

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

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**Appeal No. 2015AP000585
Winnebago County Circuit Court Case Nos.
2014 TR 0007212**

COUNTY OF WINNEBAGO,

Plaintiff-Respondent,

v.

KELLI MARIE KOSMOSKY,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE ORDER DENYING THE
DEFENDANT'S MOTION FOR SUPPRESSION OF
EVIDENCE IN THE CIRCUIT COURT FOR
WINNEBAGO COUNTY, THE HONORABLE THOMAS
J. GRITTON, PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT KELLI MARIE KOSMOSKY**

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
ARGUMENT	3
CONCLUSION	4
FORM AND LENGTH CERTIFICATION	5
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).	6
APPENDIX CERTIFICATION	7
APPENDIX.	9

Excerpts from Motion Hearing- 10/7/2014. . . ReplyApp.1

TABLE OF AUTHORITIES

Page No.

CASES

Wisconsin Supreme Court

<i>State v. Nordness</i> , 128 Wis.2d 15, 381 N.W.2d 300 (1986).....	3
---	---

Wisconsin Court of Appeals

<i>Village of Elkhart Lake v. Borzyskowski</i> , 123 Wis.2d 185, 366 N.W. 2d 506 (Ct. App 1985).....	4
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ARGUMENT

While the County argues that Trooper Koehler had sufficient probable cause to believe that Ms. Kosmosky was operating her vehicle while impaired, the County does not address the crux of Ms. Kosmosky's argument that they failed to establish a time of driving.

This is not a case where the motion hearing record reveals a time of operation, or where the officer felt the hood of the vehicle to establish that it was warm thus suggesting recent operation. In fact, Trooper Koehler concedes that prior to the arrest, he did not determine the time in which the vehicle was driven to the location. (R.30:12/ ReplyApp. 1). The issue is whether based on the facts adduced at the motion hearing, would a reasonable officer conclude that Ms. Kosmosky was intoxicated at the time of operation. 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 ...that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). Probable cause requires that at the moment of

arrest, an officer knew of facts and circumstances that were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985).

Because the record does not reveal a time of operation a reasonable officer would not have concluded that Ms. Kosmosky was impaired at the moment of operation.

CONCLUSION

Because of the above the evidence was insufficient to establish that Ms. Kosmosky was impaired at the moment that she operated her vehicle. Thus, the trial court erred in denying Ms. Kosmosky's motion for suppression of evidence. The court should reverse the trial court's ruling and vacate the Judgment of Conviction.

Dated this 29th day of June, 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 10 pages. The word count is 1219.

Dated this 29th day of June, 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 29th day of June, 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 29th day of June, 2015.

Respectfully submitted,

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APPENDIX