FILED
04-24-2025
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2025AP141-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

MICHAEL R. METON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, BRANCH I, THE HONORABLE MICHAEL D. RUST PRESIDING, TRIAL COURT CASE NO. 2022-CT-657

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF AUTHORITIES

U.S. Constitution

Wisconsin Constitution

Wisconsin Statute

United States Supreme Court Cases

[1] While Mr. Meton's case originated under the Laws of 2021-2022, for purposes of judicial economy, Mr. Meton will refer to the statutes in their present incarnation since none of the statutes at issue in this matter have changed substantively in the interstitial period.

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

Other Authority

STATEMENT OF THE ISSUE

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. Meton for operating a motor vehicle while under the influence of an intoxicant, and upon so finding, concluded that under the "independent source doctrine," the exclusionary rule and, by extension, the fruit of the poisonous tree doctrine, did not apply. R69 at 3:25 to 5:3; D-App. at 105-07.

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. Meton 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 amended criminal complaint filed on February 22, 2023, Mr. Meton was charged in Winnebago 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). R11.

After retaining counsel, Mr. Meton filed two pre-trial motions, including a motion challenging whether the arresting officer in this matter complied with both the Fourth Amendment and Wis. Stat. § 343.303 when he administered a preliminary breath test [hereinafter "PBT"] to Mr. Meton without requesting that he

submit to the same, but rather, making it appear as though he had no choice in the matter. R14.

At a motion hearing held on January 3, 2024, the parties stipulated that as an evidentiary basis for Mr. Meton's motion, the circuit court could review the video recording of the encounter between Mr. Meton and the arresting officer thereby eliminating the need for the officer's testimony to be proffered. R70 at 4:15 to 6:8.

After the motion hearing, the State submitted its letter brief in opposition to the application of the fruit of the poisonous tree doctrine to evidence obtained subsequent to the unconstitutional seizure of Mr. Meton's breath *vis a vis* the PBT. R34. Mr. Meton submitted a letter brief in reply to the State's brief in which he set forth his position regarding the application of the fruit of the poisonous tree doctrine to the suppression of the PBT result. R35.

By oral decision delivered on February 19, 2024, the circuit court found that Mr. Meton's breath had been seized in violation of the Fourth Amendment, however, it denied Mr. Meton's request that the evidence obtained after the illegal seizure be suppressed as the fruit of the poisonous tree on the ground that the independent source doctrine precluded the application of the fruit of the poisonous tree doctrine to the circumstances of Mr. Meton's case. R69 at 3:25 to 5:3; D-App. at 105-07.

After the adverse decision was issued by the circuit court, Mr. Meton entered a plea of no contest to the charge of Operating a Motor Vehicle With a Prohibited Alcohol Concentration—Second Offense on January 13, 2025. R53; D-App. at 101-02.

It is from the adverse decision of the circuit court that Mr. Meton now appeals to this Court by Notice of Appeal filed on January 22, 2025. R60.

STATEMENT OF FACTS

On December 24, 2022, Michael Meton was detained in the Town of Winchester, Winnebago County, by Deputy Nicholas Erickson of the Winnebago County Sheriff's Office, based upon a citizen complaint that the Meton vehicle had been driving recklessly. R11 at p.2.

Upon observing that a vehicle which matched the description of that involved in the report was parked in the parking lot of a local establishment known as Antlers, Deputy Erickson approached the vehicle and found Mr. Meton asleep behind the wheel. R11 at p.2.

When the deputy could not rouse Mr. Meton by knocking on the windows of his vehicle, emergency medical personnel were dispatched to the scene. R11 at p.2. Eventually, Mr. Meton was awakened and he exited his vehicle, whereupon Deputy Erickson detected an odor of intoxicants emanating from the vehicle, and noted that Mr. Meton's eyes were bloodshot and his speech slurred. R11 at p.2. When questioned, Mr. Meton admitted that he had consumed intoxicating beverages earlier that evening and stated that he was tired. R11 at p.2.

At this juncture, Deputy Erickson transported Mr. Meton to another location for field sobriety testing. R11 at p.2. Mr. Meton ostensibly exhibited sufficient clues on the field tests such that he was placed under arrest for operating a motor vehicle while intoxicated. R11 at p.2.

Prior to his formal custody, Deputy Erickson "put [the preliminary breath test device] in front of [Mr. Meton] and said, deep breath, blow for me." R69 at 3:14-15; D-App. at 105. Based upon the deputy's actions, the circuit court concluded that the deputy did not make a "verbal request" that Mr. Meton submit to a breath test, but rather, created "an expectation that [the breath test] would be done." R69 at 3:5-24; D-App. at 105. Based upon its review of the video evidence in this case, the circuit court concluded that "because there was no request as required by Wisconsin Statutes, the Court is going to suppress the PBT." R69 at 3:23-24; D-App. at 105.

Because Mr. Meton contended that the evidence obtained after the unconstitutional seizure of his breath should be suppressed under the fruit of the poisonous tree doctrine, the circuit court continued its ruling by finding that the "independent source" doctrine precluded the application of the fruit of the poisonous tree doctrine and denied that aspect of Mr. Meton's motion. R69 at 3:25 to 5:3; D-App. at 105-07.

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 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. Meton in this appeal must be analyzed. Thus, any "close calls"—in the common vernacular—with respect to whether the fruit of the poisonous tree doctrine should have been applied to the evidence obtained after the illegal seizure of Mr. Meton's breath should be resolved in his 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 preliminary breath test [hereinafter "PBT"] to that individual upon having "probable cause to believe that the person . . . has violated s. 346.63(1)." Wis. Stat. § 343.303 (2025-26). The "probable cause" referred to in § 343.303 does not rise to the level of "probable cause to arrest," but rather, means 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 circuit court found in this case that the PBT was not administered in accordance with Wis. Stat. § 343.303. R69 at 3:25 to 5:3; D-App. at 105-07. If the PBT was administered in violation of the law, the question arises as to whether the seizure of Mr. Meton'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. Suppression When There Has Been a Fourth Amendment Violation.

1. The Exclusionary Rule.

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. In this case, the court below did just that, namely it applied the exclusionary rule to the PBT result and suppressed it. The question remained, however, as to whether the court should have gone one step further and suppressed the evidence which came downstream from the illegally obtained breath specimen. This question involves the application of the fruit of the poisonous tree doctrine, which is examined more fully below.

2. The "Fruit of the Poisonous Tree" Doctrine.

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. *Wong Sun*, 371 U.S. 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) (2025-26). 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 test 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. Meton's blood sample cannot be divided or dissevered from the initial taint caused by the unconstitutionally obtained PBT sample. 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. Meton'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 was, therefore, in error.

The circuit court reasoned that the blood test result should not be suppressed as the fruit of the poisonous tree because it was saved from the same by the application of the "independent source" doctrine. This conclusion was, however, made in error for the reasons below.

The circuit court failed to recognize that the independent source doctrine is a doctrine which applies to *warrants* and not to the situation in which an individual

is compelled to submit to a breath test without consent, *i.e.*, in the *absence* of any warrant, as was the case with Mr. Meton.

More particularly, the United States Supreme Court crafted the "independent source" doctrine for application in circumstances in which the government asserts that the evidence obtained is "untainted" because "no information [was] gained from the illegal entry [which] affected either the law enforcement officers' decision **to seek a warrant** or the magistrate's decision **to grant it**." *Murray v. United States*, 487 U.S. 533, 540 (1988)(emphasis added). This is the exact same *limited* approach adopted by the Wisconsin Supreme Court and Court of Appeals—that is, an approach limited to examining evidence seized pursuant to a defective warrant. *See, e.g.*, *State v. Carroll*, 2010 WI 8, ¶ 45, 322 Wis. 2d 299, 778 N.W.2d 1; *State v. Herrmann*, 200 WI App 38, ¶ 23, 233 Wis. 2d 135 608 N.W.2d 406; *State v. Lange*, 158 Wis. 2d 609, 626, 463 N.W.2d 390 (Ct. App. 1990).

That portion of the court's decision which is premised upon the "independent source" doctrine is, therefore, wholly inapplicable to Mr. Meton's circumstance. This is unlike the fruit of the poisonous tree doctrine which *is* applicable to searches undertaken without consent. *Crews*, 445 U.S. at 471. This Court should, therefore, reverse the decision of the court below and remand Mr. Meton's case with directions consistent therewith.

CONCLUSION

Because the circuit court failed to recognize that the unconstitutional seizure of Mr. Meton's breath merited suppression of the evidence gathered thereafter under the fruit of the poisonous tree doctrine, and further, failed to recognize that the "independent source" doctrine did not apply to the types of circumstance involved in Mr. Meton's case, the lower court denied his motion in error when it declined to suppress evidence under the fruit of the poisonous tree doctrine.

Dated this 24th day of April, 2025.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
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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 3,667 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 24th day of April, 2025.

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