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05-25-2022
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2021AP001858-CR

v.

TRAVIS D HUSS
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM AN ORDER DENYING
SUPPRESSION AND A JUDGMENT OF CONVICTION ENTERED IN
THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE
JOHN A. JORGENSEN, PRESIDING

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Table of Contents

Statement of Issue Presented for Review	1
Statement on Oral Argument and Publication	1
Statement of the Case	1
Argument	2
Conclusion	8
Certification	9

Cases Cited

<u>State v. Albright</u> , 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980)	3
<u>State v. Pharr</u> , 115 Wis.2d 334, 340 N.W.2d 498 (1983)	5
<u>State v. St. George</u> , 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777	6
<u>State v. Williams</u> , 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919	6
<u>State v. Wollman</u> , 86 Wis. 2d 459, 273 N.W.2d 225 (1979)	5

Statutes Cited

Wis. Stat. 343.303	2
Wis. Stat. 809.19	1
Wis. Stat. 904.03	3, 4, 5

I. Statement of Issues Presented for Review

- 1) Whether the trial court abused its discretion in ruling evidence of Mr. Huss' demand for a PBT was more prejudicial than probative?

The circuit court found such evidence to be “too confusing and too prejudicial” (R109:P105) and did not allow such evidence to be presented to the jury.

II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument, as this matter involves only the application of well-settled law to the facts of the case.

III. Statement of the Case

The State believes Mr. Huss' recitation of the facts of the case is sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

In his opening statement, Mr. Huss' attorney told the jury the defendant "asked more than once for a PBT, and [the arresting officer] refused to provide it to him." R109:P61.

The State objected, noting that Wis. Stat. 343.303 provides that "[t]he result of the preliminary breath screening test [PBT] shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested," R109:P102, and that admitting the defendant's demand for a PBT "would lead to a lot of extraneous information about the law" and would "be more confusing than probative." *Id.*

The trial court agreed, and prohibited evidence about the defendant's demand for a PBT. Because evidence of the demand for a PBT was more prejudicial and confusing than probative, the Court correctly exercised its discretion in prohibiting such evidence to be presented to the jury.

Because Mr. Huss was able to argue his defense of an unsatisfactory investigation ("cuff them and stuff them and send them off to jail"

R109:PP199-200), he was not denied his right to a defense. Because there was no error, the conviction should be affirmed.

- 1) Evidence of Mr. Huss' offer to take a PBT is more prejudicial and confusing than probative.

Wis. Stat. 904.03 provides that “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Mr. Huss argues that “[i]f evidence of a refusal [to take a PBT]¹ is admissible on the theory that it demonstrates a consciousness of guilt, the corollary must also be true that a request for a breathalyzer is admissible on the theory that it demonstrates a consciousness of innocence.” 15 Br. of Appellant.

The results of a PBT are not admissible at trial. A refusal to do admissible field sobriety tests, followed by a demand for a PBT after arrest is consistent not only with innocence, but also with a driver unsure of his alcohol concentration, and knowing that if the result comes in high, he has

¹ Mr. Huss cites *State v. Albright* 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980) to support the his claim that a PBT refusal is admissible. *Albright* concerns evidentiary breath refusals. The State knows of no authority that a PBT refusal is admissible at trial.

provided no inculpatory evidence, and if it comes back low, perhaps the officer might reconsider her arrest decision.

Allowing evidence of Mr. Huss' request for a PBT would have required educating the jury on the legal significance of the PBT (admissible only for probable cause in an OWI case), the officer's training and understanding of the legal significance of a PBT result, and the substantive reliability of PBT results. In arguing Mr. Huss' PBT demand should be excluded, the State was unsure the officer had the foundational knowledge to address these issues. R109:P102.

The trial court correctly applied the Wis. Stat. 904.03 balancing test in finding that Mr. Huss' demand for a PBT "would confuse the jury about the officer's legal obligation, and its value in this trial would be minor compared to the confusion and the officer's belief or obligation to follow this procedure [give a PBT upon demand], and you know, which she's not required to do. So it may be minorly relevant in that Mr. Huss was trying to, I guess, arguably pick and choose which evidence he provides to law enforcement, but again, I'm going to find it is too confusing and too prejudicial and not allow it." R109:PP104-105.

- 2) Evidentiary decisions are reviewed under an erroneous exercise of discretion standard, and the trial court did not err in its exercise of discretion.

Admissibility of evidence is reviewed under an erroneous exercise of discretion standard. State v. Pharr, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983). A reviewing court must uphold a circuit court's discretion if the court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. State v. Wollman, 86 Wis.2d 459, 464, 273 N.W.2d 225 (1979). If there was a reasonable basis for the court's determination, then the reviewing court will not find an erroneous exercise of discretion. Pharr, 115 Wis.2d at 342, 340 N.W.2d 498.

In this case, the circuit court applied the accepted (and correct) legal standard of Wis. Stat. 904.03 (R109:PP104-105), in accord with the facts of record – that the defendant demanded a PBT, and the arresting officer did not accede to the defendant's demand. *Id.* The trial court correctly exercised its evidentiary discretion, articulated its reasonable basis, and this reviewing court should find no error.

3) The defendant was able to present his defense

“[T]he confrontation and compulsory process clauses of the Sixth Amendment of the U.S. Constitution and Article I, Section 7 of the Wisconsin Constitution grant defendants a constitutional right to present evidence. Our court has stated that [t]he rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial.... Despite these constitutional guarantees, a defendant's right to present evidence is not absolute. Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect.” State v. St. George, 2002 WI 50, ¶¶ 14-15, 252 Wis. 2d 499, 512–14, 643 N.W.2d 777, 781–82

The test for whether the exclusion of evidence violates the right to present a defense has been stated as an inquiry into whether the proffered evidence was “essential to” the defense, and whether without the proffered evidence, the defendant had “no reasonable means of defending his case.” State v. Williams, 2002 WI 58, ¶ 70, 253 Wis. 2d 99, 129–30, 644 N.W.2d 919, 933–34.

Mr. Huss claims he was prejudiced by the circuit court's evidentiary ruling because it "severely limited the defense's ability to challenge the thoroughness of the investigation into his impairment as well as the conclusion that Mr. Huss was actually impaired at the time of driving." 7 Br. of Appellant.

Mr. Huss was able to challenge the thoroughness of the investigation in this case. Mr. Huss was able to argue the arresting officer "refused to do any other standard field sobriety tests. No one leg stand, no walk and turn test. Things that could have been done there, even on the scene that she testified would only take up to 30 seconds to perform..... Eight minutes into it, [the arresting officer] is done with [Mr. Huss]. Losing composure, screaming at Travis.... And apparently, their training is to cuff them and stuff them and send them off to jail." R109:PP199-200. Even without evidence of his PBT demand, Mr. Huss was able to well defend himself with a claim the investigation was rushed and incomplete – "cuff them and stuff them and send them to jail."

Even without evidence of his PBT demand, Mr. Huss was able to defend himself that he was not actually impaired at the time of driving. "There was no observed driving in this case indicative of an OWI... During

[the officer's] contact with him, he observed no glassy blood shot eyes.... No problem manipulating the wallet, no problem manipulating his driver's license outside of the wallet.... No problem walking back to her squad car to do the field sobriety tests. No staggering, no tipping, no nothing. He can walk fine." R109:P198.

Mr. Huss was well able to defend himself that the investigation was not thorough, and that he was not impaired at the time of driving, and no violation of the defendant's right to defend himself from the circuit court's finding the demand for a PBT to be more prejudicial than probative.

V. Conclusion

The trial court correctly exercised its discretion in finding Mr. Huss' demand for a PBT was more confusing and prejudicial than probative. Mr. Huss was able to defend himself.

This conviction should be affirmed.

Dated at Oshkosh, Wisconsin this May 25, 2022

Electronically signed

By: Adam J Levin
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 1448 words.

Dated at Oshkosh, Wisconsin this May 25, 2022

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