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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP000888

In the matter of the refusal of Dustin R. Willette:

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.

DUSTIN R. WILLETTE,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Brown County Circuit Court,
the Honorable Thomas J. Walsh, presiding
Trial Court Case No. 16TR10066

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ISSUE FOR REVIEW

1. Did the totality of the circumstances known to Officer Hughes give rise to probable cause to lawfully arrest Willette for operating while intoxicated?

   The Trial Court Answered: Yes.

2. Did Officer Hughes properly convey information found in Wis. Stat. § 343.305(4) to Willette?

   The Trial Court Answered: Yes.

3. Did Willette refuse the test?

   The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

On Sunday, October 2, 2016, Officer Alexis Hughes was on duty for the Oneida Police Department, near the area of Packerland Drive in the Village of Ashwaubenon. (27:5). At approximately 5:24 a.m., Officer Hughes was dispatched to 3120 Packerland Drive for a

vehicle that had stopped in front the Oneida One Stop gas station. (27:5). The caller indicated they had seen a white male wearing a blue suit, pink shirt, and black shoes exit the vehicle. (27:5, 13).

Upon arrival at Oneida One Stop, Officer Hughes observed tire tracks going through the parking lot and mud and that the vehicle appeared to have run over a plastic tube coming out of the ground, causing damage. (27:6-7, 28:1). At that time, the vehicle was unoccupied and not running. (27:6).

While at Oneida One Stop, Officer Hughes received information that another officer had located a male matching the driver's description on Packerland Drive, so she responded to that site to speak with the male. (27:6). Officer Hughes identified the person as Dustin Willette, who stated he had been at a wedding, admitted he had been drinking, and stated he was not aware where he was. (27:6).

Officer Hughes transported Willette to the Oneida One Stop where the vehicle was found. (27:7). Upon arrival, Willette indicated to officers that he drove a vehicle similar to the one at the gas station, but did not identify the particular vehicle on scene as belonging to

him. (27:11). At no time did Willette tell Officer Hughes that the vehicle at Oneida One Stop was *not* his. (27:11).

Officer Hughes then requested that Willette perform standardized field sobriety tests ("SFSTs"), and Willette agreed. (27:7). The first test Officer Hughes administered was the horizontal gaze nystagmus ("HGN") test. (27:11). Officer Hughes observed six of six possible clues when she administered the HGN test to Willette. (27:7). Officer Hughes then administered the walk and turn test, and observed two clues of impairment. (27:8). Finally, Officer Hughes administered the one leg stand test, and observed two clues of impairment. (27:8). Officer Hughes also noted that Willette was uncooperative with her, but failed to elaborate as to what that specifically meant. (27:8). Officer Hughes also asked Willette to perform a preliminary breath test ("PBT"), but Willette refused. (28:7).

Relying on her training and experience, Officer Hughes decided to arrest the defendant for operating while intoxicated. (27:8). This decision was based on the totality of the circumstances known to

Officer Hughes, including the fact that the vehicle had travelled over the grass and sustained damage, the original caller's observation of a male matching Willette's description exiting the vehicle after driving it, the fact that Willette said he was coming from a wedding and there was a wedding invitation observable through the vehicle's window, Officer Hughes' observations of and conversation with Willette, and Willette's performance on the SFSTs. (11:5, Ex. 5).

Officer Hughes then read Willette the Informing the Accused form verbatim. (27:9). Officer Hughes testified that because Willette would not give a "yes" or "no" answer after being read the Informing the Accused, the response was treated as a refusal. (28:9). After the arrest, Willette was taken to Aurora Hospital. Officer Hughes obtained a search warrant, and a blood test was administered. (27:9).

On October 5, 2016, the defendant filed a request for a refusal hearing. (1). An evidentiary hearing was held on January 23, 2017 before the Honorable Thomas J. Walsh, Brown County Circuit Court Branch II. At the hearing, Officer Hughes testified about the events of

October 2, 2016, as well as her training and experience as a law enforcement officer. (27:4-5).

In an oral ruling on February 24, 2017, the court found that Willette improperly refused the chemical test. First, the court made several findings of fact regarding the events of October 2, 2016. The court found that Willette fit the description of the person driving the vehicle parked in front of Oneida One Stop, who was seen exiting by the person who initially reported the vehicle. (29:4-5). The court found that Willette admitted to being at a wedding and drinking. (29:5). The court also found that Willette admitted "that he drove a vehicle matching that description, but he didn't identify the particular one as being his." (29:5).

Notably, the court did not consider any surveillance video from Oneida One Stop when determining whether Officer Hughes had probable cause to arrest Willette, because the video quality was poor and Officer Hughes testified that she had not seen the videos prior to making the arrest decision. (29:3).

Taking all of this into consideration, the court concluded that Officer Hughes had sufficient probable cause to lawfully arrest Willette for operating while intoxicated.

The court summarized the initial contact with Willette as follows:

> So at the time…what [officers] know is, there's this vehicle in the parking lot, they were looking for the owner who was wearing a blue suit, pink shirt, and black shoes. They found the defendant, Mr. Willette, matching that description, and he indicated that he had been drinking. He had been drinking to such a point that he had no idea where he was; that he was driving a vehicle that looked like that one, but he didn't specifically say it was that one nor did he say that it wasn't. And I'm satisfied at that point in time, they appropriately asked him to take field sobriety tests.

(29:5). The court then found that Officer Hughes administered the SFSTs correctly and the clues indicated in her testimony were consistent with the videos received into evidence. (29:7). Accordingly, the court concluded that Officer Hughes observed sufficient indicia of impairment on the SFSTs to lawfully arrest Willette for operating while intoxicated. (29:7).

Next, the court turned to the issue of whether Willette refused to submit to the test. The court found that Willette did not give a

"specific answer of yes or no." (29:7). The court went on to find that Officer Hughes properly advised Willette of his statutory rights. (29:7). In response, Willette indicated first that he didn't know what the right answer was, and then that he wanted to talk to a legal person (29:7-8). When considering whether Willette's continued questions and request to speak to a lawyer, the court concluded the following:

> I don't take that as being - - trying to engage in a further conversation because that was a question, more or less, to the officer. It wasn't raised as a question, but it was, more or less, telling what the right answer is and, frankly, there is no right answer to whether to take these tests or not. The answer is either yes or no. And again you can hear the defendant indicating that he doesn't know what the right answer is.
>
> I - - I've had the occasion to review some of the case law on it and whether or not there is an argument that he was confused. I didn't hear that argument here. I just simply heard that he wanted to continue to engage…refusal can come in the form of conduct, and this defendant wanted to assert various things and continue conversation, but, frankly, I'm satisfied that, by his conduct, he refused to take the test.

(29:8-9).

Willette now appeals the court's determination that Willette refused the blood draw. Specifically, Willette argues that there is

insufficient evidence in the record to support the court's finding that Officer Hughes lawfully arrested Willette and that Willette improperly refused the blood test.

STANDARD OF REVIEW

The Wisconsin Court of Appeals will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Russ*, 2009 WI App 68, ¶ 9, 317 Wis.2d 764, 767 N.W.2d 629. The application of the implied consent statute to found facts is a question of law that the Court of Appeals reviews de novo. *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

ARGUMENT

I. OFFICER HUGHES LAWFULLY ARRESTED WILLETTE FOR OWI BASED UPON THE TOTALITY OF THE CIRCUMSTANCES.

1. Refusal Hearing Standard

"A refusal charge under Wis. Stat. § 343.305(9) is distinct from charges of OWI or operating a motor vehicle with a prohibited alcohol concentration (PAC) under Wis. Stat. § 346.63." *In re Refusal of Anagnos*, 2012 WI 64, ¶ 67, 341 Wis. 2d 576, 815 N.W.2d 675.

(Ziegler, J., concurring). The issues to be addressed at a refusal hearing are strictly limited to those enumerated in the implied consent statute; namely:

> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol…and whether the person was lawfully placed under arrest for violation of [an OWI-related statute].
>
> b. Whether the officer complied with sub. (4) [by reading the Informing the Accused form to the person].
>
> c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test…unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

In re Refusal of Anagnos, 341 Wis. 2d at ¶ 27. *See also* Wis. Stat. § 346.305(9)(a)5. (2015-16); *see also State v. Nordness*, 128 Wis. 2d 15, 19, 381 N.W.2d 300 (1986).

"The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). At a refusal hearing, the burden of persuasion is plausibility; the court is not to

weigh evidence or measure credibility. *Id.* (citing *Nordness*, 128 Wis. 2d at 35). "Indeed, the court need not even believe the officer's account. It need only be persuaded that the State's account is plausible." *Wille*, 185 Wis. 2d at 681.

2. Officer Hughes had reasonable suspicion to administer standardized field sobriety tests to Willette.

For the purposes of a refusal hearing, a defendant is not "lawfully" arrested if police did not have reasonable suspicion to stop the defendant. *In re Refusal of Anagnos*, 341 Wis. 2d at ¶ 42. However, "there is no 'actual driver' threshold test…[t]he State need only demonstrate that the arresting officer had probable cause for his belief that the defendant was driving under the influence of an intoxicant." *State v. Nordness,* 128 Wis. 2d at 38. In this case, because the circuit court's findings of historical fact are not clearly erroneous, Officer Hughes did have requisite reasonable suspicion to stop Willette and administer SFSTs.

The Fourth Amendment permits brief investigative stops when a law enforcement officer has a "reasonable suspicion;" that is, "a

particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, --- U.S. ---, 134 S.Ct. 1683, 1687 (2014). *See also, Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S.Ct. 1868 (1968). "The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.'" *Navarette*, 134 S.Ct. at 1687 (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412 (1990)).

In determining whether an officer had reasonable suspicion, the court needs to look at the totality of the circumstances, looking at all the facts, and seeing if all the facts add up to reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). A mere hunch does not create reasonable suspicion, but reasonable suspicion is an "obviously less" exacting standard than probable cause. *Id*. One does not need to rule out every possible explanation for innocent behavior in order to determine that an officer had reasonable suspicion for an investigatory stop. *Id*. at 59.

Here, the circuit court found that the original caller identified the driver of the vehicle in question was a white male wearing a blue suit, pink shirt, and black shoes. (29:4). Subsequently, officers located Willette walking on Packerland Drive, who matched the description given by the caller. (29:4). Upon speaking with officers, Willette admitted that he was at a wedding and had been drinking. (29:5). Upon returning to the Oneida One Stop with Officer Hughes, Willette indicated that he drove a vehicle matching the one at the scene, but would not say one way or the other whether that particular vehicle belonged to him. (29:5). Despite Willette's arguments to the contrary, these findings of fact are not clearly erroneous because they are supported by evidence in the record.

First, the circuit court found that any surveillance videos from Oneida One Stop that might have showed the defendant driving or exiting the vehicle were inconclusive at best and, in any case, Officer Hughes testified that she did not review them prior to making an arrest decision. (29:3). The State does not contest this finding for the purposes of this proceeding. However, it is relevant that Officer

Hughes *knew* about the recordings because she had been informed of them, and in fact told Willette at the scene that such videos existed. (11:5, Ex. 5). Officer Hughes was not misstating the contents of the videos to Willette when she informed him about the videos – she was relaying information that had been provided to her through the course of her investigation.

Even without the surveillance videos, sufficient facts were known to Officer Hughes at the scene to question Willette and ultimately administer SFSTs based on the information that had been provided by the original caller. Officer Hughes testified that she had been advised by dispatch that the caller had observed the driver of the vehicle wearing a blue suit, pink shirt, and black shoes. The caller also described the driver as a white male. This information provided by the caller was, according to Officer Hughes' testimony, observed by the eyewitness *independent* of any surveillance video. (27:13). While a recording of the original call may have existed, Officer Hughes had not reviewed it at the time of the refusal hearing. (27:14). Whether or

not she reviewed the recorded call, Officer Hughes *had* received the driver's description from dispatch on October 2, 2016. (27:5).

In addition to Officer Hughes' testimony, bodycam video recordings entered into the record show Willette wearing a blue suit. (11:5, Ex. 5). These videos *do* corroborate the information given by the complainant who called in the suspicious vehicle: that the driver was wearing a blue suit, a pink shirt, and black pants. Accordingly, when officers located an individual on the same road as the Oneida One Stop wearing clothing matching the complainant's description, it was it was reasonable for officers to conduct a brief, investigative stop.

Willette does not appear to contest the circuit court's findings of fact that he admitted to being at a wedding and drinking on the evening in question. When officers were confronted with this new information, it was reasonable for them to ask Willette to return to the scene. According to Officer Hughes' testimony, Willette freely consented to return to the Oneida One Stop. (27:14, 28:1). There is no evidence in the record to suggest otherwise.

Once back at Oneida One Stop, Willette further informed officers that "he drove a vehicle matching that description, but he did not identify that particular one as being his." (27:11). This testimony and the meaning behind the statement are somewhat ambiguous. However, it would not have been unreasonable for Officer Hughes to conclude that when Willette said he "drove" a similar vehicle, he meant on that evening. Even considering its ambiguity, Willette's statement at the Oneida One Stop is a building block of fact which, once accumulated, gives rise to reasonable inferences "where the sum of the whole is greater than the sum of its individual parts." *Waldner*, 206 Wis. 2d at 58.

In sum, there is sufficient evidence in the record to support the circuit court's findings of fact that the driver of the vehicle parked at the Oneida One Stop was wearing a blue suit; that Willette matched the description given by the complainant and was found on Packerland drive; that Willette admitted to being at a wedding and drinking that evening; and that Willette admitted "that he drove a vehicle matching that description, but he didn't identify the particular

one as being his." (29:5). These facts taken together, all of which were known to Officer Hughes at the time, constitute a plausible version of events in which Willette had possibly committed an OWI-related offense. Accordingly, Officer Hughes had the requisite reasonable suspicion to administer SFSTs to determine whether Willette's driving ability was impaired.

3. Officer Hughes had probable cause to arrest Willette for operating while intoxicated based on the totality of the circumstances.

"Every lawful warrantless arrest must be supported by probable cause." *State v. Nieves*, 2007 WI App 189, ¶ 11, 304 Wis. 2d 182, 738 N.W.2d 125. Whether probable cause to arrest exists in a given case is a question of law that the Court of Appeals determines independently of the circuit court, but benefitting from its analysis. *In re Smith*, 2008 WI 23, ¶ 16, 308 Wis. 2d 65, 746 N.W.2d 243. To determine whether probable cause existed, the Court looks at the "totality of the circumstances within the arresting officer's knowledge at the time of the arrest," and determines if the circumstances "would lead a reasonable police officer to believe that the defendant probably

committed a crime." *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

"Probable cause is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior," and questions of probable cause are assessed on a case-by-case basis. *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 392, 766 N.W.2d 551, 555 (internal citation omitted). In determining whether probable cause existed, the Court "applies an objective standard, considering the information available to the officer and the officer's training and experience." *Id.* at ¶ 20.

When considering the totality of the circumstances,

> [t]he building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

State v. Waldner, 206 Wis. 2d at 58. Evidence that leads to probable cause does not need to be sufficient to prove guilt beyond a reasonable doubt, nor does it need to prove that guilt is more probable than not. *Koch*, 175 Wis. 2d at 701.

In the context of drunk-driving related offenses, SFSTs help in the probable cause determination, but probable cause to arrest may be established even without administration of SFSTs. *State v. Felton*, 2012 WI App 114, ¶ 10, 344 Wis. 2d 483, 490-91, 824 N.W.2d 871. Similarly,

> [a]lthough evidence of intoxicant usage – such as odors, an admission, or containers – ordinarily exists in drunk driving cases **and strengthens the existence of probable cause**, such evidence is not required.

Lange, 317 Wis. 2d at ¶ 37 (emphasis added). Additional considerations can include the arresting officer's experience and the time of day. *Lange*, 317 Wis. 2d at ¶ 32.

Furthermore, although sometimes innocent explanations could be hypothesized as the reason for a driver's actions, "a reasonable police officer charged with enforcing the law cannot ignore the reasonable inference that they might also stem from unlawful behavior." *Waldner*, 206 Wis. 2d at 61. Officers are not required to rule out every possible innocent explanation for a suspect's behavior. *Id.* at 60.

In this case, the circuit court's additional findings that the SFSTs were properly administered and that Willette showed signs of impairment were not clearly erroneous. The circuit court, upon reviewing the video evidence, was satisfied that it was able to observe the clues in the walk and turn and one leg stand tests that Officer Hughes testified about. (29:6-7). Willette fails to offer any evidence in support of his position that this observation by both Officer Hughes *and* the court was erroneous.

Furthermore, the circuit court's finding that the HGN was properly administered and clues were observed is not clearly erroneous. During direct examination, Officer Hughes testified that she demonstrated the HGN test for Willette and observed six clues of impairment. (27:7). The bodycam video shows that Officer Hughes told Willette to follow the pen "with your eyes *and your eyes only*," and also corrected him mid-way through the test when he began to move his head. (11:5, Ex. 5). These portions of the evidence support the circuit court's finding that the HGN test was properly administered. Finally, although Officer Hughes testified that she was

not familiar with the different types of nystagmus, Officer Hughes did testify that she was a fairly new officer. (27:4-5.) Notably, the question that Officer Hughes was asked focused on different types – plural – of nystagmus. (28:2). The court's determination that the HGN test was properly administered is not inconsistent with the evidence because it is certainly possible that Officer Hughes, as a fairly new officer, was familiar with only *one* type of nystagmus – namely, horizontal gaze nystagmus.

With or without the results of the HGN test, Officer Hughes had sufficient probable cause to arrest Willette for operating while intoxicated after he unsuccessfully completed the remainder of the SFSTs. In addition to all of the facts which led to Officer Hughes' decision to administer SFSTs outlined in detail above, Officer Hughes also observed Willette exhibit multiple clues of impairment on at least two – if not three – of the SFSTs. It is also uncontroverted that Willette refused to provide a PBT. (28:7). Finally, at the time of arrest, Officer Hughes informed Willette that he had admitted that he

was coming from a wedding, and officers had observed a wedding invitation in the vehicle. (11:5, Ex. 5).

Ultimately, Willette attacks the trial court's conclusion that probable cause to arrest existed by attempting to call into question the veracity of each of the above factors in isolation. However, this approach is misguided because case law is clear that "the building blocks of fact accumulate," and a point may be reached where the "sum of the whole is greater than the sum of its individual parts." *Waldner*, 206 Wis. 2d at 58. This is clearly the case here. All of these facts, taken together, constitute probable cause to arrest for an OWI-related offense, particularly given that the standard for a refusal hearing is plausibility, not probability. *Wille*, 185 Wis. 2d at 681.

II. OFFICER HUGHES PROPERLY CONVEYED THE INFORMATION FOUND IN WIS. STAT. § 343.305(4) TO WILLETTE.

When reviewing the factors that the court must address during a refusal hearing, the trial court indicated that it must determine:

> Whether the officer informed the defendant in compliance with the statute, I'm satisfied that she did.

(29:9). This finding is consistent with Officer Hughes' uncontroverted testimony from the refusal hearing that she read the Informing the Accused form to Willette verbatim. (27:9). Willette does not appear to challenge this finding in his present appeal.

III. WILLETTE REFUSED TO PERMIT THE TEST.

The final issue in a refusal hearing is "whether the person refused to permit the test." Wis. Stat. § 343.305(9)(a)5.c. The circuit court found that Willette's refusal came in the form of conduct, because "this defendant wanted to assert various things and continue conversation, but, frankly, I'm satisfied that, by his conduct, he refused to take the test." (29:9.) Because this finding is supported by evidence in the record, the circuit court's finding is not clearly erroneous and should be upheld.

Under Wisconsin's implied consent law, "any person who drivers or operates a motor vehicle is deemed to consent to a test for the purpose of determining that person's blood alcohol content when properly requested to do so by a law enforcement officer." *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 191, 366 N.W.2d 506

(Ct. App. 1985). As a matter of law, any refusal that is for any reason other than those set forth in Wis. Stat. § 343.305(9)(a)5.c., is improper.[1]

A verbal refusal is not required under Wis. Stat. § 343.305(9)(a)5.c.; instead, a "volitional failure to do what is necessary in order that the test can be performed," can be enough. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d at 192; *see also State v. Reitter*, 227 Wis. 2d 213, 234, 595 N.W.2d 646 (1999). In fact, a person's conduct may result in a refusal even where the person specifically tells an officer that they are *not* refusing the test. *Reitter*, 227 Wis. 2d at 237. Refusing to answer an officer's repeated question, even to engage in other discussion, *can* rise to the level of conduct indicating a refusal. *Id.*; *see also State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1999) (overturned on other grounds by *State v. Brar*, 2017 WI 73, 898 N.W.2d 499) (holding that a defendant who insisted

[1] "The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs." Wis. Stat. § 343.305(9)(a)5.c. There is no evidence in the record to suggest that Willette refused the blood test for any of the statutorily permissible purposes.

on waiting for a lawyer resulted in a refusal to take the test); *see also State v. Rydeski*, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997) (holding that where a defendant's only conduct is an insistence to use the restroom and the officer repeats the request to administer the test several times, the failure to submit constitutes a refusal).

Here, the circuit court's finding of fact that Willette's conduct with Officer Hughes constituted a refusal is not clearly erroneous because it is supported by evidence in the record in light of the relevant case law. Although Willette never explicitly answered "yes" or "no" to Officer Hughes' question, he failed to answer the question despite Officer Hughes asking several times. First Willette answered that he didn't know what the right answer was. (29:7). After Officer Hughes read the form a second time at Willette's request, Willette then asked if he could call a lawyer. (29:8). Officer Hughes instructed Willette that he needed to answer yes or no. Instead, Willette again indicated that he wanted to talk to a legal person. (29:8).

Willette does not appear to argue that these individual findings of fact are clearly erroneous; rather, he takes issue with the circuit court's ultimate finding that this conduct constituted a refusal.

Willette makes a passing argument that he could not be expected to answer Officer Hughes' request for a blood test because of the language in the Informing the Accused form that "the fact that you refused testing can be used against you in court." (11:1). Contrary to Willette's argument that the Informing the Accused places a defendant in a "constitutionally questionable predicament," "requests to submit to a chemical test do not implicate testimonial utterances." *In re Grogan*, 2014 WI App 90, ¶ 19, 356 Wis. 2d 330, 855 N.W.2d 493 (unpublished, cited for persuasive value only) (citing *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 646). Similarly, there is no right to consult with an attorney before deciding whether to take the test. *See, e.g., Neitzel*, 95 Wis. 2d at 193.

Finally, Willette's reliance on *State v. Brar*, 2017 WI 73, 898 N.W.2d 499, is misplaced. There is no question that Willette *gave* his implied consent to the chemical test of his blood when he chose to

operate a vehicle on the roadways of Wisconsin. The issue before this court is whether Willette's subsequent conduct in response to Officer Hughes' request that he submit to a chemical test of his blood constituted a refusal. The circuit court found that Willette's conduct *was* a refusal of the chemical test, and this finding is not clearly erroneous because it is supported by uncontroverted evidence in the record. Accordingly, Willette's conduct on October 2, 2016, rose to the level of refusing a chemical test of his blood.

CONCLUSION

Officer Hughes had probable cause to lawfully arrest Willette for operating while intoxicated based upon the totality of the circumstances. Officer Hughes also properly conveyed the information found in Wis. Stat. § 343.305(4) to Willette. Finally, Willette refused to permit the test. Therefore, the Court should uphold the circuit court's decision that Willette refused a chemical test of his blood under Wis. Stat. § 343.305(9)(d) and deny his appeal.

Respectfully submitted this _____ day of August, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,916 words, including footnotes.

There is no appendix attached to this brief as any items that would have been included were included in the Defendant-Appellant's appendix.

CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copes of this brief filed with the court and served on all opposing parties.

Dated this _____ day of August, 2017.

Signed:

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