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In the

COURT OF APPEALS OF WISCONSIN

DISTRICT II

Case No. 2015AP002504

COUNTY OF WALWORTH

Plaintiff-Respondent,

vs.

JAMES E. ROBINSON, JR.

Defendant-Appellant.

Appeal from the Circuit Court of
Walworth County, Case No.: 2014CT005434

Honorable James L. Carlson, Circuit Judge

DEFENDANT-APPELLANT'S REPLY BRIEF

ARGUMENT

Plaintiff-Respondent relies in large part on the proposition that findings of fact shall not be set aside unless clearly erroneous. See Wis. Stat. §805.17(2). There is also reliance on case law which, again, supports the notion that the trial judge findings of fact are to be given deference. Noll v. Dimiceli's, Inc., 115 Wis. 2d 641, 340 N.W.2d 575 (Ct. App. 1983) and Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 274 N.W. 2d 647 (1979).

Counsel for the Defendant-Appellant does not dispute

the proposition that the Trial Court's Findings of Fact are to be given deference. However the ultimate decision, i.e. a verdict, is a question of law which can be considered anew by the Reviewing Court. In other words the Reviewing Court need not give deference to the Trial Court's ultimate finding of guilt. Reference is made to the cases cited on page 8 of the original brief for Defendant-Appellant.

Defendant-Appellant continues to maintain that the County has not proven that he is guilty of operating a motor vehicle under the influence of an intoxicant as described in Wisconsin Statute §346.63(1)(a). The burden of proof is substantial, i.e. to a reasonable certainty by evidence that is clear, satisfactory and convincing. If the Court examines the evidence closely it will find that the evidence is lacking that the Defendant-Appellant was under the influence of an intoxicant at the time of operating a motor vehicle in the late morning of December 7, 2014.

Once again the County places great weight on the testimony of Deputy Frami, the drug recognition witness, who opines that the Defendant-Appellant was under the influence of narcotic analgesics-substances that there is no evidence in the record that the defendant took.

Moreover, Frami testified that Mr. Robinson's condition, as he described it, was inconsistent with what

Mr. Robinson acknowledged taking the previous evening - some twelve (12) to thirteen (13) hours before the operation of the vehicle (R19, pg. 62). There was no evidence presented as to how long the effects of the medications last after consumption. The County valiantly tried to rehabilitate Deputy Frami by suggesting that if the HGN test were performed by Mr. Robinson, that might have altered Dept. Frami's opinion. Ironically, the inability of Mr. Robinson to perform that test was because he could not keep his eyes open (R19, pg. 61) which is consistent with what the Defendant-Appellant has claimed all along; that he was very tired and that affected his driving and the performance of the field tests. Please note that on page 49 of the transcript (R19, pg. 49) Mr. Robinson told Sergeant Timothy Otterbacher that he slept from 10:00 p.m. to 1:00 a.m. the previous night and then again from 2:30 a.m. to 4:00 a.m. on December 7, 2014 - a total of 4 ½ hours. Please note that all the witnesses, including the Defendant-Appellant himself, refer to him exhibiting classic symptoms of being very tired and while that is not recommended for good driving, it is not violative of the statute.

In any case Deputy Frami again seems to be clear that Mr. Robinson was under the influence of narcotic analgesics and not central nervous depressants - which were the only

substances taken by the defendant. Any efforts to assume that if all the tests were taken by the defendant it would have yielded a different conclusion is engaging in speculation.

The Court found on page 90 and 91 of the transcript (R19, pg. 90 & 91): "that Mr. Robinson was impaired by the medicines he took, whatever - - how he took them and when he took them or I don't know". Yet that was not the opinion of Deputy Frami who believed that Mr. Robinson was not under the influence of his prescribed medications but of something else - for which there is no evidence.

The Court's ultimate decision, therefore, is flawed and based on, at best, inconsistent and inconclusive evidence with respect to the central issue in this case - whether or not the Defendant-Appellant was under the influence of an intoxicant in the late morning hours of December 7, 2014.

CONCLUSION

The Court should find that the Trial Court's Conclusion of Law, that is, that the Defendant-Appellant was guilty of operating a motor vehicle under the influence is erroneous and should be reversed.

Dated this 13th day of April, 2016.

Respectfully Submitted,

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Attorneys for the Defendant-Appellant

By: /s/ John P. Carlson
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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch;
double spaced; 1.5 inch margin on the left
side and 1 inch margins on the other 3
sides. The length of this brief is 5 pages long.

Dated: April 13, 2016.

Signed,

/s/ John P. Carlson

John P. Carlson

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §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: April 13, 2016.

Signed,

/s/ John P. Carlson

John P. Carlson