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 REPLY BRIEF

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

John T. Bayer
Attorney for Defendant-Appellant
State Bar No. 1073928

Bayer Law Offices
735 North Water Street, Suite 720
Milwaukee, Wisconsin 53202
Phone: (414) 434-4211
Fax: (414) 210-5272
Email: jtbayerlaw@gmail.com

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ARGUMENT

I. THE STATE'S INTERPRETATION OF WIS. STATS. § 971.23(2M)(C) IS INCORRECT AND IS NOT SUPPORTED BY ANY CITED LEGAL AUTHORITY FROM THE STATE

The State argues in its Response Brief that Wis. Stats. § 971.23(2m)(c) is a rule of discovery which obligates a defendant to apprise a State's attorney prior to trial of every document which the defendant intends to offer into evidence as an exhibit at the trial. (Resp. Br. 14). The State argues that because Kohn did not abide by the discovery statute in turning over the five exhibits that Kohn proposed to admit into evidence at Kohn's trial that the trial court properly granted the State's motion to exclude the use of these exhibits during the course of the trial. (*Id.)*. The State argues that Kohn did not have good cause in failing to disclose the exhibits he intended on admitting at the trial because Kohn's attorney had admitted to holding back the documents to maintain an element of surprise. (*Id.*)

The State cites no authority to support its position that Wis. Stats. § 971.23(2m)(c) requires a defendant to turn over every document the defendant intends to introduce at trial as an exhibit, regardless of whether the document is within the "possession, custody or control of the defendant' as that phrase is intended to be meant in Wis. Stats. § 971.23(2m). One case cited by the State, *State v. DeLao*, 252 Wis.2d 289 (2002) supports Kohn's position. Kohn's position is that a defendant is not obligated to turn over material that is not within the possession, custody or control of the defendant under Wis. Stats. § 971.23(2m)(c). The issue in *DeLao* was whether a prosecutor was obligated to turn over material requested by a defendant in the defendant's discovery demand prior to trial when the defendant had requested to be apprised of any statements made by the defendant that the prosecutor intends to use in the course of trial under Wis. Stats. § 971.23(1)(b). *DeLao*, 252 Wis.2d 289, 295 (2002). The State in *DeLao* argued that the statements did not fall under the Wisconsin discovery statute because the prosecuting attorney did not personally know about the statements prior to the trial, but the court held that even

though the particular prosecuting attorney was not aware of the statements prior to the trial, that knowledge under the discovery statute is imputed to the prosecuting attorney: "Under § 971.23, the State's discovery obligations may extend to information in the possession of law enforcement agencies but not personally known to the prosecutor. *Jones*, 69 Wis.2d at 349, 230 N.W.2d 677; *State v. Maass*, 178 Wis.2d 63, 69, 502 N.W.2d 913 (Ct.App. 1993). Put another way, under certain circumstances, the knowledge of law enforcement officers may be imputed to the prosecutor." *DeLao*, 252 Wis.2d 289, 301 (2002). Ultimately, the court articulated this obligation on the State under Wisconsin's Discovery Statute to obtain information from law enforcement and other agencies it routinely relies upon by acknowledging the duty to obtain the information is not limitless and that a prosecutor is not required to consult every law enforcement agency who conceivably could have information about a case, but that the "State is charged with knowledge of material and information in the possession or control of others who have participated in the investigation or evaluation of the case and who either regularly or with reference to the particular case have reported to the prosecutor's office. *Jones,* 69 Wis.2d at 349, 230 N.W.2d 677; *Wold*, 57 Wis.2d at 349 n. 4, 204 N.W.2d 482." *DeLao*, 252 Wis.2d 289, 303 (2002). This rationale from the *DeLao* court supports Kohn's position that the State's attorney is held to an objective standard to obtain evidence that is within the possession, control or custody of the State. The *DeLao* court articulates the objective standard by stating: "The issue becomes whether a reasonable prosecutor, exercising due diligence, should have known of DeLao's statements before trial…" *Id.* at 306. In the instant case, Kohn argues that he had no duty under Wis. Stats. § 971.23(2m)(c) to turn over the contested exhibits because the State's attorney already had these exhibits in his "possession, custody or control" as that phrase is intended to mean in the statute. As *DeLao* holds, a prosecutor has imputed knowledge of the agencies that regularly report to the prosecutor's office and who have generated a report. *Id.* In the instant case, the documents the State objected to as not having received per the discovery statute Wis. Stats. § 971.23(2m)(c) were documents made by the State's analyst, Aaron Zane. (R.72:132; APP229). The State's analyst generated a laboratory report for this case and

testified on behalf of the State in the State's case in chief in regards to the report that the defendant's Blood Alcohol Content was 0.086 grams over 210 Liters of Blood around the time Kohn operated his motor vehicle. (R72:151; APP248). Kohn asserts herein that any prosecutor should be aware that in a traffic/misdemeanor OWI prosecution with a blood test that the State Lab of Hygiene will have tested the blood sample and generated the standard litigation packet which supports the basis for the test result. Wis. Stats. § 343.305(6)(a) states that in order for chemical analysis of blood to considered valid under the implied consent law that the test must be conducted substantially in accordance with the methods approved the State Laboratory of Hygiene.

The State's interpretation of Wis. Stats. § 971.23(2m)(c) ignores the statute's use of bifurcation of the phrase "within the possession, custody or control of the defendant" and "within the possession, custody or control of the state" and is thus is an incorrect interpretation of the statute. Wisconsin's criminal discovery statute, Wis. Stats. § 971.23, bifurcates the discovery obligations of the District Attorney and the Defendant in a criminal case and lists the specific discovery obligations of each party. This court would have to ignore the statute's use of bifurcation of the obligations of each party in order to adopt the State's interpretation of the statute. Kohn argues herein that the correct interpretation of Wis. Stats. § 971.23(2m) is that the statute is bifurcated and lists the obligations of each party to a criminal case and the specific information which each party is entitled to provide to the other party and limits what each party is obligated to provide by use of obligating each party to be responsible for evidence which is within the party's 'possession, custody or control.' Kohn argues that the statute's use of this phrase and the bifurcated manner in which it is used should be interpreted to mean that Kohn is not obligated under Wis. Stats. § 971.23(2m)(c) to provide to a district attorney every exhibit that Kohn intends to introduce at trial, but rather should be interpreted to mean that Kohn's discovery obligations should be reasonably limited to providing exhibits that Kohn would have intended to introduce at trial that are 'within the possession, custody and control of the defendant' and not 'within the possession, custody or control of the state." Kohn's proposed interpretation of Wis. Stats. §

971.23(2m) takes into consideration the purpose of Wisconsin's discovery statute, to have an open process and prevent trial by ambush, by making the defendant apprise the district attorney of exhibits that the district attorney is not aware of nor could reasonable be made aware of prior to a trial.

In the instant case, the documents Kohn intended to admit were documents that were within the 'possession, custody, or control' of the State and thus Kohn's attorney did not hold the documents back to increase the element of surprise for a nefarious reason. Kohn's attorney maintained from the start of trial his interpretation of the discovery obligations by stating to the trial court judge that Kohn would have only had a duty to turn over physical evidence to the district attorney had that evidence been generated by a defense expert. (R.72:10; APP107). Kohn's attorney informed the court that he believed it would have been against his client's interests to show the State's attorney prior to trial exhibits he planned on using that he wasn't obligated to turn over under the discovery statute as this would reveal the defense strategy (telepath the defense) to the district attorney unnecessarily, however Kohn's attorney also reminded the court that if he believed he was obligated to turn over the documents under the discovery obligations he would have turned them over. (R.72:134-135; APP231-APP232). Therefore, the assertion that Kohn's attorney was abusing his discovery obligations without good cause is unfounded, as Kohn's attorney was simply relying on a reasonable interpretation of Wis. Stats. § 971.23(2m) in his decision to not turn over the exhibits as discovery to the state's attorney prior to trial.

Lastly, the State's interpretation of Wis. Stats. § 971.23(2m) leads to absurd results and is inconsistent with the State's assertion that "The state is not arguing that Kohn had a general discovery obligation to turn over all reports or data compilations that he obtained from the State Lab of Hygiene." If the court adopts the State's interpretation of Wis. Stats. § 971.23(2m), (that a defendant has an obligation to turn over any exhibit he intends to offer at trial to a district attorney prior to trial), this would lead to absurd results. One instance is that a defendant would be obligated to re-copy all of the police reports and squad and body camera evidence

that a defendant commonly receives as discovery in OWI cases, because if at a trial a defendant attempts to cross examine a police officer with a squad or body camera exhibit and admit the exhibit a prosecutor can object to the admission and simply state the defendant was obligated to turn over the body camera to the state prior to trial. This is an absurd result and would lead to many instances of injustice, as it is common for a defense attorney to not know he will need to use a body cam or squad cam until the actual cross examination of the police officer occurs, as the body or squad cam may be used on the spot to remind the witness of information he may have forgot or to impeach the witness for lying. In order to prepare for those scenarios, it would be incumbent upon every defense attorney to re-copy and re-distribute all discovery received by the State back to the State. Additionally, the same scenario could play out with the State's analyst at an OWI trial as with a police officer, the defense attorney has to prepare for the possibility of impeaching the witness or reminding the witness of information that is contained in the standard litigation packet the analyst creates to support the basis of the blood test result. Thus, it would be incumbent upon every defense attorney to receive the standard litigation packet from the State and then re-copy and re-distribute the packet back to the State. This is absurd and obviously not the intent of Wis. Stats. § 971.23 and this is why the legislature bifurcated the discovery duties of each party and limited those duties to what is within the possession, custody or control of each party.

II. THE STATE PROVIDES NO AUTHORITY TO SUPPORT ITS POSITION THAT KOHN COMMITTED BAIL JUMPING BY VIOLATING HIS CONDITION OF BAIL TO NOT COMMIT A CRIME BY COMMITTING A SECOND FIRST OFFENSE OWI

The State argues in its Response Brief that *State v. Banks*, 105 Wis.2d 32 (1981) supports its position that Kohn violated his condition of bail to not commit another crime when Kohn committed a second first offense OWI. (Resp. Br. 17-18). This is a misapplication of *Banks*. The *Banks* court dealt with whether the defendant's protections against double jeopardy were violated when a commissioner vacated judgment on his

second first offense OWI conviction and the offense was reissued as a criminal misdemeanor second offense OWI and whether the OWI graduated penalty sentencing structure applies to an OWI offense where the defendant had two OWI offenses within a given five year period but where the second or subsequent arrest takes place before the date of conviction on the first offense. *Banks*, 105 Wis.2d 32, 38 (1981). The *Banks* court dealt with the application of the OWI sentencing statute, Wis. Stats. § 346.65(2)(a) and held that the legislature intended to punish repeat drunk driving and the warning of the penalties for repeat drunk driving are sufficiently laid out for the public in the statute and thus a second first offense OWI can become a criminal second offense OWI even if committed prior to the violation of the second OWI in time and further Wis. Stats. § 346.65(2)(a) does not violate due process because it is sufficiently laid out in the statute to the public and does not have an ex post facto effect because Wis. Stats. § 346.65(2)(a) was in effect prior to the defendant committing the two OWI offenses in the case. *Id.* At 50-51. The issue in *Banks* is distinguishable from the instant case. In the instant case, the issue is whether Kohn can be charged with Bail Jumping. Bail Jumping is a different offense than OWI. Kohn does not dispute the holding in *Banks*, but Kohn does assert herein that *Banks* supports Kohn's position. According to *Banks*, when Kohn has two OWI offenses pending, then it does not matter which OWI offense Kohn is convicted of first, the other OWI offense will become a second offense OWI misdemeanor. This means that Kohn has control over which OWI he pleads guilty to first knowing the other OWI offense will become a criminal misdemeanor second offense OWI. If the court takes the rationale from *Banks* and applies the State's theory that Kohn should be charged with Bail Jumping for violating his term of bond to not commit another crime when at the time the offense was committed it was a first offense OWI then this court is left adopting an absurd result: Kohn could have avoided Bail Jumping charges in this matter by first pleading guilty to the second in time OWI which occurred on November 30, 2018 thereby having that conviction remain a simple first offense OWI traffic forfeiture conviction on Kohn's record and the first in time offense OWI which Kohn committed on November 25, 2018 before he was placed on bond at all would become the second offense OWI criminal

misdemeanor case. In the aforementioned scenario, Kohn could have avoided Bail Jumping charges. This shows the absurdity of the State's theory of the Bail Jumping charge. Any defendant in Kohn's position would have to opt to plead guilty to the second in time OWI offense first so as to ensure they don't incur a charge of Bail Jumping by pleading guilty to the first in time OWI offense first. This defeats the whole purpose of the Bail Jumping offense. The Bail Jumping offense is violated by a person intentionally failing to comply with the terms of the bond, the person should be knowingly committing the offense.

The State argues in its Response Brief that *State v. West*, 181 Wis.2d 792 (Ct. App. 1993) supports its position that a first offense OWI is considered a crime for purposes of the Bail Jumping statute. (Resp. Br. 18-20). This is a misapplication of *West*. *West* dealt with defining whether a 'crime' for purposes of Bail Jumping was committed when an offense occurred in another state, while in the instant case the issue is whether a crime was committed by Kohn and Kohn is alleged to have committed a second first offense OWI. The State's theory would lead to absurd results, as the State's argument is essentially that a first offense OWI is a crime for the Bail Jumping statute when a first offense OWI is well known in Wisconsin to be a traffic forfeiture offense. A second first offense OWI has the potential to either become in the future a first offense OWI (if the other pending OWI is dismissed or the defendant is acquitted) or a second offense criminal misdemeanor (if the other pending OWI is convicted). There is no guarantee that the second first OWI will become a criminal second offense. Therefore, this court should adopt Kohn's rationale on this issue that at the time a second first offense OWI is committed it is not a 'crime' as that term is intended to be used for purposes of the Bail Jumping statute.

CONCLUSION

For the aforementioned reasons, and for the reasons argued in the Appellants Brief, 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 July 30, 2021.

Electronically Signed By:

John Bayer
State Bar No. 1072928
Bayer Law Offices
735 N. Water Street, Suite 720
Milwaukee, Wisconsin 53202
Tel: (414) 434-4211
Fax: (414) 210-5272
Email: jtbayerlaw@gmail.com

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 **3,081** 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).

Respectfully submitted this 30th day of July, 2021.

Electronically signed by:

John Bayer
State Bar No. 1073928

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 Filling Project, Order No. 19-02.

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

Dated this 30th day of July, 2021

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John Bayer
State bar 1073928