

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP000120
Sheboygan County Circuit Court Case Nos.
2016CV000479

CITY OF SHEBOYGAN,

Plaintiff-Respondent,

v.

JOHN W. VAN AKKEREN,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE ORDER OF THE TRIAL
COURT FINDING THAT THE DEFENDANT-
APPELLANT REFUSED TO PERMIT CHEMICAL
TESTING IN VIOLATION OF WIS. STAT. §343.305(9)
AND FINDING THE DEFENDANT-APPELLANT
GUILTY OF OWI IN THE CIRCUIT COURT FOR
SHEBOYGAN COUNTY, THE HONORABLE L.
EDWARD STENGEL, PRESIDING**

**THE REPLY BRIEF OF THE DEFENDANT-APPELLANT
JOHN VAN AKKEREN**

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CASES

Wisconsin Supreme Court

Washburn County v. Smith, 2008 WI 23, 308 Wis.2d
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Wisconsin Court of Appeals

State v. Felton, 2012 WI App 114, 344 Wis.2d 483,
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ARGUMENT

The City contends that Officer Erickson had the requisite level of suspicion to request Mr. Van Akkeren submit to a preliminary breath test (PBT). To bolster their argument, The City cites to *State v. Felton*, 2012 WI App 114, 344 Wis.2d 483, 824 N.W.2d 871. The City points to Mr. Van Akkeren's argument regarding the fact that many of Officer Erickson's observations of alleged impairment were minor in nature. Referring to *Felton*, the City argues that innocent behavior does not necessarily negate either probable cause or reasonable suspicion. True, in *Felton* the defendant successfully completed the field sobriety tests, and the court still found that the officer had the requisite level of probable cause to request a PBT. However, *Felton* is easily distinguishable from Mr. Van Akkeren's case inasmuch as the officer knew that Mr. Felton had multiple convictions for drunk-driving prior to requesting the PBT. *Id.* at ¶10. Mr. Felton had three prior OWI convictions, which subjected him to the lower .02 standard.

Conversely, in Mr. Van Akkeren's case, he was stopped for a first offense OWI. Thus, he was subject to the higher .08 standard. Unlike *Felton*, Officer Erickson had no knowledge of prior offenses which might have supported probable cause.

Finally, the City citing to *Washburn County v. Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, argues that an “officer may be justified in requesting a PBT without asking a driver to perform a single field sobriety test.” Brief of Plaintiff-Respondent page 3. Once again the facts in *Smith* are significantly different than those herein. Smith gave inconsistent statements about the amount of alcohol he consumed, “first stating that he had consumed a couple of beers and later stating that he would be lying if he said he had consumed just a couple of beers.” *Id.* at ¶23. Furthermore, in *Smith* “the defendant also admitted that he had been at a bar for more than ten hours immediately preceding his encounter with the Deputy.” *Id.* The *Smith* court gave significant weight to the above indicia in its probable cause analysis.

Here, Mr. Van Akkeren said he had a couple beers at his brother’s house on Thanksgiving. He did not change his story and did not state that he had been at a bar prior to the stop.

The indicia of intoxication apparent to the officers in both *Felton* and *Smith* are clearly more significant than those in Mr. Van Akkeren’s case.

CONCLUSION

Contrary to the City's contention, Officer Erickson did not have the requisite level of suspicion to request Mr. Van Akkeren submit to a PBT. Because of this, the court erred in finding that the request for the PBT was proper, and erred in finding that Mr. Van Akkeren unlawfully refused chemical testing. The Court should reverse the order and vacate the refusal.

Dated this 15th day of May, 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 1102.

Dated this 15th day of May, 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 15th day of May, 2017.

Respectfully submitted,

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