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C O U R T O F A P P E A L S

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case No. 2015AP002628

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

V.

STEVEN N. JACKSON,

DEFENDANT-APPELLANT.

APPEAL FROM THE CIRCUIT COURT'S
FINDING OF UNLAWFUL REFUSAL, THE
HONORABLE SCOTT L. HORNE, PRESIDING

BRIEF AND APPENDIX OF THE
PLAINTIFF-RESPONDENT

JOHN W. KELLIS
Assistant District Attorney
State Bar #1083400

Attorney for Plaintiff-Respondent

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601-3296
(608) 785-9604
(608) 789-4853 (Fax)
john.kellis@da.wi.gov

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ISSUES PRESENTED

Did the circuit court err in finding that an assisting officer properly authenticated a law enforcement vehicle squad video prior to its admission into evidence?

Did law enforcement have probable cause to arrest Jackson for operating while intoxicated or with a prohibited alcohol concentration?

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

Publication is precluded by Wis. Stat. § 809.23(1)(b)(4) as this appeal shall be decided by one judge. Oral argument is not requested.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

III. The circuit court properly admitted into evidence squad video footage capturing Sgt. Jacobson's contact with Jackson following his arrest.

A. Standard of Review.

Appellate courts will generally reverse a lower court's ruling related to the admission of evidence only upon a clear showing of erroneous use of discretion. *State v. Franklin*, 2004 WI 38, ¶ 6, 270 Wis.2d 271, 677 N.W.2d 276. A proper exercise of discretion requires that the circuit court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision. *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis.2d 554, 697 N.W.2d 811.

B. Deputy Olson was able to properly authenticate the admitted squad video by identifying Sgt. Jacobson's voice and unique markings on the video interface.

Jackson asserts on appeal that the circuit court erred in receiving into evidence a law enforcement squad vehicle video (hereinafter "squad video") offered by the State to establish that La Crosse County Sheriff's Department Sergeant James Jacobson, who passed away prior to the scheduled refusal hearing, properly complied with the statutory obligations set forth within Wis. Stat. § 343.305(4) and that Jackson refused to take a test under Wis. Stat. § 343.305(3)(a). Jackson's Br. at 10-12.

Jackson maintains that the State laid an insufficient foundation to authenticate the squad video pursuant to Wis. Stat. § 909.01 prior to its admission. Jackson's Br. at 10-12. Specifically, Jackson argues the squad video should not have been admitted because (1) Deputy Olson did not personally witness the events captured by the squad video and (2) Deputy Olson did not testify "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." Jackson's Br. at 11.¹

¹ Jackson's counsel also objected to the admission of the squad video into evidence as a violation of Jackson's constitutional right to confront his accuser, declaring a refusal hearing a "quasi-criminal proceeding" (13:22; R-Ap. 122). Because defense counsel later acknowledged a lack of authority supporting said argument (13:22; R-Ap. 122), and

The State does not dispute that Deputy Olson was not present at the time Sgt. Jacobson requested a blood sample from Jackson. However, for the reasons stated below, the State maintains that a sufficient foundation was presented for the circuit court to admit the squad video into evidence, and further, that the circuit court properly relied upon the audio recording captured by the squad video to determine Sgt. Jacobson complied with Wis. Stat. § 343.305(4) and Jackson unreasonably refused to submit to an evidentiary chemical test of his blood.

“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.” Wis. Stat. § 909.01.

On appeal, Jackson rests virtually his entire argument upon this court’s decision in *State v. Curtis*, 218 Wis. 2d 550, 582 N.W.2d 409 (Ct. App. 1998), for the proposition that an audio recording is authenticated only when a party to the recorded conversation identifies the defendant’s voice and testifies that the tapes accurately depict the conversation. Jackson’s Br. at 9-10.

However, Jackson’s reliance upon *Curtis* conflicts with his very concession that Deputy Olson could authenticate the recording in more than one manner. Jackson’s Br. at 11. In *Curtis*, this court recognized that a party to a conversation who testifies that the voices on an

because Jackson appears to have abandoned such argument on appeal, the State offers no additional response to that claim.

audio recording are his and a defendant's is "a valid avenue of authentication." 218 Wis.2d 550, 582 N.W.2d 409 (Ct. App. 1998). Of particular relevance to Jackson's claim, *Curtis* did not establish a rule that this was the *only* avenue for authentication.

To the contrary, Wis. Stat. § 909.015 offers litigants a number of examples in which evidence may be authenticated, including "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Wis. Stat. § 909.015(4). Authentication may also occur through "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Wis. Stat. § 909.015(5).

At the refusal hearing, Deputy Olson was asked during direct examination whether he was able to identify State's Exhibit 1, a video which the State maintained captured Sgt. Jacobson's contact with Jackson following his arrest (13:10-11; R-Ap. 110-11). In viewing the exhibit, Deputy Olson was able to identify the video interface as the video system for his agency's squad camera (13:11; R-Ap. 111).

Deputy Olson was also able to identify the voice heard reading the Informing the Accused form as Sgt. Jacobson (13:15; R-Ap. 115). Deputy Olson testified to his knowledge that Sgt. Jacobson was responsible for taking the defendant to the hospital for a blood draw (13:11; R-Ap. 111). Deputy Olson confirmed that no other individuals

other than Jackson were with Sgt. Jacobson before he left for the hospital and he placed no other individuals under arrest at that time (13:21; R-Ap. 121).

Over Jackson's objection on hearsay grounds, the circuit court permitted Deputy Olson to describe the significance of the designation "103 Jacobson" on the exhibit's video interface, which Deputy Olson agreed corresponded with the law enforcement officer involved or assigned to that particular vehicle (13:11; R-Ap. 111). Deputy Olson also agreed that the timestamp on the portions of the video played for the court were consistent with the time in which Sgt. Jacobson was transporting Jackson to the hospital for a blood draw (13:12; R-Ap. 112).

During the testimony of Deputy Olson, having overruled a litany of objections to the authentication of the squad video presented at the hearing, the circuit court found:

But what I have right now is a tape that I found to be authenticated. I've had testimony from the officer that Sergeant Jacobson was driving the defendant to the hospital for the purposes of the blood draw. I've heard testimony that the squad video is from Jacobson's vehicle at the time that he would have been transporting the defendant. I've heard testimony that he recognized the voice on the audio as that of Sergeant Jacobson. The voice on the audio is reading the Informing the Accused, apparently verbatim, and I then have a response from the other party in the vehicle indicating that he would not submit to the test.

Circumstantially, I think that's evidence of the Informing the Accused being read by Sergeant Jacobson, and at least at this point – I assume we're not completed with the testimony on this matter – but at least circumstantially I think a reasonable inference can be drawn that the voice of the other party is the party that was being transported, that being the defendant.

(13:17-18; R-Ap. 117-18).

Following the circuit court's ruling, defense counsel then endeavored to ask a number of questions for the stated purpose of establishing "that [Deputy Olson] doesn't have knowledge that the matter is what it is – what it is supposed to be" (13:27; R-Ap. 127). Specifically, Deputy Olson was asked a number of questions testing whether he could identify the squad video without certain auxiliary information, such as embedded timestamps, or whether he could identify the video if certain unspecified data was entered incorrectly (13:27-29; R-Ap. 127-29).

In *Horak v. Building Services Industrial Sales Company*, this court recognized, "Authentication does not require proving that the documents are incontrovertibly what they purport to be, but rather authentication requires presenting evidence sufficient to support a finding that the documents are what they purport to be." 2012 WI App 54, ¶ 13, 329 Wis.2d 240, 815 N.W.2d 400.

Applying the rationale underlying this court's holding in *Horak*, it should be evident that the cross-examination of Deputy Olson was intended

not to address whether the squad video was properly authenticated pursuant to Wis. Stat. § 909.01 but rather to cast doubt on whether it was incontrovertibly proven to be the squad video which captured Sgt. Jacobson's recitation of the Informing the Accused and Jackson's refusal to submit to a chemical test of his blood.

Deputy Olson understandably encountered difficulties answering questions about an arrest made nearly one year prior without first reviewing police reports or reexamining the squad video in question. One may surmise that this difficulty may have had an effect on the weight the circuit court afforded the evidence, but consistent with this court's holding in *Horak*, it did not require the circuit court to find the squad video unauthenticated pursuant to Wis. Stat. § 909.01 or otherwise exclude it from consideration.

At the time of the refusal hearing, Jackson's counsel was unable to articulate any case, statute or other authority supporting his argument (13:19-20; R-Ap. 119-20). Accordingly, the circuit court properly applied Wis. Stat. § 909.01 to the facts presented and correctly found that the State provided a sufficient foundation to authenticate the squad video offered at the refusal hearing (13:17; R-Ap. 117). This court should affirm that decision, finding that the circuit court did not abuse its discretion in arriving at this conclusion.

IV. Sgt. Jacobson and Deputy Olson had probable cause to believe Jackson was operating a motor vehicle while intoxicated and with a prohibited alcohol concentration at the time of his arrest.

A. Standard of Review

Whether probable cause to arrest exists in a given case is a question of law that appellate courts determine independently of the circuit court, but benefiting from its analysis. *Washburn County v. Smith*, 2008 WI 23, ¶ 16, 308 Wis.2d 65, 746 N.W.2d 243.

B. Police detected numerous signs of intoxication in Jackson, the lone occupant and presumptive driver of his crashed vehicle.

Jackson's second claim on appeal asserts that probable cause did not exist for law enforcement to arrest him for operating while intoxicated (13:13-14; R-Ap. 113-14). For the reasons articulated below, the State maintains that law enforcement had probable cause to believe Jackson had operated a motor vehicle while intoxicated or with a prohibited alcohol concentration.

Deputy Olson testified that on January 3, 2016, at approximately 2:30 AM, he was dispatched the a motor vehicle accident (13:4; R-Ap. 104). *See State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis.2d 383, 76 N.W.2d 551 (recognizing police contact at "bar time" as a factor supporting an officer's suspicion of impaired driving).

Contrary to Jackson's mischaracterization of the evidence offered at the refusal hearing, his vehicle was not simply found abandoned (13:13; R-Ap.113). Jackson's Br. at 13. Rather, Deputy Olson observed Jackson's registered vehicle on the south side of the road "smashed against a telephone pole" (13:4; R-Ap. 104). Deputy Olson noted that a couple hundred feet down the road, it appeared the vehicle had also run off the road and stuck a street sign (13:5; R-Ap. 105).

Deputy Olson and Sgt. Jacobson made contact with the Jackson, the registered owner of the crashed vehicle, at Jackson's residence (13:6; R-Ap. 106). Deputy Olson observed numerous signs of intoxication upon contacting Jackson, including the odor of intoxicants emitting from his person and red, bloodshot, glassy eyes (13:6; R-Ap. 106).

Deputy Olson also observed various indicators that Jackson was involved in a motor vehicle accident, including rips and blood stains on his white shirt and red bumps on his head (13:6; R-Ap. 106). Again, contrary to Jackson's argument that "Deputy Olson never indicated that Mr. Jackson appeared to have been in an accident," Deputy Olson actually testified that the injuries suffered by Jackson would be consistent with a person involved in a motor vehicle accident (13:6; R-Ap. 106). Jackson's Br. at 14.

Deputy Olson also recalled the interview between Sgt. Jacobson and Jackson concerning the driver of the located crashed vehicle (13:7; R-Ap. 107). Deputy Olson indicated that Jackson did not name any other individuals that were with him at the time of the crash, nor did Jackson indicate

that someone else was driving the vehicle (13:7; R-Ap. 107).

Though not responsible for administering the series of standardized field sobriety tests, Deputy Olson acknowledged he was present during the testing and described Jackson's balance and coordination as impaired (13:8; R-Ap. 108). Deputy Olson even recognized that Jackson encountered troubles with the elementary task of reciting the English alphabet (13:10; R-Ap. 110).

Taken together, the facts presented at the refusal hearing supported that court's finding of probable cause to believe that Jackson had operated a motor vehicle while impaired by alcohol (13:45; R-Ap. 145). While Jackson was entitled to argue innocent justifications for the myriad of observations supporting the circuit court's decision, that court was in no way required to accept those self-serving explanations.

Furthermore, assuming *arguendo* that this court were to find such observations insufficient to support a probable cause to believe Jackson was operating a motor vehicle while under the influence of alcohol, law enforcement undoubtedly possessed probable cause to believe Jackson was operating a motor vehicle with a prohibited alcohol concentration once he submitted to a preliminary breath test. Wis. Stat. § 343.305(9)(a)(5)(a).

Contrary to Jackson's deceptive characterization of the testimony offered at the refusal hearing, Deputy Olson actually testified that he witnessed Jackson's preliminary breath test result and recalled that the result exceeded

the prohibited alcohol concentration limit of .08 (13:9-10; R-Ap. 109-10). Jackson's Br. at 14. While Deputy Olson was not able to identify Jackson's precise PBT result, no evidence was presented at the hearing demonstrating that Jackson's PBT result did not exceed .08.

Assuming this court agrees that law enforcement had probable cause to believe Jackson was operating a motor vehicle while intoxicated or with a prohibited alcohol concentration, the only remaining issues to be decided at a refusal hearing are whether Sgt. Jacobson properly recited the Informing the Accused in accordance with Wis. Stat. § 343.305(4) and whether Jackson refused to permit the test. Wis. Stat. § 343.305(9)(a)(5)(b)-(c).

However, Jackson's only claim on appeal concerning the three delineated issues a circuit court must address at a refusal hearing concerns whether there existed probable cause to believe he was operating while under the influence of an intoxicant. Jackson's Br. at 12. Assuming the circuit court properly admitted the squad video, Jackson makes no argument now that the arresting officer failed to comply with Wis. Stat. § 343.305(4) or that Jackson did not refuse to permit a test.

Consequently, should this court find the circuit properly admitted into evidence the squad video from Sgt. Jacobson's vehicle, Jackson's failure to advance any argument in his Brief-in-Chief that Sgt. Jacobson failed to comply with Wis. Stat. § 343.305(4) or that Jackson did not refuse to submit to a chemical test should preclude him from raising these new arguments in his reply.

Olivarez v. Unitrin Prop. & Cas. Ins. Co., 2006 WI App 189, ¶34, 296 Wis. 2d 337, 723 N.W.2d 131 (arguments not fully developed in appellant's brief-in-chief afford the respondent no opportunity to respond, and will not be reviewed).

The circuit court properly applied the minimal standard of probable cause to the facts presented at the refusal hearing and, examining the totality of circumstances, arrived at the logical and common-sense conclusion that Jackson was operating while impaired by his use of alcohol (13:48; R-Ap. 148). Jackson's artful interpretation of the evidence offered at the refusal hearing which misstates Deputy Olson's testimony and outright ignores specific evidence detrimental to his claims should not lead this court to disturb the circuit court's ruling.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the circuit court's finding of unlawful refusal.

Dated this 22nd day of June, 2016.

Respectfully submitted,

John W. Kellis
Assistant District Attorney
State Bar #1083400

Attorney for Plaintiff-
Respondent

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601-3296
(608) 785-9604
(608) 789-4853 (Fax)
john.kellis@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,534 words.

John W. Kellis
Assistant District Attorney

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. § (Rule) 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 at La Crosse, Wisconsin, this 22nd day of June, 2016.

John W. Kellis
Assistant District Attorney

APPENDIX CERTIFICATION

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 Wis. Stat. § 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 first names and last initials 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 22nd day of June, 2016.

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on June 22, 2016, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-respondent's brief and appendix.

Dated this 22nd day of June, 2016.

John W. Kellis
Assistant District Attorney