

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2017AP000061
Milwaukee County Circuit Court Case Nos. 2016TR009717**

In the matter of the refusal of Sarah Ann Wallk;

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SARAH ANN WALLK,

Defendant-Appellant.

**AN APPEAL FROM THE DECISION AND ORDER OF
THE TRIAL COURT FINDING THAT THE DEFENDANT
REFUSED CHEMICAL TESTING IN THE CIRCUIT
COURT FOR MILWAUKEE COUNTY, THE
HONORABLE JEAN M. KIES, JUDGE, PRESIDING**

**THE REPLY BRIEF OF THE DEFENDANT-APPELLANT
SARAH ANN WALLK**

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ARGUMENT

The State uses an unpublished case, *Town of Freedom v. Fellingner*, No. 2013AP614, unpublished, (WI App. August 6, 2013), to support its argument that Deputy Gee had the requisite level of suspicion to request Ms. Wallk exit the vehicle for field sobriety testing. Brief of Plaintiff-Respondent, page 5. The State argues that the facts in *Fellinger* are “nearly identical” to those herein. In *Fellinger*, the officer obtained a **radar** reading of Fellingner’s vehicle traveling thirty-five miles-per-hour in a twenty-five miles-per-hour zone and then a second radar reading when Fellingner’s vehicle traveled into a forty-five miles-per-hour zone, and reached a speed of sixty miles-per-hour. The *Fellinger* court found that the speeding showed non-conformance with the law, and that coupled with the odor of intoxicant, admission of consumption, and time of night provided sufficient suspicion to continue to detain Fellingner for field sobriety tests.

Similarly, here, Deputy Gee observed an odor of intoxicant, Ms. Wallk admitted to consuming alcohol, and the time of night was 2:22 a.m. However, the evidence adduced at the refusal hearing did not establish that Ms. Wallk was

speeding. Unlike the officer in *Fellinger*, Deputy Gee did not obtain a radar reading, nor did he pace Ms. Wallk's vehicle. He simply observed Ms. Wallk's vehicle pull away from a group of vehicles on the highway. After catching up to Ms. Wallk's vehicle he looked at his speedometer and it showed sixty-five miles-per-hour. Gee testified that he could not obtain a vehicle pace of Ms. Wallk due to the fact that his squad was not equipped with a certified speedometer. Thus, while the town established the "non-conformance" with the law in *Fellinger*, the state failed to do so herein.

Furthermore, as stated in Ms. Wallk's initial brief, the remaining observations of Deputy Gee did not rise to the requisite level of suspicion to continue the detention. Thus, the continued detention of Ms. Wallk for field sobriety testing was not justified, unreasonable and violated both the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

Because of this, the trial court erred when it found that Deputy Gee possessed the appropriate level of suspicion to continue to detain Ms. Wallk, and further erred when it found that her refusal to submit to chemical testing was improper. The

court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 5th day of July, 2017.

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 10 pages. The word count is 1316.

Dated this 5th day of July, 2017.

Respectfully Submitted

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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 5th day of July, 2017.

Respectfully submitted,

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