

STATE OF WISCONSIN
COURT OF APPEALS
DIVISION III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

COUNTY OF ONEIDA,

Plaintiff-Respondent,

vs.

APPEAL NO.: 2014AP002766

RANDALL J. BUSAROW,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

ONEIDA COUNTY CIRCUIT COURT
THE HON. PATRICK F. O'MELIA, presiding
Trial Court Case Nos.: 14TR1083 and 14TR1084

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STATEMENT OF ISSUES

1. Whether the intoxilyzer results should not have been admitted into evidence.
2. Whether there was sufficient evidence to find Busarow guilty of Operating While Intoxicated - 1st Offense.

**STATEMENT OF ORAL ARGUMENT
AND PUBLICATION**

There is no need for oral argument or publication in this case. This case can be decided by applying applicable and well-recognized case law. The statutory criteria for publication under Wis. Stats. § 809.23 are not met.

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RANDALL J. BUSAROW,

Defendant-Appellant.

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I. STATEMENT OF THE CASE

On May 3, 2014 at 11:37 p.m., Oneida County dispatch received a call of a one vehicle crash on County Highway Y. R.11:05, 09. The caller remained on the scene. *Id.*:05. Oneida County Sheriff's Deputy Dan Semmerling responded to the call. *Id.*:05. Deputy Semmerling couldn't recall where he was when he received the dispatch. *Id.*:09. While enroute to the scene, Oneida County received a call from Randall J. Busarow. *Id.*:05. Deputy Semmerling met Busarow at the Little Rice Resort. *Id.*:06. Busarow told Deputy Semmerling he had been in an accident. *Id.*:10. Deputy Semmerling did not recall if he asked Busarow when the accident occurred. *Id.*. Busarow told him he had been

in an accident up the road. *Id.* Deputy Semmerling transported Busarow back to the scene of the one car accident. *Id.*:06. The in-squad tape, that was played in court, began recording at 11:54 P.M., with Busarow already in the squad en-route to the accident scene. *Id.*: 08, R. 7. Other than Deputy Semmerling testifying that he picked up Busarow from the Little Rice Resort, there is no evidence of anything that occurred between 11:37, the time Deputy Semmerling received the dispatch, and 11:54, the time the tape began taping the squad's interior and the discussion between Deputy Semmerling and Busarow as they approached the site where Busarow's truck left the road. There also is no evidence of the time it took Deputy Semmerling to arrive at the Little Rice Resort, the duration of time Deputy Semmerling stayed at the Little Rice Resort, the distance between the Little Rice Resort and Busarow's truck, or how long it took for Deputy Semmerling to drive to Busarow's truck once he left the Little Rice Resort.

Deputy Semmerling never observed Busarow operate his car. R.11:18. Deputy Semmerling did not know when the accident occurred that involved Busarow. *Id.*:19. There

is no direct evidence of the time that Busarow operated his motor vehicle. The only direct evidence that alludes to the time Busarow last drank was when Busarow stated, in response to the deputy's inquiries when he last drank, that he had 2 or 3 beers around 4 or 5 (R.7:23:55:40), and later, "I don't know what time it is, whatever time it took for me to walk from here to there and about ½ hour before that but I don't even know what time it is." Id.:00:23:58 (the designation following the record number is the time on the recording of the cited conversation, or 12:23 A.M..). At this point in questioning, Deputy Semmerling did not tell Busarow what time it was. Presumably, Busarow's account of the timing would have been assisted by his knowing the time when he was being questioned by Deputy Semmerling. At trial, Deputy Semmerling testified inaccurately that Busarow had told him that he last drank 1/2 hour before the accident. R.11:19. Deputy Semmerling testimony failed to include that Busarow's estimate included "whatever time it took for me to walk from here to there" (wherever "there" was). Id..

The video depiction of the location where Busarow's truck was off the road shows the truck about 10 yards off

the road, in the woods. R.7:23:55. Deputy Semmerling states to an unidentified person on the video that it was "pretty amazing he walked away from this." *Id.*:00:11:45.

Busarow told Deputy Semmerling he drank two or three beers around 4:00 or 5:00 p.m. *Id.*:23:55:40. Busarow told Deputy Semmerling he didn't drink anything since the accident and that he had not been drinking while driving. R.11:16, 18. Deputy Semmerling smelled alcohol on Busarow's breath, and asked him to perform field sobriety tests (FST). R.7:23:58:16. Busarow agreed. *Id.*:23:59:10.

During the Horizontal Gaze Nystagmus test, Deputy Semmerling observed nystagmus present in both of Busarow's eyes while checking for smooth pursuit, at maximum deviation and at onset prior to 45°-degrees. R.11:12. Deputy Semmerling observed all six clues for intoxication in Busarow's eyes. *Id.*. Busarow completed the Walk and Turn and the One Leg Stand test with a couple of clues for intoxication. *Id.*: 12-15.

Deputy Semmerling asked Busarow to take a preliminary breath test. The result of the PBT (R.7:00:05:22) is not admissible as evidence of intoxication (the parties'

stipulation of this was, apparently, agreed to while the proceedings were off the record while the tape was being played in open court) and was not relied on by the trial court in its findings.

Busarow was arrested at 1:08 a.m. on May 4, and was transported to the Oneida County jail. R.7. At the jail, Busarow submitted to a breath test (Intoxilyzer) at 1:47 A.M.. Over the defense objection, the trial court admitted Busarow's breath test result of .12. R.8; R.11:24-26.

Busarow was issued two citations: 1 for Operating While Intoxicated - 1st Offense, and the other for Operating With A Prohibited Blood Alcohol Level. R.1. He pled not guilty and the court trial was conducted on October 31, 2014. R. 11; App. 3.

At the trial, the County called Deputy Semmerling, and the Intoxilyzer operator, Lisa Miramontes, during its case-in-chief. Busarow stipulated to the Intoxilyzer results, but objected to the admissibility of the results on the ground that the County failed to establish the probative value of the results. *Id.*:24-27. The County did not call an expert witness to establish the probative value of the Intoxilyzer results in the event the court found the

Intoxilyzer was not administered within 3 hours of the driving. Sec. 885.235(3) Stats.

Busarow did not appear at the civil trial. *Id.*:5. The State did not subpoena Busarow. During his case-in-chief, Busarow only asked the trial court to take judicial notice of the Wisconsin Department of Transportation alcohol absorption chart (the "Hinz chart"). *Id.*:28. The trial court took judicial notice of the "Hinz chart". *Id.* See App. 3.

At the conclusion of the case, the trial court found:

1. Busarow walked to the Little Rice Resort immediately after the accident (*Id.*:44),
2. Busarow last drank 1/2 hour before the accident,
3. Busarow last drank at 11:00 p.m., 1/2 hour before the dispatch was received (*Id.*:43),
4. It took indeterminate number of minutes for Deputy Semmerling to drive Busarow from the Little Rice Resort to the scene of the accident (*Id.*:42),
5. The Intoxilyzer was administered 2 hours and 50 minutes after the driving (*Id.*:44),

6. Busarow was going 35 to 40 m.p.h. on clear roads when his car left the road (*Id.*),
7. Deputy Semmerling observed clues of intoxication while Busarow performed the field sobriety tests (*Id.*:46, 47),
8. Busarow was not able to safely manipulate the car's controls due to his being impaired (*Id.*:48).

Based on the trial court's findings, it found Busarow guilty of operating a motor vehicle while intoxicated and of operating with a prohibited blood alcohol level. *Id.*:49. The trial court only entered a judgment of conviction as to the operating a motor vehicle while intoxicated. *Id.*; R.12; App. 2.

II. ARGUMENT

A. THE INTOXILYZER RESULTS SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE

Over defense objections, the trial court admitted the Intoxilyzer results into evidence. Busarow objected to the admissibility of the Intoxilyzer results on the grounds that the County failed to prove that the Intoxilyzer was administered within 3 hours of Busarow's driving.

The pertinent statute reads:

"...(3) If the sample of breath, blood or urine was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony."
Sec. 885.235(3) Stats.

It is undisputed that on May 4, 2014, at 1:47 A.M. (2 hours 10 minutes after the original dispatch involving Busarow's truck) the Intoxilyzer result was .12. The County did not introduce any direct evidence of the time of driving. No one testified they saw Busarow drive on May 3. Deputy Semmerling never asked, and Busarow never offered, when he drove. R.11:10. There was no other circumstantial proof, such as whether the engine was warm, or the headlights being on, or fluid leaking from the engine, offered by the County to assist the trial court circumstantially ascertain the time of driving.

The County did not offer any expert testimony to establish the foundation for the admissibility of the Intoxilyzer results.

The trial court inferred Busarow drove at 11:00 because the original dispatch was at 11:37 P.M. on May 3. But, even the trial court conceded that the timing wasn't exact. The trial court stated: "So just extrapolating, 11:37 calls come in, one from the defendant while the deputy was en-route, and taking a half hour off of that when he had his last drink, take off some time for the walk, you're back to around 11:00 o'clock approximately. Now, is that exact? No. " R.11:43. Regardless that:

1. The trial court mistook the time of the dispatch (11:37) with the time "calls come in" (*Id.*:9),
2. The absence of any evidence that Busarow walked to the Little Rice resort immediately after his truck left the roadway, and
3. The absence of evidence of the distance between the Little Rice Resort and Busarow's truck or,
4. The time it would take a person to walk to the resort,

the trial court acknowledged that his finding that Busarow drove at 11:00 was merely an approximation. *Id.*:43.

The trial court's concession of its inexact determination of time of driving is the product of the absence of any evidence of either the distance between the Little Rice resort and Busarow's truck, or the amount of time it would take for a person to walk between the two

locations. An approximation can hardly be considered the product of clear, convincing and satisfactory evidence.

In this case, the approximated time of the driving is significant because had the driving occurred any more than 14 minutes earlier than the court's in-exact approximation, the Intoxilyzer would have been administered more than 3 hours after the driving. Pursuant to sec. 885.235(3) Stat.s, the Intoxilyzer results would not have been admissible without an expert witness establishing the probative value of the test. Because no-one saw Busarow drive, and Busarow was never asked, and he never said, when he drove, there was no direct evidence of either the time Busarow drank, or when he drove his truck relative to his drinking, prior to it leaving the road, no reasonable trier of fact could infer that that timing of his drinks was such that an illegal amount of alcohol had been absorbed into his bloodstream when he was driving. App. 3.

**B. THERE WAS INSUFFICIENT EVIDENCE TO FIND BUSAROW
GUILTY OF OPERATING WHILE INTOXICATED**

The question on appeal is whether viewing the

evidence most favorably to the County, is there sufficient evidence in the record to permit the trial court to determine by clear, satisfactory and convincing evidence that Busarow was under the influence of alcohol at the time he operated a motor vehicle?

In reviewing the sufficiency of evidence, the appellate court does not disturb the trial court's findings unless they are contrary to the great weight and clear preponderance of the evidence.

When findings of fact include circumstantial evidence, the test is whether it can be said with substantial assurance that the inferred fact more likely than not flowed from the proven fact on which it is made to depend. Ulster Co. v. Allen, 442 U.S. 140, 166, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

An appellate court must accept and follow inferences drawn by the finder of fact unless the evidence on which that inference is based is incredible as a matter of law. State v. Poellinger, 153 Wis.2d, 493, 506-07, 451 N.W.2d 752 (1990).

The trial court inferred Busarow drove at 11:00 P.M. (the dispatch was received at 11:37 (*Id.*:05, 09), Busarow walked to the Little Rice Resort immediately after the accident (*Id.*:44) and the Intoxilyzer, that was administered at 1:47 A.M., was 2 hours 50 minutes after Busarow's truck left the road (*Id.*:26, 44). Not only does the trial court's estimate of the time of driving fail to account for Busarow's description of the time it took for him to walk "from here to there", but, it cannot be said that the time of driving, inferred by the trial court, more likely than not flowed from the proven facts on which it was made to depend. Ulster Co., 442 U.S. at p. 166.

In inverse order of the proven facts relied on by the trial court:

1. The Intoxilyzer test that was administered at 1:47 A.M. does not support the trial court's inference that Busarow drove at 11:00,
2. The time of the dispatch (11:37 P.M.) does not bear any temporal relationship to the time of driving in the rural setting depicted in the in-squad video, and
3. The fact that Busarow called to report that his

truck was off the road, while Deputy Semmerling was responding to the original dispatch, does not support the trial court's inference that Busarow was driving at 11:00 P.M

There is no evidence that the person, who reported the location of Busarow's truck, ever saw Busarow, or saw Busarow driving his truck. There is no evidence that anyone observed the location where Busarow's truck was off the road at any time prior to the time it was reported to the Oneida Sheriff. There is no evidence of:

1. How long after the first report of Busarow's truck it was before Busarow himself reported it,
2. The distance between Busarow's truck and the Little Rice Resort,
3. Busarow's location when he called the Oneida County Sheriff, or
4. What Busarow did following his truck leaving the road.

And, Busarow's statements when he last drank, on the in-squad video are, hardly, clear, satisfactory and convincing. Busarow 1st said he had a few beers at 4 Or 5

o'clock. R.7:23:55:40. Later, he told Deputy Semmerling: "I don't know what time it is, whatever time it took for me to walk from here to there and about ½ hour before that but I don't even know what time it is." R.7:00:23:58. The time it took for Busarow to walk "from here to there" could've been 2 minutes. It could have been 45 minutes. Or, it could've been 3 hours. The lack of evidence of the specification of locations, and of the distance, between "here and there" make it impossible for the trial court to infer anything about the passage of time between Busarow's last drink, the time of driving and when the truck left the road.

The fact that Deputy Semmerling picked Busarow up at the Little Rice Resort does not support the court's inference that Busarow walked there immediately following the accident. No one saw him drive, or saw his truck leave the road. And, his statement to Deputy Semmerling ("I don't know what time it is, whatever time it took for me to walk from here to there and about ½ hour before that but I don't even know what time it is."), Busarow does not specify, and is not asked, where "there" is. Busarow was never asked when he drove. No one testified when Busarow

arrived at the Little Rice Resort or how long he had been there prior to Deputy Semmerling arriving at the resort.

The trial court took judicial notice of the Department of Transportations Blood Alcohol Chart ("Hinz Chart").

Id.:28. While the Hinz chart is based on averages, and is not conclusive (State v. Hinz, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984), it does show that even if Busarow last drank 1/2 hour before his truck left the road, and exhibited clues of intoxication when Deputy Semmerling administered the field sobriety tests at midnight, he was not, necessarily, under the influence at the time he was driving (whenever that was). The Hinz chart shows that it takes a varying amount of time for consumed alcohol to become fully absorbed into a person's blood stream.

Regardless that Busarow was in a 1 car accident described by the trial as a "bad accident...enough to shear off...a pretty sizable tree and it required extraction by fire personnel" (*Id.*:45), and bad enough that Deputy Semmerling was amazed that Busarow walked away from the crash (R.7:00:11:45) Busarow's performance of the field sobriety tests, that were administered at midnight does not

create an inference that he was under the influence at whatever earlier time he drove. His performance on the field sobriety tests merely provides clues of intoxication, or other basis for compromised coordination and cognitive impairment, at midnight, i.e., being involved in a "bad accident", at the time the field sobriety tests were administered.

III. CONCLUSION

The County did not establish by clear, satisfactory and convincing evidence that Busarow was operating a motor vehicle while under the influence of an intoxicant.

The Intoxilyzer results should not have been admitted into evidence without an expert witness to establish the results' probative value because there is no evidence that the test was administered within 3 hours of Busarow's driving.

The evidence without the Intoxilyzer result is insufficient to support the trial court's finding that Busarow was guilty of OWI. The record is void of direct evidence of time of operating and of of operating while intoxicated. Deputy Semmerling did not ask Busarow what

time he was driving. The County did not subpoena any witness, including patrons at the Little Rice resort or Busarow, to establish the time of Busarow's drinking, or of his driving.

The admissible circumstantial evidence of Busarow's amount, and time, of drinking and driving, does not support the trial court's inference that Busarow, at the time he drove, was unable to safely manipulate the car's controls safely due to his being impaired (*Id.*:48). The trial court's inferences: that Busarow drove at 11:00 P.M. (the dispatch was received at 11:37 (*Id.*:05, 09)), that Busarow walked to the Little Rice Resort immediately after the accident (*Id.*:44) and the Intoxilyzer, that was administered at 1:47 A.M., was 2 hours 50 minutes after Busarow's truck left the road (*Id.*:26, 44), are incredible as a matter of law. Even though this Court's review is de novo, it needn't adopt the finder of fact's inferences, in favor of the accused's guilt, if those inferences are unreasonable.

Based on the foregoing, Busarow requests this Court

reverse the trial court's judgment of conviction for
Operating While Intoxicated - 1st Offense.

Dated at Milwaukee, Wisconsin this 26th day of
January, 2015.

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APPENDIX

A. CITATION NUMBERS Q077260-1 and Q077261-2

B. ORDER FOR JUDGMENT OF CONVICTION

C. ALCOHOL CHART

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, an appendix that complies with Section 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries, and; (3) the findings or opinion of the trial court.

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 at Milwaukee, Wisconsin this 26th day of January, 2015.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Monospaced font*: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 20 pages.

Dated at Milwaukee, Wisconsin this 26th day of January, 2015.

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CERTIFICATION OF E-FILING

I hereby certify that I electronically filed this brief, on January 26, 2015, and the digital file is identical with the hard copy that was filed, with the court on January 26, 2015.

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