

RECEIVED

06-27-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 2015AP002138 and 2015AP002139

Circuit Court Nos. 2014TR003730 and 2014TR004059

In re the refusal of Sana Gutierrez:

State of Wisconsin,
Plaintiff-Respondent,

v.

Sana Gutierrez,
Defendant-Appellant

AND

Waukesha County,
Plaintiff-Respondent,

v.

Sana Gutierrez,
Defendant-Appellant

An Appeal From a Judgment of Conviction Entered by
the Honorable Michael J. Aprahamian, Circuit Judge, Branch 9,
Waukesha County

BRIEF AND APPENDIX OF PLAINTIFF-
RESPONDENT

Melissa J. Zilavy
Assistant District Attorney
State Bar No. 1097603
Waukesha County District Attorney's Office
515 West Moreland Boulevard
Waukesha, Wisconsin 53188
(262) 548-7076
Melissa.Zilavy@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES	1
STATEMENT OF THE ISSUES	2
POSITION ON ORAL ARGUMENT AND PUBLICATION ...	3
STATEMENT OF THE CASE AND FACTS	4-12
ARGUMENT	
I. REASONABLE MEANS USED TO CONVEY IMPLIED CONSENT WARNINGS FOR FINDING THAT REFUSAL WAS IMPROPER	13-21
a. Standard of Review	13-14
b. Relevant Law	14-18
c. Deputy Douglas used reasonable means to convey the implied consent warnings considering that he did not know Ms. Gutierrez was having a medical emergency due to high blood sugar, and, further, the evidence presented demonstrated Ms. Gutierrez did understand the implied consent warnings	18-21
II. SUFFICIENCY OF EVIDENCE FOR A FINDING OF GUILT AT A COURT TRIAL	21-25
a. Standard of Review	22
b. Relevant Law	22-23
c. Looking at the evidence in a light most favorable to the County and State, and the facts as a whole with the inferences from those facts, there was sufficient evidence for Judge Aprahamian to conclude that Ms. Gutierrez	

was impaired by alcohol and not a high blood sugar, and therefore, this Court should affirm the finding of guilt on the OWI.....	23-25
CONCLUSION.....	26
CERTIFICATION OF BRIEF.....	27
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	28
TABLE OF CONTENTS OF APPENDIX.....	i
TRANSCRIPT OF TRIAL COURT’S FINDINGS	App-1 – App-4
CERTIFICATION OF APPENDIX	App-5 – App-6
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)	App-7

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Statutes Section 346.63(1)(a) (2013-2014).... 4, 23-24

Wisconsin Statutes Sections 343.305(4) and (9)(a)..... 4, 13-14

Wisconsin Jury Instructions

Wisconsin Jury Instruction—Criminal 2663A: Operating a
Motor Vehicle While Under the Influence of An Intoxicant—
Civil Forfeiture—§ 346.63(1)(a) 23-24

Wisconsin Cases

City of Milwaukee v. Wilson, 96 Wis. 2d 11, 291 N.W.2d 452
(1980).....22

State v. Baratka, 2002 WI App 288, 258 Wis. 2d 342, 654
N.W.2d 875
..... 14

State v. Begicevic, 2004 WI App 57, 270 Wis. 2d 675, 678
N.W.2d 293
..... 13-14

State v. Hayes, 2003 WI App 99, 264 Wis. 2d 377, 663 N.W.2d
351..... 22-23

State v. Piddington, 2001 WI 24, 214 Wis. 2d 754, 623 N.W.2d
528
..... 14-20

State v. Poellinger, 153 Wis. 2d 493, 451 N.W.2d 752 (1990)
.....23

State v. Zielke, 137 Wis. 2d 39, 403 N.W.2d 427 (1987) 14-15

STATEMENT OF THE ISSUES

1. Did Deputy Christopher Douglas use reasonable means to convey the implied consent warnings to Ms. Gutierrez?

Circuit Court Answer: Yes.

2. Was there sufficient evidence to prove by clear, satisfactory, and convincing evidence that Ms. Gutierrez was guilty of Operating a Motor Vehicle While Under the Influence of an Intoxicant?

Circuit Court Answer: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE AND FACTS

Sana Gutierrez was cited for Operating While Intoxicated, First Offense, contrary to Wisconsin Statutes Section 346.63(1)(a) (2013-2014) and Refusal to Take Test for Intoxication After Arrest, contrary to Wis. Stat. § 343.305(9)(a), for an incident that occurred on June 27, 2014. (R. 15: 6.) A court trial was held in front of the Honorable Michael J. Aprahamian, Waukesha County Circuit Court Branch 9, on September 9, 2015, and Ms. Gutierrez was found guilty of OWI and found to have improperly refused. (*Id.* at 2, 65-66; State's Appendix, App-3 – App-4.)

On that June 27, 2014, around 2:00 a.m., Waukesha County Sheriff's Deputy Christopher Douglas was patrolling the area of Interstate 94 and Sunny Slope Road, in the City of Brookfield, Waukesha County, Wisconsin, when he "observed a vehicle travelling westbound with no headlights or taillights illuminated." (R. 15: 6.) Deputy Douglas did follow the vehicle as it got off I-94 on Moorland Road, and also observed the vehicle in a left turn only lane and make an evasive maneuver to get out of that lane and in the process, had both left tires go over a curb. (*Id.* at 7.) A traffic stop was conducted and Deputy

Douglas made contact with the driver of the vehicle, identified as Ms. Gutierrez. (*Id.* at 7-8.)

During his initial contact with Ms. Gutierrez, Deputy Douglas could detect a moderate odor of intoxicants coming from the vehicle, and asked Ms. Gutierrez if she had anything to drink that night. (*Id.* at 8-9.) Ms. Gutierrez stated that she had one glass of wine. (*Id.* at 9.) When asked where she was coming from and where she was going, Ms. Gutierrez stated she was coming from her brother's house and going to a hotel in Brookfield. (*Id.*) Ms. Gutierrez also stated numerous times throughout her contact with Deputy Douglas that her brother was an officer with the City of Milwaukee Police Department and asked for "professional courtesy." (*Id.*)

After running Ms. Gutierrez's information through his squad computer, Deputy Douglas did re-approach Ms. Gutierrez and asked her to perform field sobriety tests. (*Id.* at 10.) Deputy Douglas administered the Horizontal Gaze Nystagmus (HGN) test on Ms. Gutierrez, and observed lack of smooth pursuit in both eyes, and nystagmus at maximum deviation in both eyes. (*Id.*) Deputy Douglas then had Ms. Gutierrez perform the walk and turn test. (*Id.* at 11.) Ms. Gutierrez was wearing high-heeled shoes, and Deputy Douglas did ask if she wanted to take

her shoes off to perform the test, and initially, Ms. Gutierrez stated no but then changed her mind and took them off. (*Id.*) Deputy Douglas observed Ms. Gutierrez step out of the instructional position due to starting the test too early, and missed heel-to-toe on two steps on the second series of steps. (*Id.* at 11-12.) Last, Deputy Douglas had Ms. Gutierrez perform the one-leg stand test, and testified that Ms. Gutierrez put her foot down three times during the test, used her arms for balance, and was hopping. (*Id.* at 12.) Based on all of Deputy Douglas' observations, he did believe that Ms. Gutierrez was impaired due to intoxicants, and she was then placed under arrest. (*Id.*)

After being placed in handcuffs and placed into the back of the squad, Ms. Gutierrez indicated to Deputy Douglas that she needed to use the bathroom urgently and wanted to get her blood sugar kit from her vehicle. (*Id.* at 24.) Ms. Gutierrez was then transported to the Sheriff's Department, was allowed to use the restroom right away, and then placed back into the squad car. (*Id.* at 25, 28.) Deputy Douglas read Ms. Gutierrez the Informing the Accused Form verbatim, and she stated she would not submit to a breath test. (*Id.* at 13-15, 26.) Deputy Douglas indicated that while in the back of the squad and after he read Ms. Gutierrez the Informing the Accused form, Ms. Gutierrez

stated she felt hot, light-headed, and that her heart was racing, but these comments were not made before reading the form or while Deputy Douglas was reading the form. (*Id.* at 25-26, 29.) When Ms. Gutierrez told Deputy Douglas these concerns, he stated that the only thing he could do was call an ambulance, which he did do. (*Id.* at 26, 29.) Deputy Douglas further testified that while he was reading the form to Ms. Gutierrez, he did not notice her sweating or have a red face, and she seemed to be coherent and understanding of what he was saying. (*Id.* at 30.) Deputy Douglas indicated that at no time prior to Ms. Gutierrez's arrest or before the reading of the Informing the Accused did she mention anything about diabetes. (*Id.* at 13, 25-26, 29.)

EMS evaluated Ms. Gutierrez, and stated that her blood sugar was a level of 303, which Deputy Douglas generally knew was high for a blood sugar reading. (*Id.* at 27.) Ms. Gutierrez was allowed to adjust her insulin pump to correct the high blood sugar level. (*Id.*)

During his testimony, Deputy Douglas indicated that he is not familiar with all of the symptoms of someone having a high blood sugar, and did not know that one of the "major symptoms" is having to urgently use the restroom. (*Id.* at 25.) Deputy

Douglas was asked if he re-read the form to Ms. Gutierrez or ask her if she would be willing to submit to the test after she was able to adjust her insulin pump, and he indicated that he did not. (*Id.* at 27-28.)

Ms. Gutierrez also testified at the court trial, and stated that she has been a diabetic for 21 years and that her average blood sugar level was between 70 and 120. (*Id.* at 34.) Ms. Gutierrez also explained the symptoms she would be experiencing with a high blood sugar level including racing heart, frequent urination, getting sweaty, and “one of the more progressive symptoms” being “confusion, the inability to concentrate.” (*Id.*) Ms. Gutierrez indicated that she is usually the last person to realize she has these symptoms of high blood sugar. (*Id.* at 34-35.)

The day prior to her arrest and the morning of her arrest, Ms. Gutierrez explained that she was working as an account executive for Estee Lauder and was at an event at Brookfield Square Mall. (*Id.* at 34.) After the event, Ms. Gutierrez went out to dinner with her co-workers and had experienced a blood sugar low around dinner time. (*Id.* at 34, 36.)

Ms. Gutierrez testified that she was not used to the vehicle she was driving was a company car, and that she had

accidentally turned off the automatic lights prior in the day, and that was why they were off when she was pulled over. (*Id.* at 37.) She also explained that she was wearing four-inch high heels that evening, and did eventually decide to take them off to perform the tests, but she was still having issues because there was gravel on the road. (*Id.* at 38-39.)

Ms. Gutierrez stated she first realized her blood sugar was likely elevated after going to the bathroom at the Sheriff's Department and while in the back of the squad. (*Id.* at 40.) She testified that she told the officer she felt confused and disoriented, and that she needed her blood sugar kit. (*Id.*) Deputy Douglas indicated that she could not take something from her bag and asked if she wanted an ambulance, to which she stated yes. (*Id.*) Ms. Gutierrez indicated that Deputy Douglas read the Informing the Accused after the ambulance was called and after she notified him of her symptoms. (*Id.* at 41.) While Deputy Douglas was reading her the Informing the Accused, Ms. Gutierrez testified that she knew he was reading something but could not understand anything due to how she was feeling. (*Id.*) Ms. Gutierrez also testified that after Deputy Douglas read the form, she did ask if she could call an attorney. (*Id.* at 41-42.) Ms. Gutierrez stated that she did not understand

what was being read to her, and was unable to concentrate due to the symptoms of high blood sugar. (*Id.* at 44.) She also stated that if she was asked 20-30 minutes after her blood sugar level was adjusted, she would have been in a better state to comprehend what was being read to her. (*Id.*)

On cross examination, Ms. Gutierrez stated that she had one glass of wine around 11:30 p.m. that night at her brother's house. (*Id.* at 47-48.) She also admitted that when Deputy Douglas initially made contact with her during the traffic stop, she asked for professional courtesy, and stopped mentioning it once the field sobriety tests started. (*Id.* at 50-51.) Ms. Gutierrez was also asked about the medical records her attorney submitted, in which they stated that on a visit to her endocrinologist on April 21, 2014, two months prior to this OWI arrest, she told her doctor that she usually drinks six alcohol drinks two days per week. (*Id.* at 52-53.) Additionally, Ms. Gutierrez admitted that, generally, consuming alcohol increases your blood sugar level. (*Id.* at 55-56.)

After Ms. Gutierrez testified both the County and defense rested. (*Id.* at 57.) Judge Aprahamian found Ms. Gutierrez guilty of the OWI citation and that the refusal was improper. (*Id.* at 65-66; State's Appendix, App-3 – App-4.) In his

decision, Judge Aprahamian indicated that he found Deputy Douglas credible and Ms. Gutierrez credible in some aspects and incredible in other aspects. (R.15: 63; State's Appendix, App-1.) Further, he found that Ms. Gutierrez was driving without her headlights on, and went over the curb while trying to get out of the left turn lane, which gave Deputy Douglas reasonable suspicion to stop the vehicle. (*Id.*) When Deputy Douglas made contact, she had an odor of intoxicants, admitted to consuming alcohol, failed each field sobriety test in some aspect, and therefore, there was probable cause to arrest for OWI. (R. 15: 63-64; State's Appendix, App-1 – App-2.)

In terms of whether Ms. Gutierrez was properly informing of the implied consent warnings, Judge Aprahamian found that Deputy Douglas gave the warnings. (R. 15: 64; State's Appendix, App-2.) Judge Aprahamian found that Ms. Gutierrez did understand the warnings and stated:

And whether the defendant refused the test, she admitted she refused the test and I did write in my notes, which is the same point Ms. Zilavy made, her memory of the incident at that time was incredibly lucid for her to claim that she was not coherent and couldn't possibly understand what was going on with respect to the Informing the Accused I found to be incredible. I think she did understand. She asked questions such as may I contact a lawyer, can I make a phone call clearly in response to the Informing the Accused and I believe she did understand it and she refused to provide a chemical test as required. She didn't provide any physical inability to submit to the test.

(R.15: 64-65; State's Appendix, App-2 – App-3.)

Therefore, the refusal was improper. (R.15: 65; State's Appendix, App-3.)

When deciding on the OWI charge, Judge Aprahamian believed she was under the influence of alcohol, because of the various field sobriety tests, admission of drinking, and her admission that consuming alcohol generally increases your blood sugar level. (R.15: 65; State's Appendix, App-3.)

Further, Judge Aprahamian considered that Ms. Gutierrez refused the breath test. (*Id.*) Based on the totality of circumstances, he believed the County met its burden to prove by clear, satisfactory, and convincing evidence that Ms. Gutierrez was guilty of OWI. (*Id.* at 65-66; State's Appendix, App-3 – App-4.)

Ms. Gutierrez now appeals the OWI conviction and finding that the refusal was improper.

ARGUMENT

I. REASONABLE MEANS USED TO CONVEY IMPLIED CONSENT WARNINGS FOR FINDING THAT REFUSAL WAS IMPROPER

Ms. Gutierrez first argues that Deputy Douglas did not use reasonable means to convey the implied consent warnings, and that he should have waited until her medical condition was stabilized.

The County argues that Deputy Douglas did reasonably inform Ms. Gutierrez of the implied consent warnings by reading the form to her verbatim, and Ms. Guterrez's words and actions demonstrate she understood the warnings but just did not want to submit to the test. While it was later found that she had a high blood sugar level, and that was likely the reason for her needing to use the restroom, being hot, and her heart racing, those symptoms alone do not mean or show that Ms. Gutierrez did not understand the Informing the Accused form.

a. Standard of Review

An officer must use "reasonable means" to convey the implied consent warnings set forth in Wis. Stat. § 343.305(4), and whether an officer did so, is a question of law that an appellate court reviews de novo. *State v. Begicevic*, 2004 WI App 57, ¶ 11, 270 Wis. 2d 675, 678 N.W.2d 293. "To the extent

the circuit court’s decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous.” *Id.* (internal quotations and citations omitted) (citing *State v. Baratka*, 2002 WI App 288, ¶ 7, 258 Wis. 2d 342, 654 N.W.2d 875).

b. Relevant Law

When a court is looking at whether the implied consent warnings were sufficiently given to an individual, it needs to look at the methods used by the officer, and whether those methods under the circumstances reasonably conveyed the warnings required under Wis. Stat. § 343.305(4). *Id.* ¶ 23. Reasonable methods “does not mean the officer must take extraordinary, or even impracticable measures to convey the implied consent warnings.” *State v. Piddington*, 2001 WI 24, ¶ 28, 214 Wis. 2d 754, 623 N.W.2d 528. The Wisconsin Supreme Court recognized in *Piddington* that an officer needs to take into account and accommodate any barriers that there may be to conveying the implied consent warnings, but it needs to be done so in the purview of the purpose of the implied consent statute—“to facilitate the gathering of evidence against drunk drivers in order to remove them from the state’s highway.” *Id.* (internal quotations and citations omitted) (quoting *State v. Zielke*, 137

Wis. 2d 39, 46, 403 N.W.2d 427 (1987)). The accommodations and considerations to be given to the barriers need to be reasonable under the circumstances. *Id.*

For example, in *Piddington*, the Wisconsin Supreme Court held that an officer reasonably conveyed the implied consent warnings to a deaf individual even though the officer did not get an ASL-certified sign language interpreter. *Id.* ¶ 32. In *Piddington*, a trooper stopped Piddington, a man who had been severely deaf since birth, around 1:00 a.m. for speeding and drifting from his lane. *Id.* ¶ 2. The trooper initially made contact with Piddington through the passenger, who was being used as an interpreter. *Id.* The trooper informed Piddington through the passenger that he wanted Piddington to perform field sobriety tests. *Id.* The trooper went to his squad, and when he reinitiated contact with Piddington, the passenger asked the trooper why they had been stopped. *Id.* ¶ 3. “The trooper wrote the reason on his pad, and, for the remainder of the stop, used notes, gestures and some speaking to communicate with Piddington.” *Id.* The trooper did ask numerous times during the traffic stop for a sign language interpreter, but none were available. *Id.* Piddington did inform the trooper that he could read lips. *Id.* The trooper explained the field sobriety tests and

the PBT test orally, in writing, and/or through demonstrating.

Id. ¶¶ 4, 5. Based on the trooper's observations and the PBT result of 0.27, Piddington was placed under arrest for OWI. *Id.* ¶ 5.

The trooper initially was going to take Piddington to patrol headquarters, but Piddington indicated through a note that he wanted to do a blood test instead, so the officer took him to the hospital. *Id.* An officer arrived at the hospital who was not a certified ASL interpreter but did know some sign language, and was able to communicate with Piddington by sign language and orally. *Id.* ¶ 6. At the hospital, "Piddington was given an Informing the Accused form, and told to read it and initial each paragraph only if he understood," which he did for each paragraph. *Id.* The officer who knew some sign language also read the form to Piddington. *Id.* Piddington agreed to give a sample of his blood, the result of which was 0.206. *Id.*

Piddington testified at a suppression hearing that "he needed an ASL interpreter to fully understand both the trooper's instructions for the sobriety test and the Informing the Accused form." *Id.* ¶ 8. The trooper testified that it was not always easy to communicate with Piddington but he made sure Piddington

understood before proceeding further during all stages of his investigation. *Id.* ¶ 9.

The Wisconsin Supreme Court found that the trooper's means of conveying the implied consent warnings in the case was reasonable. *Id.* ¶ 32. The trooper communicated with Piddington using notes and lip-reading, both of which demonstrated Piddington's understanding of the trooper. *Id.* ¶ 29. "For example, Piddington wrote a note that 'I was just speeding.' At another point, he wrote 'But did I pass the test as I walked?'" *Id.* The squad video also demonstrated Piddington's understanding of the field sobriety tests, and that he failed them due to intoxication and not misunderstanding them. *Id.* ¶ 30. Additionally, Piddington asked for a blood test instead of a breath test, which showed he understood what was happening and why. *Id.*

Further, the Court also found that the trooper's attempts to find an ASL interpreter were reasonable. *Id.* ¶ 31. The trooper asked for an ASL interpreter numerous times, and found an officer who at least knew some sign language in order to assist with conveying the implied consent warnings. *Id.* ¶ 31. The Court held that based on the means used by the trooper in the case, an official ASL interpreter was not necessary as

Piddington argued, and that the warnings were reasonably conveyed. *Id.* ¶ 32.

c. Deputy Douglas used reasonable means to convey the implied consent warnings considering that he did not know Ms. Gutierrez was having a medical emergency due to high blood sugar, and, further, the evidence presented demonstrated Ms. Gutierrez did understand the implied consent warnings.

In Ms. Gutierrez's case, Judge Aprahamian found that the refusal was improper, and by doing so, implicitly found that the implied consent warnings were reasonably conveyed to Ms. Gutierrez by Deputy Douglas and that she understood what was being read to her. This Court must give deference to Judge Aprahamian's findings of evidentiary and historical facts. Based on those facts presented at the court trial, including the credibility findings of Deputy Douglas and Ms. Gutierrez, Deputy Douglas did reasonably convey the implied consent warnings to Ms. Gutierrez.

This Court needs to determine whether the means used by Deputy Douglas to convey the implied consent warnings to Ms. Gutierrez were reasonable under the circumstances, taking into account any barriers present. There is no dispute that Deputy Douglas did read the Informing the Accused form verbatim to Ms. Gutierrez, and the only issue is whether Deputy Douglas'

means to convey the warnings were reasonable so that Ms. Gutierrez could fully understand the form.

Unlike *Piddington* where the officer knew Piddington was deaf, Deputy Douglas did not know Ms. Gutierrez was having a medical emergency due to high blood sugar. In *Piddington*, it was obvious that Piddington was deaf, and any reasonable officer would know he was deaf. In Ms. Gutierrez's case, Deputy Douglas indicated he did not know the symptoms of high blood sugar. Further, the symptoms of high blood sugar Ms. Gutierrez was exhibiting included needing to use the restroom, being hot and light-headed, and a racing heart. These signs could also have been interpreted as signs of intoxication due to alcohol (having to urinate, being hot and light-headed), or signs of anxiety due to being arrested (having a racing heart and getting hot). Additionally, Ms. Gutierrez could have been hot due to it being June when the climate is warmer.

Deputy Douglas did not recognize that Ms. Gutierrez was having symptoms of high blood sugar, and it was not unreasonable for him to not notice those things considering that the symptoms were similar to those of intoxication. Furthermore, Ms. Gutierrez did not notify Deputy Douglas that she was having a medical emergency until after she was refused

the breath test. While Ms. Gutierrez did mention to Deputy Douglas that she wanted to get her blood sugar kit from her car before leaving the scene of the traffic stop, that alone would not mean Deputy Douglas should have known she was having a medical emergency that needed to be dealt with prior to reading the Informing the Accused form. Unlike *Piddington*, Ms. Gutierrez was able to hear and listen to Deputy Douglas reading the form, and other than the blood sugar, would not have had any issues understanding the form being read to her. As stated in *Piddington*, reasonable methods does not mean that Deputy Douglas is required to use extraordinary measures to convey the warnings. It would be unreasonable to hold that Deputy Douglas should have known Ms. Gutierrez was having a medical emergency when Ms. Gutierrez never told him of such initially and the signs of intoxication and high blood sugar were similar.

Also, the evidence showed that Ms. Gutierrez *did* understand what was read to her. As the County and Judge Aprahamian noted during the court trial, Ms. Gutierrez understood everything before the reading of the Informing the Accused form and everything after, but suspiciously did not remember the actual reading itself. Judge Aprahamian found

Ms. Gutierrez to be incredible in that aspect of her testimony as it was self-serving and did not make sense. Additionally, after the reading of the form, Ms. Gutierrez testified that she asked if she could have a lawyer or make a phone call. Such testimony evinced that she understood there could be legal consequences based on either agreeing to or refusing the breath test.

Overall, the evidence presented to Judge Aprahamian demonstrated Deputy Douglas used reasonable means to convey the implied consent warnings to Ms. Gutierrez, and therefore, the State and County request that this Court affirm Judge Aprahamian's ruling that the refusal was improper.

II. SUFFICIENCY OF EVIDENCE FOR A FINDING OF GUILT AT A COURT TRIAL

Ms. Gutierrez argues that there was not sufficient evidence to be found guilty of the operating while under the influence of an intoxicant as she was suffering from a high blood sugar level at the time.

The County and State contend that based on the totality of circumstances, including the admission of drinking, the performance on the field sobriety tests, the refusal to submit to the test, the odor of intoxicants, the headlights being off, and

driving over a curb, that there were sufficient facts for the trial court's finding of a guilt by clear, satisfactory, and convincing evidence.

a. Standard of Review

“The test for determining sufficiency of the evidence is whether a reasonable trier of fact could be convinced of the defendant's guilt to the required degree of certitude by the evidence which it had a right to believe and accept as true.” *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). A “reviewing court is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met.” *Id.*

b. Relevant Law

The Wisconsin Court of Appeals iterated the standard for reviewing whether there was sufficient evidence of guilt in *State v. Hayes*, 2003 WI App 99, ¶ 13, 264 Wis. 2d 377, 390, 663 N.W.2d 351:

When [a] [. . .] court reviews a challenge to the sufficiency of the evidence, the court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt [. . .]. If any possibility exists that the trier of fact could have

drawn the appropriate inferences from the evidence at trial to find guilt, the court must uphold the conviction. If more than one inference can be drawn from the evidence, the reviewing court must accept the inference drawn by the [fact finder].

(Internal citations omitted) (citing *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

c. Looking at the evidence in a light most favorable to the County and State, and the facts as a whole with the inferences from those facts, there was sufficient evidence for Judge Aprahamian to conclude that Ms. Gutierrez was impaired by alcohol and not a high blood sugar, and therefore, this Court should affirm the finding of guilt on the OWI.

In Ms. Gutierrez’s case, looking at the evidence most favorable to the State and County, and looking at the evidence as a whole, there were sufficient facts and inferences from those facts for Judge Aprahamian to find Ms. Gutierrez guilty of OWI.

In an OWI-1st offense civil forfeiture case, the prosecutor must present evidence to the trier of fact that proves by “clear, satisfactory, and convincing evidence” that (1) the defendant operated a motor vehicle on a highway, and (2) did so while under the influence of an intoxicant. Wisconsin Jury Instruction—Criminal 2663A: Operating a Motor Vehicle While Under the

Influence of An Intoxicant—Civil Forfeiture—§

346.63(1)(a).

There is no contention that Ms. Gutierrez was operating a motor vehicle, and the only issue is whether Ms. Gutierrez was impaired by an intoxicant or her high blood sugar level. First, Judge Aprahamian found that Deputy Douglas was credible, and that Ms. Gutierrez was credible in certain respects but not others. Judge Aprahamian considered various facts when making his finding of guilt including that she: (1) was driving with her headlights off; (2) drove over a curb; (3) had an odor of intoxicants; (4) failed each field sobriety test in some respect; (5) admitted drinking; (6) admitted that, generally speaking, consuming alcohol can increase one's blood sugar; and (7) refused the breath test.

It is possible that Judge Aprahamian could have found that Ms. Gutierrez's impairment was caused by the high blood sugar level instead of alcohol. But, this Court is required to accept the inference drawn by the fact finder, and in this case, Judge Aprahamian inferred impairment due to intoxication instead of a high blood sugar. As noted in *Hayes*, as long as Judge Aprahamian

could reasonably find based on the facts and inferences from the facts that Ms. Gutierrez was guilty, then this Court should affirm that finding.

Because it was reasonable for Judge Aprahamian to find Ms. Gutierrez guilty of OWI based on all the evidence as a whole, the State and County request that this Court affirm Ms. Gutierrez's conviction for OWI.

CONCLUSION

For all the foregoing reasons, the State and County respectfully request that this Court affirm Judge Aprahamian's findings that Ms. Gutierrez improperly refused the chemical test and was guilty of OWI.

Dated this 23rd day of June, 2016.

Respectfully,

/s/ Melissa Zilavy
Melissa J. Zilavy
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar No. 1097603

CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with monospaced font. The length of this brief is 5,643 words.

Dated this 23rd day of June, 2016.

/s/ Melissa Zilavy
Melissa J. Zilavy
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar No. 1097603

**CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §
(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 Wis. Stat. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of June, 2016.

/s/ Melissa Zilavy
Melissa J. Zilavy
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar No. 1097603