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SUPREME COURT

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2023AP000543-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS J. NERO

Defendant-Appellant.

On Appeal from the Final Orders Entered
in the Circuit Court for Dunn County,
The Honorable Christina Mayer and
Honorable James M. Peterson Presiding

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

Issue: This Court should review this case because it asks whether evidence should be dismissed in cases where law enforcement would not have obtained evidence but for a statement or urinalysis test procured by probation as a lead for its investigation. In these instances, does refusing to suppress evidence discourage probationers from complying with probation requests?

REASONS FOR GRANTING REVIEW

Review is warranted because the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the Supreme Court. *See* Wis. Stat. § (Rule) 809.62(1r)(c)(3). A ruling would help clarify the application of using protected statements or tests required for probationers as investigative leads.

STATEMENT OF THE CASE AND FACTS

1. *Mr. Nero gets stuck*

On the evening of October 13th, 2015, Mr. Nicholas Nero sought a safe place to sleep in Menomonie rather than making a late-night drive back to his home in Green Bay. (109:157; App. 74). After Mr. Nero dropped off his friend (Matt) and Matt's girlfriend at her relative's house in Menomonie, he planned to sleep. (109:147; App. 64). His plan: sleep in his car in the Wal Mart parking lot. But he got lost. (109:157; App. 74).

Mr. Nero ended up on the grounds of Monarch Paving Plant (hereinafter "Monarch Paving") driving around. Disoriented and tired, he struggled to navigate out of the dark plant grounds. Eventually, he prevailed; but another wrong turn got his car stuck in an oat field. (109:159-160; App. 76-77).

Nero testified at trial to this account of events. He left his car, walked to 628th road and called his friends. (109:160; App. 77). His friends picked him up. Although nervous about his car, Mr. Nero did not want to contact the police because he did not have a valid driver's license at the time. (109:148; App. 65). He thought he could come back and find his car later. So, he left with his friends. They went and smoked meth back at the house. Hours later, his friends dropped him back off near Monarch Paving, and he set out to find his car. But after about an hour of fruitless searching, Mr. Nero sought help. (109:152; App. 69).

Tired and cold, Nero eventually found a truck parked near a camper at Monarch Paving; he knocked on the trailer door and a foreman (Mr. Guthman) from the plant answered. (109:152-153; App. 69-70). It was 3:30 am. (109:88; App. 55). Guthman works and lives at the plant. (109:64; App. 43). Guthman observed Mr. Nero shaking and disoriented. He helped him into the warm camper and, unsure what to do from there, called the sheriff's department. (109:91-92; App. 58-59).

Earlier that evening (around 10:00 pm) Guthman observed a vehicle driving through the Monarch Paving grounds. The vehicle came in one gate, drove around the loop, proceeded over a concrete barrier, and exited out another gate. (109:65-66; App. 44-45). He observed one person in the vehicle; though he could not identify the driver as Mr. Nero. He did identify the vehicle as a Chevy Impala. (109:84; App. 51). Guthman chose not to notify anyone about the driver because he "[F]igured it was somebody lost or something or kids monkeying around and away they went." (109:66; App. 45). He returned to bed and slept until woken up by Mr. Nero at 3:30 am. (109:70; App. 47).

2. *Deputy Spenle arrests Mr. Nero for driving without a license and damage to property*

Deputy Michael Spenle met Mr. Nero at the trailer and joined the

search effort to find Mr. Nero's stuck car. Deputy Spenle notes Mr. Nero initially seemed to be disoriented and confused. (109:99; App. 62). After he gathered the facts from the situation, Deputy Spenle drove Mr. Nero and Mr. Guthman around searching for Mr. Nero's car; but the three could not locate find it after an hour of searching. (109:100; App. 63).

During this course of events, Deputy Spenle learned Mr. Nero's driving privileges were revoked. He also confirmed a large PVC pipe had been run over and damaged on Monarch Paving's grounds. (109:100; App. 63). In turn, Deputy Spenle arrested Mr. Nero for driving without a license and damage to property. (193:18; App. 145).

3. *Probation compels statement from Mr. Nero regarding the incident*

After getting booked into the jail, Mr. Nero was met by a local probation agent, Melinda Brunk. Ms. Brunk contacted him because Mr. Nero was on probation out of another county. She asked him for a statement regarding the incident involving his lost vehicle. Mr. Nero provided this statement:

Since the last time I seen my agent I have been staying with friends in Hudson, WI. My friend was Justine. I knew her for a couple of years. I should be getting an apartment soon in Green Bay. I had no where to stay in Green Bay. Justine lives on Red Oak in Hudson.

I have not used methamphetamine since the last time I seen my agent which was 6 days ago. The last time I used Heroin was the last time I got out of jail on this case for probation.

I was in Menomonie and was looking for somewhere to rest. I was looking for Walmart and ended up driving into a cornfield. I pulled off to the side to just rest. I asked for help because I was walking through a big puddle. I was wet and cold. I knocked on a guy's trailer for help. My car ended up stuck in the cornfield. The guy called the cops to help look for the car.

I have nothing else to say. (146; App. 93-94).

4. *Probation follows up with Mr. Nero* for a urinalysis test

Ms. Brunk later told Mr. Nero his regular probation agent ordered and wanted him to take a urinalysis (UA) test. The results of the UA returned positive for the presence of three controlled substances. (192:13; App.140).

5. *Mr. Nero* asks the Court to suppress all tainted evidence

Law enforcement then used the UA results as evidence to justify expanding the investigation into the driving incident from the previous night. (192:18-19; App.145-146). Most of the evidence would later be suppressed as improperly tainted. (105:4-5; App.161-162).

To start, Sergeant Kurtzhals learned of Mr. Nero's positive UA test from "the girls at the front desk." (193:10; App.137). After talking with her, he determined probable cause existed to require a blood test from Mr. Nero. (192:19-20; App.146-147).

The blood test results confirmed the presence of methamphetamine in Mr. Nero's system. (165).

Kurtzhals also submitted the affidavit for a search warrant to search for Mr. Nero's car; Deputy Vernon found Nero's car earlier that morning. (192:13; App.140). Vernon wrote in his report that no illegal items were seen in plain view. Kurtzhals signed off on the report; however, in his affidavit Kurtzhals cited illegal items were seen in plain view. This false statement, other incorrect statements, and the positive UA result formed the basis of the affidavit justifying the warrant. (142:2-3; App.168-169).

As a result of this additional evidence, Mr. Nero was charged with six counts:

Count 1: Possession of Cocaine

Count 2: Criminal Damage to Property

Count 3: Operate with Restricted Controlled Substance (3rd)

Count 4: OWI (3rd)

Count 5: Operating While Revoked

Count 6: Possess Drug Paraphernalia

Mr. Nero filed a motion to suppress all evidence tainted from the search, non-Mirandized statements, the compelled probation statement and the compelled probation UA test. (20,38).

6. Court suppresses all evidence except blood test result

After two evidentiary hearings on Nero's suppression motion and briefing from both parties, the Court excluded all evidence and statements obtained except the blood test results. (105:3-6; App.160-163). In an oral ruling, the Court explained its decision.

**(i) Mr. Nero's statement to probation officer—
suppressed.**

The Court concluded the statements Mr. Nero made to probation agents (Ms. Schultz or Ms. Brunk) were suppressed and could not be used in a criminal proceeding. (105:4; App.161).

**(ii) All evidence tied to unlawful search warrant—
suppressed.**

Because the search warrant was based "in part on the statements Mr. Nero had made to his probation agent and some other information that had been obtained," the Court suppressed any evidence obtained because of that search warrant. (105:4-5; App.161-162).

(iii) **Statements obtained in jail without Miranda rights—suppressed.**

The Court concluded any statements that Mr. Nero made while he was incarcerated in the Dunn County Jail were suppressed because the officer involved (Kurtzhals) failed to provide *Miranda* warnings. (105:4; App.161).

(iv) **Blood test results—not suppressed.**

Regarding the blood tests results, the Court concluded the following facts could be considered by Sergeant Kurtzhals to justify the blood test:

- The urine sample of Mr. Nero that was taken by the probation agent,
- Sergeant Kurtzhals' review of what Deputy Spenle observed regarding Mr. Nero being disorientated when Spenle responded to the incident at Monarch Paving; and
- The operation of the vehicle in the Township of Red Cedar in the early morning on October 14, 2005.

(105:6; App.163).

7. *After court order suppressing evidence, the State amends the complaint from six counts to three counts.*

The State amended the criminal complaint to three counts:

Count 1: Criminal Damage to Property (Repeater)

Count 2: Operate with Restricted Controlled Substance (3rd offense)

Count 3: Operating While Revoked (OAR). (58).

8. *At trial, Nero testifies to his account of events to the jury*

At trial, the State argued Mr. Nero drove through the Monarch Paving Plant around 10:00 pm—while on meth—and then exited the Plant onto the highway and into the oat field; thus, satisfying all the elements for OWI. It stressed to the jury Mr. Nero’s twelve convictions and the “erratic” nature of the driving. In sum, it argued Mr. Nero’s version of events was not believable and that Mr. Nero must have remained in his vehicle from some point around 10:00 pm until around 3:30 am when he knocked on Mr. Guthman’s trailer door.

In contrast, the defense presented Mr. Nero’s account of events: that he drove through Monarch Paving Plant around 10:00 pm, drove off the roadway into the oat field, abandoned his stuck vehicle, went and smoked meth with his friends, and returned later to Monarch Paving. He then knocked on Guthman’s trailer door because he could not find his vehicle. Mr. Nero testified to this account of events. The defense presented no other witnesses.

The jury found Nero guilty on all three counts. The parties proceeded to sentencing and the Court imposed the following sentence: a 2-year bifurcated sentence on the criminal damage charge, a 60-day sentence on the operating with a controlled substance charge, and a 6-month sentence on the OAR charge. In each instance, Mr. Nero was given credit for time served. (109:201-203; App.89-91)

9. *Court of Appeals remands case for resentencing*

On appeal, the Court of Appeals determined the court failed to adequately explain the sentencing factors and remanded the case for resentencing. (182:3). On February 7, 2022, the circuit court resentenced Nero. (177). He received the same sentence. (177). Thereafter, Nero filed another notice of intent to pursue postconviction

relief. (175).

10. *Nero files motion requesting new trial*

Nero then filed a motion to reconsider the suppression of the blood test results and a request for a new trial. (196; App. 3-28). Nero claimed ineffective assistance of counsel due to his Trial Attorney's failure to call witnesses to corroborate Nero's testimony. (196; App. 3-28).

11. *Circuit court denies Nero's new trial motion*

The circuit court denied Nero's motion without a hearing. (202:1; App. 29).

The court first confirmed Nero's post-conviction motion was not barred because it was questionable whether he "actually has had a direct appeal on this case." The court found it would be unfair to bar his post-conviction motion based on the presumption under *Escalona-Naranjo*. The circuit court then addressed the merits of the post-conviction motion. (202:5; App.33).

Next, the court denied Nero's motion for reconsideration because it found the request for the UA was not fruit of his compelled probation statement. The court starts by explaining that Nero's statement about drug use was a denial not an admission. In turn, the court concludes the UA test "was not derivative of his probation statement because he did not admit to using further drugs in his probation statement." (202:6; App.34).

Additionally, the court concluded the State met its burden under the *Kastigar* test. Specifically, the court found Sergeant Kurtzhals had probable cause to justify the blood test request without considering the positive UA test. The court based this probable cause on the following facts:

- Deputy Spenle observed that Mr. Nero was disorientated at Monarch Paving in the middle of the night.
- Mr. Nero did not know where his vehicle was located.

- He, Deputy Spenle and Foreman Guthman could not find the vehicle after searching for approximately 1 hour.
- In the morning, Deputy Vernon discovered that Nero drove in the parking lot of Monarch Paving, onto a grass yard, over a berm in between two retaining ponds, over a PVC pipe (breaking the pipe), and over a small retaining wall, knocking bricks out of place.
- Following the tracks, Mr. Nero then drove out onto 628th Avenue. He proceeded to turn into a bean field, drove into the beans for some distance until he went into a dip where his vehicle was stuck. (202:6-7; App.34-35).

12. *Circuit court denies Mr. Nero's ineffective assistance of counsel claim*

The court also found that the failure of Mr. Nero to provide affidavits to support his claim of ineffective assistance of counsel, his claim is conclusory. (202:9; App.37). In addition, the court found that none of the alleged deficiencies prejudiced Mr. Nero. The court refused to grant the requested Machner hearing and denied the motion. (202:10; App.38).

13. *Court of Appeals affirms the circuit court's rulings.*

Regarding Nero's motion to suppress the blood test results, the Court of Appeals found that the following evidence was sufficient to request a blood test independent from Nero's compelled statements:

- 1) The second deputy knew that the first deputy saw that Nero was disoriented and confused in the middle of the night and showed signs of being under the influence;
- 2) Nero did not know where he left his car; and
- 3) The second deputy knew that the first deputy was aware that Nero drove erratically at the paving plant and drove into a bean field for one-half mile. *State v. Nicholas J. Nero*, unpublished slip

op. No. 2023AP543, June, 10, 2025 ¶¶ 27-28.

The Court assumed without deciding that Nero's urinalysis test result was a fruit of his probation statement, but that assumption was not dispositive because the Court found the officer had probable cause without that UA test result. *Id.* ¶26.

The Court found Nero's claims "conclusory and undeveloped" because Nero's brief did not include what friends trial counsel could have called or what they could have said. *Id.* ¶38. The Court concluded that Nero also did not explain why or how whether he had gas in his car prejudiced his trial. *Id.* ¶39.

This petition follows.

ARGUMENT

I. This Court should review this matter because the effect of the Court of Appeals ruling discourages probationers from complying with probation requirements.

It appears likely that but for knowledge of Nero's compelled hot UA test law enforcement would not have investigated Nero for operating while intoxicated. Left unclarified, the Court of Appeals decision could reasonably deter probationers from complying with probation requests.

When law enforcement relies on compelled statements, the State bears the burden to demonstrate that evidence it wishes to use in a criminal prosecution is 'derived from a legitimate source wholly independent of the compelled testimony.'" *State v. Spaeth*, 2012 WI 95, ¶74, 343 Wis. 2d 220, 819 N.W.2d 769 (quoting *Kastigar*, 406 U.S. at 460))

This case presents this Court with a concise question: when the facts make it apparent that the officer would not have initiated the OWI investigation without his knowledge of the compelled probation statement (or hot UA test) can there be a legitimate and independent source? Here, the officer learned about the facts that the Court of Appeals cites provided and independent probable cause source; but at the same time, the investigating sergeant learned those facts alongside the incriminating UA test results.

What if Nero refused to comply with probation's request to provide a UA test? He risked only a potential probation hold or revocation. But by taking the UA test Nero risked significantly more.

When Nero provided a positive UA test result, it changed everything. It gave the investigating sergeant a lead to now investigate him for OWI. Though the record is unclear how the UA test result got conveyed to law enforcement, it shows that somehow probation provided law enforcement with the UA test result. The record shows the "girls at the front desk" somehow learned about Nero's hot UA test and relayed that result to the investigating sergeant. That sergeant then turned the investigation toward an OWI investigation. Prior to that, Nero faced no charges tied to substance use.

Reviewed from the perspective of the probationer, the Court of Appeals' ruling raises legitimate doubts about the trustworthiness of probation agents and the effect that compelled statements and tests might have as leads on investigations. The Court of Appeals decision finds an independent source of probable cause on other grounds: in effect, bad driving and the responding officer's unclear observations of possible impairment.

Even if those facts justify probable cause, it remains likely that Nero's conviction all traced back to his positive UA test because that UA test provided the lead. Thus, the issue posed for this Court asks: when the officer clearly relies on a compelled statement or test required by probation, should the court dismiss the tainted evidence regardless of whether other facts justify probable cause?

CONCLUSION

For the reasons stated above, Mr. Nero believes this case is appropriate for review and respectfully requests that review be granted.

Respectfully submitted,

Dated: June 25, 2025.

electronically signed by Jonathan D. Gunderson

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CERTIFICATION

In accord with Wis. Stat. 809.19 (8) (b) and (bm) and (8g), I certify that this petition satisfies the form and length requirements for a petition for review prepared using a proportional font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point text for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line and a length of 2,874 words.

Dated: June 25, 2025.

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