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**WISCONSIN COURT OF APPEALS
DISTRICT II**

**11-01-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2018AP000993

VILLAGE OF MENOMONEE FALLS,
Plaintiff-Respondent,
v.

KRISTINA SMITHERS,
Defendant-Appellant,

Appeal from a Final Judgment of the
Circuit Court of Waukesha County
Honorable Lee S. Dreyfus Presiding
Circuit Court Case No. 2017CV000790

**RESPONSE BRIEF OF
PLAINTIFF-RESPONDENT
VILLAGE OF MENOMONEE FALLS**

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STATUTES AND CODES

Wis. Stat. § 346.63	<i>passim</i>
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STATEMENT OF THE ISSUES

The issues presented on pages four through eleven of the Appellant's brief mischaracterize the issues presented for review. The circuit court made two rulings in this case: (1) an evidentiary ruling on October 10, 2017 and (2) a factual finding of guilt on May 6, 2018. For this reason, a revised statement of the issues is hereby provided.

1. Whether Ms. Smithers' motion failed to establish involuntary intoxication.

The Circuit Court ruled that "the requirements of an involuntary intoxication defense under 939.42 certainly are not met under these circumstances." (R7:4)

2. Whether the evidence presented by Ms. Smithers at trial established involuntary intoxication.

The Circuit Court held that involuntary intoxication was not applicable and found Ms. Smithers guilty of operating while under the influence.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Oral Argument. Pursuant to Wis. Stat.

§ 809.22(2)(b), the Respondent does not believe oral argument is necessary in this case. The issues presented can be adequately addressed through the briefing process and oral argument would be of marginal value and would not justify the additional expenditure of the Court's time or costs to the litigants.

Publication. Pursuant to Wis. Stat.

§ 809.23(1)(b), the respondent does not believe that publication is warranted in this case because the issues involve no more than the application of well settled rules of law to a recurring fact situation and the issues do not otherwise fit the parameters of Wis. Stat. § 809.23(1)(a).

STATEMENT OF THE CASE

1. Procedural Posture

The Village of Menomonee Falls issued municipal citation T886131-1 to the Appellant-Defendant Kristina Smithers alleging she was operating a motor vehicle while impaired in violation of Wis. Stat. § 346.63(1)(a). (R.1:4)

Following a court trial on April 19, 2017, the Menomonee Falls Municipal Court, Honorable Brad Matthiesen presiding, found Ms. Smithers guilty of violating Wis. Stat. § 346.63(1)(a). (R.1:5)

Ms. Smithers appealed the decision of the Menomonee Falls Municipal Court to the Waukesha County Circuit Court. (R.1:3). On October 6, 2017, after receiving briefs and oral arguments, the Honorable Lee S. Dreyfus denied Ms. Smithers motion request an affirmative defense of involuntary intoxication. (R.23). Ms. Smithers waived her right to a jury trial (R.12) and the circuit court found Ms. Smithers guilty of violating Wis. Stat. § 346.63(1)(a) following a court trial on May 10, 2018 (R.24).

2. Factual Background

On September 24, 2016, Menomonee Falls Police Officer Lamar Brooks was dispatched to the area of I-41 by Main Street for a possible impaired driver. (R.24:7-8). Upon arrival to the area, Officer Brooks observed several cars in the far right lane traveling at a slow rate of speed behind Ms. Smithers' vehicle, which swerved between multiple lanes of traffic while travelling approximately 45 MPH in a 70 MPH zone. (R.24:9-10). Officer Brooks conducted a traffic stop and observed that Ms. Smithers appeared to be impaired by an unknown substance. (R.24:10-12). Ms. Smithers was lethargic and unable to coherently respond to Officer Brooks or exit the vehicle without the assistance of Officer Brooks. (R.24:12-17). Ms. Smithers was taken to a nearby parking lot and the Menomonee Falls Fire Department responded to assess her condition (R.24:18). Based on his observations of Ms. Smithers' condition, Officer Brooks arrested Ms. Smithers for operating while impaired and transported her to a

hospital to obtain a sample of her blood. (R.24:19-22).

She was issued a citation, booked and released.

Results from the Wisconsin State Lab of Hygiene show multiple substances in the Defendant's blood. (R.14:2). Lab analyst Diane Kalscheur testified at the May 10, 2018 circuit court trial that four substances were found in the Defendant's blood: Carisoprodol, Meprobamate, Tramadol and Temazepam. (R.24: 30-34). Each of the four substances can cause the type of impairment similar to the impairment Officer Brooks observed while interacting with Ms. Smithers. (R.24:30-34) Ms. Kalscheur's opinion was that the Carisoprodol and Meprobamate were likely the leading cause of the impairment observed. (R.24:34). On cross examination of the Village's witnesses, defense counsel did not dispute the testimony of Officer Brooks or Ms. Kalscheur. (R.24:22-25; R.24:34-38).

Ms. Smithers testified on behalf of the defense and corroborated the testimony of both Officer Brooks and Ms. Kalscheur (R.24:41-51). She also testified

regarding the medications that she was taking in September of 2016 and offered a number of documents related to which medications she was prescribed at that time. (R.15; R.16). She testified that she was taking her medications pursuant to prescription. (R.24:49)

James Oehldrich also testified for the defense as a forensic consultant. (R.24:51). He testified that based on his review of certain materials, it was his conclusion that Ms. Smithers was taking medications as prescribed. (R.24:54). Mr. Oehldrich agreed with Ms. Kalcheur's testimony that the Carisporodol and Meprobamate were likely the leading cause of the impairment Officer Brooks observed in Ms. Smithers. (R.24:57-59).

At the close of evidence, both parties submitted brief closing arguments to the court before the Honorable Lee. S. Dreyfus found Ms. Smithers guilty of violating Wis. Stat. § 346.63(1)(a). (R.24:63-70).

ARGUMENT

Ms. Smithers has consistently failed to establish the affirmative defense of involuntary intoxication in this case. While the circuit court denied Ms. Smithers' motion regarding the defense of involuntary intoxication, Ms. Smithers presented evidence regarding the affirmative defense at trial. In both instances, Ms. Smithers was unable to establish the elements required by the affirmative defense of involuntary intoxication set forth in Wis. Stat. § 939.42.

Both the circuit court's denial of Ms. Smithers' motion on October 6, 2017 and its finding of guilt on May 10, 2018 should therefore be affirmed.

I. The Circuit Court's Denial of Ms. Smithers' Motion Should be Affirmed.

Ms. Smithers filed a motion with the circuit court on August 28, 2017 regarding the defense of involuntary intoxication. (R.3). The circuit court ruled on October 6, 2017 denying Ms. Smithers'

motion. (R.23) This Court should affirm the circuit court's ruling on Ms. Smithers' motion.

- a. The standard of review is whether the trial court exercised appropriate discretion.

While not completely clear, the motion Ms. Smithers filed with the circuit court on August 28, 2017 appears to be in the form of a motion in limine seeking an evidentiary ruling related to the affirmative defense of involuntary intoxication. (R.3). In reviewing an evidentiary ruling, appellate courts should affirm the ruling "if it finds that the circuit court examined the relevant facts, applied a proper standard of law, used demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *State v. Hunt*, 263 Wis.2d 1, 25, 666 N.W.2d 771 (2003). In addition to reviewing the reasons set forth by the circuit court, "an appellate court independently should review the record to determine whether it provides an appropriate basis for the circuit court's decision." *Id.*

- b. The circuit court's October 6 ruling was based on the briefs and oral arguments.

Ms. Smithers' motion related to involuntary intoxication requested that she be "permitted to raise involuntary intoxication as a defense." (R.2:1).

Neither the motion nor brief in support of the motion cited Wis. Stat. § 939.42 as the statutory basis for the affirmative defense being sought. (R.2; R.3). It also failed to assert the necessary elements to mount the affirmative defense. The Village's response brief argued that (1) involuntary intoxication was inappropriate and (2) that Ms. Smithers failed to assert the necessary elements of the defense. (R.4). The circuit court also received oral arguments on September 28, 2017 prior to making its ruling.

The circuit court's oral ruling on October 6 cites to Wis. Stat. § 939.42 and denies Ms. Smithers' motion because intent is not a required element of the offense and because Ms. Smithers has not met the requisite burden to establish the affirmative defense. (R.23). This ruling should be affirmed.

- c. Intent is not a requisite element under Wis. Stat. 346.63(1)(a).

As a threshold issue, the affirmative defense of involuntary intoxication is not applicable in this case because the charge alleged does not require proof of intent. Intoxication is an affirmative defense pursuant to Wis. Stat. § 939.42 for purposes of negating intent. If intent is not a requisite element of Wis. Stat. § 346.63(1), mounting a defense of involuntary intoxication would only serve to confuse.

Wis. Stat. § 346.63(1)(a) reads in pertinent part:

No person may drive or operate a motor vehicle while...[u]nder the influence of...a controlled substance [or] any other drug to a degree which renders him or her incapable of safely driving...

When “the statute makes no reference to intent, [the Wisconsin Supreme Court] has held that the statute creates a strict liability offense”. *State v. Polashek*, 2002 WI 74, ¶28, 253 Wis.2d 527, 646 N.W.2d 330. The conduct prohibited “consists of (1) driving or operating a motor vehicle, and (2) doing so while under the influence of an intoxicant.” *State v.*

McAllister, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982). “Nothing more needs to be proven to sustain a judgment of conviction against a motorist.” *Id.*

The purpose of the affirmative defense of involuntary intoxication is to negate the element of intent. Wis. Stat. § 939.42. Because the charge alleged against the Defendant does not require proof of intent, the affirmative defense is inapplicable. The charges in the two involuntary intoxication cases cited by the Defendant are serious criminal charges in which intent must be proven. *State v. Gardner*, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999) (burglary, false imprisonment and second-degree sexual assault); *State v. Anderson*, 2014 WI 93, 357 Wis.2d 337, 851 N.W.2d 760 (first-degree intentional homicide).

A first offense OWI in Wisconsin is a civil forfeiture action. Ms. Smithers is however asserting an affirmative defense set forth by the legislature in Subchapter III [Defenses to Criminal Liability] of Chapter 939 [Crimes]. Generally, these affirmative

defenses are not available to a defendant in a civil forfeiture action. *State. v. Brown*, 107 Wis.2d 44, 53, 318 N.W.2d 370 (1982). In *Brown*, the Wisconsin Supreme Court narrowly tailored an exception to this rule due to alleged erratic driving by a police officer. *Id.* Ms. Smithers has not set forth any reason why this Court should make a similar exception here.

This Court should conclude that the affirmative defense of involuntary intoxication is inapplicable to this case and affirm the circuit court ruling.

- d. Ms. Smithers failed to establish the elements required by Wis. Stat. § 939.42 in her motion.

A drugged condition “is a defense only if such condition is involuntarily produced and...[r]enders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.” Wis. Stat. § 939.42. Ms. Smithers’ motion to the circuit court regarding involuntary intoxication failed to even cite this statutory language. (R.2; R.3). Ms. Smithers should not now be able to assert that the circuit court failed

to apply the law to the facts when her motion and brief failed to even cite the applicable statute.

Movants must “[s]tate with particularity the grounds for the motion and the order for relief sought.” Wis. Stat. § 971.30(2)(c). “The rationale underlying § 971.30’s particularity requirement is notice – notice to the nonmoving party and to the court of the specific issues being challenged by the movant.” *State v. Caban*, 210 Wis.2d 597, 605, 563 N.W.2d 501, 505 (1997). Ms. Smithers’ motion to the circuit court and brief in support of her motion failed to state that Ms. Smithers’ drugged condition was involuntarily produced and rendered her incapable of distinguishing between right and wrong. (R.2; R.3).

First, Ms. Smithers’ motion failed to establish that her drugged condition was involuntarily produced. Her assertion is that she took medications as prescribed. While this assertion is far from clear, even if true, Ms. Smithers voluntarily undertook an activity incompatible with the prescribed medicine. (R.3:2-3). Ms. Smithers’ brief in support of her motion

quotes *State v. Gardner* at length. (R.3:4-5). In that case, the Court of Appeals made clear that the affirmative defense of involuntary intoxication would not be available to one who takes medicine as prescribed, but “undertakes an activity incompatible with the drug’s side effects.” *State v. Gardner*, 230 Wis. 2d 32, 42.

Second, Ms. Smithers’ motion failed to assert that her drugged condition rendered her incapable of distinguishing between right and wrong in regard to the alleged act. In fact, Ms. Smithers’ brief in support of her motion states that the drugged condition had not yet set in when she made the decision to drive to Illinois. (R.3:2-3). Once the drugged condition set in, Ms. Smithers made no assertion to the circuit court that her drugged condition impacted her ability to decide between right and wrong. (R.2; R.3).

Accompanying Ms. Smithers’ motion and brief to the circuit court was a letter from James Oehldrich simply stating that Ms. Smithers’ drugged condition could have caused “poor balance, slurred speech,

incoordination and slow movements.” (R.3:9). This is wholly insufficient to establish an involuntary intoxication defense.

Therefore, in addition to not being an appropriate affirmative defense in this case, Ms. Smithers failed to make a threshold showing of the elements of the affirmative defense in Wis. Stat. § 939.42. For this reason, this Court should affirm the circuit court’s October 6 ruling.

II. The Circuit Court’s Finding of Guilt Should be Affirmed.

Following a court trial on May 10, 2018, the circuit court found Ms. Smithers guilty of violating Wis. Stat. § 346.63(1)(a). During the trial, Ms. Smithers was allowed to present any evidence necessary to mount an affirmative defense of involuntary intoxication. (R.24:3-5). The evidence presented by Ms. Smithers however was insufficient and she was found guilty by the circuit court. The finding of guilt should be affirmed.

- a. The standard of review is whether the circuit court's ruling was clearly erroneous.

In reviewing a circuit court's findings of fact, an appellate court should uphold the findings "unless they are clearly erroneous." *State v. Williams*, 2001 WI 21, ¶18, 241 Wis.2d 631, 623 N.W.2d 106. In this case, the circuit court determination that Ms. Smithers was impaired to a degree that rendered her incapable of safely driving was not clearly erroneous and therefore should be affirmed.

- b. Ms. Smithers was operating a motor vehicle while impaired to a degree that rendered her incapable of safely driving.

During the circuit court trial, ample evidence was presented to establish that Ms. Smithers was incapable of safely operating her vehicle in violation of Wis. Stat. § 346.63(1)(a). Officer Brooks testified regarding his observations of Ms. Smithers while she was driving, sitting in her vehicle and outside of her vehicle. (R.24:9-20). Throughout his observation of Ms. Smithers he observed significant impairment. During her testimony, Ms. Smithers did not dispute

that she was significantly impaired and unable to safely operate a vehicle. (R.24:49-51).

Lab analyst Diane Kalschauer testified that the substances in her system were consistent with the types of observations observed by Officer Brooks. (R.24:31-32). Both Ms. Kalschauer and the forensic witness for the defense, Mr. Oehldrich, both agreed that the Carisporodol and the Meproamate were likely the main causes of the significant impairment exhibited by Ms. Smithers. (R.24:34; R.24:59).

Based on these facts alone, the circuit court's finding of guilt should be affirmed.

- c. The evidence Ms. Smithers presented at trial was insufficient to establish involuntary intoxication.

Ms. Smithers presented evidence at trial in an effort to mount an affirmative defense of involuntary intoxication. The evidence presented again however failed to establish the necessary elements of the defense.

The testimony by Ms. Smithers regarding her prescriptions was not sufficient to establish

involuntariness. She testified that she was prescribed Temazepam and Carisoprodol specifically and offered a number of miscellaneous documents as evidence of her prescriptions. (R.24:44). There was no specific testimony by Ms. Smithers or anyone else regarding the amount she was prescribed for any particular drug. Ms. Smithers testified that she took Carisoprodol, among other drugs on September 24 but does not recall when or how much of the drugs she took. (R.24:48). Sometime after consuming the drugs, she began driving.(R.24:49).

Again, the affirmative defense of involuntary intoxication is not available to one who takes medicine as prescribed, but “undertakes an activity incompatible with the drug’s side effects.” *State v. Gardner*, 230 Wis.2d 32, 42. This is exactly what Ms. Smithers states she did in this case.

Ms. Smithers also failed to establish at trial that the drugs she took rendered her incapable of determining right from wrong. Ms. Kalschauer testified that the effects of the drugs in Ms. Smithers’

blood were consistent with muscle relaxation, sedation, and pain relief (R.24:30-33), which is consistent with the observations of Officer Brooks. On cross examination, Ms. Kalschauer answered a number of questions from defense counsel related to the effects of these drugs but there was no mention of any impact on a person's ability to determine between right and wrong. (R.24:37-38).

At trial Ms. Smithers failed to make a threshold showing of the basic elements of the affirmative defense of involuntary intoxication.

CONCLUSION

Because Ms. Smithers has consistently failed to establish the affirmative defense of involuntary intoxication in this case, this Court should affirm the circuit court's rulings.

Dated this 1st day of November 2018.

VILLAGE OF MENOMONEE FALLS

By: 
Adam C. Koenings
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CERTIFICATION OF FORM AND LENGTH

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

Proportional serif font: Min. printing resolution of 20 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of the petition is 2,683 words.

Dated this 1st day of November 2018.

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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 in compliance with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the petition delivered on November 1, 2018.

A copy of this certificate is being filed with the court and served on all opposing parties.

Dated this 1st day of November 2018.

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CERTIFICATION OF MAILING

I certify that 10 copies of this brief were delivered to a carrier for delivery to the Clerk of the Court of Appeals on November 1, 2018.

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Dated this 1st day of November 2018.

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