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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2015AP000770
Outagamie County Circuit Court Case Nos.
2013CV001086

LITTLE CHUTE VILLAGE MUNICIPAL COURT,

Plaintiff-Respondent,

v.

DENNIS M. FALKOSKY,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, THE HONORABLE VINCENT R. BISKUPIC, PRESIDING

THE REPLY BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT DENNIS M. FALKOSKY

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ARGUMENT

Initially, the Village takes issue with Mr. Falkosky's contention that the presumed fact, the alcohol concentration, is given prima facie effect pursuant to the language of Wis. JI-Criminal 2668. Brief of Plaintiff-Respondent page 5. The Village contends that Wis. JI-Criminal 2668 does not give the test result said prima facie effect. Clearly, where a test is taken within three hours of operation, Wis. JI-Criminal 2668 affords the test result the prima facie effect pursuant to Wis. Stat. §885.235(1g). If the test is taken within three hours of the alleged operation, and the result is at or in excess of .08, the test is prima facie evidence that the defendant was impaired and had a prohibited alcohol concentration. The test result is given said prima facie effect. The jury instruction allows the jury to use the prima facie effect to presume that a test result taken within three hours of driving is the alcohol concentration at the time of driving.

In fact, even the jury instructions committee acknowledged that Wis. JI-Criminal 2668 provides the test the prima facie effect. Wis. JI-Criminal 2600 states that "The committee concluded that where there is a problem with the

"blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it 'prima facie effect'". ***Id.*** at section VII, subsection C. The Village is wrong, Wis. JI-Criminal 2668 as read in this case clearly instructed the jury to give the test result the prima facie effect.

Next, the Village, citing to ***State v. Vick,*** 104 Wis.2d 678, 312 N.W.2d 489 (1981)**,** contends that there is a rational connection between the basic fact, that the defendant had a prohibited alcohol concentration at the time of testing, and ultimate presumed fact, that the defendant had a prohibited alcohol concentration at the time of the driving. Brief of Plaintiff-Respondent pages 8-11. In ***Vick,*** the issue was whether the presumed fact "that the defendant was under the influence of an intoxicant at the time of driving "more likely than not" flowed from the proven fact of intoxication at the time of testing." ***Vick*** at 695.

The issue herein is a little different in as much as the jury found Mr. Falkosky not guilty of operating a motor vehicle while impaired. So whether he was impaired was decided by the jury. Thus, the issue is whether the presumed fact that Mr. Falkosky had a prohibited alcohol concentration at the time of driving more likely than not flowed from the proven fact that

Mr. Falkosky's had a prohibited alcohol concentration at the time of the test. To support its position that the presumed fact is more likely than not to flow from the basic fact, the Villages provides a laundry list of things suggesting that Mr. Falkosky was impaired at the time of driving. The jury rejected these facts when they found Mr. Falkosky not guilty.

Contrary to the Village's contention, Mr. Falkosky established that there was a problem with his position on the blood alcohol curve. The Village suggests that laying said foundation is not relevant in the present matter. Brief of Plaintiff-Respondent page 11. Specifically, Wis. JI-Criminal 2668 requires that a foundation be laid. The instruction committee suggested replacing the presumption and prima facie effect language of Wis. JI-Criminal 2668 with that of Wis. JI-Criminal 234 when the defendant has established that there is a problem with the his position on the blood alcohol curve.

Additionally, because of the timing of the alcohol consumption, the presumed fact that Mr. Falkosky had a prohibited alcohol concentration at the time of the driving, did not "more likely than not" flow from the proven fact of a prohibited alcohol concentration at the time of testing.

The analyst from the State Lab of Hygiene testified regarding absorption of alcohol. He testified that it takes 30-90 minutes for full absorption of one drink. He testified that a person of Mr. Falkosky's size and weight would have to have 8 ounces of 80 proof alcohol unabsorbed to be under .08 at the time of operation. (R.19:103-108/ Reply App. 1-6). Furthermore, Mr. Falkosky testified that he had two pint glasses within less than 90 minutes of driving, and the last drink within about 15 minutes of being stopped. (R.19:126-131/ ReplyApp. 7-12) The court found that Mr. Falkosky laid an appropriate foundation for a curve defense, however, the court refused to replace the presumptive language of Wis. JI-Criminal 2668, with that in Wis. JI-Criminal 234.

Furthermore, the Village contends that Mr. Falkosky has not argued that reading both Wis. JI-Criminal 2668 and 234 in their entirety was inconsistent. Brief of Plaintiff-Respondent page 13. However, the entirety of Mr. Falkosky's argument is that it was error to read both.

Finally, the Village contends that if the court erred, the error was nonetheless harmless. Brief of the Plaintiff-Respondent page 15. "The standard for harmless error is whether there is a 'reasonable possibility' that the error

contributed to the outcome of the action." ***Martindale v. Ripp,*** 2001 WI 113, ¶71, 246 Wis.2d 67, 629 N.W.2d 698. Obvious from the verdicts, it is clear that the jury did not think that Mr. Falkosky was impaired. Despite finding Mr. Falkosky not guilty of being impaired, the jury found he had a prohibited alcohol concentration. There is a reasonable possibility that instructing the jury to afford the test result the prima facie effect despite no rational connection between the basic and presumed fact contributed to the outcome in the case. Because of this, the error was not harmless.

CONCLUSION

Because the trial court erroneously exercised its jurisdiction when it instructed the jury reading the entirety of both JI Criminal 2668 and 234, and because Mr. Falkosky was prejudiced by the error, this Court should vacate the judgment of conviction and grant Mr. Falkosky a new trial.

Dated this 2nd day of August, 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 13 pages. The word count is 1976.

Dated this 2nd day of August, 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 2nd day of August, 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 2nd day of August, 2015.

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APPENDIX

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