

FILED
09-06-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP1858-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS D. HUSS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

The Plaintiff-Respondent State of Wisconsin opposes the petition for review filed by Travis D. Huss on the following grounds:

1. The petition does not satisfy this Court's criteria for review as set forth in Wis. Stat. § (Rule) 809.62(1r). Huss claims that this Court's review is necessary to address whether a defendant has a constitutional right to present evidence that he requested a preliminary breath test (PBT) in a prosecution for operating while intoxicated. However, the admissibility of such evidence is already subject to the well-worn general standards of admissibility for evidence. There is nothing about the nature of Huss's proffered evidence in this case specifically that requires this Court's intervention.

2. Huss frames this case as involving his constitutional right to present a defense. (Pet. 14–17.) Huss is, of course, correct that he has such a right. But the law is clear that the right to present a defense does not allow a defendant to circumvent the rules of evidence. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (“The accused does not have an unfettered right to offer testimony . . . inadmissible under standard rules of evidence.”). This case thus presents a question about the “standard rules of evidence” more than it does a constitutional question.

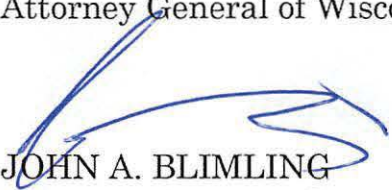
3. The standard rules of evidence squarely and adequately address the question presented by Huss's petition, as shown by the court of appeals' decision. The court had no difficulty in considering Wis. Stat. §§ 904.01, 904.02, and 904.03 to arrive at its determination that the circuit court engaged in a proper inquiry when excluding the proffered testimony, particularly with the risk of undue prejudice outweighing its probative value. (Pet-App. 9–10.) This Court has already held that the exclusion of evidence upon such a finding does not violate a defendant's right to present a defense. *See State v. Sarfraz*, 2014 WI 78, ¶ 37, 356 Wis. 2d 460, 851 N.W.2d 235.

4. Moreover, Huss's reasoning that testimony about the request for a PBT was "essential" to his defense is questionable. Huss's claim boils down to an argument that he was so confident in his sobriety that he demanded a PBT. This, he claims, demonstrated consciousness of innocence that the jury should have heard. (Pet. 12.) Yet as the petition notes, Huss's own expert at trial calculated that he had a .077 blood alcohol concentration at the time of driving. (Pet. 14.) Even if that assessment was correct—the State disagrees that it was—Huss's confidence in his sobriety, by as little as .003%, was hardly founded. This demonstrates the fundamental flaw in Huss's argument: because the result of a PBT would not be admissible at trial even if administered, *see* Wis. Stat. § 343.303, any defendant who demanded a PBT would be able to argue for the request's introduction as consciousness of innocence regardless of whether the defendant's request was based on an honest or accurate belief in his own sobriety. The evidence would thus be of minimal probative value while tending to confuse or mislead the jury; it would clearly be excludable under Wisconsin's standard rules of evidence. *See* Wis. Stat. § 904.03 ("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"). Indeed, the circuit court in this case concluded that testimony about Huss's request for a PBT would not be admissible because its prejudicial value was "just too great" and it "would confuse the jury." (R. 109:104.)

Dated this 6th day of September 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 591 words.

Dated this 6th day of September 2022.



JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 6th day of September 2022.



JOHN A. BLIMLING
Assistant Attorney General