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**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV  
Case No. 2015 AP 180**

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**In the matter of the refusal of Kirk L. Giese:**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**vs.**

**KIRK L. GRIESE**

**Defendant-Appellant.**  
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**ON APPEAL FROM THE CIRCUIT COURT OF DODGE COUNTY, BRANCH 2,  
THE HONORABLE JOHN R. STORCK, PRESIDING**  
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**BRIEF OF THE PLAINTIFF-RESPONDENT**  
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**BRIEF OF THE PLAINTIFF-RESPONDENT**  
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**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is not required because it will not assist the court. Publication is not requested.

**ARGUMENT**

1. THE TRIAL COURT CORRECTLY RULED THAT DEPUTY WEINFURTER PROVIDED A PLAUSIBLE ACCOUNT OF FACTS THAT SUPPORTED A FINDING OF PROBABLE CAUSE AT A REFUSAL HEARING.

A. Relevant Statutes

Wisconsin's Implied Consent Law is found in Wis. Stat. § 343.305. A person who refuses to provide a sample of his blood, breath or urine may request a hearing as to whether or not his refusal was proper. The issues at a refusal hearing are limited and include "**whether the officer had probable cause to believe** the person was driving or operating a motor vehicle while under the influence of alcohol." Wis. Stat. § 343.305(9)(a)5.a. (emphasis added)

A refusal hearing was conducted in this case on December 18, 2014. At the conclusion of the hearing the Trial Court found that the arresting officer had probable cause to believe that Kirk Griesse was driving a motor vehicle while under the influence of alcohol. The Trial Court ruled, therefore, that Griesse's subsequent refusal to submit to a blood sample was improper.

## B. Relevant Case Law

In *State v. Nordness*, 128 Wis. 2d 215, 381 N.W.2d 300 (1986) the Supreme Court of Wisconsin addressed the level of probable cause that the State must prove at a refusal hearing:

"We next address the determination by the court of appeals that the state needs only to establish probable cause in a revocation hearing, not probable cause to a reasonable certainty, as the trial court intimated. We affirm the court of appeals; the state must only present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant. Section 343.305(3)(b)5.a., Stats. No more is required.

Probable cause, although not easily reducible to a stringent, mechanical definition, *State v. Welsh*, 108 Wis. 2d 319, 329, 321 N.W.2d 245 (1982), reversed on other grounds, 466 U.S. 740, 104 S. Ct. 2091, 80 L.Ed.2d 732 (1984), generally refers to " 'that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.' " *Id.* (quoting from *State v. Paszek*, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971)). Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe, in this case, that the defendant was operating a motor vehicle while under the influence of an intoxicant. See, *Welsh*, 108 Wis. 2d at 329–30, 321 N.W.2d 245. "The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *Id.* at 329, 321 N.W.2d 245.

**We deem the evidentiary scope of a revocation hearing to be narrow.** In terms of probable cause issue, the trial court in a revocation hearing is statutorily required merely to determine that probable cause existed for the officer's belief of driving while intoxicated.

We view the revocation hearing as a determination merely of an officer's probable cause, not as a forum to weigh the state's and the defendant's evidence. Because the implied consent statute limits the revocation hearing to a determination of probable cause—as opposed to a determination of probable cause to a reasonable certainty—we do not allow the trial court to weigh the evidence between the parties. **The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account.** See, e.g., *Vigil v. State*, 76 Wis. 2d 133, 144, 250 N.W.2d 378 (1977)." *Id.* at 35 – 36 (Emphasis added).

In *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994) the Court of Appeals addressed evidence that can be used in determining probable cause:

“Here, the undisputed facts disclosed by the record reveal that: (1) Tripp received a citizen's report that the operator of a truck traveling in a particular group of vehicles was driving erratically; (2) Tripp observed Babbitt's vehicle, which was consistent with the citizen's description, cross the centerline three times and the eastbound dividing line once in a quarter-mile stretch; (3) Tripp detected the odor of alcohol emanating from Babbitt's car when she lowered the window; (4) Babbitt's eyes were glassy and bloodshot; (5) Babbitt's walk to the rear of the vehicle was slow and deliberate; and (6) Babbitt consistently displayed an uncooperative attitude and reluctantly complied with the officers' various requests. These facts are sufficient to allow a reasonable officer to conclude that Babbitt was “probably” driving while under the influence of alcohol in violation of § 346.63(1)(a), Stats. Therefore, even without the evidence of Babbitt's failure to submit to the field sobriety test, we conclude that probable cause existed for her arrest....

Although the court did not expressly rely on the defendant's failure to perform the field sobriety test in concluding that probable cause existed, the clear implication of this holding is that it was proper for the court to consider the refusal in making the probable cause determination. Our reading of *Wolske* is consistent with the holdings of several other jurisdictions that have directly addressed this issue. See *Summers v. State of Utah*, 927 F.2d 1165 (10th Cir. 1991) (defendant's refusal to perform a field sobriety test may be used as evidence of probable cause); *Marvin v. DMV*, 161 Cal. App. 3d 717, 207 Cal. Rptr. 793 (1984) (refusal to take the field sobriety test could be interpreted as consciousness of guilt); *Farmer*, 404 S.E.2d at 373 (use of defendant's refusal to take a field sobriety test as evidence of intoxication does not violate the defendant's right against self-incrimination). We therefore conclude that a defendant's refusal to submit to a field sobriety test may be used as evidence of probable cause.”

C. The Trial Court correctly ruled that the arresting officer had probable cause to arrest Griesse for operating a motor vehicle while under the influence of an intoxicant.

Deputy Robbie Weinfurter testified at the Refusal Hearing that he was dispatched to an accident scene (the intersection of US Highway 151 and County Highway C) where he spoke with Kirk Griesse (who was at a nearby tavern) who admitted being the driver of the motorcycle at the time it tipped over on the highway (R.13:10). Griesse downplayed the fact that the motorcycle had tipped over, claiming that it was not uncommon for him to put the bike down during the course of a driving season. (R.11:10-14) Griesse had bloodshot, watery eyes, a strong odor of an intoxicating beverage coming from his breath, and swayed in all directions. (R.13:16-19) When shown the damage on his motorcycle Griesse basically ignored the officer and disputed that the motorcycle had been damaged. (R.14:10-11) When asked to perform field sobriety tests, Griesse refused. (R.15:13) When asked to provide a preliminary breath test, Griesse refused. (R.15:21) Deputy Weinfurter then placed Griesse under arrest for operating a motor vehicle while under the influence of an intoxicant. (R.17:13-15)

Griese's attorney argued to the Trial Court that the arresting officer had insufficient evidence to believe that Griese was impaired at the time the driving occurred: "This biggest problem in this case is the officer didn't know when the driving was." (R.35:16-17) The Trial Court disagreed with that argument and made the following findings of fact:

1. Deputy Weinfurter received a 9-1-1 dispatch at approximately 6:18 p.m. on October 24. (R.38:17-18)
2. Deputy Weinfurter was informed that a Mr. Johnston was calling in indicating that he had observed a motorcycle at the intersection of 151 and C, that the motorcycle had tipped over, that the driver had gotten back on the motorcycle, and that the driver had driven to a tavern. (R.38:18-23)
3. **It was a reasonable inference for a deputy with ten years of experience to believe that a 9-1-1 call of an accident of someone tipping over was made at or immediately after the incident occurred.** (R.38:24-39:4) (emphasis added)
4. Griese never denied driving the motorcycle. (R.39:6-7)
5. Griese threw his key on the parking lot, which indicated unusual behavior. (R.39:7-10)
6. Griese had a strong odor of intoxicants on his breath, he was swaying, and his eyes were bloodshot. (R.39:10-12)
7. It was appropriate to infer a consciousness of guilt from his refusal to do any field sobriety test. (R.39:13-16)
8. Griese exhibited odd behavior when Deputy Weinfurter pointed out the damage to the motorcycle and Griese was unable to comprehend it. (R.39:16-20)
9. Griese was inconsistent with his statements about drinking at the tavern. (R.39:20-39:23)
10. There was reason to believe that Griese was under the influence of intoxicants enough to ask him to do the field sobriety test. (R.39:25-40.7)
11. There was sufficient probable cause in the mind of the deputy at the time of the arrest to arrest Griese for the OWI and that Griese's refusal was improper. (R.40:16-20)

Many of the *Babbitt* factors are present in the current case: Deputy Weinfurter received a citizen's report that a motorcycle had tipped over and that the driver had driven to a tavern; Griese admitted to Deputy Weinfurter that Griese had driven the motorcycle and tipped it over on the highway; Deputy Weinfurter detected the odor of intoxicants on Griese's breath; Griese's eyes were bloodshot and watery; Griese was swaying and had trouble maintaining his balance; and Griese refused to submit to a field sobriety test.

## **CONCLUSION**

The Trial Court's findings of fact, based upon the testimony of Deputy Weinfurter, were properly made. Deputy Weinfurter had probable cause to believe that Mr. Griese was intoxicated while operating his motorcycle and was within his authority to ask Griese to submit to a blood test.

For the foregoing reasons, the Trial Court's decision that Griese's refusal was improper should be affirmed.

Dated this the 5th day of May, 2015.

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### **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 1,642 words.

Dated this the 5th day of May, 2015.

Signed:

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### **CERTIFICATION**

I hereby certify that I have submitted an electronic copy of this brief 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 this 5th day of May, 2015.

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