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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

VILLAGE OF DEFOREST,

Plaintiff-Respondent,

vs.

Appeal No. 14 AP 2398

MICHAEL BRAULT,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT ENTERED
BY JUDGE STEPHEN EHLKE
IN DANE COUNTY

**BRIEF AND REQUIRE SHORT APPENDIX OF
DEFENDANT-APPELLANT MICHAEL BRAULT**

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ISSUE PRESENTED FOR REVIEW

I. Did Judge Ehlke err by finding Brault guilty of the offenses charged?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal seeks a reversal of the Trial Court judgment. The law is well established and its application to the facts of this case is not complex. Neither oral argument nor publication of the court's opinion are necessary.

STATEMENT OF THE CASE

On April 10th, 2014, the Village of DeForest filed charges against the Defendant, Michael Brault (“Brault”): Operating While Intoxicated -1st Offense, Refusal to Take the Test for Intoxication, Possession of Open Intoxicants, and Failure to Stop for a Stop Sign. (R. 1) For the purposes of this Appeal, Brault only seeks review of his Operating While Intoxicated conviction. Brault had two bench trials regarding all four allegations: one before the DeForest Municipal Court and one before the Honorable Judge Ehlke, Dane County Circuit Court.¹

Judge Ehlke heard the evidence on September 30th, 2014 and found Brault guilty of all four charges. On October 9th, 2014, Brault filed a Notice of Intent to Pursue Postconviction Relief. (R. 15) The Notice of Appeal was filed that same day. (R. 16) The record was transmitted on November 3rd, 2014.

The matter is now properly before the Court of Appeals for the Fourth District of Wisconsin for briefing and decision.

¹ On both occasions Defense Counsel offered to stipulate to the Police Reports to avoid testimony. On both occasions, the Prosecution declined.

STATEMENT OF FACTS

I. FINAL TRIAL

The relevant facts to the instant appeal were solicited at the September 30th, 2014 Bench Trial. The first, and only, witness called by the State was Officer Ronald Stage. (TR 4:1) Officer Stage testified that at about 9:20 PM on April 10th, 2014 he was on patrol in the Village of DeForest. (TR 5:21 – 6:7) At about that time, Officer Stage witnesses a blue Chevrolet truck fail to stop for a stop sign. (TR 7:14-21) Officer Stage then conducted a traffic stop of the vehicle and identified the driver. (TR 7:23 – 8:8:13)

Officer Stage then asked Brault why Brault thought he had been stopped. (TR 8:19) Brault indicated he did not know. (TR 8:20) While speaking to Brault, Officer Stage noticed that he had “bloodshot and watery eyes.” (TR 9:13-15) Brault then admitted to consuming two glasses of wine over the evening. (TR 9:20) At this point, despite not having Brault perform any field sobriety tests, Officer Stage was of the opinion that Brault was under the influence of intoxicants. (TR 12:1-4)

Officer Stage then had Brault complete the Standard Field Sobriety Tests. First, Officer Stage had Brault perform the Horizontal Gaze Nystagmus Test. (TR 13:17) Officer Stage noticed first that Brault exhibited lack of “smooth pursuit”. (TR 14:23) He then noticed both a sustained jerkiness at maximum deviation and nystagmus prior to forty-five degrees. (TR. 15:1-7) Officer Stage did not note a vertical nystagmus. (TR 15:9)

Officer Stage then had Brault complete the Walk and Turn Test. (TR 15:19) Officer Stage, again, from watching Brault perform this test formed the opinion that Braut was impaired. (TR 17:22) Officer Stage then had Brault perform the One-Leg Stand Test. (TR 18:3) Officer Stage once again formed the opinion that Brault was impaired from the result of this test. (TR 18:24) Brault then refused to submit to a Preliminary Breath Test (TR:19:10-11) though, oddly², then Officer Stage testified that the result of the test was a 0.097. (TR 19:14) Officer Stage then arrested Brault. (TR 20:9-10)

After arresting Brault, Officer Stage discovered an open bottle of beer on the “right front passenger

² Given the refusal to complete the test.

floorboard.”³ (TR 20:17-18) Back at the station, Brault indicated that he would not agree to a chemical test of his breath. (TR 22:15-18) Ultimately, Brault was issued citations for Operating While Intoxicated, Open Intoxicants, and Failure to Stop for a Stop Sign. (TR 26:9-21) Judge Ehlke then found Brault guilty of all citations. (TR 29:10 – 32:5)

RELEVANT LAW

I. Relevant Caselaw

The standard of proof that the Village must meet in the prosecution of a civil ordinance is “clear and convincing”. *e.g. In Re the Commitment of Edwin C.*, 800 N.W.2d 929, 2011 WI 83, ¶76. Each of the citations in the present case has this same burden.⁴

³ Again, Brault does not appeal the conviction for Possession of Open Intoxicants. However, given the direction of the case to date, Counsel does not wish to ignore these facts.

⁴ Though, again, Brault only appeals his conviction for Operating While Intoxicated – 1st Offense.

ARGUMENT

I. Judge Ehlke's Decision Convicting Brault Of Operating While Intoxicated – 1st Offense Was Against The Weight Of The Evidence.

Standard of review: In reviewing whether the evidence in a case was sufficient to prove the guilt of the defendant, an Appellate Court may not substitute its judgment for the trier of fact unless that evidence is so lacking in probative value that no trier of fact, acting reasonably, could have found guilt. ***State v. Poellinger***, 451 N.W.2d 752, 758, 153 Wis.2d 493 (Wis. 1990).

a. Officer Stage Had Formed An Opinion Of Intoxication Prior To Brault Performing Any Field Sobriety Tests.

Officer Stage testified at the Bench Trial that he believed Brault was intoxicated and unable to operate his motor vehicle in accordance with the law when he first spoke to Brault. (TR 12:1-4) At this point, Brault had performed no Field Sobriety Tests nor taken any tests for intoxication. (TR 12:1-4)

Judge Ehlke found Brault guilty of Operating While Intoxicated as a First Offense. (TR 29:10 –

32:5) In doing so, Judge Ehlke placed emphasis on Officer Stage's training and experience. (TR 29:10-15) Yet, Officer Stage came to the conclusion that Brault was intoxicated prior to any corroborating tests or information other than two scant and very general observations. (TR 12:1-4) Given that Officer Stage formulated his opinion far before corroborating evidence was available to bolster it, Judge Ehlke erred in relying on Officer Stage's opinions as one of his basis' of conviction. Therefore, Judge Ehlke as the trier of fact came to a conclusion based off of the available evidence which was completely lacking in probative value.

CONCLUSION

Judge Ehlke’s decision convicting Brault of Operating While Intoxicated – 1st Offense should be reversed and remanded.

Dated: January 5, 2015

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,476 words.

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CERTIFICATION

I hereby certify that the following appendix complies with Wis. Stat. § 809.19(2)(a) and that it contains: (1) the table of contents above; (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 the record is required by law to be confidential (this one is not), 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.

/s/ Adam Walsh

Adam Walsh

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. §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 at Madison, Wisconsin: January 5, 2015

/s/ Adam Walsh

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