STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

Village of Menomonee Falls,

Plaintiff-Respondent,

Appeal No. 2018AP000993

-vs-

Kristina Smithers,

Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the Decision made from the bench on May 10, 2018 by the Honorable Lee S. Dreyfus, Jr., Circuit Judge for Branch 5, Waukesha County Circuit Court, in Waukesha County Circuit Court Case No. 2017-CV-790.

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STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument is likely to be of limited assistance, as the facts are straightforward and essentially undisputed.

The effects of prescription medications are an ongoing issue in our society, so guidance asbout when impairment created by prescription medications is a violation of the law and when it is a defense may be useful.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

On September 24, 2016 at approximately 2:15 p.m. Kristina Smithers was driving southbound on Hwy. I-41 in the Village of Menomonee Falls. Several other drivers made calls to the Menomonee Falls Police Department because they were concerned about the operation of her vehicle. Officers who responded noted that the Smithers vehicle was swerving between two lanes and was being operated at about 45 m.p.h. in an area where the speed limit was 70 m.p.h. When officers pulled her vehicle over and had contact with Kristina Smithers it was readily apparent that she was impaired. Her speech was slurred, she had difficulty maintaining balance, her coordination was poor, and she was slow in reacting to officers' questions and instructions. According to one of the investigating officers, Lemar Brooks, she did not appear to understand what was going on around her and was "not processing" and was not really responsive to anything." (R. - 21, Trial transcript, pages 17 -24.)

There was no odor of intoxicants and even at the scene one of the officers noted that it seemed that Smithers' condition was the result of medications. (R. - 21, page 19) A blood sample was taken at Community Memorial Hospital and the results when it was analyzed showed that Ms. Smithers had no alcohol in her system and that the only drugs which were found were prescription medications which she had taken that day. The report from the WSLH, dated January 12, 2017, reported that no ethanol had been

detected and further reported that Carisoprodol and Meprobamate, which is a metabolite of Carisoprodol; Tramadol and O-desmethyltramadol, which is a metabolite of Tramadol; and Temazepam were detected. (R. - 14, Exh. 3, App. page 19)

The Carisoprodol, Tramadol, and Temazepam are all medications for which Ms. Smithers had prescriptions and which she had taken that day in accordance with the directions related to the prescriptions.

James Oehldrich, who was a forensic toxicologist for the State Crime Laboratory for over 30 years and is now a private consultant, reviewed Ms. Smithers medication records and the medications she reported taking on September 24, 2016 and found that she had taken her medications in accordance with her prescriptions. Mr. Oehldrich also found that because Ms. Smithers reported taking a dose of Carisoprodol shortly before leaving her house in West Bend, that the Carisoprodol would have been peaking at about the time that Ms. Smithers was driving in Menomonee Falls. He also provided the opinion that Ms. Smithers symptoms as observed by the officers was consistent with the effects of Carisoprodol, and further provided the opinion that there were no indications of anything else causing Ms. Smithers' impairment. (R. - 14, Exh,. 4, App. page 20; R. - 21, pages 51 - 60)

For the sake of completeness it should be noted that Diane Kalscheur, the analyst who issued the January 2017 report from WSLH was of the opinion that the level of

Carisoprodol found in the blood sample was higher than therapeutic ranges, while James Oehldrich found that it was within therapeutic ranges. This difference of findings is not particularly significant, however, because Kalscheur also testified that her opinion that the level was above therapeutic ranges was not indicative of Ms. Smithers taking the medication in any manner other than as prescribed. In short, that a person could take medication in the manner prescribed and that it could still be present above therapeutic ranges. Kalscheur's testimony on this subject at the municipal court trial was brief, and had to do with absorption and the like.

All of this is consistent with Ms. Smithers' recollection, which is that she left her house in West Bend shortly some time between 1:30 and 2:00 p.m. on September 24, on her way to northern Illinois to spend the weekend with friends whom she was meeting there. Ms. Smithers was talking with one of those friends on her Bluetooth ear piece from the time she left West Bend until being pulled over in Menomonee Falls. When she left West Bend Ms. Smithers felt fine and had no indication that her medications were having an adverse effect. The friend later told Ms. Smithers that there was a change in her conversation during the period of approximately 20 minutes between when she left home in West Bend and when she was pulled over by Menomonee Falls police. (R. - 21, pages 41 - 50)

LEGAL ISSUES PRESENTED

WHETHER THE STATUS OF A FIRST OFFENSE OWI AS A CIVIL MATTER PRECLUDES DEFENDANT FROM RAISING INVOLUNTARY INTOXICATION AS A DEFENSE IS AN ISSUE IN THIS CASE. THE TRIAL COURT HELD THAT BECAUSE THIS CASE IS A FIRST OFFENSE OWI CASE, INVOLUNTARY INTOXICATION COULD NOT APPLY. DEFENDANT CONTENDS THAT BOTH DEFENSES PROVIDED IN THE SUBSECTIONS OF §939.42 APPLY.

Several issues are presented in this case. A threshold issue is whether involuntary intoxication can be raised as a defense in a first offense OWI case. One of the rulings of the trial court in its decisions concerning the pre-trial motion brought by the defense and at trial was that because involuntary intoxication is a defense found in the criminal code and a first offense OWI case is a civil matter, that involuntary intoxication cannot be raised as a defense in such cases. (App. pages 12 - 18) Defendant contends that involuntary intoxication can be raised as a defense in first offense OWI cases because they are quasi-criminal in nature.

The trial court also found that even if involuntary intoxication could be raised as a defense in a first offense OWI case such as this one, that it would not apply in this case. With all due respect, the trial court failed to apply the correct legal standard to the facts presented and made findings regarding most of the elements of an involuntary

intoxication defense, but failed to evaluate the evidence presented and to make a finding concerning the issue of whether defendant's intoxication 1) rendered her incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed, which is the standard set forth in §939.42(1), Wis. Stats., or 2) negatived the existence of a state of mind essential to the crime, the standard set forth in §939.42(2), Wis. Stats.

To be fair, neither party emphasized interpretation of §939.42, with both plaintiff and defendant focussing their arguments and presentations on whether an OWI offense is a strict liability offense, with no element of culpability, scienter, or mens rea to be considered in determining the guilt or innocence of the defendant. Evidence was, however, presented as to each of the subsections of §939.42, so that both of the defenses found in the statute were presented to the trial court.

It is of significance that once evidence of involuntary intoxication was presented, the burden shifted back to the plaintiff. See, Gish v. Dittmann, 291 F.Supp.3d 864 (2017) at 875, citing Wisconsin Criminal Jury Instructions § 755A Comments n.3 (2015) and State v. Anderson, 2014 WI 93, ¶ 25. "If the state does not meet its burden, 'the result will be an acquittal on the charge.'"

WHETHER SUBSECTION (1) OF §939.42 APPLIES GIVEN THE FACTS PRESENTED IN THIS CASE IS AT ISSUE. DEFENDANT CONTENDS THAT THE TRIAL COURT ERRONEOUSLY EXERCISED

ITS DISCRETION WHEN IT FAILED TO APPLY
THE PROPER LEGAL STANDARD TO THE FACTS
PRESENTED REGARDING THIS ISSUE.

Defendant looks first to §939.42(1) along with relevant case law, most notably State v. Gardner, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999) The evidence of involuntary intoxication as a result of taking prescription medications was presented through the testimony of Ms. Smithers and of, James Oehldrich, a forensic toxicologist. Smithers testified concerning the medications she had taken and demonstrated through pharmacy and medical records that all of them were prescribed. (R. - 21, pages 41 - 50; R. - 15 and 16, Exh. 6 - 9) Oehldrich testified that the medications which Smithers described taking were those which had been prescribed to her, Both Oehldrich and Diane Kalscheur, the toxicologist from the Wisconsin State Laboratory of Hygiene, testified that Ms. Smithers' impairment was the result of the medications she had taken. (R. - 21, pages 26 -36 and pages 51 - 60)

As regards Kristina Smithers being "incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed", which is the language of subsection (1), her incapacity was described in considerable detail by Officer Lemar Brooks.

Brooks described Kristina Smithers as "lethargic", "delayed", having a "heavy tongue". He also testified that she repeatedly gave the same answer to different questions. When asked whether Smithers appeared to be aware of what was going on,

Brooks said that she "wasn't processing". He also testified that Smithers was unable to respond to questions he asked her about her driving. In addition, he testified about responses given by Smithers which were inaccurate and demonstrated her lack of capacity. These included telling him that she was not under a doctor's care, that she had diabetes, and that the only medication she had taken was sudafed. All of these statements were wrong.

Officer Brooks testified, "Well, it appeared that she was awake and understanding, but she was not. She was very lethargic and slow to respond. So she was the opposite of what I was seeing." (R. - 21, pages 12-13) He also testified, "She was conscious. That's probably about as much as I could tell from the situation. She wasn't really responsive to anything." (R. - 21, page 17) Officer Brooks further testified that he thought that Smithers might be having a diabetic reaction or that she was under the influence of "some type of medication". (R. - 21, page 19)

Brooks also testified that he couldn't understand many of Smithers' answers to his questions. He told another responding officer that he thought Smithers was under the influence of medications or had a medical condition. He was sufficiently concerned about her condition that he called fire and medical responders to the location and had Smithers in the back of the ambulance while he was questioning her. (R. - 21, page 24)

In short, what Officer Brooks was describing was someone with significant

incapacities, who was barely functioning and certainly not aware of what she was doing. This was not a situation like that presented in State v. Alby, 2001 WI App 146, 246 Wis. 2d 671, 630 N.W.2d 276 , where defendant told the arresting officer that he knew he had messed up and fallen off the wagon; or State v. Deppiesse, 2014 WI App 71, 351 Wis. 2d 622, 848 N.W.2d 903, where defendant testified that she was not impaired and had a clear recollection of the traffic stop; or State v. Eggenberger, 2013 WI App 128, ¶ 14, 351 Wis.2d 224, 838 N.W.2d 866, where all that was alleged were impaired judgment and lowered inhibitions. These cases are examples of situations where the condition of the defendant was impaired to the point that driving was illegal, but not so impaired that he or she lacked the ability to know that they were impaired.

In this case, on the other hand, Kristina Smithers was so impaired by reason of having taken prescribed medications that she lacked the capacity to understand that she was impaired. This is clear from the testimony of Officer Brooks and of Smithers herself. If Smithers had been suffering from a diabetic reaction, as Officer Brooks at first suspected, she would not be liable under the statute, particularly if she was unaware that she was experiencing the reaction.

The same holds true when, as is the case here, she was suffering from a medical condition – impairment as described in the testimony – and was unaware of it. If her impairment had been slight, and she had known (or should have known) that she was under the influence and chose to drive anyway, that would be a different matter. But

where, as here, she was unable to comprehend her circumstances, where in the language of subsection (1), she was unable to distinguish between right and wrong in regards to the criminal act alleged, and that impairment and lack of capacity was brought on by the innocent act of using medications as prescribed by her treating medical professionals, the statute provides a defense.

Evidence of Ms. Smithers' impairment and of her lack of capacity was presented to the trial court and was commented upon by the judge during the course of his ruling. What the trial court did not do, however, as it decided this case was take into account the legal effect of the evidence of lack of capacity. Given the evidence presented here is no question that the finding of the court should have been that Ms. Smithers was incapable of distinguishing between right and wrong in regard to the alleged offense, and that the defense provided for in subsection (1) applies in this case.

For that reason the judgment in this case should be reversed and the case dismissed. In the alternative the judgment should be vacated and the case remanded for determination by the trial court of whether Ms. Smithers was incapable of distinguishing between right and wrong in regard to the alleged offense. A finding could be made based on the testimony and evidence already adduced or the trial court could order a new trial. With findings and conclusions of law concerning the issue of whether Ms. Smithers was capable of distinguishing right from wrong being made, the trial court will have applied the law to the facts presented.

> WHETHER THERE IS A MENTAL STATE WHICH IS AN ELEMENT IN AN OWI OFFENSE – A KNEW OR SHOULD HAVE KNOWN STANDARD – AND, IF SO, WHETHER KRISTINA SMITHERS' INVOLUNTARY INTOXICATION FROM PRESCRIPTION MEDICATIONS CONSTITUTED A DEFENSE TO THAT ELEMENT IS AN ISSUE IN THIS CASE. THIS IS THE DEFENSE PROVIDED BY SUBSECTION (2) OF §939.42. DEFENDANT CONTENDS THAT THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY FAILING TO APPLY THE LAW TO THE FACTS ON THIS ISSUE.

Ms. Smithers also presented and actually emphasized the issue of whether a mental state is part of an OWI offense. If, as defendant contends, there is a mental state – whether denominated intentionality, scienter, or mens rea, then the Village was required to show that defendant knew or should have known that she was impaired and should not have been operating a motor vehicle. The defense further contended that Ms. Smithers' condition of involuntary intoxication was such that it negatived the existence of that state of mind, i.e., that the defense provided by subsection (2) applies. The response of the Village has been that OWI is a strict liability offense and that no showing of intent, scienter, or mens rea need be made. And that if no showing of such a state of mind is necessary, that it cannot be negatived, no matter what Ms. Smithers' condition was at the time of the alleged offense.

The exact standard to be applied in determining whether a state of mind has been negatived under subsection (2) is not described in the language of the statute. It has been

described in State v. Guiden, 46 Wis. 2d 328, 174 N.W.2d 488 (1970) as follows:

> The 'intoxicated or drugged condition' to which the statute refers is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime. To be relieved from responsibility for criminal acts it is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.
> 46 Wis. 2d at 331.

Given the description of Kristina Smithers' condition by Officer Brooks in his testimony, there can be little or no question that any state of mind necessary to the offense was negatived by her involuntary intoxication.

If, as defendant contends, a state of mind is required for a person to be found guilty of OWI, then the defense provided for in subsection (2) applies in this case. For reasons which are set forth in the argument section of this brief, defendant contends that there is a state of mind which should be read into the OWI statute which is similar to that read into the OAR statute in State v. Collova, 79 Wis. 2d 473, 255 N.W.2d 581 (1977), and into other statutes where case law has found that it should be added. The state of mind which should be read into the OWI statute is a knew or should have known standard which is often read into statutes which are silent on their face as to state of mind.

Just as in the application of subsection (1) to the facts presented at trial, application of subsection (2) should result in a reversal and dismissal. Again, the

alternative would be that the judgment should be vacated and the case remanded for determination by the trial court of whether the state of mind was negatived by Ms. Smithers' involuntary intoxication. A finding could be made based on the testimony and evidence already adduced or the trial court could order a new trial. With findings and conclusions of law concerning the issue of whether an essential state of mind was negative being made, the trial court will have applied the law to the facts presented.

ARGUMENT

DEFENSES THAT APPLY IN CRIMINAL CASES ALSO APPLY IN QUASI-CRIMINAL ORDINANCE VIOLATION CASES

Criminal procedures and standards, including criminal defenses, apply in all important respects to civil ordinance violations which are quasi-criminal in nature. See, for example, Milwaukee v. Cohen, 57 Wis. 2d 38, 203 N.W.2d 633 (1973) , in which the Wisconsin Supreme Court held that Fourth Amendment protections against unreasonable search and seizure applied in a civil case which was quasi-criminal and that the county court had authority to grant a motion to suppress items seized unlawfully. Id. at 46.

See also County of Ozaukee v. Quelle, 198 Wis. 2d 269, 542 N.W.2d 196 (1995), in which the Court of Appeals held that §971.31(10), which on its face applied only to

criminal cases, also applied to first offense OWI cases, even though they are not criminal. This is the statute which provides for appeals of adverse rulings on suppression motions to be brought even when the defendant has entered a plea of guilty or no contest.

In addition, see City of Janesville v. Wiskia, 97 Wis. 2d 473, 293 N.W.2d 522 (1980), in which the Supreme Court reversed an award of attorneys fees awarded when defendant was acquitted, because the prosecution of city ordinance violations is quasi-criminal in nature and, therefore, civil remedies such as the award of attorneys fees do not apply.

It is clear that prosecution of first offense OWI violations is quasi-criminal in nature and, therefore, defenses which would apply if it were completely criminal in nature apply.

DEFENDANT PRESENTED ALL OF THE ELEMENTS OF A DEFENSE UNDER §939.42(1), WIS. STATS. AND THE TRIAL COURT FAILED TO APPLY THE LAW CONCERNING THIS STATUTORY DEFENSE TO THE FACTS PRESENTED

The issue of involuntary intoxication as a result of taking prescription medications as a defense in an OWI case has not been directly addressed in any published case, although there has been at least one published case where it was rejected as a defense because the defendant had consumed alcohol along with prescription medications. City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W.2d 314 (1969). There are also two

unpublished cases in which the elements which would be necessary for it to apply are discussed, but found not to apply. State v. Alby, 2001 WI App 146, 246 Wis. 2d 671, 630 N.W.2d 276 and State v. Deppiesse, 2014 WI App 71, 351 Wis. 2d 622, 848 N.W.2d 903.

Probably the most useful case on the subject of involuntary intoxication as a defense is State v. Gardner, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999). It includes a lengthy discussion which sets forth the elements, the underlying rationale of the defense, and includes citation to out of state cases which are illustrative. The Gardner court states:

> It is clear that the effects of prescription medication can form the basis of an involuntary intoxication defense. When commenting on the criminal code revision, the Legislative Council referred to an annotation discussing when the defense is available. See 1953 A.B. 100, A § 1 at 34. The cited annotation begins with the following quote:
>
> That if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him.
>
> Annotation, When intoxication deemed involuntary so as to constitute a defense to criminal charge, 30 A.L.R. 761, 761-62 (1924) (quoted source omitted). Modern authorities confirm that the defense is available for intoxication caused by prescription drugs. See 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 4.10(f), at 560 (1986) ("Yet another instance of involuntary intoxication is when the substance was taken pursuant to medical advice."). Under the Model Penal Code, intoxication is an affirmative defense when it is not self-induced and renders the actor incapable of appreciating the criminality of his or her conduct, or unable to conform his or her conduct to the law. See Model Penal Code § 2.08(4) (1962). An exclusion in the definition of "self-induced" demonstrates that prescription drug effects may count as

involuntary intoxication:

> (b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime.

Id. § 2.08(5)(b) (emphasis added). See also Phillip E. Hassman, When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge, 73 A.L.R.3d 195 § 7 (1977) ("Intoxication prescribed or administered by physician").

The State acknowledges that the effects of prescription medication may constitute involuntary intoxication, but urges us to add the requirement that the
defendant must not know of the intoxicating effect. We acknowledge that ample case law supports this position. The rationale is that if the defendant knows of the intoxicating effect prior to taking the medication, then the intoxication is rendered voluntary. See City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976) (so holding and citing supporting cases). We see no reason to so limit the defense. Even if forewarned of the intoxicating effect of a prescription drug, a person should have recourse to the defense if the drug renders him or her unable to distinguish between right and wrong. When faced with a medical condition requiring drug treatment, the patient hardly has a choice but to follow the doctor's orders. Intoxication resulting from such compliance with a physician's advice should not be deemed voluntary just because the patient is aware of potential adverse side effects. We agree with the Texas courts' formulation of when the defense is available. "The involuntary intoxication defense is limited to (1) the defendant's unawareness of what the intoxicating substance is; (2) force or duress; or (3) medically prescribed drugs taken according to prescription." Shurbet v. State, 652 S.W.2d 425, 428 (Tex. Ct. App. 1982) (emphasis added). We note that this does not include cases where a patient knowingly takes more than the prescribed dosage, see Goldsmith v. State, 252 S.E.2d 657 (Ga. Ct. App. 1979), or mixes a prescription medication with alcohol or other controlled substances, see State v. Voorhees, 596 N.W.2d 241 (Minn. 1999). Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug's side effects. See City of Wichita v. Hull, 724 P.2d 699 (Kan. Ct. App. 1986) (holding that involuntary intoxication defense was properly denied where defendant drove after taking sleeping pill).

To similar effect, see State v. Anderson, 2014 WI 93, 357 Wis. 2d 337, 851 N.W.2d 760, in which the Supreme Court discussed both the inapplicability of an involuntary intoxication defense to situations in which the defendant had mixed prescription medications with alcohol and the requirement that a defendant had taken prescription medications as ordered for an involuntary intoxication defense to apply. Id. at ¶34 and at fn. 12. See also Gardner at ¶42 regarding the requirement that the defendant have taken their prescription medications as ordered.

Taking all of the cases together it becomes clear that the elements of a defense of involuntary intoxication under subsection (1) of §939.42 based on taking prescription medications are that: 1) that the intoxication was involuntary, i.e., that neither the medications nor anything else taken with them were consumed for purposes of intoxication; 2) that only the prescription medications were taken, i.e., they were not mixed with alcohol or anything else; 3) that the medications were taken as prescribed, i.e., in amounts and in the manner ordered by the medical professional who prescribed them; and 4) that the effects of the medication were such that they rendered the defendant incapable of distinguishing between right and wrong regarding the offense charged.

The trial court made findings either explicitly or implicitly during the course of his ruling at trial on the first three elements and even made comments concerning the extent of Ms. Smithers' impairment which were part of an analysis of the fourth element. The findings on the first three elements were all favorable to Smithers, as were the

comments it made concerning aspects of the fourth element. The trial court did not, however, make a finding of whether Smithers' impairment rendered her incapable of distinguishing right from wrong as to the OWI offense. It simply made the analysis and comments it made at the end of the trial, including comments about how this sort of situation could arise because of the uncertainties of medications, and then repeated its conclusion from the October 6, 2017 motion hearing that involuntary intoxication was not a defense that could be raised in an OWI case. In short, it failed to apply the law to the facts.

In reviewing whether a trial court made an erroneous exercise of discretion the appellate court determines whether the trial court "examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Appleton Post-Crescent v. Janssen, 149 Wis. 2d 294, 302-03, 441 N.W.2d 255, 258 (Ct. App, 1989).

By failing to fully consider the fourth element and to make findings on this element and to apply conclusions of law concerning it, the trial court made an erroneous exercise of its discretion. Because the facts presented as to that element are undisputed and the legal conclusion which flows from them is clear, this court could reverse the judgment of the trial court and order dismissal, or in the alternative it could vacate the judgment and remand for findings by the trial court which apply the law to the facts.

DEFENDANT ALSO PRESENTED EVIDENCE SHOWING A DEFENSE UNDER SUBSECTION (2) OF §939.42, WIS. STATS. AND THE TRIAL COURT DID NOT APPLY THE LAW TO THOSE FACTS

Subsection (2) of §939.42, Wis. Stats., provides that when the other elements of involuntary intoxication are shown, the fact of defendant being in an intoxicated or drugged condition is a defense if the condition "Negatives the existence of a state of mind essential to the defense."

Defendant has contended from the outset of this case that there is an element of intentionality to an OWI offense. Whether referred to as intention, scienter, mens rea, or similar terms, the point is the same, implicit and read into the OWI statutes is an element that the defendant knew or should have known that he or she was impaired (or that his or her conduct would lead to impairment). Defendant has also contended from the outset that this element was negated by her involuntary intoxication.

The Village, unsurprisingly, has taken the position that OWI is a strict liability offense and that all it must show are the fact of intoxication and the operation of a motor vehicle.

Smithers submits that the elements of an involuntary intoxication defense based on taking prescription medications under Subsection (2) of §939.42 are that:1) the intoxication was involuntary, i.e., that neither the medications nor anything else taken

with them were consumed for purposes of intoxication; 2) that only the prescription medications were taken, i.e., they were not mixed with alcohol or anything else; 3) that the medications were taken as prescribed, i.e., in amounts and in the manner ordered by the medical professional who prescribed them; and 4) that the effects of the medication were such that they negatived the existence of the state of mind, i.e., knew or should have known that the medications were causing impairment which would interfere with the defendant's ability to operate a motor vehicle.

> WHETHER REFERRED TO AS INTENTIONALITY, MENS REA, OR SCIENTER, THERE IS A STATE OF MIND WHICH IS AN ELEMENT OF THE OFFENSE OF OWI. THIS ELEMENT IS A KNEW OR SHOULD HAVE KNOWN STATE OF MIND AND IS READ INTO THE STATUTE IN THE SAME WAY THAT KNEW OR SHOULD HAVE KNOWN IS READ INTO OTHER STATUTES WHERE THE REQUIREMENT OF SCIENTER DOES NOT APPEAR IN THE LANGUAGE OF THE STATUTE.

Whether a defense of involuntary intoxication applies when a violation of §346.63(1)(a), Wis. Stats., is charged remains the issue before this Court as well. Put another way, the issue is whether some degree of intentionality, often referred to as mens rea or scienter is requisite to the offense and whether lack of it is an affirmative defense.

At the trial court the Village argued that the language of the statute does not include a reference to intention as being an element of the offense, and contended that this was dispositive of the issue. It cited State v. McAllister, 107 Wis. 2d 532, 319 NW.2d 865 (1982) where it states that the two elements the State must prove in an OWI

case are 1) driving a motor vehicle while 2) under the influence of an intoxicant. This statement was, however, in the context of McAllister's claim that the State had to prove his prior convictions to a jury for a repeater enhancer to be applied, so it doesn't provide guidance on the issue of whether lack of mens rea can constitute a defense.

Also cited by the Village, but more helpful to the defendant when the sentence relied on is read along with the surrounding discussion, is State v. Polashek, 2002 WI 74, 253 Wis. 2d 527, 646 N.W.2d 330. Polashek involved a charge that defendant had violated a statute requiring that information about child abuse cases be kept confidential. One of the issues in the case was whether the statute created strict liability if all of the elements of the offense were shown to be present.

The Village relied on the first two sentences of paragraph 28, which do in fact state that, "Both parties here agree that the plain language of §48.981(7)(f), does not specify a mental state. Often, when the statutes makes no reference to intent, we have held that the statute creates a strict liability offense." The next sentence makes clear, however, that whether a statute includes reference to a mental state is not the end of the analysis, but the beginning. It reads, "However, the mere fact that there is no mention of a mental state in the statute does not inevitably lead to that conclusion." Id. at ¶28.

In the next paragraph the Court lists the factors it considers when a statute is silent as to a requirement of intent or negligence. It reads:

> ¶ 29. We have occasionally found a requisite mental state for an offense when the statute is silent regarding the mens rea requirement. *Stoehr,* 134 Wis. 2d at 77. When we have done so, we have looked at a number of factors to determine the legislative intent of the statute. These include the statute's plain language, the legislative history of the statute, the seriousness of the potential penalty imposed, the statute's purpose, and the practical requirements of effective law enforcement. *Id.* at 76 (citing *State v. Stanfield,* 105 Wis. 2d 533, 560-61, 314 N.W.2d 339 (1982); *State v. Collova,* 79 Wis. 2d 473, 478-80, 482, 485, 255 N.W.2d 581 (1977)).

There is a much longer analysis, applying each of the factors, in the Collova case, where the Supreme Court found that §343.44, the statute which prohibits operating a motor vehicle after revocation of a driver's license, had a mens rea element even though the plain language of the statute was silent. That court noted, "Thus the definition of the offense here involved does not contain any express words requiring or negativing any specific state of mind. Legislative silence on whether scienter is an element of the offense is not unusual in criminal statutes and the courts have been left the task of ascertaining the legislative intent from the nature of the particular statute involved." Id. at 480.

The Collova court also noted State v. Alfonsi, 33 Wis. 2d 469,476, 147 N.W.2d 550 (1960), when it stated "...this court observed that 'the element of scienter is the rule rather than the exception in our criminal jurisprudence.'" Id. at 480.

An important factor, discussed at some length in the Collova case, is whether a criminal statute is primarily regulatory in nature or focussed more on the culpability of an

individual. Where the statute is regulatory in nature, scienter tends to be disregarded, where it focusses on culpability of an individual, scienter is more likely to be required.

> The problem is determining where the legislature intended to draw the line between offenses which do and do not require scienter. Liability without fault has been applied in Wisconsin, as the above cited cases demonstrate, in "regulatory criminal statutes." The complex industrial state of the 20th century has generated increased social regulation and has adapted the criminal law, originally designed to punish the culpable individual, to enforce obedience to regulatory statutes. These regulatory statutes are concerned primarily with the protection of social and public interests, with the prevention of direct and widespread social injury. They are more concerned with the injurious conduct than with the question of individual guilt or moral culpability. The penalties imposed are generally light. The usual rationale for strict liability statutes is that the public interest is so great as to warrant the imposition of an absolute standard of care the defendant can have no excuse for disobeying the law. Because of the multitude of cases arising under these regulatory statutes, there is a need for quick, simple trials unhindered by examinations of the subjective intent of each defendant.
>
> Id. at 482. (Emphasis added.)

An OWI case involving drugs can involve both a regulatory interest that the State or a municipality enforcing a statute which it has incorporated into its ordinances has in maintaining public safety and a penal interest in enforcing the statute and punishing those who violate it. If the focus were solely on the regulatory interest, scienter would not be a factor, being under the influence of drugs – whether because of knowingly using drugs which are likely to induce intoxication or because of innocent use of prescription medications which had an unanticipated effect – would be sufficient. Where, however, if there is greater focus on the penal aspect of the statute, then scienter should be read into the statute.

The Collova court found that the OAR statute being considered in that case had these dual concerns, that it was part of a regulatory scheme including the traffic code, but that it also included holding a wrongdoer culpable as an important part of its purpose. Ultimately, it was the potential severity of the penalty associated with violation of the OAR statute which was the deciding factor for the Supreme Court in holding that scienter was implicit in the statute, even though it was silent on its face as to any mental state being required. Id. at 484-85.

While this case is quasi-criminal, involving the adoption of a statute by a municipality, and there is no incarceration as a penalty for first offense violations of §346.63(1), Wis. Stats., it certainly is a statute which involves very heavy penalties for repeat offenses, including being a felony under some circumstances.

It also should be noted that the interest of the State – and in this case the Village – in maintaining safety on the highways is not undermined by a finding that scienter is an element of violation of the statute and allowing a defense of involuntary intoxication in the rare circumstances where it might apply. A separate, albeit related, part of the regulatory scheme concerning motor vehicles and driving privileges is found at Wisconsin Administrative Code Trans 112. Trans 112.045 and 112.05 provide for a comprehensive review and regulation of an individual's medical condition and use of drugs, including prescription drugs, and operating privileges can be withdrawn or limited unless and until appropriate safeguards are possible and are being maintained.

The purpose and focus of these Administrative Code provisions is, of course, purely regulatory, with there being no difference between incapacity as a result of an illness such as epilepsy or as a result of use of drugs – prescription or otherwise. There is no consideration of whether the individual driver is culpable of wrongdoing, the sole concern is maintaining safety. As part of a regulatory scheme with no penalties, scienter would not and does not enter into consideration. As a practical matter, Ms. Smithers has been required to review and examination under these provisions, but it is their part in the overall regulatory scheme which is important in the context of this case, not her particular level of involvement.

An additional factor which this Court should take into account is that the situation presented in this case is rare. Usually even when there are prescription drugs in a person's system in an OWI case, they will be mixed with alcohol or other non-prescription drugs. It is clear from Waukesha v. Godfrey that when alcohol is mixed with prescription drugs, scienter generally and involuntary intoxication in particular cannot be raised as a defense.

THE MENTAL STATE THAT IS READ INTO
THE STATUTE IS NEGATIVED IN THIS CASE
BY DEFENDANT'S INVOLUNTARY INTOXICATION.
THE TRIAL COURT DID NOT CONSIDER WHETHER
SMITHERS' INVOLUNTARY INTOXICATION NEGATIVED
THE ELEMENT BECAUSE IT IMPLICITLY HELD THAT
THERE WAS NO MENTAL STATE ELEMENT TO THE
OFFENSE. IT THEREFORE FAILED TO APPLY THE LAW
TO THE FACTS AS TO SUBSECTION (2) AS WELL.

The trial court did the same thing as regards subsection (2) of §939.42 as it did concerning subsection (1). Its analysis in its decision addressed the first three elements directly, and its comments concerning Ms. Smithers' condition made clear that her condition met the legal standard necessary to successfully raise the defense..Then, because it did not recognize that there is a mental element of the offense, the trial court made no findings and reached no conclusions of law on the issue of whether Smithers' condition negatived a state of mind essential to the offense.

In short, it failed to apply the law to the facts as to subsection (2) in the same manner as it failed to apply the law to the facts as to subsection (1). Once again, there is no real question whether Ms. Smithers' condition negatived any mental state, so it would be appropriate for this court to order reversal of the judgment and dismissal. It would also be appropriate for this court to order the matter remanded to the trial court for additional findings and to apply the law to the facts, which would result in a dismissal.

CONCLUSION

For the reasons set forth above, the judgment that Kristina Smithers has violated §346.63, Wis. Stats., should be reversed and the case against her dismissed. In the alternative, the judgment against her should be vacated and the case remanded to the trial court for application of the law to the facts as to both subsections of §939.42, Wis. Stats.

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CERTIFICATIONS

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)

I hereby certify that this brief conforms to the rules contained in s. 809,19(8)(b) and (c) for a brief and appendix produced with monospaced font. The length of the brief is 25 pages and 6,775 words.

Signed: Daryl W. Laatsch
Signature: /s/Daryl W. Laatsch

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted or will submit contemporaneously with the paper filing 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: The 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.

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I hereby certify that: I have filed or will file contemporaneously with the paper filing a copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that: The electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

I hereby certify that filed with this brief, either as a separate document or as a part of this grief, is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of anyy unpublishedopinion cited under s. 809.23 (3) (a) or (b); and (4) portions of

the record essential to an understanding of the issues raaised, including oral or written rulings or decisions showing the circuit court's reasoning regarding these issues.

I further certify that if this appeal is taken from a circuit court order or 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 firstnames 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.

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APPENDIX

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