

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

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Appeal No. 2015AP000462  
Shawano County Circuit Court Case No. 2014TR004106

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IN THE MATTER OF THE REFUSAL OF KORY V. AMBROZIAK

COUNTY OF SHAWANO,  
Plaintiff-Respondent,

vs.

KORY V. AMBROZIAK,  
Defendant-Appellant.

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AN APPEAL FROM THE JUDGMENT OF CONVICTION BEFORE THE  
HONORABLE JAMES R. HABECK, SHAWANO COUNTY CIRCUIT COURT

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BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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## TABLE OF CONTENTS

	Page
STATEMENT ON ORAL ARGUMENT.....	1
STATEMENT ON PUBLICATION .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS.....	2
STANDARD OF REVIEW.....	4
ISSUE .....	4
CONCLUSION .....	7
CERTIFICATION ..	7
APPENDIX (Exhibit A, B, C)	
CASES CITED	
State v. Secrist, 224 Wis. 2d 201, 207, 208 (1999).....	4
State v. Krier, 165 Wis. 2d 673 (Ct. App. 1991).....	4
State v. Betow, 226 Wis. 2d 90, 94, 95, (Ct. App. 1999).....	5
State v. Lange, 317 Wis. 2d 383 at 397 (2009).....	5
State v. Babbitt, 188 Wis. 2d 349, (Ct. App. 1994).....	6
State v. Mallick, 210 Wis. 2d 427, (Ct. App. 1997).....	6
County of Jefferson v. Renz, 231 Wis. 2d, 293 (1999).....	6

## COUNTY ORDINANCE

2-82 2(b) . . . . .	2, 4
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## STATUTES CITED

Wis. Stat. 346.63(1)(a) . . . . .	2
Wis. Stat. 343.305(9) . . . . .	2
Wis. Stat. 343.05(9) . . . . .	4

## OTHER AUTHORITIES

Rule 809.22(2)(b) . . . . .	1
Rule 809.23(1)(b)1 . . . . .	1

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

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Appeal No. 2015AP000462  
Shawano County Circuit Court Case No. 2014TR004200

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COUNTY OF SHAWANO,  
Plaintiff-Respondent,

v.

KORY V. AMBROZIAK,  
Defendant-Appellant.

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AN APPEAL FROM THE JUDGMENT OF CONVICTION BEFORE THE  
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---

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT

The plaintiff-respondent believes oral argument is unnecessary in this case pursuant to Rule 809.22(2)(b) Wis. Stats. The brief will fully develop and explain the issues, therefore, oral argument would be of little value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The plaintiff-respondent believes publication of this case would also be unnecessary pursuant to 809.23(1)(b)1 Wis. Stats. as this case involves the application of well-settled rules of law to a common fact situation.

## STATEMENT OF THE CASE

Defendant-appellant, Kory V. Ambroziak, was arrested and charged for OWI 1st in violation of 346.63(1)(a) Wis. Stats, and a local county ordinance for Disorderly Conduct with a Motor Vehicle, 2-82 2(b) (App B), on August 30, 2014, and subsequently charged with a refusal in violation of 343.305(9) for not providing a breath sample when requested. Ambroziak filed a Request for Refusal Hearing through his attorney on September 8, 2014. The Refusal Hearing was held on December 19, 2014, in Menominee/Shawano County Circuit Court Branch 1, Honorable James R. Habeck, presiding. Based upon the testimony of Shawano County Deputy David Rogers the Circuit Court found Ambroziak unreasonably refused the requested breath test.

The defendant-appellant now appeals the Circuit Court decision.

## STATEMENT OF THE FACTS

On Saturday, August 30, 2014, Deputy David Rogers of the Shawano County Sheriff's Department was on duty in uniform driving a marked squad performing a regular patrol. (Tr. 3; 25) At approximately 12:32 a.m. he stopped on Mill Street where it's intersected by Cedar Street in the Village of Eland, Shawano County, (Tr. 4; 3, 5, 20) Deputy Rogers was the third vehicle in line. (Tr. 3; 11) Deputy Rogers observed the first vehicle in line performing what he calls a "brake stand", which means a vehicle driver depresses the accelerator and brake at the same time. (Tr. 4; 12-15) Deputy Rogers observed this "brake stand" to cause the tires to squeal and produce a large amount of smoke. (Tr. 4;

14-15) The vehicle then pulled forward and Deputy Rogers activated his emergency lights to stop the vehicle and issue the driver a citation for violation of the county ordinance of Disorderly Conduct with a Motor Vehicle. (Tr. 4; 17) The vehicle drove 100 to 200 feet down the road and pulled over. (Tr. 5; 6)

Deputy Rogers observed the vehicle's driver's door open, a male exit and placed his hands behind his back. (App C; 1) Deputy Rogers had to repeatedly tell the male to get back into the vehicle before he actually did as Deputy Rogers approached. (Tr. 6; 25 and Tr. 7; 4-5) Deputy Rogers could smell burnt rubber as he approached the vehicle. Deputy Rogers then informed the driver who he identified as Kory V. Ambroziak the reason for the stop. (Tr. 5; 16)

Ambroziak stated he knew he was in trouble. (App C; 1) When Deputy Rogers asked why, Ambroziak stated he was on probation and he shouldn't be drinking alcohol. (Tr. 8; 5) Ambroziak stated he was celebrating his 21st birthday and had just come from a bar where he had drank, "a lot". (Tr. 8; 10, 14, 19) Deputy Rogers observed Ambroziak to have slurred speech, a strong odor of intoxicants coming from his person, and bloodshot eyes. (Tr. 6; 24 and Tr. 9; 3) Deputy Rogers also noticed Ambroziak stagger or have trouble walking. (Tr. 15; 3) Based upon these observations Deputy Rogers believed Ambroziak may have been operating while intoxicated. (Tr. 9; 9)

Deputy Rogers then requested Ambroziak perform standardized field sobriety tests and take a preliminary breath test. (Tr. 7; 20, 24) and (Tr. 12; 13, 14) Ambroziak refused to do either. (Tr. 7; 20, 24) and (Tr. 12; 13-14) Ambroziak was placed under arrest for OWI and transported to the Shawano

County Jail for intoximeter test. (App C; 2) After being read the Informing the Accused Form Ambroziak refused the test. (Tr. 11; 7-14)

### STANDARD OF REVIEW

In determining whether there is sufficient suspicion to continue a detention an appellate court accepts the circuit court's factual determination unless clearly erroneous, but application of those facts to constitutional principles is a question of law and it is reviewed de novo *State v. Secrist*, 224 Wis. 2d 201, 207, 208 (1999).

### ISSUE

**THE TRIAL COURT PROPERLY CONCLUDED THE DEPUTY HAD GATHERED ENOUGH SPECIFIC ARTICULABLE FACTS AND REASONABLE INFERENCES FROM THOSE FACTS FOLLOWING THE STOP OF THE DEFENDANT TO PROVIDE PROBABLE CAUSE TO MAKE A REASONABLE DEPUTY BELIEVE THE DEFENDANT WAS OPERATING WHILE INTOXICATED**

The defendant-appellant stipulates that the only issue regarding a Refusal Hearing under Subsection 343.05(9) Wis. Stats. that is at issue here, is whether the deputy had probable cause to believe that the defendant was operating or driving a motor vehicle while under the influence of an intoxicant. In this case the deputy stopped the Ambroziak vehicle to issue a county ordinance for Disorderly Conduct with a Motor Vehicle. 2-82 2(b) A civil forfeiture type violation can be the basis for a valid stop. *St. v. Krier*, 165 Wis. 2d 673 (Ct. App. 1991). Once a valid traffic stop is made an officer is entitled to conduct an investigation into a new violation of law. *St. v. Betow*, 226 Wis. 2d 90, (Ct. App. 1999). If that officer becomes aware of additional suspicious factors which would give rise to

articulable suspicion that a person has committed or is committing an offense separate and distinct from the act that prompted the officer's initial stop. *Id.* at 94, 95. In the instant case upon Deputy Rogers encountering Ambroziak he developed numerous specific and articulable factors which would lead a reasonable officer based upon his training and experience to suspect Ambroziak was operating while intoxicated.

First, the deputy would have been aware that this was a very early time on a Saturday morning, a time when it has been established people tend to consume more intoxicants than during other times of the week. *St. v. Lange*, 317 Wis. 2d 383 at 397 (2009).

Second, soon after encountering Ambroziak, Deputy Rogers was able to detect the smell of intoxicants coming from the person of Ambroziak.

Third, early on in their interactions Ambroziak admitted to Deputy Rogers that he had been out drinking as he was celebrating his 21st birthday. For many people the rite of passage that is the turning of 21 years of age is associated with your first opportunity to go out and legally drink alcohol. Unfortunately, this usually entails drinking far in excess. Ambroziak himself admits to drinking "a lot" at a bar.

Fourth, Deputy Rogers also observed Ambroziak to have bloodshot eyes and slurred speech. He also noticed a stagger or difficulty in walking when Ambroziak left his vehicle.

Fifth, when asked to perform the standardized field sobriety tests by Deputy Rogers; Ambroziak declined. The refusal to perform standardized field



sobriety tests have been determined constitutional in determination of probable cause to arrest for Operating while Intoxicated as well as constitutional in the use against a defendant at trial. See *State v. Babbitt*, 188 Wis. 2d 349, (Court of App. 1994) and *State v. Mallick*, 210 Wis. 2d 427, (Ct. of App. 1997).

Sixth, when requested to take a preliminary breath test Ambroziak refused. A PBT helps an officer in the field to make a determination as to whether any and if any how much alcohol a person may have consumed. Obviously, an officer would want to use this in forming probable cause to determine whether Operating while Intoxicated to be conducted. *County of Jefferson v. Renz*, 231 Wis. 2d, 293 (1999).

At the time Deputy Rogers placed Ambroziak under arrest for Operating While Intoxicated he had certain specific articulable facts that either were a direct sign of intoxication or were moves by Ambroziak to avoid anything that would show just how intoxicated he was. A reasonable officer in Deputy Rogers position could have taken these factors and reasonably would come to the conclusion that Ambroziak was intoxicated.

## CONCLUSION

Based on these foregoing law and arguments the plaintiff-respondent requests this court to deny the defendant-appellant request to overturn and vacate the decision of the trial court.

Dated this 25th day of June, 2015

RESPECTFULLY SUBMITTED:

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Scott E. Niemi  
Attorney for Plaintiff-Respondent  
State Bar No. 1030867

## CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional spaced font. The length of the brief is 7 pages containing 1,465 words.

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Scott E. Niemi  
Attorney for the Plaintiff-Respondent

**CERTIFICATE OF COMPLIANCE  
WITH WIS. STATS. §(RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief and appendix, if any, which complies with the requirements of Wis. Stats. §(Rule) 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 25th day of June, 2015.

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Scott E. Niemi  
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## APPENDIX

## APPENDIX TABLE OF CONTENTS

Exhibit A – Refusal Hearing Transcript from December 19, 2014

Exhibit B – Disorderly Conduct with a Motor Vehicle Ordinance

Exhibit C – Two-page Narrative Report of Deputy David Rogers

## 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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 or 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 25th day of June, 2015

Respectfully Submitted,

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