STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2023AP169-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER A. GORE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, THE HONORABLE MARTHA MILANOWSKI, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Defendant-Appellant Christopher A. Gore drunkenly rolled his car, killing his passenger. He initially agreed to an evidentiary blood test but later sought to suppress its inculpatory results, arguing that his consent was coerced by an officer warning him that any refusal would result in the revocation of his driving privileges. Was Gore entitled to the suppression of his blood test results?

The circuit court answered no. It assumed, without deciding, that police misadvised Gore about the consequences of refusing a blood draw but concluded that the results were still admissible under the inevitable discovery doctrine.

This Court should answer no. It should hold that, at worst, police committed a statutory violation that did not invalidate Gore's consent and, regardless, the results were otherwise admissible under the inevitable discovery doctrine.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve application of well-established principles to the facts presented.

STATEMENT OF THE CASE

With a blood alcohol concentration nearing three times the legal limit, Gore drove off road and into a ditch one night, striking a driveway embankment that launched his vehicle into the air. (R. 2:3–6, 10.) His sole passenger, who was ejected from Gore's vehicle during the high-speed rollover crash, was pronounced deceased on scene. (R. 2:4–6.)

The cause of Gore's crash became increasingly clear after police and medical personnel arrived. Gore informed treating medics that he had been drinking that night. (R. 2:3.)

He smelled of alcohol when officers spoke with him. (R. 2:3.) He was noticeably confused and did not know who had been driving his vehicle. (R. 2:3.) A whiskey bottle was found on the ground next to his crashed vehicle. (R. 2:5.) And Gore later consented to a blood test upon his hospital arrival, revealing his high blood alcohol concentration. (R. 2:3–4, 10.)

Facing charges of homicide by intoxicated use of a vehicle and homicide by use of a vehicle with a prohibited alcohol concentration, (R. 2:1; 13:1), Gore moved to suppress his blood test results, arguing that his consent to the test was involuntarily procured due to the injuries he suffered in the crash and because police supposedly misrepresented the consequences of refusing a blood test, (R. 26; 27). The court convened a hearing on Gore's motions where dispatcher Nicole Lilek, patrol officer Devon Gaszak, and Lieutenant Jason Benbenek testified. (R. 41:8, 20–21, 46.)

A Minocqua Police Department patrol officer of nearly six years, Officer Gaszak advised that he obtained traffic accident reconstruction training while at the police academy. (R. 41:21–22.) There, he learned to study various factors that might contribute to a car crash, including those related to the driver, his vehicle, and the weather. (R. 41:22.) Outside of that training, his experience as a Minocqua police officer led him to discover that tourists—or "nonlocals"—were often drinking when police were called to respond. (R. 41:23.)

His training and experience proved essential when dispatched to a car accident near local restaurant Minocqua Prime early one evening. (R. 41:23, 29, 43.) He recounted that "[i]t was dusk" and "still light out" when he responded to the call, which came in at approximately 9:15 p.m. (R. 41:23–24.) He also noted that "[t]he weather was clear," and "[t]he roads were dry" at the time. (R. 41:24.) And while there appeared to be some initial confusion about the intensity of the road curve near the crash site, Officer Gaszak clarified that Gore crashed

following only "a bend in the road," where the speed limit was a "[c]ontinuous 55" miles-per-hour. (R. 41:24, 38, 42–43.)

When he arrived at the crash scene, Officer Gaszak saw medics removing Gore from his car, which was upside down, resting on its roof. (R. 41:24, 38.) He spoke with one of the medics, who advised that Gore was the suspected driver and had admitted to drinking. (R. 41:24, 39.) As he spoke with Gore thereafter, Officer Gaszak confirmed the odor of alcohol coming from his person, and Gore maintained that he was coming to Minocqua Prime to meet with a friend, but he was confused and did not remember the crash. (R. 41:24.) And while Gore did not appear to be injured, medics still placed him in a neck brace before transporting him to the hospital by ambulance. (R. 41:26, 39.)

Based on the information known to him at that point, Officer Gaszak believed that Gore had committed the crime of homicide by intoxicated use of a vehicle, though he admitted that Gore was not formally arrested nor informed of the belief that he had committed a crime. (R. 41:28–29, 35–37, 40.) Officer Gaszak went on to explain, "When investigating a traffic accident there's usually an underlying issue, so based on training we always look for . . . vehicle factors or weather factors in which in this case was not present." (R. 41:42.) He then summarized, "So we also look for a driver, you know driver condition or -- or what they were doing. So I believe the accident occurred due to alcohol impairment from the driver." (R. 41:42.)

Lieutenant Benbenek also recalled being dispatched to assist with the traffic fatality investigation. (R. 41:48.) He noted that Officer Gaszak had called him to advise that the deceased passenger was ejected from the vehicle. (R. 41:49.) He also remembered Officer Gaszak told him that Gore was the crashed vehicle's registered owner, that Gore admitted to drinking and coming to the area to golf, and that Gore smelled of alcohol. (R. 41:49.)

When Lieutenant Benbenek reached the hospital and gained permission to speak with Gore, he noted that Gore did not appear to have suffered any physical injuries, and he was "very alert, talking, [and] answering questions." (R. 41:51.) Gore admitted to drinking "a couple beers" with friends before the crash. (R. 41:51.) Gore also stated that he had nothing to eat that day, which was significant to Lieutenant Benbenek, who knew that alcohol could "absorb a little bit quicker into the system and heighten impairment" in those who drink on an empty stomach. (R. 41:53–54.)

Thereafter, Lieutenant Benbenek returned to his car to complete "OWI paperwork" before turning and reading Gore "the Informing the Accused." (R. 41:56–59.) Gore agreed to submit to a test but asked what would happen if he refused, which prompted Lieutenant Benbenek to explain that he would contact a judge to obtain a warrant. (R. 41:56–57, 64–65, 74.) That said, Lieutenant Benbenek conceded that no officer "made any effort to obtain a search warrant to draw blood from Mr. Gore." (R. 41:63–64.) Yet while he admitted that Gore was not arrested at the time, Lieutenant Benbenek confirmed that he read the Informing the Accused form to Gore based on probable cause of the offense of "[o]perating while intoxicated causing death." (R. 41:57–58.)

The circuit court denied Gore's suppression motions. (R. 43; 45.) Relevant to Gore's single appellate claim, the court acknowledged our supreme court's decision in *Blackman*[1] but distinguished its holding given that police had probable cause to arrest Gore before reading him the Informing the Accused form. (R. 45:4–5.) "[A]ssum[ing] without finding that the Informing the Accused form misrepresented the consequences of refusal to" Gore, the court nevertheless concluded that Gore's blood test results were still admissible under the

[1] *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774.

inevitable discovery doctrine. (R. 45:5–6.) The court reasoned that police had probable cause to arrest Gore when his blood sample was requested, that body camera footage confirmed that Lieutenant Benbenek told Gore that he was going to "call the Judge" and obtain a warrant if Gore refused, and that "[b]ecause probable cause existed to arrest the defendant for the OWI offense, the warrant would have been granted and the blood draw would have inevitably occurred." (R. 45:6.)

Gore later pled no contest to homicide by operation of a motor vehicle with a prohibited alcohol concentration, and the court sentenced him to prison. (R. 78.)

Gore appeals. (R. 84.)

ARGUMENT

The circuit court correctly denied Gore's motion to suppress his blood test results.

Gore argues that supreme court precedent compelled the suppression of his blood test results, which he insists were not saved by the inevitable discovery doctrine. (Gore's Br. 8–16.) He is wrong on both points. The authority upon which he bases his argument has no bearing on Gore's case because he was never misinformed about the consequences of rejecting a blood test; his driving privileges ultimately would have been revoked had he refused. But should this Court disagree and conclude that police made a mistake meriting evidence suppression, the record reveals that police inevitably would have obtained the same evidence by way of a search warrant. Either way, the circuit court was correct to deny Gore's suppression motion, and this Court should affirm.

A. Gore voluntarily consented to the drawing and testing of his blood.

1. Blood draws are searches, searches must be reasonable, and warrantless searches are reasonable if performed based on voluntary consent.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures." *State v. Adell*, 2021 WI App 72, ¶ 15, 399 Wis. 2d 399, 966 N.W.2d 115. "A blood draw to uncover evidence of a crime is a search within the meaning of the Fourth Amendment." *State v. Tullberg*, 2014 WI 134, ¶ 31, 359 Wis. 2d 421, 857 N.W.2d 120. Thus, a blood draw must be reasonable to pass constitutional muster. *See Schmerber v. California*, 384 U.S. 757, 767 (1966) ("It could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment.").

Warrantless searches are presumptively unreasonable barring "a few specifically established and well-delineated exceptions." *State v. Coffee*, 2020 WI 53, ¶ 24, 391 Wis. 2d 831, 943 N.W.2d 845 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). One of those exceptions is a search performed based on consent. *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998).

To satisfy the Fourth Amendment, consent to search need not be knowingly and intelligently offered; the Constitution demands only that consent be voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 246–48 (1973). For voluntary consent to be given, "the Fourth and Fourteenth Amendments require that . . . consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228. Put another way, "[w]hen a suspect is asked to . . . consent to a search, the suspect's response must be 'an

essentially free and unconstrained choice,' not 'the product of duress or coercion, express or implied.'" *State v. Artic*, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430 (quoting *Bustamonte,* 412 U.S. at 225, 227).

Whether evidence should be suppressed is a question of constitutional fact, where the circuit court's factual findings are evaluated under the clearly erroneous standard, but the circuit court's application of the historical facts to constitutional principles is reviewed de novo. *State v. Floyd*, 2016 WI App 64, ¶ 10, 371 Wis. 2d 404, 885 N.W.2d 156.

2. Correctly advising a driver about the consequences of refusing a blood test does not render consent involuntary.

Under Wisconsin's implied consent law, police may ask a motorist for an evidentiary breath, blood, or urine sample in multiple situations. Most commonly, an officer may request a sample from a driver arrested for any of several drunk-driving offenses. Wis. Stat. § 343.305(3)(a). An officer may also request a sample from a driver involved in a crash that causes substantial bodily harm to another if the presence of alcohol, controlled substances, or controlled substance analogs is detected. Wis. Stat. § 343.305(3)(ar)1. And an officer may also request a sample from a driver involved in a crash that causes great bodily harm or death to another if he or she is suspected of violating state or traffic laws. Wis. Stat. § 343.305(3)(ar)2.

Notably, none of the three situations described above are mutually exclusive. To illustrate, a driver might exhibit numerous clues of impairment after hurting or killing his passenger in a drunken crash. Though police might have probable cause to immediately arrest the driver, nothing in the above statutes compels police to do so. Put another way, that an officer has probable cause to believe that a drunk driver has injured or killed another does not require a prompt arrest or compel an officer to act under Wis. Stat.

§ 343.305(3)(a). Rather, an officer who knows that a drunk driver just severely injured someone is wholly within the statutory bounds to ask for a sample without first effectuating arrest assuming he or she detects the presence of alcohol or controlled substances along the way. Wis. Stat. § 343.305(3)(ar)1.

Whichever route the officer takes, however, he or she must read certain information to the driver. Wis. Stat. § 343.305(3)(a), (3)(ar)2. Often referred to as the "Informing the Accused" form, the statutorily mandated advisory informs the driver of various ramifications of consenting to or refusing a breath, blood, or urine test. Wis. Stat. § 343.305(4). One of those consequences is that a driver's refusal to provide a sample upon request will result in the revocation of his or her driving privileges. Wis. Stat. § 343.305(4).

That warning, by itself, is generally not enough to render a driver's ensuing consent involuntary. *State v. Wintlend*, 2002 WI App 314, ¶ 18, 258 Wis. 2d 875, 655 N.W.2d 745, *overruled on other grounds by State v. Prado*, 2021 WI 64, ¶¶ 52–54, 397 Wis. 2d 719, 960 N.W.2d 869. After all, "[w]hile police cannot use deceit or trickery [to obtain consent], they are entitled to make true statements." *Village of Little Chute v. Walitalo*, 2002 WI App 211, ¶ 11, 256 Wis. 2d 1032, 650 N.W.2d 891.

When relayed to a driver who police have probable cause to believe he or she drove while under the influence of alcohol, a drug, or any combination of the two, the warning is accurate: a circuit court is required to revoke a defendant's driving privileges if the State successfully proves that (1) police had probable cause to believe the person was driving while under the influence of alcohol, (2) the officer read the driver the Informing the Accused form, and (3) the driver refused to permit the test. Wis. Stat. § 343.305(9)(a)5.a.–c.

Where a motorist's consent to a blood draw is based on misinformation, however—that is, where he agrees to a blood test only on threat of consequences that could not possibly occur—our supreme court has held that consent is coerced, and evidence gained from such a search performed based on coerced consent must be suppressed. *State v. Blackman*, 2017 WI 77, ¶¶ 52–66, 377 Wis. 2d 339, 898 N.W.2d 774.

In *Blackman*, however, the motorist's consent was undeniably secured as the result of an empty threat based on misinformation. Again, a circuit court may not order a driver's operating privileges revoked for refusing to provide a sample unless the State proves that police had probable cause. Wis. Stat. § 343.305(9)(a)5.a. Thus, if an officer who lacks probable cause tells a driver that his operating privileges will be revoked if he refuses consent, that is an empty threat that improperly coerces the driver's consent by misstating the consequences of refusing. *Blackman*, 377 Wis. 2d 339, ¶ 51.

3. Gore's consent was voluntary because police did not misinform him about the consequences of refusing.

Before Gore agreed to provide a blood sample following his fatal crash, Lieutenant Benbenek warned, "If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." (*See* R. 41:56); Wis. Stat. § 343.305(4). Because that warning involved no "deceit or trickery" and correctly informed Gore about the consequences of refusing a blood test, his ensuing consent was voluntarily tendered, and the circuit court was correct to deny Gore's motion to suppress his blood

test results.[2] *Wintlend*, 258 Wis. 2d 875, ¶ 18; *Walitalo*, 256 Wis. 2d 1032, ¶ 11.

Again, under Wisconsin's implied consent law, a court will order a driver's operating privileges revoked if police "had probable cause to believe" that the driver at issue "was driving . . . while under the influence of alcohol," the officer complied with Wis. Stat. § 343.305(4) by reading the Informing the Accused form when requesting a sample, and the driver "refused to permit the test." Wis. Stat. § 343.305(9)(a)5., (10)(a). Because there was no dispute that Lieutenant Benbenek read Gore the Informing the Accused form as required or that Gore refused a test upon request, the only question that remained was whether police had probable cause to believe that Gore committed one of many impaired driving offenses.

As the circuit court recognized below, probable cause threshold is not a high bar to meet. (*See* R. 45:4.) Our supreme court has described it as a mere "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551 (citation omitted). While more than a possibility that the defendant committed an offense is needed, "evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). This holds true in drunk-driving cases like Gore's, where our supreme court recognized, "Although evidence of intoxicant

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[2] An appellate court may affirm a circuit court's decision "on an alternative ground as long as the record is adequate and the parties have had the opportunity to brief the issue on appeal." *State v. Rippentrop*, 2023 WI App 15, ¶ 34, 406 Wis. 2d 692, 987 N.W.2d 801. In its response to Gore's pretrial suppression motion, the State argued that officers had probable cause to arrest him for drunk driving before reading him the Informing the Accused form, thus rendering its advisory accurate. (R. 29:1–6.)

usage—such as odors, an admission, or containers—ordinarily exists . . . and strengthens the existence of probable cause, such evidence is not required. The totality of the circumstances is the test." *Lange*, 317 Wis. 2d 383, ¶ 37.

Applying that flexible, common-sense test here, this Court should hold, just as the circuit court did below, that the aggregate facts known to police supported probable cause to arrest Gore for drunk driving before he was asked to consent to a blood test. (R. 45:4–6.) In other words, this Court should declare that the totality of the circumstances surrounding Gore's high-speed crash and police's ensuing investigation would lead any reasonable officer to believe that Gore was probably impaired when he drove his car off the road and crashed into a driveway embankment, causing his car to flip and eject his passenger to his death.

To begin, there can be no dispute that Gore was the driver behind the wheel when his car careened off the road. As Officer Gaszak explained, the medics who tended to Gore believed that he was the driver given his physical placement in the vehicle, with his feet tangled in or around the steering wheel. (R. 41:25.) Officer Gaszak also described the indicators that only the driver was wearing a seatbelt, while the ejected passenger was not. (R. 41:40–41.) And Officer Gaszak also recounted that Gore was the registered owner of the crashed vehicle. (R. 41:41.)

Gore was not only driving, but he was driving outright dangerously. This was not an innocuous fender-bender easily dismissed as just a careless act. Gore drove off the road at such elevated speeds that his vehicle repeatedly rolled and landed on its roof. (R. 41:38.) Excessive driving speed is one fact that often supports probable cause to arrest an intoxicated driver. *See State v. Lobato*, No. 2021AP1687-CR, 2022 WL 2963238, ¶ 27 (Wis. Ct. App. July 27, 2022) (unpublished); *State v. Pace*, No. 2018AP1428, 2019 WL 387422, ¶ 9 (Wis. Ct. App. Jan. 30, 2019) (unpublished);

Lange, 317 Wis. 2d 383, ¶ 24. And while insufficient to establish probable cause by itself, high driving speeds paired with a crash have, at times, supported probable cause to arrest for impaired driving even absent common indicia of intoxicant usage. *See, e.g.*, *Lange*, 317 Wis. 2d 383, ¶¶ 25–28, 37–38.

The time and weather conditions surrounding Gore's crash were also telling. Gore rolled his car shortly before 9:15 p.m. on a night where the weather was "clear" and the roads he traveled were "dry." (R. 41:23–24, 47–48.) While perhaps not as concerning as "bar time" operation, unsafe driving during early evening hours is still one of many facts that might lead an officer to suspect that a driver is impaired. *State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 733 N.W.2d 634. Moreover, the total absence of hazardous environmental factors only reinforced the conclusion that Gore's intoxication was to blame for his crash. *See Lange*, 317 Wis. 2d 383, ¶ 29 (noting a lack of traffic or poor road conditions that would cause a motorist's poor driving behavior). This was not a blustery Wisconsin winter night where a motorist might lose control after hitting black ice. Rather, it was logical to infer that Gore bore the blame for his crash since the weather was clear, the roads were dry, and it was still light out when he drove off the road and into a driveway embankment.

That inference was further supported by the odor emitting from Gore's person after the crash. Officer Gaszak could smell intoxicants on Gore after he was extricated from his vehicle. (R. 41:24, 27.) Unlike the occasional situation where an officer may not be able to discern the source of the offending odor or assess whether it is coming from the driver, a passenger, or the vehicle itself, *see, e.g.*, *State v. Glover*, No. 2010AP1844-CR, 2011 WL 1045540, ¶¶ 16, 18 (Wis. Ct. App. Mar. 24, 2011) (unpublished), Officer Gaszak knew the odor was coming from Gore despite only briefly speaking with him, (R. 41:24). That observation did two things: (1) it confirmed

Gore was drinking; and (2) it revealed that Gore consumed alcohol closer to the time of the crash, as opposed to a drink consumed much earlier that would likely have no impact on Gore's motor skills or judgment.[3] And while not determinative of intoxicated driving by itself, even the "slight" odor of intoxicants is a clue that can coalesce to form probable cause. *See, e.g.*, *State v. Reggs*, No. 2013AP2367-CR, 2014 WL 2974225, ¶ 25 (Wis. Ct. App. July 3, 2014) (unpublished).

Gore's responses to medics and officers were also cause for concern. His story describing where he was headed that evening—to meet a friend at Minocqua Prime, (R. 41:24)—made little sense given the speed and intensity of the crash. To have reached his destination yet still be traveling at such speeds that he would lose control of his car and crash into a driveway embankment, launching his vehicle airborne, Gore plainly either forgot where he was driving or failed to realize he had already reached his destination—both clear signs of impaired judgment and motor skills that one could reasonably expect from an intoxicated driver.

Moreover, despite remaining conscious, "coherent," "very alert," and responsive to police questioning about his alcohol intake, food consumption, and earlier activities with his friend, Gore was noticeably "confused" about the crash he just caused. (R. 41:24, 51–55.) While one might easily attribute his waning memory and nonresponsive answers to a possible blow to the head, the court heard no evidence suggesting Gore was concussed during the crash, and even so, neither police nor this Court are required to accept that excuse for Gore's inability to grasp how his car came to rest

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[3] According to the criminal complaint, Officer Gaszak discovered a whiskey bottle on the ground at Gore's crash scene, (R. 2:5), which would suggest that he or his passenger were actively drinking while inside the vehicle. However, the State concedes that this information is contained only in the criminal complaint, and Officer Gaszak did not testify to that fact.

upside down when his intoxication was a viable explanation. *See State v. Kutz*, 2003 WI App 205, ¶ 12, 267 Wis. 2d 531, 671 N.W.2d 660.

Gore's admitted alcohol and food consumption was vital for more reasons than one. By conceding that he had drunk multiple beers with a friend and that he had nothing to eat that day, (R. 41:51–53), Gore dispelled any notion that he may have smelled of intoxicants for reasons besides his own consumption. Maybe more importantly, his concession was heard by Lieutenant Benbenek, who knew that alcohol absorbs more quickly in persons who have not consumed food, causing "heighten[ed] impairment." (R. 41:53–54.) The circuit court, as well as this Court, must consider those facts not in a vacuum but from the officer's vantage, cognizant of his training and experience. *Kutz*, 267 Wis. 2d 531, ¶ 12.

Considering the totality of the circumstances, the State submits, as the circuit court held below, that police had probable cause to arrest Gore for drunk driving before reading the Informing the Accused form that garnered his consent to an evidentiary blood draw, and that conclusion is supported by several of this Court's decisions holding that police had probable cause based on similar facts.

For example, even without the benefit of standardized field sobriety testing, this Court held that police had probable cause to arrest a driver for operating a motor vehicle while intoxicated where an officer arrived at the scene of a one-vehicle accident, found a van that struck a telephone pole, and noted that the van's driver smelled strongly of alcohol and slurred his speech. *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996).

Admittedly, Officer Gaszak did not specifically describe the intensity of the odor coming from Gore, nor could he determine if Gore was slurring his speech due to the neck brace or "collar" inhibiting his jaw movement. (R. 41:65.) That

said, other damning observations not present in *Kasian* fueled a probable cause finding in Gore's case: (1) Gore was driving during the evening hours (the time of the crash in *Kasian* played no role in this Court's decision); (2) Gore's crash was extreme, with his vehicle launching into the air, rolling, and landing on its roof, (R. 41:38)—a far cry from the seemingly minor telephone pole collision in *Kasian*; and (3) absent from this Court's opinion is any suggestion that Kasian was confused or unable to recall any details about his crash, whereas Gore could not even remember who crashed his vehicle, (R. 41:24). These additional facts more than make up for a lack of slurred speech or odor intensity that played into this Court's probable cause finding in *Kasian*.

The State has also found several unpublished decisions that, while not binding on this Court, reveal that this Court has previously held that police had probable cause to arrest drivers based, again, on similar facts. For example, this Court once held that police had probable cause to arrest a driver who (1) slid off the road early one winter night, causing his vehicle to roll to its roof in the ditch, (2) originally denied drinking that evening, only to later admit to consuming alcohol when officers smelled alcohol on his breath, and (3) expressed confusion about where he had crashed his vehicle. *Marquette County v. Culver*, No. 2011AP1523, 2012 WL 2345033 (Wis. Ct. App. June 21, 2012) (unpublished). Again, while the facts in Gore's case and *Culver* are distinguishable in some ways, they command the same result given that Gore crashed his vehicle absent any hazardous weather conditions, smelled of alcohol, openly admitted to drinking, and was confused about the circumstances surrounding his crash.

Additionally, in *Town of Mukwonago v. Uttke*, No. 2011AP2021, 2012 WL 130383 (Wis. Ct. App. Jan. 18, 2012) (unpublished), this Court held that police had probable cause to arrest a motorist for drunk drinking after merely smelling the odor of alcohol on the driver and observing that he had

crashed his motorcycle at night, which left skid marks and blood on the road. Indeed, if those observations were enough to establish probable cause in *Uttke*, it's admittedly difficult to see how the same cannot be said for Gore, who rolled a four-wheeled vehicle at night and similarly smelled of alcohol.

Jurisdictions besides Wisconsin have likewise held that police had probable cause to arrest an impaired motorist in similar situations. For example, the Ohio Court of Appeals held that state troopers had probable cause to arrest a driver who smelled of alcohol and was both crying and unresponsive to questions after crashing his truck, injuring or killing several passengers. *State v. Hollis*, No. 12CA34, 2013 WL 3193511, ¶¶ 2–9, 29 (Ohio Ct. App. June 17, 2013) (unpublished). The Ohio Court of Appeals concluded those "tragic facts and circumstances" were "replete with probable cause" supporting the appellant's arrest. *Id.* ¶ 29.

The Georgia Court of Appeals similarly held that police had probable cause to suspect a motorist was driving under the influence of alcohol when a witness detected the odor of alcohol at the scene where the suspect drove off the roadway, traveled onto a grass median, and struck a large tree in the early morning hours after New Year's Eve. *Mason v. State*, 837 S.E.2d 711 (Ga. Ct. App. 2020).

And the Texas Court of Appeals would plainly agree that officers had probable cause to arrest Gore given its consistent recognition that probable cause exists to arrest a motorist for impaired driving when he or she smells of alcohol after being involved in a serious automobile crash. *See, e.g.*, *State v. May*, 242 S.W.3d 61, 62 (Tx. App. 2007); *State v. Cullen*, 227 S.W.3d 278, 282 (Tx. App. 2007).

In the end, however, the State recognizes that no two cases are identical, and whether police had probable cause to arrest Gore for impaired driving remains a totality-of-the-circumstances inquiry. *Lange*, 317 Wis. 2d 383, ¶ 37. Still, the

above survey of decisions reveals that appellate courts across the country, including this Court, have held that police had probable cause to arrest an impaired driver based on facts similar to—and often even less egregious—than those facts described by Officer Gaszak in this case.

Guided by that authority, this Court should hold that the aggregate facts known to police supported probable cause to arrest Gore for drunk driving. And because, unlike *Blackman*, the warning that his driving privileges would be revoked if he refused was an accurate recitation of Wisconsin law and a correct prediction of what would have happened had Gore not consented as Wisconsin's implied consent law required, this Court should conclude that Gore's consent to a post-crash blood test was not improperly coerced.

4. At most, officers committed a statutory violation that did not invalidate Gore's consent.

Despite identifying the critical difference separating Gore's case from *Blackman*—that police had probable cause to arrest Gore for impaired driving before reading him the Informing the Accused form—the circuit court "assume[d] without finding that the Informing the Accused form misrepresented the consequences of the refusal to the defendant" before determining that the inevitable discovery doctrine saved the evidence from suppression. (R. 45:5.)

If the circuit court made any mistake at all in this case, it was making that assumption. Having concluded that police had probable cause to arrest Gore for impaired driving before reading him the Informing the Accused advisory, the circuit court failed to explain which information was misrepresented to Gore or why it warranted evidence suppression prompting its inevitable discovery discussion. (*See* R. 45:5.) As the State has explained, police had probable cause to arrest Gore, and the record otherwise confirmed that Gore was read the

Informing the Accused form and refused to provide a blood sample; it's all but certain that any refusal would have resulted in the revocation of his driving privileges just as he was warned.

Conceivably, the court may have been focused on Gore's argument that the failure of police to arrest him before reading the Informing the Accused form rendered the threat of license revocation inaccurate. (R. 41:85–86.) But an officer has no duty to arrest a driver before reading the Informing the Accused form to him if that driver was involved in a crash that causes substantial bodily harm or worse to another. *See* Wis. Stat. § 343.305(3)(ar)1.–2. Moreover, whether Gore was arrested before he was read the Informing the Accused form says nothing about whether the consequences relayed in the advisory were accurate. As the State has already explained, the State must prove only three things for a court to order a defendant's driving privileges revoked, and an arrest preceding the reading of the Informing the Accused form is not one of them. *See* Wis. Stat. § 343.305(9)(a)5.a.–c.

For the sake of the argument, even assuming that it was wrong to read the Informing the Accused form to Gore without first arresting him, any perceived error resulted in only a statutory violation, not one of constitutional dimension. The constitutional issue Gore framed was whether his consent to a post-crash blood draw was voluntarily produced given the parallels he drew with *Blackman*. (*See* R. 27.) As the State has already explained, Gore's consent was not involuntarily coerced because the threat of a driver's license revocation was accurate. *See supra* pp. 15–16. Thus, the only question remaining is whether, assuming Gore's consent was voluntarily offered yet police still violated a statute by failing to arrest him before reading the Informing the Accused form, did that statutory violation demand evidence suppression?

The answer is plainly no. Our supreme court could be no clearer that Wisconsin's implied consent law "does not

dictate that a violation thereof requires suppression of a blood test result as a remedy." *State v. Piddington*, 2001 WI 24, ¶ 52, 241 Wis. 2d 754, 623 N.W.2d 528 (citing *State v. Zielke*, 137 Wis. 2d 39, 51, 403 N.W.2d 427 (1987)). A failure to abide by the statute's directives "affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility of results," but "if [the] evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible." *Zielke*, 137 Wis. 2d at 51–52.

In sum, while the protections guaranteed by the Fourth Amendment are vital and must be carefully guarded, a violation of statute does not magically become a constitutional violation just because it involves a government search. Because Gore's test results were constitutionally obtained when he voluntarily consented to having his blood drawn and tested, any perceived violation of Wisconsin's implied consent law did not mandate suppression of the fruits of a consensual search. But if this Court disagrees, it should still affirm Gore's judgment of conviction because police inevitably would have obtained his blood test results through other lawful means.

B. Alternatively, Gore's blood test results were admissible under the inevitable discovery doctrine.

1. The exclusionary rule does not apply to evidence obtained during an unlawful act that police would have inevitably discovered by lawful means.

The Fourth Amendment to the United States Constitution "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Rather, courts exclude such evidence pursuant to a "judicially-created, prudential doctrine designed to compel respect for the Fourth

Amendment's constitutional guaranty." *State v. Burch*, 2021 WI 68, ¶ 16, 398 Wis. 2d 1, 961 N.W.2d 314.

"However, exclusion is not an absolute, automatic remedy." *State v. Jackson*, 2016 WI 56, ¶ 46, 369 Wis. 2d 673, 882 N.W.2d 422. Our supreme court explained, "[J]ust because a Fourth Amendment violation has occurred does not mean the exclusionary rule applies. Rather, exclusion is the last resort." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (footnote omitted) (citation omitted). To that end, "the exclusionary rule should be applied as a remedy to deter police misconduct and most appropriately when the deterrent benefits outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." *Id.* ¶ 38.

Where those costs outweigh the benefits, however, "courts have crafted some exceptions to the rule where exclusion of the evidence would not serve the exclusionary rule's purpose." *Prado*, 397 Wis. 2d 719, ¶ 56. One well-established exception to the exclusionary rule is the inevitable discovery doctrine. *See Nix v. Williams*, 467 U.S. 431, 444 (1984). Under that doctrine, seized evidence "tainted by some illegal act may be admissible" if police would have discovered it by lawful means. *Jackson*, 369 Wis. 2d 673, ¶ 47 (quoting *State v. Lopez*, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996)).

To avail itself of that exception, the State must prove by a preponderance of the evidence that law enforcement would have inevitably discovered by lawful means the evidence sought to be suppressed. *Jackson*, 369 Wis. 2d 673, ¶ 66. In *Jackson*, our supreme court explained that this analysis requires consideration of three factors that are "important indicia of inevitability" but not "indispensable elements of proof":

> (1) [A] reasonable probability that the evidence in question would have been discovered by lawful means

> but for the police misconduct; (2) that the leads making discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

Id. ¶¶ 60, 66 (citation omitted).

Whether the inevitable discovery doctrine applies to prevent suppression of evidence also is a constitutional issue to be reviewed independently by this Court but in light of the trial court's findings of fact. *Jackson*, 369 Wis. 2d 673, ¶ 45.

2. Evidence suppression is inappropriate because police inevitably would have obtained Gore's blood test results absent the alleged statutory violation.

Should this Court decide, contrary to *Zielke* and *Piddington*, that constitutionally obtained evidence of Gore's intoxication should be suppressed due to some violation of Wisconsin's implied consent law, it should still affirm because police inevitably would have discovered the same evidence by lawful means. *Lopez*, 207 Wis. 2d at 427.

This holds true because, as the circuit court astutely noted, assuming police did something wrong by reading Gore the Informing the Accused form as required by statute, and assuming Gore would have refused a blood test had police not committed that so-called "misconduct," police were prepared to apply for and obtain a search warrant, and the State would have obtained the same test results by court order instead of by Gore's voluntary consent. (R. 45:5–6.)

That conclusion is well supported by the record before this Court. The circuit court was influenced by Lieutenant Benbenek's body camera footage, which revealed that he was ready and willing to seek a search warrant for Gore's blood if he refused to consent to a blood test and even warned Gore that this was his plan. (R. 45:5–6.) Moreover, both Officer

Gaszak and Lieutenant Benbenek believed that they had probable cause to arrest Gore for drunkenly causing the death of his passenger. (R. 41:28–29, 57.) And as far as the officers' choice not to immediately commence the warrant application process, Officer Gaszak explained that police do not automatically apply for a search warrant and wake a judge in the middle of the night unless a driver refuses a blood draw, (R. 41:43–44), which did not happen in Gore's case. Finally, Lieutenant Benbenek reiterated that he told Gore of his plan to "contact a judge and look to get a warrant." (R. 41:56–57.)

Viewed together, the above-referenced testimony and other evidence reveals that police were planning to secure a search warrant to gain a sample of Gore's blood even if he refused a blood test upon request. And, as the circuit court correctly recognized, police would have Gore's blood because, unlike in *Blackman*, officers had the requisite probable cause to obtain a search warrant. (R. 45:6.)

Two of the three "important indicia of inevitability" adopted in *Jackson* supports the circuit court's conclusion: (1) there was a "reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct" given that Lieutenant Benbenek was ready—and even warned Gore of his intent—to contact a judge and obtain a search warrant if he refused a blood test, and the circuit court recognized that a warrant would have been granted, (R. 45:6); (2) by the time Gore was asked for a sample of his blood, police already possessed the "leads making discovery inevitable" given that Officer Gaszak had already inspected the crash scene, interviewed witnesses, and noted indicia of alcohol use that, together, supported probable cause to justify the issuance of a search warrant. *Jackson*, 369 Wis. 2d 673, ¶ 60.

Nevertheless, the State concedes that Gore is right about some things. First, he correctly points out that the facts in *Jackson* can be distinguished from those in his case because

police in *Jackson* were independently pursuing another line of investigation unrelated to the taint of an illegally obtained statement. (Gore's Br. 10.) But Gore's argument plainly conflates the independent source doctrine with the inevitable discovery doctrine, which are distinct tests. *Jackson*, 369 Wis. 2d 673, ¶ 52.

To be clear, the supreme court made abundantly clear that the State need not prove that police were actively pursuing an independent line of investigation for the inevitable discovery doctrine to apply:

> Demonstrated historical facts proving active pursuit of an alternative line of investigation at the time of the constitutional violation certainly help the State to substantiate its claim that discovery of otherwise excludable evidence was inevitable. However, requiring proof *in all cases* of active pursuit at the time of the constitutional violation risks exclusion of evidence that the State might demonstrate that it inevitably would have discovered.

Jackson, 369 Wis. 2d 673, ¶ 65.

Gore's case is a prime example of the irrational result that comes from suppressing evidence that police inevitably would have discovered just because officers were not actively involved in an independent investigation at the time of the alleged misconduct. Recall that Gore's criminal investigation was not complex; he crashed his car, killing his passenger, and he exhibited signs of alcohol use and impairment long before his blood test results were reported. If police made any mistake, it occurred after Officer Gaszak lawfully gathered evidence revealing Gore's intoxication. And Lieutenant Benbenek's clearly had the information necessary to obtain a search warrant for Gore's blood and would have done so had Gore refused a blood test. That he or other police officers were not actively engaged in another independent investigation does not detract from that conclusion.

For that same reason, Gore's second argument relating to the so-called "third prong" of the inevitable discovery test is also unavailing. (Gore's Br. 11–12.) Again, the State does not dispute that "an alternative line of investigation" remains relevant in "most cases" implicating the inevitable discovery doctrine. (Gore's Br. 11–12.) There will undoubtedly come a case where this Court decides that the State failed to prove that police inevitably would have discovered evidence without violating a suspect's rights because the wrongdoing itself led police to identify a lead to certain evidence it never otherwise would have discovered. However, that's not this case; again, the only alleged wrongdoing by police occurred at the end of the investigation, after all of the evidence besides Gore's blood sample was gathered.

Gore's third and fourth arguments also miss their marks. Clinging to the belief that *Blackman* controls his case, Gore complains that declining to suppress evidence in his case would render the supreme court's decision meaningless, and he invites this Court to somehow infer from the State's efforts to distinguish *Blackman* that *Blackman* must control. (Gore's Br. 13–15.) But *Blackman* remains good law, and it will continue to prevent the State from obtaining evidence from drivers who were never suspected of drunk driving but were wrongly threatened that refusing a blood test after a serious car crash would trigger a driver's license revocation. That said, *Blackman* has no bearing on cases, like Gore's, where police have probable cause to arrest a drunk driver involved in a fatal car crash as the underlying premise driving the supreme court's decision—an inaccurate threat about the consequences of refusing a blood test—is not present. That the State has identified this difference distinguishing Gore's case from *Blackman* does not somehow refute that point.

Finally, Gore concludes by asking this Court to reject the circuit court's inevitable discovery analysis because the lower court was "Not in a Position to Make a Conclusion

About Whether a Warrant Would Inevitably Be Obtained." (Gore's Br. 15.) In support, he argues that the circuit court's analysis was "problematic" for two reasons. (Gore's Br. 15.) First, there's nothing saying evidence offered to justify a search warrant for Gore's blood would have mirrored the evidence offered at Gore's motion hearing. And second, because one cannot definitively say how many police officers would have participated in the warrant application process, what those officers would have said, or how the magistrate hearing that evidence would have interpreted the evidence, the circuit court was apparently prohibited from concluding that a search warrant would have been authorized in Gore's case. (Gore's Br. 15–16.)

Gore's final arguments again miss their marks. Indeed, his same contentions could be made in every case involving the inevitable discovery doctrine for there will always be the conceivable possibility that police may not have taken certain actions or said certain things. However, that doesn't mean that the circuit court should have assumed that police might have forgotten to mention the most impactful facts supporting probable cause to arrest Gore or that some hypothesized magistrate might have remained unconvinced by the State's evidence had police sought a search warrant.

In the end, the State needed only to prove by a mere preponderance of the evidence that, absent an alleged violation of Wisconsin's implied consent law, police still would have obtained Gore's blood test results by lawful means. *See Jackson*, 369 Wis. 2d 673, ¶ 66. Gore's litany of what-ifs should not lead this Court to disrupt the circuit court's conclusion that police would have obtained his blood absent any violation of Wisconsin's implied consent law.

CONCLUSION

This Court should affirm Gore's judgment of conviction.

Dated this 30th day of June 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,653 words.

Dated this 30th day of June 2023.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of June 2023.

Electronically signed by:

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