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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.

And

WAUKESHA COUNTY,
Plaintiff-Respondent,

v.

Sana Gutierrez,
Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

DAVID ZIEMER
State Bar #1001594
Attorney for Sana Gutierrez

David Ziemer
6920 N. Ardara Ave.
Glendale, WI 53209
414.306.1324

Marc E. Christopher
State Bar 1050295
Christopher Law Office, LLC
P.O. Box 370452
Milwaukee, WI 53737-1552
414.751.0051

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REPLY

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

The Government's Brief is noteworthy for its extensive discussion of the Supreme Court's opinion in *State v. Piddington*, 2001 WI 24, 214 Wis.2d 754, 623 N.W.2d 528. More noteworthy, however, is its simultaneous failure to acknowledge the vast differences between that case, and the case at bar.

The case is easily distinguishable, because of the, quite frankly, Herculean effort put forth by the officer in that case to ensure that the motorist understood his rights.

The officer never did get an ASL-certified sign interpreter to communicate with the motorist. *Id.*, at par. 32. But, it was not for lack of trying.

Consider the extent of the efforts, all recognized in the Government's own brief: he attempted to communicate with the driver through the passenger. *Id.*, at par. 2; the officer used a notepad, gestures, and some speaking to communicate. *Id.*, at par. 3; the officer verified that the driver could read lips. *Id.*; the officer explained the PBT orally, in writing, and/or through demonstrating. *Id.*, at pars. 4-5; he arranged for an officer to meet at the hospital who was not ASL-certified, but did know some sign language. *Id.*, at par. 6; he went over the form with the driver at the hospital, and the officer who knew some sign language also read it to him. *Id.*

In the case at bar, in contrast, the officer, after realizing that Gutierrez' blood sugar levels were dangerously high at the time he had gone over the form with her, did nothing, at all.

This case bears far more similarity to *State v. Begicevic*, 2004 WI App 57, 270 Wis.2d 675, 678 N.W.2d 293, which the Government fails to even discuss in its brief, and which found, “[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 Government also does not dispute that the best practice, as recognized by numerous police departments in the state is to read the informing the accused form at the station, where the breath test will occur.

Where the warning was given in the squad car, rather than at the station, and it is undisputed that the driver was suffering from a medical problem that interfered with her ability to understand the warnings, it was unreasonable not to go over the form a second time, 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

The Government cites not a single case in which an appellate court has found that, on facts similar to those in the case at bar, the evidence was sufficient to support a guilty verdict.

The Government fails to even recognize the numerous undisputed facts supporting a finding of evidence. To iterate: 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 on gravel R15, pps. 22-24; and she was suffering genuine medical distress when she “refused” the breath test; 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.

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 11th day of July, 2016

David Ziemer
State Bar #1001594
Attorney for Appellant

David Ziemer
Attorney at Law
6920 N. Ardara Ave.
Glendale, WI 53209
(414)306-1324

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 734 words.

Dated this 11th day of July, 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 11th day of July, 2016

David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 11th day of July, 2014, I mailed 10 copies of the Reply 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