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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP458-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DUSTIN J. VANDERGALIEN,
Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S POSTCONVICTION MOTION FOR VARIOUS RELIEF WITHOUT A HEARING IN DODGE COUNTY CIRCUIT COURT WITH THE HONORABLE MARTIN DE VRIES PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP458-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUSTIN J. VANDERGALIEN,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S POSTCONVICTION MOTION FOR VARIOUS RELIEF WITHOUT A HEARING IN DODGE COUNTY CIRCUIT COURT WITH THE HONORABLE MARTIN DE VRIES PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

Defendant-Appellant, "VanderGalien" reiterates the Statement of the Case presented in his brief. (Appellant's Br. 3-9)

ARGUMENT

I. THERE IS NO RATIONAL BASIS TO INCLUDE BENZOYLECGONINE IN THE DEFINTION OF "RESTRICTED CONTROLLED SUBSTANCE" UNDER THE VEHICLE CODE.

The State has taken extraordinary leaps to overcomplicate the legal issues actually raised by VanderGalien in his brief. Prior to proceeding further, VanderGalien wishes to directly address Respondent's footnote 4. (Respondent's Br. 16) There, Respondent postures that "VanderGalien challenges only Wis. Stat. § 346.63(2)(a)3—causing injury by operating of a vehicle with a detectable amount of a restricted controlled substance in the blood. He makes no mention of the other two statutes under which he was convicted: Wis. Stat. §§ 940.09(1)(am) and 940.25(1)(am)." However, this is an inaccurate representation of VanderGalien's claims. Respondent has either: 1). failed to actually read VanderGalien's brief, or 2). is intentionally presenting disingenuous arguments to confuse the issues presented on appeal. However, VanderGalien is entitled to a full and complete review of his claim, and relief should be granted.

Petitioner clearly identified in his brief that he is challenging the inclusion of benzoylecgonine (hereinafter "BE") in the definition of "restricted controlled substance" as applied to the entire Wisconsin Vehicle Code. Section I of his brief is, in fact, titled: "Including Benzoylecgonine in the Definition of 'Restricted Controlled Substance' For Purposes

of Prosecution Under the Wisconsin Vehicle Code Has No Rational Basis Under the Law…" (Appellant's Br. 9) VanderGalien specifically identifies in § I.A that "Wis. Stat. § 340.01(50m) contains the definition of "'restricted controlled substance' as applied to the Wisconsin Vehicle Code." (Appellant's Br. 11). This is what *the plain language* of his brief states. And because all criminal statutes under the vehicle code—and all the offenses VanderGalien was convicted of—have adopted *the same* definition of "restricted controlled substance,"[1] VanderGalien submits that it is unnecessary to identify each statutory subsection sec. 340.01(50m) applies to, because BE should not be included in the definition of "restricted controlled substance" under *any* offense.

VanderGalien has suggested adoption of certain legal principles from ***State v. Luedtke***, 2015 WI 42, including that this Court should utilize the same standard of review. (Appellant's Br. 10) The suggestion was made, however, because the ***Luedtke*** decision directs that *all* operation of a motor vehicle with a detectable amount of restricted controlled substance offenses (herein after "RCS offenses") are strict liability offenses. ***Luedtke***. Because *all* RCS offenses—not just sec. 346.63(2)(a)(3)—impose strictly liable penalties, the Court's holding in ***Luedtke*** creates a reasonable presumption that that *all* substantive due process challenges to RCS offenses must be reviewed for rational basis. ***Id.*** at ¶¶76-78. And because VanderGalien presents a substantive due process challenge to the RCS statutes, ***Luedtke,*** therefore, *does* provide the correct standard of review.

This Court should not be distracted by Respondent's attempts to mischaracterize VanderGalien's deliberate

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[1] **Wis. Stat. § 340.01**: "In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided…"

categorical facial challenge to the inclusion of BE under sec. 340.01(50m). Appellant has *never* directly stated, or otherwise implied in his brief, that he *only* challenges the inclusion of BE under the definition of "restricted controlled substance" in cases charging sec. 346.63(2)(a)(3). Even though specific RCS offenses which utilize the definition of "restricted controlled substance" provided in sec. 340.01(50m) (of which there are many) may be referenced within different portions of VanderGalien's brief for persuasive purposes, his challenge is not limited to any specific count he was convicted of, or even charged with. Because including BE in the definition of "restricted controlled substance" under the Wisconsin Vehicle Code is inappropriate and unconstitutional under all circumstances.

A. VanderGalien's challenge to the RCS statutes is substantively different from those previously considered and the caselaw cited by the State is not controlling on the issues raised.

Respondent argues that VanderGalien's challenge to the inclusion of BE as a "restricted controlled substance" is somehow precluded due to the Court of Appeals' holding in ***State v. Smet,*** 2005 WI App 263. However, Respondent is wrong. While it is true that "impairment has not been a prerequisite for prosecution under the 'driving under the influence' statute since 1981," (Respondent's Br. 18, *quoting* ***Smet***, ¶13), the specific factual circumstances of VanderGalien's case present a fundamentally unique constitutional question, because the *only* relevant restricted controlled substance in VanderGalien's blood could never, under any circumstances, independently produce impairment.

In ***Smet***, the defendant was arrested on suspicion of OWI. ¶2. His blood results showed no alcohol but did reveal a measurable concentration of 3.2 nanograms per milliliter of

delta-9-THC; 3.2 nanograms per milliliter of 11-hydroxy-THC; and 95 nanograms per milliliter of carboxy-THC. ***Id*** Delta-9 THC is the primary active ingredient in marijuana and can produce impairment. **IB Adams, BR Martin,** *Cannabis: pharmacology and toxicology in animals and humans,* ADDITION, 1585-614, Nov. 1996. 11-hydroxy-THC is a metabolite of THC and can also independently produce impairment. ***Id.*** It appears ***Smet***'s challenge in that case related to the absence of a threshold level of THC concentration providing a per se assumption of impairment under Wisconsin law. However, unlike the defendant in ***Smet***, *absolutely no other relevant restricted controlled substances were found in VanderGalien's blood*.

VanderGalien does not argue that there was simply not enough BE in his blood for the State to prove he was actually impaired while driving, or that he was able to tolerate having BE in his blood without experiencing impairment when others might experience impairment. Such an argument would surely fail under ***Smet.*** VanderGalien, instead, argues that because it is *impossible* for BE to *ever* independently cause impairment, it should never stand-alone as the sole basis for conviction of a RCS offense.

Respondent has presented no evidence and posed no argument that BE can *ever* produce impairment. It has presented no evidence that any additional "restricted controlled substances" that actually cause impairment were found in VanderGalien's blood, other than the fentanyl which was clinically administered upon him arriving at the hospital. Respondent has not identified a single case wherein a defendant was convicted of a RCS offense where the *only* relevant substance found was undisputedly non-impairing and

inactive—regardless of the concentration level.[2] There also is not a single case relied upon by the court in ***Smet*** wherein the *only* relevant RCS found in the blood was an indisputably inactive and non-impairing metabolite.[3] Therefore, *no*

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[2] Respondent cites the following in response to VanderGalien's due process argument:

- ***State v. Stehlek***, 262 Wis. 642, 643, 56 N.W.2d 514 (1953) (Defendant not charged with RCS offenses)
- ***State v. Smet***, 2005 WI App 263, ¶2 (Defendant's blood results showed 3.2 nanograms per milliliter of delta-9-THC, 3.2 nanograms per milliliter of 11-hydroxy-THC, and 95 nanograms per milliliter of carboxy-THC.) (Delta-9-THC and 11-hydroxy-THC both can cause impairment (see **Adams**, *supra*))
- ***State v. Luedtke***, 2015 WI 42, ¶¶2, 5 (Consolidated defendants both charged with RCS offenses. Blood results showed presence of cocaine and BE (Luedtke); and delta-9-THC (Weissinger)) (Cocaine can cause impairment. *See* **Alan Wayne Jones**, *Perspectives in Drug Discovery*, 12. Cocaine, TIAFT Bulletin, Wol. XLIII, Number 2, 2013) (Delta-9-THC also can cause impairment (*see* **Adams**, *supra*))
- ***State v. Gardner***, 2006 WI App 92, ¶3 ("[S]ubstantial amounts of cocaine and the metabolites of cocaine were found" in defendant's blood.)
- ***State v. Loomer***, 153 Wis.2d 645, 649, 451 N.W.2d 470 (Ct.App. 1989) (Defendant not charged with RCS offenses)
- ***State v. Caibaiosai*,** 122 Wis.2d 587, 588, 363 N.W.2d 574 (1985) (Defendant not charged with RCS offenses)

[3] The following cases were cited in ***Smet***:

- ***State v. Cole***, 2003 WI 112, ¶1 (Defendant not charged with RCS offenses)
- ***State v. McManus***, 152 Wis.2d 113, 119, 447 N.W.2d 654 (1989) (Consolidated defendants were not charged with RCS offenses)
- ***Kahn v. McCormack***, 99 Wis.2d 382, 384, 299 N.W.2d 279 (Ct.App. 1980) (Does not involve prosecutions for RCS offenses)
- ***State v. Stehlek***, 262 Wis. 642, 643 56 N.W.2d 514 (1953) (Defendant not charged with RCS offenses)
- ***Bisenius v. Karns***, 42 Wis.2d 42, 44, 165 N.W.2d 377 (1969) (Does not involve prosecutions for RCS offenses)
- ***State v. Hermann***, 164 Wis.2d 269, 275, 474 N.W.2d 906 (Ct.App. 1991) (Does not involve prosecutions for RCS offenses)

controlling caselaw exists on the issues presented, despite Respondent's conclusory belief that further review is precluded.

B. Including a non-active, non-impairing, drug metabolite in the definition of RCS is not rationally related to the expressed purpose of combating drugged driving and allows the State to convict a

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- ***State v. Muehlenberg***, 118 Wis.2d 502, 503, 347 N.W.2d 914 (Ct.App. 1984) (Defendant not charged with RCS offenses)
- ***State v. Lindsey A.F.***, 2003 WI 63, ¶3 (Juvenile not charged with RCS offenses)
- ***State v. Phillips***, 178 Ariz. 368, 369, 873 P.2d 706 (1994) (Defendant charged with RCS offense based on presence of methamphetamine and marijuana metabolite in blood) ("Methamphetamine is a nervous system stimulant which acts to impair judgment and cognitive skills." ***Id.*** at 370)
- ***State v. Comried***, 693 N.W.2d 773, 774 (Iowa 2005) (Defendant charged with RCS offenses based on the presence of methamphetamine in blood)
- ***State ex rel. Lyons v. DeValk***, 47 Wis.2d 200, 202, 177 N.W.2d 106 (1970) (Defendant not charged with RCS offenses)
- ***State v. Trochinski***, 2002 WI 56, ¶1, 253 Wis.2d 38, 644 N.W.2d 891 (Defendant not charged with RCS offenses)
- ***City of Milwaukee v. Wilson***, 96 Wis.2d 11, 13, 291 N.W.2d 452 (1980) (Defendant not charged with RCS offenses)
- ***State v. Thomas***, 2004 WI App 115, ¶1 (Defendant not charged with RCS offenses)
- ***State v. Jorgensen***, 2003 WI 105, ¶3 (Defendant not charged with RCS offenses)
- ***State v. Disch***, 119 Wis.2d 461, 464, 351 N.W.2d 492 (1984) (Defendant not charged with RCS offenses)
- ***State v. Heft***, 185 Wis.2d 288, 294, 517 N.W.2d 494 (1994) (Defendant not charged with RCS offenses)
- ***State v. Pulizzano***, 155 Wis.2d 633, 637, 456 N.W.2d 325 (1990) (Defendant not charged with RCS offenses)
- ***Love v. State***, 271 Ga. 398, 517 S.E.2d 53 (1999) (Defendant charged with RCS offense based upon presence of marijuana metabolites in blood. The specific metabolite(s) were never identified)
- ***People v. Fate***, 159 Ill.2d 267, 268, 201 Ill. Dec. 117, 636 N.E.2d 549 (1994) (Defendant charged with RCS offense based upon either marijuana or marijuana metabolites in blood)

defendant based solely upon otherwise inadmissible prior bad acts.

As stated repeatedly, VanderGalien's constitutional challenge is specifically limited to circumstances wherein the *only* relevant substance located in the blood cannot possibly produce impairment. The State has essentially argued that BE should remain included in the definition of "restricted controlled substance" under the vehicle code because "many restricted controlled substances metabolize quickly" and because "proving that a person was actually intoxicated by illegal substances while driving" can be difficult. (Respondent's Br. 20). However, the State has neglected to acknowledge the panoply of other evidentiary issues which are implicated by the inclusion of an inactive, non-impairing metabolite under the definition of "restricted controlled substance," and how those issues diminish the probative value of the evidence, and otherwise compromise long-standing legal principles that protect a defendant's right to due process in criminal proceedings.

The existence of an inactive metabolite of a controlled substance in a person's blood system is *only* evidence that the person has ingested cocaine at some point in the past- *not* that the person was under the influence of cocaine at the time of operating a vehicle. *See* **Matthew C. Rappold**, *Criminal Law-Evidence of Inactive Drug Metabolites in DUI Cases: Using a Proximate Cause Analysis to Fill the Evidentiary Gap between Prior Drug Use and Driving under the Influence,* 32 U. ARK. LITTLE ROCK L. REV. 535 (2010)[4] The problem with the State's proposal—that BE should remain included in the definition of "restricted controlled substance"—is that it effectively disguises otherwise inadmissible evidence of a defendant's

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[4] *Citing* **John P. Apol & Stacey M. Sudnicki**, *Criminal Law for the 2005-2006 Term*, 53 WAYNE L. REV. 183, 192 (2007).

prior bad act, as an attempt to prove an element of an Operating with a Restricted Controlled Substance related offense. *See* **Rappold**, p. 541. "Unlike a positive BAC test result, which helps to show that the defendant was intoxicated at the time of the test, a positive test result for pharmacologically inactive metabolites does no such thing. On the contrary, evidence of inactive metabolites helps to show that the defendant was *not* intoxicated at the time of the test." ***Id.*** *citing* **Charles R. Cordova, Jr.,** *DWI and Drugs: A Look a Per Se Laws for Marijuana,* 7 NEV. L.J. 570, 592 (arguing that a positive test result for a low level of metabolites is irrelevant evidence); **Lindsay Calhoun**, *Michigan's Operating While Intoxicated Statute: The Possible Ramifications of the Michigan Supreme Court's Decision in People v. Derror,* 53 WAYNE L REV. 1125, 1138 (discussing the inaccuracies of drug testing techniques for cocaine); *see also* ***State v. Bealor***, 902 A.2d 226 231 (N.J. 2006) (considering the defendant's argument that "it would be 'a leap of faith' to conclude that 'having some substance in your urine [means] being under the influence of it;") ***Brown v. Ala. Elec. Co.***, 60 Ark. App. 138, 149 959 S.W.2d 753, 758 (1998) (Griffen, J., dissenting) ("It makes no more sense to call a marijuana metabolite marijuana than to call carbon monoxide gasoline."). Therefore, further review is needed to resolve the conflicts between these principles.

II. VANDERGALIEN WAS ENTITLED TO AN EVIDENTIARY HEARING ON ALL OTHER CLAIMS RAISED IN HIS POST CONVICTION MOTION

The State has devoted significant space to its arguments in opposition to the additional issues raised in VanderGalien's post-conviction motion. However, it has forgotten three important principles. First: The presumption in *all* sec. 974.06(3) post-conviction motions is that an evidentiary hearing should readily be granted. ***Zuehl v. State***, 69 Wis.2d

355, 359, 230 N.W.2d 673 (1975) ("[A] trial court *shall* 'grant a prompt hearing….' unless '…the motion and files and records of the action conclusively show that the person is entitled to no relief'…Under this standard, petitions (requesting a post-conviction evidentiary hearing) are liberally construed.") Second: Even if a defendant's post-conviction allegations have little or no direct support in the record of the original proceedings, a "silent record" "does not conclusively show that a defendant is entitled to no relief." ***Id.*** at 362. Third: When facts are raised in post-conviction proceedings which could potentially be contradicted by the evidence of record, an evidentiary hearing is *required* to resolve the issue(s) of fact. ***Id.*** These principles apply equally to all claims raised in the post-conviction setting.

A. Prosecutorial conflict of interest claim

Here, VanderGalien presented a legitimate and sufficient factual showing that an impermissible prosecutorial conflict of interest may have existed in this case. (See Appellant's Br. 19-24) While the State may disagree with VanderGalien's position—and while the facts adduced at hearing may make it impossible for VanderGalien to meet his burden—there is *absolutely nothing* in the record which can end the debate without an evidentiary hearing taking place. DA Klomberg has never provided *any* explanation at *any* point why he felt no need to disclose to either the court or the defendant that his long-time, personal judicial assistant had a near-familial relationship with the deceased. Furthermore, his continued personal involvement in this case *after* leaving the Dodge County District Attorney's office only compounds the problems which already existed prior to VanderGalien's post-conviction filings. If DA Klomberg *only* acted ethically in prosecuting this case, why would he as the *elected* district attorney of Dodge County not wish to promote public faith in

the judicial system by explaining his unprecedented prosecutorial decisions in this matter?

It is *possible* that an innocent explanation exists, however, there is *no way* to know without an evidentiary hearing being held. And VanderGalien is completely justified in his demand for answers on his prosecutorial conflict of interest claim. It would be incomprehensible to believe that *any* defendant would not have doubts about the fairness of a criminal prosecution when a deceased individual's de-facto mother-in-law was actively employed for the agency prosecuting the matter and trying to imprison him for decades. VanderGalien's factual assertions concerning DA Klomberg's perceived conflict of interest were sufficient to raise an issue of *fact*, and if proved, would entitle him to relief. The court's inquiry need go no further on this issue.

B. Post-Sentencing Plea Withdrawal Claims

VanderGalien also made sufficient factual showings to merit evidentiary hearings on both grounds for plea-withdrawal raised. VanderGalien presented an affidavit along with his post-conviction motion alleging facts which, under sec. 947.06(3), *are presumed to be true.* While VanderGalien's allegations that his attorney did not adequately inform him of the meaning and effect of dismissed-but read in charges at sentencing may not "be supported by any previous record made during the course of the original proceedings,' *this is not the test*" for whether an evidentiary hearing should be granted under 947.06(3). ***Zuehl,*** 362 Wis.2d at 362. (Emphasis added) There was no transcript of Attorney Snow's actual conversation with VanderGalien where they discussed dismissed but read-in charges previously entered into the record. Attorney Snow has also never provided testimony regarding his conversations with VanderGalien. Therefore, a legitimate question of fact exists, regardless whether the

burden of proof necessary to prove the individual claim is difficult to meet or not.

The same can be said of VanderGalien's motion for post-sentencing plea withdrawal because his plea was not entered knowingly, intelligently, and voluntarily. VanderGalien has never been afforded the opportunity to *explain* on the record what he believed the court meant when dismissed but read-in charges were addressed during his plea colloquy. It is *possible* that VanderGalien actually understood the effects of dismissed but read-in charges, even though DA Klomberg and Attorney Snow could not agree at the sentencing hearing. But there is no evidence which can end the debate without additional proceedings occurring.

CONCLUSION

For the reasons stated above, as well as those set forth in Defendant-Appellant's Brief-In-Chief, this Court should grant the relief requested.

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,975 words.

Dated this 1st day of September, 2023.

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