NEW LAWS

WISCONSIN STATUTE 800.13
Recordings in Municipal Court

Even though some hearings might seem more routine than others, the Wisconsin Statutes on recordings must be strictly adhered to. Specifically, the statute mandates recordings in "**every proceeding**" in which testimony is taken under oath or affirmation, on hearings involving a motion for relief of judgment, and hearings involving whether a particular defendant is unable to pay a judgment because of poverty. The recording is to be by electronic means.

The importance of compliance to this statute was recently underscored when a circuit judge ordered a municipal court to strictly adhere to the recording requirement. So while perhaps on routine hearings it may seem counter-intuitive, it is best to take the cautious approach and insure that in **every hearing** where witnesses are sworn or affirmed, or where poverty and an inability to pay a judgment is discussed, the proceeding is electronically recorded.

NEW PUBLISHED CASES

WAS THERE REASONABLE SUSPICION FOR THE STOP AND WAS THERE A COMMUNITY CARETAKER REASON TO EXTEND THE TRAFFIC STOP?

State of Wisconsin v. Michael Gene Wiskowski
Decided by the Wisconsin Supreme Court (6/18/24)

This case involves a traffic stop and subsequent arrest for OWI. At around 1pm while waiting in the McDonalds' "drive-thru" lane Wiskowski fell asleep behind the wheel of his truck. Wiskowski was awakened by a McDonalds' employee knocking on his truck window. The employee was sufficiently concerned to call the local police about the situation. Within minutes, a police officer arrived at the scene, and saw a vehicle matching the truck's description at the end of the "drive thru" lane. The officer observed Wiskowski exit the lane, Wiskowski's turn right, stop at a stop sign, and make a correct, proper, and lawful turn onto the road. The officer turned his squad around the parking lot and briefly followed Wiskowski. The officer continued to observe that Wiskowski was driving properly and did not commit any traffic violations. Nevertheless, the officer activated his lights and stopped Wiskowski.

The officer asked Wiskowski about his falling asleep and took his driver's license and proof of insurance. Wiskowski explained that he was tired because he had been working for the last 24 hours, and he exhibited no medical issues. The officer observed that Wiskowski did not seem sleepy, was not slurring his speech and appeared normal. The officer also did not smell any alcohol on Wiskowski, nor did he observe any other indicators of intoxication.

The officer returned to his squad to check on Wiskowski's license and was joined by a more experienced officer who had arrived on the scene. The two officers discussed the possibility of getting Wiskowski out of his truck but were unsure as to the justification. The check of Wiskowski's license revealed that he had three past OWI convictions. Approximately six minutes after the original stop, the officers, based on Wiskowski's falling asleep behind the wheel of his truck in the early afternoon and the original confusion over the insurance card, commanded Wiskowski to exit the vehicle. Once Wiskowski complied, the officers could smell the odor of an intoxicant and ultimately Wiskowski was arrested for OWI.

Wiskowski filed a motion to the trial court to suppress the evidence generated from the traffic stop. After a hearing, the trial court denied Wiskowski's motion, and found the stop was justified as a community caretaker activity. Wiskowski then pled no contest to fourth offense OWI, and then appealed the judgement of conviction to the court of appeals. The court of appeals affirmed the trial court and held that both the original stop and the subsequent detention prior to first observing indicia of OWI was justified under the community caretaker doctrine.

Wiskowski appealed to the Wisconsin Supreme Court arguing that the traffic stop was not proper as either a reasonable suspicion or community caretaker stop.

In a 6-1 decision the Wisconsin Supreme Court reversed the court of appeals and held that the OWI evidence be suppressed. The Court first held that there was not a sufficient reasonable suspicion for the traffic stop. Then the court, assuming without deciding that the community caretaker stop was lawful, held that the stop was improperly extended once it was clear that Wiskowski was OK and was suffering from no medical issues.

The Reasonable Suspicion Analysis

The Court reprised the law that the police can make a traffic stop if they reasonably suspect that unlawful behavior is afoot. The Court acknowledged that falling asleep in a "drive thru" at one in the afternoon is suspicious, but it is not by itself sufficient for the basis of a reasonable suspicion stop, particularly here where the officer observed Wiskowski driving properly and lawfully before the stop. As the court noted, reasonable suspicion does not demand much but it does demand more than the facts that were present on this occasion. Hence, the Court held that the stop of Wiskowski's vehicle could not be justified under a "reasonable suspicion" analysis.

The Community Caretaker Analysis

First, the Court reviewed the community caretaker doctrine reminding that there are three prongs as to the doctrine's application. They are: 1) There must be a 4th Amendment seizure; 2) There must be a bonafide community caretaking function, and 3) Even if there is a bona fide function the court balances the State's interest against the intrusion to determine if the function is reasonable. Looking at these three prongs in this case the Court quickly found that there was a 4th Amendment seizure and assumed without deciding that there was a bona fide use of the community caretaker function. But, the Court found that the doctrine was applied unreasonably and thus the third prong was not satisfied. The gist of the unreasonableness is that once it was clear that Wiskowski was fine and had no medical issues, there was no more community caretaker reason to continue the stop. Thus, the command to have Wiskowski exit the car did not seem reasonable under a community caretaker analysis.

The Court concluded that the officer had exceeded the scope of his original community caretaker justification, and thus all the evidence generated after the scope was exceeded should be suppressed.

CAN A LAB ANALYST IN A CRIMINAL CASE TESTIFY ABOUT THE TESTS DONE BY A FORMER ANALYST UNDER THE CONFRONTATION CLAUSE OF THE CONSTITUTION ? AND DOES THIS RULING APPLY IN MUNICIPAL COURT CASES?

Smith v. Arizona United States Supreme Court decided 6/21/24

This is a fractured Supreme Court opinion. A lab analyst testified that the substances tested in a criminal defendant's case were illegal drugs based on the work done by a former lab analyst. The opinion said that appeared to violate the Confrontation Clause of the United States Constitution and that constitutional rights trump the Rules of Evidence. The case was sent back to the trial court to determine if the evidence might be admissible on other grounds.

In municipal courts, however, the cases are not criminal, so there's a question of whether the Confrontation Clause applies in a civil forfeiture case. The most prudent position is that the confrontation clause is inapplicable to our civil municipal cases until a court with jurisdiction over Wisconsin municipal courts rules otherwise. There is certainly a due process right to question and present evidence, and the hearsay rules apply, but no confrontation clause right.

WAS THERE REASONABLE SUSPICION TO STOP A VEHICLE BASED UPON A CITIZEN COMPLAINT AND OFFICER OBSERVATIONS?

State v. Solom, (3/19/25) (2024AP691-CR) (Recommended for Publication)

This case involved whether the police officer had the requisite reasonable suspicion to make a valid traffic stop. Around 5:33 pm, the officer was on patrol when he received a dispatch relaying the report of a named witness who had observed a red Honda Civic "run" a red light and then crash into a snowbank. The witness further had reported that the Civic was damaged, had left the scene, and was traveling westbound on Main Street.

Two to three minutes after receiving this dispatch, the officer observed a red Honda Civic traveling westbound on Main Street about a mile from where the vehicle had been first observed. After making a u-turn the officer continued to observe the Civic being driven at erratic speeds as well as weaving within its own lane. Based on the dispatch information as to the stop sign violation and the officers own observations a traffic stop was made. The subsequent investigation resulted in the defendant being arrested for OWI 6th offense.

The defendant argued that there was no reasonable suspicion for the stop as the dispatch as to the citizens observations were insufficient, since it could have been "any" red civic that the witness had observed. The defendant sought support from the Wisconsin Supreme Court case of State v. Richey where a citizen complaint of an erratically driven Harley motorcycle was deemed insufficient reasonable suspicion for a valid traffic stop. The court of appeals distinguished Richey and rejected the defendant's arguments. Notably, the court felt that this case differed from Richey, because in Richey the offending vehicle was generically described as a Harley whereas here the vehicle was not just described as a Honda but more specifically described as a red Civic. Moreover, the vehicle encountered here was in a more rational place compared to the citizen complaint, than was the location where the Harley had been encountered in Richey. Finally, in Richey the police made no suspicious observations after first observing the Harley, where here the police observed the Civic being driven at noticeably erratic speed as well as weaving in its own lane

Thus, based on the totality of the circumstances, the officer's traffic stop was lawful.

UNPUBLISHED CASES

Beginning on July 1, 2009, an unpublished opinion issued on or after that date may be cited for its persuasive authority. Persuasive authority is not, binding precedent and an opinion rendered by a court that relies on such persuasive authority is not binding on any other court in this state.

REASONABLE SUSPICION/PROBABLE CAUSE CASES

WAS THERE REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH THE VEHICLE?

State v. Brenda Kornmeyer (5/2/24) (UNPUBLISHED)

An officer on routine patrol observed a vehicle speeding (61 mph in a 55 zone) and further observed the vehicle's rear license plate lights were not properly illuminated. Officer activated his lights to make a stop but the vehicle did not stop and when the officer turned the bend of the road he could not initially see the vehicle. But, the officer quickly spotted the vehicle with its lights off in a driveway off the highway. The officer identified the vehicle because it was the same model as the one he had observed and he had also verified the license plate.

The officer made contact with the defendant. As he had approached the defendant, the officer had observed the defendant making many furtive movements. He also observed that the defendant's eyes were glassy. The officer also was a canine officer and his dog alerted to the car. The officer then asked the defendant if he had been taking "meth" and the defendant answered, "Would I piss clean? No I wouldn't". The officer then searched the vehicle whereupon a controlled substance was found and ultimately the defendant was convicted of operating a motor vehicle with a controlled substance in her blood.

The defendant denied speeding and also claimed that she checks all her lights regularly and they were working. Thus, the officer did not have reasonable suspicion to stop. The defendant also claimed that the canine was not reliable and without the canine the officer lacked the necessary probable cause to search the car.

The court of appeals held that the officer had reasonable suspicion to make the stop based on speeding and the dim plate lights finding the police version of events to be far more credible than the defendant's version. And the court felt the canine alert plus the defendant's initial evasion and furtive movements and finally the defendant's admission that she would not pass a urine test for drugs to be sufficient probable cause for a vehicle search.

WAS THERE REASONABLE SUSPICION TO PREVENT A VEHCILE FROM LEAVING?

State v. Poole, (**8/28/24) (UNPUBLISHED)**

In the early morning hours of December 7, 2020, a deputy discovered Poole's vehicle legally parked in a parking area at the trailhead to a piece of public land often used for hiking. The vehicle was running, and the headlights were off. The deputy found this unusual. In the previous month or so of patrols, he had not

seen a vehicle parked there during his shift. The deputy acknowledged that there was nothing suspicious about the vehicle itself. However, he testified it was not "uncommon to have parking areas like that throughout the county ... where people park and walk and try to burglarize homes or do illegal activities." The deputy decided to investigate further. He parked his squad car behind Poole's vehicle such that he was blocking the rear passenger corner. This effectively trapped Poole's vehicle: Poole could not pull his vehicle forward because there was a fence surrounding the parking area, and Poole testified he likely would have hit the squad car if he tried to back up. The deputy then illuminated Poole's vehicle with the squad's headlights and with a spotlight.

Poole filed a motion to suppress the evidence derived from the stop, alleging he was unlawfully detained. Following an evidentiary hearing at which the deputy and Poole testified, the circuit court made findings of fact consistent with the facts described above. Poole then entered guilty pleas to the two possession offenses pursuant to a plea agreement with the State. He now challenges the suppression ruling.

The parties first dispute when the seizure occurred. The State argues Poole and his passenger were first seized when the deputy withheld their proof of identification while awaiting backup on the outstanding warrant. On the other hand, Poole argues he was seized when the deputy positioned his squad car behind his vehicle in a way that prevented Poole from leaving without striking the deputy's car.
The appellate court ruled that Poole was seized the moment the deputy parked behind him and illuminated his vehicle with a spotlight. The State's argument emphasizes the deputy's use of the spotlight, citing *State v. Young*,2006 WI 98, ¶65 n.18, 294 Wis.2d 1, 717 N.W.2d 729, for the proposition that the use of a spotlight is not a show of authority sufficient to effect a seizure. But *Young* was very clear that the use of a spotlight in conjunction with other displays of authority may constitute a seizure, *id.*, ¶65, and here, the deputy also prevented Poole from leaving by placing his squad car within Poole's only available path of departure. *See State v. Harris*,206 Wis.2d 243, 247, 258-59, 557 N.W.2d 245 (1996) (holding seizure occurred when officers blocked car with their own vehicle).

The State's argument that the deputy here possessed reasonable suspicion failed because the State pointed to no "specific and articulable facts" suggesting that anyone in Poole's vehicle was up to anything nefarious. The appellate court noted the deputy's perceived oddity of a car lawfully parked in a public area during early morning hours hardly sufficed as reasonable suspicion of criminal conduct. Indeed, even a person's presence in a "high crime" area-which nothing suggests this was-adds nothing to reasonable suspicion absent other factors suggesting criminal behavior. *See State v. Gordon*, 2014 WI.App. 44, ¶15, 353 Wis.2d 468, 846 N.W.2d 483. There was no evidence of recent burglaries in the area and no reports of suspicious persons or burglaries that evening. The State did not even establish at the suppression hearing that there were feasible burglary targets within walking distance of the trailhead-the circuit court described the area as "highly rural." The judgment was reversed, and case remanded for further proceedings with directions.

HAS A SEIZURE UNDER THE FOURTH AMENDMENT OCCURRED IF AN OFFICER WALKS UP TO A DRIVER IN A PARKING LOT AND SPEAKS WITH THEM THROUGH THE OPEN WINDOW OF THEIR VEHICLE?

State v. Zander (9/12/24) (UNPUBLISHED)

The Officer was standing in the parking lot of a bar. He saw Zander exit the bar and walk to a pickup at 10:41 p.m. on a Saturday night. As the officer walked to the vehicle he heard the engine turn over and saw the headlights come on. Zander lowered the passenger side window as the officer approached. Upon talking with Zander the officer smelled a “strong” odor of alcohol on Zander’s breath and saw that his

eyes were bloodshot and glassy. He asked Zander to exit the truck and FSTs were initiated, resulting in Zander's arrest. Zander moved to suppress, arguing that the officer did not have sufficient reasonable suspicion when he seized Zander.

On appeal Zander argued that the trial court erred in crediting the officer's testimony that Zander got into the truck after he walked from the bar and that the officer spoke to Zander through the truck's lowered window. Instead, Zander argued the court should have credited Zander's contrary testimony that he was standing next to the truck when the officer walked up to him, and should have held that the seizure of Zander occurred at that moment, when the officer had little to no evidence of impairment.

The Court of Appeals held that walking up to the truck and speaking to Zander after he voluntarily opened the passenger side window did not constitute a seizure. Citing *County of Grant v. Vogt*, 2014 WI 76, 356 Wis. 2d 343, the Court held that officers are allowed under the Fourth Amendment to gather facts before a seizure occurs, so long as the circumstances do not cause a reasonable person to believe that he or she is not free to leave. A reasonable person in Zander's position would have believed that he was free to leave at least up until the moment when reasonable suspicion arose because of the observations of the odor and his eyes. Not all encounters between police and other people are seizures. To the contrary, police may lawfully pursue a broad variety of inquiries and tasks that involve interactions with people, stopping short of a seizure, in the absence of reasonable suspicion or probable cause. *Vogt*, ¶26.

WAS THERE REASONABLE SUSPICION TO STOP A VEHICLE AFTER IT LEFT A PARKING LOT AROUND MIDNIGHT ON A FRIDAY NIGHT?

State v. Knautz (5/12/24) (UNPUBLISHED)

A sergeant was performing a "general patrol" in Platteville on Friday night. At about 11:50 p.m., while sitting in his unmarked vehicle at a traffic light at an intersection, the sergeant took notice of a parked car in a parking lot of a chiropractic business and auto parts shop. The car was properly parked in a parking stall on the "front side" of the chiropractic business at a spot within sight of vehicles passing on the highway. The headlights and taillights of the car were on, but not its interior lights, and its engine was running. There did not appear to be any lights on inside the building housing the chiropractic business. The chiropractic business is "attached to a financial services business." The sergeant knew that the building was not "normally open" at that time of night.

From his original vantage point at the light-controlled intersection, the sergeant watched the parked car for about one minute. There appeared to be one person in the car. The person appeared to be in the driver's seat and was "moving around," although the sergeant "could not tell what they were doing." The sergeant did not observe this person holding anything, such as a tool that could be used in a break-in or to vandalize. At no time did the sergeant see any person outside the car, nor did he see a door of the car open.

After the initial minute of observation, the sergeant drove pulled into the parking lot of a commercial business directly across the highway from the chiropractic business. The sergeant did this with the purpose of "parking there for maybe a few more minutes to see if I could see anybody coming in or out of" the chiropractic business. As the sergeant entered this parking lot he turned off the headlights of his unmarked sport utility vehicle. Also, as the sergeant entered the lot, the car he was keeping track of across the highway backed out of the stall that it had been parked in and headed toward a highway ramp. The sergeant proceeded to drive toward the car and then pulled it over on the highway ramp. Knautz was the driver. At no time did the sergeant observe Knautz engage in any irregular or illegal driving behavior. The defendant was charged with two drunk driving forfeiture violations. The defense filed a motion to suppress the

evidence based upon a lack of reasonable suspicion to stop the vehicle. The circuit court ruled that the city failed to show that there was reasonable suspicion for the stop and therefore the Fourth Amendment was violated. The city argues that it proved reasonable suspicion and appealed.

The appellate court ruled that under the totality of the circumstances the city failed to clear the "low bar" of reasonable suspicion and instead relied on what was, at most, "a mere hunch" by the sergeant regarding the possibility of an active or imminent break-in or other property crime. The evidence regarding events leading up to the stop failed to establish articulable facts, and rational inferences from those facts, that could have led a reasonable officer in the sergeant's position to suspect that any occupant of the car had engaged in criminal activity, was currently doing so, or was about to do so. The sergeant observed, from a fair distance in the dark, a car with its headlights on and its engine running at a closed business next to a well-traveled road at around midnight on a Friday. The car was properly parked in a parking space and there was no one around the car or getting in or out of it.

The court noted that an officer in the sergeant's position could reasonably entertain a professional interest in the parked car, because it was not usual to see a car parked at this closed business at midnight. The Fourth Amendment would not have prevented the sergeant from surveilling, following on public roadways, or approaching the car to satisfy any concern or curiosity, so long as he did not effect a seizure. But the court stated it would be a leap to go from what made the circumstances here "unusual" to anything resembling the specific and articulable facts warranting a reasonable belief that criminal activity was afoot. The best argument that may have been available to the city was that the sergeant could have reasonably believed at the time of the stop that the chiropractic business was within an area that experiences higher property crime rates compared to other areas of the city. The court noted that would have been at least something in favor of reasonable suspicion of a possible property crime, but it would not tip the scales based on the totality of the circumstances. The motion to suppress was affirmed.

DOES REASONABLE SUSPICION EXIST IF THE REGISTERED OWNER OF A CAR HAS NO LICENSE AND THE UNIDENTIFIED DRIVER IS THE SAME GENDER AND NEAR IN AGE?

State v. Jagla, (3-18-25) (UNPUBLISHED)

Because it was close to bar time, Officer Muenster ran the plates of a car being filled with gas. He then ran the license status of the sole registered owner, Santos Garcia, and learned Garcia did not have a license. Muenster stopped the car shortly after it left the Kwik Trip. A strong odor of alcohol emanated from the vehicle, and the driver - Jagla – had glassy eyes and slurred speech. Jagla, who admitted to drinking alcohol, staggered when he exited the vehicle, and declined to perform field sobriety tests. Muenster observed that Jagla had a .02 legal limit, having been convicted of seven OWIs.

Jagla sought to suppress the evidence. Muenster testified that he did not observe Jagla exhibiting any illegal or furtive behavior at the gas station, beyond being suspicious because it was after hours and he was pumping gas, and he did not witness any traffic violations. He stated he learned Garcia's name, date of birth, and address. He did not know Garcia, and the records did not include a photograph of him. But he knew he was a male, and the driver pumping gas was a male. He lost the motion and appealed.

The appellate court rejected Jagla's argument that Muenster lacked reasonable suspicion to stop his vehicle. Even though exemptions do exist from the requirement that drivers must possess a valid Wisconsin license, *see* WIS. STAT. § 343.05(3)(a), (4)(b), the fact the registered owner did not have a license provided reasonable suspicion of a traffic violation. Earlier cases involving multiple registered

owners were not controlling where there was a single owner and the person was of the same gender as the observed driver. An officer does not have to rule out the possibility that a person other than the registered owner was driving, especially when, as here, both Jagla and Garcia were male, and near the same age. The fact Jagla may have a different ethnicity than a person named Garcia did not dispel the reasonable suspicion – there was nothing in the record suggesting that Garcia was actually Hispanic and a person with a Hispanic last name does not necessarily have Hispanic features.

WAS THERE REASONABLE SUSPICION TO STOP A VEHICLE WITH ILLEGIBLE LICENSE PLATES?

State v. Lozano, (4/9/25) (UNPUBLISHED)

This case involved whether the police officer had the requisite reasonable suspicion to make a valid traffic stop. The police officer observed the defendant driving a black Acura SUV with an illegible license plate and conducted a traffic stop. The officer testified that the plate was illegible because the lower half of the last two digits had been rubbed down to the bare aluminum and the license plate frame/bracket around the plate almost completely obscured the fact that a vehicle was registered as a truck. After the stop the officer garnered sufficient evidence to arrest the defendant for OWI second offense. The defendant appealed arguing an unlawful traffic stop.

The defendant's core argument was twofold. First, he argued that his plates were proper in that his vehicle was lawfully registered and second, that he violated no statute since the plates were properly affixed to his automobile. The argument centered around the interpretation of 341.15(2) Wis Stats which sets forth certain requirements related to the attachment, maintenance, and display of license plates. The defendant argued that the statute is a narrow one requiring that registration plates be attached firmly and rigidly in a horizontal position and conspicuous place. Thus, since his plates were so affixed he reasoned the officer lacked reasonable suspicion to stop him. The state countered that in. addition to being attached in a prominent place, the statute required that the plate be maintained in a legible condition and shall be so displayed that they can be readily and distinctly seen and read.

The court of appeals determined that the circuit court finding of fact that the plate was not so properly maintained to be legible was not erroneous. The court of appeals further held that the statute was broader than the defendant asserted and required not just that the plate be properly affixed in a prominent place but **also** that it be maintained so that it is clearly legible. As the defendant had not satisfied the second requirement, the court of appeals said the officer had reasonable suspicion to believe the statute had been violated and thus the stop was lawful.

OWI ISSUES

IMPLIED CONSENT? FOLLLOWING THE READING OF THE "INFORMING THE ACCUSED" FORM, WHAT MUST A DEFENDANT SAY OR DO TO CONSENT OR REFUSE?

Village of Butler v. Hernandez, (6/19/24) (UNPUBLISHED)

In June 2022 at about 11:00 p.m., a Village of Butler Police Officer observed a vehicle driving under the speed limit in the middle of two lanes of traffic with its flashers on. The officer continued to follow the vehicle for a short distance, and it continued to drive slowly in the middle of the two lanes of traffic. The officer stopped the vehicle and contacted Hernandez, the driver. Hernandez smelled of alcohol, slurred his speech, handed the officer a credit card rather than his driver license, and was confused about his location. Hernandez initially denied that he had been drinking but subsequently admitted to having done so. The officer administered the Field Sobriety Tests which Hernandez mostly failed. Not surprisingly, the officer arrested Hernandez for OWI and took him to the station where he read him the Informing the Accused Form. The officer asked Hernandez if he would consent to an evidentiary chemical test of his breath. Hernandez did not respond with either a "Yes" or "No". Instead, he asked a number of questions. The officer read the Form a second time, after which Hernandez again did not answer, even after the officer instructed him that he need to answer either "Yes" or "No". Hernandez asked if he could delay deciding and talk to a lawyer because he did not understand the consequences of saying yes or saying no. When told he must provide a yes or no answer, Hernandez ultimately responded: "I guess, yes." The officer responded that he had to definitively answer yes or no and that "guessing" was not an option. However, Hernandez continued to ask questions. The officer informed Hernandez he was interpreting Hernandez's actions as a refusal and began filling out the Refusal paperwork. While the officer filled out the refusal paperwork, Hernandez kept repeating "I said yes." and continued to ask questions and stated that he was confused.

Hernandez made a timely request for a refusal hearing. At the hearing the circuit court determined that under the totality of the circumstances since Hernandez did not provide a distinct "Yes" or "No" answer in a timely fashion, his conduct amounted to a refusal. Hernandez appealed.

Hernandez asserts that the circuit court erred because he consented both through Wisconsin's Implied Consent Law, WIS. STAT. § 343.305(2), and then through his words. Because he consented to the search via his conduct (driving on Wisconsin's roads), he could only revoke his implied consent via an unequivocal action or statement. He said his response of "I guess, yes" was an affirmation of his consent—or at the very least, that it was not an unequivocal withdrawal of his previously given implied consent.

The Village argued that the circuit court's finding was correct and quoted State v. Neitzel, 95 Wis. 2d 191 (1980), for the proposition that the law requires an accused "to take the test promptly or to refuse it promptly." The Village said Hernandez did neither.

The Court of Appeals reasoned that consent through the Implied Consent Law is only the starting point of the analysis. WIS. STAT. § 343.305(4) required that the officer read the Informing the Accused Form to Hernandez. The Form informed Hernandez of the consequences for submitting to the test and the consequences for refusing to submit. See State v. Prado, 2021 WI 64. Hernandez was required to either reaffirm the previously given consent or revoke that consent by refusing to submit to the officer's request. "(C)onsent for purposes of a Fourth Amendment search must be 'unequivocal and specific.'" State v. Reed, 2018 WI 109.

Ultimately, the Court of Appeals held that under the totality of the circumstances, it was reasonable for the circuit court to conclude that Hernandez's conduct and words did not constitute voluntary consent. Therefore, the circuit court's finding that Hernandez refused the request to submit to an evidentiary test was not clearly erroneous.

MAY A DEFENDANT BE CONVICTED OF OWI AND REFUSAL WHERE NO ONE SAW HIM DRIVE, HIS TESTS WERE PERFORMED IN A BLIZZARD AND HE DID NOT UNDERSTAND THE WISCONSIN IMPLIED CONSENT LAW?

City of Rhinelander v. Zachary Tyler LaFave-LaCrosse, (1/7/25) (UNPUBLISHED)

LaCrosse appeals pro se from the circuit court judgments, entered after a bench trial, convicting him of first-offense operating a motor vehicle while intoxicated (OWI) and refusing to submit to a chemical test for intoxication. At the bench trial, a Rhinelander police officer testified that she saw a car in a snowbank at 2:35 a.m., and that LaCrosse got out of the car when she pulled up. LaCrosse's breath smelled of intoxicants, he had "slow and slurred speech." He admitted that he was coming from the Jailhouse Bar and "had a couple drinks at the bar." The officer asked him to perform field sobriety tests, and asked if he'd rather do the tests inside at the police department. LaCrosse said he would do the test on the road and the officer administered three tests. The tests revealed multiple clues of intoxication. LaCrosse refused a PBT. The officer arrested him, took him to the jail and read him the Informing the Accused form, asked for a chemical test of his breath, and LaCrosse again refused.

LaCrosse also testified at trial, stating he "was not inside [the] vehicle when the officer showed up." He claimed that his mother was the driver and that she had walked home to get her boyfriend so he could pull the car out of the ditch. According to LaCrosse, his mother just recently had a baby, and her boyfriend would not leave the ten-month-old child, which is why she had to walk the mile and a half distance to the house. LaCrosse admitted that at no time did he ever advise the officer that he had not been driving, or that his mother had been driving. His mother had never came forward to law enforcement. When asked why his mother was not in court to testify that she was the one driving, LaCrosse stated, "She's at home watching the baby." He also explained that he was from Arizona, and didn't know that Wisconsin was an implied consent state. The circuit court found LaCrosse's testimony incredible and concluded that he was the driver. The court further found that the officer properly read the Informing the Accused form to LaCrosse and that LaCrosse refused the test.

On appeal LaCrosse challenged both charges on the basis that the evidence was insufficient to support his convictions. LaCrosse argued that there was no evidence that he had been the driver of the car. He further claimed problems with the field sobriety tests, including them being administered in "blizzard conditions" and that he had received a concussion several days before. In response, the Court of Appeals noted that Lacrosse had been given an opportunity to have the tests inside and declined. The Court rejected the arguments as undeveloped and concluded there was a sufficient totality of evidence of LaCrosse's intoxication. The Court also concluded that the city had met its burden because the evidence that LaCrosse drove or operated the vehicle, though circumstantial, was strong, and that the circuit court had made reasonable inferences. As to the refusal, the Court understood LaCrosse to argue: (1) he did not understand the implied consent law in Wisconsin because he is from Arizona; and (2) the officer did not read him the Informing the Accused form until after he refused the PBT request. The Court rejeced LaCrosse's first argument because the circuit court found that the officer properly read him the form, which "is meant to inform the accused of the law in Wisconsin and the consequences of refusing the test." Second, the officer read LaCrosse the form at the proper time–after his arrest but before requesting a chemical test of his breath.

WAS THERE PROBABLE CAUSE FOR THE DEFENDANT'S REFUSAL AND WAS HIS REQUEST FOR ALTERNATIVE TESTS VALID?

City of Mequon v. Schumacher (7/3/24) (UNPUBLISHED)

At around 9 p.m., the police officer observed the defendant driving a vehicle with a malfunctioning headlight. The officer also noticed that the vehicle had substantial damage to the driver's side, and that the damage appeared to have occurred recently because the officer could actually hear pieces of the vehicle scraping on the pavement. The officer stopped the defendant's vehicle.

The officer observed that the defendant smelled of intoxicants, and had glassy bloodshot eyes. Further, the defendant explained that the damage to the vehicle might have come from when he had crashed into a stationary sign pole. The defendant was surprised at the extent of the damage when the officer showed it to him. The officer then administered field sobriety tests to the defendant and he did poorly. The officer then administered a PBT revealing a score of .037. Despite this relatively low score, the officer arrested the defendant for OWI based on the circumstances. As the officer felt that the low score was inconsistent with all the observations he had made, he decided to ask for a blood test as such a test would also show other factors besides alcohol that might have caused impairment.

The defendant initially balked at doing a blood test saying that he wanted to do either a breath or urine test instead. Eventually the defendant agreed to a blood test, but ultimately refused before the test could be administered. The police then procured a search warrant and also charged the defendant with a refusal.

The court of appeals held that the trial court's refusal finding was proper. The court noted that the officer had sufficient probable cause to ask for the test based on the defendant's eyes, odor, and poor performance on the field tests, as well as his driving into a stationary sign pole. Moreover, the court was not impressed that the defendant was willing to offer breath or urine, since it is the State's choice to pick the test. So, the court of appeals affirmed the trial court order holding that the defendant's refusal was unlawful.

Key Point:

1) **The burden of persuasion at a refusal hearing is substantially less than at a suppression hearing.**
2) **It is the State, and not the defendant, who has the authority to choose the test to administer after a lawful OWI arrest.**

CAN A COURT LAWFULLY ORDER AN IGNITION INTERLOCK REQUIREMENT IF THERE HAS NOT BEEN A REFUSAL FINDING UNDER Wis. Stat. § 343.305?

State v Green, (3/5/25) (UNPUBLISHED)

In August 2023, Devron Michael Green was cited for operating while intoxicated (first offense), operating with a restricted controlled substance (ORS), and for refusing to submit to a blood test. Green plead not guilty, demanded a jury trial, and made a timely request for a refusal hearing. Subsequently, he and the prosecutor agreed that he would plead guilty to the OWI charge and the State would dismiss the ORS and the refusal. The parties agreed to argue to the court whether to order an ignition interlock device ("IID"). Wis. Stat. § 343.301(1g) (a) states in part "A court shall enter an (IID) order if … The person improperly refused to take the test under 343.305…" At sentencing, the circuit court accepted Green's plea to the OWI and granted the prosecutor's motion to dismiss the ORS and the refusal allegation. But, over Green's

objection, ordered a 12-month IID installation based solely on the arresting officer's sworn affidavit in the blood search warrant indicating that Green had, in fact, refused the blood test.

On appeal, Green argued that the court lacked statutory authority to impose an IID because the State never obtained a formal determination that he "improperly refused" the blood test under Wis. Stat. § 343.305. He emphasized that dismissing the refusal citation without conducting the statutorily required refusal hearing meant there were no adjudications on (1) probable cause for the test, (2) whether the "Informing the Accused" form had been read, or (3) whether he actually refused the test—findings necessary to render a refusal "improper" after a demand for a refusal hearing was timely filed. The State countered that the officer's affidavit supporting the blood-draw warrant, coupled with the prosecutor's pretrial comments, was sufficient to establish an improper refusal and that no additional procedural hearing was required under Wis. Stat. § 343.301(1g)(a) .

The Court of Appeals examined the relevant statutes and held that Wis. Stat. § 343.301(1g) (a) mandates IID installation only when a person has improperly refused a test under § 343.305. The statute requires that if a refusal hearing is properly requested, findings on the three specified issues must occur before a refusal may be deemed improper. Because no refusal hearing was ever held, and the court made no such findings, it lacked authority to impose an IID. The court therefore affirmed Green's OWI conviction but reversed the portion of the judgment ordering a 12-month ignition interlock device installation.

WAS THERE A LEGAL BASIS TO STOP THE DEFENDANT AND COULD THE STOP BE EXTENDED FOR AN OWI INVESTIGATION?

State v. Reichert (8/14/24) (UNPUBLISHED)

The police received a citizen complaint that a male and a female had been arguing outside Reichert's residence and that each stormed off driving different vehicles, the male in a silver Malibu and Reichert in a purple Honda Pilot. The police were further advised that there might have been some kind of gun threat involved, and that at least one child was in one the vehicles that might have collided. The police began to comb the area, motivated by both a community caretaker instinct and concern about investigating a potential domestic disturbance situation. The police encountered in the immediate vicinity, a dark colored SUV that seemed to match the description of the Purple Pilot that they were looking for. The police stopped the vehicle, which was driven by Reichert and had one child passenger.

After a short while, the police determined that neither Reichert nor the child were in danger, but they continued to investigate the possible domestic abuse. Reichert told the police that she and her boyfriend had fought in the front yard and that when she attempted to leave in her car he had blocked her travel route with his vehicle, forcing her to drive on her neighbor's lawn and driveway to get away. During the time the police were talking to Reichert they noticed that her speech was slurry and thick tongued and they also received information that the boyfriend had told the police that Reichert was drinking, and that was why they were fighting.

The police asked Reichert to perform SFSTs , which she failed, and ultimately she was arrested for OWI.

The court of appeals held that the initial stop was justified by the community caretaker doctrine as the police had a legitimate belief that Reichert might have needed aid and assistance. Then, the court held that the police lawfully continued their contact to investigate the domestic dispute situation, and finally lawfully continued the stop to investigate a possible OWI under the developing facts. So, the court affirmed the trial court's denial of Reacher's suppression motion.

Key Point:

In reaching its decision the Court reminded us of the elements of a community caretaker stop: 1) There must be a seizure, 2) The police must have a bona fide community caretaker concern, and 3) The public interest furthered by the officer's conduct outweighs the intrusion the privacy of the seized individual. In evaluating the third element the court looks at 1) the degree of the public interest, 2) the circumstances surrounding the stop, 3) whether a vehicle was involved, and 4) the availability of a different less intrusive way to effectively check on the situation.

HOW MUCH PROBABLE CAUSE IS NEEDED TO REQUEST A PBT FROM A DRIVER?

City of Monona v. Erickson, 5-30-25 (UNPUBLISHED)

Police were alerted to a potential impaired driver by a store manager after Erickson asked to borrow or purchase a shovel to dig his car. Officers Wedig and Flora were dispatched and found Erickson trying to use an umbrella to dig a car out of the snow. They smelled the odor of alcohol on Erickson's breath, noticed that his speech was slurred, and observed he was in an unplowed portion of a well-lit parking lot. They requested that Erickson undergo a PBT. He initially consented, but did not provide a breath sample sufficient to create a meaningful result. The officers continued to talk with him for a time, and then placed him in handcuffs and moved him to the front of one of the officers' squad cars because, according to Wedig, Erickson was trying to play games or at least prolong the process. The again asked Erickson to the PBT, but he declined. He also declined to do field sobriety tests. He was eventually arrested and refused the chemical test. In circuit court he sought to suppress the evidence, and was then convicted.

On appeal, Erickson argue the city failed to show that the officers had "probable cause to believe" he was operating under the influence or had a prohibited alcohol concentration, as required by statute before they could lawfully request a PBT under § 343.303. The court rejected this, because the information objectively available to the officers exceeded the amount of evidence necessary to justify that request: he had driven into the snow in a partially plowed commercial parking lot; the odor of alcohol; the slurred speech; his evasive answers to questions.

The court also found probable cause to arrest for OWI after he refused to cooperate with providing a sample through the PBT process. Using the time of placing him in handcuffs as the moment of Erickson's arrest, the court found sufficient probable cause to arrest because of all the additional interactions leading up to that moment which involved delay and obfuscation. Erickson attempted to retract his initial statements, exhibited an inability to follow police officer commands not to drink a clear liquid; displayed odd behavior in scrolling through his phone while avoiding to answer questions asked of him; and he appeared nervous and showed confrontational mannerisms. All of which, individually and collectively, reasonably support the inference of consciousness of guilt. When considered as part of the totality of the circumstances, along with the facts summarized above supporting the PBT request, probable cause to arrest was easily established.

TO WHAT LEVEL MUST THE PROSECUTION PROVE THAT A DEFENDANT'S UNSAFE DRIVING WAS CAUSED BY HIS USE OF CONTROLLED SUBSTANCES?

State v. Joseph B. Venable, (8/15/24) (UNPUBLISHED)

A trooper pulled Venable over after receiving four complaints of unsafe driving and observing Venable's car go from the right lane onto the shoulder, then into the middle lane and almost collide with a truck. Venable explained that he was tired but he seemed confused, his speech was slow and slurred, his pupils were dilated, and his body movements were "very animated," and he was travelling in the wrong direction. Venable told the trooper he had taken four prescription medications, including Adderall and paroxetine. After conducting field sobriety tests, the trooper arrested Venable, searched his car (finding loose and broken Adderall pills). Venable consented to a blood draw, which revealed the presence of amphetamine and paroxetine in his blood. At a bench trial, the state's blood analyst testified that although it is "very uncommon," the drugs detected can interact to cause "serotonin syndrome," which is "an excess of the chemical serotonin in the body that can have adverse complications", such as sweating, shivering, uncontrollable body movements, confusion, unconsciousness and death. The state presented no other evidence of the impairing effects of the medications.

Venable was convicted of violating § 346.63(1)(a), which provides in relevant part, "No person may drive or operate a motor vehicle while … under the influence of … a controlled substance … to a degree which renders him or her incapable of safely driving." The parties did not dispute that Adderall, amphetamine, and paroxetine are controlled substances. Nor did Venable contest on appeal that he was incapable of driving safely. He argued only that there was insufficient evidence that his unsafe driving was due to the influence of a controlled substance rather than fatigue as he contended.

The evidence to support a conviction is insufficient only if, "when viewed most favorably" to the government, the evidence "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt" under the applicable evidentiary standard. State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The Appellate Court concluded that, despite the lack of direct evidence regarding the impairing effects of the specific levels of controlled substances, the evidence nevertheless permits a reasonable inference that Venable's impairment was due to his use of a controlled substance. Even if the record supports an inference that Venable's impairment was due to fatigue, it is not the role of the court to choose between competing inferences. When the record "supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." Poellinger.

CAN AN OFFICER'S REFUSAL TO GRANT A DEFENDANT'S NUMEROUS REQUESTS TO USE THE BATHROOM OVER AN EXTENDED PERIOD OF TIME VIOLATE THE FOURTH AMENDMENT?

State v. Holly J. Grimslid, (1/16/25) (UNPUBLISHED)

Although the decision does not tell us the exact time, during an evening in March 2023 Holly Grimslid was operating a vehicle in LaCrosse without any headlights. When an officer also observed her vehicle incorrectly signal a turn he stopped her. She was the driver and the only occupant of the vehicle.

Grimslid admitted to having "probably two drinks." Her speech was slurred and in some undescribed manner she contradicted herself. Of course, the officer detected an odor of intoxicants coming from inside

her vehicle. He asked Grimslid to exit the vehicle to administer field sobriety testing. Grimslid appeared to be unsteady and had trouble following the officer's directions. The officer thought it was appropriate to stop the field sobriety testing and he arrested Grimslid. He drove to the Mayo hospital for a blood draw.

While parked outside the hospital the officer read the "Informing the Accused" form to Grimslid. The officer asked her several times if she would consent to the testing of her blood, but her initial responses were "conditional and equivocal". The officer told her "it's a yes or no question," and that if she did not answer he would consider it to be a refusal. One last time he asked Grimslid whether she would submit to a blood test and she responded, "Uh, I will [pause] no, I'll, you can take me into Mayo. Take me into Mayo right now. I would wonderfully go into May—Mayo right now. And, yeah, I would love to. Let's go. Let's go to Mayo right now." The officer stated he understood Grimslid's responses to mean that she was not consenting to testing. (Note at a separate hearing on her refusal to submit to the test, the circuit court ruled that the State failed to prove she had unlawfully refused.)

While still in the squad car the officer began to prepare an application for a search warrant to draw Grimslid's blood. Meanwhile, Grimslid, handcuffed in the back of the squad car, asked to use the bathroom. The officer responded, "No, not until I'm done." Grimslid repeated her request several times as the officer waited for the warrant application to be approved. The officer repeated that she could use the bathroom after "this process is done." In total, it took more than forty minutes for the warrant application to be approved. Following the approval of the search warrant the officer escorted Grimslid into the hospital for a blood draw. Inside the hospital, Grimslid again asked to use the bathroom several times, and the officer responded that she could use the bathroom when they "get down to the jail." After Grimslid's blood was drawn at the hospital, she was transported to the jail. The decision presumes that she was at that time allowed to use the bathroom. The decision does not tell us the exact time between when she first asked to use the bathroom until she was booked into the jail.

Grimslid filed a motion to suppress the blood test result alleging the officer violated the Fourth Amendment's reasonableness requirement when he "denied [her] the basic human right to relieve herself." Grimslid asked the court to suppress the results of the blood test on that basis. Grimslid expressly conceded that she was not challenging the basis for the investigatory stop or the subsequent arrest. The circuit court held an evidentiary hearing and denied the motion. The court did, however, acknowledge that some aspects of the body camera footage were "cringeworthy", and speculated that perhaps more could have been done to allow Grimslid to use the bathroom while at the same time "safeguard[ing] the integrity of the [blood] sample that was about to be obtained." However, the court determined there was a "lack of nexus between" the officer's denial of Grimslid's requests to use the bathroom and the lawful basis for the blood draw. Grimslid appealed the denial of her suppression motion.

The Fourth Amendment protects against unreasonable searches and seizures by the government. Accordingly, to demonstrate that the blood test results should have been suppressed, Grimslid must demonstrate that she was subject to an unconstitutional search or seizure. The Court of Appeals found that Grimslid failed to show she was unconstitutionally searched or seized. Here, in fact, the officer obtained a search warrant authorizing the blood draw, and Grimslid does not challenge any aspect of the warrant. Therefore, she did not establish that she was subjected to an unconstitutional search.

Grimslid argued instead that the blood test results must be suppressed based on the conditions that she was subjected to after she was seized. The Court of Appeals concluded it was not necessary to establish whether Grimslid proved a Fourth Amendment violation for purposes of resolving the appeal. Even if it was assumed that the officer's refusal to allow Grimslid to use the bathroom made the conditions of her confinement objectively unreasonable, and might constitute a Fourth Amendment violation, Grimslid was not entitled to suppression of the blood test result. The exclusionary rule specifies that there must be a

connection between the Fourth Amendment violation and the evidence that a defendant is seeking to suppress. The Court of Appeals agreed with the circuit court that there was a lack of nexus between the officer's refusal to allow Grimslid to use the bathroom and the collection of the blood sample. The Court of Appeals affirmed the circuit court's ruling which denied Grimslid's motion to suppress.

MAY A DEFENDANT BE CONVICTED OF OWI AND REFUSAL WHERE NO ONE SAW HIM DRIVE, HIS TESTS WERE PERFORMED IN A BLIZZARD AND HE DID NOT UNDERSTAND THE WISCONSIN IMPLIED CONSENT LAW?

City of Rhinelander v. Zachary Tyler LaFave-LaCrosse, (1/7/25) (UNPUBLISHED)

LaCrosse appeals pro se from the circuit court judgments, entered after a bench trial, convicting him of first-offense operating a motor vehicle while intoxicated (OWI) and refusing to submit to a chemical test for intoxication. At the bench trial, a Rhinelander police officer testified that she saw a car in a snowbank at 2:35 a.m., and that LaCrosse got out of the car when she pulled up. LaCrosse's breath smelled of intoxicants, he had "slow and slurred speech." He admitted that he was coming from the Jailhouse Bar and "had a couple drinks at the bar." The officer asked him to perform field sobriety tests, and asked if he'd rather do the tests inside at the police department. LaCrosse said he would do the test on the road and the officer administered three tests. The tests revealed multiple clues of intoxication. LaCrosse refused a PBT. The officer arrested him, took him to the jail and read him the Informing the Accused form, asked for a chemical test of his breath, and LaCrosse again refused.

LaCrosse also testified at trial, stating he "was not inside [the] vehicle when the officer showed up." He claimed that his mother was the driver and that she had walked home to get her boyfriend so he could pull the car out of the ditch. According to LaCrosse, his mother just recently had a baby, and her boyfriend would not leave the ten-month-old child, which is why she had to walk the mile and a half distance to the house. LaCrosse admitted that at no time did he ever advise the officer that he had not been driving, or that his mother had been driving. His mother had never came forward to law enforcement. When asked why his mother was not in court to testify that she was the one driving, LaCrosse stated, "She's at home watching the baby." He also explained that he was from Arizona, and didn't know that Wisconsin was an implied consent state. The circuit court found LaCrosse's testimony incredible and concluded that he was the driver. The court further found that the officer properly read the Informing the Accused form to LaCrosse and that LaCrosse refused the test.

On appeal LaCrosse challenged both charges on the basis that the evidence was insufficient to support his convictions. LaCrosse argued that there was no evidence that he had been the driver of the car. He further claimed problems with the field sobriety tests, including them being administered in "blizzard conditions" and that he had received a concussion several days before. In response, the Court of Appeals noted that Lacrosse had been given an opportunity to have the tests inside and declined. The Court rejected the arguments as undeveloped and concluded there was a sufficient totality of evidence of LaCrosse's intoxication. The Court also concluded that the city had met its burden because the evidence that LaCrosse drove or operated the vehicle, though circumstantial, was strong, and that the circuit court had made reasonable inferences. As to the refusal, the Court understood LaCrosse to argue: (1) he did not understand the implied consent law in Wisconsin because he is from Arizona; and (2) the officer did not read him the Informing the Accused form until after he refused the PBT request. The Court rejeced LaCrosse's first argument because the circuit court found that the officer properly read him the form, which "is meant to inform the accused of the law in Wisconsin and the consequences of refusing the test." Second, the officer read LaCrosse the form at the proper time–after his arrest but before requesting a chemical test of his breath.

MISCELLANEOUS LEGAL ISSUES

WAS DRIVING 45 MPH ON THE INTERSTATE HIGHWAY WHERE THE POSTED LIMIT WAS 70 MPH A VIOLATION OF THE OBSTRUCTING OR IMPEDING TRAFFIC LAW?

State v. Dowling, (5/1/25) (UNPUBLISHED)

A trooper stopped Dowling's electric-battery-powered Tesla sedan because Dowling was operating it "in the forties" (that is, between 40 and 49 miles per hour) on the Interstate where the posted speed limit was 70. The circuit court determined that the Tesla was traveling at "a significantly reduced speed" compared with the speeds of other vehicles. These findings appeared to be based on the testimony of the trooper and the court's review of camera video taken by the trooper's squad car that showed the Tesla from behind shortly before and during the traffic stop. As a result, the court found, other vehicles passed the Tesla "at a very high rate of speed," and the Tesla's speed was "not enough to cause [other] vehicles … in the dark to get a clear understanding of how slow [the Tesla] was going [so that the other vehicles could] kind of come around" the Tesla. Consistent with these findings, in the course of addressing an evidentiary issue during the bench trial, the circuit court observed that the squad-car video reflected vehicles "whip[ping] around" or "whipping past" the Tesla while it was still in the right lane of the two lanes traveling in Dowling's direction. The circuit court found the defendant guilty of obstructing traffic and imposed a forfeiture. Dowling appealed.

Dowling did not dispute that he was operating the Tesla at 45 miles per hour on the interstate at night, in a 70 mile-per-hour speed zone. Instead, Dowling raises three alternative arguments on appeal: (1) the circuit court erroneously operated under the "apparent belief" that the minimum speed provision may be violated when the speed of a vehicle merely has the potential to impede the movement of traffic but the vehicle does not in fact slow the progress of another vehicle; (2) here, the Tesla's speed was not, in the words of the minimum-speed provision, "so slow as to impede the normal and reasonable movement of traffic"; and (3) here, Dowling's reduced speed was, in the words of the minimum-speed provision, "necessary for safe operation" of the Tesla.

The appellate court did not decide whether Dowling was correct that a violation of the minimum-speed provision required evidence that the vehicle in fact slowed another vehicle's progress. Even with that assumption, the court rejected Dowling's argument that the circuit court operated from the "apparent belief" that the minimum-speed provision may be violated even when there is no such evidence. The circuit court made statements that reflected a belief that there was evidence that the Tesla in fact slowed the progress of other vehicles and such evidence was contained in the record on appeal. There also was sufficient evidence to support the circuit court's finding that other vehicles were, in the words of the court, "whipping around" the Tesla which was impeding the normal movement of traffic.

Finally, Dowling argued that he faced a dilemma once the battery power level approached zero. Either he could drive at the speed essentially dictated by the Tesla and stand a good chance of making it to the next charging station, or else he could drive at a more normal speed and risk having the battery run out, forcing him to pull onto the shoulder. Dowling's argument was that if he had been forced to pull onto the shoulder and call for assistance that would have "stranded" the family, at approximately 10 p.m., in "pitch black with no street lamps/light[ing]," with "freezing temperatures outside, snow, no protective/safety gear, limited space on the shoulder of the highway, the need for a special tow, and two young children in the backseat." The circuit court implicitly rejected this argument. Instead, the court gave every indication that

it credited the testimony of the trooper to the effect that it would have been safe—and certainly safer than driving 45 miles per hour under the circumstances—for Dowling to pull to the side of the road and call for assistance. In addition, when the Dowlings were alerted that the battery power level was starting to reach surprisingly low levels, they could have used one of their phones to call from the Tesla to arrange for roadside assistance while the Tesla was still fully operational. In this way, the Dowlings could have made arrangements for someone to pick them up and get them out of the cold, whether this would have been while they were pulled over or else while they were still driving at a safe speed. That is, they could have arranged for someone to pick up the Tesla either from the shoulder or from some other pull-off point, and had it towed to a charging station or, if that was not sufficient, to a service facility. To the extent that the Dowlings were "totally dumbfounded, shocked, [and] terrified" by the Tesla's indications that they should drop their speed significantly, a reasonable response would have been for them to set in motion roadside assistance, and to not wait to first run out of power or to have to stop on the shoulder.

For those reasons the appellate court affirmed the circuit court decision.

WHAT IS THE REMEDY WHEN LAW ENFORCEMENT FAILS TO PRESERVE ARGUABLY EXCULPATORY EVIDENCE WITHIN ITS CUSTODY AND CONTROL?

State v. Roth, (12/11/24) (UNPUBLISHED)

Technology sometimes fails. Roth had been arrested by three officers and charged with battery/threat to officer, resisting, and others. He moved to dismiss because the body camera and squad videos were not preserved. The police were equipped with such cameras but testified that the systems never worked well and video was either not created or preserved. Roth claimed the videos would show excessive use of force.

When evidence that should be in the possession of law enforcement is either destroyed or not preserved, the defense carries a difficult burden. A violation of due process requires a showing that either the State failed to preserve evidence that was apparently exculpatory, or that the State acted in bad faith by failing to preserve evidence that was potentially exculpatory.

"Apparently exculpatory" means the evidence possessed an exculpatory value that was apparent to those who had custody of the evidence and was of such a nature that the defendant is unable to obtain comparable evidence by any other reasonably available means. It matters not why or how the evidence was destroyed or authorities failed to preserve it. However, the defendant is required to show that the evidence would be game changing without, in many instances, being able to show exactly what the evidence actually was or would show.

"Potentially exculpatory" evidence requires defendants to show that the officers were aware of the potentially exculpatory value or usefulness of the evidence that they failed to preserve. In many instances this is an easier burden, because it requires less proof as to what the evidence actually was. However, to meet this burden the defense has to show that the officers acted in bad faith, meaning with official animus or having made a conscious effort to suppressed the evidence.

In Roth, the appellate court affirmed the trial court's finding that the missing evidence was only potentially exculpatory, and that the officers' testimony demonstrated only a failure, system wide, to fix technical problems – that nothing was done with the purpose of keeping the evidence from the defense.

WHAT ARE THE EVIDENTIARY STANDARDS AND WHAT FINDINGS OF FACT SHOULD BE MADE BY THE COURT IF THE SAFEGUARDS BUILT INTO THE INTOX TEST AND TESTING PROCESS ARE CHALLENGED?

County of Waukesha v. Vecitis, (2/12/25) (UNPUBLISHED)

This case contains very good descriptions about the workings of breath testing devices, the required procedures and the importance of following those steps. It also demonstrates the importance of a court making complete findings of fact, as the appellate court had to infer findings that were not articulated by the court.

Vecitis was cited for 1st offense OWI and OWI/PAC after a crash. He challenged the .12 breath test on two grounds. First, he testified that he had blood in his mouth during the time of the breath test. Second, since the deputy administering the breath test used hand sanitizer in the room during the test, Vecitis argued that alcohol was introduced into the ambient air which either impacted the test or was inhaled (ingested) by Vecitis, again invalidating the test result. (As she was using the hand sanitizer the deputy wondered aloud whether the hand sanitizer might affect the result of the test.)

Vecitis, both officers, and an expert for each side testified at trial. The circuit court found that testing involved was relevant and had been conducted according to the requirements of the Wisconsin Administrative Code. The court found that the testing instrument would have stopped working if contaminants were found to exist. The court accepted the .12 and found Vecitis guilty.

The appellate court affirmed, holding that the findings made by the trial court were not clearly erroneous and the discretionary decision to admit the test result was not in error. The Court reminded lower courts of the importance of making clear findings on the record, so that review on appeal would not require inferring facts based upon the ultimate result found by the trial court. The Court concluded that the County established that Vecitis had a blood alcohol concentration of .12 and was, thus, properly found guilty of operating a motor vehicle while under the influence of an intoxicant