STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2024AP2629-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

TIMOTHY J. PETRIE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CALUMET COUNTY, BRANCH I, THE HONORABLE JEFFREY S. FROEHLICH PRESIDING, TRIAL COURT CASE NO. 2023-CT-69

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

WHETHER THE STATE'S CONCESSION THAT THERE WAS NO PROBABLE CAUSE TO ADMINISTER A PRELIMINARY BREATH TEST IN THIS MATTER SHOULD HAVE RESULTED IN SUPPRESSION OF THE EVIDENCE GATHERED AFTER THE ILLEGAL SEIZURE UNDER THE FRUIT OF THE POISONOUS TREE DOCTRINE?

> Trial Court Answered: NO. The circuit court concluded that even in the absence of the preliminary breath test, there was probable cause to arrest Mr. Petrie for operating a motor vehicle while under the influence of an intoxicant, finding that "[t]he Court has been provided no statutory authority or case law indicating that an improperly administered PBT would be cause to have all the subsequent observations that the officer made suppressed." R52 at p.5; D-App. at 117.

WHETHER MR. PETRIE WAS DENIED HIS SIX AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS WHEN THE CIRCUIT COURT SUMMARILY FOUND THAT PROBABLE CAUSE EXISTED TO ARREST HIM?

> Trial Court Answered: NOT APPLICABLE. Because the lower court summarily found that probable cause existed to arrest Mr. Petrie, there was no opportunity for him to be heard, and therefore, the circuit court never directly addressed this issue.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question of law based upon a set of uncontroverted facts. The issue presented 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. Petrie will NOT REQUEST publication of this Court's decision as the common law authority at issue is well developed, and furthermore, the underlying facts which give rise to the issue herein do not occur with sufficient frequency that publication of this Court's decision is merited or warranted.

STATEMENT OF THE CASE

By criminal complaint filed on August 11, 2023, Mr. Petrie was charged in Calumet County with Operating a Motor Vehicle While Under the Influence of an

Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and with Operating a Motor Vehicle With a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b). R4.

After retaining counsel, Mr. Petrie filed a pre-trial motion challenging whether the arresting officer in this matter had probable cause to administer a preliminary breath test [hereinafter "PBT"] to him. R13.

At a motion hearing held on September 19, 2024, the State proffered that at an earlier date it "acknowledged there was not probable cause to administer that test." R53 at 4:1-2; D-App. at 106. Additionally, the circuit court took judicial notice of the State's acknowledgement by repeatedly observing that "[t]he State has conceded that the level of information that the officer had at the time the PBT was administered was insufficient statutorily to meet the requirements for the officer to request the PBT." R52 at 7:2-6; 11:2-4; D-App. at 109; 113. Despite the State's concession, it contended that probable cause to arrest Mr. Petrie existed independently of the ill-gotten PBT. R53 at 4:2-3; D-App. at 106.

The circuit court entertained the State's argument that, even in the absence of the PBT result, probable cause to arrest existed in this case and the matter should continue without further suppression of evidence gathered subsequent to the illegal seizure of Mr. Petrie's breath. R53 at 5:23 to 10:8; D-App. at 107-12. Ultimately, the lower court concluded that even in the absence of the preliminary breath test, there was probable cause to arrest Mr. Petrie, stating that "[t]he Court has been provided no statutory authority or case law indicating that an improperly administered PBT would be cause to have all the subsequent observations that the officer made suppressed." R52 at p.5; D-App. at 117.

After the adverse decision was issued by the circuit court, Mr. Petrie entered a plea of no contest to the charge of Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense on December 17, 2024, whereupon the court entered a judgment of conviction against him. R48; D-App. at 101-02.

It is from the adverse decision of the circuit court that Mr. Petrie now appeals to this Court by Notice of Appeal filed on December 20, 2024. R41.

STATEMENT OF FACTS

On April 22, 2023, Timothy Petrie was detained in the City of New Holstein, Calumet County, by Officer Emily Kramp of the New Holstein Police Department based upon a report that a vehicle matching the description of Mr. Petrie's had been involved in an accident and was attempting to leave the scene. R4 at p.2.

Upon observing that a vehicle which matched the description of that involved in the accident was parked in front of a residence on Puritan Road, Officer Kramp stopped and exited her suad and approached an individual who had exited the other vehicle and started walking toward her. R4 at p.2. This person was later identified as Mr. Petrie. R4 at p.2.

When discussing what had transpired, Mr. Petrie indicated that he had fallen asleep behind the wheel of his vehicle and struck a parked car. R4 at p.2. He stated that he had been working multiple hours that day, and was returning home from work after going through Sheboygan. R4 at p.2. When Officer Kramp asked Mr. Petrie why he had not stopped, Mr. Petrie responded that he "just wanted to get off the street and come home." R4 at p.2.

At this juncture, Officer Kramp asked Mr. Petrie to submit to a PBT. R4 at p.3. Mr. Petrie admitted that he had consumed intoxicating beverages earlier in the evening and was unsure of the amount but knew that he drank between 5:00 p.m. and 11:00 p.m.. R4 at p.3. Mr. Petrie stated he knew he was above the legal limit, whereupon he provided a breath sample which yielded a result of 0.072. R4 at p.3. According to the officer, she "could smell an odor of intoxicants coming from" Mr. Petrie while he was providing a breath specimen. R4 at p.3.

Thereafter, Officer Kramp asked Mr. Petrie to submit to a battery of field sobriety tests, to which request Mr. Petrie consented. R4 at p.3. Officer Kramp then administered a horizontal gaze nystagmus test which allegedly produced six of six clues of impairment. R4 at p.3. Officer Kramp next attempted to administer a walk-and-turn test to Mr. Petrie, however, he declined to perform the same, stating that he would not be able to do it. R4 at p.3. When asked whether he would be willing to submit to other field sobriety tests, Mr. Petrie similarly declined. R4 atp.3.

Officer Kramp next interrogated Mr. Petrie, asking him such questions as what he had been drinking and whether he thought the accident in which he had been involved was the result of his consumption of alcoholic beverages, but added that he had been working many hours and fell asleep while driving. R4 at p.3. Mr. Petrie was then placed under arrest for operating while intoxicated.

Subsequent to his arrest, Officer Kramp read the Informing the Accused form to Mr. Petrie and asked to submit to an implied consent test of his blood. R4 at p.4. Mr. Petrie agreed to the test and was taken to the hospital for a blood draw. R4 at p.4. A sample of Mr. Petrie's blood was obtained, and a later analysis of the same yielded an ethanol result of 0.146% by weight.

STANDARD OF REVIEW

This appeal presents an issue of constitutional law premised upon an undisputed set of facts. This Court, therefore, reviews the matter independently of the trial court's determination. *State v. Verstoppen*, 185 Wis. 2d 728, 736, 519 N.W.2d 653 (Ct. App. 1994).

ARGUMENT

I. THE FRUIT OF THE POISONOUS TREE DOCTRINE APPLIES TO EVIDENCE GATHERED AFTER AN ILLEGAL SEIZURE OF A PERSON'S BREATH.

A. The Fourth Amendment in General.

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 Court has further 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 question presented by Mr. Petrie must be analyzed. Thus, any "close calls"—in the common vernacular—with respect to whether the officer's actions were constitutionally unreasonable should be resolved in Mr. Petrie's favor.

B. Seizures Under Wis. Stat. § 343.303.

Pursuant to Wis. Stat. § 343.303, an officer who suspects an individual of operating a motor vehicle while intoxicated may administer a PBT to that individual upon having "probable cause to believe that the person . . . has violated s. 346.63(1)." Wis. Stat. § 343.303 (2023-24). The "probable cause" referred to in § 343.303 does not rise to the level of "probable cause to arrest," but rather, has been interpreted to mean that "quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop . . . but less than the level of proof required to establish probable cause for arrest." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999); *see also State v. Fischer*, 2010 WI 6, ¶ 5, 322 Wis. 2d 265, 778 N.W.2d 629.

Notably, the State conceded in this case that "there was not probable cause to administer that test," referring to the PBT. R53 at 4:1-2; D-App. at 106. If no probable cause existed to administer a PBT, the question arises as to whether the illegal seizure of Mr. Petrie's breath was a cognizable seizure for Fourth Amendment purposes because if it was, the remedy ought to be suppression of the PBT result under the exclusionary rule *and* suppression of the evidence gathered "downstream" from the illegal seizure under the fruit of the poisonous tree doctrine. *See* Section I.C. to D., *infra*.

C. Seizures of a Person's Breath Are Cognizable Seizures for Fourth Amendment Purposes.

It is axiomatic that the seizure of a person's breath prior to an arrest implicates 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 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), implicated 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 (4th Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

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

Wisconsin courts have come to the same conclusion as the *Skinner* Court. In *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), the 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).

Based upon the foregoing authority, it is irrefutable that the protections afforded by the Fourth Amendment extend to the seizure of a person's breath, and because they do, the sole remaining question relates to what remedy should be imposed for a violation thereof.

D. The Fruit of the Poisonous Tree Doctrine.

Under the "exclusionary rule," evidence obtained as a direct result of the infringement of the right to be free from unreasonable searches and seizures is subject to suppression. *State v. Scull*, 2015 WI 22, 361 Wis. 2d 288, 862 N.W.2d 562. As the Wisconsin Supreme Court has observed:

> Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment is generally inadmissible in court proceedings. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). The court has explained that "[t]he exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

Scull, 2015 WI 22, ¶ 20.

Not only are the direct products of an illegal search or seizure excluded from evidence, but the indirect or secondary products of a Fourth Amendment violation are excluded as well in order to prevent police exploitation of such violations. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991). In what has famously become known as the "fruit of the poisonous tree" doctrine, evidence which comes to light as a result of exploiting the benefit of an unconstitutional initial search or seizure must be suppressed because the taint from the initial violation flows downstream to all of the subsequently gathered evidence. *Anderson*, 165 Wis. 2d 441; *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970); *see also, State ex rel. White Simpson*, 28 Wis. 2d 590, 594, 137 N.W.2d 391 (1965); *Browne v. State*, 24 Wis. 2d 491, 129 N.W.2d 175 (1964).

Typically, the fruit of the poisonous tree doctrine is applied when "the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation, ..." *United States v. Crews*, 445 U.S. 463, 471 (1980)(emphasis in original). The doctrine is the functional equivalent of an extension of the exclusionary rule "to the indirect as [well as] the direct products of such [Fourth Amendment] invasions." *Id*. at 470.

E. Application of the Law to the Facts.

In *Wong Sun*, the United States Supreme Court held that when evidence, either direct or indirect, is discovered as the result of the "exploitation of an illegality," such as a Fourth Amendment violation, it must be suppressed. *Id*. at 487-88. A preliminary breath test, apart from assisting a law enforcement officer in making the probable cause determination, also serves an additional function in assisting the officer in determining *what form of testing* will subsequently be sought.

For example, Wisconsin prohibits the operation of a motor vehicle while under the influence of controlled substances, controlled substances and alcohol, and while having a detectible amount of a restricted controlled substance in one's system. *See* Wis. Stat. § 346.63(1)(a)-(c) (2023-24). There can be no doubt, based upon the spectrum of prohibited acts set forth in § 346.63(1) that an officer's decision about the form of testing he or she will be requesting is a *direct* function of what the PBT result reveals. That is, if the field sobriety tests indicate impairment, but a PBT result is returned at .00, .02, .05, *etc*., a law enforcement officer is likely to suspect that substances *other than* ethanol are present in the subject's body. Since each form of testing has its limitations—*e.g.*, an Intoximeter is not designed to detect the presence of, for example, fentanyl—a law enforcement officer faced with a low PBT result will likely choose to request a blood specimen from the accused rather than a breath test in order to confirm his or her suspicions regarding drug use.

Seen in this light, since the PBT result has a *direct* impact on the type of evidentiary sample which will be sought, the illegal seizure of Mr. Petrie's blood sample cannot be divided or dissevered from the initial taint. Therefore, the blood test result becomes subject to suppression as the fruit of the poisonous tree. Even if the officer's decision to request a blood test was not the "direct" result of Mr. Petrie's PBT, the *Crews* Court admonished that "indirect" connections suffice to invoke the fruit of the poisonous tree doctrine. Either way, the doctrine itself is unavoidable, and this subjects the blood ethanol result obtained in this case to suppression. The lower court's election not to apply the fruit of the poisonous tree doctrine in this case was, therefore, in error.

II. MR. PETRIE'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER'S WAS DENIED WHEN THE LOWER COURT SUMMARILY FOUND THAT PROBABLE CAUSE EXISTED TO ARREST HIM.

A. Introduction.

In determining that it would not accept Mr. Petrie's contention that the fruit of the poisonous tree doctrine operated to suppress all of the evidence gathered after the unconstitutional seizure of his breath, the Court made a finding that probable

cause existed to arrest him under the circumstances of this case. R52 at 11:2 to 13:12; D-App. at 113-15.

As soon as the circuit court recited the facts pled in the criminal complaint, it held "[s]o given all of that, there was probable cause for the arrest." R52 at 13:11-12; D-App. at 115. In so doing, the court slammed the door on Mr. Petrie's ability to confront and cross-examine his accusers regarding their observations of him, the administration of the field sobriety tests, the conclusions they drew, *etc*.. For the reasons set forth below, Mr. Petrie contends that the court's summary finding, in the absence of any confrontation, violated his Sixth Amendment due process rights.

B. The Right to Confront One's Accusers.

Among the most bedrock and sacred of the constitutional rights which guarantee accused individuals due process of law is the right to confront one's accusers. U.S. Const. amend. VI; Wis. Const. art. I, § 7. The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Co-extensive with this right is the right to confront one's accusers as guaranteed by the Wisconsin Constitution in Article I, §7 which provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face-to-face; . . . ." Wis. Const. art. I, § 7.

The Supreme Court has long held that "face-to-face confrontation 'forms the core of the values furthered by the Confrontation Clause, ...'" *Maryland v. Craig*, 497 U.S. 836, 847 (1990), *citing California v. Green*, 399 U.S. 149 (1970). "[F]ace-to-face confrontation enhances the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person." *Craig*, 497 U.S. at 846.

Hand-in-glove with the right to confront one's accusers is "'[t]he right of an accused in a criminal trial to due process [which] is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process.'" *State v. Schaefer*, 2008 WI 25, ¶ 63, 308 Wis. 2d 279, 746 N.W.2d 457, quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *see Washington v. Texas*, 388 U.S. 14, 19 (1967).

C. The Right to a Meaningful Hearing.

1. The Underlying Statutory Right to a Hearing.

Pursuant to Wis. Stat. § 971.31, a defendant in a criminal case has the statutory right to raise "defenses and objections based on . . . the use of illegal means to secure evidence," and such challenges "shall be raised before trial by motion. . ." Wis. Stat. § 971.31(2) (2023-24).

While it is true that a court is not required to hold an evidentiary hearing in every instance in which an accused has filed a pre-trial motion under § 971.31, it is equally true that "[a]n evidentiary hearing is necessary only if the party requesting the hearing raises a significant, disputed factual issue." *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999), quoting *United States v. Sophie*, 900 F.2d 1064, 1070 (7th Cir. 1990).

2. The Constitutional Requirement That Hearings, Once Granted, Be "Meaningful."

When the government affords an individual an opportunity to review whether evidence in a criminal case has been constitutionally seized, it cannot effectively foreclose access to that review by preventing the *meaningful* exercise of that right. *See, e.g., Lane v. Brown*, 372 U.S. 477, 484 (1963). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court recognized that certain procedures "may offend due process because [they] operate[] to foreclose a particular party's opportunity to be heard." *Id*. at 380. The right "to be heard" constitutionally requires that the opportunity afforded be a "meaningful" one. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see generally*, *In re Winship*, 397 U.S. 358 (1970); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also*, *Gardner v. California*, 393 U.S. 367 (1969).

As the Wisconsin Supreme Court characterized it in *State v. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, a criminal defendant's right to a meaningful hearing is fundamental:

> "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, 410 U.S. 284 (1973), **or in the Compulsory Process or Confrontation clauses of the Sixth Amendment**, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308

> (1974), **the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense**.' *California v. Trombetta*, 467 U.S. 479, 485 (1984); . . . . '"

George, 2002 WI 50, ¶ 14 n.8 (citations omitted in part; emphasis added); *State v. Pulizzano*, 145 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Too fine a point cannot be placed on the *George* court's pronouncement because it ties the Confrontation Cluse not only with the right to a meaningful hearing, but also belies how those rights themselves are inextricably woven together with the right to present a defense as well—which is of no less constitutional magnitude since it is numbered among the components of due process. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Chambers*, 410 U.S. at 294; *In re Oliver*, 333 U.S. 257, 273 (1948). The United States Supreme Court has long characterized the right of an accused to have "an opportunity to be heard in his defense. . . " as among the **most fundamental** of all due process rights enjoyed by citizens in a free society. *Chambers*, 410 U.S. at 294 (emphasis added).

Since the rights implicated in this case are all tied to notions of "due process," a brief foray into the concept of due process itself is instructive at this point. The Supreme Court has long and steadfastly held that "due process" protects substantive as well as procedural rights. The Due Process Clause of the Fourteenth Amendment protects substantive rights by ensuring that the processes to which an individual is subject are "fundamentally fair." *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 24-25 (1981). While the soil from which the concept of fundamental fairness springs is well tilled, the notion of fundamental fairness itself is not given to a tight definition or rigid rule. The *Lassiter* Court has remarked upon the nebulous nature of fundamental fairness in this way:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[Unlike] some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter, 452 U.S. at 24-25. As the Supreme Court similarly noted in *Matthews v. Eldridge*, 424 U.S. 319 (1976), due process, in the context of fundamental fairness,

"'is flexible and calls for such procedural protections as the particular situation demands.'" *Id*. at 334, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

For the reasons set forth below, Mr. Petrie contends that Judge Froehlich's summary finding of probable cause in this matter abridged his right to confront his accusers, his right to a meaningful hearing, his right to present a defense, and his right to due process.

D. Application of the Law to the Facts.

While there is no single case which identifies all of the elements which are included within the concept of "due process" or a "meaningful hearing," there exists a thematic thread which runs through all of them, and that is a party should be granted a "fair opportunity to challenge" the action. In the instant matter, Mr. Petrie attempted to do just that. He filed a pre-trial motion which took issue with the conclusions the officer drew based upon her alleged observations of him because, as he expressly pled the issue:

> 15. As for the alleged "subjective indicia" of impairment, there are none. Mr. Petrie's speech is not slurred; his eyes are not glassy or bloodshot; there is no odor detected until after the administration of the PBT; his mentation is not impaired and therefore he has no problems understanding or following directions; and he has no difficulty ambulating, standing, or walking.

R13 at p.8. Based upon the foregoing, it is evident that Mr. Petrie's "take on the facts" was different than that which the State had. As Mr. Petrie contended, there were sufficient facts which were counter-indicative of impairment and therefore mitigated *against* any conclusion Officer Kramp drew about his being impaired. Yet, despite this clear difference in how the facts known to the officer should be interpreted, the circuit court never afforded Mr. Petrie an opportunity to be heard on this issue and to elicit even more facts favorable to his position. At the hearing, when it found probable cause to arrest Mr. Petrie even in the absence of a PBT, the court accepted as true the facts alleged in the criminal complaint without providing him with a meaningful hearing—as he is entitled both statutorily and constitutionally—to exercise his Sixth Amendment right to cross-examine Officer Kramp on the observations set forth in the complaint. Professor Wigmore has called cross-examination the "greatest legal engine ever invented for the discovery of the truth," yet in this case, Mr. Petrie was summarily foreclosed from discovering the

truth by Judge Froehlich, rendering this "engine" idle. J. Wigmore, *Evidence*, § 1367, at p.32 (J. Chadbourn Rev. 1974).

Mr. Petrie's constitutional right to confront Officer Kramp regarding the veracity, credibility, and plausibility of her observations (which formed the basis of the criminal complaint in this matter) is hardly served, let alone protected, when a fact finder—in this case Judge Froehlich—simply *assumes* they are accurate and credible and then uses them as a basis for finding probable cause to arrest. This is constitutionally repugnant as it serves only to emasculate the Sixth Amendment's Confrontation Clause.

Apart from the impingement upon his Sixth Amendment confrontation right, the lower court's "one-sided" judgment interfered with Mr. Petrie's right to a meaningful hearing because it denied him a statutory right under § 971.31, *i.e.*, the right to be heard when there is a dispute regarding the conclusions to be drawn from the facts of his case. Had he been afforded this right, he would have likely been able to adduce additional facts which would have undercut the probable cause calculus. Nevertheless, in derogation of the right to a meaningful hearing, the lower court ignored the factual dispute between the parties and rendered a decision after "hearing only one side of the story."

Beyond this, the lower court's conclusory disposition denied Mr. Petrie an opportunity to present a defense. If the right "to be heard in his defense. . . " is truly among the most fundamental of all due process rights, then being denied the opportunity to contest the facts as pled does not simply "undermine" it, rather, it wholly abrogates that right.

Finally, the broader concept of due process was violated in this case because Judge Frohlich's actions, when uncritically adopting the facts pled in the criminal complaint, can hardly be characterized as "fundamentally fair." Considering the interests at stake as the *Lassiter* Court admonished—which interests included Mr. Petrie's liberty and reputational interests, along with his right to confrontation, right to a meaningful hearing, and right to present a defense—there can be little doubt that the court's actions served *none* of these.

If a court is permitted to do nothing more than make probable cause determinations based upon criminal complaints, then no defendant anywhere within

the four corners of this state will ever be able to levy a challenge to probable cause. Such challenges would only survive in the rarest of instances in which a complaint is so poorly pled that the probable cause error is "obvious." This comports neither with the statutory right to a hearing under § 971.31, the constitutional right under the Fourteenth Amendment that such hearings be meaningful, nor the Sixth Amendment right to confront one's accusers. As such, this Court should reverse the decision of the court below with direction to afford Mr. Petrie his right to confront his accusers, have a meaningful hearing, and present a defense, for if it elects not to do so, all of these constitutional rights will be rendered trivial, if not meaningless.

CONCLUSION

Because the circuit court failed to recognize that the unconstitutional seizure of Mr. Petrie's breath without probable cause tainted the evidence gathered thereafter, including *inter alia* the officer's observations of Mr. Petrie, his performance on the field sobriety tests, the ethanol analysis of his blood specimen, *etc*., the lower court erred in not suppressing the same under the fruit of the poisonous tree doctrine.

Additionally, by accepting as true the facts alleged in the criminal complaint when finding that probable cause existed to arrest Mr. Petrie, the court denied him his Sixth Amendment right to confront his accusers and his Fourteenth Amendment right to a meaningful hearing.

Mr. Petrie respectfully requests that this Court reverse the decision of the circuit court denying his motion to suppress evidence obtained as a result of the fruit of the poisonous tree and remand his case with further directions consistent therewith. Alternatively, Mr. Petrie requests that this Court find that he was denied his constitutional right to confront his accusers, and to a meaningful hearing, and remand this matter with direction to afford him an opportunity to be heard.

Dated this 9th day of March, 2025.

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 7,035 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 9th day of March, 2025.

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