

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**CLERK OF COURT OF APPEALS
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**Appeal No. 2015AP000298
Ozaukee County Circuit Court Case Nos. 2014CV000307**

VILLAGE OF FREDONIA,

Plaintiff-Respondent,

v.

BRUCE A. GOSSETT,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT-APPELLANT'S
MOTION FOR SUPPRESSION OF EVIDENCE IN THE
CIRCUIT COURT FOR OZAUKEE COUNTY, THE
HONORABLE PAUL V. MALLOY, JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT BRUCE A. GOSSETT**

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STATEMENT OF THE ISSUES

Did Village of Fredonia Police Officer Christopher Erickson have the requisite level of suspicion to request Mr. Gossett perform a preliminary breath test?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Bruce A. Gossett (Mr. Gossett) was charged in the Mid Moraine Municipal Court – Village of Fredonia, with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat. §346.63(1)(a) and (b). The defendant filed a motion for suppression of evidence in the municipal court challenging the detention and arrest. A hearing on said motion was held on February 19, 2014, wherein the court, the Honorable Steven Cain, Judge, denied said motion. A municipal trial in this matter was held on July 11, 2014, wherein the court found Mr. Gossett guilty of both operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration.

The defendant timely filed an appeal to the circuit court pursuant to Wis. Stat. §800.14. The defendant refiled his motion for suppression of evidence in circuit court. A hearing on said motion was held on September 19, 2014, the Honorable Paul V. Malloy, Judge, presiding. The Court orally denied the defendant's motion on said date. (R.41:20 A.App.11). The Court signed an Order denying defendant's motion on November 11, 2014. (R.51/A.App. 1). A trial to the court was held on

December 11, 2014, the Honorable Paul V. Malloy, Judge, presiding. The court found Mr. Gossett guilty of both charges.

On February 9, 2015, the defendant timely filed a Notice of Appeal. The appeal stems from the Court's Order denying Mr. Gossett's motion for suppression of evidence.

The pertinent facts to this appeal were adduced at the motion hearing held on September 19, 2014 and were introduced through the testimony of Village of Fredonia Police Officer Christopher M. Erickson. Officer Erickson testified that on March 5, 2013, while he was on duty as a Fredonia Police Officer, he received a dispatch call at approximately 3:30 p.m. regarding a semi-tractor trailer that was northbound on Highway 57. The caller said the vehicle was all over the road, and described the semi as a blue cab with Minnesota trailer tags. (R.41:7/ A.App.2).

Officer Erickson testified that he has been an officer for fifteen years. After receiving the call he went out with lights and sirens on trying to find the semi. (R.41:8/A.App.3). Erickson observed the semi on Highway 57. At that point Erickson was on Fredonia Ave. He started to follow it. However, he acknowledged that he lost sight of it for a period of time. (R.41:9/A.App.4). However, once Erickson turned from

Fredonia Ave. to Highway 57, he regained sight of the vehicle. *Id.* Officer Erickson then got behind the vehicle and observed it drift from the right lane over the white dotted line into the left. (R.41:10/ A.App.5). Erickson estimated that half of the vehicle width crossed the white dotted line. *Id.* This occurred two times. Erickson also noted that the vehicle was traveling 45 miles per hour in a 55 mile per hour zone. However, Erickson acknowledged that it was quite windy on that date. *Id.*

Officer Erickson testified that he followed the semi for three tenths of a mile with his lights and sirens activated before the vehicle pulled over. Erickson conceded that there was nothing unusual about the way that the semi pulled to the side of the road. (R.41:11/A.App.6). Erickson further acknowledged that the complainant was identified.

After stopping the vehicle Officer Erickson identified the driver as Mr. Gossett. Erickson asked Mr. Gossett to exit the vehicle, and walk to the rear. As Mr. Gossett walked to the rear of the vehicle, he put his right hand on the side of the cab, Erickson thought to steady himself. (R.41:12/A.App.7). Erickson advised Mr. Gossett of the complaint, and Mr. Gossett indicated the driving behavior was the result of the extremely windy weather. (R.41:11/ A.App.6).

Officer Erickson noticed Mr. Gossett was chewing gum, but did not testify that he observed an odor of intoxicant. Officer Erickson asked Mr. Gossett to perform a preliminary breath test (PBT) and Mr. Gossett said he would. Erickson knew a second officer, Deputy Maglio, was on the way, so he waited to perform the PBT until Maglio arrived. (R.41:13/ A.App.8). Erickson had Mr. Gossett blow into the machine, however before seeing the result, he handed the PBT to Deputy Maglio and said “Tell me if it’s positive or negative. I don’t want to know the number.” *Id.*

Officer Erickson then heard the click of the machine and knew it was done evaluating, Deputy Maglio then asked Mr. Gossett if he was sure he had not been drinking. Erickson explained that after hearing that question, he knew it was a positive result. (R.41:14/ A.App.9).

The Plaintiff citing to *County of Jefferson v. Renz* argued that “the legislature authorizes police officers to request a commercial driver to submit to a PBT with the minimum of suspicion.” Plaintiff counsel argued that the facts in Mr. Gossett’s case supported the request for the PBT. Defense counsel argued that the Village offered no evidence that Officer Erickson observed an odor of intoxicant, slurred speech, or

bloodshot eyes, (R.41:16/ A.App.10) and without additional facts the evidence was insufficient to continue the detention and request Mr. Gossett provide preliminary breath test (PBT). The Court denied the defendant's motion finding that the evidence supported the request for a PBT. However, the court indicated that had Mr. Gossett been operating a non-commercial motor vehicle it would have clearly been improper to request a PBT based on the elicited facts. (R.41:20/ A.App.11). A written Order denying said motion was filed on November 11, 2014. Mr. Gossett timely filed a Notice of Appeal on February 9, 2015.

STANDARD OF REVIEW

An appellate court will uphold a lower court's finding of fact unless clearly erroneous, *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999) but whether those facts rise to the requisite level of suspicion is a question of law that is reviewed de novo. *Id.*

ARGUMENT

OFFICER ERICKSON DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO REQUEST THAT MR. GOSSETT PERFORM A PRELIMINARY BREATH TEST

Under Wis. Stat. §343.303, a law enforcement officer may request a commercial motor vehicle operator to provide a

sample of his breath for a preliminary breath test screening when the officer detects any presence of alcohol or has reason to believe that the operator is violating Wis. Stat. §346.63(7). In determining whether an officer had the requisite level of suspicion, the court looks at the totality of the circumstances, in light of the officer's training and experience. See *State v. Kutz*, 2003 WI App. 2005, ¶¶11-12, 267 Wis.2d 531, 671 N.W.2d 660 and *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct.App. 1994). In interpreting Wis. Stat. §343.303, the Court in *County of Jefferson v. Renz*, 231 Wis.2d 293, 310-311, 603 N.W.2d 541 (1999) stated that "if the person stopped is a commercial driver, the officer may request a PBT upon detection of "any presence" of an intoxicant or if the officer has "reason to believe" the driver had been operating the vehicle while intoxicated." "If either the "any presence" or the "reason to believe" standard is satisfied, the officer may request a PBT breath sample from a commercial driver." *State v. Goss*, 2011 WI 104, at ¶12, 338 Wis.2d 72, 806 N.W.2d 918. .

Because the record here does not support the fact that Officer Erickson observed "any presence" of alcohol, the sole issue is whether Officer Erickson had reason to believe that Mr. Gossett was operating the vehicle while intoxicated. The reason

to believe standard is lower than the “probable cause to believe” necessary to request a non-commercial motor vehicle driver to submit to a PBT but higher than the reasonable suspicion justifying an investigatory stop. See *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999). Thus, Erickson needed sufficient reason to believe that Mr. Gossett was operating his commercial motor vehicle while intoxicated.

The evidence adduced at the motion hearing did not support Officer Erickson’s request that Mr. Gossett provide a PBT sample. Other than the driving behavior, which was easily explainable in the extremely windy conditions, Officer Erickson’s testimony is that Mr. Gossett put his hand on the side of the vehicle after he exited the semi and walked to the rear. Officer Erickson did not testify that he observed an odor of intoxicant, slurred speech, or anything unusual with Mr. Gossett’s eyes. Nor did Officer Erickson testify that he made any other observations consistent with Mr. Gossett being impaired as he operated his commercial motor vehicle. While Officer Erickson and the caller observed Mr. Gossett’s truck deviate from its lane and travel below the speed limit, the record is clear that it was extremely windy on that afternoon. Finally, the fact that Mr. Gossett put his hand on the vehicle adds little to

the conclusion that Mr. Gossett was operating the semi while intoxicated.

It is clear that Officer Erickson did not observe the presence of alcohol. Furthermore, the testimony elicited at the motion hearing did not support a reason to believe that Mr. Gossett was operating his commercial motor vehicle while he was impaired thus justifying the request for a PBT.

CONCLUSION

Because Officer Erickson did not possess the requisite level of suspicion to request Mr. Gossett provide PBT sample, the court should have suppressed all evidence obtained after the test. The Court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 12th day of May, 2015.

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 15 pages. The word count is 2785.

Dated this 12th day of May, 2015.

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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 May, 2015.

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 May, 2015.

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APPENDIX