

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017 AP 001886 CR
Waukesha County Circuit Court Case Nos. 2016CT001508

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE M. DATKA,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT-APPELLANT
MOTION FOR SUPPRSSION OF EVIDENCE, IN
WAUKESHA COUNTY, THE HONORABLE LEE S.
DREYFUS, JR, JUDGE, PRESIDING

THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT JACQUELINE M. DAKTA

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CASES

Wisconsin Supreme Court

State v. Lange, 2009 WI 49, 317 Wis.2d383, 766
N.W.2d 551. 4-5

ARGUMENT

The State argues that the deputies in this case “observed all the ordinary signs of intoxication.” Brief of Plaintiff-Respondent, page 12. Conveniently, the State ignores Deputy Steger’s testimony. During cross-examination, defense counsel examined Deputy Steger about possible signs of intoxication. (R.34:12-13/ Reply App. 1-2). Deputy Steger confirmed that possible signs of intoxication, included bloodshot and glassy eyes, and odor of intoxicant, slurred or slow speech and motor coordination problems. *Id.* Furthermore, Steger agreed that on the date of the offense, he advised Deputy Coats that he observed no immediate signs of intoxication. (R.34:13/ Reply App. 2).

Coats confirmed this testimony, inasmuch as he also testified that he observed no immediate signs of intoxication. (R.34:41/ Reply App. 7). Coats testified that not only did Deputy Steger inform him that he observed no odor of intoxicant, but Steger also said that he observed no signs of intoxication. (R.34:18/ Reply App. 3). From Deputy Coats perspective, Steger was unsure as to what was the issue. *Id.*

Clearly, the deputies, by their own testimony observed no significant signs of intoxication upon their initial contact.

However, they requested Ms. Datka perform field sobriety tests. Despite the State's argument to the contrary, Ms. Datka successfully performed the horizontal gaze nystagmus test (HGN), the one leg stand test and the alphabet test. Coats agreed that the HGN test was the most accurate in terms of determining impairment. Coats agreed that the eyes don't lie. (R.34:38/ Reply App. 5). According to his training, Coats is looking for a minimum threshold of four of the potential six clues. (R.34:37/ Reply App. 4). Ms. Datka exhibited only two.

The minimum threshold on the one leg stand test was two of four potential clues, and Ms. Datka exhibited only one clue. (R.34:37-38/ Reply App. 4-5). Furthermore, and once again ignored by the State, Ms. Datka showed no observable signs of intoxication on the alphabet test, and had no balance problems on the Rhomberg balance test. (R.34:40/ Reply App. 6)

In an attempt to bolster their argument, the State cites to *State v. Lange*, 317 Wis.2d 383, 766 N.W.2d 551 (2009). The State's argument is that the observations by the deputies herein, were significantly greater than those in *Lange*. Brief of Plaintiff-Respondent page 10.

However, a close look at *Lange* reveals quite the contrary. In *Lange*, the officer observed dangerous driving, the

defendant collided with a utility pole (here Ms. Datka was parked when officers arrived), the time of night was a factor considered by the court in *Lange*, (here the stop occurred in the afternoon). Finally, in *Lange* officers were aware that the defendant had prior convictions (here, there were no prior convictions).

Contrary to the State's contention, the quantum of evidence within the deputies knowledge herein was not significantly greater than possessed by the officer's in *Lange*. More importantly, in Ms. Datka's case, the officer's had knowledge that Ms. Datka successfully completed three field sobriety tests.

Under a totality of the circumstances and when weighing the evidence herein, it is clear that the officer did not possess the requisite level of suspicion to request Ms. Datka to perform a PBT.

CONCLUSION

Because of the above, the State's argument fails. The trial court erred in denying Ms. Datka's motion. The Court should vacate the judgement of conviction and reverse the order denying Ms. Datka's motion.

Dated this 9th day of February, 2018.

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 1419.

Dated this 9th day of February, 2018.

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 9th day of February, 2018.

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of February, 2018.

Respectfully submitted,

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APPENDIX