

FILED
07-07-2025
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**

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & SINGH, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

ARGUMENT

I. THE EXISTENCE OF PROBABLE CAUSE TO ARREST MR. METON FOR AN OPERATING WHILE INTOXICATED OFFENSE DOES NOT REMOVE THE TAIN FROM THE UNCONSTITUTIONALLY OBTAINED PRELIMINARY BREATH TEST.

The State asserts that the blood test result obtained in the instant case need not be suppressed even if it was “downstream” of the illegally seized sample of Mr. Meton’s breath because “Deputy Erickson had probable cause that Mr. Meton had committed the crime of operating while under the influence of an intoxicant, independent of Mr. Meton’s PBT result.” State’s Response Brief, at p.5¹ [hereinafter “SRB”]. There are several significant problems inherent in the State’s reasoning, however.

First, the State treats the court’s decision in *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), as though it only stands for the proposition that Wis. Stat. §343.303 “does not imply that a PBT is required to establish probable cause for an OWI arrest.” SRB at p.6, citing *Renz*, 231 Wis. 2d at 307. At first blush, this is a reasonable conclusion to draw from *Renz*. Unfortunately, it represents only “half the story” as the *Renz* court had far more to say about the appropriate use of the PBT than the State lets on.

More specifically, the *Renz* court concluded that the Wisconsin Legislature never contemplated the use of the PBT *after* the determination to arrest the individual has been made. Instead, the *Renz* court stated that “[t]he driver’s performance on [field sobriety] tests may not produce enough evidence to establish probable cause for arrest. **The legislature has authorized the use of the**

¹ Mr. Meton will refer to specific pages of the State’s brief as though it had been properly paginated under Wis. Stat. § 809.19(8)(bm) which requires “**sequential [Arabic] numbering starting at ‘1’ on the cover.**” Wis. Stat. § 809.19(8)(bm) (2025-26). The State begins numbering the pages of its response brief with the notation that its actual page two is page “i,” and then continues sequentially therefrom using lower case Roman numerals until it reaches its *actual* page four where it begins its Arabic sequence. The State left its cover page unnumbered as well. The State’s numbering format is contrary to the statutory rule. Given this discrepancy, Mr. Meton will, therefore, refer to specific pages of the State’s brief not by the erroneous page numbering it employed, but rather, by the page’s actual cardinal position if the cover of its brief had been treated as an Arabic numbered page one (1) as it should have been.

PBT to assist an officer *in such circumstances.*” *Renz*, 231 Wis. 2d at 310 (emphasis added).

The use of a PBT after an arrest determination has been made is not sanctioned because the PBT is designed to assist in the *arrest decision* making process and not intended to be used to gather evidence *after the arrest determination has been made*. As the *Renz* court observed:

[T]he overall scheme of [§ 343.303] is to allow officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed, if the arrest is challenged. *This scheme makes the most sense if the officer may request a PBT before establishing probable cause for an arrest*, to help determine whether there are grounds for an arrest.

Renz, 231 Wis. 2d at 304 (emphasis added).

Inherent in the *Renz* court’s decision is the recognition that a PBT serves no real or genuine purpose subsequent to the decision to arrest. The very language of the statute itself plainly establishes as much by providing that “[t]he result of this preliminary breath screening test may be used by the law enforcement officer **for the purpose of deciding whether or not the person shall be arrested** for a violation of s. 346.63(1),” Wis. Stat. § 343.303 (2025-26)(emphasis added). 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 Manitowoc 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.

Looking at the whole of the *Renz* decision—something which the State altogether avoids—it is true that the use of the PBT is not “required” as the State asserts, however, it *is* to be used when the field sobriety tests do not produce enough evidence “before establishing probable cause for an arrest.” *Renz*, 231 Wis. 2d at 304. Thus understood, the luster is taken off the State’s opening rebuttal.

The second problem with the State’s position is that it fails to acknowledge that the PBT result *has a direct impact* upon the decisions a law enforcement officer makes *based upon* the result of the PBT analysis. As Mr. Meton identified in his initial brief, if the field sobriety tests indicate a person is impaired, but a PBT result is returned below the prohibited limit for ethanol, a law enforcement officer will 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 methamphetamine, tetrahydrocannabinol, fentanyl, *etc.*—a

law enforcement officer faced with a low PBT result will choose to request a form of implied consent testing which can detect these substances, such as blood or urine testing.

Finally, the State appears to proffer an “inevitable discovery” doctrine argument as well without ever labelling it as such. SRB at pp. 8-10. Mr. Meton draws this conclusion based upon the State’s recitation of facts which arguably establish probable cause for his arrest even without considering the PBT result. Setting aside for the moment that § 343.303 only authorizes the use of the PBT when probable cause to arrest has *not* yet been established by the accused’s performance on the field sobriety tests and looking at the State’s implied inevitable discovery argument solely from the perspective of that doctrine alone, the State overlooks the responsibility it has to establish the inevitable discovery exception to the exclusionary rule. That is, there are three elements which must be proven by the State before the inevitable discovery exception may be invoked.

The leading case in Wisconsin which describes the inevitable discovery rule is *State v. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992). In *Schwegler*, the Wisconsin Court of Appeals observed that in situations in which law enforcement officers violate a suspect’s Fourth Amendment rights, the ill-gotten evidence may be saved from suppression under the exclusionary rule and the fruit of the poisonous tree doctrine if the evidence can otherwise be demonstrated to have been inevitably discoverable. In order to save the evidence from suppression, the State must demonstrate **all** of the following:

- (1) a reasonable probability that the evidence would have been discovered by lawful means but for the police misconduct;
- (2) the leads making the discovery inevitable were possessed by the County at the time of the misconduct; and
- (3) **prior to the unlawful search, the government was pursuing some alternate line of investigation independent of the misconduct.**

Schwegler, 170 Wis. 2d at 500 (emphasis added).

The third of the above-described prongs requires that law enforcement officers pursued the evidence along some alternate line of investigation apart from their misconduct for it to remain admissible. *Id.* Regrettably for the State, the facts of this case do not provide law enforcement officers with any line of inquiry independent of the underlying misconduct.

From moment one, square one, the investigation in this matter was about Mr. Meton's ability to safely operate his motor vehicle. The investigation pursued by the law enforcement officers was designed to look for evidence of Mr. Meton's alleged impairment. This was never a case about investigating an operating while revoked violation; a criminal kidnapping; a transportation of a scheduled substance across state lines; *etc.* The tools, procedures, and methods employed by law enforcement officers never involved investigative techniques apart from the deputy's field sobriety test training or drunk driving investigation methodologies, *et al.* This case never involved independent testimony of a confidential informant along some lines unrelated to the drunk driving investigation. Every aspect of every moment of the investigation of this case was, in some form or manner, tied directly to a line of investigation involving the search for proof of Mr. Meton's allegedly operating a motor vehicle while impaired. It is this very inseparability from that single line of investigation which renders any attempt on the part of the State to apply the inevitable discovery doctrine to the circumstances of this matter to fail. Thus, this Court should find that the doctrine does not apply because the line of investigation undertaken to discover the evidence in Mr. Meton's blood was indivisible from the tainted line of investigation.

Apart from the foregoing, the State also contends that the blood test result—despite the direct nexus between it and the method of implied consent sampling sought—is saved from suppression under the “independent source” doctrine. SRB at pp.10-14. The State's reliance on the independent source doctrine is, even in a light most favorable to the State, problematic under *State v. Van Linn*, 2022 WI 16, 401 Wis. 2d 1, 971 N.W.2d 478. In *Van Linn*, the court observed:

It follows that excluding illegally obtained evidence “does not mean that the facts thus obtained become sacred and inaccessible,” provided **the State's knowledge of them is gained from a source *unrelated* to the State's illegal conduct.**

That idea is the foundation of the independent-source doctrine. The doctrine is an exception to the exclusionary rule in that it allows for the admissibility of evidence or information tainted by an illegal evidence-gathering activity **when the State otherwise acquires the same information—or “rediscover[s]” it—by lawful means “in a fashion untainted” by that illegal activity.**

Id. at ¶ 12 (citations omitted; emphasis added). Undoubtedly, the determination of whether the State's knowledge has been gleaned from a *source unrelated* to the

State's illegal conduct in a fashion *untainted* by that illegal activity presents questions of constitutional fact. By way of example, some of the questions of constitutional fact which are relevant to the independent source inquiry include: What was the deputy's independent source? Was it truly independent of the underlying investigation or directly related to it? What was the extent of the officer's knowledge at the time of the illegally-seized evidence, and what formed the basis of that knowledge? Was there a temporal break between the tainted investigation and the discovery of the evidence which the State seeks to save from suppression? In the absence of the illegally-obtained evidence, was it even possible for it to be "rediscovered"?

It is Mr. Meton's contention, as described above, that there exists no reasonable universe in which one could conclude that the obtaining of a blood specimen in his case was "independent" of what the deputy knew at the time he unlawfully seized Mr. Meton's breath. Everything that led to the seizure of Mr. Meton's breath was tied to *one* investigation for impaired driving. There was no temporal break between the seizure of Mr. Meton's breath and the preceding field sobriety tests or the subsequent blood sampling. The entire extent of the deputy's knowledge at the time was premised upon the deputy's own investigation. There is nothing about the investigation in this matter which can independently be severed from any other part. It is a fabric woven with but one, single thread.

In an exercise of pure fantasy, the State asserts that "the blood draw [in this case] was the product of a separate and lawful course of events." SRB at p.12. Mr. Meton is compelled to ask: What *separate* course of events exists? The sole and only reason the Informing the Accused form was read to Mr. Meton was because he was arrested for an operating while intoxicated violation. Mr. Meton's arrest for that violation was premised upon the whole of what transpired prior to that point, which *included* his submitting to a PBT. The act of having Mr. Meton submit to the PBT is a *direct result* of the deputy's suspicion that he was operating a motor vehicle while under the influence of an intoxicant. The PBT was never part of a separate, distinct process or procedure in which the deputy was attempting to ascertain anything else other than Mr. Meton's alleged impairment. In essence, the State is pretending that the things which transpired *after* Mr. Meton's arrest are somehow distinct and divisible from what happened prior to his arrest. For example, this case does not present a circumstance in which a person is arrested for a burglary and then, while being booked into the jail for that offense, another officer comes along and realizes the person matches the description of a suspect in a homicide so she

has the suspect placed in a line-up for identification by a witness. This hypothetical represents a circumstance in which “a separate and lawful course of events” leads to the discovery of independent evidence, and notably, is nothing like the singular and unbroken course of events to which Mr. Meton was subject.

In its closing volley, the State proffers that it would be in a “worse position” if the blood test evidence is suppressed. SRB at p.15. This statement is patently false as suppression of the blood test evidence has little, if any, effect on the prosecution of the operating while intoxicated charge. Having an evidentiary chemical test result is **not** the *sine qua non* of a prosecution for impaired driving. The State expended significant energy in its brief trying to convince this Court that there was ample proof of Mr. Meton’s impairment which was observed by the deputy in this matter. In fact, it expends no less than four pages of its brief describing facts which it labels as “ample” to establish that Mr. Meton was operating while intoxicated. SRB at pp. 8-10, 13. Clearly, suppression of the blood test in this case will have no effect on how “ample” the State’s proof of impairment was.

In a prosecution for operating while intoxicated, the State is only obligated to establish that the defendant was less able to exercise the clear judgment and steady hand necessary to safely operate a motor vehicle, and nowhere within the four corners of this standard is it required that the State submit evidence to a jury as to what the accused blood ethanol concentration was. Wis. JI-Crim. 2663 (Rev. 07/2020). Thus understood, even if the blood test result is suppressed, no harm befalls the State with regard to its ability to proceed with a prosecution for operating while intoxicated.

CONCLUSION

Because the unconstitutional seizure of Mr. Meton's breath cannot be severed from the seizure of a sample of his blood, the fruit of the poisonous tree doctrine should be applied to the singular and unbroken line of investigation in this case, and therefore result in suppression of the State's blood ethanol test result.

Dated this 4th day of July, 2025.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:

Dennis M. Melowski

State Bar No. 1021187

Attorneys for Michael R. Meton,
Defendant-Appellant

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 2,700 words.

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 4th day of July, 2025.

MELOWSKI & SINGH, LLC

Electronically signed by:

Dennis M. Melowski

State Bar No. 1021187

Attorneys for Michael R. Meton,
Defendant-Appellant