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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP2628

In the Matter of the Refusal of Steven N. Jackson
STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN N. JACKSON,

Defendant-Appellant.

ON APPEAL FROM A FINDING THAT THE
DEFENDANT UNLAWFULLY REFUSED AN IMPLIED
CONSENT TEST, ENTERED IN THE LA CROSSE
COUNTY CIRCUIT COURT CASE 15-TR-342, THE
HONORABLE SCOTT L. HORNE, PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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STATE OF WISCONSIN
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BRIEF AND APPENDIX OF
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ISSUES PRESENTED

- I. DID THE TRIAL COURT ERR IN RECEIVING AND RELYING UPON AN AUDIO RECORDING WHERE NO WITNESS TESTIFIED AS TO WITNESSING THE RECORDING,**

**CREATING THE RECORDING, OR
HAVING KNOWLEDGE OF THE
TECHNICAL ASPECTS AND
CHAIN OF CUSTODY OF THE
RECORDING.**

The trial court admitted the recording under Wis. Stat. § 909.015(1), finding that Deputy Olson authenticated the recording because he claimed to recognize it as a squad video.

**II. DID PROBABLE CAUSE EXIST TO
ARREST THE DEFENDANT FOR
OPERATING WHILE
INTOXICATED AND TO REQUEST
A BLOOD TEST?**

The trial court found that there was probable cause to arrest the defendant.

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

The appellant does not request oral argument as the briefs of the parties should sufficiently address the issues.

Publication is unnecessary as the issues both involve an application of settled law to an isolated set of facts.

STATEMENT OF THE CASE

The defendant, Jackson, appeals an order finding that he unlawfully refused a blood test under Wisconsin's implied consent statute, Wis. Stat. § 343.305(9)¹.

¹ Unless specified, all statutory references are to the 2013-2014 Wisconsin Statutes.

On January 3rd, 2015, the defendant was issued a notice of intent to revoke his operating privileges (App. 55),(3). He timely filed a request for a refusal hearing (App. 56)(4), which was held on December 1st, 2015 (13). At the refusal hearing the court admitted 3 minutes of an audio recording (App. 15-22) (13:14-21), which involved the reading of The Informing the Accused form to an unidentified individual² (7: Time 4:08:38-4:11:30). The only witness at the hearing, Deputy Olson, admitted that he did not personally witness the events of the audio-recording, could not identify whether it involved the defendant and could not say whether it was accurate (App. 29-30), (13:28-29). The defendant objected to the admission of the recording on the basis that foundation and authenticity were not established (App. 13-14), (13:12-13). The court admitted and relied exclusively upon the recording to find that the defendant unlawfully refused an implied consent test (App. 49-50), (13:48-49).

The defendant also argued that Deputy Olson's recollection and testimony were conclusory and insufficient to establish probable cause for his arrest (App. 42), (13:41). The court found probable cause for the arrest (App. 49), (13:48), denying the motion and revoking the defendant's license (App. 51), (13:50).

STATEMENT OF FACTS

² While the recording is purportedly a squad video, the appellant refers to the recording as an audio because the video depiction of an empty parking lot adds no evidentiary significance, (7: Time 4:08:38-4:11:30).

At the refusal hearing, the State called one witness, Deputy Jorrey Olson (App. 3), (13:2). Deputy Olson testified that he has less than two years of law enforcement experience (App. 8), (13:7). He also testified to the following information: At approximately 2:30 in the morning he observed an unattended truck that struck a telephone pole (App. 5), (13:4) and that was registered to Jackson (App. 7), (13:6). Deputy Olson went to Jackson's home where another officer, Sgt. Jacobson, was already conversing with Jackson (App. 7), (13:6). Deputy Olson claimed that he could smell an odor of intoxicants coming from Jackson; that Jackson's eyes were red, bloodshot and glassy; that Jackson's shirt was ripped and contained blood stains; and that Jackson had some red bumps on his head (App. 7), (13:6). At the refusal hearing, there was no evidence that anyone saw Jackson operating a vehicle or that he indicated that he drove or operated a vehicle that evening.

Regarding impairment, Deputy Olson testified that Jackson's balance and coordination throughout the field sobriety tests were "impaired" (App. 9), (13:8). Deputy Olson claimed that he recalled a preliminary breath test being administered and the result being above a .08, but he could not recall the result (App. 10), (13:9) or even whether he or Sgt. Jacobson administered the test (App. 38), (13:37).

Regarding the field sobriety tests, Deputy Olson explained, "I did not observe any clues for the HGN because I wasn't close enough to observe that, but I did observe him do the one-legged stand and the walk and turn. But like I said, I did not—I cannot recall the exact clues that were exhibited." (App. 37), (13:36). Deputy Olson could not identify which or how many clues Mr. Jackson exhibited on the field sobriety tests (App. 37), (13:36).

Ultimately, Mr. Jackson was placed under arrest by Sgt. Jacobson. Upon arrest, Sgt. Jacobson and Jackson entered Sgt. Jacobson's patrol vehicle and completely and totally left Deputy Olson's sight.

Deputy Olson admitted that after Sgt. Jacobson and Mr. Jackson left his sight he lacked independent knowledge as to where they went (App. 28-29), (13:27-28). Deputy Olson did not know what time they left (App. 25), (13:24), and he had no personal knowledge as to whether or when the Informing the Accused form was ever read to Mr. Jackson (App. 28), (13:27). No other witnesses were called at the hearing.

In an effort to meet its burden of demonstrating that Sgt. Jacobson complied with the statutory mandates requisite to the court upholding the refusal, the State introduced less than 3 minutes of an audio recording, starting at the purported time of 4:08:38 and ending at 4:11:30. The visual portion of the recording depicted only a vacant parking lot (7: Time 4:08:38). Neither Jackson, Sgt. Jacobson nor any identifiable landmarks were depicted on the recording. (7: Time 4:08:38). The audio component of the recording involved a voice reading the informing the accused language to an unidentified individual. (7: Time 4:08:38-4:11:30).

In an effort to establish the recording's authenticity, the State displayed a paused screen which Olson said was "the video system for our squad cameras" (App. 12), (13:11). Olson was then asked and answered the following leading questions:

Q: "On the bottom left corner under the general section it appears to show an officer designation '103 Jacobson?'" (App. 12), (13:11).

A: “yes.” (App. 12), (13:11).

Q: “And then that resp—that would correspond with whatever deputy or whatever sergeant is involved or whoever is assigned that vehicle?” (App. 12), (13:11).

A: “Yep.” (App. 12), (13:11).

Q: “At the very bottom of the screen do you see a designation says date slash time. Correct?” (App. 13), (13:12).

A: “Yes.” (App. 13), (13:12)

Q: “And that the current time it looks like four – 4:08 a.m. would that be consistent with the time that Sergeant Jacobson would have, I guess, left the scene and arrived at the hospital?” (App. 13), (13:12).

A: “Yes, it would.” (App. 13), (13:12)

However, Deputy Olson later admitted that he did not know when Sgt. Jacobson and Mr. Jackson left Mr. Jackson’s residence (App. 25), (13:24), that he did not know how long they were in Sgt. Jacobson’s patrol car (App. 26), (13:25), and that he did not know the next time anybody else was in Sgt. Jacobson’s car (App. 26), (13:25). Deputy Olson admitted that he could not say whether or not the video was accurate or complete (App. 29), (13:28), and he could not identify who Sgt. Jacobson was talking to in the video or the duration of the video (App. 30), (13:29). Deputy Olson admitted that if the video happened to involve a different arrest—not Mr. Jackson’s—he would not know “past the fact it was Sgt. Jacobson” (App. 30), (13:29). Deputy Olson admitted that all of his knowledge about what happened in the video comes *from* the video and that if the video was not

accurate he *would not know one way or the other* (App. 30), (13:29).

No evidence was presented establishing who created the video, who possessed the video, or where it came from, other than that Deputy Olson recognizing the screen as “the video system for our squad cameras” (App. 12), (13:11). There was no evidence that the video contained any self-authenticating markings or certifications.

ARGUMENT

I. THE TRIAL COURT ERRED IN RECEIVING AND RELYING UPON AN AUDIO RECORDING WHERE NO WITNESS TESTIFIED TO WITNESSING THE RECORDING, CREATING THE RECORDING, OR HAVING KNOWLEDGE OF THE TECHNICAL ASPECTS AND CHAIN OF CUSTODY OF THE RECORDING.

In order to revoke a driver’s license under the implied consent law, the court must find that the officer read the statutorily-required language to the defendant (hereinafter “the Informing the Accused”) and that the defendant refused. Wis. Stat. § 343.305(9)5; *see also State v. Nordness*, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986). In this case, the only evidence on either point was the audio portion of a three-minute recording of a voice reading the Informing the Accused to an unidentified individual who audibly refused (7: Time 4:08:38-4:11:30). As explained below, the State failed to establish the authenticity or identification of the recording. Thus the lower court erred in admitting the recording.

a. Standard of Review

Generally appellate courts apply the abuse of discretion standard to issues regarding admissibility of evidence. *State v. Doss*, 2008 WI 93, 312 Wis. 2d 570, 585, 754 N.W.2d 150. Whether statutory requirements of admissibility are met, however, involves statutory interpretation, a question of law subject to de novo review. *Id.* at 585. This case involves the statutory requirement of authenticity pursuant to Wis. Stat. § 909.01, which is “preliminary and precedent to a question of admissibility.” *State v. Denton*, 2009 WI App 78, 319 Wis. 2d 718, 733, 768 N.W.2d 250. Thus whether the court reasonably applied the law to the evidence is subject to an abuse of discretion standard. Whether the court applied the correct legal standard is subject to de novo review.

b. Requirements of Identification and Authentication of an Audio-Recording.

In an evidentiary hearing, the proponent of a particular item of evidence must lay a foundation as to the relevancy of that evidence. Wis. Stat. § 904.01. Relevant evidence is admissible, whereas irrelevant evidence is not. Wis. Stat. § 904.02. Under Wis. Stat. § 906.02, “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” The witness’s personal knowledge may be established through testimony. *Id.*

When establishing the admissibility of a specific piece of evidence, “authentication is a special aspect of relevance and is preliminary and precedent to a question of admissibility.” *State v. Denton*, 2009 WI App 78, 319 Wis. 2d 718, 733, 768 N.W.2d 250. In order to establish the foundation for the evidence, Wis. Stat. § 909.01 provides,

“the requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* at 733. Wis. Stat. § 909.015 provides illustrations of the types of evidence or testimony that would provide the authentication required under § 909.01. Wis. Stat. § 909.015. In addition, there are a number of ways that a document is self-authenticating in that no extrinsic evidence is necessary to establish authentication. Wis. Stat. § 909.02.

There are special requirements that must be met in order to adequately authenticate an audio conversation. “Tapes are properly identified and authenticated when *a party to the recorded conversation identifies the defendant’s voice and testifies that the tapes accurately depict the conversations.*” *State v. Curtis*, 218 Wis. 2d 550, 552 582 N.W.2d 409 (Ct. App. 1998)(emphasis added)(adopting the reasoning of *United States v. Carrasco*, 887 F.2d 794, 801 (7th Cir. 1989)).

Federal cases dealing with Fed. R. Evid. 901(a), the federal authentication statute which is virtually identical to Wisconsin’s, have ruled consistently with *Curtis*, 218 Wis. 2d at 552.³ Applying the federal rule, the Seventh Circuit stated,

“Clear and convincing evidence of the truth, accuracy, and authenticity of a tape may be shown in two ways. The proponent may show the tape's chain of custody. ... If no proof as to chain of custody is rendered, the tape may be

³ Cases applying an analogous federal statute are persuasive authority in applying the Wisconsin Statute. *State v. Boettcher*, 144 Wis. 2d 86, 92, 423 N.W.2d 533 (1998)

admissible if a foundation as to the accuracy and trustworthiness of the evidence is laid. In this circuit, the recollections of eyewitnesses to the events in question are sufficient to establish a foundation for the admission of tapes."

Smith v. City of Chicago, 242 F.3d 737, 741-42 (7th Cir. 2001)(internal quotations and citations omitted). Likewise, in *United States v. Carrasco*, whose reasoning was explicitly adopted in *Curtis*, 218 Wis. 2d at 552, the 7th Circuit held, "in the case of either an original or a duplicate tape the government may establish a foundation for accuracy and truth of the tape through 'evidence of chain of custody and by the correspondence between the tape's version of the events...and the recollections of eyewitnesses to those events; in this circuit, either variety of evidence can establish a tape's foundation.'" *United States v. Carrasco*, 887 F.2d 794, 802 (7th Cir. 1989)(quoting *United States v. Blakey*, 607 F.2d 779, 787 (7th Cir. 1979)).

c. Deputy Olson's Testimony Failed to Establish the Recording's Authenticity

Turning to the case at hand, the State sought to admit what was purported to be a recording of Deputy Jacobson reading the defendant the Informing the Accused form, as well as what is purported to be the defendant's verbal refusal to submit to an evidentiary test of his blood. However, although the three-minute recording includes a visual image of a parking lot, there is no apparent correlation between the parking lot and the audio (7: Time 4:08:38). The individuals who are speaking never appear on the video whatsoever. *Id.* Therefore, the recording is akin to nothing more than a standard audio recording.

According to the requirements of authentication discussed above, Olson could have authenticated the recording either by having witnessed the events in the recording or possibly by testifying to sufficient facts pertaining to the chain of custody and technical aspects of the recording so as to ensure that it was a true and accurate recording of what it purported to be. He did neither.

Instead Deputy Olson admitted that he had no way of knowing whether the content of the recording was accurate, because he was not present to witness the conversation (App. 29), (13:28). While he indicated that he recognized Jacobson's voice (App. 16), (13:15), he never indicated he recognized the other voice as the defendant's. Rather, he admitted that he did not know to whom Jacobson was talking on the recording (App. 29), (13:28). Further, he could not say whether it involved the defendant or another arrest (App. 30), (13:29).

Deputy Olson's testimony also failed to establish the chain of custody or any technical aspects the recording. He did not establish how the recording was made, who made it or who had access to it. There was no evidence as to how the audio related to the video screen or the significance of the purported time on the screen. Deputy Olson admitted that all of his knowledge about what was depicted on the screen comes *from the recording* and that if it was inaccurate he would not know (App. 29), (13:28). Thus his identifying Jacobson's name and officer number and the displayed time was simply parroted hearsay. It *presumes* the authenticity of the recording. It does not *establish* it.

Without fulfilling the requirement set out in *Curtis*, 218 Wis. 2d at 552, the State did not lay the requisite foundation to admit the audio recording. Therefore, the Court

should find that the lower court erred in admitting the recording under Wis. Stat. § 909.015(1). Because the recording was the only evidence tending to establish that Sgt. Jacobson complied with Wis. Stat. § 343.305(4) or that the defendant refused an implied consent test, the Court should reverse the lower court’s finding that the defendant refused an implied consent test.

II. PROBABLE CAUSE DID NOT EXIST TO ARREST THE DEFENDANT FOR OPERATING WHILE INTOXICATED OR TO REQUEST A BLOOD TEST

a. Standard of Review

Determining whether probable cause exists to arrest involves a mixed question of law and fact. *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 586, 815 N.W.2d 675. The Wisconsin Supreme Court explained, “first, we reviewed the circuit court’s findings of historical fact under the clearly erroneous standard. Second we review the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court...” *Id.* at 586.

b. Testimony of the State’s Only Witness Did not Establish Probable Cause

Interpreting Wis. Stat. § 343.305(9)5.a., the Wisconsin Supreme Court held that at a refusal hearing the defendant can challenge probable cause and “whether the person was lawfully placed under arrest for violation of an OWI-related statute.” *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 586, 815 N.W.2d 675.

The WI Supreme Court discussed probable cause as it related to operating while intoxicated in a footnote in *State v. Swanson*:

“for a search incident to an arrest to be lawful, the arrest itself must be lawful, and for the arrest to be lawful, probable cause for arrest must exist. Probable cause requires more than bare suspicion. Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.”

State v. Swanson, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991).

In this case the facts adduced at the hearing failed to establish any more than a mere suspicion that that Mr. Jackson was operating a motor vehicle or that his ability to operate a motor vehicle was impaired.

The testimony relating to whether Mr. Jackson actually operated a motor vehicle was that (1) a vehicle registered in his name was found abandoned, and (2) when later awakened in his home in the early morning hours, Mr. Jackson’s shirt was ripped and contained blood stains and Mr. Jackson had “some red bumps” on his head. (App. 7), (13:6). Without more, these vague references say nothing as to whether Mr. Jackson was in an accident, much less driving. Nothing raised a reasonable inference that the stains were actually blood, that they were fresh, or that they had anything to do with driving a vehicle. Likewise, with respect to the testimony that Mr. Jackson had red bumps on his head, one

can only speculate as to whether the bumps were contusions, a rash, or a hand mark after having been sleeping. Deputy Olson never indicated that Mr. Jackson appeared to have been in an accident. Likewise, there were no statements or observations made suggesting that Mr. Jackson was driving. Accordingly the State failed to establish probable cause regarding this element.

Deputy Olson's testimony also failed to establish that Mr. Jackson's ability to drive was impaired. Deputy Olson made conclusory assertions that Mr. Jackson's performance on the field sobriety tests was "impaired" and that a preliminary breath test result was above the legal limit, but Deputy Olson admitted that he did not know the results of the preliminary breath test (App. 10), (13:9) or even who administered the test (App. 37), (13:36). He also admitted he did not know which or how many clues of impairment Mr. Jackson exhibited during the field sobriety tests (App. 37), (13:36). The only specific facts that Deputy Olson could recall arguably relating to impairment were that Mr. Jackson's eyes were red and that he emitted the odor of alcohol (App. 7), (13:6). These facts fall far short of establishing probable cause that Mr. Jackson's ability to operate a motor vehicle was impaired.

CONCLUSION

For the above-stated reasons, the defendant-appellant respectfully requests that the trial court's order finding that he unlawfully refused an implied consent test be REVERSED.

Dated this 29th day of April, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4232 words.

Dated this 29th day of April, 2016.

Signed:

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**CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 29th day of April, 2016.

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CERTIFICATE OF SERVICE

State of Wisconsin v. Steven N. Jackson

Appeal No: 2015AP2628

La Crosse Case No: 15-TR-342

I hereby certify that on April 30, 2016, the undersigned caused the original and 9 true and correct copies of the **BRIEF AND APPENDIX OF DEFENDANT-APPELLANT** to be served on the following by U.P.S. for delivery on May 2, 2016:

VIA U.P.S. COURIER TO:

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I hereby certify that on May 2, 2016, the undersigned caused 3 true and correct copies of the **BRIEF AND APPENDIX OF DEFENDANT-APPELLANT** to be served by hand delivery on the following:

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