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DISTRICT II

June 15, 2022

To:

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Circuit Court Judge
Electronic Notice

Christian A. Gossett
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Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP404-CR

State of Wisconsin v. Steven A. Brownell (L.C. #2018CF664)

Before Neubauer, Grogan and Kornblum, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Steven A. Brownell appeals from a judgment convicting him of homicide by use of a vehicle with a prohibited alcohol concentration. He contends that the circuit court erred in denying his motions to exclude or suppress his blood test result. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On August 10, 2018, the Winnebago County 911 Communications Center received calls about a Ford Mustang driving recklessly on the highway. Brownell was the driver of the car. He eventually lost control of it, exiting the highway, going airborne, and landing in a cornfield. One of his passengers—his ten-year-old daughter—died in the crash.

Brownell was taken to the Theda Clark Medical Center for treatment. There, a sheriff's deputy detected a faint odor of intoxicants coming from Brownell's breath and learned that Brownell's pupils were visibly constricted—a possible sign of narcotic use. Based upon those observations and the earlier reports of reckless driving, the State secured a search warrant for a sample of Brownell's blood. Afterward, a person acting under a physician's direction drew Brownell's blood into two gray-topped vials.

In addition to the above blood draw, the State also secured a search warrant to acquire all containers of blood and urine taken from Brownell at the Theda Clark Medical Center. Sergeant Craig Bohn executed that warrant and prepared a report confirming that the only items he retrieved from the hospital were three vials: one with a purple top and two with yellow tops. From the samples' physical appearance, Sergeant Bohn believed that the purple-topped vial contained blood and the yellow-topped vials contained urine.

The items obtained from Theda Clark Medical Center—one purple-topped vial and two yellow-topped vials—were sent to the state crime lab. The lab relabeled the vials' contents as blood and serum. The blood contained a blood alcohol concentration of 0.261 g/100 mL. The serum was not examined.² Upon the items' return, confusion arose over the urine sample that

² The blood in the two gray-topped vials was also sent to the state crime lab but not examined.

Sergeant Bohn believed he had recovered in the yellow-topped vials. Police later learned that those vials contained serum, which could be mistaken for urine given its similar color.

The State subsequently filed a complaint against Brownell. It charged him with several crimes, including homicide by use of a vehicle with a prohibited alcohol concentration.

Brownell filed several motions to exclude or suppress his blood test result. He argued that the result was inadmissible due to various evidentiary issues (i.e., WIS. STAT. § 904.03, authentication, and chain of custody). He also complained that his due process rights were violated based upon the unreliability of the result and the State's failure to preserve potentially exculpatory evidence in bad faith.³

The circuit court denied Brownell's motions in an oral ruling. It found no basis to order an evidentiary hearing based on the information presented. However, it agreed to revisit Brownell's claims at trial if supported by witness testimony.

Instead of proceeding to trial, Brownell pled guilty to homicide by use of a vehicle with a prohibited alcohol concentration. The circuit court imposed a sentence of three years of initial confinement and seven years of extended supervision. This appeal follows.

On appeal, Brownell contends that the circuit court erred in denying his motions to exclude or suppress his blood test result. He renews both his evidentiary and due process challenges.

³ In making this latter argument, Brownell accused the State of losing or destroying his urine sample. However, at one point in his brief, Brownell questions whether a urine sample ever existed.

We conclude that Brownell waived his evidentiary challenges by operation of the guilty-plea-waiver rule. *See State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. There is an exception to this rule that allows defendants to appeal orders denying a motion to suppress. *See* WIS. STAT. § 971.31(10). That exception does not apply to evidentiary challenges, which seek to exclude evidence, not suppress it. *See State v. Eichman*, 155 Wis. 2d 552, 562-63, 456 N.W.2d 143 (1990) (recognizing the distinction between excluding evidence due to an evidentiary rule violation and suppressing it due to a constitutional violation); *see also State v. Nelson*, 108 Wis. 2d 698, 702, 324 N.W.2d 292 (Ct. App. 1982) (noting that § 971.31(10) “cannot be construed so as to except from the rule of waiver every motion to exclude evidence”).

As for the remaining challenges, we are not persuaded that a due process violation occurred. *See State v. Luedtke*, 2015 WI 42, ¶37, 362 Wis. 2d 1, 863 N.W.2d 592 (whether a due process violation occurred is a question of law that we decide independently). Nothing in the record suggests that Brownell’s blood test result was unreliable to a degree that implicated his due process rights. Indeed, the blood was taken from a vial with which there has been no identified problem. Moreover, Brownell has not shown that the State failed to preserve potentially exculpatory evidence in bad faith. Again, the record reveals that there was no urine sample in this case—only a police officer’s mistaken belief of one. This mistaken belief does not provide Brownell with an avenue for relief.⁴

Upon the foregoing reasons,

⁴ To the extent we have not addressed an argument raised by Brownell on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals