

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2014AP001463
Taylor County Circuit Court Case Nos.
2013TR000188**

COUNTY OF TAYLOR,

Plaintiff-Respondent,

v.

DEAN T. WOYAK,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION IN THE CIRCUIT COURT FOR TAYLOR
COUNTY, THE HONORABLE ANN N. KNOX-BAUER,
PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT DEAN T. WOYAK**

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ARGUMENT

The County employs the rationale in *State v. Vick*, 104 Wis.2d 678, 688-689, 312 N.W.2d 489 (1981) when arguing that the court appropriately instructed the jury. Brief of the Plaintiff-Respondent page 5. While the analysis in *Vick* is the appropriate analysis, the facts in *Vick* are significantly different than those herein. In *Vick*, the defendant argued that “he was not under the influence of an intoxicant at the time of arrest because an insufficient amount of alcohol had been absorbed in his bloodstream to cause him to be under the influence.” *Id.* at 683. There was no question in *Vick* that the entirety of alcohol consumption occurred prior to Vick operating his motor vehicle.

In contrast, the theory of defense advanced by Mr. Woyak was that the majority of consumption occurred after the vehicle operation. Thus, the presumed fact that [Mr. Woyak] was under the influence of an intoxicant at the time of driving [did] not “more likely than not” flow from the proven fact of intoxication at the time of testing” *Vick*, at 498. Mr. Woyak testified that he consumed only one beer prior to the accident and consumed the majority of alcohol while waiting more than an hour for authorities to arrive. Furthermore, the County’s own

expert opined that one beer would raise a 180 pound man's alcohol concentration to only .03. (R.42:103/ ReplyApp. 1).

Mr. Woyak put forth a valid theory of defense. He was entitled to the modified jury instruction. By not modifying the jury instruction, the jury was permitted to find Mr. Woyak guilty despite believing Mr. Woyak's testimony regarding post-driving consumption. The jury instruction rendered meaningless the fact that Mr. Woyak claimed he consumed the majority of alcohol post-driving. The time of the test was the only critical factor. That is, as long as the jury found that the test was taken within three hours of the accident, they could find that he was impaired and over the legal limit at the moment of the accident despite Mr. Woyak's claim that the relevant consumption occurred only after the operation. Allowing JI-Criminal 2668 to be used under these facts permitted the jury to find guilt even if they accepted Mr. Woyak's version of the events. Because of the above, the court should have substituted the permissive presumption language of WI JI-Criminal 2668 with that of WI JI-234.

CONCLUSION

Because the trial court erroneously exercised its discretion when it instructed the jury using JI Criminal 2668, and because Mr. Woyak was prejudiced by the error, this Court should vacate the judgment of conviction and grant Mr. Woyak a new trial.

Dated this 12th day of November, 2014.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 10 pages. The word count is 1357.

Dated this 12th day of November, 2014.

Respectfully Submitted

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of November, 2014.

Respectfully submitted,

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APPENDIX CERTIFICATION

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

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

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

Dated this 12th day of November, 2014.

Respectfully submitted,

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APPENDIX