STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2023AP2017-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JOSEPH S. SCHENIAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MANITOWOC COUNTY, BRANCH II, THE HONORABLE JERILYN M. DIETZ PRESIDING, TRIAL COURT CASE NO. 18-CT-82

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF AUTHORITIES

U.S. Constitution

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[1] Although Mr. Schenian's violation occurred under the Laws of 2017-2018, for purposes of judicial economy, he will refer to the current incarnation of the relevant laws since they have not changed substantively in the interim period.

Federal Court of Appeals Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

Other Authority

STATEMENT OF THE ISSUES

WHETHER THE LAW ENFORCEMENT OFFICER IN THIS CASE VIOLATED BOTH MR. SCHENIAN'S FOURTH AMENDMENT RIGHTS AND WIS. STAT. § 343.303 WHEN HE FAILED TO "REQUEST" A PRELIMINARY BREATH TEST FROM HIM?

> Ttial Court Answered: NO. The circuit court concluded that (1) § 343.303 does not require that the administration of a preliminary breath test must be "made using certain words," and (2) Mr. Schenian "did not choose" to refuse the test even though he had initially been asked to submit to field sobriety tests and the preliminary breath test may be considered a part of that battery. R40 at pp. 2-3; D-App. 104-05.

WHETHER MR. SCHENIAN WAS ARRESTED WITHOUT PROBABLE CAUSE TO BELIEVE THAT HE OPERATED A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT IN VIOLATION OF THE FOURTH AMENDMENT?

> Trial Court Answered: NO. The circuit court concluded that the officer in this case had probable cause to arrest Mr. Schenian based upon the time of day, Mr. Schenian's admission to consuming intoxicants, the odor of alcohol, his having bloodshot eyes, and his performance on the field sobriety tests. R39 at pp. 2-3; D-App. at 108-09.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Schenian will NOT REQUEST publication of this Court's decision as the common law authority which sets forth the standard for expanding the scope of a detention is well settled.

STATEMENT OF THE CASE

On December 23, 2017, Mr. Schenian was charged in Manitowoc County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—

Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 346.63(1)(b). R1.

After retaining counsel, Mr. Schenian filed several pretrial motions including, *inter alia*, a motion to suppress his preliminary breath test obtained in violation of the Fourth Amendment and Wis. Stat. § 343.303, and a motion to suppress evidence based upon a lack of probable cause to arrest. R18 & R19. A hearing on Mr. Schenian's motions was held on October 22, 2018. R30.

At the motion hearing, the State offered the testimony of Deputy Cory Hartman of the Manitowoc County Sheriff's Office. R30 at pp. 5-73. At the conclusion of the hearing, the court ordered the parties to submit supplemental briefs. R30 at 76:21 to 78:6.

The parties submitted their respective additional briefs (R33, R34, R35, R36 & R37), and by written decisions filed on January 22, 2019, denied Mr. Schenian's motions on the ground that: (1) § 343.303 does not require that the administration of a preliminary breath test must be "made using certain words" and Mr. Schenian "did not choose" to refuse the test even though he had been asked to submit to field sobriety tests and the preliminary breath test may be considered a part of that battery; and (2) probable cause to arrest Mr. Schenian existed because of the time of day he was detained, his admission to consuming intoxicants, the odor of alcohol about his person, his having bloodshot eyes, and his performance on the field sobriety tests. R40 & R39, respectively; D-App. at 103-10.

On October 17, 2023, Mr. Schenian entered a plea of no contest to the charge of operating with a prohibited alcohol concentration, whereupon the Court found him guilty and entered a judgment of conviction. R118; D-App. at 101-02.

It is from the adverse decisions and judgment of the circuit court that Mr. Schenian now appeals to this Court by Notice of Appeal filed on October 23, 2023. R107.

STATEMENT OF FACTS

On December 23, 2017, Joseph Schenian was detained in the Town of Kossuth in Manitowoc County Deputy Cory Hartman of the Manitowoc County Sheriff's Office for operating his motor vehicle with his top-mounted auxiliary lamps lit. R30 at 8:23 to 10:10.

After making contact with Mr. Schenian, Deputy Hartman observed that Mr. Schenian had an odor of intoxicants emanating from his person, bloodshot eyes, and

admitted to having five drinks prior to driving. R30 at 11:16 to 13:146:20-25. Based upon these observations, Deputy Hartman had Mr. Schenian submit to a battery of field sobriety tests. R30 at 15:22 to 16:7.

The first field sobriety test Mr. Schenian performed was the horizontal gaze nystagmus [hereinafter "HGN"] test. R30 at 16:20-21. Deputy Hartman claimed to have observed six out of a possible six clues on this test. R30 at 18:2-5. Notably, Deputy Hartman conceded that the clues he observed on the HGN test might have been present simply because Mr. Schenian was tired and not because he was impaired by alcohol. R30 at 50:8-14.

Mr. Schenian was then asked to perform the walk-and-turn [hereinafter "WAT"] test. R30 at 19:25 to 20:2. Deputy Hartman observed *only one clue* on this test which is below the threshold that indicates impairment. R30 at 20:23 to 21:11

The next test the deputy administered was the one-leg stand test [hereinafter "OLS"]. R30 at 21:12-14. Mr. Schenian again exhibited *only one clue* on this test as well, which is also below the threshold for indicating impairment. R30 at 57:16-21; 59:6-9.

Upon completing the OLS, the deputy administered a counting test which required Mr. Schenian to count backward from 78 or 76 to 55. R30 at 25:1-13. According to the deputy, Mr. Schenian failed this test because he stated the number "69" twice and stopped at 53 instead of 55. R30 at 25:18-21. All of the numbers were otherwise recited in the proper order.

The last test the deputy had Mr. Schenian perform was the "alphabet test" which required him to recite the alphabet from the letter "C" to the letter "T." R30 at 26:8-13. According to Deputy Hartman, Mr. Schenian "mouthed the letters A and B, then verbally started C, and then continued onto T and stopped there," which the deputy *did not consider to be indicative of impairment*. R30 at 26:10-19.

Finally, after completing the foregoing battery of standardized field sobriety tests, Deputy Hartman had Mr. Schenian submit to a preliminary breath test [hereinafter "PBT"]. R30 at 27:18-23. In so doing, however, the deputy admitted that he told Mr. Schenian: "I've got one last test for you to perform, and what I'm going to need you to do is give me approximately an eight second breath, . . ."

without "ask[ing] specifically for the PBT, ..." R30 at 27:16-20 & 64:18-19, respectively.

The foregoing is a general overview of what transpired between the officer and Mr. Schenian, however, for purposes of Mr. Schenian's appeal, there remain other relevant facts of which this Court should be apprised and which will play a significant part in the development of his legal argument below. For example:

> Deputy Hartman acknowledged that throughout his entire encounter with Mr. Schenian, not only did he provide "appropriate responses" to the deputy, but "[h]is responses were intelligent" (R30 at 38:16-20);
>
> Likewise, there was no instance in which Mr. Schenian's speech was "thick tongued" or in which it was not "clear" (Tr. 40:14-21);
>
> Deputy Hartman further stated that Mr. Schenian was "cooperative with [him] from start to finish" of their encounter (Tr. 41:20-22);
>
> When Deputy Hartman activated his emergency lights, Mr. Schenian demonstrated an appropriate situational awareness by immediately pulling his vehicle over to the side of the road and parking in response to the lights (R30 at 10:7-13);
>
> The timeliness with which a person stops their vehicle in response to an officer's lights is something Deputy Hartman looks for to determine whether the person may be impaired (Tr. 36:17-24) and
>
> Mr. Schenian's ability to park his vehicle safely and properly at roadside was evidence that he has an awareness of his surroundings which is not impaired by alcohol (Tr. 37:3-17).

For the reasons set forth below, Mr. Schenian proffers that the facts of this case indicate that: (1) the PBT was not administered in accordance with § 343.303 and the Fourth Amendment; and (2) Deputy Hartman lacked probable cause to arrest Mr. Schenian for an operating while intoxicated violation.

STANDARD OF REVIEW

The issues presented in this appeal question whether the PBT was not lawfully administered and whether the circuit court erred in finding that probable cause existed to arrest Mr. Schenian. Both issues are based upon the facts adduced at the evidentiary hearing, and because these questions involve applying a constitutional standard to undisputed testimony, this Court reviews the questions of law *de novo*. *State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423.

ARGUMENT

I. THE FOURTH AMENDMENT PRINCIPLES UNDERGIRDING MR. SCHENIAN'S ISSUES ON APPEAL.

Because both issues Mr. Schenian raises on appeal implicate safeguards afforded by the Fourth Amendment, it is necessary to begin the analysis of the questions he raises by first weaving the common thread which is sewn throughout the tapestry of each of his contentions.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious police action is not tolerated under the umbrella of the Fourth Amendment. As the Wisconsin Supreme Court noted in *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983), "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id.* at 448-49; *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

When applying the protections against unreasonable searches and seizures, both federal and state courts have consistently held that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**." *Mapp v.*

Ohio, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction deprives [these protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)(emphasis added).

The foregoing authority does not stand alone as time and again the Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be **liberally construed to prevent impairment of the protection extended**." *Grau v. United States*, 287 U.S. 124, 127 (1932)(emphasis added). The High Court has admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Ultimately, "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

It is under the rubric of the foregoing paradigm that the questions presented by Mr. Schenian must be analyzed. Thus, any "close calls"—in the common vernacular—with respect to whether the officer's decision to administer the preliminary breath test in the manner which he did and to arrest Mr. Schenian were constitutionally unreasonable should be resolved in Mr. Schenian's favor.

II. THE ADMINISTRATION OF THE PRELIMINARY BREATH TEST VIOLATED BOTH THE FOURTH AMENDMENT AND WIS. STAT. § 343.303.

A. The Seizure of a Person's Breath Implicates the Fourth Amendment.

The seizure of a sample of a person's breath is a cognizable seizure for Fourth Amendment purposes and is, therefore, afforded the full protection of the Fourth Amendment. In *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S.

602 (1989), the United States Supreme Court examined whether a federal regulation which permitted quasi-private railways to obtain breath samples from railroad personnel who were involved in accidents on the railroad implicated Fourth Amendment protections for the suspect railroad workers. *Id.* at 614-15. In holding that the Fourth Amendment *was implicated in the seizure of breath samples* from railroad employees, the High Court stated:

> **We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private railroads in reliance on Subpart D will not implicate the Fourth Amendment**.
> . . .
>
> We have long recognized that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. *See Schmerber v. California*, 384 U.S. 757, 767-768 (1966). *See also Winston v. Lee*, 470 U.S. 753, 760 (1985). In light of our society's concern for the security of one's person, see, *e. g.*, *Terry v. Ohio*, 392 U.S. 1, 9 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. *Cf. Arizona v. Hicks*, 480 U.S. 321, 324-325 (1987). Much the same is true of the breath-testing procedures required under Subpart D of the regulations. **Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, *see, e. g., California v. Trombetta*, 467 U.S. 479, 481 (1984), implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search**, *see* 1 W. LaFave, Search and Seizure § 2.6(a), p. 463 (1987). *See also Burnett v. Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3rd Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

Skinner, 489 U.S. at 615, 616-17 (emphasis added).

Even more recently, the United States Supreme Court again acknowledged that a suspect may not be compelled to provide a breath sample. In *Birchfield v. North Dakota*, 579 U.S. 438 (2016), the Supreme Court noted with respect to one of the cases joined with Birchfield's (a defendant by the name of Beylund) that:

> Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative

> proceeding. **The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel . . . breath tests.** Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.

Birchfield, 579 U.S. at 478 (citations omitted; emphasis added).

Similarly, in *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), the Wisconsin Court of Appeals recognized that **"the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, ..."** *Id*. at 623, citing *Waukesha Mem'l Hosp., Inc. v. Baird*, 45 Wis. 2d 629, 173 N.W.2d 700 (1970), and *State v. Bentley*, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979).

"Warrantless searches are *per se* unreasonable under the Fourth Amendment" and subject to "specifically established and well-delineated exceptions to the warrant requirement." *State v. Williams*, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834, citing *Katz v. United States*, 389 U.S. 347, 357 (1967). Included among these exceptions are searches conducted pursuant to ***freely and voluntarily*** given consent. *Williams*, 2002 WI 94, ¶ 18 (emphasis added), citing *Meyers*, 218 Wis. 2d at 196. "The State bears the burden of proving that consent was given freely and voluntarily." *Schneckloth*, 412 U.S. at 222. It must satisfy that burden "by clear and convincing evidence." *Meyers*, 218 Wis. 2d at 197. The consent must be a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. *Holt v. State*, 17 Wis. 2d 468, 117 N.W.2d 626 (1962). **Consent is not voluntary if the State proves "no more than acquiescence to a claim of lawful authority**." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968)(emphasis added).

B. The Requirements Imposed by Wis. Stat. § 343.303.

Apart from the Fourth Amendment implications of a PBT, there are conditions prerequisite to the preliminary seizure of a person's breath imposed by the legislature in § 343.303. More specifically, § 343.303 provides in relevant part that "[i]f a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity

therewith, . . . , the officer, prior to an arrest, may **request** the person to provide a sample of his or her breath for a preliminary breath screening test . . . ." Wis. Stat. § 343.303 (2023-24)(emphasis added).

Note must be taken of the fact that the legislature required law enforcement officers to "request" preliminary breath tests. *Id.* The statute does not permit the officer to "demand," "require," "obtain" or otherwise "direct" the suspect to submit. A "request," by definition, denotes a *choice* otherwise it would be deemed a "requirement." When the meaning of a statute is plain on its face, there is no reason for interpretation. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110; *see also, Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659. Because the plain meaning of § 343.303 does not permit an officer to simply present a PBT device to a suspect and tell him or her to provide a breath sample as though the suspect has no *choice* in the matter, it is a violation of the plain language of the statute for a law enforcement officer to so act.

It is important to take note that the "request" language found in § 343.303 is *unique* relative to similar provisions of the Wisconsin Statutes which permit the administration of PBTs under other circumstances. Statutes which speak to the administration of PBTs in intoxicated boating, intoxicated snowmobiling, and intoxicated all-terrain vehicle cases *all* state that the suspect "**shall provide** a sample of his or her breath for a preliminary breath screening test" when requested to do so. *See* Wis. Stat. §§ 30.682(1), 350.102(1), & 23.33(4g)(a) (2023-24)(emphasis added). If Mr. Schenian's position that the "request" language employed by § 343.303 did not mean *request*, then one must ask: Why would the Wisconsin Legislature elect to use *different* language across so many other statutes dealing with the same subject? The legislature could have enacted § 343.303 with the words "shall provide" as it did in every other instance, yet it chose to employ the words "may request." Under the prevailing canons of statutory construction, this *must mean something* because not only is this Court required to harmonize the statutes, but additionally, when the legislature elects to use different language on a similar topic, a different intention is evidenced. *See Kalal*, 2004 WI 58, ¶ 46. The language of each statute must be given full force and effect. *See generally*, *State v. Delaney*, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416; *State v. Newman*, 157 Wis. 2d 438, 459 N.W.2d 882 (Ct. App. 1990). Thus, employing the notion that different words are intended to give a different effect, the legislature's choice to require officers to

"request" PBTs under § 343.303 must be given a different effect than the use of the term "shall provide" elsewhere.

C. Application of the Law to the Facts.

It is irrefutable based upon the record in this case that a PBT was never "requested" from Mr. Schenian by Deputy Hartman since he conceded that he did not specifically ask for the PBT. What remains to be addressed, however, are the circuit court's erroneous conclusions of law (1) that consent to a PBT was given when Mr. Schenian initially agreed to submit to field sobriety tests and (2) that because Mr. Schenian never objected to the PBT, there was no violation of the law.

With respect to the circuit court's first point, consent to submit to field sobriety tests such as the HGN, WAT, and OLS, *etc.*, is **not at all** like submitting to a PBT for two reasons. First, the standardized battery of field sobriety tests ostensibly do not implicate the Fourth Amendment in the way the *seizure* of a person's breath does. As the *Skinner* and *Proegler, et al.*, Courts recognized, "the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, ..." *Proegler*, 95 Wis. 2d at 623. It follows, therefore, that a seizure under the Fourth Amendment, in the absence of a warrant, requires the person subject to the seizure "freely and voluntarily" consent to the same. *Williams*, 2002 WI 94, ¶ 18. It is not sufficient for the State to simply demonstrate acquiescence to a law enforcement officer's demand, which is at most what happened here. *Bumper*, 391 U.S. at 548-49. Thus, the Fourth Amendment requires that a law enforcement officer specifically "request" permission for a breath test, unlike making non-invasive observations of a person balancing and walking during field sobriety tests.

Second, the legislature must have recognized Mr. Schenian's point in the foregoing regard, *i.e.*, that breath seizures require *consent* because the language the legislature chose to interpose into § 343.303 uses the word "request." The plain and unadorned meaning of the word "request"—which requires *no* interpretation—is employed in a manner consistent with the recognition that obtaining a sample of a person's breath is a cognizable seizure under the Fourth Amendment. Based upon this notion, an abstract willingness to submit to other forms of testing which do not require the "seizure" of anything from the body—that is, the only thing being "seized" during a WAT or OLS test, for example, are the "seizure" of the photons

being reflected off of the subject into the observing officer's eyes—cannot extend to the seizure of something internal to the subject, *i.e.*, their breath, as the *Skinner* and *Pregler* Courts knew.

Regarding the circuit court's position that Mr. Schenian never objected to the seizure of his breath, there are likewise several problems. First, by failing to "request" a PBT, the deputy never apprised Mr. Schenian of his right to make a choice about whether to submit to a PBT or not. In other words, Mr. Schenian's general "agreement" to perform observational field tests cannot be equated to a "free and voluntary" consent to submit to a search and seizure of his deep lung air. This is no different than a Court concluding that a homeowner who permits law enforcement officers into his or her foyer when the officers ask to "come in" has also consented to a search of their bedroom, bathroom or kitchen. Clearly, such a conclusion would not pass constitutional muster.

The second, and perhaps most significant, problem with the lower court's theory that the seizure was permissible was because Mr. Schenian never objected to it. This is nothing more than an undisguised act of burden shifting. It is **not** Mr. Schenian's responsibility to demonstrate that he objected to the seizure. Instead, it is the **State's** burden to establish compliance with the rigors of the Fourth Amendment. The United States Supreme Court has been clear on this point: "The State bears the burden of proving that consent was given freely and voluntarily." *Schneckloth*, 412 U.S. at 222. It is the responsibility of the **State** to satisfy this burden "by clear and convincing evidence." *State v. Meyers*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998).

Finally, the circuit court's *assumption* that Mr. Schenian's "consent" was ongoing simply because he acquiesced to the PBT relieves the State of having to establish anything, let alone satisfy its burden to prove "free and voluntary" consent by clear and convincing evidence.

For the foregoing reasons, the seizure of Mr. Schenian's breath violated both the Fourth Amendment to the United States Constitution and § 343.303. Based upon these violations, the PBT should not be considered in the probable cause determination as examined below.

III. PROBABLE CAUSE TO ARREST MR. SCHENIAN DID NOT EXIST UNDER THE TOTALITY OF THE CIRCUMSTANCES IN THIS CASE, CONTRARY TO THE LOWER COURT'S RULING.

A. The Probable Cause Standard.

To safeguard individuals against arbitrary invasions of their security, the Fourth Amendment requires that before a person is arrested, "probable cause" first exists to believe that the person has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 208 (1979). "Probable cause, although not easily reducible to a stringent, mechanical definition, generally refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986)(citations omitted). "Probable cause exists where the *totality of the circumstances* within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe . . . that the defendant" has committed a crime. *Id*. (emphasis added).

According to the Wisconsin Supreme Court in *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982):

> The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. **The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense.**

Id. at 329 (emphasis added).

When assessing whether the conduct of law enforcement officers is constitutional under the Fourth Amendment, "the 'touchstone of the Fourth Amendment is **reasonableness**.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)(emphasis added), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

The Wisconsin Supreme Court has held that an action is "reasonable" under the Fourth Amendment "'as long as the circumstances, viewed objectively, justify [the] action.'" *State v. Howes*, 2017 WI 18, ¶ 21, 373 Wis. 2d 468, 893 N.W.2d 812, citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006), quoting *Scott v. United States*, 436 U.S. 128, 138 (1978). Thus, the question in the instant case becomes whether it was reasonable for Deputy Hartman to conclude that he had probable cause to believe that Mr. Schenian operated a motor vehicle while

impaired. For the reasons set forth below, Mr. Schenian proffers that Deputy Hartman's decision to arrest him was constitutionally *un*reasonable.

B. Application of the Law to the Facts.

The issue to be evaluated by this Court is whether, under the totality of the circumstances, a sufficient factual basis exists to conclude as a matter of law that Deputy Hartman had probable cause to arrest Mr. Schenian. To make this determination, it is necessary to look beyond the sparse factors upon which the circuit court relied when it rendered its decision to the *totality* of the facts which existed in this case.

First, there were no observations by law enforcement officers or citizen witnesses of Mr. Schenian engaged in any reckless, erratic, or unsafe driving. The reason for Mr. Schenian's detention was solely for an extremely minor equipment violation.

Second, the alleged "odor" coming from Mr. Schenian's person, along with his admission to consuming intoxicants earlier in the evening, is less than damning for the reasons already recognized by this Court in cases such as *State v. Gonzalez*, No. 2013AP2535-CR, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. May 8, 2014)(unpublished); *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755 (Ct. App. July 14, 2010)(unpublished), and *County of Sauk v. Leon*, No. 2010AP 1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (Ct. App. Nov. 24, 2010)(unpublished).[2]

In *Gonzalez* for example, this Court observed that:

> "**Not every person who has consumed alcoholic beverages is 'under the influence'** …." Wis JI—Criminal 2663. Instead, reasonable suspicion of intoxicated driving generally requires reasonable suspicion that the suspect is "[u]nder the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving." *See* Wis. Stat. §§ 346.63(1)(a) and 346.01(1).

Gonzalez, 2014 WI App 71, ¶ 13 (emphasis added).

The *Gonzalez* court also examined other decisions of a similar nature which reached the same conclusion as it did. Even though these decisions involved questions of reasonable suspicion to detain rather than probable cause to arrest, they are nevertheless instructive because if they establish the *de minimus* value of an

[2] The foregoing decisions are limited precedent opinions which may be cited for their persuasive value pursuant to Wis. Stat. § 809.23 (2023-24).

"odor" and an admission to drinking in the lesser context of reasonable suspicion, they carry at least equal weight when examining the higher threshold of probable cause. It is worth quoting the *Gonzalez* court at length here because the cases which the *Gonzalez* court examined are relevant to the issue raised by Mr. Schenian:

> There appears to be no published case law addressing reasonable suspicion on similar facts. As to the odor of intoxication alone, neither Gonzalez nor the State cites a published case addressing whether the smell of alcohol coming from a driver is sufficient to provide reasonable suspicion of intoxicated driving. Gonzalez does, however, identify two unpublished cases that support the conclusion that the odor of alcohol alone is not enough: *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755, unpublished slip op. (WI App July 14, 2010), and *County of Sauk v. Leon*, No. 2010AP 1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929, unpublished slip op. (WI App Nov. 24, 2010). Both cases, in terms of the odor of alcohol and the time of day, are as suspicious or more suspicious than the facts here.
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> In *Meye*, at 3:23 a.m., a police officer detected a "strong" odor of intoxicants coming from two individuals who had just exited a vehicle, but the officer could not determine whether the odor was coming from the driver or the passenger. *Meye*, No. 2010AP336-CR, 2010 WI App 120, ¶ 2, 329 Wis. 2d 272, 789 N.W.2d 755. The officer initiated an investigatory stop of the driver on this basis. *See id*., ¶¶ 2-3. The court in *Meye* rejected the proposition that the odor was enough to provide reasonable suspicion. *Id*., ¶ 6. The court indicated that there were no cases, published or unpublished, in which a court has held that "reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped." *Id*.; *see also, State v. Resch*, No. 2010AP2321-CR, 2011 WI App 75, 334 Wis. 2d 147, 799 N.W.2d 929, unpublished slip op., ¶ 19 (WI App Apr. 27, 2011 ("In *Meye*, this court held that the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated. . . ."). So far as I can tell, the *Meye* court's decision did not hinge on the ambiguity of whether the odor was coming from the driver or passenger. Rather, the court concluded that this ambiguity "exacerbated" "[t]he weakness of this seizure." *See Meye*, 2010AP336-CR, 2010 WI App 120, ¶ 9, 329 Wis. 2d 272, 789 N.W.2d 755.
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> In *Leon*, at approximately 11:00 p.m., a police officer detected alcohol on the breath of a suspect who admitted to consuming one beer with dinner an hour or two earlier. *See Leon*, No. 2010AP 1593, 2011 WI App 1, ¶¶ 2, 9-10, 330 Wis. 2d 836, 794 N.W.2d 929. **The court in *Leon* concluded that the "admission of having consumed one beer with an evening meal, together with an odor [of intoxicants] of unspecified intensity," was not sufficient to provide reasonable suspicion of intoxicated driving**. *Id*., ¶ 28.

Gonzalez, 2014 WI App 71, ¶¶ 18-20 (footnotes omitted; emphasis added). What is notable about the *Gonzalez* court's description of the circumstances of the case before it and those faced by other courts is that all these decisions *downplayed* the value of an "odor of intoxicants," including concomitant admissions to drinking, in

the reasonable suspicion calculus in part because it is *not* illegal in Wisconsin to consume intoxicants and drive—it is only illegal to consume a sufficient amount of an intoxicant that one becomes impaired—and that it is, in large measure, a *subjective* observation rather than an objective one. In the instant matter, this Court is faced with a question involving the higher burden of probable cause to arrest, and there is no reason to think that the observations made by this Court in the aforesaid cases is any less impactful.

Third, Deputy Hartman conceded that Mr. Schenian did not slur his speech. This is significant to the extent that in the "typical" operating while intoxicated prosecution, this observation is almost universally made.

Fourth, the *totality* of the circumstances in Mr. Schenian's case includes the absence of any testimony that Mr Schenian had difficulty ambulating or moving about as he was at roadside. Similarly, there was no testimony that Mr. Schenian was having difficulty with his fine motor skills, such as fumbling for his driver's license or insurance information. Moreover, unlike some intoxicated drivers who become aggressive, belligerent or non-compliant with officers, Deputy Hartman admitted that Mr. Schenian was "cooperative with [him] from start to finish" of their encounter. R30 at 41:20-22. According to the deputy, Mr. Schenian remained polite and respectful throughout the detention. R30 at 41:23-24.

Fifth, as far as Mr. Schenian's ability to safely control his motor vehicle is concerned, Deputy Hartman conceded that he exhibited no problems with his actual driving ability or in timely responding to the deputy's signal to stop and safely park his vehicle.

Sixth, apart from the absence of the foregoing observations, perhaps the most revealing part of the totality of the circumstances test is that Deputy Hartman did *not* observe that Mr. Schenian had any problems with his mentation. The record is literally devoid of any testimony from Deputy Hartman that Mr. Schenian was having difficulty understanding him, following his directions, answering his questions, *etc*. As is well known—and part of the common stock of knowledge—alcohol does *not* discriminate, *i.e.*, it affects an individual's mentation just as it does his coordination. In fact, this is why field sobriety tests are referred to as "divided attention tasks"—they are designed to test a person's ability to think clearly *and* whether they can balance and coordinate their movements. The absence of any diminution of Mr. Schenian's mental acuity is exceptionally revelatory, in a manner *favorable* to him.

Finally, but perhaps most tellingly, Mr. Schenian's performance on the field sobriety tests was outstanding. Not only did he clearly and irrefutably pass three of the five tests administered to him—namely, the WAT, OLS, and alphabet tests—but his performance on the counting test was far from egregious in that he started at the correct number and recited all of the numbers correctly and in the proper order, with the singk. Since this is a non-standardized test, there is nothing in this record which indicates at what point a person is considered to be "under the influence" with respect to the number of "clues" observed.

In summary, what facts had the lower court to rely upon to conclude that probable cause existed to arrest Mr. Schenian? An uncooperative demeanor? No. Slurred speech? No. Any individual who witnessed Mr. Schenian operating his vehicle erratically or unsafely? No. An admission by Mr. Schenian that he was impaired? No. Any impairment of Mr. Schenian's ability to think clearly, follow instructions, or appropriately respond to officer inquiries? No. An inability on Mr. Schenian's part to coordinate his movements or ambulate? No. Any impairment of his fine motor skills? No. A failed WAT test? No. A failed OLS test? No. A failed alphabet test? No.

It seems that all the State has to support its probable cause case is a test which has no identified clues (the counting backward test), an odor of intoxicants and admission to drinking (neither of which are illegal), and bloodshot and glassy eyes (neither of which is incriminating of itself and both of which are wholly *subjective*). It appears that when the *totality* of the circumstances test is applied to the probable cause inquiry at hand, the circuit court's finding of probable cause comes up well short.

CONCLUSION

Because the totality of the circumstances in the instant matter do not rise to the level of objectively establishing the requisite probable cause to arrest, Mr. Schenian respectfully requests that this Court reverse the decision of the circuit court denying Mr. Schenian's motion and remand the case with further directions that absent the required probable cause, Mr. Schenian should not have been arrested for allegedly operating a motor vehicle while intoxicated.

Dated this 16th day of January, 2024.

Respectfully submitted:

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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,626 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

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

Dated this 16th day of January, 2024.

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