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**STATE OF WISCONSIN COURT OF APPEALS**  
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**Appeal No. 2021AP564**  
**Circuit Court Case Nos. 19-TR-**

**2414,**

**19TR-2415, 19-TR2425**

**Terence S. O’Haire,**

**Defendant-Appellant.**

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**ON APPEAL FROM AN ORDER OF JUDGEMENT ENTERED IN**  
**THE CIRCUIT COURT FOR JUNEAU COUNTY, BRANCH 1, THE**  
**HONORABLE STACY A SMITH PRESIDING, TRIAL COURT**  
**CASE NOS. 19-TR-2414, 19-TR2415, 19-TR2425**

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## **ISSUE PRESENTED**

- I. Whether or not the Statements of the Sergeant were unreasonably coercive to obtain a Preliminary Breath test from Mr. O'haire.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State is not requesting oral argument or publication.

## **STATEMENT OF FACTS**

The State is not offering facts in addition to those listed in the exhibits, transcript, or the defendant-appellant's brief.

## **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, Open Intoxicants in Motor Vehicle, and Unlawfully Refusing to Submit to an Implied Consent Test.

Through counsel, there was a pre-trial motion that was heard before the Honorable Judge Stacy Smith on November 19, 2020. This was an evidentiary hearing to which the Trial Court took testimony from Sergeant Sawyer as to whether or not the statements surrounding a request to submit to a Preliminary Breath Test to O'Haire was coercive. Based on the evidence presented, the Honorable Judge Smith determined that the statement's made were not coercive.

Contrary to the defendant-appellant's assertions, the State contends that it is clear from the record that the Trial Court, by the Honorable Judge Stacy Smith, correctly took into account the applicable appropriate law, and made a factual determination based on the evidence presented. For these reasons, the State requests that the Trial Court's ruling be affirmed and the defendant-appellant's appeal be denied.

### **STANDARD OF REVIEW**

Given the testimony presented to the trial court during the evidentiary hearing on November 19, 2020, the Trial Court made a finding of fact that the Statements made to Mr. O'Haire prior to his submission of a PBT was not coercive, therefore the Court should apply a "*Clearly Erroneous*" Standard of Review as to the Trial Courts Findings. *State v Woods*, 1984 117 Wis. 2d 701, 345 N.W.2d 457.

### **ARGUMENT**

#### **I. The Statements Made Surrounding the Request for Preliminary Breath Test were not unreasonably coercive.**

As discussed above, the Trial Court held an evidentiary hearing on November 19, 2020 in which Sergeant James Sawyer provided testimony to events that occurred on July 20, 2019. The relevant statute this Court must take into account is Wisconsin Statute §343.303, which outlines when a Preliminary Breath Screening Test may take place in relation to an OWI investigation. The assumption that Defendant-Appellant makes is that O'haire is entitled to more than the statutory protections under §343.303, and that the Sergeant's statements were unreasonably coercive to the point it transformed the "request" as dictated under §343.303 into a command.

The factual crux of the Defendant-Appellant's argument relies on the summary of the Sergeant's statements following the field sobriety testing that:

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.

(R81; R82; R83 at 17:22 to 18:3; P-Res at 101-102.) As well as the summarized statement that:

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.

(R81; R82; R83 at 18:14 to 18:19; P-Res at 102) However it should be noted that these are summaries of the Sergeants interaction with O'Haire. Upon further evidence as presented to the trial court, the Sergeant was able to provide important context to that particular line of questioning (R81; R82; R83 at 19:10 to 19:19; P-Res at 103). With that context, this was merely a request that a Law Enforcement officer is entitled to make pursuant to §343.303 on the basis of probable cause. To the point of probable cause, the trial court provided an in depth record of totality that gave the sergeant probable cause to request the PBT pursuant to §343.303. (R81; R82; R83 at 26:1 to 28:6 and 28:23 to 28:24; P-Res 104-106)

Given the Statutory authority that the Sergeant had to request the PBT, the only question that remains is whether or not the statements were so unreasonably coercive as to transform the request into a command to submit to the test, potentially triggering some sort of 4<sup>th</sup> Amendment protections. To that end, the Honorable Judge Smith determined they did not. Judge Smith on November 19<sup>th</sup> was in the best vantage point within his discretion to assess

the credibility of the testimony and evidence presented, and make a determination of fact under that discretion.

As demonstrated, the trial court did not erroneously exercise its discretion when it considered the testimony of Sergeant James Sawyer to not be coercive. Thus, the Trial Court's order should be affirmed.

### CONCLUSION

For the reasons as outlined above, the State respectfully requests the State requests that the Trial Court's ruling be affirmed and the defendant-appellant's appeal be denied.



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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1246 words.

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:



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**CERTIFICATION OF COMPLIANCE WITH RULE 809.19(3)(b)**

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § 809.19(3)(b) and that contains a table of contents and that complies with the confidentiality requirements of §§ 809.19(2)(a) and (b). I further certify that it contains portions of the record essential to an understanding of the issues raised.

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

Signed:



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