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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

In the matter of the refusal of David Francis Walloch:

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2015AP000574

v.

DAVID FRANCIS WALLOCH,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER OF THE
CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH III,
THE HONORABLE TODD K. MARTENS, PRESIDING

Emily Bell
State Bar Number: 1065784

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ISSUES PRESENTED

1. Did the trial court err in holding that the State had sufficiently identified the Defendant as the person who refused chemical testing under Wis. Stat §343.305(9)(a)(5)?
 - a. The trial court answered no, holding the state had identified the Defendant.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant requests neither oral argument nor publication.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This is a refusal action, a special proceeding under Wis. Stat. §343.305(9). The scope of a refusal hearing is limited to 1) whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence, 2) whether the officer complied with the implied consent law, and 3) whether the person refused to permit the test. Wis. Stat 343.305(9)(a)(5). Id. The Plaintiff, in this case the State, bears the burden of establishing every element of a refusal hearing.

On October 15, 2014, a refusal hearing was held in this case. (R, 6). The state presented two witnesses, Officer Andrew Mammen, and Lieutenant Joseph Cashin. (R, 6). Defendant did not personally appear, and

instead chose to be represented by his counsel, Attorney Emily Bell. (R, 6). Both state witnesses testified that they made contact with a suspect on the evening of July 29th, 2014 and that neither of them had ever met this person in any capacity prior to that evening. (R 6, p. 21 & p. 34). Both witnesses testified at length regarding their interactions with the suspect. (R, 6). However, in their descriptions of their interactions with the suspect, neither testified to asking the suspect his name, nor to the suspect volunteering this information. (R, 6). While there is testimony regarding the suspect's demeanor, neither officer testified to a physical description of the suspect, such as eye and hair color, height, etc. (R, 6). Neither testified to verifying the suspect's identification against any form of picture or government identification, such as a driver's license. (R, 6). In fact, neither testified to asking for or viewing a driver's license or other form of identification at all. (R, 6). The only reference to the identifying the suspect was a single word response to a leading question by the State:

Q: On July 29th, 2014, do you recall conducting an investigation of and subsequently arresting an individual that you then identified as David Walloch; W-A-L-L-O-C-H?

A: Yes.

(R 6, p. 6-7). While the State and its witnesses continued to refer to the suspect as “Mr. Walloch” and “the defendant,” no testimony was ever given regarding how this identification was made or what caused the witness to believe the identification was reliable. (R, 6). Defendant was not present in the court room, and his counsel did not stipulate to his identification as the suspect the witnesses had contact with. (R, 6).

ARGUMENT

The State Failed to Prove Identification of the Suspect, and Because of This, it Also Failed to Prove Defendant Refused to Permit the Test

The State bears the burden of identifying the defendant. See *Village of Butler v. Clay*, No. 2009AP1763 (Wis. App. 1/13/2010) (Wis. App., 2010), ¶7. There is no requirement that the state meet its burden through a courtroom identification, see *Id.*, but at a minimum the state must offer evidence that the person in question is, in fact, the defendant. In failing to identify the suspect, the State failed to prove that defendant David Walloch was the person who refused to permit the test in this case. This is different than the “actual driver” issue presented in *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300 (Wis., 1986). There, the issue wasn’t whether the defendant was the person who took the test, but rather whether he was the actual driver, because he was apprehended at his home and not in his

vehicle. Id. Additionally, there was evidence another person was driving the vehicle. Id. While the identity of the driver was at issue in *Nordness*, the identity of the person the officer believed to be the driver, and believed to be under the influence, and who refused the chemical test, was not. Id. The officer knew the defendant, and testified as such. Id. The court held that the person did not have to actually be the driver in order for the officer to have probable cause that the person was the driver, and thus was subject to the implied consent law. Id. *Nordness* is the opposite of the situation presented in the present case.

Here, both witnesses testified that they had never met the suspect or had any contact whatsoever with him prior to July 29, 2014. There was no testimony regarding how the officers ascertained the suspect was David Walloch, and short of one leading question, no testimony that the suspect even was David Walloch.

There is no question that someone was driving on July 29, 2014, nor is defendant challenging that the officers had probable cause to believe that person was under the influence of alcohol, or that the person refused to voluntarily take a chemical test. However, the state failed to prove to any standard that the person in question was defendant David Walloch.

CONCLUSION

The defendant-appellant respectfully prays that the matter be reversed and remanded for a new decision consistent with a finding that the state failed to meet its burden in proving that David Walloch refused chemical testing in the present case.

Signed and dated at Glendale, Wisconsin this 4th day of June, 2015.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

AMENDED CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 900 words.

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 Wis. Stats. §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 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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated at Glendale, Wisconsin this 5th day of June, 2015.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

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 Wis. Stat. §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.

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Respectfully submitted,
MISHLOVE & STUCKERT, LLC

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