

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

06-02-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

VILLAGE OF BAYSIDE,

Plaintiff-Respondent,

Appeal No. 2016-AP-256

v.

AMBER E. SCHOELLER,

Defendant- Appellant.

**APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY
CASE NO. 2015-TR-8383
HON. T. CHRISTOPHER DEE, PRESIDING**

RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

Elizabeth K. Miles
WI Bar No. 1064284
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE ISSUE 1

STATEMENT ON PUBLICATION AND ORAL ARGUMENT 1

STATEMENT OF THE CASE 1

 A. Sergeant Ehler Observed Schoeller Make An Illegal U-Turn 1

 B. Sergeant Ehler Concluded From Her Observations That Schoeller
 Was Unable To Safely Operate Her Vehicle 2

 C. Schoeller Refused To Take A Chemical Test Of Her Breath 4

 D. The Trial Court Found Schoeller Improperly Refused The Breath
 Test And Operated A Motor Vehicle While Under The Influence
 Of An Intoxicant..... 4

STANDARD OF REVIEW..... 6

ARGUMENT 6

 I. Schoeller Improperly Refused To Submit To A Chemical Test Of
 Her Breath; Therefore, No Further Analysis Is Necessary 6

 II. Even Ignoring The Refusal, The OWI Judgment Must Be Affirmed 6

CONCLUSION 9

FORM AND LENGTH CERTIFICATION..... 10

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)..... 11

MAILING CERTIFICATION 12

TABLE OF AUTHORITIES

Cases

City of Mequon v. Wilt,
No. 2011AP931, 2011 WL 5375126 (Ct. App. Nov. 9, 2011)..... 8

City of Milwaukee v. Wilson,
96 Wis. 2d 11, 291 N.W.2d 452 (1980)..... 6

State v. Forster,
2003 WI App 29, 260 Wis. 2d 149, 659 N.W.2d 144 6

State v. Sonnenberg,
No. 2012AP1025, 2012 WL 4094148 (Ct. App. Sept. 19, 2012) 8

Statutes

Wis. Stat. § 346.63(1)(a) 7

Wis. Stat. § 752.31(2)(b) 1

Wis. Stat. § 809.22(2)..... 1

Wis. Stat. § 809.23(1)(b)(4) 1

Other Authorities

Wis JI-Criminal 2663B (2015)..... 7

STATEMENT OF THE ISSUE

Whether the evidence presented at trial, even without considering Defendant-Appellant Amber Schoeller's ("Schoeller") improper refusal to take an evidentiary chemical test of her breath, was sufficient to prove that Schoeller operated a motor vehicle while under the influence of an intoxicant to a degree that rendered her incapable of safely driving.

The trial court found that Schoeller improperly refused the breath test and included it as one of the facts upon which it based its finding that Schoeller operated her vehicle while intoxicated; therefore, the court did not answer the issue presented.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

This appeal will be decided by one judge. Wis. Stat. § 752.31(2)(b). Therefore, the resulting decision is not eligible for publication. Wis. Stat. § 809.23(1)(b)(4). This appeal does not warrant oral argument pursuant to Wis. Stat. § 809.22(2).

STATEMENT OF THE CASE

A. Sergeant Ehler Observed Schoeller Make An Illegal U-Turn

Around 2:30 a.m. on Saturday, January 24, 2015, Village of Bayside police officer Sergeant Francesca Ehler observed Schoeller's vehicle make a U-turn at the intersection of W. Brown Deer Road and N. Port Washington Road in Bayside, contrary to two posted signs. *R. 13:8-9; R-App. 108-09.*¹ At the time of trial, Sergeant Ehler had been a police officer for 23 years. *R. 13:6-7; R-App. 106-07.* For most of those 23 years, she worked the midnight to 8:00 a.m. shift. *R. 13:7; R-App. 107.* Sergeant Ehler is trained in and has significant experience with detecting persons under the influence of an intoxicant. *R. 13:7-8; R-App. 107-08.*

¹ Schoeller included portions of the transcript of the November 2, 2015 refusal hearing, bench trial, and trial court decision in her appendix. Rather than append the pages not included by Schoeller, the Village has included the entire transcript in its appendix.

Upon observing the illegal U-turn, Sergeant Ehler activated her emergency lights to stop Schoeller's vehicle. *R. 13:9; R-App. 109.* After about a third of a mile, Schoeller steered her vehicle into a left turn lane on W. Brown Deer Road across from the entrance to the Indian Hills School. *R. 13:10; R-App. 110.* She slowed down, then pulled back onto W. Brown Deer Road and proceeded driving. *Id.* Schoeller pulled into a left turn lane again near the intersection of W. Brown Deer Road and N. Spruce Road and stopped in the turn lane. *Id.* There was no reason she could not have pulled over to the right on W. Brown Deer Road in response to Sergeant Ehler's emergency lights. *Id.*

B. Sergeant Ehler Concluded From Her Observations That Schoeller Was Unable To Safely Operate Her Vehicle

Sergeant Ehler approached the vehicle, identified Schoeller by her driver's license, and spoke with her about the reason for the traffic stop. *R. 13:11, 14; R-App. 111, 114.* Sergeant Ehler detected an odor of an intoxicating beverage coming from Schoeller's mouth and observed that her eyes were bloodshot and glassy. *R. 13:15; R-App. 115.* Schoeller told Sergeant Ehler she had had one drink that evening. *Id.*

Based on her observations and Schoeller's admission to drinking, Sergeant Ehler asked Schoeller whether she was an educated person and knew the alphabet. *Id.* Schoeller responded that she was a doctor. *Id.* Sergeant Ehler then asked Schoeller to say the alphabet from A to Z. *Id.* Schoeller stopped at B on both attempts. *Id.* Schoeller said she could not repeat the alphabet because Sergeant Ehler was making her nervous. *R. 13:15-16; R-App. 115-16.*

Sergeant Ehler's observations up to this point caused her to question whether Schoeller could safely drive, so she asked Schoeller to vacate the vehicle and perform field sobriety tests. *R. 13:16; R-App. 116.* The tests were performed on a dry surface. *Id.* The temperature was about 30 degrees. *R. 13:35; R-App. 135.*

The first test was the horizontal gaze nystagmus (“HGN”) test. *R. 13:17; R-App. 117.* Sergeant Ehler observed lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and nystagmus prior to 45 degrees in both eyes. *R. 13:17-19; R-App. 117-19.* This indicated to her that Schoeller had consumed alcohol prior to being pulled over. *R. 13:20; R-App. 120.* When Sergeant Ehler asked Schoeller if she was wearing contact lenses, Schoeller said, “I think so.” *Id.*

The second test was the walk-and-turn test. *Id.* Sergeant Ehler instructed Schoeller to take nine heel-to-toe steps while keeping her arms at her sides and looking at her feet. *R. 13:21; R-App. 121.* Sergeant Ehler instructed that when Schoeller reached the ninth step, she should plant her feet, take short choppy steps to turn around, then take nine heel-to-toe steps back to the original position. *Id.* Sergeant Ehler asked Schoeller whether she had any physical problems that would make the test difficult for her. *Id.* Schoeller said she had broken her right leg three year prior, but did not object to taking the test. *R. 13:21-22; R-App. 121-22.* Schoeller then took 12 steps instead of nine, made a turn contrary to instructions, lost her balance and stepped off the imaginary line she was following, and took 15 steps back. *R. 13:22; R-App. 122.* She did not make heel-to-toe contact on most of her steps in both directions, leaving three to four inches of space between her feet. *Id.*

The third test was the one leg stand. *R. 13:23; R-App. 123.* Sergeant Ehler asked Schoeller to hold the leg of her choosing six to 10 inches off the ground in front of her while keeping her arms at her side and counting out loud “one-one thousand, two-one thousand,” et cetera until told to stop. *Id.* Schoeller chose to raise her right leg. *R. 13:24; R-App. 124.* She skipped the number 11 and lost balance at the count of 20, causing her to hop and put her foot down. *Id.*

Sergeant Ehler then asked Schoeller to consent to a PBT. *Id.* Schoeller declined to do so. *Id.* Based on her training, experience, and observations,

Sergeant Ehler concluded Schoeller was unable to safely operate a motor vehicle and arrested her for operating while intoxicated. *R. 13:25; R-App. 125.*

C. Schoeller Refused To Take A Chemical Test Of Her Breath

Sergeant Ehler transported Schoeller to the Bayside police department, conducted a 20 minute observation in preparation for the collection of a breath specimen, and read an Informing the Accused form containing the information required by Wis. Stat. 343.305(4). *R. 13:26-27; R-App. 126-27.*

Schoeller refused to submit to an evidentiary chemical test of her breath. *R. 13, Exs. 2, 3; R. 13:27-28, 44; R-App. 127-28, 144.* She gave no explanation for refusing. *R. 13:27-29, 44-45; R-App. 127-29, 144-45.* While at the station, Schoeller's behavior swung between very cooperative and very uncooperative. *R. 13:30; R-App. 130.*

Ultimately, Schoeller was issued citations for operating while intoxicated in violation of Bayside ordinance 98-1, adopting Wis. Stat. § 346.63(1)(a), and illegal U-turn, and was charged with improperly refusing to take an evidentiary chemical test of her breath. *R. 13:31; R-App. 131.*

D. The Trial Court Found Schoeller Improperly Refused The Breath Test And Operated A Motor Vehicle While Under The Influence Of An Intoxicant

On November 2, 2015, the trial court held a refusal hearing and a bench trial on Schoeller's OWI and U-turn citations. *R. 13.* After the hearing and trial, the court made specific factual findings that included: Sergeant Ehler's 23 years of experience and familiarity with the area she was patrolling; Schoeller's illegal U-turn; Schoeller's "kind of weird" driving in response to the emergency lights; Schoeller's inability to recite the alphabet, despite being highly educated, which indicated in the court's view "some kind of confusion of rather simple directions"; the odor of an intoxicating beverage and glassy and bloodshot eyes, which the court concluded "certainly would cause any prudent officer to act on, to make sure that this person was in a condition to safely operate a vehicle"; the HGN test's

indication of an intoxicant, which the court found “certainly gives Officer Ehler reason to move on”; and Schoeller’s performance on the walk-and-turn and one leg stand test, which the court found “more illustrative of impairment” than the other tests and indicated Schoeller was unable to follow instructions. *R. 13:52-57; R-App. 52-57.*

The court then concluded that Schoeller improperly refused to take an evidentiary chemical test of her breath.² *R. 13:58; R-App. 158.* It also found Schoeller made an illegal U-turn (which Schoeller has not appealed) and operated a motor vehicle while under the influence of an intoxicant, in violation of Wis. Stat. § 346.63(1)(a). *R. 13: 58-60; R-App. 158-60.* Regarding the OWI citation, the court stated:

As to the OWI, I find under standards of clear, satisfactory, and convincing evidence, all that information I've gone over already, I won't go over it again, there is a refusal.

Now people can look at that as consciousness of guilt, just being cranky, not wanting to cooperate. I suspect there may be professional reasons involved for Doctor Schoeller as well. I don't know.

Certainly I can take it as consciousness of guilt, and add to it all of the observations made by the Sergeant and certainly, in some respects, confirmed by the officer, Officer Janssen.

I would find there is evidence here that Doctor Schoeller was operating a motor vehicle, which we saw in the video, on a highway, Brown Deer Road, while under the influence of intoxicants.

There's also her admission of drinking, and the under the influence part, about not being able to safely operate a motor vehicle, certainly is borne out by the physical observations and the field sobriety.

So certainly, you add onto that some consciousness perhaps of guilt, which by doing the refusal, and I think that does add up to an OWI.

² Schoeller has appealed this decision in Appeal No. 2016-AP-257.

Id. This appeal, and Schoeller's appeal of the refusal finding in Appeal No. 2016-AP-257, followed.

STANDARD OF REVIEW

In determining the sufficiency of the evidence, this Court's inquiry is limited to whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof was met. *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). The burden of proof in this case is clear, satisfactory, and convincing evidence. *Id.* at 22. This Court reviews the facts in the light most favorable to the judgment. *See State v. Forster*, 2003 WI App 29, ¶ 2, 260 Wis. 2d 149, 659 N.W.2d 144. If more than one inference might be drawn from the evidence, this Court must accept the inference found by the trial court as the fact finder. *Id.*

ARGUMENT

I. Schoeller Improperly Refused To Submit To A Chemical Test Of Her Breath; Therefore, No Further Analysis Is Necessary

Schoeller concedes that the OWI judgment must stand if the trial court's decision that she unlawfully refused to take a chemical test of her breath is affirmed. *Br.*, p. 8. As set forth in the Village's brief in Appeal No. 16-AP-257, that finding should be affirmed because Schoeller exhibited more than enough indications of intoxication for the appellate court to find under Wisconsin precedent that Sergeant Ehler had probable cause to request a PBT (the narrow issue that is the subject of Schoeller's refusal appeal) and, therefore, had probable cause to arrest Schoeller for operating while intoxicated.

II. Even Ignoring The Refusal, The OWI Judgment Must Be Affirmed

Even without considering Schoeller's refusal to take the breath test, however, there is sufficient evidence to conclude that she operated a motor vehicle while under the influence of an intoxicant.

In order to prove that Schoeller operated while under the influence of an intoxicant in violation of Wis. Stat. § 346.63(1)(a), the Village had to prove by clear, satisfactory, and convincing evidence that she had “consumed a sufficient amount of alcohol to cause [her] to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.” Wis JI-Criminal 2663B (2015). The trial court correctly found that the evidence presented at trial satisfied this standard.

Schoeller incorrectly suggests that her refusal to take a breath test was a decisive factor in the trial court’s OWI determination. *Br.*, p. 9, 11. The court first identified the facts upon which it was basing its decision that Sergeant Ehler had probable cause to arrest Schoeller and, ultimately, that Schoeller improperly refused the breath test, including:

- Sergeant Ehler’s 23 years of experience;
- Illegal U-turn;
- Odd driving in response to emergency lights;
- Inability to recite the alphabet;
- Six clues exhibited during the HGN test;
- Odor of an intoxicant;
- Glassy and bloodshot eyes;
- Failure to make heel-to-toe contact during the walk-and-turn test, leaving three to four inches of space between steps;
- Failure to turn as instructed, loss of balance and stepping off line, and too many steps during the walk-and-turn test;
- Failure to count as instructed and loss of balance during the one leg stand; and
- Refusal to submit to a PBT.

R. 13:52-57; R-App. 152-57. The trial court then referenced those findings as a basis for its decision that Schoeller operated her vehicle while intoxicated. It stated, “[a]s to the OWI...all that evidence I’ve gone over already, I won’t go over it again,” and then added the fact that Schoeller refused to take the breath test and admitted to drinking. *R. 13:59; R-App. 159.*

The court specifically referenced Schoeller's poor performance on the field sobriety tests as evidence that she could not operate her vehicle safely, stating: "and the under the influence part, about not being able to safely operate a motor vehicle, certainly is borne out by the physical observations and the field sobriety." *Id.* The court then added to all of that evidence "some consciousness of guilt" from the refusal and concluded that Schoeller was guilty of operating while intoxicated. *R. 13:59-60; R-App. 159-60.* The court properly considered the totality of the circumstances and did not primarily rely on Schoeller's refusal to take the breath test.

The evidence presented supports the trial court's conclusion. Notably, Schoeller cites no Wisconsin case in which similar evidence was found insufficient to support an OWI judgment. Nor can she, because Wisconsin law fully supports a conclusion by this Court that the facts, viewed in the light most favorable to the judgment, compel that the judgment be affirmed.

For example, the court in *City of Mequon v. Wilt*, No. 2011AP931, 2011 WL 5375126, ¶ 23 (Ct. App. Nov. 9, 2011), concluded that the following evidence was sufficient to affirm the OWI judgment: the defendant was involved in a one-car crash, appeared confused and unsteady, had bloodshot and glassy eyes, smelled of alcohol, admitted to drinking, and performed poorly on field sobriety tests, including non-balance tests, with which the defendant's multiple sclerosis would not have been a factor. Schoeller exhibited similar signs of intoxication, including on the alphabet test, HGN test, and taking too many steps on the walk-and-turn test, on which the cold and a prior leg injury would have no effect.

The court in *State v. Sonnenberg*, No. 2012AP1025, 2012 WL 4094148, ¶ 9 (Ct. App. Sept. 19, 2012), concluded that similar evidence of bloodshot and glassy eyes, admission of drinking, and poor performances on field sobriety tests was sufficient to affirm the OWI judgment, and that case lacked any observation of unusual driving.

Although Schoeller points to the lack of evidence that her speech was impaired or that she had any difficulties balancing when exiting her car for the field sobriety tests, *Br.*, p. 9, there is certainly no requirement that a driver must show every possible sign of impairment or extreme symptoms to properly conclude that his or her ability to safely drive is impaired.

Schoeller also provides no legal support for her suggestion that an officer must characterize his or her observations as “clues” to support the ultimate conclusion that a driver cannot safely operate a vehicle. Sergeant Ehler’s observations regarding Schoeller’s inability to follow instructions and perform simple physical tasks, combined with her unusual driving, smell of alcohol, and admission to drinking provided more than enough evidence of impairment for this Court to affirm the judgment against her.

CONCLUSION

For the reasons set forth herein, the Village requests that this Court affirm the judgment against Schoeller for operating a motor vehicle while under the influence of an intoxicant, in violation of Bayside ordinance 98-1, adopting Wis. Stat. § 346.63(1)(a).

Dated: June 2, 2016

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,582 words.

Dated: June 2, 2016

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the supplemental appendix, that complies with the requirements of Wis. Stat. § 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: June 2, 2016

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

MAILING CERTIFICATION

I hereby certify that on June 2, 2016, in accordance with Wis. Stat. §§ 809.80(3)(b) and 809.80(4), 10 copies of this brief and supplemental appendix were mailed via UPS Overnight Mail, postage pre-paid, addressed to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53701-1688.

I further certify that on June 2, 2016, 3 copies of this brief and supplemental appendix were mailed via UPS Overnight Mail, postage pre-paid, addressed to opposing party:

Walter A. Piel, Jr.
Piel Law Office
500 W. Silver Spring Drive, Suite K-200
Milwaukee, Wisconsin 53217

Dated: June 2, 2016

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*