STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001858-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS D. HUSS,

Defendant-Appellant-Petitioner.

On 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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PETITION FOR REVIEW

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ISSUE PRESENTED

> In an OWI trial, did the circuit court err in excluding evidence of law enforcement's refusal to perform a breath test when Mr. Huss repeatedly requested one in the course of the OWI investigation?

The circuit court ruled this evidence was inadmissible.

CRITERIA FOR REVIEW

This appeal involves the propriety of an evidentiary ruling during OWI/PAC trial: specifically, the admissibility of a defendant's request for a PBT. The circuit court disallowed this evidence in Mr. Huss's trial. It is undisputed, per Wis. Stat. § 343.303, that the results of a preliminary breath test (PBT) are inadmissible in an OWI trial, however, this statute governs only the results – not the request of a PBT. This Court should take review to clarify that the request of a PBT is admissible evidence even though the results of a PBT are not. Review is therefore warranted under Wis. Stat. (Rule) 809.62(1r)(c) (a decision from this Court will help develop and clarify the law).

Because this case involved very little physical evidence of impairment, evidence regarding the way in which the investigation was conducted, including law enforcement's refusal to provide a PBT after it was requested by the defendant, was essential to the

defense. Thus, the evidentiary ruling on defendant's request for a PBT thus inhibited Mr. Huss's constitutional right to present a defense. Review is therefore also warranted under Wis. Stat. (Rule) 809.62(1r)(a) (a real and significant question of federal or state constitutional law is presented).

STATEMENT OF FACTS

On September 20, 2019, at approximately 1 a.m., Officer Paige Collins observed Mr. Huss's vehicle make a right hand turn at an intersection with flashing red lights without coming to a complete stop. (109:64, 69). Apart from the rolling stop, Officer Collins did not observe any concerning driving. (109:84).

Officer Collins initiated a stop for the traffic violation. (109:70). When Officer Collins approached Mr. Huss, she noticed the odor of intoxicants, rapid, slurred, and nonsensical speech. (109:73). Mr. Huss was talking about "corruption on you guys" "the MEG[1] unit" "mini surveillance cameras" and his "privacy consultant business." (Ex. 1 00:36-2:40).[2] Based on her observations, Officer Collins believed Mr. Huss was

[1] MEG is an acronym that references law enforcement's drug unit. (109:71).

[2] Trial Exhibit 1 is found in Record 123, which is a thumb drive that contains Officer Collins's body camera footage. Portions of this footage were played for the jury. Exhibit 1 in this brief will refer to the folder titled "Huss media" → subfolder "other media" → subfolder "146" and will be followed by a minute and second marker.

"tweaking out on something" and asked Mr. Huss to perform field sobriety tests. (109:73; Ex. 1 6:19).

Officer Collins began with the horizontal gaze nystagmus test but Mr. Huss continued talking while she tried to explain the directions and then would not do as she asked. (109:73-74; Ex. 1 6:47-11:11). After Mr. Huss repeatedly failed to comply with her instructions, Officer Collins lost her temper and without attempting other field sobriety tests placed Mr. Huss under arrest for operating while intoxicated. (109:7; Ex.1 11:08). As soon as Officer Collins put the handcuffs on Mr. Huss, he repeatedly – at least 8 times – requested a breathalyzer test. (Ex 1. 11:18, 11:27, 11:47, 13:40, 13:48, 13:57, 47:24, 47:30). Officer Collins refused to perform a breath test on Mr. Huss. (Ex 1. 11:50).

After arresting Mr. Huss, Officer Collins took him to the hospital for a legal blood draw. (109:76). The blood tests results showed that Mr. Huss had a blood alcohol content of 0.109 grams per 100 milliliters at 2:14 a.m. (109:124; 86).

At trial, a chemist specializing in toxicology from the Wisconsin State Laboratory testified that alcohol is not immediately absorbed into the bloodstream and that an individual's physiology will affect the rate of absorption. (109:126-127). The chemist testified that alcohol levels can be higher at the time of the blood draw than they would have been earlier in time. (109:128). Specifically, the chemist testified that if someone consumes a couple of "harder alcohol" drinks

an hour and a half or so before the blood draw it is possible that the blood alcohol concentration would still be rising at the time the blood is drawn. (109:130).

Based on his knowledge of typical absorption and elimination rates, the chemist was asked to calculate the blood alcohol level at the time of driving if Mr. Huss had had a shot and a "Jack Daniels double" between 12:15 and 12:45. (109:169-170). Under this circumstance, the chemist estimated "the blood alcohol concentration could be anywhere between a .077 and .087." (109:170). The chemist also testified that if the shot and Jack Daniels double was not consumed at the last minute, the blood alcohol concentration could have been between .091 and .101. (109:171).

Mr. Huss offered testimony about how much alcohol he had had to drink on the night in question, but his testimony was often rambling narrative, non-responsive, non-linear, and contradictory. (109:137-167). Mr. Huss made many references to surveillance cameras, tapes and flash drives, sting operations, speaking in code and to people putting things in his drinks. (*See e.g.* 109:149, 150, 154, 155). He stated that Officer Collins had arrested him pursuant to a mental commitment in 2016, but that it was because of "another fake story on officers." (109:150).

The prosecutor distilled some of Mr. Huss's rambling testimony, calculating that Mr. Huss had admitted to consuming somewhere between 8-12 drinks over the course of 6 hours that night.

(109:148, 164). The defense elicited testimony that the night finished with a Jack and Coke and a shot just before Mr. Huss left the bar, and that he "slammed it fast." (109:166).

In closing, the defense argued that the 0.077 testimony created a reasonable doubt as to the PAC charge. (109:197). The defense further argued that none of the typical indicators of intoxication which would corroborate a blood alcohol concentration of 0.08 or above were present in this case. (109:198). The defense also argued that impairment was not fully investigated because Officer Collins inappropriately lost her cool with Mr. Huss before completing the investigation. (109:199-200).

The state conceded that there was very little evidence of impairment apart from the chemical blood test but, the state argued, it was Mr. Huss's fault for not being cooperative. (109:193, 194). The state asked the jury to rely on the chemist's estimates that put the blood alcohol level at 0.08 or above at the time of driving and find impairment based on that. (109:191, 196).

The jury returned a guilty verdict on both counts, as well as a letter that stated "We the Jury, recommend that though guilty, the defendant would benefit from better/and or extra mental health supervision and support." (83, 90). The jury never heard about Mr. Huss's requests for a breath test or Officer Collins's refusal to give him one because the

circuit court ruled that it would be confusing and prejudicial. (109:104-105; App.23-24).

On appeal, Mr. Huss claimed that the ruling on the admissibility of the request for a PBT was in error and also that it prevented Mr. Huss from exercising his constitutional right to present his defense. Mr. Huss argued that the requests demonstrated a willingness to cooperate with law enforcement as well a consciousness of innocence. The court of appeals affirmed the lower court's decision holding that evidence of the request would confuse the jury because the officer had no legal obligation to conduct the test. *State v. Huss,* No. 2021AP1858-CR, ¶14, unpublished slip op. (July 20, 2022).

This petition follows.

ARGUMENT

This Court should issue an opinion on the admissibility of requests for breath tests in OWI/PAC trials.

In a case such as this one, where there is little evidence of physical impairment, a defendant's request for a PBT – and an officer's refusal to give one – is relevant evidence, essential to the defense. The circuit court's reason for not admitting this evidence, adopted by the court of appeals, is not supported by the laws governing relevance, PBT's, or analogous case law. This Court should take review and clarify that

evidence of a defendant's request for a PBT is admissible evidence in an OWI trial.

A. Governing law on OWI/PAC, relevance and standard of review.

In an OWI trial, the state must prove, beyond a reasonable doubt, that the defendant: (1) operated a motor vehicle on a highway and (2) was under the influence of an intoxicant at the time the defendant operated the motor vehicle. WIS JI – CRIMINAL 2669. "Under the influence" means "the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." *Id.* The state must prover that the driver "has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." *Id.*

With respect to the PAC charge, the first element is the same but instead of needing to prove the defendant was "under the influence," the state must prove that at the time of driving, the defendant had a blood alcohol concentration of 0.08 grams or more of alcohol per 100 milliliters of blood. *Id.*

Any evidence relevant to these elements is admissible. Wis. Stat. § 904.02. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 901.01. "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…." Wis. Stat. § 904.03.

Whether to admit evidence is a discretionary decision. *State v. Raczka*, 2018 WI App 3, ¶7, 379 Wis. 2d 720, 906 N.W.2d 722. Importantly, however, exercising "discretion is not the equivalent of unfettered decision making." *State v. Daniels,* 160 Wis. 2d 85, 100, 465 N.W.2d 633 (1991). To survive appellate scrutiny, a discretionary decision by the circuit court must result from "reasoned application of the appropriate legal standard to the relevant facts in the case." *Id.; see also Raczka,* 379 Wis. 2d 720, ¶7 ("if the exercise of discretion is based on an incorrect legal standard, it is an erroneous exercise of discretion").

B. Evidence of a request for a breathalyzer is generally relevant and admissible.

Wisconsin Stat. § 343.303 prohibits the admission of preliminary breath tests results in OWI trials. *See* Wis. Stat. § 343.303 ("[t]he result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest"). This is because the legislature has "determined that the results are not sufficiently reliable for jury consideration in determining guilt or innocence." *See State v. Fischer*, 2008 WI App 152, 761 N.W.2d 7, 314 Wis.2d 324, *affirmed on other grounds* 778 N.W.2d 629, 322 Wis.2d 265; *reversed on other grounds through habeas corpus proceedings,* 741 F.Supp.2d 944.

But the fact that a test was given – or not – and the reasons it was given or not are regularly presented and admitted in OWI trials. Evidence of a refusal to perform field sobriety tests or take a preliminary breath test will be admitted on the theory that "the most plausible reason for refusing the test is consciousness of guilt." *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980) (regarding the admissibility of evidentiary breath test refusals); *State v. Mallick*, 210 Wis. 2d 427, 565 N.W.2d 245 (Ct. App. 1997) (regarding the admissibility of field sobriety tests refusals); *see also State v. Lemberger*, 2017 WI 39, 369 Wis. 2d 224, 880 N.W.2d 183. If evidence of a refusal 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. *See State v. Hoffman*, 106 Wis. 2d 185, 217, 316 N.W.2d 143 (Wis. App. 1982) (evidence bearing directly on consciousness of innocence is relevant).

Along this vein, this Court has held that a defendant's explanation for refusing to take a chemical breath or blood test is admissible in an OWI prosecution. *State v. Bolstad,* 124 Wis. 2d 576, 586, 370 N.W.2d 576 (1985). *Bolstad* explained "evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test." *Id.*

Further, the admissibility of a request for a breathalyzer is analogous to the way in which a polygraph test may be used at trial. Like the results of a preliminary breath test, the results of a polygraph are inadmissible in Wisconsin. *State v. Pfaff,* 2004 WI App 31, ¶¶ 26-27, 269 Wis. 2d 786, 676 N.W.2d 562. An offer to take a polygraph test, however, *is* admissible because it "is relevant to the state of mind of the person making the offer." *Id.* A request for a PBT similarly connotes the state of mind of the defendant – the act of asking for a breath test shows that the defendant, knowing what s/he has consumed, believes that it is not enough to be over the limit.

In an unpublished, persuasive decision, the court of appeals has recognized that a request for a PBT is relevant and admissible in trials when it is law enforcement who is doing the requesting. In *State v. Delvoye,* 2017AP833-AP, ¶4, unpublished slip op. (July 3, 2018) (App. 25-28), the court of appeals examined the legislative history and concluded "prior amendments to Wis. Stat. § 343.303 confirm that plain language of the statute's current version does not mandate the exclusion of evidence regarding requests for preliminary breath tests." What is good for the goose is good for the gander; if the state can present evidence of a request for a PBT, the defense can too.

Even if the circuit court's reasoning that the jury would be confused about the officer's legal obligation were correct, it doesn't make this inadmissible evidence. PBTs, like field sobriety tests, are one of the many screening tools used by law enforcement to

assist police in enforcing OWI laws. While it is true that a police officer is not obligated to request a PBT, a police officer is also not obligated to conduct field sobriety tests. *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325, (Ct. App. 1994). Whether an officer chooses to conduct field sobriety tests, what ones were used and how they were conducted are routinely fodder for trial, despite not being obligated to conduct them at all. Further, because the issue in this case is simply the request for the PBT and there was no test and no result, the fact that a PBT result cannot be presented at trial would not be confusing. The request bears on the defendant's state of mind and the how the investigation was conducted, not on the substantive reliability of the test or how the results may be used.

The court of appeals decision thus does not comport with other persuasive and analogous decisions. This Court should take review and clarify that a request for a PBT is generally admissible in an OWI trial.

C. The inadmissibility of Mr. Huss's request for a breathalyzer denied him his constitutional right to present a defense.

The only way Mr. Huss could be acquitted in this case was if he established reasonable doubt as to his impairment and blood alcohol level being at 0.08 or above at the time of driving. Because the chemist testified that Mr. Huss's blood alcohol concentration could have been as low as 0.077 at the time of driving, any evidence that tended to support non-impairment at the time of driving was essential to his defense. In addition to being a complete defense to the OWI charge, if Mr. Huss could establish reasonable doubt as to impairment, it would be far more likely that the low end of the chemist's range was correct, thus increasing reasonable doubt on the PAC charge. In a case where guilt turned on presence of hundredths or thousandths of a gram of alcohol, any fact tending to undermine the impairment conclusion was essential to Mr. Huss's defense.

A defendant has a constitutional due process right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973). The test for whether the exclusion of evidence violates the right to present a defense is 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, 644 N.W.2d 919.

In a typical OWI trial, a jury will hear about bad or erratic driving, fumbling or stumbling, glossy, blood shot eyes, poor performance on field sobriety tests – all things that lead to the conclusion the driver was impaired at the time of driving. Here, apart from the blood alcohol concentration, the only evidence that could suggest intoxication at the time of driving was Mr. Huss's admission to drinking before driving (though, notably, it is not illegal to drink before driving), the irrational manner of speaking and the non-compliance with the request to perform one field sobriety test. (109:86). Under the totality of the circumstances in this case, this is very weak evidence of impairment.

The fact that Mr. Huss did not cooperate with the HGN test was a significant factor that caused Officer Collins to conclude that Mr. Huss was impaired that night. (109:75). It is a probable and permissible inference from his refusal to cooperate that Mr. Huss did not want to take the test because it would reveal that he was intoxicated. *Lemberger*, 369 Wis. 2d 224, ¶¶19-20. But Mr. Huss's requests for a breathalyzer show that he *was willing* to cooperate and wanted to demonstrate to law enforcement that he did not believe he was impaired at the time of driving. As such, Mr. Huss's requests for the breathalyzer rebut a consciousness of guilt inference and "tend to make less probable the fact of intoxication - a fact of consequence in this action." *Bolstad,* 124 Wis. 2d 576, 585-586.

The request for a PBT is significant evidence in light of the weak evidence of intoxication in this case. Mr. Huss's irrational speech, or "crazy talk" as the prosecution termed it, may have provided probable cause for Officer Collins to believe Mr. Huss was "tweaking out on something" but probable cause to arrest is not proof beyond a reasonable doubt. (109:190). The jury had more information than Officer Collins had at the time she stopped Mr. Huss.[3] Namely, after hearing all the evidence and observing Mr. Huss, the jury properly deduced that Mr. Huss suffers from a severe mental illness. (83). The jury was aware that Mr. Huss's irrational speech during the OWI investigation, which mirrored his trial testimony, was likely a product of his mental illness rather than impairment due to consuming alcohol.

The evidentiary ruling in this case severely handicapped the defense from presenting its theory that Mr. Huss's arrest that night was more a product of a rush to judgment than a contemporaneous conclusion that he was actually impaired. While Officer Collins's decision to arrest without attempting to gather more evidence of impairment doesn't affect the lawfulness of the arrest, it should have made it more difficult for the state to prove its case at trial. As it was, the state was able to argue, contrary to fact, that Mr. Huss was entirely uncooperative and as such there was no way law enforcement could have

[3] Although Officer Collins was involved in Mr. Huss's mental commitment, she testified that she had no recollection of that when she was conducting the OWI investigation. (109:89).

gathered more information (*see* state's closing: "[Mr. Huss's] lack of cooperation didn't give any chance to more precisely measure his intoxication at the time.") (109:193).

To be sure, Mr. Huss's mental health condition made the OWI investigation more difficult than it would have been if he wasn't suffering from a severe mental illness. But Officer Collins might have recognized Mr. Huss's ramblings for the paranoid delusions they were and rather than screaming at Mr. Huss and arresting him, she might have employed de-escalation techniques so that she could have more effectively evaluated whether he exhibited any of the classic signs of impairment.[4] Her decision to move straight to arrest without attempting either more field sobriety tests or a breath test – particularly in light of Mr. Huss's requests for one – demonstrates a shallow investigation and rush to judgment. Because of the exclusion of evidence relating to Mr. Huss's request for a PBT, he was unable to present evidence necessary and essential for his defense.

[4] *See e.g.* The United States Bureau of Justice Assistance Police Mental Health Collaboration Toolkit (…[t]hrough effective training, officers learn to identify signs and symptoms of mental illnesses, and how to utilize a range of stabilization and de-escalation techniques, and they learn about disposition options, community resources, and legal issues…) *available at:* https://bja.ojp.gov/program/pmhc/training .

CONCLUSION

For the reasons stated in this brief, Mr. Huss respectfully requests that this Court remand to the circuit court with directions to vacate the judgment of conviction and order a new trial.

Dated this 19th day of August, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,587 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 19th day of August, 2022.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

STATE OF WISCONSIN

IN SUPREME COURT

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APPENDIX TO PETITION FOR REVIEW

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

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

Dated this 19th day of August, 2022.

Signed:

FRANCES REYNOLDS COLBERT
Assistant Public Defender