STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2023AP169-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

CHRISTOPHER A. GORE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, BRANCH I, THE HONORABLE MARTHA J. MILANOWSKI PRESIDING, TRIAL COURT CASE NO. 20-CF-193

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE DECISION IN *STATE v. BLACKMAN* IS CONTROLLING.

It is not clear from the State's brief that it actually read *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774, because the first argument it proffers is that Mr. Gore's test result should not be suppressed since he "voluntarily" consented to a blood test. State's Response Brief at pp. 15-17 [hereinafter "SRB"]. The State's twisted logic is premised upon its belief that when Lt. Benbenek informed Mr. Gore that his operating privilege would be revoked if he refused to consent, the Informing the Accused form [hereinafter "ITAF"] based threat did not matter. The State believes that it was removed from under the umbrella of the *Blackman* court's disapproval of the coercive nature of this statement given that Lt. Benbenek had probable cause to arrest Mr. Gore. SRB at pp. 16-23. To convince this Court that probable cause existed to arrest Mr. Gore, the State then enters into a detailed description of the facts of this case. *Id.*

None of the State's extended foray into describing the facts of this case matters. What *does* matter is a reference the State made to *Village of Little Chute v. Walitalo*, 2002 WI App 211, 256 Wis. 2d 1032, 650 N.W.2d 891, which it elected to brush past without recognizing its relevance to Mr. Gore's case. SRB at p.14. The *Walitalo* court held that "police cannot use deceit or trickery [to obtain consent]." *Walitalo*, 2002 WI App 211, ¶ 11; SRB at p.14. In order to avoid the application of the *Walitalo* admonishment, the State implies that the existence of probable cause to arrest Mr. Gore gave *carte blanche* authority to Lt. Benbenek to characterize his request for a blood specimen in any way he chose fit—even if this meant hiding his underlying motivation for wanting a blood sample. In other words, the State wants this Court to put its imprimatur of approval upon a law enforcement officer's *concealment* of the reasons underlying his request for consent.

To begin, one must examine what the definition of "deceit" denotes. According to the Oxford English Dictionary, "deceit" is "the action or practice of deceiving someone by **concealing** or misrepresenting the truth."[1] (Emphasis

[1]https://www.google.com/search?rlz=1C1UEAD_enUS1051US1051&sxsrf=AB5stBjJ4LRdIhjINKoG7joMJD0Ncq-XjQ:1688955929038&q=deceit&si=ACFMAn877DF3UlybLi_vyb99wWZFh1dLcrQbpkwziApYdXlD0J9

added). If, as the State protests, Lt. Benbenek had probable cause to arrest Mr. Gore for an alcohol-related offense, then why *conceal* that information from Mr. Gore?

The State's approach, which encourages the concealment of a law enforcement officer's intentions or motivations, has already been soundly rejected by numerous courts when it comes to seeking constitutional consent to a search. For example, in *State v. Munroe*, 2001 WI App 104, 244 Wis. 2d 1, 630 N.W.2d 223, the court of appeals examined the question of whether a law enforcement officer's actions, under the guise of a false motive, may render an individual's consent to a search not "freely and voluntarily" given.

To begin its analysis of the foregoing question, the *Munroe* court noted that warrantless searches are *per se* unreasonable under the Fourth Amendment and subject to specifically established and well-delineated exceptions to the warrant requirement. *Munroe*, 2001 WI App 104, ¶ 8. It continued that the State's burden in a consent search is to show that the consent was "freely and voluntarily given." *Id*. at ¶ 10.

The holding in *Munroe* plays a significant part in the analysis of Mr. Gore's case because of the factual similarity between the conduct of the officers therein and the conduct of officers in the case at bar. More specifically, the facts of *Munroe* are as follows. Munroe obtained lodging at a hotel in the City of Glendale by paying cash for his room and when he did, contrary to a local ordinance, he failed to provide identification to the hotel clerk. *Id*. ¶ 3.

Local law enforcement officers were conducting a "hotel interdiction" at the time Munroe was lodging at the hotel. *Id*. ¶ 2. This interdiction involved officers "checking hotels in the city for 'anything illegal'—primarily drugs, but also guns and prostitution." *Id*. The officers eventually arrived at Munroe's room, knocked on his door, and requested entry. *Id*. ¶ 4. Munroe answered the door and allowed the officers in. *Id*.

After entering, the officer told Munroe that they were just "there to confirm

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his identification . . . ." *Id*. ¶ 5. When Munroe stated that he did not have a photo ID with him and instead showed the officers a social security card and provided his name, one of the officers "asked him if [he] could search his room for anything illegal." *Id*. ¶ 5. Munroe replied "that he would 'rather not.'" *Id*. The officers continued to press the issue, and Munroe finally relented, allowing the search. *Id*. The search of Munroe's room yielded tetrahydrocannabinol, and Munroe was ultimately charged with illegal possession of the same. *Id*. ¶ 1. Munroe moved the circuit court to suppress the THC evidence on the ground that his Fourth Amendment rights were violated when his hotel room was searched, but the court denied his motion. *Id*. Munroe sought relief from the circuit court's ruling and the appellate court reversed. *Id*.

The *Munroe* court stated that "unlike the situation in *Phillips*, where the officers honestly 'explained that suspected drug dealing was the purpose of the visit,' and thus provided *Phillips* 'with sufficient information with which he could decide whether to freely consent to the search of his bedroom,' . . . , the officers here continued to mislead Munroe about their real reason for being in his room right up to the time that he finally agreed to let them search." *Munroe*, 2001 WI App 104, ¶ 13 (citation omitted).

Based upon the officers misleading Munroe about the purpose of their interdiction, the court of appeals concluded its decision with a powerful—and relevant—observation, to wit: "Their violation of Munroe's constitutional rights was purposeful and flagrant." *Munroe*, 2001 WI App 104, ¶ 13. In other words, the officers' *concealment* of their objective in searching Mr. Munroe's room made his consent to the same *in*voluntary and *not* freely given as required under the Fourth Amendment.

Like *Munroe*, Lt. Benbenek's expressed pretext for wanting Mr. Gore to submit to a blood test was to obtain constitutional consent to the same. Nevertheless, Lt. Benbenek erroneously threatened, *vis a vis* the ITAF (*and* his telling Mr. Gore that he "would contact a judge to obtain a warrant),"[2] that **he would be subject to a revocation of his operating privilege if he refused to submit to testing**—which is *precisely* the issue addressed in the *Blackman* holding. This

[2]SRB at p.10.

threat (along with the threat of a warrant) is cut from the same fabric as the *Munroe* officers' threat to bring a canine into his hotel room if he did not consent to a search. As the *Munroe* court recognized, "[t]he officer's stated purpose was not true . . . but it *was* the reason Munroe acquiesced to their entry." *Munroe*, 2001 WI App 104, ¶ 11.

Munroe is on all fours with the instant matter in that if there was probable cause to arrest Mr. Gore, law enforcement officers' willingness to *conceal* this from him—by failing to advise him of their underlying justification for requesting a blood test from the first instance—satisfies the definition of "deceit" just as the *Munroe* officers failing to advise him that their true purpose in entering his room was to conduct a "hotel interdiction." Thus, contrary to the State's assertions otherwise, there was an active deceit in Mr. Gore's case. The truth of the matter can be gleaned from the State's own argument. For example, the State conceded that "[Mr.] Gore was not formally arrested **nor informed of the belief that he committed a crime**." SRB at p.9 (emphasis added). The State further acknowledged that the circuit court "assumed, without deciding, that police misadvised [Mr.] Gore about the consequences of refusing a blood draw . . ." which satisfies the *Blackman* standard and is like the misleading conduct in which the *Munroe* officers engaged. SRB at p.7.

Additionally, just as Mr. Munroe initially indicated his reluctance to submit to the requested search, Mr. Gore inquired "what would happen if he refused" to submit to a test, and again like the *Munroe* officers who threatened Munroe with a canine search, Lt. Benbenek told Mr. Gore that he would obtain a warrant. SRB at p.10. The threatened warrant in this case is the functional equivalent of the canine in *Munroe*.

If probable cause to arrest Mr. Gore for an alcohol-related driving violation existed as a mechanism for obtaining a blood specimen under the circumstances of this case, then the question must be repeated: Why hide it? Disguising the fact that officers had probable cause to arrest Mr. Gore is akin to the officers disguising the "hotel interdiction" purpose the officers in *Munroe* had.

In forging its probable cause argument, the State overlooks one very serious problem with its position, namely that it would lead to absurd results. More

particularly, if a law enforcement officer undertakes the practice of requesting consent to submit to an evidentiary chemical test under Wis. Stat. § 343.305(3)(ar)2. when he or she is aware that probable cause exists to arrest the individual for an alcohol-related driving offense, then the *Blackman* holding would be rendered judicial flotsam since the probable cause standard—at least as portrayed by the State[3]—is so low that virtually every operating while intoxicated related matter would satisfy it. Thus, whenever a defendant raised a *Blackman* challenge, the State could always fall back on the argument it does in Mr. Gore's case, to wit: "The *Blackman* remedy doesn't attach here because the officer already had probable cause." Apart from being a dubious argument, it is highly unlikely that the Wisconsin Supreme Court would want its holding relegated so easily to the trash bin of jurisprudential history.

The State rounds out its position regarding its belief that *Blackman* does not apply to the instant matter by engaging in an effort to undermine the circuit court's statement that it "assumed, without deciding, that police misadvised [Mr.] Gore about the consequences of refusing a blood draw . . . ." SRB at p.7. It first takes issue with the circuit court's conclusion by proffering that it was not error to read the ITAF to Mr. Gore since probable cause existed to arrest him. SRB at p.24. For the reasons already set forth above, this argument is a non-starter for the State.

The State continues to posit that even if the ITAF was misleading, the misinformation provided to Mr. Gore "resulted only in a statutory violation, not one of constitutional dimension." SRB at p.24. This brings the parties full circle to Mr. Gore's opening statement which questioned whether the State had even read *Blackman* because it is that decision which addressed the *coercive* nature of the mis-advisements contained on the ITAF. More specifically, the State protests that "Gore's consent was not involuntarily coerced because the threat of a driver's license revocation was accurate" ostensibly due to the fact that probable cause existed to arrest him. SRB at p.24. Other than being a barely disguised "rehash" of its initial position, the State's assertion fails to recognize that when an individual is asked for constitutional consent to a test, *i.e.*, **when they are *not* under arrest**, the Wisconsin Supreme Court has already concluded that the information on the ITAF ***is*** misleading. This question is settled, and it rises well beyond a mere statutory

[3]In the State's own words, the "probable cause threshold is not a high bar to meet." SRB at p.16.

violation. The State's attempt to divert this Court's attention away from this simple, straightforward, and unavoidable holding of the *Blackman* court by asserting that an officer "failing to arrest" a suspect is not dispositive is a red herring. It is *entirely* dispositive. If a person is not under arrest for an alcohol-related driving violation, but instead is being asked to voluntarily consent to a test, then how is *Blackman* not applicable? These are precisely the facts underlying the *Blackman* decision and the State's protestation that the absence of an arrest is not the functional mechanism by which *Blackman* becomes applicable is, frankly, patently absurd. It is the *absence* of an arrest which *triggers* the application of *Blackman*.

The State then closes its argument by proffering that a violation of the implied consent statute does not ever trigger suppression of a blood test result as a remedy. SRB at pp. 24-25. This is far from an accurate statement. First, suppression has long been recognized as the potential remedy for violating the due process rights of the accused under the implied consent statute. *See, e.g.*, *State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986); *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984); *State v. Ehlen*, 119 Wis. 2d 451, 351 N.W.2d 503 (1984); *State v. Disch*, 119 Wis. 2d 461, 351 N.W.2d 492 (1984); *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985).

Second, it is also well-settled that suppression is a recognized remedy for a statutory violation. In *State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, the Wisconsin Supreme Court held:

> **[The common law when] properly read, do[es] not require the legislature expressly to require or allow suppression of unlawfully obtained evidence in order for a circuit court to grant a motion to suppress**.

Popenhagen, 2008 WI 55, ¶ 68 (citations omitted; emphasis added). Clearly, suppression is an available remedy for Mr. Gore, the State's protestations to the contrary notwithstanding.

II. THE INEVITABLE DISCOVERY DOCTRINE DOES NOT APPLY.

The State posits that the blood test evidence obtained by law enforcement

officers would have been inevitably discovered. SRB at pp. 27-31. The State's argument is premised upon the fact that Lt. Benebenek believed he had probable cause to obtain a search warrant. SRB at pp. 27-28.

The State comments "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**." SRB at p.28 (emphasis added). By making this argument, the State has hoisted itself on its own petard. More specifically, *State v. Jackson*, 2016 WI 56, 369 Wis. 2d 673, 882 N.W.2d 422, requires that for the inevitable discovery doctrine to apply, the discovery of the evidence would need to be based upon an independent investigation distinct from the tainted one. *Id*. ¶¶ 87-88. By conceding that the State would have obtained the evidence it sought regardless of Mr. Gore's decision, it has inextricably tied the two lines of investigation to one another, especially in light of its initial argument regarding the existence of probable cause. The "probable cause" that motivated Lt. Benebenek to seek constitutional consent from Mr. Gore is the *very same* probable cause that would have ostensibly justified a warrant. The two are indissolubly related, *i.e.*, there is ***no*** "independent" line of investigation that would have led to one but not the other. It should not be forgotten that in *Jackson*, the evidence was deemed independently discoverable because, apart from the violation of Jackson's Fifth Amendment rights, the investigating officers also had evidenced obtained from statements made by Jackson's son and from the hotel room in which the victim had been found. *Id*. ¶¶ 34, 41. Unlike *Jackson*, the line of evidence which would have supported a warrant is *exactly the same line of evidence* which prompted Lt. Benbenek's request of Mr. Gore that he give his consent to a blood test—the two are disseverable—and the State conceded as much when it reflected that "**by the time Gore was asked for a sample of his blood**, police already possessed the leads" necessary both to obtain a warrant and to ask Mr. Gore for consent. SRB at p.28 (emphasis added). The State's own formulation of its initial argument frustrates its later assertion that the inevitable discovery doctrine applies to this case.

The State argues that an independent line of investigation need not be established "in all cases," but rather is merely a relevant consideration for a reviewing court. SRB at p.29. It notes that because "[Mr.] Gore's criminal investigation was not complex" an "irrational result [would] come[] from suppressing evidence that police would have inevitably discovered . . . ." *Id*. Mr.

Gore was unaware that the constitutional rights of the accused were diminished when the offense being investigated "was not complex." If this Court adopts the State's approach, an unworkable standard would be imposed upon lower courts to determine precisely what is a "non-complex" case so that the accused could be denied the same remedy as that afforded defendants in "complex" cases. *The complexity of a case has **never** been part of the inevitable discovery doctrine test, nor should it be.*

The State concludes that *Blackman* will remain "good law" because it will "continue to prevent the State from obtaining evidence from drivers who were never suspected of drunk driving . . . ." SRB at p.30. This assertion is remarkable given that the State has argued that the "probable cause threshold is not a high bar to meet." SRB at p.16. Mr. Gore questions: Which is it? Is the probable cause threshold so low that it will virtually always be met in the case of an accident which caused injury to, or the death of, another or is it a high enough bar that the constitutional rights of the accused will be protected by the holding in *Blackman*? It appears the State is "wanting its cake and eating it too."

Dated this 10th day of July, 2023.

Respectfully submitted,

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CERTIFICATION OF LENGTH

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 2,957 words.

I also certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 10th day of July, 2023.

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