NEW LAWS

MUNICIPALITIES MAY ADOPT ORDINANCES TO IMPOUND VEHICLES INVOLVED IN A RECKLESS DRIVING OFFENSE UNDER CERTAIN CIRCUMSTANCES.

2023 Wis. Act 1. Effective 4/5/23. Creates 349.115(1) and amends 349.01.

Counties, cities, villages and towns are now authorized to adopt ordinances to impound a vehicle used in violating the Reckless Driving statute or ordinance if at the time of issuing the citation:

- The person cited is the owner of the vehicle; and
- The person has a prior conviction for Reckless Driving; and
- The person has not fully paid the forfeiture imposed for that prior offense.

The ordinance may provide for impoundment until the person fully pays the prior forfeiture and reasonable costs of impounding. These costs include towing, transportation and storage costs. If the impounded vehicle "remains unclaimed for more than 90 days after the disposition of the citation for which the vehicle was impounded", the municipality may dispose of the vehicle as set forth in Sec. 342.40.

PENALTIES FOR RECKLESS DRIVING ARE INCREASED.

2023 Wis. Act 9. Effective 5/12/23. Amends various sections of 346.65, 346.655 and 346.657.

- The penalty for reckless driving is doubled from a forfeiture of $25 to $200 to a forfeiture of $50 to $400.
- The penalty for recklessly endangering safety by unlawfully driving across a railroad crossing when required to stop is also doubled from a forfeiture of $300 to $1,000 to a forfeiture of $600 to $2,000.
- The driver improvement surcharge ($435) and safe ride surcharge ($50) must now be imposed on anyone convicted of reckless driving. Previously, these surcharges were only imposed on those convicted of OWI.
- All second or subsequent reckless driving offense are criminal offenses. Hence, municipal courts do not have jurisdiction.

ELECTRIC BICYCLES NOT SUBJECT TO OWI LAW. SPECIFIC DEFINITION OF ELECTRIC BICYCLE PROVIDED.

2022 Wis. Act 34. Effective 11/22/19. Amongst many changes relating to electric bicycles, creates 340.01(15ph), 346.806, 347.489(3m) and amends 340.01(35)

Wisconsin's OWI statute applies while driving or operating a motor vehicle. Sec. 346.63(1). This Act modified the definition of "motor vehicle" under 340.01(35) to specifically exclude an electric bicycle. The Act also created a very specific definition of an electric bicycle:

> **340.01(15ph)** "Electric bicycle" means a bicycle that is equipped with fully operative pedals for propulsion by human power and an electric motor of 750 watts or less and that meets the requirements of any of the following classifications:
>
> **(a)** Class 1 electric bicycle is an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling and that ceases to provide assistance when the bicycle reaches the speed of 20 miles per hour.

(b) Class 2 electric bicycle is an electric bicycle that may be powered solely by the motor and is not capable of providing assistance when the bicycle reaches the speed of 20 miles per hour.

(c) Class 3 electric bicycle is an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling and that ceases to provide assistance when the bicycle reaches the speed of 28 miles per hour.

The Act creates new regulations specifically applicable to electric bicycles, Sec. 346.806. Persons under the age of 16 are prohibited from operating a Class 3 electric bicycle. Further, electric bicycles are specifically allowed to operate on bikeways even if the electric motor is in operation. However, municipalities, counties and the DNR may enact ordinances and rules to prohibit such operation. See 349.18(4)

Sec 347.489 sets regulations for bicycle lighting and other equipment. This Act added regulations concerning electric bicycles. For example an electric bicycle's motor must cease to provide power when the brakes are applied or when the rider stops pedaling. Also, a Class 3 electric bicycle may not be operated unless it is equipped with a reasonably accurate speedometer.

NEW PUBLISHED CASES

State v. Nimmer (6/23/22) Wisconsin Supreme Court

Reasonable Suspicion for a Terry Stop (ShotSpotter)

This case concerned whether the police had the requisite reasonable suspicion to execute a "Terry" stop on Nimmer; finding Nimmer alone at a location recently identified by "ShotSpotter" as a place where a shot had been fired and observing Nimmer taking evasive actions after noticing the police presence. A unanimous Supreme Court agreed that, under the totality of the circumstances, the police properly stopped Nimmer. But, there were concurring opinions about whether the severity of the suspected crime is a legitimate part of the reasonable suspicion calculus. Thus, the Court reversed the court of appeals, who had held in a per curium opinion, that there was not sufficient reasonable suspicion to stop Nimmer. Accordingly, Nimmer's conviction was reinstated.

In the summer of 2019, two police officers were on patrol when, at approximately 10:06 p.m. they received a computerized "ShotSpotter" report in their squad, showing that four shots had been fired about three blocks away from their location. The police quickly drove their squad to the location, but they did not activate their siren or their flashing red and blue lights. The officers arrived at the scene no more than one minute after receiving the "ShotSpotter" report and encountered Nimmer, standing alone at basically the exact location where the "ShotSpotter" report said the shots came from. The police observed that Nimmer, upon observing the squad car, immediate accelerated his pace to leave the scene. The office also observed Nimmer digging around his left side pocket with his left hand. The officers got out of the squad to approach Nimmer, and Nimmer began turning his left side away in an attempt to prevent the police from seeing it. The officers then stopped Nimmer and based on the shooting report immediately patted him down for weapons. As the pat-down began, Nimmer admitted that he had a gun in his waist-band. The gun was found, and as Nimmer was a felon, he was arrested for being a felon in possession of a firearm The State charged Nimmer with being a felon in possession of a firearm.

Nimmer moved to suppress the evidence generated from his being stopped, arguing that the police did not have the requisite reasonable suspicion. The trial court denied Nimmer's motion. Nimmer then entered into a plea agreement, pled guilty, and was sentenced to two years of initial confinement followed by two years of extended super-vision. Nimmer appealed and the court of appeals reversed the conviction and remanded to the trial court, holding that there was insufficient reasonable suspicion for the police stopping Nimmer. The State appealed to the Wisconsin Supreme Court, who granted review. Oral argument was heard on October 25, 2021.

All seven Justices held that the police had the proper reasonable suspicion to stop Nimmer. The agreed to factors leading to this conclusion were as follows: 1) ShotSpotter" generates reliable reports of gunfire in near real-time; 2) The police responded within one minute of receiving the "ShotSpotter" report; 3) Nimmer was found at nearly the exact location where "ShotSpotter" reported gunfire; 4) Nimmer was the only person the officers saw at the scene; 5) Nimmer made furtive and evasive movements upon noticing the police presence. In reaching its opinion, the Court noted that reasonable suspicion is a relatively low bar, that the test is the totality of the circumstances, and thus the analysis is a collective one and not a "divide and conquer" scheme where each factor is looked at and evaluated in isolation. The Court observed that a key in this case was the timing of the officer's response to the report of gunfire, lending extra significance to finding Nimmer alone at the scene. In this manner the Court distinguished cases the court of appeals had relied on in reaching its different conclusion; cases where people were stopped for being in areas where shootings often occurred instead of being stopped as in this case, where a shooting had reportedly just occurred. So, the Court reversed the court of appeals, held that suppression was improper, and reinstated Nimmer's conviction.

Key Points 1) The police may briefly stop an individual, without a warrant, if the police have reasonable suspicion to believe the individual is involved in criminal activity. 2) Reasonable suspicion is relatively low bar, more than a hunch but consider-ably less than proof of wrongdoing by a preponderance of the evidence, and less than is necessary for probable cause. 3) Reasonable suspicion is analyzed under the totality of the circumstances test. The circumstances are looked at in the aggregate and not in isolation. Officers are not required to rule out the

possibility of innocent behavior before initiating a "Terry" stop. 4) The key is that the officers upon making a "Terry" stop have a particularized and objective basis to reasonably suspect criminal activity. 5) "ShotSpotter" reports are sufficiently reliable as to be considered in a reasonable suspicion evaluation. 6) To date, there is no consensus that the severity of the suspected offense should impact a reasonable suspicion analysis. The Wisconsin Supreme Court held that the police had the requisite reasonable suspicion to stop Nimmer, based on their response to the "ShotStopper" report, their finding Nimmer alone at the scene, and Nimmer's behavior upon first observing the police presence.

State v. Moore Decided by the Wisconsin Supreme Court (6/20/23)

This is a search incident to arrest case. The core issue is whether a strong odor of marijuana in a vehicle is probable cause to arrest its lone occupant for possession, even though marijuana could not be smelt on him. The court of appeals answered this question no. But the Supreme Court reversed the court of appeals and held there was sufficient probable cause for an arrest. In so doing, the Court reaffirmed its ruling in State v. Secrist (1996), which had said that the strong odor of marijuana linked to a defendant is probable cause to arrest the defendant for possession.

Moore was stopped for speeding. While executing the stop, officers saw Moore throw some type of liquid outside his vehicle. Moore was the lone occupant of the vehicle, and the car contained the strong odor of marijuana. Moore was ordered out of the car and because of police safety concerns was patted down for weapons. No weapons were found but a vaping device was. Though the police could not smell marijuana on Moore, they decided to search him based on the overwhelming marijuana odor in the car he was driving. The search was justified under the search incident to arrest doctrine, since the State argued that the police had enough probable cause to arrest Moore for possession before conducting the search.

The search of Moore's person did not reveal marijuana but did disclose cash, cocaine, and fentanyl packaged for distribution. Moore was charged with two possession to deliver charges.

Moore moved to suppress evidence because he alleged he was illegally searched, since the police did not have probable cause to arrest him for possession prior to the search. The trial court agreed and granted Moore's motion and the court of appeals affirmed. The court of appeals reasoned that the legality of Hemp and CBD products no longer made the odor of marijuana unmistakable, since the odor could be for legal products. The State appealed to the Wisconsin Supreme Court who granted review.

The Wisconsin Supreme Court reviewed the concept of probable cause and reminded that it does not mean guilt, or certainty, or even more likely than not. Thus, the court held that even though the odor source could be explained by legal products it also could be explained by illegal marijuana. As Moore was strongly linked to the odor, as he was the vehicle's lone occupant, the court surmised that the relatively modest bar of probable cause had been met and the police could have properly arrested Moore for possession prior to the search. Thus the search was incident to arrest and therefore lawful and the discovered evidence is admissible. Accordingly, the court of appeals and trial court were reversed and the matter returned for trial with the seized evidence to be admissible at trial.

State v. Valiant Green
Decided by the Wisconsin Supreme Court- (6/15/22)
Search Warrant Challenge

This case involved the propriety of a search for warrant for blood in an OWI case. Green was arrested for OWI, and refused the blood test. The police obtained a search warrant for the blood and it was drawn revealing a blood alcohol level of .214. Green then moved to suppress the blood evidence, arguing that the search was defective since the warrant did not show probable cause to support a criminal offense. Specifically, Green argued that the affidavit supporting the search warrant did not show probable cause that he was driving on a highway, a necessary element for an OWI charge. The Wisconsin Supreme Court held (6-1) that the affidavit was sufficient, that it

could be reasonably inferred that Green was driving on a highway while intoxicated. Consequently, the Supreme Court affirmed the court of appeals denial of Green's motion to suppress.

Green was arrested for OWI. Green refused the offered blood test under Implied Consent and the police secured a search warrant for Green's blood. The blood test showed a blood alcohol level of .214. Green had three prior offenses and thus his prohibited alcohol level was .02.

There was no factual dispute that Green was impaired and that he was driving a motor vehicle. There was one fact in dispute; whether or not Green was operating a vehicle on a Wisconsin highway, an element of the OWI offense. Put another way it is not a violation of the OWI statute for an impaired person to drive a vehicle on a private parking area at farms or single family residences. The factual basis for this disputed issue was as follows: I) The search warrant affidavit identified the location of the offense, as "at Green's driveway", 2) The affidavit pointed to two witnesses who observed Green driving the vehicle, and 3) The stop was occasioned by a citizen statement.

A 6-1 Wisconsin Supreme Court affirmed the court of appeals and held that the search warrant contained the requisite probable cause linking Green to criminal activity. The Court honed in on the location issue, and while recognizing that merely driving on a private driveway would not be OWI a reasonable inference could be drawn that Green was operating on a highway. The Court noted that the affidavit did not say Green was operating the vehicle on the driveway, but rather "at" the driveway. Thus, the Court held it reasonable to conclude that Green was observed operating in the highway by his driveway as opposed to entirely on the driveway. Additionally, the Court buttressed it's interpretation of "at the driveway" to mean by the driveway and not on the driveway by the following: 1) Two witnesses observed Green's driving and it is reasonable to infer that they would not have meant actual driving on the driveway, and 2) the stop was occasioned by a citizen and not a police officer and so the actual terminology used by the police would be less determinative of the issue. In the end, the Court concluded that it was utterly reasonable to believe that "at the driveway" meant the highway immediately adjacent to the driveway, and thus a location covered by the criminal statute. The Court opined that the totality of the facts laid out in the search warrant affidavit was sufficient to show probable cause that Green had committed the crime of OWI. Accordingly, the judgement of conviction was affirmed.

IS THE STATUTORY DEFINITION OF "RESTRICTED CONTROLLED SUBSTANCES" FACIALLY UNCONSTITUTIONAL BECAUSE IT INCLUDES AN INACTIVE AND NON-IMPAIRING METABOLITE OF COCAINE?

State v. VanderGalien 2024 WI APP 4 (PUBLISHED) (12/29/23)

At 6:30pm in July of 2019 VanderGalien was involved in a terrible motor vehicle crash. Driving in the wrong direction of a 2 lane highway he struck 2 cars head-on and seriously injured three people and killed another. He was helicoptered to a hospital and blood was drawn with a search warrant approximately 4 hours from the time of the crash. His blood contained benzoylecgonine (BE), an inactive and non-impairing metabolite of cocaine. Sec. 340.01(50m)(c) defines "restricted controlled substance" for purposes of prosecution under the Wisconsin motor vehicle code to include "[c]ocaine or any of its metabolites." VanderGalien was subsequently charged with multiple criminal charges.

In the trial court VanderGalien challenged whether an inactive non-impairing cocaine metabolite can alone form the basis for a violation and argued that criminalizing driving while having a non-impairing metabolite in a driver's blood is not reasonably and rationally related to a legitimate public interest like roadway safety and is, therefore, unconstitutional. VanderGalien called an expert who testified that cocaine breaks down, or in other words metabolizes, into metabolites, including BE. BE is an inactive, non-impairing metabolite of cocaine. Depending on an individual's method and amount of ingestion, cocaine can be detected in the blood for about 5 hours to 10 and one-half hours after ingestion, while BE typically remains detectable for up to 48 hours. The trial court denied this challenge to the constitutionality of the statute. VanderGalien appealed to the Court of Appeals.

A challenge to the constitutionality of a statute must establish its unconstitutionality beyond a reasonable doubt. "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32 (1973). In this case the challenged statute does not implicate a fundamental right or a suspect class and, therefore, it is subject to rational basis scrutiny. See *State v. Luedtke*, 2015 WI 42. In addition, VanderGalien must show that the statute cannot be enforced "under any circumstances". *State v. Wood*, 2010 WI 17.

Wisconsin's Supreme Court has previously rejected challenges to the constitutionality of the statutory definition of "Restricted Controlled Substances". See *State v. Luedtke*, 2015 WI 42. In *Luedtke* the Supreme Court reasoned that "[i]n addressing the problem of drugged driving, the legislature could have reasonably and rationally concluded that proscribed substances range widely in purity and potency and thus may be unpredictable in their duration and effect." Thus, to make prosecutions easier and because there is no reliable measure of impairment for illicit drugs, the legislature could have reasonably concluded that the more sensible approach was to ban drivers from having any amount in their systems. Accordingly, the court in *Luedtke* determined that the legislature "rationally concluded that a strict liability, zero-tolerance approach is the best way to combat drugged driving."

VanderGalien did not argue that *Luedtke* should be overturned but rather, he argued that *Luedtke* and the line of following cases upholding the constitutionality of the zero tolerance approach did not address the situation here, where the ONLY substance found in the blood is an inactive and non-impairing metabolite. The question was whether prohibiting an inactive, non-impairing metabolite such as BE in the blood while operating a motor vehicle bears a reasonable and rational relationship to the legislative purpose of promoting roadway safety and preventing drugged driving.

The Court of Appeals reasoned that based on VanderGalien's own expert "an individual may ingest cocaine and, up to nine hours later, while the cocaine is still detectable in the individual's blood, operate a motor vehicle. The individual could then be stopped and arrested and have blood drawn one or two hours after the individual had been driving. At that point, the cocaine will likely no longer be detectable and only BE will be detectable. In such a case, BE accurately indicates that the individual had a detectable amount of cocaine in the individual's blood at the time of driving. Moreover, in cases when, as here, a collision occurs involving several motor vehicles and numerous individuals who require immediate medical attention, including the driver and the victims, it may be several hours before the driver's blood can be drawn. If an inactive, non-impairing metabolite such as BE was not included as a restricted controlled substance, the State may be unable to prosecute drugged drivers in such cases even though the driver had an impairing substance, cocaine, in the blood while driving."

Consequently VanderGalien failed to show that the legislature could not have reasonably determined that the inclusion of inactive, non-impairing metabolites in the definition of a restricted controlled substance is a reasonable means of combatting drugged driving. VanderGalien failed to meet the heavy burden to overcome the presumption of constitutionality.

DOES ENTRY INTO A VEHICLE BY A K-9 VIOLATE THE 4TH AMENDMENT RIGHT TO PRIVACY?

State v Campbell, (**1/23/24) 2024 WL244336 (RECOMMENDED FOR PUBLICATION)**
(*The State sought review from the Supreme Court as to the Court of Appeals (COA) reversal in Campbell. The COA withdrew its opinion to take another look at things. No telling what might happen now, but that is the status of things at this moment.)*

A K-9 officer was called to assist during a routine traffic stop. The police had no reason to believe there were illegal drugs in the vehicle, but using the K-9 sniff was not going to extend the length of the stop. The handler asked Campbell and her passenger to exit the vehicle. In doing so, Campbell left the driver's side door open. The dog entered the vehicle through the open door during each of the two walks around the vehicle. The dog stood sniffing inside the vehicle, with its front paws on the driver's seat and back legs on the street. The dog alerted to the presence of drugs.

The Court of Appeals held that both entries by the dog were searches that violated the right to privacy. Therefore, the physical search of the vehicle by the officers that followed was invalid. There was no consent to the search of the interior, and the Court rejected an argument that the dog acted by instinct such that there would be an exception to the requirement of having a warrant. No such 'instinct' exception is recognized in Wisconsin and the Court, having reviewed the squad camera footage, determined that the handler had full control over the dog and encouraged it to enter the vehicle. Because the officer created the opportunity for the K-9 to enter, the search was illegal and the evidence suppressed.

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

WHAT IS REQUIRED TO MAKE A TIP SUFFICIENTLY RELIABLE TO PROVIDE REASONABLE SUSPICION FOR POLICE TO CONDUCT A TRAFFIC STOP?

State v. Jason D. Kluck (01/18/23) (UNPUBLISHED)

Officers in Rothschild, WI responded to a dispatch call regarding a complaint of erratic driving. Dispatch relayed that a "named caller" reported that a white Ford Ranger pickup truck was proceeding southbound on West Grand Avenue near the 19th Hole Tavern when it "crossed the centerline and was being "driv[en] on the sidewalk for a short time." The caller provided the truck's license plate number and stated that it continued southbound on Grand Avenue until it reached Business Highway 51. The caller then reported that the truck pulled into the Shopko Plaza parking lot. Within minutes of the dispatch, officers observed and stopped the described truck driving through the Shopko Plaza parking lot. Officers had not observed any bad driving. Kluck, the operator of the truck was subsequently arrested and charged with Operating with a Restricted Controlled Substance in his blood. He moved to suppress the stop. The trial court denied his suppression motion and he was convicted.

On appeal the court noted that for an informant's tip to justify an investigative stop, the tip "should exhibit reasonable indicia of reliability." In assessing the reliability of a tip, a court should take into account both the informant's veracity and basis of knowledge. In addition, where the allegations in the tip suggest an imminent threat to public safety, it may be reasonable for an officer to conclude that the potential for danger caused by a delay in immediate action justifies stopping the suspect without any further observation. "Thus, exigency can in some circumstances supplement the reliability of an informant's tip in order to form the basis for an investigative stop". Kluck argued the officers didn't know the identity or location of the caller. Here, the fact that law enforcement officers located a truck matching the description given by the caller (including the license plate number) in the place contemporaneously identified by the caller partially corroborated the tip, and therefore supported the caller's veracity. Furthermore, although the caller did not specify the basis for his or her knowledge, it would be fair to infer from the nature of the information provided—particularly the license plate number and the distance over which the observations were reported—that the caller was in another vehicle following the truck. At a minimum, the caller must have been in close proximity to the truck. Finally, the report that the truck had been driven up onto the sidewalk suggested an imminent threat to public safety from an impaired driver. The court ruled that these circumstances provided sufficient indicia of reliability to support the reasonable suspicion determination.

WAS IT PERMISSIBLE FOR THE OFFICER TO EXTEND A TRAFFIC STOP?

State v. Monson (1/18/23) (UNPUBLISHED)

In 2019, at a time of day unknown, a police officer in Winnebago County came upon a vehicle stopped in traffic. The vehicle was about one full vehicle length behind a stop sign. The officer noticed the driver appeared to be "messing around with something in the car". Eventually she realized the driver was having trouble with an Ignition Interlock Device (IID). She knew that IIDs were only placed in vehicles if the owner or driver had been previously convicted of an OWI. The officer approached the vehicle. The driver, Monson, reported she was having trouble with her IID which was giving an error message that she had never seen previously. The officer

also determined that the vehicle registration was expired and Monson did not have proof of insurance. The officer returned to her squad to issue these citations. Upon returning to Monson's vehicle the officer observed that Monson's eyes were glassy, bloodshot and darting "all over the place". Monson's appeared to have a dry mouth and her speech was "exaggerated and slurred." Monson appeared nervous and stated she was having an anxiety attack. The officer further noticed that Monson "kept clenching her teeth and smiling". The officer believed from training and experience that these observations could be associated with the use of methamphetamines. Consequently, the officer administered field sobriety tests. Given Monson's poor performance on these tests, Monson was arrested and a blood sample taken after a search warrant was issued. The blood test revealed THC and methamphetamines. She was charged with OWI and ORC.

Monson filed a motion to suppress the blood test results, arguing the officer did not have reasonable suspicion to extend the stop to administer field sobriety tests. The circuit court disagreed and denied the motion to suppress. Monson appealed.

The Court of Appeals upheld the trial court ruling which denied Monson's motion to suppress. A lawful traffic stop may be extended beyond the original purpose of the stop only if the police discover under the totality of the circumstances reasonable suspicion to support further investigation of an additional offense. Of consequence for us is the Court of Appeals detailed analysis of "reasonable suspicion" and the famous "totality of the circumstances". It is worth presenting the Court's analysis nearly verbatim.

"Reasonable suspicion is 'a low bar." State v. Nimmer, 2022 WI 47. It requires less certainty than probable cause. State v. Eason, 2001 WI 98. But, it "must be based on more than an officer's 'inchoate and unparticularized suspicion or hunch.'" State v. Post, 2007 WI 60. To be reasonable, not only must a traffic offense stop (like other Fourth Amendment seizures) be justified at its inception, but subsequent police conduct must also be reasonable under the circumstances. See State v. Arias, 2008 WI 84. The Court of Appeals quoted from State v. Adell, 2021 WI App 72:

> If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

The Court of Appeals also quoted State v Waldner, 206 Wis. 2d at 58, for a concise definition of the famous "totality of the circumstances":

> Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

In Monson's case the Court of Appeals looked at the totality of the circumstances. This included Monson's vehicle and the manner and reasons it was stopped in traffic; Monson's trouble operating the vehicle's IID; and multiple observations of Monson's physical condition. Therefore, the Court of Appeals found that these articulable facts warranted reasonable suspicion to extend the traffic stop, which lawfully led to Monson's subsequent arrest.

IS MOVING A SUBJECT TO A SECLUDED SPOT REASONABLE DURING A TERRY STOP?

State v. Adekola John Adekale (3/9/23) (UNPUBLISHED)

State Trooper Digre stopped Adekale's vehicle for speeding and having a bad taillight. Adekale parked his car in a parking lot on the south side of a Motel 6. There were six passengers in the car, who "kept chiming in" and asking about the stop. They were boisterous and seemed to have been drinking. The trooper asked them to leave,

and they walked toward the hotel's entrances, though the trooper could not see if they went in. The trooper said he smelled intoxicants on Adekale and that he had glossy eyes and slurred speech and admitted to drinking. He opted to move Adekale–who he cuffed and placed in his squad–to the portion of the parking lot on the other side of the motel for "officer safety" and to prevent potential disruption of the field sobriety tests the trooper planned to conduct. Eventually Adekale was convicted of OWI; he appeals the denial of his suppression motion.

At issue is whether the movement within the parking lot violated Terry's requirement that temporary detentions be conducted "reasonably". The governing case on movements of detainees in Wisconsin is State v. Quartana, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). Quartana imposes a two-part test, permitting movement of a person if (1) the person was moved within the vicinity of the stop, and (2) the purpose in moving the person within the vicinity was reasonable.

As to the first prong, the court concludes that movement from one parking lot to another in the same hotel complex was within the vicinity: "It is undisputed that Adekale was stopped in a parking lot on one side of a motel, and the circuit court found that Adekale was transported to the other side of the motel, 'very close 'to where Adekale had been stopped. The parties do not dispute that, as Digre testified and one of the videos played at trial showed, the transport took just under one minute of travel time. I conclude that these facts establish that Adekale was transported within the vicinity of the stop."

The second prong of the Quartana test is whether the purpose for transporting Adekale was reasonable: "The circuit court credited Digre's testimony that the passengers 'conduct while Digre was interacting with Adekale was disruptive. The court found that the passengers left when Digre told them that 'he had to do some paperwork, 'that Digre could not see whether all of the passengers actually entered the motel, and that it was possible that the passengers 'could have returned to the scene 'if they saw Digre instead conducting field sobriety tests. I conclude that Digre's transport of Adekale to the north side of the motel parking lot had the reasonable purpose of ensuring the undisrupted conducting of the field sobriety tests and ensuring the officer's safety."

IS IT A SEIZURE IF POLICE FOLLOW A DRIVER, LIMIT HIS ABILITY TO EXIT A PARKING SPACE AND THEN ASK THE DRIVER TO ROLL DOWN THE WINDOW?

State v. Thering, (1/25/2024) (UNPUBLISHED)

At 4:15 a.m., a fully marked police squad car performed a U-turn to follow Thering's car into an empty parking lot. Thering parked in a space which had a curb in front and on the right. The squad parked behind and perpendicular to Thering's car. No emergency lights or sirens were activated. An officer immediately got out of the squad car and approached Thering's car. The officer gestured for Thering to lower the driver-side window; which he did. In hearing a motion to suppress, the court found that, given his immediate surroundings, Thering had one option for driving away, which would have been to back out and execute a Y-turn. In County of Grant v. Vogt, the Wisconsin Supreme Court decided that similar circumstances presented a close call, but Vogt was not seized. The Court of Appeals reached the opposite conclusion under these facts.

A person has been 'seized' only if, under all the circumstances, a reasonable person would have believed they were not free to leave. A seizure occurs only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. The test is whether an innocent reasonable person, rather than the specific defendant, would feel free to leave under the circumstances. In Vogt the driver had ample room to pull forward and turn around to exit the parking lot. Thering could not, because of the curb to the front and right. The trial court decided he could have backed up a bit and executed a 'Y' turn to drive through empty parking spaces to his left, but the appellate court thought that too restrictive under the circumstances.

The court also held that the officer executing a 'U' turn and then following Thering into the parking lot raised the level of the show of authority. In Vogt the driver did not know that the police had shown any interest in him until they pulled in and parked behind him. This 'pre-contact following conduct' by the officer was solely directed at Thering and contributed to a reasonable person in his position having a belief that he was seized when subsequently asked to lower the window.

SHOULD EVIDENCE BE SUPPRESSED WHEN A POLICE OFFICER IN GOOD FAITH UNLAWFULLY STOPS A VEHICLE?

State of Wisconsin v. Jason William Castillo (10/26/23) (UNPUBLISHED)

At 10:45 p.m. a sheriff's deputy observed a vehicle traveling on the highway with its high beam lights on, a violation. The deputy took steps to stop the offending vehicle but before he could effectuate the stop, Castillo's vehicle got between the sheriff's squad and the target vehicle. The deputy, an experienced officer, ascertained that he could not safely pass Castillo's vehicle so that he could be placed immediately behind the target car. The officer followed the vehicles for about a mile when he activated his lights while still behind Castillo. In response to the emergency lights both Castillo and the targeted vehicle pulled over. The deputy in passing Castillo's car to approach the target vehicle detected from Castillo's open window, a strong odor of burnt marijuana. Based on this smell, the deputy made contact with Castillo and from there made sufficient observations to lawfully place Castillo under arrest for operating a vehicle with a controlled substance and possession of drug paraphernalia. Castillo moved to suppress all the evidence generated during the incident as the police had no lawful basis to stop his vehicle.

The Court agreed with Castillo that he had been seized and that the police had no legal basis for doing so. But the Court also held that the police had done nothing wrong as there had been no alternative way to safely pull over the target vehicle without also pulling over Castillo's car. The Court surmised that the police plan was to tell Castillo that he was free to go, but that this plan had been changed by the officer when he detected the strong odor of burnt marijuana coming from Castillo's auto. The Court reprised the principle that the exclusionary rule is designed to punish police misconduct and to deter improper police behavior but that would serve no purpose here where the office did not engage in any bad behavior to deter. So, the Court affirmed the trial court's denial of Castillo's suppression motion.

OWI ISSUES

IS THE ADMISSION OF SMOKING MARIJUANA SUFFICIENT TO ESTABISH PROBABLE CAUSE FOR AN OWI?

State v. Robin Davis Smolarek (6/16/22) (UNPUBLISHED)

Smolarek was involved in an accident while driving his motorcycle. He was subsequently contacted by police and admitted he had smoked marijuana prior to driving. The officer placed Smolarek under arrest and read him the Informing the Accused form. Smolarek consented to a blood test, which showed that his blood contained THC. Smolarek had changed his story to indicate he had smoked the marijuana and had also taken a shower AFTER the accident. He moved to suppress the test as an unlawful search without a warrant and without probable cause to arrest. The court denied the motion.

The appeals court upheld the determination, noting they were to uphold findings of fact unless clearly erroneous, but it would determine de novo whether those facts satisfy the standard for probable cause. The court agreed that the officer's testimony at the suppression hearing was credible and sufficient to establish probable cause. Further, the officer testified that Smolarek's appearance belied aspects of his changed story: when she first met with him, he did not appear to have recently taken a shower, and he was still wearing bloody clothes from the accident. Smolarek provided no authority for his proposition that probable cause to arrest cannot be based solely on the defendant's admitting to criminal conduct. He admitted to ingesting THC and all that is required for a violation is a detectable amount in his bloodstream when driving.

DOES POTENTIAL OFFICER MISINFORMATION ABOUT ADDITIONAL TESTING, MADE AFTER THE INFORMING THE ACCUSED WAS READ AND DEFENDANT SUBSEQUENTLY REFUSED TESTING, REQUIRE DISMISSAL OF REFUSAL?

State v. Roman D. Ozimek (11/22/2023) (UNPUBLISHED)

In the early morning hours, Ozimek was stopped operating his car going the wrong way on a one-way street. He admitted he was coming from a bar, he had slurred speech and glossy, bloodshot eyes and a strong "odor of intoxicants" was emanating from his vehicle. Ozimek declined field sobriety tests and was subsequently arrested for operating a motor vehicle while intoxicated (OWI) and transported to a hospital for a blood draw. At the hospital, an officer read an Informing the Accused form verbatim to Ozimek, who immediately refused testing. Ozimek then asked if there would be further testing and the officer responded that he "would have to consent to the initial test to be allowed those other tests." Ozimek then asked "what he should do," and the officer responded that he could not provide any legal advice. Ozimek did not change his mind and refused the blood draw. He was issued an Intent to Revoke notice and filed a request for a Refusal Hearing. At the hearing the judge ruled that Ozimek was read the Informing the Accused and unreasonably refused testing. The court did not allow testimony that Ozimek was told he could not obtain his own testing without first consenting to the requested chemical tests, deeming it irrelevant as it came after the refusal.

On appeal, Ozimek argued that it would have been relevant to the circuit court's inquiry under § 343.305(9)(a)5.b. to determine whether he received "misinformation" about his right to collect his own chemical testing after he had refused the chemical testing requested by the officer. Relatedly, Ozimek also contended that this misinformation impacted his "fundamental constitutional right" to "gather evidence" because he had a right to obtain his own chemical testing regardless of whether he submitted to the request for a blood draw. The Court noted that, where, as here, a law enforcement officer provided all of the statutorily required information but then allegedly provided more information than that provided in WIS. STAT. § 343.305(4), courts employ a three-part test to determine whether the officer complied with § 343.305(4). Pursuant to that test, an officer has not complied with § 343.305(4) if: (1) the officer has exceeded his or her duty under § 343.305(4) to provide information to the accused; (2) the officer's oversupply of information was misleading or erroneous; and (3) the officer's failure to

properly inform the driver affected the driver's ability to make the choice about chemical testing. It was conceded that the officer provided additional information, but argued that the information was not misleading or erroneous and didn't affect the defendant's choice about chemical testing, as he had already made his choice before the information was provided.

The Court agreed that the information provide was not misleading or erroneous as it was a correct restatement of the law. Further, the information did not affect the defendant's choice about testing, as he had already made the choice. The defendant made the additional assertion that the information impacted his "constitutional" right to obtain his own tests. The Court noted that he failed to identify a single case establishing that a defendant has an unfettered right to obtain evidence, especially in a context similar to the implied consent one at issue here. In any event, even if the court assumed that Ozimek had been misinformed about a constitutional right to obtain his own chemical testing and that this misinformation could be considered in a court's inquiry under § 343.305(9)(a)5.b., Ozimek still had not produced any evidence that this misinformation actually affected his ability to decide whether to submit to the requested test, the correct issue at a Refusal Hearing. Further, even assuming misinformation had affected his ability to decide, dismissal would not have been the correct remedy.

DID DEPUTY'S STATEMENTS ABOUT THE INFORMING THE ACCUSED FORM RENDER THE CONSENT TO TAKE A BLOOD TEST INADMISSIBLE AND INVOLUNTARY?

County of Dunn v. Cormican (2/7/23) (UNPUBLISHED)

A deputy stopped a vehicle operated by Cormican for speeding. After additional investigation, the deputy placed Cormican under arrest for first-offense OWI, and ultimately first offense PAC. After placing him under arrest the deputy told Cormican, "I know you mentioned you have a CDL [commercial driver's license] and stuff in Wisconsin .... First offense is a traffic citation. There are some penalties involved, but, you know, I don't think it's the end of the world, or the end of the road there for the, um, CDL."

After placing Cormican under arrest, he was transported to a hospital for a blood draw. On the way Cormican told the deputy, "I'm just wondering how fucked up my life's gonna be over this." The deputy responded, "I know guys with CDLs that have first offenses, so I know they don't, you know, lose them .... I know there'll be penalties, but I don't know exactly what—how that all works. I just know it's not a definite thing."

After reading Cormican the informing the accused (ITA) Form, the deputy asked whether Cormican was willing to submit to an evidentiary chemical test of his blood. Cormican responded, "So what happens if I say no?" Pollock replied, "I cannot give you legal advice, but I can read right here [on the ITA Form] that it says, 'If you refuse to take any test that this agency requests, your operating privileges will be revoked and you will be subject to other penalties.'"

Cormican then asked what those other penalties would include. The deputy responded that he did not know all the penalties, but "I do know that, if you refuse the test, the state will just automatically take your privileges away. If you submit to the test, there may be some penalties involved from positive test results." The deputy continued:

"I guess the bottom line is, the state, when you get your license, you kind of sign off and say that you promise that you're gonna be a legal driver all the time without a substance in your system ... [by] substance, I mean alcohol. I mean, they're just saying that when you get your license, you're telling them that, "Yep, I'm not gonna do this." And you're—and that's what the implied consent is, that when you get your license, you're basically implying your consent to the state, saying, "Yep, you can test me any time; I'm not gonna be over the limit." But, you know, I can't really give you legal advice, it's just a yes or a no. But I do—you know, as the form clearly states, if you just automatically say" no," the state will just up and take it."

Cormican responded, "I guess I have nothing [unintelligible]. Let's go ahead and test." The deputy then stated, "I think, you know, in your situation it's probably the best way to go."

Cormican moved to suppress the results of his blood test arguing that he did not validly consent to the test because the deputy improperly influenced his decision to consent. More specifically, Cormican argued that his consent was invalid because: (1) the deputy exceeded his duty under WIS. STAT. §343.305(4) by providing additional information, beyond that included on the ITA Form; (2) the additional information was misleading; and (3) the misinformation affected Cormican's choice to consent to the blood test. *See* **County of Ozaukee v. Quelle,** 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* **Washburn County v. Smith,** 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243. Cormican also argued that his consent was involuntary because Pollock "engaged in an unlawful attempt to incentivize [his] consent." The circuit court denied the suppression motion and the issues were ultimately appealed to the appellate court.

It was undisputed that the deputy read Cormican the ITA Form and therefore provided the information mandated by WIS. STAT. §343.305(4). Cormican argues, however, that his consent to the blood test was nevertheless invalid because the deputy also provided him with additional information, beyond that included on the ITA Form. The court then assessed the adequacy of the information provided using the three-prong test set forth in ***Quelle***. *See* ***Smith***, 308 Wis. 2d 65, ¶64 & n. 57 (clarifying that the ***Quelle*** test applies when an officer satisfies his or her duty under § 343.305(4) but then supplies additional information, beyond that set forth in the statute). To obtain relief under that test, a defendant must show that: (1) the officer exceeded his or her duty under § 343.305(4) to provide information to the accused driver; (2) the oversupply of information was misleading; and (3) the officer's failure to properly inform the driver affected the driver's ability to make a choice about chemical testing. ***Quelle***, 198 Wis. 2d at 280; *see also* **State v. Reitter,** 227 Wis. 2d 213, 233, 595 N.W.2d 646 (1999).

Cormican contends that the deputy exceeded his duty under WIS. STAT. § 343.305(4) by stating that: (1) the state would "automatically" take Cormican's operating privilege away if he refused to consent to a blood test; and (2) Cormican had already consented to the blood test by virtue of obtaining a Wisconsin driver's license. The court concluded that neither of these categories of statements satisfies all three prongs of the ***Quelle*** test.

First, the deputy's comments indicating that the state would "automatically" take away Cormican's operating privilege if Cormican refused to consent to a blood test were consistent with the information contained on the ITA Form, which an officer is statutorily required to read to a person when requesting an evidentiary chemical test. See WIS. STAT. § 343.305(4). As such, the deputy statements about the automatic revocation of Cormican's operating privilege did not go beyond the information required by § 343.305(4), nor were those statements misleading.

Cormican argued that the deputy comments about the state automatically taking away his operating privilege were misleading because they "erroneously implied a summary nature of the revocation proceedings" and did not acknowledge Cormican's ability to request a refusal hearing. However, WIS. STAT. § 343.305(4) does not require an officer to inform a person about his or her ability to request a refusal hearing. Instead, under the statute, an officer is merely required to tell the person that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." Sec. 343.305(4) (emphasis added). The court noted that if the deputy's statements regarding the automatic revocation of Cormican's operating privilege were misleading, then, logically, it would follow that § 343.305(4) is also misleading because it fails to inform a person that his or her operating privilege may not be revoked if the person requests, and prevails at, a refusal hearing. Cormican did not develop any argument that § 343.305(4) is misleading or otherwise invalid. Because Pollock's statements about the "automatic" revocation of Cormican's operating privilege were consistent with § 343.305(4), which must be read to an accused, the court rejected Cormican's argument that those statements were misleading.

Cormican also argued that the deputy exceeded his duty under WIS. STAT. §343.305(4) by stating that Cormican had already consented to the requested blood test by virtue of obtaining a Wisconsin driver's license. This statement satisfied the first prong of the ***Quelle*** test because it went "beyond what [§ 343.305(4)] provides." Nevertheless, the court found the statement was not misleading under the second prong of the ***Quelle*** test and that the statement did not affect Cormican's decision to consent to a blood test under the third prong of the ***Quelle*** test. Here, the deputy stated that a person implies his or her consent to an evidentiary chemical test by obtaining a Wisconsin driver's license. That statement is accurate under Wisconsin law. The deputy never stated that a person

gives actual consent to an evidentiary chemical test by obtaining a Wisconsin driver's license. That is why the deputy required a yes or no answer to the ITA Form.

The court also rejected Cormican's argument that the deputy's statements rendered his consent to the blood test involuntary. The court already determined that the deputy's statements about implied consent and about the state automatically taking away Cormican's operating privilege were not misleading. In addition, the deputy's statement that there "may be" penalties due to a positive test result was an accurate statement of what might occur if Cormican's blood tested positive for alcohol. Cormican provided no legal authority in support of the proposition that a law enforcement officer's accurate statements of the law can render a person's consent to a blood test involuntary.

As for the deputy's statement that he knew individuals with first-offense OWIs who had not lost their CDLs, there is nothing in the record to show that this statement was inaccurate or otherwise misleading. He never promised Cormican that "his circumstances would end the same" as those other individuals, nor did he state that a first-offense OWI would have "zero consequences" with respect to Cormican's CDL. The deputy did state that a first-offense OWI would not necessarily be the "end of the road" for Cormican's CDL. In context, however, the most reasonable interpretation of that phrase was that a first-offense OWI would not necessarily result in the permanent loss of Cormican's CDL. By statute, a driver is permanently disqualified from operating a commercial motor vehicle after two OWI convictions, not one. See WIS. STAT. § 343.315(2)(c).

Finally, while Cormican cites the deputy's statement that consenting to a blood test was "probably the best way to go," it is undisputed that the deputy made that statement after Cormican had already consented to the test. The statement is therefore irrelevant to the analysis of whether Cormican's consent was voluntary. The judgment was affirmed.

FOR THE PURPOSE OF DETERMING SUFFICIENT PROBABLE CAUSE TO ARREST WHEN WAS SCHINDLER ACTUALLY UNDER ARREST AND WHAT LEVEL OF PROBABLE CAUSE IS REQUIRED AT A REFUSAL HEARING?

State v. Schindler (1/25/24) (UNPUBLISHED)

Around 11:30 p.m. a Jefferson County Sheriff's Deputy arrived on the scene of a one car accident. At a three-way "T-intersection" he observed a vehicle 50 to 75 feet down a ravine on the side of the road. It appeared the vehicle had proceeded through the stop sign and drove forward down into the ravine. The deputy heard the vehicle's engine revving as though the driver was spinning the vehicle's wheels in the mud. With another deputy the two walked to the vehicle and contacted Schindler. The deputy smelled alcohol coming from the vehicle and observed that Schindler's eyes were bloodshot and glassy and that his speech was slurred. A dog was the only other occupant in the vehicle. Schindler was repeatedly asked to turn off the vehicle, and Schindler eventually did so.

Schindler was asked to step out of the vehicle but refused. Schindler was asked whether he had consumed any alcohol, but he refused to answer any questions. A deputy opened the door and again asked Schindler to step out. Schindler again refused. Schindler then began reaching for a pen, but the deputy grabbed Schindler's hand and pulled him from the vehicle before he could do so. The two deputies pulled Schindler to his feet and held him against the vehicle. Schindler refused to place his hands behind his back. They managed to handcuff one of Schindler's hands, but he was grabbing the top rail of the vehicle with his other hand and would not allow the deputies to handcuff that hand. A deputy delivered several strikes to the back of Schindler's leg and was then finally able to handcuff Schindler. During this struggle, the deputies called for additional backup support.

After backup arrived, they walked Schindler up the ravine to a squad car and placed him in the vehicle while he was still handcuffed. Schindler was not told that he was under arrest. According to the deputy Schindler was being detained at that point as part of the officers' ongoing investigation and due to his uncooperative behavior. While Schindler was sitting in the squad car, one of the deputies asked Schindler to perform standardized field sobriety tests, and Schindler refused. After Schindler refused the field sobriety tests, a deputy informed Schindler that he was under arrest for operating a vehicle while intoxicated.

At some point, it was learned that Schindler had three prior convictions for operating a vehicle while intoxicated (OWI) or having a prohibited alcohol concentration (PAC). As a result, Schindler was legally prohibited from operating a vehicle with a PAC greater than 0.02. However, it is not clear exactly when the deputies learned of Schindler's prior convictions.

Subsequently, Schindler was read the Informing the Accused Form and he refused the request for a sample of his blood. Because of his refusal, Schindler was issued a Notice of Intent to Revoke. Schindler made a timely request for a refusal hearing. At the hearing the circuit court judge determined that there was probable cause to arrest Schindler; he was properly read the form; and he refused to submit to the request for a sample of his blood. The circuit court revoked Schindler's operating privileges. Schindler appealed this order.

Schindler argued to the Court of Appeals that the deputies did not have probable cause to believe he had been Operating While Intoxicated at the time of his arrest. He argued his arrest occurred when he was handcuffed and placed into the squad car. Consequently, his subsequent refusal to perform field sobriety tests could not be considered when determining whether there was sufficient probable cause to arrest. The state argued that he was not placed under arrest until after he refused to perform field sobriety tests.

In Wisconsin, "the test for whether a person has been arrested is whether a 'reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances.'" *State v. Blatterman*, 2015 WI 46 "[A] police officer may, under certain circumstances, temporarily detain a person for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest." Additionally, the "investigative means" used in this temporary detention must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion" and may last "no longer than is necessary to effectuate the purpose of the stop." When temporarily detaining a person, an officer may use handcuffs and place the person in a squad car without rendering the temporary detention unreasonable or transforming the detention into an arrest. However, "such measures generally are reasonable only when particular facts justify the measure for officer safety or similar concerns." *State v. Pickens*, 323 Wis. 2d 226. Schindler argued that he was placed under arrest when he was handcuffed and put in the squad car because a reasonable person would believe they were in custody at that point. The Court of Appeals disagreed and found Schindler was placed in handcuffs and put in his squad car because of his lack of cooperation, not because he was under arrest. Hence, The Court found Schindler was placed under arrest only after having refused field sobriety testing and was informed by the deputy that he was, in fact, under arrest.

The Court of Appeals went on to comment on the level of probable cause needed to be proven at a refusal hearing. The State's burden of proof is "substantially less than at a suppression hearing." *State v. Pfaff*, 2004 WI App 31 "The State need only show that the officer's account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses." *State v. Wille*, 185 Wis. 2d 673, "Indeed, the court need not even believe the officer's account. It need only be persuaded that the State's account is plausible."

REASONABLE SUSPICION TO STOP; PROBABLE CAUSE TO REQUEST A PBT; PROBABLE CAUSE TO ARREST; AND MUST AN OFFICER TELL A DEFENDANT THERE IS NO RIGHT TO COUNSEL WHEN DECIDING WHETHER TO TAKE OR REFUSE THE TEST?

City of Whitewater v Kosch, (9/13/23) (UNPUBLISHED)

A City of Whitewater police officer with over 19 years of experience responded to a 911 call at a motel reporting a domestic incident between a male and a female. When the officer arrived a motel employee described and pointed to the "suspect vehicle" as a dark-colored SUV which the officer observed drive through the motel parking lot and into a parking lot across the street where the officer stopped it. The officer did not observe any traffic violations by the operator of the SUV. When the officer approached the vehicle she spoke with the driver, identified as Kosch, and observed slurred speech. She asked him if he'd been drinking, and Kosch said "nothing, like two beers." The officer asked Kosch to perform standardized field sobriety tests (SFSTs). He complied and

the officer concluded that Kosch had failed each of the three tests. There was disagreement on whether the officer had deviated from the standard procedures when administering the tests. Kosch declined to take a PBT and the officer concluded that he was impaired and placed him under arrest for OWI.

At the station Kosch was read the Informing the Accused form and asked if he would submit to a breath test. There was disagreement on Kosch's response. Kosch argued he responded " no, no, no, not without an attorney" but the trial judge watched the video and concluded that Kosch responded "No" and then went on to request an attorney.

Kosch was subsequently convicted of OWI and found to have improperly refused to submit to a test of his breath. Kosch challenged his arrest and subsequent conviction on multiple grounds but we will only discuss those most relevant to municipal judges. First, Kosch challenged whether there was reasonable suspicion to stop his vehicle. The trial court and the Court of Appeals concluded that given the report of a "domestic disturbance" and the motel employee pointing to Kosch's vehicle as having been involved, the officer had sufficient reasonable suspicion to freeze the situation and stop Kosch's vehicle.

Kosch also challenged whether there was probable cause to request a PBT under WIS. STAT. 343.303 after administering the field sobriety tests (SFST). In particular, Kosch argued the court should not put any weight on the SFSTs because the officer deviated from the standard procedures. The Court concluded SFSTs are observational tools and can provide probative results even if strict protocols in administering the tests are not followed exactly. *City of West Bend v. Wilkens,* 2005 WI App 36. The standard to request a PBT is greater than reasonable suspicion but less than probable cause to arrest. *County of Jefferson v Renz,* 231 Wis. 2d 293 (1999). Kosch had slurred speech; admitted to drinking alcohol and experienced difficulties on the field sobriety tests. All this provided a sufficient level of probable cause to request a PBT.

Kosch further argued there was not sufficient probable cause to support his arrest for OWI. Specifically, he argued the refusal to submit to the PBT could not be considered evidence of consciousness of guilt. The Court rejected this argument citing the reasoning in State v. Babbitt, 188 Wis. 2d 349 (Ct. App. 1994) holding that refusal to submit to SFSTs could be considered evidence of consciousness of guilt. The Court concluded under the totality of the circumstances, which included all the factors listed above and Kosch's refusals to submit to the PBT, there was probable cause to arrest Kosch for OWI.

Finally, Kosch claimed he should not have been found to have improperly refused to submit to the requested breath test. He claimed the officer failed to tell him that he did not have a right to an attorney when deciding whether to take the test. The Court of Appeals rejected this argument. Due process nor the statute require that an officer inform a defendant that there is no right to consult with an attorney about whether to take the test. *State v. Reitter,* 227 Wis. 2d 213 (1999).

WHAT FACTORS MAY BE CONSIDERED IN DETERMINING WHETHER PROBABLE CAUSE EXISTS FOR REQUESTING A PBT?

State v. Roger Wolf Jr. (8/24/23) (UNPUBLISHED)

Roger Wolf appeals a judgment of conviction for operating with a prohibited alcohol concentration, challenging the trial court's order denying his motion to suppress and arguing that the arresting officer did not have probable cause to "administer" a preliminary breath test (PBT). At approximately 12:49 a.m., an officer was dispatched to a motorcycle accident involving a deer. A citizen initially reported to dispatch that a male subject had crashed. When the officer arrived at the scene of the accident, the reporting party told the officer that while he was driving, he observed a headlight coming toward him but then noticed that the headlight had disappeared. He then came across a person later identified as Wolf lying on the ground by a motorcycle and a dead deer. The officer contacted Wolf, who was then conscious and standing up. The officer noticed that Wolf's head was bleeding and that an odor of intoxicants was coming from Wolf as he spoke. Wolf told the officer that he had "been drinking all day." The officer observed that Wolf's "pants in the crotch region were wet, as it appeared maybe [he] possibly urinated himself." The officer also observed a deer carcass at the accident scene and there is no dispute that the

motorcycle hit the deer. When the officer asked Wolf what happened, Wolf responded that he was "not sure." Wolf also told the officer that he was a passenger on the motorcycle. When the officer asked Wolf who he was riding with, Wolf responded that he did not know the man's name. The officer questioned Wolf "multiple times" about the passenger and Wolf "insisted that he was riding, not operating, and that he was with a person on the bike that he could not identify." The officer observed that the motorcycle was a single-seat motorcycle and no other operator or passenger of the motorcycle was present. The motorcycle was registered to Wolf and the officer was informed through dispatch that Wolf had one prior OWI conviction. Following Wolf's arrest, the officer learned that Wolf actually had two prior OWI convictions. Wolf was placed in an ambulance, and while Wolf was lying on the ambulance bed, the officer asked Wolf if he would take a PBT. The PBT showed a result of .118. The officer also testified that he did not look for bloodshot or glassy eyes or consider the possible urination due to the accident itself and the possibility of crash related injuries.

Wolf argues that the circuit court erred in denying his motion to suppress the PBT result because the officer lacked probable cause to request a PBT. An officer may request a PBT if the officer has "probable cause to believe that the person" has operated a motor vehicle while intoxicated or with a prohibited alcohol concentration. As used in § 343.303, "probable cause" is a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest. An officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of OWI, and the PBT result will be admissible to show probable cause for an arrest, if the arrest is challenged. In determining whether probable cause exists, appellate courts apply an objective standard. Probable cause is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior. The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances.

The appellate court agree with the trial court that the officer had probable cause to request the PBT based on the following information that the officer was aware of at the time he requested the PBT: • Wolf told the officer he had been "drinking all day"; • Wolf smelled of alcohol; • Wolf was involved in a traffic accident in which he hit a deer; • the accident occurred at approximately 12:49 a.m.; • Wolf told the officer that he was not sure what had happened; • Wolf told the officer that he was a passenger on the motorcycle but did not recall the operator's name; • the motorcycle was a one-seater and no other operator or passenger was at the scene of the crash; • the motorcycle was registered to Wolf; and • Wolf had a prior OWI conviction. Motion denied.

WHERE IS THE LINE IN DETERMINING REASONABLE SUSPICION TO START AN OWI INVESTIGATION AND PROBABLE CAUSE TO REQUEST A PBT?

State v. Lauren Dannielle Peterson, (12/29/2023) (UNPUBLISHED)

Peterson's vehicle was pulled over based on an inoperative taillight. The officer observed Peterson and two passengers, an adult and a child, in the vehicle. When Peterson rolled down her window, the officer "noticed an odor of intoxicants emitting from the vehicle" and that Peterson's eyes "were glossy [sic] and bloodshot." When asked, Peterson indicated that she was coming from a relative's house where she had been watching the Bucks game. She claimed she had consumed two White Claws during the game and had finished the second drink approximately 20 minutes before she was stopped. A record check showed Peterson had a valid license and a prior OWI. At that point, the officer returned to the vehicle and asked Peterson to exit the vehicle. Once she was outside, the officer detected the odor of intoxicants on Peterson's person. The officer asked Peterson to perform three standardized field sobriety tests: the Horizontal Gaze Nystagmus (HGN) test, the walk-and-turn test, and the one-leg stand test. According to the officer, he has been trained to look for six clues of impairment in the HGN test, and Peterson exhibited all six. Peterson performed somewhat better on the walk-and-turn test, exhibiting one of eight clues of impairment. Finally, Peterson exhibited zero of four clues of impairment on the one-leg-stand test. The officer asked Peterson to take a PBT, with a result of .103. The officer arrested Peterson.

Peterson moved to suppress the evidence obtained as a result of the traffic stop. In her motion, Peterson argued that the officer lacked reasonable suspicion to commence an OWI investigation, and that he also lacked probable cause to ask Peterson to take a preliminary breath test. Following the hearing, the circuit court determined that the officer had reasonable suspicion to commence the OWI investigation. However, the court concluded that, following the field sobriety testing, the officer did not have probable cause to ask Peterson to take the preliminary breath test. Therefore, the court suppressed the evidence and the State appealed.

On Appeal the court noted the officer originally pulled over Peterson's vehicle based on reasonable suspicion of an equipment violation. To constitutionally extend the mission of the stop to include an OWI investigation, the officer needed reasonable suspicion to believe that Peterson was violating or had violated one of Wisconsin's OWI laws. Reasonable suspicion is an objective test that examines the totality of circumstances. The test is grounded in common sense—what would a reasonable police officer reasonably suspect, in light of the officer's training and experience, based on the totality of facts and circumstances and the reasonable inferences to be drawn therefrom. In the context of an OWI investigation, the officer must be able to point to "specific and articulable facts" and "rational inferences from those facts" to reasonably suspect that the person has violated an OWI related law. Reasonable suspicion is not a high bar, "the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." Here, prior to asking Peterson whether she had been drinking, the officer knew that Peterson had just come from a family gathering, he smelled the odor of intoxicants coming from inside the vehicle, and he observed Peterson's "glossy" and bloodshot eyes. The court concluded that these facts collectively gave rise to reasonable suspicion of an OWI violation, which allowed the officer to commence an OWI investigation.

The court then considered whether the officer had probable cause to ask Peterson to take a preliminary breath test. The probable cause needed to ask a person to take a preliminary breath test based on suspicion of an OWI-related offense is not the same as the probable cause needed to arrest a person for that offense. More specifically, the quantum of proof needed to ask a person to take a preliminary breath test is greater than the reasonable suspicion necessary to justify an investigatory stop for OWI, but less than the level of proof required to establish probable cause for arrest. In his investigation, the officer observed more than just bloodshot and glassy eyes. He also detected the odor of intoxicants, which he had later pinpointed to Peterson's person, and Peterson also admitted to drinking. As discussed, Peterson also exhibited six of six clues of impairment on the HGN test, one of eight clues on the walk-and-turn test, and zero of four clues on the one-leg-stand test. Peterson contends that her performance should have "dissipated what suspicion the officer could reasonably have," but the court disagreed, stating that Peterson's performance was at best ambiguous- not a total failure, but also not a pass with flying colors. The court felt this was a good example where field tests "may not produce enough evidence to establish probable cause for arrest," but that "[t]he legislature has authorized the use of the PBT to assist an officer in such circumstances". The court ruled that in the totality of those circumstances, the officer did have the level of probable cause necessary to request a PBT, and therefore overturned the suppression order.

PRIOR TO READING THE INFORMING THE ACCUSED FORM THE OFFICER STATED "NOT ALL OF THIS WILL APPLY TO YOU." IS THIS A VIOLATION OF THE IMPLIED CONSENT STATUTE?

State v. Williams, (10/4/23) (UNPUBLISHED)

At 3:30 a.m. a City of Waukesha police officer saw a pickup truck stopped in a traffic lane. The driver's head was slumped over and he appeared to be sleeping. The officer knocked on the window and observed the lone occupant driver, Williams, had bloodshot and glassy eyes. He also smelled of intoxicants. The officer asked Williams to submit to field sobriety tests, which Williams did not pass. Williams subsequently refused to take a PBT. The officer arrested him for OWI.

Williams was taken for a blood draw. The officer read the full Informing the Accused form to Williams. However, prior to reading the form the officer stated that not everything in the form would apply to him, but that he was required to read the entire form. Williams subsequently refused to submit to the blood test. Williams requested a refusal hearing, contending that he did not unlawfully refuse. The circuit court rejected his arguments. Williams appealed.

Williams argued to the Court of Appeals that he was improperly denied his statutory and constitutional right to due process under the Implied Consent law which states the specific information that must be conveyed prior to requesting a defendant to take the test. Wis. Stat. 343.305(4). This statutory information is included verbatim on the Informing the Accused form.

To assess the adequacy of the information provided to a defendant under the implied consent law, courts apply the following three-prong inquiry set forth in *County of Ozaukee v. Quelle*, 198 Wis. 2d 269 (Ct. App.1995): (1) Has the law enforcement officer not met, or exceeded his or her duty under the statute to provide information on the Informing the Accused form to the accused driver; (2) Is the lack or oversupply of information misleading; and (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

As to the first prong, clearly the officer exceeded his duty by providing additional information to Williams prior to reading the form.

As to the second prong, was this oversupply of information misleading? The Court of Appeals concluded that this additional information was not misleading. The additional information was true. Not all parts of the form would apply to Williams. The form included information for operators of commercial motor vehicles and also for drivers who had been in an accident. Neither of these situations applied to Williams. The officer's true statement that parts of the form would not apply to Williams was not false and could not mislead him any more than simply reading the form.

Finally, even if the additional information was misleading, Williams provided no evidence concerning the third prong that it affected his ability to decide whether to take the test. A defendant has the burden of proof on this third prong. *State v. Ludwigson*, 212 Wis. 2d 871 (Ct. App. 1997). Williams failed to show that the statement influenced his decision whether to take the test.
Williams refusal to take the test was unlawful.

MAY EVIDENCE OF IMPAIRMENT BE CONSIDERED WHEN A CITATION OF OWI/PAC IS BEING TRIED AND THE TEST RESULT IS .08?

Columbia County v. Smits (12/7/23) (UNPUBLISHED)

A jury found Smits guilty of OWI/PAC where the test result was .08. The trial court denied Smits' motion for a directed verdict at the close of the county's case, and denied his motion for judgment notwithstanding the verdict. Smits appealed, arguing that the verdict was not supported by clear and convincing evidence. Specifically, Smits argued that the test result did not prove his guilt by clear and convincing evidence because the result was subject to a margin of error of "plus or minus 0.005."

At trial the forensic scientist testified that the lab allows a "variability [of] plus or minus 0.005." She "acknowledge[s] that there's actually a window around [the reported] value where the true result lies." This allowed variability is not reflected in the test report, but is reflected in "judging the quality of any given day's testing and making sure that the calibrators [] and the quality control materials meet their target windows." She also testified because of the variability "there's an equal chance that [the test result] is below .08 as there is that it's above."

On appeal the Court considered the evidence of impairment gathered by the arresting officer. The stop, for speeding, was at about midnight. There was an odor of alcohol and the officer saw an open beer can in the center console, and other open or empty cans. Smits had bloodshot, glossy eyes and exhibited clues on FSTs. Smits was cooperative and followed the officer's directions throughout the encounter.

The Court of Appeals held that the additional observations and evidence of impairment justified the trial court's decisions to neither take the case from the jury on directed verdict, nor to upset the jury's verdict by entering judgment for Smits notwithstanding the verdict. The Court viewed the evidence under the clear and convincing standard, and found that it cannot be said that all of the evidence was "so insufficient in probative value and force that ... no trier of fact, acting reasonably, could have found guilt…" Further, the fact the jury acquitted Smits on the operating while impaired citation did not impact upon the PAC issue as the evidence of impairment could still be considered on that count.

DO HIGH BLOOD SUGAR LEVELS CAUSING A LOSS OF COMPREHENSION CREATE A PHYSICAL DIABILITY WHICH MAY EXCUSE A REFUSAL TO SUBMIT TO OWI TESTING?

DOES A TRIAL COURT'S FAILURE TO ADEQUATELY EXPLAIN REASONS FOR DENYING A CONTINUACE REQUEST REQUIRE A NEW HEARING?

State v. Matthew E. Sullivan, (10/19/23) (UNPUBLISHED)

Matthew Sullivan appeals a revocation judgment for unlawfully refusing to submit to chemical testing of his blood pursuant to Wisconsin's implied consent law. Sullivan contends that the evidence at the refusal hearing demonstrated that he did not unlawfully refuse to submit to testing, and further, that the circuit court erroneously denied his request for a continuance of the hearing.

Sheriff's deputies had responded to a disabled vehicle on the side of the road and identified Sullivan as the driver. When an officer approached Sullivan, the officer could smell a "heavy odor of intoxicants" and administered field sobriety testing. Sullivan showed signs of impairment on the horizontal-gaze nystagmus test. The officer asked Sullivan to perform a one-leg stand test and a walk-and-turn test, but Sullivan said that he could not perform either test. Sullivan consented to a preliminary breath test (PBT), and the PBT indicated that his blood alcohol concentration was more than double the normal legal limit of .08. During this encounter, Sullivan indicated that he was diabetic, and the officer learned that Sullivan's blood sugar monitor had been showing blood sugar levels "in the 300s" for approximately six hours. Sullivan was arrested for operating a motor vehicle while intoxicated (OWI). The officer read Sullivan the statutory "Informing the Accused" script, and asked whether Sullivan would consent to the test. Although the officer asked Sullivan to submit to a blood test "at least four to six times," Sullivan did not expressly consent or refuse and instead responded, "I don't know." Eventually, the officer determined that Sullivan would not submit, and he then issued a civil notice of intent to revoke.

Sullivan timely requested a refusal hearing and the hearing was set on the Monday after Thanksgiving. Sullivan began to seek an attorney the week before the hearing. However, the attorney Sullivan wished to retain was on vacation at the time, and Sullivan did not retain that attorney or any other prior to the hearing. On the day before the Thanksgiving holiday, Sullivan submitted a letter to the circuit court requesting a continuance, but the circuit court denied Sullivan's request at the hearing.

When a law enforcement officer arrests a person for an OWI-related offense, the officer may seek to obtain a sample of the person's blood, breath, or urine for chemical testing. WIS. STAT. § 343.305(3)(a). To that end, the officer reads the statutory Informing the Accused script, and the person must take or refuse the test "promptly." A refusal need not be express and can be implied from conduct. If the person refuses, they may request a refusal hearing in court, where the issues are limited by statute to those set forth in § 343.305(9)(a)5. One of the issues that may be raised is "[w]hether the person refused to permit the test." As an affirmative defense in a refusal proceeding, a defendant may show "by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs." By contrast, "subjective confusion" about the Informing

the Accused script is not recognized as a defense. Sullivan argued that his failure to expressly consent to or refuse the blood test was due to a diabetic episode causing high blood sugar levels and a loss of comprehension, and was therefore due to a "physical disability."

The appellate court disagreed stating that Sullivan must also show that this disability caused a "physical inability to submit to the test." Sullivan failed to offer any argument, or identify any facts in the record, to show that his diabetic episode caused a "physical inability" to submit to a blood test. The court noted that no expert testimony was introduced at the hearing as to the effect that such blood sugar levels could have on a person's comprehension. The sole evidence in the record was Sullivan's own testimony, which balanced against his high PBT score and his responding to the officer's other requests by consenting to a PBT and refusing to perform certain field sobriety tests, suggested that Sullivan had some functional level of comprehension at that time and that he was more likely simply intoxicated.

Turning to Sullivan's argument that the trial court erroneously denied his request for a continuance, the appellate court noted that a court's decision to grant or deny a continuance is discretionary. The prosecutor was ready to proceed with the State's case, and the arresting officer was present in court to offer testimony. The trial court informed Sullivan that he had no constitutional right to counsel at the hearing and asked why Sullivan had waited until Thanksgiving week to reach out to an attorney. Sullivan responded that he had not wanted "to pay for a lawyer" and initially intended to proceed pro se, but that he had changed his mind. Sullivan argued that the trial court did not adequately explain its reasons for denying the request. According to Sullivan, the court was required to expressly consider certain factors articulated by Wisconsin courts as relevant to a continuance request, which include "(1) the length of the delay requested; (2) whether the lead counsel has associates prepared to act in his absence; (3) whether other continuances had been requested and received; (4) the convenience or inconvenience to the parties, witnesses, and the court; and (5) whether the delay seems to be for legitimate reasons." The appellate court agreed that those are all legitimate factors to consider, but indicated that the trial court was also correct that Sullivan had no legal right to counsel at the hearing, and Sullivan presented no compelling reason for his delay in seeking counsel, or for his failure to request a continuance until the last minute. Motion denied.

WOULD A REASONABLE LAW ENFORCEMENT OFFICER BELIEVE THAT DEFENDANT WAS OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE?

State v. Strawder, (1-17-24) (UNPUBLISHED)

At 2:19 a.m., the officer was directed to a "hit-and-run accident" nearby. He found one vehicle with extensive frontend damage in the middle of the street, with Strawder standing next to the vehicle. Strawder said she was returning to her home from a party when she was run off the road by another vehicle. Her eyes were glassy but she denied having anything to drink. She later admitted that she had a drink and changed the direction from which she had been driving. Strawder performed FSTs, yielding five of six clues on the HGN, four of eight on the walk and turn, and one out of four on the one leg stand. Before doing any tests Strawder had told the officer she had a broken ankle. After her arrest she blew a .19.

The circuit court granted the motion to suppress, holding that the officer lacked probable cause to arrest. The State appealed. The Court ruled that based on the information available, a reasonable officer would believe Strawder was operating under the influence of an intoxicant. The time of day, that Strawder was coming from a party where she admitted she had been drinking after initially denying she consumed any alcohol; the five out of six clues indicating impairment observed during the HGN field sobriety test; and that the direction of Strawder's travel was inconsistent with her intended destination. Together these facts would lead a reasonable police officer to believe that Strawder was probably operating her vehicle under the influence. The Court noted that the absence of evidence of specific indicators of intoxication, such as an odor of intoxicants, and the presence of alternate explanations or reasonable inferences did not need to be considered in the analysis of probable cause.

DID THE POLICE HAVE A LEGAL BASIS TO SEARCH A VEHICE INCIDENT TO AN OWI ARREST?

State v. John Lee Griffin (12/21/23) (UNPUBLISHED)

At 11:30 p.m., an officer observed a vehicle enter an intersection on a red light. The officer followed the vehicle for a few blocks and noticed that the vehicle crossed a center line two or three times, traveled over areas of the street marked as parking stalls, and crossed a double yellow line. Based on all these observations, the officer executed a traffic stop.

As the officer approached the vehicle, she heard clicks of doors locking up and saw the driver's side window was up. The officer knocked on the driver's window and asked the driver (later identified to be Griffin) to lower the window and Griffin only lowered it approximately two inches As the officer spoke with Griffin she observed a strong odor of intoxicants coming from the car. The officer also observed that Griffin's eyes were glassy and bloodshot and that he was fumbling with producing his license and insurance card. Griffin was ordered out of the car, failed the field sobriety tests, and ultimately was arrested for OWI.

The officer then arrested Griffin for OWI, and then conducted a search incident to arrest of the vehicle, which revealed in the center console a plastic baggie containing a substance that tested positive for cocaine.

Griffin sought suppression of the cocaine evidence, arguing that the police did not have a lawful basis for a search incident to arrest of his vehicle. The court denied the motion and Griffin appealed.

The court of appeals recognized that the police are not automatically entitled to search a vehicle incident to arrest. Rather, the police need a reasonable suspicion that they might find evidence in the car that supports the arrest. Here the court ruled, that the odd behavior of clicking doors locked and windows shut, the strong odor of alcohol, and the very limited opening of the driver window, gave the officer reasonable suspicion that there might be evidence in the car that supported the OWI arrest. In its holding, the court reprised the Wisconsin law on the issue articulated in State v. Coffee, 2020 WI 53, 391 Wis. 2d 831. The *Coffee* principle followed here, sets forth that the police may search a car incident to an OWI arrest when there is reasonable suspicion that the car contains evidence of OWI. The trial court ruling to deny Griffin's motion to suppress was affirmed.

MISCELLANEOUS LEGAL ISSUES

MAY A DIVER LAWFULLY PASS A SCHOOL BUS AS ITS YELLOW, THEN RED LIGHTS ARE FLASHING AND ITS STOP SIGN EXTENDED?

City of Sheboygan Falls v. Wesley Scot Melton, (1/24/2024) (UNPUBLISHED)

Melton received a traffic citation for passing a school bus that had its stop sign extended and red lights flashing. The citation was based on the school bus drivers report to the police of the incident. Melton disputed the citation and proceeded to trial. The experienced bus driver testified that he flips a switch inside the bus that illuminates the yellow flashing lights. When he stops the bus and opens the door, the yellow lights automatically switch to red, and the stop sign extends out at the same time. He testified that after making a stop, he proceeded to the next stop and flipped the switch to immediately reactivate the yellow lights because the distance between the two stops was minimal. The bus was purportedly traveling at approximately ten to fifteen miles per hour, in a thirty-five mile per hour zone. He testified that while stopped at the second stop with the stop sign out, which also meant the red lights were flashing, he saw Melton's car passing the bus on the left. The car did not stop but instead sped away. The bus driver took a photograph of the passing car, honked the bus's horn, and reported the incident to the police. The bus driver testified that other cars had stopped behind the bus and that he believed the passing car should have had time to stop as well. The photograph was placed in evidence and shows the stop sign fully extended and the red light on the stop sign illuminated. The photograph also shows Melton's car in the process of passing the stop sign.

The police officer who issued Melton's citation testified that based on the bus driver's statement and the photograph, she was able to identify Melton as the driver of the passing car and that when contacted, Melton admitted he was the driver of the car but claimed he did not see the stop sign go out and therefore did not have time to stop.

At trial Melton stated he did not see any yellow or red lights until he was already in the process of passing the bus. On cross-examination, he testified that the yellow lights may have begun flashing right at the moment he began passing the bus but that he nevertheless believed he could lawfully pass the bus at that time because it was purportedly traveling at less than half of the posted speed limit. He testified it would have been unsafe for him to stop as he was in the lane for oncoming traffic, and further the bus driver's failure to illuminate the yellow lights 300 feet before stopping meant he should not receive a citation for passing the bus.

The trial court as well as the appellate court disagreed with Melton and found him guilty. They pointed out that at the reported speeds, Melton MAY have passed, except for the red lights and stop sign on the bus. As far as stopping being unsafe, Melton was only passing in the oncoming traffic lane precisely because there was no oncoming traffic in it at the time he began to pass the school bus, and even if cars had approached in the oncoming traffic lane while the bus remained stopped, those drivers, too, were obligated to stop for the school bus. Further a School Bus is only required to have yellow lights flashing for 300 feet where the speed limit is at 45 or above. Here the requirement was only 100 feet, and even if it wasn't completely met, Melton was still required to stop for the red lights and stop sign.

IF A CONFLICT OF INTEREST APPEARS, DOES WAITING FOR AN OFFICER FROM ANOTHER JURISDICTION TO ARRIVE AND INVESTIGATE UNLAWFULLY EXTEND THE STOP?

State v. Shilts (12/5/23) (UNPUBLISHED)

At 11:00 p.m. Deputy Wells saw a car speeding toward him, 30 to 40 over the speed limit, and causing him to drive into a ditch to avoid collision. He made a U-turn and conducted a stop. He found that the driver was Shilts, a coworker and good friend. Shilts was uneven on his feet, his initial words were slurred, and Wells detected an odor of chewing tobacco and intoxicants. Because of the conflict of interest, State Trooper Boley was dispatched to conduct an investigation. He didn't arrive until 12:15 a.m. in part because he made a stop on his way to Wells'

location. After talking with Wells and others Boley asked Shilts to step out of his vehicle. Boley noted a moderate odor of intoxicants and bloodshot and glassy eyes. Shilts was argumentative but admitted to having one drink per hour starting at 5:00 p.m. Boley conducted FSTs, finding clues supportive of an arrest. Shilts declined a PBT, stating that he believed that he had passed the field sobriety tests. Boley then placed Shilts under arrest and issued a citation for OWI, as a first offense.

Shilts filed a motion to suppress, arguing the officers lacked reasonable suspicion to expand the initial traffic stop, that the duration of the stop was unreasonable, and that there was a lack of probable cause to administer a PBT. He lost. Before the Court of Appeals Shilts first argued Boley lacked reasonable suspicion to conclude that Shilts was driving under the influence and violated his Fourth Amendment rights by asking him to step out of his vehicle to perform FSTs. Based on the information Wells conveyed to Boley, as well as Boley's own observations, there was sufficient reasonable suspicion for Boley's actions. Shilts next argued, without citation to any authority, that a trooper or officer from the local area should have taken over the case. The Court found no reason to second-guess the decisions of law enforcement when dealing with a conflict of interest.

Shilts' final argument was that the State unlawfully extended the duration of his stop—first, by waiting for a state trooper from outside the county and, second, because Boley stopped at the weigh station after he was called and prior to arriving at the scene. The Court ruled that the original purpose of the stop—to investigate the basis for Schilt's reckless driving—was not completed when the stop was delayed in order for an unbiased trooper from a different county to arrive and conduct the investigation. The delay was necessary so that the underlying reason for the stop—Shilts' reckless driving—could be investigated in an unbiased manner, free of any conflict of interest. This was supported by the fact that no investigative steps were taken until Boley arrived.

WAS THERE A LEGAL JUSTIFICATION TO SPEED?

State v. Jacobson (5/16/23) (UNPUBLISHED)

This is a speeding case. The defendant did not challenge the speed but argued that he had a legal justification to speed. The trial court rejected this argument and found Jacobsen guilty of speeding. Jacobson appealed and the court of appeals affirmed the trial court's judgment.

Jacobsen was driving a grey Tesla when he was observed driving 85 miles per hour in a 70 mph speed zone. After the traffic stop, Jacobson admitted to the state trooper that he was speeding but claimed that he needed to do so for safety reasons. Jacobson explained that he was in the far left lane and a truck was next to him in the center lane. According to Jacobson, the truck was being driven erratically and twice came close to cutting him off in his lane. Therefore, Jacobson contended, he felt compelled to speed to clear himself away from the truck and the threat it posed.

The trooper did note that while Jacobson did not stay at the high speed for too long he did hold it long enough for the laser to get a clear reading. And, the trooper did not see any real danger of a traffic accident. Accordingly, the citation was issued.

At the bench trial, the court found Jacobson guilty of speeding. The court ultimately determined that an emergency did not exist to a degree that required Jacobson to exceed the speed limit.

The court of appeals first looked at the case Jacobson used to support his argument- *State v. Brown* 107 Wis 2d 44, 55 (1982) In *Brown* the Wisconsin Supreme Court held that when a violation of a speeding law is caused through the actions of law enforcement, an individual may claim the defense of a legal justification to speed. But the court of appeals noted that the defense was predicated by law enforcement actions; there was no mention if a third party's action could justify speeding. Then, the court of appeals reasoned that even if *Brown* was applicable there was not enough evidence to raise the notion that Jacobson was compelled to speed. The court opined that even if Jacobson felt threatened, the more prudent course was for him to reduce his speed and let the truck get safely ahead of him.

Because Jacobson admitted to violating the speed limit and a possible legal justification defense would not apply to the facts found in this case, Jacobson's conviction for speeding was affirmed.

WHICH SPEEDING CONVICTIONS TRIGGER A MANDATORY 15 DAY LICENSE SUSPENSION?

Grant County v. Hochhausen (4/13/23) (UNPUBLISHED)

A Grant County Sheriff Deputy stopped and cited Hochhausen for driving 86 miles per hour (mph) in a 55-mph zone. The citation was issued for a violation of WIS. STAT. § 346.57(4)(h).

Hochhausen first filed a motion to dismiss the citation. He argued that that § 346.57(4)(h) did not apply because there were posted signs displaying the speed limit. 346.57(4)(h) states it applies "(i)n the absence of any other fixed limits or the posting of limits as required or authorized by law, 55 miles per hour." He argued that, because Highway 61 has posted signs indicating a speed limit of 55 mph, § 346.57(4)(h) is inapplicable. The trial court agreed but allowed the prosecutor to amend the charge to a violation of 346.57(5) which states "no person shall drive a vehicle in excess of any speed limit established pursuant to law by state or local authorities and indicated by official signs."

Hochhausen plead no contest to this amended charge and at the prosecution's request the trial court imposed a 15 day suspension of Hochhausen's driver's license pursuant to § 343.30(1n).

Hochhausen appealed the 15 day suspension. He argued the 15 day suspension required by 343.30(1n) did not apply to a conviction under 346.57(5). § 343.30(1n) states: "A court shall suspend the operating privilege of a person for a period of 15 days upon the person's conviction by the court of exceeding the applicable speed limit as established by [WIS. STAT. §] 346.57(4)(gm) or (h), by 25 or more miles per hour." Hochhausen argued that, because his conviction was not for exceeding the applicable speed limit as established by [§] 346.57(4)(gm) or (h), but is instead a conviction for exceeding the applicable speed limit as established by § 346.57(5), the mandatory suspension in § 343.30(1n) does not apply.

The County argued that the mandatory suspension should apply because the posted limit in this case— 55 mph— is numerically the same as the fixed limit established by WIS. STAT. § 345.57(4)(h). The prosecution argued § 343.30(ln) to mean that the SPEED LIMITS "established by" WIS. STAT. § 346.57(4)(gm) and (h) are 55, 65, and 70 and violating any of those speed limits by 25 MPH or more triggers the mandatory 15 day suspension. Thus, under the prosecution's argument, Hochhausen was convicted of exceeding the applicable speed limit as "established by" § 346.57(4)(h) by 25 or more mph, and the mandatory suspension therefore applies.

The Court of Appeals agreed with Hochhausen. The Court rejected the prosecution's argument as being contrary to the plain language of §§ 343.30(ln) and 346.57(4)(h). The 55-mph speed limit established by WIS. STAT. § 346.57(4)(h) applies only "in the absence of any other fixed limits or the posting of limits as required or authorized by law." The 55-mph speed limit in Hochhausen's case was a posted speed limit and therefore that speed limit is not "established by" § 346.57(4)(h). Consequently, under the plain language of §§343.30(1n) and 346.57(4)(h), the 15-day mandatory suspension is not applicable. For the 15 day suspension to apply a defendant must have been convicted of a violation under 346.57(4)(gm) or (h) and to have exceeded the speed limit by 25 MPH or more.

DID NOT GETTING A VIDEO OF THE TRAFFIC STOP REQUIRE A MISTRIAL?

Clark County v. Kettner (12/21/23) (UNPUBLISHED)

Kettner was found in a car with his girlfriend in a ditch in a car, next to another ditched vehicle. Kettner was found standing by the driver's side of the vehicle while his girlfriend was in the passenger seat. The girlfriend was the owner of the other ditched vehicle. Kettner was clearly intoxicated and arrested for OWI. Kettner admitted he

was drunk, but claimed that another man named Tim had driven Kettner's car and had fled the scene. The police saw no evidence, such as footprints in the snow, to suggest that anybody else had been present.

At trial, Kettner claimed he should be found not guilty as the State had not produced early body cam footage, in which he stated he had consistently claimed that Tim was the driver of the vehicle. The State claimed that Kettner was given all the body cam video that they had, as the early part of the contact had not been recorded. And, the body cam evidence the State did have also showed Kettner claiming to not be the driver. The judge found Kettner guilty.

First, the appellate court noted that Kettner was now asking for a mistrial and yet he had never moved for a mistrial during his court trial. So, the court ruled that Kettner had forfeited his right to ask for a mistrial on appeal. Despite this holding, the court also looked at the merits and found that Kettner's argument failed because there was no reason to think that the absence of video just showing Kettner denying driving, and blaming Tim, would change things. In short, there was no evidence other than Kettner's claims, that anyone other than Kettner was driving his vehicle. The trial judge's guilty verdict was affirmed.

FOR THE PURPOSE OF THE MANDATORY 15 DAY LICENSE SUSPENSION, MUST THE HIGHWAY A HAVE SIGN POSTING THE 55 MPH SPEED LIMIT?

State v. Tisha Lee Love 12/20/22 (UNPUBLISHED)

Love was ticketed for going 85 in a 55 mph zone. She took it to a jury and was found guilty after a trial that, jury selection to verdict, took all of one hour and two minutes (including eight minutes for deliberations). "Love raises two issues on appeal, neither of which motor toward a reversal." First, she argues that the judge failed to instruct the jury before deliberations that Love was not required to appear for the traffic trial. During jury selection the judge told the jury Love not required to appear. The appellate court figured the jury would have remembered that information, since it was given to them about 45 minutes before they started to deliberate.

The second issue involves § 343.30(1n), which requires a court to suspend for fifteen days the license of any person who drives twenty five miles per hour or more on a road with a fifty-five-mile-per-hour speed limit. A speed limit of 55 is a default speed limit. "In the absence of any other fixed limits or the posting of limits as required or authorized by law, [the speed limit is] 55 miles per hour." § 346.57(4)(h). Love argued that the mandatory 15 day suspension did not apply to her because the speed limit was affirmatively posted at 55, rather than being 55 by default. In her view, the license suspension only applies if there is no sign posting a 55 mph speed limit. As the Court of Appeals noted:

> If a driver is caught speeding at eighty-seven miles per hour on a highway with a fifty-five-mile-per-hour speed limit, and that speed limit is not posted with a sign, then as part of the penalty for that violation the legislature intended that the driver must have his or her license suspended for fifteen days. However, if a driver is caught speeding at eighty-seven miles per hour on a highway that has the fifty-five-mile-per-hour speed limit posted with a sign as big as life for all the world to see, then the legislature did not intend for there to be a mandatory fifteen-day license suspension as a penalty for that violation. Courts are to avoid interpreting statutes so as to cause absurd or unreasonable results.

Love lost on appeal. It does not matter if the 55 mph speed limit is posted or inferred; a suspension follows if the speeding is greater than 25 mph over the 55 mph speed limit.

MUST A MUNICIPAL COURT FOLLOW THE REQUIREMENTS OF SEC. 800.035 REGARDING PROCEDURES AT INITIAL APPEARANCES?

City of Milton v. Jackson 4/27/23 (UNPUBLISHED)

Jackson went to his initial appearance. No municipal judge was present. Instead, a police officer called Jackson's case and handed him an intake sheet. Jackson marked "not guilty" and wrote: "object to jurisdiction appearance in person failure to follow procedures under 800.035(2)(a) no judge." Six weeks later he was found guilty at a trial before the municipal judge. Jackson appealed and requested a jury trial. He also filed a motion to dismiss. He argued sec. 800.035(2)(a) requires a municipal judge to be present if a defendant appears in person, and requires the judge to provide specific information to the defendant. He argued the municipal court lost competency to proceed because the judge was not present and did not follow the statute.

The circuit court agreed that the municipal court's procedure had been "sloppy" and failed to comply with the statute, and that the intake form failed to provide information as required. However, the motion to dismiss was denied because those failures did not result in a loss of competency. They were not central to the statutory scheme and did not prejudice Jackson. After a trial in circuit court Jackson appealed his conviction.

The appellate court discussed jurisdiction and competence. Jurisdiction is granted to municipal courts by the Wisconsin Constitution. Competency is the ability of a court to exercise the subject matter jurisdiction vested in it by the constitution. The Court recognized that competency may be affected by noncompliance with statutory requirements pertaining to the invocation of jurisdiction in an individual case.

The appellate court agreed that the requirements of sec. 800.035 are mandatory and the municipal court should have followed them. However, that did not mean the court lost competency to proceed. The legislative purpose, according to the court, could still be fulfilled without strict compliance with the mandates of the statute. As long as a defendant otherwise knows or learns of the information set forth, the legislative purpose is fulfilled.

Ultimately, Jackson was not prejudiced by the municipal court's violation of sec. 800.035(2) because he was aware of the things the court was to explain to him. Further, he failed to allege in any court that he would have done anything differently had he been properly advised by a municipal court judge at his initial appearance as required by sec.800.035.