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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2016 AP 000256
Milwaukee County Circuit Court Case Nos.
2015TR008383

VILLAGE OF BAYSIDE,

Plaintiff-Respondent,

v.

AMBER E. SCHOELLER,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE T. CHRISTOPHER DEE, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT AMBER E. SCHOELLER

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STATEMENT OF THE ISSUES

Without the refusal to submit to chemical testing under Wis. Stat. §343.305 (9) was the evidence sufficient to support the trial court's finding of guilt?

The trial verdict: Guilty.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Amber E. Schoeller (Ms. Schoeller) was charged in the Village of Bayside Municipal Court, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a) and with having refused chemical testing contrary to Wis. Stat §343.305(9) and (10). The defendant timely filed a Request for Refusal Hearing on January 30, 2015. A refusal hearing and court trial was held in municipal court on May 12, 2015, the Honorable Charles Barr, Judge, Municipal Court, presiding, wherein the court found that Ms. Schoeller unlawfully refused chemical testing, and further found Ms. Schoeller guilty of operating a motor vehicle while under the influence of an intoxicant.

On May 13, 2015, the defendant timely filed an appeal to the circuit court pursuant to Wis. Stat. §800.14 appealing both the guilty verdict and the finding that Ms. Schoeller refused chemical testing. A trial to the court and a refusal hearing were held in Circuit Court on November 2, 2015, the Honorable T. Christopher Dee, Judge, presiding. The Court found the defendant refused chemical testing and found the defendant guilty of operating a motor vehicle while under the influence of

an intoxicant. (R. 13:60 / A.App. 25). The Court entered a Dispositional Order/ Judgment on November 2, 2015. (R.14:1-4). The defendant timely filed an appeal of the refusal allegation and OWI conviction by single Notice of Appeal on January 29, 2016. The Clerk of Court separately docketed each case under different appeal numbers (2016AP000257 (refusal) and 2016AP000256 (OWI). Because the Milwaukee Clerk of Court required separate docketing fees for the refusal and OWI charges, Mr. Schoeller is simultaneously filing briefs in each case. The appeal herein stems from the trial court finding Ms. Schoeller guilty of operating a motor vehicle while under the influence of an intoxicant.

Facts in support of this appeal were adduced at the court trial/ refusal hearing held on November 2, 2015 and were introduced through the testimony of Village of Bayside Police Sergeant Francesca Ehler. Sergeant Ehler testified that on January 24, 2015 at approximately 2:30 a.m., she was patrolling in the Village of Bayside. She testified that she observed a vehicle traveling eastbound on W. Brown Deer Road. Ehler testified that at the intersection of Brown Deer Road and North Port Washington Road, she observed said vehicle make a u-turn.

Ehler testified that the intersection is clearly marked with two posted no u-turn signs. (R.13:8-9/ A.App. 1-2).

Sergeant Ehler positioned herself behind the vehicle and activated her lights. She observed that the vehicle pulled to the left into a left turn only lane, but did not stop, then pulled back into the left turn through lane, continued to Spruce Street, pulled into left turn lane and stopped. (R.13:10/ A.App. 3). Sergeant Ehler testified that there was no reason that the driver, who was identified as Amber E. Schoeller, could not have stopped immediately. ***Id.***

During her initial contact with Ms. Schoeller, Ehler observed an odor of intoxicant coming from Ms. Schoeller's breath and observed Ms. Schoeller to have bloodshot and glassy eyes. Ms. Schoeller admitted to consuming one drink. (R.13:15/ A.App. 4). However, Ehler testified that Ms. Schoeller's speech was unimpaired. (R.13:33/ A.App. 15). Furthermore, Ehler agreed that there was nothing about Ms. Schoeller's motor coordination while she sat in the vehicle that led her to suspect Ms. Schoeller was impaired. (R.13:34/ A.App. 16), nor were there any problems with Ms. Schoeller's balance as she exited the vehicle that suggested she was impaired. ***Id.***

Sergeant Ehler asked Ms. Schoeller to perform field sobriety tests. Ms. Schoeller indicated to Sergeant Ehler that it was too cold outside. Ehler gave Schoeller her gloves but still required Ms. Schoeller to complete the tests outside. (R.13/34-35/ A.App. 17-18).

Ehler asked Ms. Schoeller to recite the alphabet test starting from the letter "A' and ending with the letter "Z". (R.13:15/ A.App. 4). Ms. Schoeller recited the letters "A" to 'B" and then stopped and asked Ehler if she wanted her to say the entire alphabet. Ehler said yes. Ms. Schoeller then said "A" to "B" again and stopped and said that the officer was making her nervous. (R.13:15/ A.App. 4).

Sergeant Ehler then asked Ms. Schoeller to perform the horizontal gaze nystagmus test. (HGN). (R.13:17/ A.App. 5). During that test, Sergeant Ehler observed six clues, including a lack of smooth pursuit, nystagmus at maximum deviation and the onset of nystagmus prior to 45 degrees in both eyes. (R.13:18/ A.App. 6). Sergeant Ehler testified that the result of the HGN test led her to believe that Ms. Schoeller had consumed alcohol. (R.13:20/ A.App. 7). Ehler testified that Ms. Schoeller performed the walk and turn test. (R.13:21/ A.App. 8). On that test, Ms. Schoeller missed heel to toe by 3-4 inches on several

steps, took the wrong number of steps out an back (12 and 15 respectively, instead of the 9 that were instructed), stepped off line and turned improperly. (R.13:22/ A.App. 9).

The final test performed was the one leg stand tests. (R.13:23/ A.App. 10). On that test, Ms. Schoeller did not count the number 11, and lost her balance and put her foot down at number 20. (R.13:23/ A.App. 10). Ehler conceded that up to 20, Ms. Schoeller performed the test "fine." (R.13:38/ A.App. 20). Ehler testified that she could not recall the number of seconds that Ms. Schoeller had actually kept her foot off the ground. (R.13:39/ A.App. 22).

After performing the field sobriety tests, Ehler asked Ms. Schoeller to perform a preliminary breath test (PBT). Ms. Schoeller declined the request for a PBT. (R.13:24/ A. App. 11).

Ehler then placed Ms. Schoeller under arrest because she felt that Ms. Schoeller could not safely operate a motor vehicle. (R.13:25/ A. App. 12). Ehler transported Ms. Schoeller to the Village of Bayside Police Department, read her the Informing the Accused Form, and requested that she submit to a chemical test of her breath. (R.13:26/ A. App. 13). Ms. Schoeller refused to provide a chemical test of her breath. (R.13:27/ A.App. 14).

Defense counsel argued that the Village did not establish the requisite level of probable cause to request a PBT test, and probable cause to arrest. (R.13:51/ A.App. 22). Defense counsel further argued that the evidence was insufficient to find Ms. Schoeller guilty of operating a motor vehicle while under the influence of an intoxicant. The Village argued that the evidence was sufficient to support the arrest and guilty verdict. The Court found the defendant refused chemical testing and that there was probable cause to arrest. (R.13:58/ A.App. 24). Furthermore, the Court found Ms. Schoeller guilty of operating a motor vehicle while under the influence of an intoxicant. (R.13:60/ A.App. 25). In making its finding of guilt, the court recited the reasons that supported probable cause to arrest, and then found that when "you add onto that some consciousness of perhaps guilt, which by doing the refusal, and I think that does add up to an OWI." (R.13:60/ A.App. 25). A Dispositional Order/ Judgment was entered on November 2, 2015. Mr. Schoeller timely filed a Notice of Appeal on January 29, 2016. In Appeal No. 2016AP000257, Ms. Schoeller challenges the trial court's finding that she refused to submit to chemical testing, specifically, she argues that the officer did not have the requisite

level of probable cause to request a preliminary breath test, and the additional probable cause to arrest her.

The issue herein is if the refusal were proper and not supported by probable cause, was the remaining evidence sufficient to sustain the conviction.

STANDARD OF REVIEW

When an appellate court reviews whether the evidence presented at a bench trial is sufficient to support the verdict, the court will affirm unless the court's findings of fact are clearly erroneous. See Wis. Stat. §805.17(2); see also ***Ozaukee County v. Flessas,*** 140 Wis.2d 122, 130-31, 409 N.W.2d 408. The Village bears the burden of proving the elements of the offense. The court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative force and value that no trier of fact, acting reasonably could have found guilt to a reasonable certainty by evidence that is clear, satisfactory and convincing evidence. ***State. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W. 752 (1990). However, a determination of the sufficiency of the evidence is a question of law, the review is de novo. ***State v. Booker,*** 2006 WI 79, ¶12, 292 Wis.2d 43, 717 N.W.2d 676.

ARGUMENT

IF THE COURT FINDS THAT THE REFUSAL WAS IMPROPER, IN APPEAL NUMBER 2016AP000257, *In the Matter of the Refusal of Amber E. Schoeller,* VILLAGE OF BAYSIDE v. AMBER E. SCHOELLER, THE REMAINING EVIDENCE DID NOT AMOUNT TO CLEAR, SATISFACTORY AND CONVINCING EVIDENCE TO WARRANT THE CONVICTION

When determining whether the evidence is sufficient to sustain a conviction, an appellate court will accept the inferences drawn by the circuit court so long as they are reasonable, and search the record for evidence to support its findings. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.,*** 2002 WI App 91, ¶10, 253 Wis.2d 588, 644 N.W.2d 269. Here, the trial court concluded that the refusal, and the consciousness of guilt that could be inferred from it, coupled with the other evidence adduced at the trial "add[ed] up to an OWI." (R.13:60/ A.App. 25). If the refusal determination stands, the defendant concedes that the evidence is sufficient to sustain the conviction.

However, the defendant claims the court erred in considering the refusal, inasmuch as Sergeant Ehler did not have the requisite level of probable cause to arrest Ms. Schoeller for operating her motor vehicle while under the influence. The defendant made the probable cause argument in her initial Brief

in the companion appeal of the refusal, Appeal No. 2016AP000257.

Clearly, the consciousness of guilt inferred by the refusal was a significant component of the court's rationale in finding Ms. Schoeller guilty of the operating a motor vehicle under the influence of an intoxicant charge.

Without the consciousness of guilt evidence, the court is left with insufficient evidence to support guilt. Here, the evidence revealed that Ehler stopped Ms. Schoeller for making an illegal u-turn. Upon making contact, Sergeant Ehler observed an odor of intoxicant coming from Ms. Schoeller, and her to have glassy and bloodshot eyes. However, Ehler made no observations about Ms. Schoeller's mannerisms that suggested that she might be impaired. Ms. Scholler's speech was normal, her movement in the vehicle did not show impairment and her normal balance when she exited the vehicle was unimpaired. Despite this, Ehler asked Ms. Schoeller to exit the vehicle for field sobriety testing. During the alphabet test Ms. Schoeller said the letters "A" and "B" and then stopped twice and told the officer that the officer made her nervous. Ehler then abandoned this test.

Sergeant Ehler performed the HGN test observing six clues. According to Ehler, the result of the HGN test indicated that Ms. Schoeller simply consumed intoxicant. (R.13:20/ A.App. 7). Ehler provided no testimony that her observations on the HGN test suggested Ms. Schoeller was less able to safely operate a motor vehicle.

In terms of the other tests, Sergeant Ehler provided no testimony as to the number or clues of intoxication that she was trained to detect. Ehler testified as to how she explained each test, but the Village elicited no testimony as to Ehler's training regarding the significance of her observations on each test. There was no testimony elicited regarding the maximum potential indicators of impairment on each test, as to the specific number of clues of impairment that Ms. Schoeller exhibited or the minimum number of clues that would suggest someone is less able to safely operate a motor vehicle. Ehler did not testify that Ms. Schoeller failed the field sobriety tests.

On the walk and turn test, Ms. Schoeller performed the test in heels, told the officer she was cold (R.13:36-37/ A.App. 18-19), and advised Ehler that she had broken her leg three years ago (R.13:22/ A.App. 9). During this test she had a gap of three to four inches between her steps, took more steps than the

officer instructed and stepped off line during the turn. ***Id.*** The errors were minor in nature. More importantly, Sergeant Ehler provided no testimony regarding the number of clues that she was looking for or the number of clues that suggested impairment

During the one leg stand test she testified that up until at least 20 seconds Ms. Schoeller performed "fine", exhibiting no balance problems. Only after 20 seconds did Ms. Schoeller put her foot down. Ehler provided no testimony as to the significance of putting the foot down at twenty as opposed to thirty seconds.

Ms. Schoeller's normal mannerisms were unimpaired. Furthermore, the other evidence adduced at the trial including the field sobriety tests does not establish to a reasonable certainty by evidence that is clear, satisfactory and convincing the Ms. Schoeller was impaired. Using the trial court's own reasoning, without the refusal component, the evidence would not "add up to an OWI."

Thus, the court erred in finding Ms. Schoeller guilty of operating a motor vehicle while under the influence of an intoxicant.

CONCLUSION

Because of the above, the evidence was insufficient to establish that Ms. Schoeller was guilty of operating a motor vehicle while under the influence of an intoxicant. The trial court erred in finding Ms. Schoeller guilty. The court should vacate the judgment of conviction and remand this matter to the circuit court.

Dated this 10th day of May, 2016.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 16 pages. The word count is 3486.

Dated this 10th day of May, 2016.

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CERTIFICATION 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 s. 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 this 10th day of May, 2016.

Respectfully submitted,

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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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 10th day of May, 2016.

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APPENDIX

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