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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 2015AP2138
2015AP2139

In re the refusal of Sana Gutierrez:

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
SANA GUTIERREZ,
Defendant-Appellant.

WAUKESHA COUNTY,
Plaintiff-Respondent,
v.
SANA GUTIERREZ,
Defendant-Appellant.

APPEALS FROM THE CIRCUIT COURT OF WAUKESHA COUNTY,
THE HONORABLE MICHAEL J. APRAHAMIAN, PRESIDING

# BRIEF OF DEFENDANT-APPELLANT

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# BRIEF OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED

Whether the arresting officer used reasonable means to convey the implied consent warnings to Defendant.

The Circuit Court held yes.

Whether the evidence was sufficient to convict Defendant of operating a motor vehicle while under the influence of an intoxicant.

The Circuit Court held yes.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that oral argument is unwarranted. The briefs fully present the issues on appeal and fully develop the theories and legal authorities on each. However, publication is requested, because few published cases address these issues.

## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

This is a review of an order of the Hon. Michael J. Aprahamian, Circuit Court Judge, Waukesha County, presiding, which was entered on September 9, 2015, and which found Defendant Sana Gutierrez guilty of operating a motor vehicle while under the influence of an intoxicant, in violation of Wis. Stats. Sec. 346.63(1)(a), first offense, and which found that Defendant refused to provide a breath sample upon arrest, as required by Wis. Stats. Sec. 343.305. Gutierrez was also found guilty of operation without required lamps lighted, but this conviction is not on appeal.

Specifically, Gutierrez contends that the evidence was insufficient to show by clear and convincing evidence that she was under the influence of an intoxicant. She further contends that, given the serious medical condition she was suffering at the time the informing the accused form was read to her (Gutierrez is diabetic, and her blood sugar level was 303), the arresting officer did not reasonably convey to her the law's requirements.

On October 20, 2015, Gutierrez filed timely notices of appeal.

## B. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

### Statement of Facts

Sana Gutierrez is a Chicago resident who was staying at a hotel in Brookfield near Brookfield Square mall, and was returning to her hotel after visiting with her brother in Milwaukee on June 27, 2014, at around 2:00 a.m. She was observed driving westbound on I94 by Deputy Christopher Douglas, without her headlights or taillights illuminated. R15, p.6.

The officer followed Gutierrez, observed her exit on Moorland Rd., and continue northbound. Shortly north of the exit, the two left lanes become left turn only lanes into Brookfield Square, while the two right lanes continue straight. Gutierrez drove over a curb, while switching from the left turn only lane to a straight lane. R15, pps. 7, 16-17. The officer detected a "moderate" odor of intoxicants from the vehicle, and Gutierrez admitted having one glass of wine. R.15, pps. 8-9.

Gutierrez did not have any problems producing her driver's license or proof of insurance; her speech was not slurred; she was cooperative; she did not have glassy eyes; and she did not have difficulty exiting the car or standing. R.15, pps. 17-20.

The officer administered field tests, and observed four of six clues on the HGN test. R15, p. 10. Gutierrez was wearing shoes with 4-inch high heels, which she removed for the walk-and-turn test, and the one-leg stand. The officer observed two clues on the walk-and-turn, and several clues on the one-leg stand. Gutierrez was then placed under arrest for suspicion of operating while intoxicated. R15, p. 11-12.

After being placed in the squad car, Gutierrez informed the officer she was diabetic, needed to use the bathroom urgently, and requested to adjust her blood sugar level. She also stated that she was feeling light-headed, her heart was racing, and she felt extremely hot. R.15, pps. 24-26.

The officer read Gutierrez the Informing the Accused form in the squad car, at the Sheriff's Department, after allowing Gutierrez to use the bathroom. R.15, p. 26. After the form was read, an ambulance arrived and treated Gutierrez for her extremely high blood sugar level, 303. The officer was informed of the fact that Gutierrez' blood sugar level was very high. Nevertheless, the officer did not go over the form a second time with Gutierrez, after the medical treatment. R.15, pps. 26-28. Gutierrez' normal blood sugar range is 70-150. R.15, p. 32.

Gutierrez testified she did not understand the Informing the Accused form when it was read to her. Gutierrez was never taken to the room in the Sheriff's Department where a breath analysis would be taken. R.15, pps. 40-44.

Procedural History

Gutierrez was charged with: operating without her headlights illuminated; first offense operating while intoxicated; and refusal to comply with the implied consent law.

On September 15, 2015, all three cases were tried to the court, the Hon. Michael J. Aprahamian presiding. Evidence was presented as stated above, arguments were made, and the court ruled against Gutierrez on all three cases.

On October 20, 2015, timely notices of appeal were filed. R.10. After resolving assorted

procedural issues unrelated to the merits of the cases, this court deemed the appeal in 2015AP2138 to be timely filed, and the two appeals were consolidated.

## STANDARD OF REVIEW

Whether the officer used reasonable means to convey the necessary implied consent warnings under Wis. Stat. sec. 343.305(4) is a question of law that an appellate court reviews de novo. To the extent the decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. *State v. Begicevic*, 2004 WI App 57, par. 11, 270 Wis.2d 675, 685-686, 678 N.W.2d 293.

A conviction can only be set aside for insufficiency of the evidence if the evidence, viewed most favorably to the government and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt by clear, satisfactory and convincing evidence. *State v. Poellinger,* 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

## ARGUMENT

### THE ARRESTING OFFICER DID NOT USE REASONABLE METHODS TO CONVEY THE IMPLIED CONSENT WARNINGS TO DEFENDANT

When a motorist fails to comply with a request to provide a breath sample under the implied consent law, the motorist is limited as to the issues he can raise in her defense. Among the issues are “Whether the officer complied with sub. (4).” Wis. Stats. Sec. 343.305(9)(a)5.b.

Subsection (4) provides that the arresting officer must inform the driver that she must take a

test, and that if she doesn't her operating privileges will be revoked.

It is not disputed in this case that the officer did so. However, Wisconsin case law has interpreted this provision to require that, in individual cases, the officer must do what is necessary to use reasonable means to convey the warnings.

In *State v. Piddington*, 2001 WI 24, 241 Wis.2d 754, 623 N.W.2d 528, the driver had been profoundly deaf since birth. The court held that, the standard -- whether the officer reasonably conveyed the warnings -- is based upon the objective conduct of the officer rather than upon the comprehension of the accused driver. *Id.*, at par. 21. Ultimately, the Supreme Court concluded that the officer used reasonable efforts to convey the warnings. *Id.*, at par. 33.

Interpreting *Piddington*, the Wisconsin Court of Appeals held in *State v. Begicevic*, 2004 WI App 57, 270 Wis.2d 675, 678 .W.2d 293, that the officer failed to use reasonable means to convey the warnings to the defendant. The defendant's primary language was Croatian, and he spoke only some German and some English. *Id.*, at par. 11.

The court concluded,

> "[The officer] did not attempt to obtain an interpreter. When [the officer] read the Informing the Accused in English, [the German translator] did not translate the form verbatim nor did he make an effort to explain the rights in the form in German to Begicevic. In *Piddington,* the trooper used speech-read, gestures and notes to communicate with Piddington. Additionally, he was assisted by a

> police officer who knew ASL and Piddington was given the opportunity to read the implied consent warnings and initial that he understood each paragraph. [The officer's] attempts to reasonably communicate with Begicevic fall woefully short of the standard set by the trooper in *Piddington. Id.*, at par. 21(footnote omitted).

The case at bar does not involve problems with language, but with a dangerous health issue. Nevertheless, the principles set forth in *Piddington* and *Begicevic* apply, as the circuit court recognized.

At issue, then, is whether the officer's attempts to convey the warnings were reasonable, in light of Gutierrez' undisputed medical problems.

Here, the officer read the warnings immediately upon arrest, while Gutierrez was still in the squad car under medical distress. The officer failed to go over the form a second time, after the medical emergency had passed, when they were back at the Sheriff's Department.

Gutierrez acknowledges that it is not unreasonable per se for an officer to read the informing the accused form in the squad car, rather than back at the station, where the breath test will occur. Nevertheless, Gutierrez submits that it is best practice to do so, and notes that both the City of Port Washington and City of Milwaukee police departments provide that the form is not to be read until processing.

The City of Milwaukee procedures, General Order 2014-41, p.6, provide that the informing the accused warning shall be given at the station if the

officer intends to give a breath test rather than a blood test.
http://city.milwaukee.gov/ImageLibrary/Groups/mpdAuthors/SOP/OPERATEWHILEINTOXICATED-1201.pdf

In contrast, if a blood test at a hospital is intended, a trip to the station would be superfluous. But the officer here intended no such thing.

The City of Port Washington procedures, General Order 6.2.3, pages 4-5, also provide that the warnings must be given at the police station under these circumstances.
http://www.pwpd.org/pdf/go6_2_3.pdf

In the case at bar, it is particularly evident why it is more reasonable to read the warnings at the station, after the situation is calmer. It is undisputed that, at the time the warnings were given, Gutierrez was in medical distress. A blood sugar reading of 303 is dangerous, and required medical treatment.

While the officer did not know at the time he read the form that Gutierrez' blood sugar was that high, he knew so after the treatment by the EMTs. R.15, p.27, lns. 3-9. He also knew that Gutierrez needed to go to the bathroom, was lightheaded, and feeling hot. He acknowledged that it would not have been burdensome to go over the form again after Gutierrez was stabilized. R.15, pps. 27-28.

This Court should be understandably loath to create a requirement that warnings be given a second time after a "refusal" has occurred. Gutierrez acknowledges that it may be common for suspects to feign medical conditions to evade the consequences of their actions.

Nevertheless, this case involves very limited circumstances: (1) the warning was given in the squad car rather than at the station; and (2) it is undisputed that the suspect was suffering from a medical problem that interfered with her ability to understand the warnings. This Court should not be loath to hold that, in these circumstances, reasonableness required that the warnings should have been given to Gutierrez at the Sheriff's Department after her condition had stabilized.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT OF OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT

Gutierrez acknowledges that longstanding law provides that, even in the absence of breathalyzer test results, a defendant may be convicted of operating a motor vehicle while under the influence of an intoxicant, solely on the basis of other evidence. *State v. Burkman*, 96 Wis.2d 630, 292 N.W.2d 641 (1980). At issue is whether the other evidence in this case is sufficient.

Two elements must be proven in order to convict a defendant of a violation of sec. 346.63(1), Stats.: (1) that the defendant was driving or operating a motor vehicle; and (2) that the defendant was under the influence of an intoxicant at the time that he was driving or operating the motor vehicle. *Id.*, 96 Wis.2d at 647-648.

The first element is not in dispute.

Here, the following evidence support an inference of guilt on the second element: Gutierrez was driving without her headlights on; Gutierrez had difficulty when the lane she was in unexpectedly became a left-turn only lane; Gutierrez admitted to drinking one glass of wine;

the officer smelled a “moderate” odor of alcohol; Gutierrez failed the field sobriety tests; and Gutierrez “refused” the breath test.

The following undisputed evidence, however, significantly mitigates the inference of guilt: although the officer followed her for a significant period, he witnessed no other erratic driving, other than at the tricky lane change R15, p.16-17; one glass of wine is not enough to impair most drivers R15, p. 19, lns. 4-7; the odor of alcohol was not “strong” R15, p. 18, lns. 15-18; she had to perform the field sobriety tests in her bare feet R15, pps. 22-24; and she was suffering genuine medical distress when she “refused” the breath test.

The following evidence supports a finding of innocence: Gutierrez had no difficulty complying with the request for her driver’s license and proof of insurance R15, pps. 17-18; Gutierrez’ speech was not slurred R15, p. 18, lns. 4-6; Gutierrez was cooperative R15, p.18, lns. 7-9; Gutierrez did not have glassy eyes R15, p.18, lns. 10-14; and Gutierrez did not act erratically, have difficulty exiting the car, nor was she stumbling or staggering R15, p.20, lns.14-21.

Gutierrez did not dispute that probable cause for arrest was present, nor does she do so here. Nevertheless, the evidence stated above does not sufficiently prove the County’s allegation of guilt, in the absence of a corroborating breath test. At no point did the County contend that it could not have obtained a search warrant for Gutierrez’ blood.

Indeed, given Gutierrez’ need for medical treatment, taking her to the hospital for such treatment and a blood draw may have been the most reasonable course to take.

The facts in the case at bar are a far cry from those in *Burkman*.

The Court in *Burkman* found the following:

> Thomas McKenna testified that after the accident in which the defendant's truck struck a tree, the defendant appeared "very unsteady," seemed to "weave and buck," slurred his speech and had difficulty removing his wallet from his pocket. Officer Neeb testified that the defendant had a strong odor of alcohol on his breath when he was given the breathalyzer test. Officer Blochowiak testified that the defendant had a strong odor of alcohol on his breath at the time he was arrested, was very unstable on his feet, slurred his speech, and was unable to touch his nose with the forefinger of either hand when his eyes were closed. Blochowiak also stated that the defendant swayed and staggered when he walked, he turned around with difficulty and his turns were uncoordinated. Blochowiak testified that, in his opinion, the defendant was under the influence of an intoxicant. *Id.*, at 644-645.

In contrast to the case at bar, the facts in *Burkman* provide far more indicia of intoxication.

Other published Wisconsin cases that find sufficient evidence despite the absence of a chemical test also show far greater indicia of intoxication.

In *State v. Albright*, 98 Wis.2d 663, 666, 298 N.W.2d 196 (Ct.App.1980), the defendant drove 87 MPH, struck a shoulder, had watery and red eyes,

a moderate odor of alcohol, failed to recite the alphabet, and fell against the patrol car.

In *City of Milwaukee v. Thompson*, 24 Wis.2d 621, 624-625, 130 N.W.2d 241 (1964), the defendant admitted drinking "quite a bit," smelt "strongly" of alcohol, had slurred speech, staggered and had to support himself against the car, and "did poorly in the balance test, walking test, finger-to-nose test, eye test, and the coin test." The officers had no opportunity to observe the defendant drive, because he approached them from his parked vehicle to ask for directions. The Supreme Court held that, even without chemical tests, the evidence supported the conviction.

It is clear that the facts in these cases are far more supportive of a finding of intoxication than in the case at bar. It is also undisputed that Gutierrez was suffering from extraordinarily high blood sugar levels at the time that the officer made his observations of her.

In light of the modest evidence of intoxication, and the undisputed evidence of medical impairment unrelated to intoxication, no trier of fact, acting reasonably, could have found guilt by clear, satisfactory and convincing evidence.

## CONCLUSION

Accordingly, Gutierrez respectfully requests that the Court of Appeals reverse the judgment of conviction for violating Wis. Stats. Sec. 346.63(1)(a), and vacate the revocation of her driver's license under Wis. Stats. Sec. 343.305.

Dated this 25th day of April, 2016

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2816 words.

Dated this 25th day of April, 2016

_____

David Ziemer

CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. SEC. 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 Wis. Stat. sec. 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 the brief filed with the court and served on all opposing parties.

Dated this 25th day of April, 2016

_____
David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 25th day of April, 2014, I mailed 10 copies of the Brief of Defendant-Appellant Sana Gutierrez to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688

_____
David Ziemer

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; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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 25th day of April, 2016

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David Ziemer