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DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP1662

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NATHAN ALAN BISE,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 7, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Neither oral argument nor a published opinion in this case is necessary in this case as there are no legal issues or arguments contained in the appellant's brief. Instead, the arguments in this brief, as well as those in the Appellant's brief, are based on the facts presented to the Circuit Court and outlined in the transcript. Simply a ruling on the issues presented will suffice in this case.

ARGUMENT

Mr. Bise makes a few arguments in his brief. First, Mr. Bise argues that there was no refusal. Second, Mr. Bise argues that the refusal was decided before he could put on evidence in front of the trial court. Finally, Mr. Bise argues that the officer did not have probable cause to arrest him and subject him to a chemical evidentiary test of his breath. These arguments do not have merit based on the evidence and facts in the Circuit Court record.

In order for a court to find that a subject improperly refused a chemical evidentiary test contrary to implied consent, a court must find: (1) that the officer had probable cause to believe that the subject was driving or operating a motor vehicle while under the influence of an intoxicant; (2) the officer read the Informing the Accused form verbatim to the subject; and (3) the subject refused the evidentiary chemical test requested by the officer after reading the Informing the Accused form to the subject. Wis. Stat. 343.305(9). For this reason, this brief will focus on issue of the refusal, as that will address Mr. Bise's other arguments at the same time.

I: Officer Walker had probable cause to believe that Nathan Bise was driving a motor vehicle while under the influence of alcohol.

Contrary to Mr. Bise's argument, the officer has probable cause to believe that Mr. Bise was driving while under the influence of alcohol. Probable cause in a refusal hearing is the "plausibility of an officer's account that the driver was under the influence of an intoxicant." State v. Nordness, 128 Wis. 2d 15. Further, the State's burden at a refusal hearing requires only that the State present evidence sufficient to establish an officer's probable cause to believe that a subject was operating while intoxicated. State v. Wille, 185 Wis. 2d 673 (1994). In refusal hearings the court is not to weigh the evidence for and against probable cause or to determine the credibility of witnesses. *Id.* Instead, the court must only be persuaded that the State's account is plausible. *Id.* Further, probable cause in cases such as this one involves a totality of the circumstances analysis. State v. Lange, 2009 WI 49.

In this case, Officer Walker had probable cause to believe that Mr. Bise was driving a motor vehicle while under the influence of an intoxicant, specifically alcohol.

On March 26, 2017 at approximately 2:50 AM, Officer Walker was located on University Avenue in downtown Madison, Dane County, Wisconsin when he observed a dark colored vehicle that was traveling outbound on University Avenue in the right-hand lane. Tr 63. At the trial, Officer Walker detailed that the vehicle passed over the center line and also drove in the bike lane. Tr 63. The driver of that vehicle was the Appellant, Nathan Bise. Tr 63. At the time that Officer Walker made contact with the Mr. Bise, Officer Walker detected the odor of intoxicants coming from inside the vehicle. Tr 64. Officer Walker also testified that Mr. Bise had trouble locating his driver's license when asked for identification. Tr 64. Officer Walker testified that Mr. Bise had red, bloodshot eyes, which are some things he was trained to identify in OWI investigations. Tr 65. These observations indicated that Mr. Bise might possibly be under the influence of alcoholic intoxicants, based on Officer Walker's training and experience. Tr 65. Officer Walker testified at the trial that Mr. Bise admitted that he was coming from a bar downtown and that he

admitted to consuming alcohol prior to driving. Tr 75.

Officer Walker also noted that Mr. Bise's speech was slow and slurred, another possible indication that the Appellant was possibly under the influence of intoxicants. Tr 75.

Officer Walker further testified that he took Mr. Bise's performance on the standardized field sobriety tests, Mr. Bise's driving behavior, and the observations he made about Mr. Bise through his interactions into account before making a determination that Mr. Bise was likely operating while under the influence of an intoxicant. Tr 75.

Officer Walker testified at the trial that Mr. Bise admitted that he was coming from a bar downtown and that he admitted to consuming alcohol prior to driving. Tr 75.

Officer Walker also noted that Mr. Bise's speech was slow and slurred, another possible indication that the Appellant was possibly under the influence of intoxicants. Tr 75.

Officer Walker requested that Mr. Bise submit to standardized field sobriety tests, which he was trained to perform. Tr 68. Officer Walker testified that he observed clues of intoxication on each of the standardized field sobriety tests when Mr. Bise performed these tests. Tr 70, 73, 74. Further, Officer Walker testified that he asked Mr. Bise if Mr. Bise had any medical issues that would prevent

him from completing the tests, to which Mr. Bise stated he did not. Tr 74.

A totality of the circumstances analysis of the evidence at trial shows that Officer Walker did have probable cause to believe Mr. Bise was driving a motor vehicle while under the influence of alcohol. In addition, based on all the facts on the record, the Circuit Court found that there was probable cause. This ruling made by the trial court should be affirmed.

II: The Circuit Court Judge properly concluded that Mr. Bise improperly refused to submit to an evidentiary chemical test of his breath.

After finding probable cause that the officer had probable cause to believe that the subject was driving while under the influence of alcohol, the next step in the refusal analysis is for the judge to consider whether the officer complied with Wis. Stat. 343.305(4). This means the officer must read the Informing the Accused form verbatim to the subject. Once the circuit court judge determines that the officer read the Informing the Accused form verbatim to the subject, the next step is to determine that the subject

refused the evidentiary chemical test requested by the officer. Wis. Stat. 343.305(2).

In this case, Officer Walker testified that he read the Informing the Accused form verbatim to Mr. Bise and asked Mr. Bise to submit to an evidentiary chemical test of his breath. Tr 77. Mr. Bise told the officer that he did not want to submit to an evidentiary chemical test of his breath. Tr 77. Officer Walker explained to Mr. Bise that he would be able to submit to a blood test once he had submitted to the breath test. Tr 77. Officer Walker read the form again to Mr. Bise and informed him that if he refused the breath test, it would be marked as a refusal. Tr 77. Mr. Bise did not submit to the breath test, even knowing that information, and his response was marked as a refusal. Tr 78.

Because the evidence showed that Officer Walker read the Informing the Accused form verbatim to Mr. Bise, the second prong of the refusal analysis was met. Further, Mr. Bise refused to submit to an evidentiary chemical test of his breath as requested by the officer, satisfying the third and final prong of the refusal analysis. All three prongs of the refusal analysis were satisfied by the evidence.

Therefore, the Circuit Court's ruling that Mr. Bise improperly refused should be affirmed.

III: The Circuit Court ruled on the issue of the refusal at the appropriate time given the request of Mr. Bise's defense attorney for a directed verdict on that issue.

The issue of whether a subject improperly refused to submit to an evidentiary chemical test is a question for a judge, not a jury, to decide. Wis. Stat. 343.305. In this case, Mr. Bise's trial counsel then requested a directed verdict on the refusal at the close of the State's case in chief, before a defense case was presented. Tr 113. As a result of that request, Judge Hanrahan decided the issue of the refusal before the defense presented any evidence. Based on all the information on the record at that time, Judge Hanrahan determined that it was an improper refusal. Tr 121.

Therefore, the Circuit Court ruled on the issue of the refusal at the appropriate time, as it was decided at the time requested by Mr. Bise's trial counsel.

CONCLUSION

Based on the evidence presented at trial in the case of State of Wisconsin v. Nathan Allan Bise, there was probable cause to believe that Mr. Bise had been operating a motor vehicle while under the influence of alcohol on University Avenue in Madison. Mr. Bise was then read the Informing the Accused form verbatim, and Mr. Bise refused to submit to an evidentiary chemical test of his breath. This was an improper refusal. The Circuit Court decided the issue of the refusal at the appropriate time, after Mr. Bise's trial attorney requested a directed verdict on the issue.

For the reasons outlined above, the Respondent respectfully requests that this Court affirm the trial court's rulings in this case.

Dated this 12th day of October, 2018.

Respectfully submitted:

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CERTIFICATION

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

Monospaced font: 10 characters
per inch; double spaced; 1.5
inch margin on left side and 1
inch margins on the other 3
sides. The length of this brief
is _____ pages.

Dated: _____.

Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 12th day of October, 2018.

Alexandra Keyes
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