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DISTRICT 1

CASE NOS 2018AP001553, 2018AP001554

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

v

CHRISTANN SPANNRAFT

Defendant-Appellant

BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT

ON NOTICE OF APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON JULY 20, 2018, IN THE CIRCUIT COURT FOR MILWAUKEE
COUNTY, THE HONORABLE KASHOUA KRISTY YANG, PRESIDING,
FINDING SPANNRAFT GUILTY OF OWI-1ST AND OPERATION WITHOUT
REQUIRED LAMPS LIGHTED

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ISSUES PRESENTED

1. Did the circuit court err in excluding from testimony, the procedure used to administer the Preliminary Breath Test?
2. Did the circuit court err in its conclusion the Field Sobriety Tests were administered and graded according to NTSHA standards and the arrest was warranted?
3. Did the circuit court err in its conclusion of all events surrounding the Intoximeter testing?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Spannraft believes the issues presented by this case are not straightforward and cannot be resolved with the application of settled law to the facts of the case. Accordingly, Spannraft does believe that oral argument is warranted.

STATEMENT OF THE CASE

On July 2, 2017, Milwaukee County Sheriff Deputy Nathan Spittlemeister issued Christann Spannraft uniform traffic citations for Operation W/O Required Lamps Lighted, Operating While Intoxicated (1st offense) and Operating with a Prohibited Alcohol Concentration (1st offense). Spannraft pled not guilty, the case was assigned to the Milwaukee County Circuit Court, the Honorable Kristy Yang, presiding.

The final pretrial conference was scheduled for April 19, 2018. Spannraft had emergency surgery that morning and the court concluded the April 19, 2018 conference be treated as a status conference. The pretrial was vacated from the court's calendar. The next status conference was scheduled for May 7, 2018. (App., p.30:23-25)

May 7, 2018 at the status conference, Judge Yang stated:

"I'm losing patience with this case because we already had a final pretrial and the time has come and gone with filing pretrial issues with the court." (App. P.32:6-9)

Yang then set a trial date of July 19, 2018. Despite the courts assertion, there was no pre-trial conference held.

The case proceeded to trial on July 19, 2018. The County presented testimony of the arresting officer, Deputy Spittlemeister, and the intoximeter operator, Officer Scott Prodzinski. Spannraft testified on her own behalf. The Court ruled the procedure used during the administration of the Preliminary Breath Test was inadmissible. The Court found Spittlemeister had conducted the Field Sobriety Tests according to NTSHA standards and Spittlemeister's decision to arrest Spannraft was valid. The court stated Spannraft's testimony was not credible regarding intoximeter testing and the events surrounding it (App. P.73:24-25, P.74:1). The court ruled Spannraft guilty of OWI – 1st and Operation W/O Required Lamps, and judgment of conviction was entered. The County dropped the PAC citation. The court ordered Spannraft, on the OWI – 1st, to pay a fine of \$300 plus surcharges, court costs, AODA assessment and six-month driver license revocation. Sentencing on the headlamp violation was a fine of \$166.20, inclusive of court costs, with three points assessed. Spannraft now appeals.

STATEMENT OF FACTS

On July 2, 2017, at approximately 03:19 hours., Deputy Nathan Spittlemeister of the Milwaukee County Sheriff's Office conducted a traffic stop of Christann Spannraft's vehicle. Spittlemeister testified while traveling southbound on I-43 near Lapham Street, he observed Spannraft's vehicle traveling "without any lights illuminated". Spannraft's 2015 Chrysler 200C has a safety feature for onboard and outside lights. If the headlamp switch is not positioned at "auto", the very bright running lamps and fog lamps illuminate as do full dashboard lights. Spittlemeister never stated, made note of or testified that Spannraft was speeding, swerving or otherwise driving erratically. Spittlemeister testified he believed Spannraft was under the influence of alcohol because her eyes were bloodshot, red and glassy, and her speech was slurred. Spannraft testified she was coming from, and had spent over five and a half hours in Potawatomi Casino which allows smoking, therefore cigarette smoke is prevalent. Spannraft also stated she wears contacts which were irritating her eyes because of the smoke and length of time the contacts were in. (App. P.49:15-25, P.50:1-4) These factors resulted in Spannraft's eyes being red, bloodshot and glassy. The arrest video does not demonstrate Spannraft's speech sounding slurred at any point.

Spittlemeister believed Spannraft was under the influence of alcohol above the legal limit in WI of .08, hence Spittlemeister had Spannraft step out of the vehicle and stated Spannraft would perform sobriety testing. Spittlemeister asked

Spannraft if she had any physical limitations that would stop her from doing the tests and Spannraft had stated she did not. Spannraft, having never been stopped by an officer while driving under any circumstance, had no idea what tests were going to be performed prior to any specific instruction. Spannraft considers herself an able-bodied person with no physical handicap, she interpreted the question to ask if she had a physical disability, to which the response was, "no".

Once the tests began, Spannraft informed Spittlemeister at each point she anticipated and/or experienced a physical limitation. The first of these occurred as soon as Spittlemeister explained the Horizontal Gaze Nystagmus test (HGN), again during the one leg stand test (OLS) and twice during administration of the preliminary breath test (PBT).

Spittlemeister began to administer the HGN test. Immediately after Spannraft heard Spittlemeister's instructions for the HGN, Spannraft stated her eyes would not follow Spittlemeister's pen because of a condition Spannraft has. This condition is Strabismus¹. Diagnosis of Spannraft's Strabismus when she was three years old resulted in Spannraft having four eye surgeries (in 1971, 1973, 1974 and 1986), to which she testified. (App. P.49:4-8.)

At trial, Spittlemeister testified he was unable to complete the HGN test because Spannraft's eyes were not tracking properly.

Spittlemeister informed Spannraft the nine step Walk-and-Turn (WAT) would be administered next. WAT is defined as a test based on the concept of divided attention. Spittlemeister had not asked Spannraft about any psychologically diagnosed condition which would limit the ability to perform any FST. Spannraft has, in fact, been diagnosed with Attention Deficit Disorder and Anxiety both of which Spannraft later indicated in answering questions on the Drug and Alcohol Influence Report. Spittlemeister was apparently unaware Strabismus causes loss of depth perception and the WAT requires accurate depth perception which Spannraft does not have.

Spittlemeister testified the FSTs were completed on a flat and clear surface; however, Spittlemeister later testified there was enough gravel on the shoulder of

¹<https://www.aao.org/eye-health/diseases/what-is-strabismus> When one eye is out of alignment, two different pictures are sent to the brain. The brain learns to ignore the image of the misaligned eye and sees only the image from the straight or better-seeing eye. The subject then loses depth perception these patients suffer from a loss of binocular vision and stereopsis, which means that the two eyes do not work together as they should to provide depth perception.

the road “which, even if I would have moved a broom across the portion that she walked, it would be impossible to remove all of the little rocks on the side of the freeway.” (App. P.52:3-6) (Vid 03:26:16-03:26:19).

At no point in the WAT did Spittlemeister direct Spannraft to a clearly visible line, nor did he direct Spannraft to walk parallel with a curb or guardrail. Spannraft was told to “picture a straight line” in front of her (Vid. 03:24:23); however, there was not enough light to see any frame of reference for Spannraft’s imaginary invisible line. Spittlemeister stated earlier he had already turned the headlights off on the squad to reduce the glare. As shown in the video, Spannraft had turned her emergency lights on immediately upon pulling onto the shoulder. In addition to Spittlemeister’s red and blue squad lights flashing, Spannraft’s yellow emergency lights were flashing.

Spittlemeister testified Spannraft exhibited four of the eight clues used to detect signs of impairment on the WAT: not maintaining balance during the instructions, stepping offline on multiple steps, missing heel-to-toe on multiple steps and not using a series of small steps turning around.

Spittlemeister then administered the (OLS). Spannraft had asked permission to remove her flip-flops and, with approval from Spittlemeister, did so. Spittlemeister indicated in his field notes and testified that Spannraft “swayed, used arms for balance and put foot down”. Spittlemeister believed those were signs of Spannraft being impaired.

After the OLS, Spittlemeister stated there would be a breath sample test. The primary use of a Preliminary Breath Test (PBT) is for screening and establishing probable cause for arrest.

At trial, Attorney Michael Pierski began to question Spittlemeister specifically about the PBT process used on July 2, 2017 with Spannraft. The purpose of this line of questioning was to show the exchange between Spittlemeister and Spannraft and the difficulty Spannraft encountered performing the breath test.

The County objected to Pierski’s line of questioning regarding administration of the PBT test (App. P.53:21-23) stating that PBT results are not admissible.

Wisconsin Statute Section 343.303 (2017-18) provides:

“the *result* of the preliminary breath screening test shall not be admissible in any action or proceeding...” (*emphasis added*).

The statute does not mention, and there is no case law nor precedent regarding, the actual procedure used in administering the PBT, which is what is at question. Had the Court held a pretrial conference, this issue would have been raised. At trial the Court erred in disallowing this evidence.

As shown on the video, Spittlemeister began the PBT at 03:27:57. After Spannraft's first attempt of blowing for eight seconds Spittlemeister stopped the test. Spannraft stated to Spittlemeister, "I have asthma." This statement was ignored by Spittlemeister. Spannraft attempted to blow again and did so for nine seconds, Spittlemeister stopped that test and said to try again. Spannraft made a third attempt and blew for four seconds. Spittlemeister stopped that test and changed the tube. At 03:29:23 a fourth attempt was made by Spannraft blowing for five seconds, Spittlemeister stopped the test and stated, "it's not even registering that you're breathing." Spannraft asked to use her inhaler. Spittlemeister ignored Spannraft and said "try again". Spannraft coughed and was immediately directed to blow for a fifth time. After Spannraft blew for two seconds, Spittlemeister stopped the test (Video: 03:29:47). Spittlemeister arrested Spannraft at 03:29:58. A moment later, Spittlemeister stated, to a 2nd officer who arrived, "(the result) ...on the shortest blow I've ever done." (Video: 03:33:38).

Spittlemeister placed Spannraft under arrest and transported Spannraft to the Criminal Justice Facility (CJF) Intoximeter (Intox) room where Spittlemeister processed Spannraft. Spittlemeister testified there is no video surveillance in the Intox room.

In the Intox room Spannraft asked Spittlemeister twice if she could take one of her prescribed Valium for anxiety. Spittlemeister responded in the negative. At the CJF, Spannraft was regurgitating stomach acid up into her throat; she could feel the burning sensation. She did not tell the deputies about it as it is a regular occurrence for her. Question number 18 on the Alcohol/Drug Influence Report is "Do you have GERD?" Spannraft answered "yes" and such was noted by Spittlemeister on that form.

While Spittlemeister was processing and questioning Spannraft, and prior to the Intoxilizer testing, Deputy Prodzinski began the required twenty-minute observation of Spannraft at 03:55, during which time Prodzinski did not see Spannraft smoke, regurgitate, put anything in her mouth (App. P.54:4-7). Spannraft did not dispute this in her testimony.

Prodzinski testified after his twenty-minute observation period, Spannraft provided a first breath sample at 04:20 with a result of .141 (Doc.53: Tr.69:16-19). In fact, Spannraft had made two attempts on the Intoxilizer prior to that result. After the blank check at 04:17 Spannraft attempted to provide a sample. It did not

register. Spannraft attempted again with the same outcome. At 04:20 Spannraft was able to provide enough air to provide a reading on the Intoxilizer which was reported as .141. Spannraft then attempted to provide the required second breath sample. Spannraft's first two attempts for the second sample did not register on the Intoxilizer. Prodzinski said, "Go ahead. Use your inhaler." Spannraft turned around and Spittlemeister, who had possession of Spannraft's purse, handed the purse to Spannraft to allow retrieval of her prescribed Albuterol inhaler² which unbeknownst to Spannraft at that time, contains ethanol³. Ethanol is alcohol and inhalers that contain ethanol cause false high positives on breath sample machines (i.e., Intoxilizer) even in non-drinking subjects when used immediately prior to providing a breath sample. Spannraft then used the inhaler as prescribed taking two puffs from it. Spannraft immediately turned back around to Prodzinski who directed Spannraft to attempt a third breath sample. At 04:25 a result registered .144.

At trial Prodzinski confirmed the Intoxilizer does not record how many attempts are made, he stated after three attempts the machine errs out and the entire test must begin again. (App. P.56:3-11).

Yet, Judge Yang, in her findings of fact and decision stated:

"The Intoximeter results for Ms. Spannraft indicates by the machine each time the subject was subjected to the Intoximeter test, in other words when the subject blew into the Intoximeter and also when the twenty-minute observation started. It's noted on there, and it contradicts Spannraft's testimony" (App. P.48:2-9)

This contradicts Prodzinski's testimony and Spannraft never spoke to how the Intoxilizer machine works or how the machine records information.

Prodzinski further testified there is nowhere on the report generated by the Intoxilizer, to indicate if a subject would make use of an inhaler for breathing purposes. (App. P.58:22-25)

Additionally, Prodzinski stated, when questioned about Spannraft using her inhaler in the Intox room:

Prodzinski: "we don't let them put anything in their mouth.

² <https://www.rxlist.com/proair-drug.htm#medguide> Active ingredient: albuterol sulfate. Inactive ingredients: propellant HFA-134a and ethanol. (Albuterol sulfate) Inhalation Aerosol

³ https://www.rxlist.com/consumer_ethanol_alcohol/drugs-condition.htm#what_are_side_effects_of_ethanol "What are the Side Effects Associated with Using Ethanol?" Common side effects of ethanol include: Intoxication

M. Pierski: "ok"

Prodzinski: "for the twenty-minute observation, sir" (App. P.59:20-22)

Prodzinski again emphasized later in testimony "during my twenty minutes' observation" (App. P.60:3-5) Spannraft would not have been allowed to utilize an inhaler for asthma.

Judge Yang, in her findings of fact and decision stated she did not find Spannraft's testimony to be "credible as to what occurred during those twenty minutes". (App. P.73:24-25, P.74:1).

In Yang's decision she further stated:

"Also, she knew she wasn't allowed to put anything in her mouth. As I recall from the testimony, Deputy Spittlemeister had told her that she could not use her inhaler. And, furthermore, Officer Prodzinski had testified -- And I find both of their testimonies to be credible -- Officer Prodzinski testified that nothing was allowed during those twenty minutes." (App. P.74:9-19)

Spittlemeister never stated to Spannraft she could not use her inhaler. He simply ignored Spannraft asking to use it during the PBT test. The testimony regarding PBT procedure was not allowed at trial. Prodzinski and Spannraft's testimonies agreed that during the twenty-minute observation period in the Intox room, nothing was allowed, nor put in Spannraft's mouth. Yang's conclusion of Spannraft's testimony not being credible about those twenty minutes is, in the least, confusing as Spannraft said nothing contrary to Prodzinski regarding that time period.

After the Intoxilizer results were acquired by Prodzinski, the information was handed to Spittlemeister while still in the Intox room at the CJF. Spannraft was then issued citations, read her Miranda rights and agreed to answer verbal questions from Spittlemeister for the Alcohol/Drug Influence Report. Spittlemeister testified to question number 10 on the report, he was aware of Spannraft being under a doctor's care and Spannraft has prescribed medications which she took the morning of the arrest.

Spannraft's answer to question 12 on the Alcohol/Drug Influence Report listed the medications Spannraft is prescribed and taking daily. Adderall and Protonix⁴, among others, were noted on the report. Spannraft testified she didn't mention

⁴ <https://www.pfizermedicalinformation.com/en-us/patient/protonix#what-is-protonix>
<https://www.mayoclinic.org/diseases-conditions/gerd/symptoms-causes/syc-20361940>

Protonix is used in the treatment of acid reflux, which, the Mayo Clinic defines thusly: Reflux occurs when stomach acid frequently flows back into the tube connecting your mouth and stomach (esophagus). This backwash (acid reflux) can irritate the lining of your esophagus.

Valium or the Albuterol inhaler in the medication list as they are on an “as needed” basis, not taken daily. Spittlemeister had just witnessed Spannraft’s possession and use of the prescribed Albuterol inhaler.

Closing arguments ensued and Yang entered her findings of fact and decision.

ARGUMENT

I. THE COURT COMMITTED CLEAR ERROR IN EXCLUDING FROM TESTIMONY THE PROCEDURE USED ADMINISTERING THE PRELIMINARY BREATH TEST OF SPANNRAFT

The County objected to Pierski’s line of questioning regarding administration of the PBT test (App.P.61:1-9) stating that PBT results are not admissible per Wis. Stat. § 343.303 which clearly states the result of the PBT testing is inadmissible. The statute does not mention, and there is neither case law nor any precedent regarding, the actual **procedure used** in administering the PBT, which is what is at question.

Wisconsin Statute Section 343.303 (2017-18) provides: “The *result* of the preliminary breath screening test shall not be admissible in any action or proceeding...” (*emphasis added*)

Had the Court held a pretrial conference, this issue would have been raised. At trial the Court erred in disallowing the procedural evidence.

After the FST, Spittlemeister stated there would be a breath sample test. In doing this, Spittlemeister acted contrary to the requirements of Wisconsin Statute Section 343.303(2017-18) which provides:

“If a law enforcement officer has probable cause to believe that the person is violating or has violated S346.63(1) or (2m)...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...” (*emphasis added*).

Spannraft was not asked for consent or given a choice to blow or not blow for the PBT, as the video demonstrates (03:27:41-03:27:58). Spittlemeister did not make a request of Spannraft. The fact Spannraft acquiesced with the command, rather than questioning it or refusing, does not equal consent.

The process Spittlemeister used to administer the PBT is in question as to probable cause for arrest.

The fact that Spannraft had made four attempts to provide a breath sample over a span of almost two minutes, all the while stating she has asthma, requested use of an inhaler and coughed, indicated to Spittlemeister Spannraft was having difficulty performing the PBT and unable to provide a sufficient sample:

According to Alco⁵, the manufacturer of the PBT device used by Milwaukee County Sheriff's Department⁶, a sufficient sample requires exhalation time of at least seven seconds, yet Spannraft's sample was just shy of three seconds.

II. THE COURT ERRED IN CONCLUDING THE FIELD SOBRIETY TESTS WERE ADMINISTERED AND GRADED ACCORDING TO NTSHA STANDARDS AND WARRANTED THE ARREST

Spittlemeister testified he believed Spannraft was under the influence of alcohol because her eyes were bloodshot, red and glassy, and her speech was slurred. Spannraft testified she was coming from, and had spent over five and a half hours in, a smoky casino and consumed two and a half glasses of wine between approximately 9:00 p.m., July 1, 2017 and 12:30 a.m., July 2, 2017. Spannraft left the casino at approximately 2:50 a.m., July 2, 2017. Spannraft stated the cigarette smoke had irritated her eyes. These factors resulted in Spannraft's eyes being red, bloodshot and glassy. The arrest video does not demonstrate Spannraft's speech sounding slurred at any point.

Spittlemeister administered the FSTs, beginning with an attempt to perform the HGN. Spittlemeister did not complete the HGN because of Spannraft's eye disease, Strabismus.

Once Spittlemeister realized, during the HGN, Spannraft's eyes did not move in unison and Spannraft stating she has Strabismus, Spittlemeister did not ask what limitations or effects Spannraft's Strabismus causes and we can assume since Spittlemeister has not had medical training, he did not know the effects of Strabismus. The most severe symptoms Spannraft exhibits are reduced depth perception and poor peripheral vision.

⁵ <https://www.alcopro.com/product/alco-sensor-iv-with-memory-for-dot-testing/>

⁶ On 9/6/17 Spannraft called the Sheriff's Department to find out which roadside PBT device is used by their department. Spannraft was informed by Lt. Smoot the Alco-Sensor IV is the device used.

Spittlemeister then administered the WAT. Spittlemeister testified the FSTs were completed on a flat and clear surface; however, Spittlemeister later testified there was enough gravel on the shoulder of the road that a broom would not be able to remove all the rocks and gravel from the shoulder where the FSTs were being administered. Spittlemeister had turned off the headlights on his squad and the only lighting in the area of the FSTs was from the flashing red and blue squad lights and Spannraft's flashing yellow emergency lights in the distance. Flashing lights are considered a distraction.

A 1981 Study by Tharp, Burns and Moskowitz⁷ found:

“performing the WAT is difficult for people with monocular vision (i.e., poor depth perception). Additionally, it is essential the test be performed with enough light to have a frame of reference.”

“Requesting that people ‘watch their feet’ while performing this test [WAT]... makes the task difficult for people with monocular vision (i.e., poor depth perception). Performing the walk-and-turn task with the eyes open with enough light to see some frame of reference is essential if individuals are to perform the test without difficulty.”

At no point in the WAT did Spittlemeister direct Spannraft to a clearly visible line, nor did he direct Spannraft to walk parallel with a curb or guardrail. Spannraft was told to “picture a straight line” in front of her (Vid. 03:24:23); however, there was not enough light to see any frame of reference for Spannraft's imaginary invisible line. Spittlemeister's red and blue squad lights flashing and Spannraft's emergency lights flashing caused distraction.

Spittlemeister testified Spannraft exhibited four of the eight clues used to detect signs of impairment on the WAT: not maintaining balance during the instructions, stepping offline on multiple steps, missing heel-to-toe on multiple steps and not using a series of small steps turning around.

Spannraft was wearing thin, rubber flip-flops without tread on the bottom. Spittlemeister did not make note of this as the NTSHA suggests. Spannraft's flip-flops, in combination with the great deal of tiny rocks/gravel on the ground along with Spannraft's compromised depth perception, made it virtually impossible for Spannraft to not slip or step off an invisible line. Additionally, Spannraft “pivoted” on the turn-around portion of the test, a move that Spittlemeister agreed requires some agility, and Spannraft did not lose balance, nor step off the imaginary line during the turn-around.

⁷ Development & Field Test of Psychophysical Tests for DWI Arrest (Tharp, Burns, and Moskowitz, 1981) P.15.

Spittlemeister then administered the OLS. Spannraft asked permission to remove her flip-flops. Spittlemeister approved. Spittlemeister indicated in his field notes and testified that Spannraft “swayed, used arms for balance and put foot down”. Spittlemeister believed those were signs of Spannraft being impaired.

During the OLS test, the video clearly shows (Vid. 03:26:54 – 03:27:03) Spannraft had struggled to keep her right foot raised, then put that foot down and asked to switch legs, stating she had undergone knee surgery. Spittlemeister approved this request and said he would start the test over. Spannraft put her left foot down at approximately 17 seconds, ending the test due to her bare right foot hurting as it was on gravel and concrete. (Vid. 03:27:25). Spittlemeister testified:

“once you’ve removed your shoes...there are tiny pieces of gravel... it’s going to pester the bottom of a foot” (App. P.62:17-21).

After Spannraft put her left foot down, the video shows Spannraft squatting and doing knee bends in an effort to provide some relief of pain/stiffness in her knees/legs. Spannraft can also be seen on the video picking up her feet and wiping each foot against her legs to remove the rocks from the bottom of both feet.

There is a point on video (Vid. 03:27:17) during the OLS Spannraft tips her head side-to-side in unison with small circular motions of her hands at the wrists as she counted. This takes some coordination. There is no time in the video showing Spannraft using her arms for balance, nor swaying. The NTSHA states “Uses arms for balance (on the OLS) requires the movement of the arm 6 or more inches from the side of the body”, it is clear on the video Spannraft did not move her arms at all and the wrist movement was nowhere near six inches from her body at any point.

Regarding the OLS, the 1981 Study by Tharp, Burns and Moskowitz additional findings were:

“Generally, few variables alter the sensitivity of the one-leg stand test. The most sensitive variable was time...the officer must ask the stopee to count aloud from 1001 to 1030 in order to estimate the passage of 30 seconds.

Two other important variables are that: (1) the suspect must be able to see in order to orient himself or herself; and (2) the police officer must stand back from the suspect in order not to provide an artificial reference frame which could distract the suspect. Generally, if the stopee cannot see or orient with respect to a perpendicular frame of reference, then this test will be difficult to perform even if sober.

Certain individuals will have difficulty performing this test under sober conditions, including: people over 65 years of age; people with leg, back, or middle ear problems; people who are overweight by 50 or more pounds. These individuals should only be given the nystagmus test. Suspects who are wearing over two-inch heels should remove them before performing the test.” (P.16)

The video demonstrates (Vid.03:26:37) Spittlemeister instructed Spannraft to count starting at 1001 until he says to stop. There is no time Spannraft was told thirty-seconds was the goal of the test. Spannraft's bare right foot was getting sore supporting her weight and her left leg was fatigued from holding up a leg that was weakened due to prior surgery. Spannraft put her left foot down immediately after saying "1017" due to those factors. As noted in the above study, individuals having leg problems will have difficulty performing this test under sober conditions. Spannraft made a valid attempt despite her knee surgery and rocks under her bare foot.

Spittlemeister stated the standard for OLS exhibiting two out of four clues is considered performing poorly and, according to Spittlemeister, Spannraft "displayed three out of four" (App.P.63:3-5). In actuality, Spannraft technically displayed only one of four by ending the test herself due to pain in her right foot from gravel under it and fatigue in the raised leg, which was affected by prior surgery, and put her left foot down. At no time was Spannraft's foot put down and raised up again as if to regain balance.

This brings into question the accuracy of Spittlemeister's perception⁸, lack of knowledge of Strabismus, field notes and subsequent testimony regarding the results for each of FSTs and the affect they had on the Court making its decision at trial. Judge Yang states in her findings of fact and decision she finds Spittlemeister's testimony credible. Yang did not give any clarification as to her reasoning.

Spannraft's Strabismus affected the HGN not being performed and affected the manner in which Spannraft performed the WAT, which renders Spittlemeister's observations invalid. Additionally, Spannraft did not indicate more than one clue on the OLS test. This information, along with the compromised procedure used to administer the PBT show no probable cause for arrest. Spannraft's admission of drinking early in the evening does not mean she was intoxicated at the time of driving.

As Wisconsin Statute Section 346.63(7)(b) (2017-18) provides:

"Field sobriety tests are not scientific tests but are observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication, the perception of which is necessarily subjective."

⁸ Wisconsin Statute Section 346.63(7)(b) (2017-18)

III. THE COURT CLEARLY COMMITTED ERROR IN ITS CONCLUSIONS OF THE INTOXIMETER TESTING AND EVENTS SURROUNDING SUCH

At trial Prodzinski confirmed the Intoxilizer does not record how many attempts a subject makes, he stated after three attempts the machine errs out and the entire test must begin again. Yet, Judge Yang, in her findings of fact and decision stated the exact opposite and then accused Spannraft of having contradictory testimony. In actuality Spannraft did not testify to the workings of the Intoxilizer machine, therefore Spannraft could not have contradicted anything. In fact, Yang's statement is contradictory to Prodzinski's testimony.

"The Intoximeter results for Ms. Spannraft indicates by the machine each time the subject was subjected to the Intoximeter test, in other words when the subject blew into the Intoximeter and also when the twenty-minute observation started. It's noted on there, and it contradicts Spannraft's testimony"

Between the first and second breath samples on the Intoxilizer, Spannraft did as instructed by Prodzinski and took two puffs of her prescribed Albuterol inhaler which contains ethanol. Ethanol is alcohol and inhalers that contain ethanol cause false high positives on breath sample machines (i.e., Intoxilizer) even in non-drinking subjects when used immediately prior to providing a breath sample.

According to an abstract from the National Center for Biotechnology Information study National Library of Medicine - National Institutes of Health⁹:

"Asthma inhalers, including those without alcohol contents, lead to positive readings of breath alcohol measuring devices within the first minutes. Albuterol, a common component of the most popular asthma inhalers, is one such substance that contains a methyl compound that is not absorbed."

A 1998 study jointly conducted by the Department of Pharmacology at the St. Louis College of Pharmacy and Toxicologic Associates, Inc., by T. Martinez and R. Martinez¹⁰,

"The researchers found in non-drinking subjects that a single puff from a bronchial inhalator obtained readings as high as 0.120 BrAC. However, in subjects who had ingested some alcohol, the influence of the inhaler on breathalyzer scores continued past the twenty-minute mark. The investigators recommend that if the subject has used any medication, a breath alcohol test should not be done and a blood alcohol test should be used instead. In this study researchers also found that test subjects who were completely

⁹ Med Clin (Barc). 2002 Mar 16;118(9):332-4,

¹⁰ The Effect of an Inhalation Aerosol Bronchodilator on Breathalyzer Results in Drinking and Non-Drinking Subjects, Proc.West.Pharmacol.Soc. 41:51-52 (1998).

sober but had taken two puffs of an Albuterol inhaler experienced readings as high as .21 on a breathalyzer test. Effects were even more marked in subjects who had been drinking, with the effects lasting more than 20 minutes after taking an inhaler.”

Seeing as Albuterol inhalers have caused falsely elevated results on breathalyzer test machines, by Spannraft using her prescribed inhaler as directed prior to the second breath test, the reading of .144 is falsely inflated.

Prodzinski further testified there is nowhere on the report generated by the Intoxilyzer, to indicate if a subject would make use of an inhaler for breathing purposes. Prodzinski went on, when questioned about Spannraft using her inhaler in the Intox room saying, “We don’t let them put anything in their mouth for the twenty-minute observation period.” Prodzinski went on to emphasize a second time, “during my twenty minutes’ observation” Spannraft would not have been allowed to put anything in her mouth.

In her findings of fact and decision, Yang stated Prodzinski observed Spannraft for twenty-minutes at the CJF and Spannraft was not allowed to put anything into her mouth. Yang went on to say, “I don’t find Ms. Spannraft’s testimony to be credible as to what occurred during those twenty minutes.” Yet, at no time did Spannraft testify regarding any events in the Intox room during the twenty-minute observation period. Given this fact, it is unclear why Yang believed Spannraft is not credible. There simply is no testimony given by Spannraft on this subject to be found credible or not.

Prodzinski testified that he does not keep independent notes from testing unless a subject is unruly. Prodzinski stated Spannraft was “Absolutely” cooperative. (App.P.64:9-19). Prodzinski later contradicted himself, stating he keeps a “Day book” in which he would note anything unusual in regard to Intoxilizer testing processes (App.P.65:12-16).

Spittlemeister also testified he didn’t have any notes or independent records outside of the official reports and he does not keep a notebook or any handwritten notes. (App.P.66:3-9, App.P.67:24-25).

On July 3, 2017, Spannraft was reviewing the paperwork provided to her from the arrest. Spannraft noticed there was no mention of her use of the Albuterol inhaler on the Intox/CAD report. Spannraft immediately called Spittlemeister to question this omission. Spittlemeister did not answer and Spannraft left a voicemail message stating her concern. Spittlemeister called Spannraft back on July 7, 2017 and stated to Spannraft “the Intoxilizer/CAD report doesn’t have anywhere to note the inhaler use, but it is noted in my copies of the paperwork.” This statement is in direct contrast to Spittlemeister’s testimony of [He] doesn’t make any notes or

keep independent records, but rather completes online forms and there is no place to insert notes.

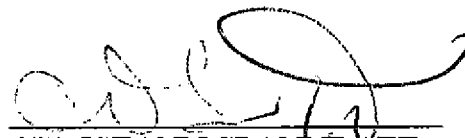
Spittlemeister and Prodzinski indicated there is no video surveillance in the CJF Intox room. Therefore, there is no record of the time Spannraft used her prescribed Albuterol inhaler, which was after Prodzinski's twenty-minute observation period and prior to a second breath sample registering on the Intoxilizer.

Once Prodzinski and Spittlemeister realized the difficulty Spannraft experienced in generating readings on the Intoxilyzer, Spannraft should have been sent for chemical blood testing. A blood test would have confirmed whether Spannraft was over the legal limit. This was not done and would have provided an accurate BAC level for Spannraft.

CONCLUSION

For the reasons stated above, Ms. Spannraft respectfully requests this Court reverse the ruling of the circuit court on the OWI (1st). Given Spannraft's perfectly clean driving record, Ms. Spannraft requests this Court issue a warning for a non-moving violation (Defective Equipment) rather than the Operation W/O Required Lamps Lighted.

Respectfully submitted this 30th day of October, 2019.




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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for brief and appendix produced with a proportional serif font. The length of this brief is twenty pages and 6175 words.

Respectfully submitted this 30th day of October, 2019.


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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

- (1) I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809.19 (12). I further certify that:
- (2) This electronic brief is identical in content to the printed for of the brief filed as of this date.
- (3) A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted this 30th day of October, 2019.


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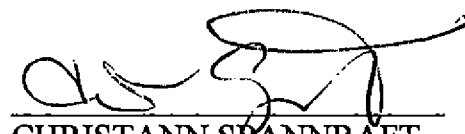
APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

CASE NOS. 2018AP001553, 2018AP001554

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

v.

CHRISTANN SPANNRAFT

Defendant-Appellant.

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