STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2021AP564

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

TERENCE S. O'HAIRE,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR JUNEAU COUNTY, BRANCH I, THE HONORABLE STACY A. SMITH PRESIDING, TRIAL COURT CASE NOS. 19-TR-2414; 19-TR-2415 & 19-TR-2425

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE CIRCUIT COURT SHOULD HAVE GRANTED MR. O'HAIRE'S MOTION TO SUPPRESS THE RESULT OF THE PRELIMINARY BREATH TEST ADMINISTERED TO HIM, INCLUDING THE EVIDENCE OBTAINED THEREAFTER UNDER THE "FRUIT OF THE POISONOUS TREE" DOCTRINE, WHEN HIS BREATH SAMPLE WAS OBTAINED WITHOUT HIS CONSENT IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND IN VIOLATION OF WIS. STAT. § 343.303?

> Trial Court Answered: NO. The circuit court denied Mr. O'Haire's motion to suppress the preliminary breath test [hereinafter "PBT"] result on the ground that the trooper's statement to Mr. O'Haire that "this [the PBT] is going to be in your best interest because if you don't blow into this, you're going to jail, . . ."[1] was not coercive. (R84; R85; R86 at 28:7 to 29:10; D-App. at 108-09.)

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question of law. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue herein is based upon a unique set of facts which is of such an esoteric occurrence that publishing this Court's decision would likely have little impact upon future cases.

[1]R84 at 17:22 to 18:3; D-App. at 104-05.

STATEMENT OF THE CASE

Mr. O'Haire was charged in Juneau County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), Open Intoxicants in Motor Vehicle, contrary to Wis. Stat. § 346.935(1), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a), arising out of an incident which occurred on July 20, 2019. (R2 & R3.)

Mr. O'Haire retained private counsel and subsequently filed a pre-trial motion alleging, *inter alia*, that the blood test result obtained by the State was inadmissible because the trooper in this case unconstitutionally obtained a sample of Mr. O'Haire's breath by coercion. (R14.)

An evidentiary hearing on Mr. O'Haire's motion was held on November 19, 2020. (R84; R85; R86.) At the conclusion of this hearing, the circuit court, the Honorable Stacy A. Smith presiding, denied Mr. O'Haire's motion to suppress the PBT on the ground that statements made to Mr. O'Haire prior to his submission to the PBT were not coercive. (R84 at 28:7 to 29:10; D-App. at 108-09.)

On March 29, 2021, a refusal hearing/trial to the court was held on all of the matters pending against Mr. O'Haire. (R87; R88; R89.) The court found all matters adverse to Mr. O'Haire and ordered his operating privileges revoked for one year. (R75; R76; R77; D-App. at 101-03.)

It is from that adverse judgment that Mr. O'Haire appeals to this Court by Notice of Appeal filed March 29, 2021. (R64.)

STATEMENT OF FACTS

On July 20, 2019, the Appellant, Terence O'Haire, was stopped and detained in the Town of Germantown, Juneau County, by Trooper James Sawyer of the Wisconsin State Patrol for allegedly operating his motor vehicle in an erratic manner. (R84; R85; R86 at 6:2 to 7:8.)

Upon making contact with Mr. O'Haire, Trooper Sawyer observed that he had an odor of intoxicants emanating from his person and had bloodshot eyes. (R84; R85; R86 at 7:12-16.) Based upon these observations, Mr. O'Haire was asked to submit to a battery of field sobriety tests. (R84; R85; R86 at 9:22 to 12:5.) Mr. O'Haire consented to perform the tests, allegedly failing them. (*Id*.)

Upon completing the field sobriety tests, Mr. O'Haire was approached by the trooper who told him:

> Okay, you don't have to do this, but I am telling you right now that if you're going to be below the legal limit, this is going to be in your best interest because if you don't blow into this, you're going to jail, so you can make the decision.

(R84; R85; R86 at 17:22 to 18:3; D-App. at 104-05.) Upon being given this information, Mr. O'Haire asked whether his passenger could provide a PBT sample, to which the trooper ultimately replied:

> Either you blow into it, and if it is below the legal limit, we will figure out what we are going to do or you just don't blow into it and go right to jail. It doesn't matter to me.

(R84; R85; R86 at 18:15-21; D-App. at 106.) Mr. O'Haire provided a sample of his breath as directed by the trooper after it appeared to him as though the trooper was about to handcuff him. (R84; R85; R86 at 18:22 to 19:2; D-App. 105-06.)

Thereafter, Mr. O'Haire was arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), and Open Intoxicants in Motor Vehicle, contrary to Wis. Stat. § 346.935(1). (R2; R3.) He was then read the Informing the Accused form and asked to submit to an evidentiary chemical test of his breath, which request Mr. O'Haire allegedly declined. (R89 at 18:10 to 19:18.) Mr. O'Haire was then issued a Notice of Intent to Revoke Operating Privilege form and charged with Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a). (R1.)

STANDARD OF REVIEW ON APPEAL

The question presented to this Court concerns whether an undisputed set of facts requires the suppression of evidence obtained by the State after an unconstitutional seizure of his breath under the exclusionary rule and the fruit of the poisonous tree doctrine. Questions of this nature, based upon undisputed facts, merit *de novo* review by this Court. *State v. Jahnke*, 2009 WI App 4, ¶ 4, 316 Wis. 2d 324, 762 N.W.2d 696.

ARGUMENT

I. THE SEIZURE OF A PERSON'S BREATH BY A PRELIMINARY BREATH TESTING DEVICE IS SUBJECT TO FOURTH AMENDMENT PROTECTION.

A. The Fourth Amendment in General.

The Fourth Amendment to the United States Constitution, enforceable against the states through the Due Process Clause of the Fourteenth Amendment,[2] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. Const. amend. IV. The Wisconsin Constitution affords the same protection to citizens of this State. Wis. Const. art. I, § 11. Wisconsin courts interpret the protections granted by Article I, § 11 of the Wisconsin Constitution identically to those under the Fourth Amendment as delineated by the United States Supreme Court. *State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, 198-203, 577 N.W.2d 794 (1998).

Regarding the Fourth Amendment, both federal and state courts have consistently held that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**."

[2] *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

Mapp v. Ohio, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction [of Fourth Amendment protections] deprives them of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)(emphasis added). "Warrantless searches are per se unreasonable under the Fourth Amendment" and are subject to "specifically established and well-delineated exceptions to the warrant requirement." *State v. Williams*, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834, citing *Katz v. United States*, 389 U.S. 347, 357 (1967).

B. The Seizure of a Sample of a Person's Breath Implicates the Fourth Amendment.

As part of Mr. O'Haire's proffer, it is important to acknowledge that he was entitled to more than the statutory protections afforded by Wis. Stat. §343.303 when his breath was seized, but rather, was entitled to the protections afforded by the Fourth Amendment as well.

Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602 (1989), is instructive on the foregoing proposition. In *Skinner*, the United States Supreme Court examined whether a federal regulation which permitted quasi-private railways to obtain breath samples from employees who were involved in accidents on the railroad implicated Fourth Amendment protections for the railroad workers. *Id.* at 614-15. In holding that the Fourth Amendment ***was implicated in the seizure of breath samples*** from railroad personnel, the High Court stated:

> **We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private**

> **railroads in reliance on Subpart D will not implicate the Fourth Amendment**.
> . . .
>
> We have long recognized that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. *See Schmerber v. California*, 384 U.S. 757, 767-768 (1966). *See also Winston v. Lee*, 470 U.S. 753, 760 (1985). In light of our society's concern for the security of one's person, see, *e. g., Terry v. Ohio*, 392 U.S. 1, 9 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. *Cf. Arizona v. Hicks*, 480 U.S. 321, 324-325 (1987). Much the same is true of the breath-testing procedures required under Subpart D of the regulations. **Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, *see, e. g., California v. Trombetta*, 467 U.S. 479, 481 (1984), implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search**, *see* 1 W. LaFave, Search and Seizure § 2.6(a), p. 463 (1987). *See also Burnett v. Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3rd Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

Skinner, 489 U.S. at 615, 616-17 (emphasis added); *see also*, *State v. Banks*, 2010 WI App 107, ¶ 18, 328 Wis. 2d 766, 790 N.W.2d 526 (favorably citing *Skinner* for the proposition that the seizure of a breath implicates the Fourth Amendment).

Similarly, in *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), the court of appeals recognized that "the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, ..." *Id*. at 623, citing *Waukesha Mem'l Hosp., Inc. v. Baird*, 45 Wis. 2d 629, 173 N.W.2d 700 (1970), and *State v. Bentley*, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979).

Pursuant to the foregoing authority, the lower court failed to recognize that Mr. O'Haire's breath sample was seized in violation

of the U.S. and Wisconsin constitution's—let alone being seized in a statutorily compliant fashion—when the trooper in this case approached Mr. O'Haire and told him that if he did not submit to a PBT, he would "go right to jail" as though the state could compel the seizure of a sample of his breath. (R84; R85; R86 at 17:22 to 18:21; D-App. at 104-05.)

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), clearly established that seizures of a person's breath may *not* be compelled under the Fourth Amendment. In a case joined with Birchfield's involving a defendant named Beylund, the United States Supreme Court observed:

> Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. **The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel . . . breath tests**.

Id. at ___, 136 S. Ct. at 2186 (citations omitted; emphasis added).

In order to determine whether agents of the State are unconstitutionally "compelling" an individual to submit to their authority, the Wisconsin Supreme Court developed the test set forth in *State v. Artic*, 2010 WI 83, 327 Wis. 2d 392, 768 N.W.2d 430, the Wisconsin Supreme Court provided multiple nonexclusive factors to be considered when determining whether consent is given voluntarily. Included among these are:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent;
>
> (2) **whether the police threatened or physically intimidated the defendant** or "punished" him by the deprivation of something like food or sleep;
>
> (3) **whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite**;

> (4) how the defendant responded to the request to search;
>
> (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and
>
> (6) whether the police informed the defendant that he could refuse consent.

Artic, 2010 WI 83, ¶ 33 (emphasis added), citing *Phillips*, 218 Wis. 2d at 198-203.

According to the *Arctic* court, an individual's consent must be "'an essentially free and unconstrained choice,' not 'the product of duress or *coercion*, express or implied.'" *Artic*, 2010 WI 83, ¶ 32, quoting *Schneckloth*, 412 U.S. at 225, 227 (emphasis added). The determination of voluntariness is based upon an evaluation of the totality of the surrounding circumstances. *Artic*, 2010 WI 83, ¶ 32.

The *Artic* court's logic stems from the fact that "[w]arrantless searches are *per se* unreasonable under the Fourth Amendment" and subject to "specifically established and well-delineated exceptions to the warrant requirement." *Williams*, 2002 WI 94, ¶ 18, citing *Katz*, 389 U.S. at 357. Included among these exceptions are searches conducted pursuant to ***freely and voluntarily*** given consent. *Williams*, 2002 WI 94, ¶ 18 (emphasis added), citing *Phillips*, 218 Wis. 2d at 196. "The State bears the burden of proving that consent was given freely and voluntarily." *Schneckloth*, 412 U.S. at 222. It must satisfy that burden "by clear and convincing evidence." *Phillips*, 218 Wis. 2d at 197. "The State's burden in a consent search is to show voluntariness, which is different from informed consent." *Id*. at 203. The consent must be a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. *Holt v. State*, 17 Wis. 2d 468, 474-75, 117 N.W.2d 626 (1962). **Consent is not voluntary if the State proves "no more than acquiescence to a claim of lawful authority**." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968)(emphasis added).

In *Bumper*, four law enforcement officers approached Hattie Leath at her home and advised that they had a search warrant to search the house. Ms. Leath allowed them in and as a result of their search, the officers seized a rifle that was later introduced into evidence at Ms. Leath's grandson's trial. At a suppression hearing regarding the admissibility of the rifle, Ms. Leath testified that she allowed the officers into her home simply because she believed their assertion that they had authority to do so under a search warrant. In fact, the officers did not have a warrant to search the home. Nonetheless, the State asserted that Ms. Leath's consent was valid. The United States Supreme Court rejected this assertion and found that Ms. Leath's consent was invalid because it was no more than acquiescence to law enforcement's claim of lawful authority to search. *Bumper*, 391 U.S. at 548-49.

Since breath tests are (1) entitled to Fourth Amendment protection under *Skinner*, and (2) may not be compelled under *Birchfield*, and finally, (3) consent to the same may not be obtained coercively under *Artic*, the only question which remains for this Court to decide is whether, under the circumstances of this case, the trooper coerced Mr. O'Haire into submitting to a PBT.

C. Coercion Existed Under the Circumstances Herein.

One must wonder how any case, other than one involving a physical threat, could present a more coercive set of circumstances than the instant one. The uncontroverted testimony of Trooper Sawyer was that he expressly told Mr. O'Haire that if he did not submit to the PBT, he was going "right to jail." (R84; R85; R86 at 17:22 to 18:21; D-App. at 104-05.) Mr. O'Haire wonders what more would be required to make the foregoing statement a "threat" if it is not already? The options given to Mr. O'Haire by the trooper were limited to two, and two alone: either take the test I want you to take or you will be incarcerated. Under *Artic*, this is not a "congenial, non-threatening" request, but rather falls into the category of "intimidation" of which the *Artic* court waned. *Artic*, 2010 WI 83, ¶ 33.

Given that the trooper's statements were undoubtedly coercive, the only question which remains is whether the "fruit of the poisonous tree" doctrine enunciated in *Wong Sun v. United States*, 371 U.S. 471 (1963), applies to the evidence obtained after the unconstitutional seizure of Mr. O'Haire's breath.

D. The Fruit of the Poisonous Tree Doctrine.

In the seminal case of *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court examined the extent to which the Fourth Amendment's exclusionary rule was to be applied. *Id*. at 487. More specifically, the Court addressed whether, in a prosecution for the possession of heroin, evidence obtained after the search of a person which was premised upon an informant's arrest without probable cause, could be suppressed as the "fruit" of the unconstitutional arrest of the informant. *Id*. at 486-88.

In concluding that the exclusionary rule required suppression of the subsequently obtained evidence because it was the "fruit" of an unconstitutional action by law enforcement in violation of the Fourth Amendment, the *Wong Sun* Court held that "[t]he exclusionary prohibition extends as well to the indirect as the direct products of such invasions." *Id*. at 484, citing *Silverthorne Lumber Co*. *v. United States*, 251 U.S. 385 (1920).

Upon concluding that the taint of illegally obtained evidence extends "to the indirect as [well as] the direct products" of the unconstitutional act, the *Wong Sun* Court held that the appropriate test in order to determine whether the ill-gotten evidence ought to be suppressed is to question "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488, quoting Maguire, *Evidence of Guilt*, 221 (1959).

The fruit of the poisonous tree doctrine has been adopted in the same form as that established by the *Wong Sun* Court. *See*, *e.g.*, *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991); *State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), *abrogated in part*

on other grounds, *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775.

As the *Skinner* Court recognized, "[t]he . . . chemical analysis of a breath sample to obtain physiological data is a[n] invasion of [a person's] privacy interests." *Skinner*, 489 U.S. at 616. The direction in an operating while intoxicated case with regard to the "physiological data" which an officer seeks in an operating while intoxicated case is a function of a person's PBT result. More specifically, a law enforcement officer makes a decision whether to request an evidentiary breath or blood test as **a direct function** of what is revealed by the PBT. That is, if a PBT tests positive for the presence of alcohol and reveals that the subject's ethanol concentration is well above the prohibited limit, the trooper *is not* likely to seek a blood test because the officer believes that the degree of impairment is likely due to alcohol alone as opposed to cocaine for example. Similarly, if the PBT result is below the legal limit, but the subject is demonstrating significant signs of impairment, the trooper *is* likely to order blood work because the officer suspects that the person may be under the influence of drugs beyond alcohol. Likewise, if the individual is found to have marijuana in their vehicle and the PBT result is returned at a value near the legal limit, the trooper might seek a blood specimen in order to direct a laboratory to test for both alcohol *and* THC. It is clear from the foregoing examples that the PBT result *will play a significant role* in which type of test an officer will request. The two are not only inseparable, but directly linked to one another in a causal way.

This causal nexus is precisely the link about which the *Wong Sun* Court was concerned. There is no way to "sufficiently purge" the blood test from the taint of the PBT because the evidence obtained from administering field sobriety tests is not designed to distinguish between impairment by alcohol versus impairment by cocaine versus impairment by THC, *etc*., thereby providing an officer with direction regarding whether to seek a blood test versus a breath test. That is, if a person fails to pass the field sobriety tests, a law enforcement trooper may reasonably suspect impairment by alcohol, *but it is not until such time that a PBT is administered* that the trooper knows whether s/he should suspect another intoxicant (such as THC). It is

the *seizure* of the breath sample—and *only* this seizure—which provides the distinguishing information between alcohol and other substances and thereby affects the trooper's decision regarding how to proceed. To argue that the field tests and evidence of impaired driving could, of themselves, "close the book" on the issue of what a law enforcement officer should subsequently seek in the form of an evidentiary test utterly ignores the reality of these encounters between drivers and law enforcement.

Law enforcement officers simply do not know what should be tested until they have administered a PBT. Thus, one cannot posit that the officer's subsequent actions are attenuated from the remaining evidence, whether it is a refusal to submit to testing or an actual test result. As a result of the direct nexus between the ill-gotten preliminary breath test and the request for an evidentiary chemical test, evidence of Mr. O'Haire's refusal should have been suppressed from trial and the refusal charge should have been dismissed.

CONCLUSION

Because Mr. O'Haire was unconstitutionally compelled to submit to a PBT, he respectfully requests that this Court remand this matter to the circuit court to suppress the PBT result obtained in this case and suppress the fruits which were obtained thereafter.

Dated this 14th day of June, 2021.

Respectfully submitted:

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By:_____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 3,789 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 14, 2021.

Dated this 14th day of June, 2021.

MELOWSKI & SINGH, LLC

_____

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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APPENDIX

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