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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE SEIZURE OF MR. O'HAIRE'S BREATH WAS OBTAINED THROUGH COERCIVE MEANS, CONTRARY TO THE STATE'S ASSERTIONS OTHERWISE.

A. The State Fails to Grasp the Effect of the Trooper's Statements.

In an ephemeral and conclusory argument, the State posits that there was nothing coercive about the manner in which the trooper in this case obtained a breath sample from Mr. O'Haire. State's Response Brief at pp. 3-4. For purposes of laying the foundation for his rebuttal argument, it is first necessary to remind this Court of the testimony elicited from the trooper in this case. To that end, Mr. O'Haire was approached by the trooper who, upon Mr. O'Haire's completing the field sobriety tests, 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)(emphasis added). Once Mr. O'Haire was given this information, he 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 105)(emphasis added). Mr. O'Haire then 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.)

Without providing this Court with a verbatim quote from the record, the State asserts that the foregoing statements were not coercive because "the Sergeant was able to provide important context to [the] particular line of questioning" which ostensibly clarified the above-referenced testimony. State's Response Brief at p.3. Since the State did not make the effort to put the "context" of the trooper's statements in its brief, Mr. O'Haire will do so now. More specifically, the State was referring to the following:

> Q: There was some statements that your quote was somewhere in the realm of, "If you don't blow into this you are going to jail." Was that just a factual statement?
>
> A: Yeah. And, in fact, when he doesn't blow into it, I tell him to "turn around and place his hands behind his back." So that was not a coercive statement; that was just this is what's going to happen; you can choose not to do it, that's fine, but here's the next course of action.

R83 at 19:10 to 19:19.

What the State apparently cannot divine from relying upon the foregoing "context" is that it has hoisted itself on its own petard and made Mr. O'Haire's point for him. Note carefully what the trooper initially told Mr. O'Haire, namely: "If you don't blow into this you are going to jail." Note then that the trooper admits that Mr. O'Haire did not initially "blow into [the PBT]," so what action did the trooper next take? He made good on his threat and told Mr. O'Haire to "turn around and place his hands behind his back." It was only *after* the trooper made good on his threat about taking Mr. O'Haire to jail by telling him to "turn around and place his hands behind his back" that Mr. O'Haire finally relented and gave up asserting his Fourth Amendment right to refuse to submit to the PBT. Mr. O'Haire wonders how, in any reasonable universe, the State could proffer that this "context" makes the seizure of Mr. O'Haire's breath seem any more reasonable, appropriate, or constitutional? Mr. O'Haire was threatened that if he did not provide a breath sample, he would be taken to jail. He attempted to exercise his Fourth Amendment rights by not immediately agreeing to provide a sample. The trooper then *took action* to arrest him and it was only after this action that Mr. O'Haire finally relented. If this is *not* coercive, then what is?

The point that a true "request" must be made under § 343.303 is best made by illustration. If a law enforcement officer read a person their *Miranda* rights and thereafter said, "if you don't answer my questions, you're going to jail," there is no court in any Federal or State jurisdiction which would find that if the individual waived his right to remain silent and answered questions that the statements made by the accused would be admissible against him. Clearly, in this context, the officer's threat of jail would properly be deemed coercive in derogation of the Fifth Amendment.

The only difference between the foregoing hypothetical and Mr. O'Haire's circumstance is that instead of implicating a Fifth Amendment right, this case

implicates a Fourth Amendment right. As he noted in his initial brief, the seizure of a sample of a person's breath implicates the Fourth Amendment. *See Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989); *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980); *Waukesha Mem'l Hosp., Inc. v. Baird*, 45 Wis. 2d 629, 173 N.W.2d 700 (1970); *State v. Bentley*, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979). The State, in its Response Brief, does not contest this fact, rather, it only questions whether the trooper's statements could be deemed coercive in the context in which they were delivered. Given the State's implicit concession that the Fourth Amendment *is* implicated in seizures of a person's breath, it follows that the State must also accept the *full freight* of everything which comes along with the Fourth Amendment and this includes the rule that any waiver of a Fourth Amendment right must be freely and voluntarily made, without duress or coercion either expressed or implied.

If there is any question regarding whether Mr. O'Haire's rights were unconstitutionally infringed, it must be remembered that the United States Supreme Court has asserted that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886). Thus, the State is not starting from a "level playing field" when it proffers that the trooper's statements are not coercive. The examination of this issue is constitutionally required to begin from a point wherein the scales are, at least initially, tipped in favor of Mr. O'Haire. Any conclusory arguments by the State to the contrary cannot overcome this significant burden.

B. The Trooper Lacked the Authority to Do Anything But "Request" a Preliminary Breath Test.

The State next argues that the trooper had "the Statutory [*sic*] authority . . . to request the PBT, ..." State's Response Brief at p.3. Tellingly, the State uses the word "request" when it describes the trooper's authority, but fails to acknowledge that threatening a person with the words "if you don't blow into this, you're going to jail" is somehow not coercive. The State seemingly equates the foregoing statement with the term "request." The State's position in this regard, at least insofar as it relates to the trooper's "statutory authority," is patently absurd.

To emphasize his point in the foregoing regard, *i.e.*, that breath tests must be "requested" under Wis. Stat. § 343.303 rather than coerced, Mr. O'Haire refers this

Court to other preliminary breath test statutes which apply to similar circumstances as those present in the instant case but which require that different action be taken. For example, statutes which speak to the administration of PBTs in intoxicated boating, intoxicated snowmobiling, and intoxicated all-terrain vehicle cases *all* state that the suspect "**shall provide** a sample of his or her breath for a preliminary breath screening test" when requested to do so. *See* Wis. Stat. §§ 30.682(1), 350.102(1), & 23.33(4g)(a) (2021-22)(emphasis added), respectively. If Mr. O'Haire's position that the "request" language employed by § 343.303 did not truly mean *request*, but rather meant that the seizure of a person's breath is something that can be compelled, then one must naturally ask: Why would the Wisconsin Legislature elect to use *different* language across so many other statutes? The legislature could have enacted § 343.303 with the words "shall provide" as it did in every other instance, yet it chose to employ the words "may request." The legislature is presumed to know what the law is on any given topic, and therefore, under the prevailing canons of statutory construction, the legislature's election to use alternative language in § 343.303 *must* mean something. Not only is this Court required to harmonize these statutes, but additionally, when the legislature elects to use different language on a similar topic, it must conclude that a *different* intention is evidenced. *See State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The language of each statute must be given full force and effect. *See generally*, *State v. Delaney*, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416; *State v. Newman*, 157 Wis. 2d 438, 459 N.W.2d 882 (Ct. App. 1990).

Based upon the foregoing, it is clear that the State is in error when it argues that the trooper had the "statutory authority" to compel Mr. O'Haire's submission to a preliminary breath test by coercive means.

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 9th day of August, 2021.

Respectfully submitted:

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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 1,790 words.

Dated this 9th day of August, 2021.

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