

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2010AP001113CR

JASON GOSS,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF
CONVICTION ENTERED IN CIRCUIT COURT FOR EAU
CLAIRE COUNTY, HONORABLE LISA STARK PRESIDING

REPLY BRIEF AND OF DEFENDANT-APPELLANT

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Argument

I. THE DEFENSE CONCEDES THAT THE STATUTORY ARGUMENT RAISED IN THE DEFENDANT-APPELLANT'S BRIEF WAS BASED UPON AN ERRONEOUS READING OF THE WISCONSIN STATUTES.

The State is correct that § 343.303 of the Wisconsin Statutes authorizes an officer to require a person to submit to a preliminary breath test if there is probable cause to believe the person is guilty of operating with a prohibited alcohol concentration contrary to § 345.63(1)(b).

II. SECTION 343.303 REQUIRES MORE THAN MERELY DETECTING THE PRESENCE OF ALCOHOL BEFORE AN OFFICER MAY REQUIRE A PRELIMINARY BREATH TEST, EVEN WHEN THE SUBJECT IS PROHIBITED FROM OPERATING A MOTOR VEHICLE WITH A .02 BLOOD-ALCOHOL CONCENTRATION.

The State agrees that *County of Jefferson v. Renz*, 231 Wis.2d 293 (1999) provides guidance in the interpretation of the level of "probable cause" required by section 343.303 of the Wisconsin Statutes. In *Renz*, the Supreme Court of Wisconsin made it clear that whatever "probable cause" is required, it must be more than would otherwise be required of a commercial driver. The State argues that

"given how low a level .02 really is," merely detecting the presence of alcohol on a person with four prior OWI offenses. (See Brief of Plaintiff-Respondent at p. 6). This argument is not supported by either the text of the statute or the Supreme Court's decision in *County of Jefferson v. Renz*, and the State offers no additional authority to support its claim.

Section 343.303 of the Wisconsin specifically provides a lower burden of proof when an officer requires a driver of a commercial vehicle to submit to a preliminary breath test. It contains no similar provision for drivers with multiple prior convictions counted under section 343.307(1). The lack of such a provision implies that the legislature did not intend to authorize an officer to require a preliminary breath test based upon the mere detection of alcohol, yet the State asks the Court to interpret the statute in such a manner as to imply it.

In *County of Jefferson v. Renz*, the Supreme Court held that, at least under circumstances where an officer was not aware and would not have inevitably become aware of prior OWI convictions, the following indicators of intoxication were not sufficient "probable cause" to administer a preliminary

breath test: (1) the car smelled "strongly" of intoxicants, (2) the driver admitted to drinking three beers, and (3) field sobriety tests revealed some signs of possible intoxication. *Renz*, 231 Wis.2d at ¶ 49. In the situation at hand, the officer had far less legal evidence in support of his decision to order a preliminary breath test. Even if the State's argument is correct in its argument that if the officer knows a person is prohibited from driving with a BAC of .02, the *Renz* decision still stands for the proposition that some quantum of evidence beyond the mere detection of alcohol, not even emanating from the driver's breath, is required.

Conclusion

The State's Response Brief asks this Court to interpret § 343.303 so that an officer may require a preliminary breath test based solely on the detection of intoxicants if the driver is prohibited from operating with a .02 Blood Alcohol Concentration. Such an interpretation is contrary to the letter and intent of the statute. Mr. Goss asks this Court to reverse the Trial Court's finding that there was probable cause to administer the preliminary breath test and to reverse the Judgment of Conviction dated January 4, 2010.

Dated at River Falls, Wisconsin this 18th
day of August, 2010.

Respectfully Submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: monospaced font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of characters per line. The text is 13 point type and the length of the brief is 5 pages (1,106 words).

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Certification of Electric Filing

I hereby certify, pursuant to Rule 809.19(12)(f), that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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