohn was convicted of a first offense OWI in a separate first offense OWI. (R.72:245; APP342). The court denied the motions. (R.72:246; APP343).

At Kohn's Jury Trial on September 8, 2020 the State's analyst from the Wisconsin State Lab of Hygiene, Aaron Zane, testified on behalf of the State regarding the testing and result of the blood sample that was taken from Kohn on November 30, 2018 and which was found to contain 0.086 % weight of alcohol. (R.72:151; APP248). Kohn attempted to use exhibits that reflected the data generated by the analyst Zane in regards to the test conducted on Kohn's sample in Kohn's cross examination of the analyst Zane but the State objected to the use of these documents on the grounds that Kohn did not turn these documents over to the State per the State's discovery demand. (R.72:131-137; APP228-APP234). Kohn argued that Kohn did not have a duty under Wis. Stat. § 971.23(2M) to turn over these particular documents to the State because these documents are already in the possession of the State as these documents are simply standard data documents generated by the State's analyst upon the testing of Kohn's blood sample. *Id.* Kohn argued that were Kohn obligated to turn over these documents to the State that Kohn would be unnecessarily telepathing his defense strategy to the State prior to trial. *Id.* The court sustained the State's objection to Kohn's use of these documents and Kohn

was not allowed to use exhibits reflecting the data generated by the State's analyst in regards to Kohn's blood sample for blood alcohol concentration in the cross examination of the State's analyst. *Id.*

Kohn was found guilty of all three counts charged in the amended criminal complaint (OWI Second Offense, Operating with PAC Second Offense, and Misdemeanor Bail Jumping) on September 8, 2020. (R.50:1-2; APP073-APP074). The court sentenced Kohn to serve fifteen days in jail and ordered fines and costs totaling $2512.00. *Id.* The court ordered eighteen months of license revocation and eighteen months of Ignition Interlock Device and an AODA Assessment and Driver Safety Plan. *Id.* Kohn appeals from the court's adverse ruling on his motion to suppress evidence based upon involuntary consent to blood draw and from the adverse ruling on the objection to the use of scientific documents in the cross examination of the State's analyst and from the adverse ruling on Kohn's motion to dismiss and motion for judgment notwithstanding verdict on the Bail Jumping charge. Kohn argues herein that his consent to the blood draw was not obtained voluntarily and therefore evidence resulting from the violation of his rights under both the US and Wisconsin Constitutions should be suppressed. Kohn also argues herein that his rights were violated when he was denied the ability to use exhibits reflecting data generated by the State's analyst regarding Kohn's blood sample being tested for blood alcohol content by the State's analyst and he should be granted a new trial and Kohn argues that his rights were violated when his motion to dismiss the Bail Jumping charge and motion for judgment notwithstanding verdict on the Bail Jumping charge were denied by the trial court and requests this court grant these motions and order the Bail Jumping charge dismissed.

ARGUMENT

I. KOHN'S CONSENT TO THE EVIDENTIARY BLOOD DRAW WAS OBTAINED INVOLUNTARILY AND THUS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AND THUS THE EVIDENCE IT PRODUCED SHOULD HAVE BEEN SUPPRESSED

A. Standard of Review

Kohn asks this court to reverse the circuit court's order denying his Motion to Suppress Evidence Based Upon Involuntary Consent to Blood Draw filed on February 7, 2020. (R.21:1; APP049). When this court reviews a motion to suppress evidence, the proper standard of review is: "for this court to uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis.2d 497, 518, 553 N.W.2d 539 (Ct.App.1996). However, the application of constitutional principles to those facts is a question of law that we decide without deference to the court's decision. *State v. Patricia A.P.*, 195 Wis.2d 855, 862, 537 N.W.2d 47 (Ct.App.1995). Further, 'the constitutional significance of the undisputed facts regarding the issue of consent must receive independent, appellate review." *State v. Johnson*, 177 Wis.2d 224, 233, 501 N.W.2d 876 (Ct.App.1993)." *Village of Little Chute v. Walitalo*, 256 Wis.2d 1032, 1036 (Ct.App.2002).

B. The warning contained in the Informing the Accused stating that "You will be subject to other penalties" if you refuse to consent to a blood draw that was read to Kohn prior to Kohn consenting to the blood draw rendered Kohn's consent to the blood draw involuntary

Consent to a search is a well settled exception to the Fourth Amendment requirements of both a warrant and

probable cause. *Id.* at 1037 (citing Sc*hneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "'A warrantless search conducted pursuant to consent which is 'freely and voluntarily given' does not violate the Fourth Amendment.'" *Id.* (citing *State v. Phillips*, 218 Wis.2d 180, 196, 577 N.W.2d 794 (1998) (citation omitted)). The burden is upon the State to prove by clear and convincing evidence that the consent to the evidentiary blood draw was given by the defendant voluntarily. *Village of Little Chute v. Walitalo*, 256 Wis.2d 1032, 1038 (2002). The court should engage in a two-step analysis to determine voluntariness of consent: First, did the defendant in fact consent to the blood draw. *Id* at 1037. Second, was the consent voluntarily given. *Id.* For the second prong of this analysis, the focus of the inquiry is the presence or absence of actual coercion or improper police practice because it is determinative on the issue of whether the consent was the product of a free and unconstrained will, reflecting deliberateness of choice. *Id* at 1037-1038. The court must also take into consideration the physical and emotional condition of the defendant when determining voluntariness of consent. *State v. Phillips*, 218 Wis.2d 180, 202 (1998). The focus will generally be on the defendant's age, intelligence, education, physical and emotional condition, and prior experience with police. *Id.*

A motion hearing in the instant case occurred regarding whether the defendant's consent to the blood draw was voluntarily obtained under the Fourth Amendment on December 2, 2019. (R.67:1; APP075). Officer Ryan Hurda of the City of Port Washington Police Department testified at the Motion Hearing that after he placed Kohn under arrest for OWI that he read Kohn the Informing the Accused form verbatim which was admitted into evidence as Exhibit Number 1. (R.67:6; APP080). After reading the form to Kohn Officer Hurda testified that Kohn consented to a blood draw by answering "yes" that Kohn will submit to an evidentiary chemical test of his blood. (R.67:8; APP082). Officer Hurda testified that after Kohn

consented to the blood draw Officer Hurda brought Kohn to the hospital and Kohn's blood was drawn. (R.67:11; APP085). Officer Hurda testified that at the time he read Kohn the informing the accused form Officer Hurda believed Kohn was under the influence of an intoxicant, including alcohol. (R.67:10; APP084).

A blood draw is considered a Fourth Amendment issue with the privacy concerns being equivalent to that of police entering a person's home. *Missouri v. McNeely*, 569 US 141 (2013), held that a blood draw is an invasion of bodily integrity that implicates an individual's "most personal and deep rooted expectations of privacy." *Id* at 148. The Court noted that as search warrants are ordinarily required for searches of dwellings, absent an emergency, no less can be required where intrusions into the human body are concerned, even when the search is conducted following a lawful arrest. *Id.* "The importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'" *Id.* Therefore, because this matter presents a blood draw, and Officer Hurda in this matter never obtained a search warrant, the exception to the warrant requirement must be justified as the consent exception to the warrant requirement. (R.67:11; APP085).

Kohn argued an additional argument in regards to whether his consent to the blood draw was voluntary in the Motion to Suppress Evidence Derived from Involuntary Consent to Blood Draw filed on August 23, 2019. (R.13:2; APP020). Kohn does not argue here as he did in the circuit court that the warning in the informing the accused form that his refusal to consent to a blood draw cannot be used as consciousness of guilt at the underlying OWI trial and thus it is a false and coercive warning as this argument was rejected in a recent published decision, *State v. Levanduski*, 393 Wis.2d 674 (2020). *Id.* Kohn does reargue here though that the warning that he would

have been 'subject to other penalties' is coervice, as the legality of this particular warning was not covered in the *Levanduski* opinion. (R.13:3-4; APP021-APP022).

In the instant case, Officer Hurda read Kohn the Informing the Accused form verbatim prior to asking Kohn to submit to a blood draw. (R.67:6; APP080). In the informing the accused, Officer Hurda warned Kohn that: "If you refuse to take any test that this agency requests, your operating privilege will be revoked *and you will be subject to other penalties*." (R.15:1; APP026). Kohn responded that he will consent to the blood draw after being apprised of this information by Officer Hurda. (R.67:8; APP082). This information provided by Officer Hurda to Kohn was coercive as it suggested to Kohn that if he were to refuse consent to the blood draw he will be subject to a criminal sentence or penalty, as the phrase 'other penalties' is suggestive of a criminal penalty, which is in contrast to Kohn's rights under *State v. Dalton*, 383 Wis.2d 147 (2018). It is important to note that the *Dalton* case was simply an application of *Birchfield v. North* Dakota, 136 S. Ct. 2160 (2016) which was decided by the US Supreme Court on June 23, 2016, which held that it is a violation of a defendant's Fourth Amendment rights to be criminally punished for refusing a blood draw, as the *Dalton* court states:

> "The *Birchfield* court recognized that 'there must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.' 136 S.Ct. at 2185. The limitation it established directs: no criminal penalties may be imposed for refusal. Here the record demonstrates that Dalton was criminally penalized for his refusal to submit to a blood draw. By explicitly punishing Dalton for refusal, the circuit court violated *Birchfield*. In denying Dalton's postconviction motion after remand, it made an error of law by misapplying *Birchfield*. Such error constitutes an erroneous exercise of discretion. We therefore conclude that the circuit court violated *Birchfield* by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant."

Dalton, 383 Wis.2d 147, 175 (2018). In the instant case, the information that was read to Kohn in the Informing the Accused form was read prior to Kohn consenting to the blood draw, therefore Kohn consented to the blood draw believing that if he did not consent to the blood draw he would be subject to 'other penalties.' (R.67:8; APP082). This warning provided by Officer Hurda rendered Kohn's consent to the blood draw involuntary as this information is false as Kohn cannot be subjected to a criminal penalty for refusing consent to a blood draw. The warning did not explicitly warn Kohn that the 'other penalties' that Kohn will be subjected to for refusing consent to the blood draw are not criminal, but the State has the burden of proof that consent was voluntary, not Kohn. It is reasonable to assume an arrestee would believe he is being threatened with criminal penalties when he is told he will be subject to 'other penalties' for refusing consent to a blood draw. It is unreasonable to assume an arrestee would believe the warning that he will be subject to 'other penalties' for refusing consent to a blood draw means he is being warned about benign, collateral consequences like an ignition interlock device order under Wis. Stats. § 343.30. Without any further elaboration on what 'other penalties' means to Kohn, Kohn and any other reasonable arrestee would assume that he is being warned of a criminal penalty for refusing consent to a blood draw especially when the warning comes directly after an arrest. Additionally, Kohn is already in a vulnerable position to render voluntary consent, as Officer Hurda testified that in his opinion Kohn was under the influence of an intoxicant, including alcohol. (R.67:10; APP084). Thus this warning is unlawful and renders the consent involuntary as the State has not provided sufficient evidence to the court that after a threatening warning of this nature that Kohn's consent to the blood draw was voluntary by clear and convincing evidence.

Therefore, the use of any evidence derived from the involuntary consent to the blood draw would violate rights guaranteed to the defendant by the *Fourth, Fifth, and Fourteenth Amendments to the*

United States Constitution, and *Article One, Sections 1, 7, and 11 of the Wisconsin Constitution.*

C. This Court Should Suppress the Evidence

This court should order that the evidence in this matter that was generated from the involuntary consent to the blood draw should be suppressed:

> The exclusionary rule provides for the suppression of evidence that "is in some sense the product of the illegal government activity." *State v. Knapp*, 2005 WI 127, ¶ 22, 285 Wis.2d 86, 700 N.W.2d 899 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct 2501, 81 L.Ed.2d 377 (1984)). "The primary purpose of the exclusionary rule 'is to deter future unlawful police conduct.;" *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)). It is a judicially created rule that is not absolute, but rather requires the balancing of the rule's remedial objectives with the 'substantial social costs exacted by the exclusionary rule." *Id.* ¶¶ 22-23 (quoting *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed2d 364 (1987)). This rule extends to both tangible and intangible evidence that is the fruit of the poisonous tree, or, in other words, evidence obtain "by exploitation of" the illegal government activity. *Id.*, ¶ 24 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

State v. Felix, 339 Wis.2d 670, 811 N.W.2d 775, 690 (2012). Accordingly, because the consent to the blood draw was involuntary in this matter, the blood test which resulted directly from the Fourth Amendment violation should be suppressed.

II. KOHN WAS NOT OBLIGATED UNDER WISCONSIN'S DISCOVERY STATUTE WIS STAT § 971.23(2M) TO SERVE UPON THE STATE THE DOCUMENTS REFLECTING THE DATA GENERATED FROM THE LEGAL BLOOD TEST FOR BLOOD ALCOHOL CONCENTRATION CONDUCTED BY THE STATE'S ANALYST AT THE WISCONSIN LABORATORY OF HYGIENE

A. Standard of Review

Kohn asks this court to find that the trial court committed an erroneous exercise of discretion in excluding evidence of documents reflecting data generated by the State's analyst from the Wisconsin State Lab of Hygiene in regards to the test of Kohn's blood sample for blood alcohol content to assist in Kohn's cross examination of the State's analyst. "A trial court's decision whether to exclude evidence for failure to comply with discovery requirements under Wis. Stat. § 971.23 is committed to the trial court's discretion, and if there is a reasonable basis for the ruling, we do not disturb it. *See State v. Guzman*, 2001 WI App 54, ¶ 19, 241 Wis.2d 310, 624 N.W.2d 717, *review denied*, 2001 WI 88, 246 Wis.2d 166, 630 N.W.2d 219." *State v. Gribble,* 248 Wis.2d 409 (2001).

B. Kohn was not obligated to turn over documents reflecting the data generated by the State's analyst in regards to the analyst's testing of Kohn's blood sample for blood alcohol concentration because these documents were not in the "possession, custody or control of the defendant" as that phrase is intended to be used under Wis. Stat. § 971.23(2m)

At Kohn's Jury Trial on September 8, 2020 Kohn attempted to admit into evidence documents reflecting the data generated by the State's analyst Aaron Zane in regards to the testing of Kohn's blood sample for blood alcohol concentration during the cross examination of the State's analyst Aaron Zane from the Wisconsin State Laboratory of Hygiene. (R.72:132-137; APP229-234). The State objected to Kohn's use of these documents on the grounds that the State was not served copies of these documents under the authority of the State's discovery demand. (R.72:136; APP233). The State argued that the State is entitled to notice of any physical evidence that the defendant intends to introduce at trial. *Id.* Kohn argued that the State is not entitled to these documents under the discovery statute because these documents

were not generated by a defense expert hired by Kohn. (R.72:133-134; APP230-APP231). Rather these documents were obtained through Kohn's open records request to the Wisconsin State Laboratory of Hygiene for the standard litigation packet in regards to Kohn's blood test for blood alcohol concentration conducted by Aaron Zane of the Wisconsin State Laboratory of Hygiene. (R.72:132; APP229). Kohn argued that he had no duty to turn over these documents because these are documents generated by the test that the State ran, that the State's arresting officer set up, that the officer got the results for and the officer handed the results to the State and the State admitted the blood test result into evidence itself. (R.72:134; APP231). Kohn had in fact requested these specific documents in the Defense Discovery Demand served on the State, as these are records that are commonly held in the possession of the State. (R10:6; APP014). The State did not provide these documents in discovery and Kohn never followed up on this discovery request with the State because Kohn obtained the lab records from the Wisconsin State Lab of Hygiene via an open records request. (R.72:132; APP229). But the fact that Kohn requested the material in his Discovery Demand to the State is evidence that the State should have been aware that Kohn was seeking the lab records to use in his defense. The State's analyst, Aaron Zane, brings the litigation packet with him to court in a briefcase, as the State's analyst typically brings the litigation packet with them to every OWI trial anticipating the extreme likelihood they will be asked about the details of the testing process in either direct or cross examination. (R.72:136; APP233). Zane admitted in his cross examination that he had with him the standard run packet, which will be referred to in this brief as the standard litigation packet. (R.72:172; APP269). Zane referred to documents in the standard litigation packet he brought with him to court to refresh his memory about a diluter. (R.72:170; APP267). The documents herein in contention mentioned on the record after the court reviewed the documents presented were that one document was specifically a chromatogram from the

calibration of the run that was obtained in the testing process which obtained the result to test Kohn's blood. (R.72:134; APP231). The other documents mentioned on the record were an alcohol analysis report with Aaron Zane's name on it that Aaron Zane signed and the alcohol analysis and sequence with Aaron Zane's initials, AZ at the top. (R.72:136; APP233). The trial court ultimately denied Kohn the ability to use these documents and granted the State's motion to exclude these documents holding that these documents should be excluded under Wis. Stat. § 971.23(2m)(c) and (7m). (R.72:137-138; APP234-APP235). The trial court's decision rested upon the grounds that Kohn's attorney was holding the documents back so he could do a trial by ambush or surprise against the State, that Kohn's attorney had the documents by getting the documents through an open records request and that he waited too long to serve these documents on the State prior to trial. *Id.*

Kohn argues herein that this is not a reasonable basis for the trial court's ruling to exclude this evidence. The statute states: "Upon demand, the defendant or his or her attorney shall, within a reasonable time period before trial, disclose to the district attorney and permit the district attorney to inspect and copy or photograph all of the following materials and information, *if it is within the possession, custody or control of the defendant…*" Wis. Stats. § 971.23(2m). The plain language of this statute requires that for a piece of evidence to be considered under the purview of this statute that the evidence must be in the possession, custody or control of the defendant. In the instant case, the evidence contended by the State that it did not receive in discovery from Kohn was evidence that was already within the possession, custody and control of the State. The documents were generated as a result of the State's test of Kohn's blood sample by the Wisconsin State Laboratory of Hygiene. (R.72:134; APP231). The State's analyst, Aaron Zane, brought these documents to court in a briefcase with him to Kohn's Jury Trial, as the State's analyst routinely bring the standard litigation packet with them to OWI trials. (R.72:136;

APP233). The State's attorney admitted he did not obtain and review the litigation packet in the matter prior to trial. (R.72:136; APP233). Kohn argues herein that the failure of the State's attorney to prepare for an OWI trial by failing to obtain and review the standard litigation packet that the Wisconsin State Laboratory of Hygiene prepares as a means for parties to review the merits of the blood tests that the lab tests of people suspected of OWI does not somehow make this material within the exclusive possession of the defendant and subject to the discovery law. The material that Kohn wanted to admit into evidence was material that was generated by the State's analyst in the standard testing of Kohn's blood sample by the analyst Aaron Zane. (R.72:132; APP229). The State called Aaron Zane as a witness and Aaron Zane did testify to the testing of Kohn's blood sample and the result of Kohn's blood test sample of 0.086 was admitted into evidence. (R.72:151; APP248). The State's attorney admitted that he has done dozens of jury trials on blood test results and there have been numerous trials where the blood test chromatograms from the standard litigation packet are not used by defendants and therefore the State is entitled to know before a trial whether a defendant will use the chromatograms to assist in his defense or the defense is violating the discovery statute and conducting a trial by ambush. (R.72:137; APP234). Kohn's counsel did in fact argue to the trial court that Kohn was not obligated under the discovery statute to turn over these documents and therefore Kohn's counsel chose not to turn over the documents voluntarily as it would be giving the State an unfair advantage at trial against Kohn as Kohn's defense strategy would be telepathed to the State. (R.72:134-135; APP231-APP232). Kohn argues herein that the discovery statute was not intended to obligate defendants to show the State's attorney which exact documents that the defendant plans to use from the State's scientific test of the defendant so the State's attorney can be fully prepared for a defendant's cross examination of the State's witness prior to trial. Therefore, because the documents generated by the State's analyst regarding

Kohn's blood test sample for blood alcohol concentration included in the standard litigation packet were not in the 'possession, control or custody' of the defendant as required by Wis. Stat. § 971.23(2m), the trial court had no reasonable basis to exclude the evidence and this court should find that the exclusion of the evidence was an erroneous exercise of discretion.

C. The exclusion of the evidence was not harmless error and Kohn requests a new trial and this court should grant Kohn a new trial

Kohn requests that this court grant him a new trial due to the error that was committed by the trial court in not allowing Kohn the use of the documents contained in the standard litigation packet to cross examine the State's analyst in regards to the test of Kohn's blood sample for blood alcohol concentration. R.72:137; APP234).

> "An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.' If the error did not affect the substantial rights of the party, the error is considered harmless.
> Two statutes govern this situation, Wis. Stat. § 901.03 (Rulings on evidence) and wis. Stat. § 805.18(2) (Mistakes and Omissions; Harmless Error). Section 901.03 provides that error may not be predicated on a ruling that admits or excludes evidence 'unless a substantial right of the party is affected.' This statute must be read together with § 805.18(2), which provides that a new trial shall not be granted for an error unless the error has affected the substantial rights of the party. This latter provision, which dates back to the early years of Wisconsin statehood, applies to both civil and criminal cases…
> For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. *State v. Dyess*, 124 Wis.2d 525, 543, 547, 370 N.W.2d 222 (1985); *see also Town of Geneva v. Tills*, 129 Wis.2d 167, 184-85, 384 N.W.2d 701 (1986) (noting that the standard set forth in *Dyess* applies in

> civil cases as well as criminal cases). A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.' *Dyess*, 124 wis.2d at 544-45, 370 N.W.2d 222 (quotation omitted). Where the erroneously admitted or excluded evidence affects constitutional rights or where the outcome of the action or proceeding is weakly supported by the record, a reviewing court's confidence in the outcome may be more easily undermined than where the erroneously admitted or excluded evidence was peripheral or the outcome was strongly supported by evidence untainted by error. *Id.* at 545, 370 N.W.2d 222.

Martindale v. Ripp, 246 Wis.2d 67 (2001).

Kohn's denial by the trial court of the ability to fully cross examine the analyst Aaron Zane regarding the testing of his blood sample affected his rights substantially. The facts of this case were very close as the elements of whether Kohn was 'under the influence of an intoxicant' and whether Kohn's blood contained a 'prohibited alcohol concentration,' were close calls for a jury to make, as the court stated on the record: "This was not an open and shut case," and reiterated the State's attorneys comment that "this is not a case where somebody is completely intoxicated to the point of drunkenness." (R.72:244; APP341). Officer Hurda, the arresting officer for OWI in this matter, observed no slurred speech on Kohn. (R.72:93; APP190). Kohn never swerved over the center line of the roadway in the course of his driving observed by Officer Hurda. (R.72:88; APP185). Officer Hurda admitted the incident could have been recorded on body camera but he forgot to grab his body camera the night of the incident. (R.72:95; APP192). Officer Hurda ultimately observed only two clues on the one leg stand and Kohn was able to hold his leg up the full thirty seconds without putting it down. (R.72:109; APP206). This case was a very close case factually on the aforementioned elements, and the blood test result itself was also very close to the limit, as the result came back at 0.086. (R.72:151; APP248). Kohn's defense strategy was to attack the credibility of this test result based on a theory that the

result may have been contaminated by carry over contamination, or alcohol being carried over from a previous sample to the next sample, which the analyst Zane admitted that the blank that was run during the calibration of the machine used to test Kohn's blood sample displayed 0.006 grams over 100 milliliters of ethanol on it. (R.72:176; APP273). Kohn was denied the ability to bring this to life for the jury by admitting into evidence the actual chromatograms, or scientific documents showing that the carry over contamination occurred and how this occurred because of the trial court's denial to Kohn's use of the standard litigation packet as exhibits in Kohn's cross examination of the analyst. (R.72:137; APP234). Kohn also was unable to get into the facts regarding the maintenance records of the machine used to test his blood to point out to analyst Zane that in Kohn's test the diluter was not tested within a week of his sample as the maintenance records suggest, because Zane did not bring the maintenance records to court and Kohn was denied by the trial court the ability to use the maintenance records from Kohn's blood test that Kohn obtained in the standard litigation packet from the open records request to the Wisconsin State Lab of Hygiene. (R.72:172; APP269). Even though Zane suggested that the weekly bleach and rinse of the diluter would not affect Kohn's test result, the jury may have disagreed with Zane's assertion as not credible had the jury been able to see the maintenance records admitted into evidence as an exhibit. Had the jury been able to see the maintenance records and the scientific documents regarding the calibration blank being contaminated with .006 ethanol on it, Kohn's defense would have been seen as more credible, and there is a strong likelihood the jury may have found Kohn not guilty of OWI and PAC in this matter.

Additionally, Kohn's due process rights were violated by the court's denial to Kohn to cross examine the State's analyst in regards to Kohn's blood test. "Due process is afforded by the elements of cross-examination of witnesses and the inspection of the machine…impeaching factors which may result from

cross examination of those who have performed the tests go to the weight of the evidence or the credence to be given to the witnesses by the factfinder." *State v. Disch*, 119 Wis.2d 461, 463 (1984). "Other due process inquiries can explore such questions as:…what was the nature of the test or analysis itself; was the machine (usually a gas chromatograph testing device) properly tested and balanced before and during the analysis…" *Id.* at 471-472. Kohn was clearly denied the ability to fully cross examine the State's analyst by the trial court's ruling that Kohn could not use documents from the Wisconsin State Lab of Hygiene's standard litigation packet in the cross examination of the analyst Aaron Zane, and this violated Kohn's due process rights.

Therefore, because the trial court's ruling violated Kohn's right to due process and hampered his ability to cross examine the blood test analyst about the test result in a case which was factually a close call as to whether Kohn's was under the influence of an intoxicant and whether Kohn's blood contained a prohibited alcohol concentration, this court should find that the trial court's erroneous ruling was not harmless error and grant Kohn a new trial.

III. THE TRIAL COURT SHOULD HAVE GRANTED KOHN'S MOTION FOR DISMISSAL OF THE BAIL JUMPING CHARGE ON THE GROUND THAT KOHN DID NOT LEGALLY COMMIT A CRIME WHEN HE WAS CITED FOR A FIRST OFFENSE OWI TRAFFIC FORFEITURE LEVEL OFFENSE ON NOVEMBER 30, 2018 AND THEREFORE CANNOT LEGALLY BE CONVICTED OF BAIL JUMPING UNDER THE THEORY THAT HE COMMITTED ANOTHER CRIME

A. Standard of Review

"The test for sufficiency of the evidence on a motion to dismiss is whether 'considering the State's evidence in the most favorable light, the evidence

adduced, believed and rationally considered, is sufficient to prove the defendant's guilt beyond a reasonable doubt.' *State v. Duda*, 60Wis.2d 431, 439, 210 N.W.2d 763 (1973). Accordingly, we will not reverse the circuit court's denial of Henning's motion to dismiss as long as the jury reasonably could have found Henning guilty beyond a reasonable doubt. *See State v. Scott*, 2000 WI App 51, ¶ 12, 234 Wis.2d 129, 608 N.W.2d 753." *State v. Henning*, 346 Wis.2d 246, 260 (2013).

B. At the time Kohn committed the OWI it was a first offense OWI traffic forfeiture level offense and not a crime and thus the jury should not have been able to find Kohn guilty of Bail Jumping for committing a crime while on bond

At the jury trial in this matter, Kohn made a motion for dismissal at the close of the State's case and the court denied the motion. (R.72:244-246; APP341-APP343). Kohn argues herein that this court should reverse the decision of the trial court and grant the motion to dismiss in regards to the Bail Jumping charge. This is because the State's theory of prosecution on the Bail Jumping charge was that Kohn committed a crime on November 30, 2018 when he committed the OWI offense that he was on trial for at the Jury Trial in the instant case. *Id.* This court should grant this motion to dismiss because the trial court was aware of the facts in the case, the amended criminal complaint stated that the prior OWI offense had a conviction date of February 15, 2019 and a violation date of November 25, 2018. (R.23:2; APP004). The OWI which Kohn was on trial for in the instant case had a violation date of November 30, 2018. (R.23:1; APP003). Therefore, when Kohn was apprehended on November 30, 2018 for OWI, he was cited for a first offense OWI traffic forfeiture level offense and was not committing a crime. Thus, he was in compliance with the terms of the bond he signed on November 26, 2018, in Ozaukee County case 2018CM000499. (R.37:1; APP062). "Thus, before a defendant may be found guilty of the offense of bail jumping under §

946.49(1), Stats., the State must prove by evidence beyond a reasonable doubt the following three elements: first, that the defendant was either arrested for, or charged with, a felony or misdemeanor; second, that the defendant was released from custody on a bond, under conditions established by the trial court; and third, that the defendant intentionally failed to comply with the terms of his or her bond, that is, that the defendant knew of the terms of the bond and knew that his or her actions did not comply with those terms. *See* Wis. J I – Criminal 1795" *State v. Dawson*, 195 Wis.2d 161, 170-171 (1995). In the instant case, the evidence presented is insufficient when taken in the light most favorable to the State to prove Kohn guilty of Bail Jumping because there is insufficient proof that Kohn intentionally failed to comply with the terms of his bond because there is insufficient proof that Kohn knew that his actions on November 30, 2018 were criminal. Kohn committed a first offense traffic ticket OWI on November 30, 2018, and even though the OWI from November 30, 2018 was dismissed and charged as a second offense OWI criminal misdemeanor in a complaint filed on February 28, 2019, that does not give the State the ability to charge Kohn for the crime of Bail Jumping on the basis that he knowingly committed a crime at an earlier date when the offense was a traffic forfeiture level offense. (R.23:1-2; APP003-APP004). Therefore, Kohn requests that this court grant Kohn's motion to dismiss the Bail Jumping charge based on the aforementioned argument.

IV. THE TRIAL COURT SHOULD HAVE GRANTED KOHN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE BAIL JUMPING CHARGE BECAUSE KOHN DID NOT LEGALLY COMMIT A CRIME WHEN HE WAS CITED FOR A FIRST OFFENSE OWI TRAFFIC FORFEITURE LEVEL OFFENSE ON NOVEMBER 30, 2018 AND THEREFORE CANNOT LEGALLY BE CONVICTED OF BAIL JUMPING UNDER THE

THEORY THAT HE COMMITTED ANOTHER CRIME

A. Standard of Review

"We review a trial court's denial of a motion for judgment notwithstanding the verdict de novo, applying the same standards as the trial court. *Lisa R.P. v. Michael J.W.*, 210 Wis.2d 132, 140 565 N.W.2d 179 (Ct.App 1997). A motion for judgment notwithstanding the verdict accepts the findings of the verdict as true but contends that the moving party should have judgment for reasons evident in the record other than those decided by the jury. Wis. Stat. § 805.14(5)(b); *Greenlee v. Rainbow Auction/Realty Co.*, 202 Wis.2d 653, 661, 553 N.W.2d 257 (Ct.App.1996). The motion does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law. *Logterman v. Dawson*, 190 Wis.2d 90, 101, 526 N.W.2d 768 (Ct.App.1994)." *Hicks v. Nunnery*, 253 Wis.2d 721, 736 (2002).

B. At the time Kohn committed the OWI it was a first offense OWI traffic forfeiture level offense and not a crime and thus for these reasons in the record but not decided by the jury this court should grant Kohn's motion for judgment notwithstanding the verdict

After the verdict of guilty was rendered against Kohn at his Jury Trial, Kohn moved for Judgment Notwithstanding Verdict on the Bail Jumping charge. To support his motion, Kohn argued that he cannot legally be found guilty of Bail Jumping on the premise that he knowingly intentionally failed to comply with the terms of the bond of not committing a crime on the theory of the State's case that the OWI he committed on November 30, 2018 was a crime because at the time the OWI offense was committed on November 30, 2018, the OWI was a traffic forfeiture level offense. R.72:245; APP342). Kohn argued that the facts are that he was not convicted of the separate OWI offense

(which occurred on November 25, 2018 and of which he was convicted on February 15, 2019) prior to November 30, 2018 and therefore did not violate the terms of his bond on November 30, 2018 by committing a criminal OWI second offense. *Id.* On November 30, 2018 the only offenses Kohn committed were second first offense traffic forfeiture level OWI and Prohibited Alcohol Concentration offenses, of which both offenses are non-criminal in nature. *Id.* It is the State's duty to prove beyond a reasonable doubt that Kohn intentionally failed to comply with the terms of his bond by knowing that his actions did not comply with the terms of his bond. *State v. Dawson*, 195 Wis.2d 161, 170-171 (1995). On this record, with the terms of the bond that the State has alleged Kohn to fail to comply with being that the defendant shall not commit a crime, there is no basis for Kohn's guilt in regards to the Bail Jumping as Kohn never committed a crime on November 30, 2018. Therefore, Kohn requests this court grant the motion for judgment notwithstanding the verdict on the Bail Jumping charge.

CONCLUSION

For the aforementioned reasons, Kohn asks this court to hold that the circuit court should have suppressed the evidence resulting from involuntary consent to blood draw; that this court should decide that the trial court abused its discretion in denying Kohn the ability to cross examine the State's analyst using documents from the standard litigation packet and grant Kohn a new trial; that this court should grant Kohn's motion to dismiss the Bail Jumping charge; that this court should grant Kohn's motion for judgment notwithstanding the verdict. He further requests that the court remand his case for proceedings consistent with this holding.

Dated at Milwaukee, Wisconsin on April 12, 2021.

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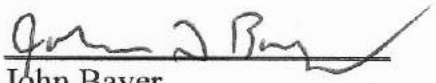
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **6,080** words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19 (12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Respectfully submitted this 12th day of April, 2021.



John Bayer
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APPENDIX CERTIFICATION

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 § 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials 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.

Respectfully submitted this 12th day of April, 2021

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.40(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on April 12th, 2021. I further certify that the brief will be correctly addressed and postage prepaid. Three copies will be served by the same method on the Ozaukee County District Attorney, 1201 S. Spring Street, Port Washington, WI 53074.

Dated this 12th day of April, 2021.

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