

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No.: 16 AP 420 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANGELO M. REYNOLDS,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
MARCH 6, 2015 IN THE CIRCUIT COURT
FOR DANE COUNTY, BRANCH V,
THE HON. NICHOLAS J. MCNAMARA PRESIDING.

Respectfully submitted,

ANGELO M. REYNOLDS,
Defendant-Appellant

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ARGUMENT

I. THE STATE FAILED TO PROVE THAT DEPUTY SCHIRO HAD PROBABLE CAUSE UNDER WIS. STAT. § 343.303 TO REQUEST MR. REYNOLDS SUBMIT TO A PBT.

The question before the Court is whether Deputy Schiro had the requisite probable cause necessary to ask Mr. Reynolds to submit to a preliminary breath test (PBT). Mr. Reynolds raised several issues in his initial brief including that the circuit court incorrectly applied caselaw, should not have relied upon observations of Reynolds after he was given medications at the hospital, and wrongly concluded the deputy had probable cause to administer a PBT. In its brief, the State fails to respond to issues Mr. Reynolds raised, misapplies an unpublished Court of Appeals decision, and ignores Wisconsin Supreme Court precedent.

A. The circuit court incorrectly applied *State v. Lange*.

The circuit court incorrectly relied upon *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 634, when it determined there was probable cause for Deputy Schiro to administer a PBT to Mr. Reynolds. (47:71-74.) In his initial brief, Mr. Reynolds challenged the applicability of *Lange* to this case based on distinguishable facts and the circuit court's incorrect application of *Lange's* holding. The State failed to address this challenge in its brief. In fact, the State does not

even mention the *Lange* case, the very case the circuit court relied upon to make its decision.

Arguments not refuted are deemed admitted. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979). Therefore, the State has conceded that the circuit court incorrectly applied *Lange*.

B. The circuit court should not have relied upon observations the Deputy made at the hospital.

In determining that Deputy Schiro had probable cause to administer a PBT, the circuit court relied upon observations of Mr. Reynolds at the hospital. (47:76-77.) Mr. Reynolds asserted that it was improper for the deputy to rely on these observations because Deputy Schiro was aware that Mr. Reynolds had been given a powerful painkiller and was sedated between the time of driving and the time of the observations. (47:43.)

While the State argues that the observations Deputy Schiro made should be taken into consideration when determining probable cause, the State failed to address the challenge to this conclusion Mr. Reynolds raised. Mr. Reynolds challenged whether any observations made at the hospital were relevant because he had been given a sedative. The State simply ignores this argument. By failing to respond to this issue raised by Mr. Reynolds in his initial brief, the

State has conceded that it was improper to rely upon these observations. *Charolais, supra*.

C. *State v. Tadych* is distinguishable from this case.

The State relies entirely on an unpublished, distinguishable case it failed to raise in the court below to argue that Deputy Schiro had probable cause to administer a PBT. *See State v. Tadych*, 2010 WI App 33, 323 Wis. 2d 824, 781 N.W.2d 551 (unpublished but citable for persuasive value per Wis. Stat. § 809.23(3)(b)). The State's argument fails to take into consideration distinguishable facts in *Tadych* from those in the present case. Furthermore, such a holding ignores Supreme Court precedent that an accident along with an odor of intoxicants and admission of drinking is not enough to administer a PBT.

In *Tadych*, the defendant was charged with operating while intoxicated after he was involved in a rollover crash. *Id.*, ¶ 3. Law enforcement was dispatched to a report of a rollover around 4:30 a.m. *Id.* When the officer arrived, he observed a truck was overturned in the ditch, and the occupant had left the scene. *Id.* The officer located the defendant a short time later at the hospital being treated for his injuries. *Id.*, ¶ 4. The officer observed an odor of intoxicants on the defendant's breath, and the defendant admitted to drinking an unspecified amount of alcohol, but said he had stopped about three

hours prior to the crash. *Id.* Based on these observations, the Court of Appeals found the officer had probable cause to administer a PBT. *Id.*, ¶ 12.

The State argues that “the facts in the present case display more clues, or indicators of alcohol consumption and impairment than the facts” in *Tadych*. State’s Brief, p. 6. However, as noted above, by failing to address Mr. Reynolds’ arguments, the State has conceded that many of these “clues or indicators” of impairment were improperly considered in the first place. The remaining, properly made observations are distinguishable from those in *Tadych*.

The time and nature of the accident in each case is significant. In *Tadych*, officers were dispatched around 4:30 a.m. to a truck in the ditch that had rolled over. *Tadych*, ¶ 3. It is common knowledge that individuals are more likely to drive while intoxicated around bar time. *See State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 733 N.W.2d 634. Furthermore, law enforcement finding a truck in the ditch that had flipped over suggests a certain amount of erratic driving associated with someone who was impaired. Unlike in *Tadych*, Mr. Reynolds was not driving at bar time. Mr. Reynolds reported he was operating his motorcycle around 7:30 p.m. when another vehicle ran him off the road. (47:16.) Mr. Reynolds’ statement regarding his accident was consistent with what had been reported to EMS personnel. (47:46.)

There is a significant, common-sense difference between a truck going into the ditch and rolling over at 4:30 a.m. and a motorcycle being run off the road at 7:30 p.m. The scenario involving a truck leads itself to a reasonable suspicion, on those facts alone, that the driver may be impaired. The scenario involving the motorcycle has no such inference of suspicion. There is no evidence that the accident did not happen exactly the way Mr. Reynolds said it did. There is nothing about Mr. Reynolds' accident itself that would lead a reasonable officer to suspect the accident occurred because Mr. Reynolds was impaired.

The fact that the defendant in *Tadych* left the scene is also noteworthy. Police were dispatched to a crash in which it was determined the occupant had left the scene. This behavior, when combined with the time of day, creates more suspicion that the driver may be impaired. It is a reasonable inference that someone driving after bar time who is involved in a crash and leaves the scene does so because he or she wants to avoid police contact.

This is a very different scenario than what Deputy Schiro had. While both Deputy Schiro and the officer in *Tadych* contacted the vehicle operators at a hospital, the circumstances were very different. In *Tadych*, the officer responded to the defendant's residence, spoke to the defendant's sister, and then tracked the defendant down at a

hospital. *Tadych*, ¶ 3-4. In the present case, Deputy Schiro was dispatched directly to the hospital to check on an individual involved in an accident. (47:13-14.) Deputy Schiro knew that an ambulance had transported Mr. Reynolds. There was no indication, as there was in *Tadych*, that Mr. Reynolds had left the scene on his own to flee after the crash. When Deputy Schiro arrived to speak to Mr. Reynolds at the hospital, there is no suggestion that Mr. Reynolds had done anything to avoid police contact.

While both the defendant in *Tadych* and Mr. Reynolds admitted to consuming alcohol prior to their accidents, the information the officers had in each case was different. In *Tadych*, the defendant indicated he had been consuming an unspecified quantity of alcohol. *Tadych*, ¶ 4. He stated he had stopped drinking at 1:30 a.m., three hours before the officer was dispatched to the scene of the crash. *Id.* It was a reasonable inference for the officer to make that if someone was consuming alcohol until bar time and became involved in a crash a few hours later, the person may still be intoxicated. This is a different situation than what Deputy Schiro encountered with Mr. Reynolds. When asked, Mr. Reynolds stated he had consumed four beers that day. (47:25.) However, Deputy Schiro did not discern when those beers were consumed or when the last drink was. Unlike in *Tadych*, Deputy Schiro was not aware of any

time frame that would suggest alcohol was a factor in Mr. Reynolds' accident.

The scenario the law enforcement was presented with in *Tadych* is significantly different than that in the present case. In *Tadych*, an officer responded to a crash after bar time. He located a truck that had gone off the road and rolled over. The driver left the scene. The officer located the defendant at a hospital and the defendant admitted to consuming alcohol close to the time of the crash. There is a reasonable inference that the defendant was impaired. Based on that information, the officer had probable cause to administer a PBT.

In Mr. Reynolds' case, Deputy Schiro was dispatched in the early evening hours to check on the driver of a motorcycle who had been run off the road. Mr. Reynolds did not leave the scene after the accident on his own, but was transported to a hospital by ambulance. While Mr. Reynolds admitted to consuming a few beers that day, Deputy Schiro was not aware that Mr. Reynolds had consumed alcohol close to the time of the accident. There is no inference that the accident occurred because Mr. Reynolds was impaired. Based on this information, Deputy Schiro did not have probable cause to administer a PBT.

The State's argument goes against the holdings of the Wisconsin Supreme Court in *State v. Seibel*, 163 Wis.2d 164, 471 N.W.2d 226 (1991), and *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991), as raised in Mr. Reynolds' initial brief. By failing to address the issue Mr. Reynolds raised as it relates to *Seibel* and *Swanson*, the State has conceded the argument. *Charolais, supra*.

CONCLUSION

This Court should reverse the circuit court's orders denying Mr. Reynolds' motion to suppress. The State has conceded by failing to respond to the contrary, that the circuit court erroneously relied upon *Lange* when it determined that an accident alone is enough justification to request a PBT. The State has also similarly conceded that observations Deputy Schiro made at the hospital indicating signs of impairment were improper in determining whether Mr. Reynolds was impaired at the time of the accident.

The State argues for a blanket rule under the unpublished case of *Tadych* that an officer can administer a PBT when a person is involved in an accident, admits to consuming alcohol within three hours of the accident, and has an odor of intoxicants on his breath. This argument ignores the highly suspicious nature of the crash itself in *Tadych* that leads to inferences that defendant was impaired. Furthermore, this approach abandons the well-established totality of circumstances standard. See: *State v. Babbit*, 188 Wis.2d 349, 356, 525 N.W.2d 12 (Ct. App. 1994). It also ignores precedential case law. See: *Swanson, supra*; *Seibel, supra*. An unpublished case may never be used as a basis to overturn previously published caselaw. *Cook v. Cook*, 560 N.W.2d 246, 256 (Wis. 1997)

This Court should not create a rule that allows for probable cause to be determined simply by an accident, odor of an intoxicant, and admission to consuming some alcohol (which simply explains the odor and adds nothing more to the equation). In this case, there is not sufficient probable cause based upon the totality of the circumstances for Deputy Schiro to request Mr. Reynolds perform a PBT. Had the suppression motion been granted, Mr. Reynolds would not have entered a plea to the charge, as the remaining evidence was insufficient for conviction.

Mr. Reynolds therefore respectfully requests that this Court reverse the circuit court's denial of his motion to suppress and remand to the circuit court for further proceedings.

Dated at Madison, Wisconsin, February 22, 2017.

Respectfully submitted,

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2516 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: February 22, 2017.

Signed,

BY: _____
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CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: February 22, 2017.

Signed,

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