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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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. Deputy Hartman acknowledged, however, 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 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 ostensibly failed this test simply because he stated the number "69" twice and stopped at 53 instead of 55. R30 at 25:18-21.

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 (emphasis added).

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 [the] start to [the] 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 safely and properly park his vehicle 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.

ARGUMENT

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

The State leads its rebuttal argument in opposition to Mr. Schenian's preliminary breath test [hereinafter "PBT"] challenge by attempting to distinguish *Birchfield v. North Dakota*, 579 U.S. 438 (2016), noting that the Supreme Court permitted "warrantless breath tests to be obtained by officers as searches incident to arrest . . . ." State's Response Brief, at p.7 [hereinafter "SRB"]. It is surprising that the State overlooks the glaring reason that its reliance on *Birchfield* is not only

misplaced, but is entirely irrelevant to Mr. Schenian's argument, namely: the *Birchfield* Court's characterization of the privacy interest in breath as a **search incident to arrest**. Mr. Schenian's case does *not* involve a "search incident to arrest"—when one can naturally expect diminution in their freedom because, after all, they have been arrested—rather, his case involves the authority of law enforcement officers to seize breath *prior to* formal arrest. Doubtless, the powers granted law enforcement officers to act *before* actual custody are more limited than those *after* formal arrest. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968).

A second problem with the State's counterargument is that it fails to account for or consider that the *Birchfield* Court never expressly overruled or abrogated *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989), and similarly, does not acknowledge that Wisconsin courts *have* recognized a protected constitutional right in the seizure of a sample of a person's breath in decisions such as *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), *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).

Acknowledging what the State turns a blind toward—namely, the pre-arrest constitutional protection afforded a person's breath—is precisely what forms the basis of a portion of Mr. Schenian's argument that the seizure of a breath sample cannot be compelled. As Mr. Schenian stated in his initial brief, "[w]arrantless searches are *per se* unreasonable under the Fourth Amendment" and subject to "specifically established and well-delineated exceptions to the warrant requirement,"[1] and consent to a seizure 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).

The facts of this case, as outlined in Mr. Schenian's initial brief, establish that Deputy Hartman 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. Telling Mr. Schenian that he is "going to need" him to provide a breath sample is as close to "a claim of lawful authority" as one

[1] *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).

can get, and therefore, violates the constitutional prohibition against warrantless seizures.

Even if Mr. Schenian's circumstances are not viewed from a constitutional perspective, but instead, are viewed solely from a statutory one through the lens of Wis. Stat. § 343.303, the State's argument still falls short of the mark. More specifically, the State asserts that the legislature never required law enforcement officers to "us[e] certain words or phrases" when administering a PBT because § 343.303 is silent in this regard. SRB at p.6. This argument, however, misses the point of Mr. Schenian's comparison of § 343.303 with other statutes on the same topic. *See* Wis. Stat. §§ 30.682(1), 350.102(1), & 23.33(4g)(a) (2023-24). Contrary to the State's characterization, the legislature *did use* different language in § 343.303 by employing the word "request" in § 343.303 when it did *not* do so elsewhere. Under the prevailing canons of statutory construction, this must mean the legislature was expressing a different intent under § 343.303, the State's argument notwithstanding.

The State also complains that because Mr. Schenian "cooperated" with Deputy Hartman throughout the field sobriety tests, his consent to the PBT must have been implied since he did not protest. SRB at pp.5.-6. This argument is also a non-starter because it neglects to consider the plain language, meaning, and purpose of § 343.303. If the preliminary seizure of a person's breath was really part of a field sobriety testing "continuum," there would literally be *no need* for the enactment of § 343.303—PBTs could simply be administered as "part of the process." Clearly, this is *not* how the legislature viewed PBTs because it took the time and expended the effort to enact § 343.303, and the legislature cannot be deemed to create superfluous laws. Moreover, the legislature carefully chose the specific words that comprise the PBT statute. Thus, when the legislature commands—through clear, unequivocal, and plain language—that law enforcement officers "request" a PBT, they are obligated to obey. There is no middle ground.

Even the premise underlying the State's argument that Mr. Schenian "consented" to the PBT by virtue of his cooperative conduct is absurd in light of the *Bumper* holding. SRB at p.5. As noted above, "consent" is *not* truly *consent* when an individual does nothing more than accede to a law enforcement officer's claim, whether express or implied, that the person must obey the officer's command or comply with the officer's request. This is no different than a law enforcement

officer approaching a citizen on the street and commanding them to "empty their pockets" because they "look suspicious." A person who is confronted under these circumstances is likely to think, "Well, he is a law enforcement officer, I have to do what he says." The luster of the badge obscures the illegality of the officer's command, and that is the point of *Bumper*.

II. PROBABLE CAUSE TO ARREST MR. SCHENIAN DID NOT EXIST UNDER THE TOTALITY OF THE CIRCUMSTANCES IN THIS CASE.

The State's attack on Mr. Schenian's probable cause argument begins with its contention that it need not "show impairment of Schenian's mentation . . . ." SRB at p.9. While the State's assertion may be superficially true, it does not answer the question as to why it would be irrelevant for this Court to consider a lack of impairment of Mr. Schenian's mentation as part of the *totality* of the circumstances known to Deputy Hartman. If a suspected impaired driver is *not* showing any signs of confusion, difficulty thinking, responding to questions, following instructions, *etc*.—**all things which if present the State would surely point out in *support* of a probable cause argument**—then why is it any less fair or reasonable for Mr. Schenian to point out their *absence*? What is sauce for the goose is sauce for the gander, despite the State's protestations to the contrary.

The State next argues that the facts which Mr. Schenian identified as being counter-indicative of impairment "do not reduce the aggregate of the indicators" that support Deputy Hartman's conclusion that he was impaired. SRB at p.11. Mr. Schenian respectfully disputes this assertion.

The deputy's observations are *not* made in a vacuum, rather, they are intertwined with one another much as a forest is made up of a *collection* of trees. In other words, if one "sampled" a forest and, in so doing, noted that of the five trees sampled, all produced pinecones, the State would have this Court believe it was standing in a coniferous wood. On the other hand, if one took a step back and looked at the whole forest, *i.e.*, the forest in its *totality* (notably, the requisite test herein), one might see that the five coniferous trees were surrounded by dozens of deciduous trees, thereby causing this Court to conclude that it was standing in a deciduous wood. Thus understood, the State's "selective" aggregate is no aggregate at all, but is a partial picture taken through a narrow lens. The "aggregate of indicators" (as the State characterizes it) can, and *is*, affected by the whole picture. In the end, Mr.

Schenian's point is this: When considering the *totality* of the circumstances, there are enough indicators present in his case that weigh against proof of impairment such that the weight of the countervailing evidence is diminished.

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. Additionally, Mr. Schenian requests that this Court conclude that Deputy Hartman's failure to "request" a preliminary breath test violates both the Fourth Amendment and the plain language of Wis. Stat. § 343.303.

Dated this 18th day of March, 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 2,296 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 18th day of March, 2024.

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