STATE OF WISCONSIN :COURT OF APPEALS DISTRICT I

In re the matter of the refusal of James M. Gregg:

CITY OF WEST ALLIS,

Plaintiff-Respondent,

v.

Appeal No. 18-AP-1326

JAMES M. GREGG,

Defendant-Appellant. Milwaukee County Circuit Court Case Number 17-TR-26646

ON NOTICE OF APPEAL TO REVIEW A REFUSAL FINDING AND ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEAN MARIE KIES PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

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STATEMENT OF THE ISSUES PRESENTED

1. Did the arresting officer have probable cause to arrest Mr. Gregg, rendering unreasonable his subsequent refusal to submit to an evidentiary chemical test?

   Circuit Court's answer: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Gregg anticipates that the parties' briefs will "fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant." Wis. Stat. § (Rule) 809.22.

Unfortunately, this case is not eligible for publication. *See* Wis. Stat. § Rule 809.23(1)(b)4. But for the procedural posture of this appeal, Mr. Gregg suspects that he would propose publication, given the unique factual and legal issue presented.

STATEMENT OF CASE

In the early morning of February 14, 2017, City of West Allis Police Officer Jacob Kaye was dispatched to a call for a suspicious vehicle parked outside of a bar on West Mitchell Street. Upon arrival, he observed a silver Audi SUV stopped, but running, at the location. As Officer Kaye approached the vehicle, he observed that it was no longer running. Though the vehicle's owner was sitting in the front passenger

seat, and without conducting any investigation into the call for which he was dispatched, Officer Kaye directed the individual in the driver's seat, Defendant-Appellant James M. Gregg, to exit the vehicle after observing indicia of intoxication.

After administering field sobriety tests to Mr. Gregg, Officer Kaye arrested him for Operating a Motor Vehicle While Intoxicated (OWI), a violation of Wis. Stat. § 346.63(1)(a). After that arrest, Officer Kaye asked Mr. Gregg to submit to an evidentiary chemical test of his breath, pursuant to Wis. Stat. § 343.305(3)(a). Mr. Gregg refused (R.6), and was issued a Notice of Intent to Revoke Operating Privilege, pursuant to Wis. Stat. § 343.305(9)(a) (R.1), in addition to the OWI citation. Mr. Gregg exercised his right to a hearing on the revocation of his operating privileges before the City of West Allis Municipal Court. At a combined refusal hearing and OWI trial, that court found Mr. Gregg not guilty of OWI, but held that he improperly refused to submit to the evidentiary chemical test. (R.1)

Mr. Gregg appealed the refusal finding to the Milwaukee County Circuit Court. At an evidentiary hearing held on June 1, 2018, the Circuit Court, the Honorable Jean Marie Kies presiding, also found that Mr. Gregg improperly refused to submit to the evidentiary chemical test. (R.7).

This appeal followed. (R.12, App.).

ARGUMENT

Unlike most cases in which the contested issue is whether an arresting officer had probable cause to believe that a defendant operated a motor vehicle while under the influence of an intoxicant, this appeal addresses the first element of the offense in question, i.e. whether the totality of the circumstances provided the officer with a sufficient basis to believe that Mr. Gregg had operated a motor vehicle. The refusal hearing before the circuit court did not feature a vigorous challenge to the legitimacy of the standardized field sobriety tests, or a strong attack on the credibility of the arresting officer's purported observations of indicia of intoxication. Because the probable cause analysis in most OWI cases turns on the latter element, i.e. a sufficient basis to believe that the defendant was under the influence of an intoxicant, it is not surprising that the circuit court erred in both its characterization of the issue and its application of the evidence to the proper legal framework.

I. STANDARD OF REVIEW.

Among the contestable issues at a refusal hearing is "[w]hether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol." Wis.

Stat. § 343.305(9)(a)5.a. Whether an arresting officer had probable cause to believe that a defendant operated a motor vehicle while under the influence of an intoxicant is a question of law that this Court reviews *de novo*. *Washburn County v. Smith*, 2008 WI 23, ¶ 16, 308 Wis. 2d 65, 746 N.W.2d 243.

II. BECAUSE THE ARRESTING OFFICER LACKED PROBABLE CAUSE TO ARREST MR. GREGG, HE CANNOT BE FOUND TO HAVE IMPROPERLY REFUSED AN EVIDENTIARY CHEMICAL TEST.

Probable cause in an OWI case exists when a reasonable police officer believes the defendant was operating a vehicle while intoxicated, given the totality of the circumstances and everything the officer knew at the time. *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986).

In the present case, defense counsel explained at the start of the hearing that the operation element of the offense would likely be the dominate issue,[1] and so that element was the focus of the circuit court's probable cause analysis. The circuit court's initial analysis of the issue was as follows:

> The question is whether or not Officer Kaye saw the vehicle being operated.

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[1] "I will just say the operating part will be the most interesting issue as far as the probable cause determination." (3.6-8).

> While the vehicle may have been in the area of 58th and Mitchel Street outside of the bar called Uncle Fester's, Officer Kaye credibly came in and said he observed the silver Audi with its headlights on, illuminating, and that the vehicle was running. He saw exhaust coming out the exhaust pipe.
>
> Operate under Wisconsin Jury Instruction Number 2663 means the physical manipulation of or activation of any of the controls of the motor vehicle necessary to put it in motion. Obviously the vehicle was on pursuant to the credible testimony of Officer Jacob Kaye in this case because he saw exhaust coming out. It was turned off when the officer came up to the car after he pulled behind it, but at the time that he initially observed this vehicle it was operating. It was being physically manipulated by the driver.
>
> And the second thing is was Mr. Gregg the driver in this case? Mr. Gregg was observed behind the wheel of the car. At no time did the officer see Mr. Dunlow, the passenger, behind the wheel of the car. Mr. Gregg was actually talking to Officer Kaye from behind the wheel of the vehicle.
>
> And so, as such, Mr. Gregg was able to manipulate the controls of the vehicle, meaning that he was operating the vehicle at the time.

(46.8-47.1, App.7-8). This analysis was literally flawed from the start. The question was not whether "Officer Kaye saw the vehicle being operated," as case law does not require that an officer personally observe a vehicle being operated before conducting an OWI arrest.

But the close of the above-quoted passage is the most problematic portion: "Mr. Gregg was able to manipulate the controls of the vehicle, meaning that the was operating the vehicle at the time." Because this does not comport with the statutory definition of "operate," defense counsel asked for clarification. The circuit court then explained, "I'm finding that the vehicle was being operated because the officer not only saw that the defendant was in the driver's seat behind the wheel of the

car but the car had exhaust coming out of the exhaust pipe. That indicates to me that the vehicle was on. It was operational." (49.14-19, App.10). This analysis misses the mark a second time.

Contrary to the circuit court's reasoning, Wisconsin case law is clear that merely sitting in the driver's seat of a running motor vehicle does not constitute "operation" of that vehicle. *Haanstad*, 2006 WI 16.

A. Turning off a vehicle is not "operation."

The undersigned has not found any Wisconsin appellate decisions applying the definition of "operating" to the act of turning off a vehicle. Officer Kaye testified that he did not "observe the vehicle to actually move" during his investigation (27.18-21), nor did he "observe any individual manipulate any of the controls to the vehicle" (28.6-8). The only potential evidence of "operation" of the vehicle during the investigation in question that is present in this record is Officer Kaye's testimony that the vehicle was running with its headlights on when he first observed it, but was no longer running when he made his initial approach.[2]

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[2] Defense counsel asked Officer Kaye, "The turning off of the vehicle is an important detail in this investigation, correct?" Officer Kaye answered, "Not really. We make traffic stops all the time where we have people turn off the car. We don't write that in our report." (27.12-17).

1. To give meaning to each word in the statutory definition of "operate," deactivating a vehicle's ignition cannot constitute "the physical manipulation or activation" of a motor vehicle's controls.

In Wisconsin, "'Operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Wis. Stat. § 346.63(3)(b). "According to the explicit words of the statute, in order to 'operate' a motor vehicle, the statute requires that the person physically manipulate or activate any of the controls of the motor vehicle necessary to put it in motion." *Village of Cross Plains v. Haanstad*, 2006 WI 16, ¶ 16, 288 Wis. 2d 573, ###, 709 N.W.2d 447, 451.

In *Haanstad*, the Supreme Court of Wisconsin addressed a factual situation similar to the one in the present case:

> According to the explicit words of the statute, in order to "operate" a motor vehicle, the statute requires that the person physically manipulate or activate any of the controls of the motor vehicle necessary to put it in motion. The Village does not dispute, and the court of appeals concluded, that Haanstad never physically manipulated or activated any of the vehicle's controls. She did not turn on or turn off the ignition of the car. She did not touch the ignition key, the gas pedal, the brake, or any other controls of the vehicle. Haanstad simply sat in the driver's seat with her feet and

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It cannot legitimately be questioned that police officers frequently make traffic stops in which the vehicle is turned off during the stop. Nor can it legitimately be questioned that the fact that the vehicle is turned off during a traffic stop is usually of little to no significance. But Officer Kaye's answer, that the turning off of the vehicle is not an important detail in *this* investigation, is incorrect, as evidenced by the length of this brief.

> body pointed towards the passenger seat. Haanstad did not "operate" a motor vehicle under the statute's plain meaning.

¶ 16. While the Supreme Court of Wisconsin listed "turn[ing] on *or turn[ing] off* the ignition of the car" as one of the actions that the defendant in *Hanstaad* did not perform, the specific question of whether turning off the ignition would constitute "operating" a motor vehicle was not at issue in that case, since there was no dispute that the defendant in *Haanstad* performed none of the listed actions. *Id*.

The ignition is clearly one of the controls of a motor vehicle that must be activated in order for the motor vehicle to be put in motion. But the act of turning *off* the ignition is not a manipulation or activation that is "necessary to put" a motor vehicle "in motion" – it is the exact opposite, i.e. a deactivation of one "of the controls of the motor vehicle necessary to put it in motion." Officer Kaye clearly lacked probable cause to believe that anyone, including Mr. Gregg, had activated the ignition while intoxicated.

It is not clear how one could "activate" one of the controls of a motor vehicle necessary to put it into motion without also "physically manipulating" the control in question. To avoid redundancy, *see Bruno v. Milwaukee County*, 2003 WI 28, ¶ 24, 260 Wis. 2d 633, 660 N.W.2d 656, the statute should be interpreted to define "operate" to include the activation of those controls that are said to be "activated" or

"deactivated" (e.g., ignition) and the physical manipulation of those controls that are not said to be "activated" or "deactivated" (e.g., steering wheel, gear shift). This interpretation excludes the deactivation of any controls necessary to put a motor vehicle into motion, a result that both gives meaning to both of the above-discussed terms and promotes safety by encouraging the disabling of motor vehicles by intoxicated individuals while continuing to prohibit acts necessary to put the vehicle in motion.

Such an interpretation would be consistent with *Milwaukee County v. Proegler*, in which this court explained,

> The prohibition against the "activation of any of the controls of a motor vehicle necessary to put it in motion" applies either to turning on the ignition or leaving the motor running while the vehicle is in "park." One who enters a vehicle while intoxicated, and does nothing more than start the engine is as much of a threat to himself and the public as one who actually drives while intoxicated. The hazard always exists that the car may be caused to move accidently, or that the one who starts the car may decide to drive it.

95 Wis. 2d 614, 626, 291 N.W.2d 608, 613 (Ct. App. 1980). One who turns off the engine to such a vehicle is less of a threat than one who starts the engine or leaves it running. "The real issue in *Proegler* was whether the statute should be interpreted to penalize one who, having already started the engine, has the 'brains to get off the road.'" *Haanstad*, ¶ 19 (quoting *Proegler*, 95 Wis. 2d at 626-27) .

Applying this interpretation to the facts in the present case, Officer Kaye clearly lacked probable cause to believe that anyone, including Mr. Gregg, had operated the motor vehicle in question while intoxicated. Officer Kaye testified that he never saw the vehicle in motion, and that he did not observe anyone to manipulate the controls of the vehicle. In fact, his presence at the location was due to being dispatched after a call that the vehicle in question had been sitting at that location for some time. While he clearly inferred (reasonably, of course) that the vehicle was turned off by one of its occupants, a statutory term defined to include the activation of one of the controls necessary to put a motor vehicle into motion should not be interpreted to include the deactivation of such a control, i.e. the exact opposite.

2. Finding probable cause based on these circumstances is contrary to public policy.

It is very likely that, had the vehicle not been turned off prior to Officer Kaye's approach, Officer Kaye would have asked the vehicle's occupants to turn off the vehicle during his interaction with them. Officer Kaye testified, "We make traffic stops all the time where we have people turn off the car." (27.15-16). He explained that this is such a common occurrence that "[w]e don't write that in our report." (27.16-17). In addition, turning off the vehicle is one of the natural

prerequisites to exiting the vehicle, another frequent request that officers make of a vehicle's occupants. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

In *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985), this Court found probable cause to arrest the defendant, sitting alone inside the vehicle while holding a can of beer, based on the defendant's having operated the vehicle prior to being directed by the arresting officer "to move the vehicle off the roadway." *Id.* at 187-88, 366 N.W.2d 506, 507. That defendant's driving the vehicle off the roadway upon the officer's direction played no part in this Court's probable cause analysis.

It would be unfortunate if the result of the present case hinged on when the vehicle in the present case was turned off vis-à-vis Officer Kaye's approach. If the defendant in *Haanstad* had observed the officer approaching and turned off the ignition of the truck in which she was sitting, it would be no less accurate that, "As the circuit court judge so aptly stated, 'if she is guilty, she is guilty of sitting while intoxicated.'" *Haanstad*, ¶ 21. In the present case, probable cause to believe that Mr. Gregg had operated a motor vehicle while intoxicated could not be premised on a response to a request by Officer Kaye to turn off the

vehicle. The vehicle's occupants' reward for being proactive should not be an arrest for operating while intoxicated.

B. Even so, all the evidence in this record dispels any probable cause to believe that Mr. Gregg operated the vehicle.

Even if Officer Kaye's observation that the motor vehicle had turned off at some point between his first observation of the vehicle and his on-foot approach was sufficient to establish probable cause that the vehicle was operated during that period, he still lacked probable cause to arrest Mr. Gregg for operating while intoxicated.

Officer Kaye testified that he was dispatched to the location because "[s]omeone had called about a suspicious vehicle that was parked for an extended period of time, I believe about 45 minutes." (5.20-22). He explained that he "didn't do anything" to investigate the suspicious vehicle "aside from made contact with the suspicious vehicle." (29.17-18). Officer Kaye also testified that either Mr. Gregg or the vehicle's owner, who was sitting in the front passenger seat, "offered up that they were there for some time." (29.2-3).

Officer Kaye acknowledged that he "did not observe any manipulation" of the controls to the vehicle and could not recall whether he had ever "ask[ed] Mr. Gregg whether he had operated the vehicle" (28.6-11) or "ask[ed] the passenger whether anyone had

operated the vehicle" (28.22-24). Nor could Officer Kaye recall whether he investigated the location of the vehicle's keys prior to arresting Mr. Gregg (34.9-21).

While case law is clear that an officer need not thoroughly investigate, let alone disprove, all possible innocent explanations before conducting an arrest, nothing in the record suggests that Officer Kaye conducted any investigation into whether Mr. Gregg had operated the vehicle in which he was sitting. Mr. Gregg was not the only individual seated in the front of the vehicle. Mr. London Donlow, the vehicle's registered owner, was sitting in the front passenger seat, next to Mr. Gregg. But Officer Kaye testified that he did not inquire of either Mr. Gregg or Mr. Donlow whether either individual had operated the vehicle. Nor did Officer Kaye recall investigating the location of the vehicle's keys before arresting Mr. Gregg.

While intent is not an element of the offense, *see Proegler*, 95 Wis. 2d at 628, 291 N.W.2d at 614, that Officer Kaye was dispatched to a call indicating that the vehicle had been parked at the location for a suspicious amount of time, and remained there long after the bar it was parked outside had closed, is certainly circumstantial evidence that the vehicle's intoxicated occupants had no intention of driving the vehicle anywhere any time soon.

CONCLUSION

Even the City of West Allis must concede that Mr. James M. Gregg made no attempt to drive home from the bar on the night in question. Instead, Mr. Gregg and the owner of the vehicle at issue in the present case sat in the vehicle for so long that they were the subject of a call to police regarding a suspicious vehicle. As City of West Allis Officer Jacob Kaye arrived, the vehicle stopped running. Officer Kaye nevertheless arrested Mr. Gregg, and while the municipal court found Mr. Gregg not guilty of OWI, both lower courts incorrectly determined that he improperly refused an evidentiary chemical test of his breath.

Both courts were incorrect because both determined that Officer Kaye's arrest of Mr. Gregg was supported by probable cause. The circuit court's ruling ignores long-standing Wisconsin precedent emphasizing that operating a motor vehicle requires more than merely sitting in the driver's seat of a motor vehicle, even if the vehicle is running. Because Officer Kaye lacked probable cause to believe that Mr. Gregg did anything more than that, his arrest of Mr. Gregg was improper, and the circuit court's refusal finding must be reversed.

Dated this 27th day of December, 2018.

Respectfully submitted,

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CERTIFICATION OF FORM, LENGTH, MAILING, AND ELECTRONIC COPY

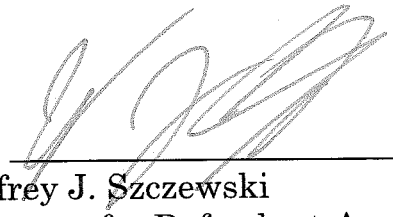
I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,013 words.

Pursuant to Wis. Stat. § (Rule) 809.80(3)(b), I further certify that I have delivered to a 3rd-party commercial carrier 10 copies of this brief and appendix for filing with the clerk within 3 calendar days and 3 copies of this brief and appendix for service on Plaintiff-Respondent City of West Allis.

I further 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), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 27th day of December, 2018.

SZCZEWSKI LAW, LLC



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CERTIFICATION OF APPENDIX

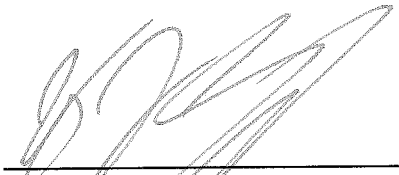
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § (Rule) 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those 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 one or more initials or other appropriate pseudonym or designation 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 27th day of December, 2018.

SZCZEWSKI LAW, LLC



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piece of information I don't think there's sufficient evidence of operating at the time of the arrest for the officer to have probable cause.

I think it's not in the community's interest to have people arrested just in case they were operating a vehicle when they are observed in the driver's seat but in a vehicle that's not moving and in the absence of any further investigation into the circumstances of the vehicle. I don't believe there's any indication that there was even a question or if anybody was asked who started it.

I'm going in circles. I'm going to stop now.

THE COURT: Thank you, Attorney Szczewski. Appreciate it.

Anything else from the City?

MR. CERWIN: The only thing I would add is that the burden on the officer when he has to make that decision is a lesser burden than it would be on the City or the State at some point to prove a potential OWI offense. That officer is operating on probable cause such that I know the Court is aware of that but that's what I'm arguing at this point. That's all. Thank you.

THE COURT: All right. Thank you very much.

So we are here today for a refusal hearing in relationship to this case. A proper request for refusal

hearing was made by the defense. At a refusal hearing pursuant to Wisconsin Statute Section 343.305 sub 9 sub a and sub c this hearing has to address the following issues: First, whether or not the officer had probable cause and lawfully stopped and arrested the defendant; second, whether the officer informed the defendant, in this case, Mr. Gregg, of the informing the accused compliance requirements; next, whether or not the defendant, in fact, refused the test that was required to be performed; and the final requirement is whether or not Mr. Gregg refused because of physical inability to submit to the test. That's really applicable only when the inability is caused by a disability or illness which is unrelated to the use of alcohol or controlled substances.

So, those are the things that the Court has to look at. The evidence today which was presented was given by Officer Jacob Kaye. Officer Kaye is a West Allis Police Department Officer who has been employed there for the past six years. He was on duty on February 14, 2017 at about three a.m. on patrol on third shift. Officer Kaye has been trained regarding operating while under the influence cases, including field sobriety tests and other observations. He was given training both at the police academy as well as through the West Allis Police

Department new officer training. He also has experience in his work as a police officer using field sobriety tests. He testified that he does it at least two to three times per month.

On that day, February 14, Valentine's Day, 2017, about three a.m. Officer Kaye was dispatched to the area of 35th and West Mitchell Street in West Allis, Milwaukee County, Wisconsin. The West Allis dispatch had received a call from a caller regarding a suspicious vehicle parked facing westbound for about the past 45 minutes on West Mitchell Street.

When Officer Kaye arrived in the area of South 58th and West Mitchell Street in West Allis he observed a silver Audi vehicle with its headlights illuminated and the vehicle was running because he saw the exhaust coming out of the back tail pipe of the vehicle. He also observed two occupants inside the vehicle.

Initially the officer passed the Audi and then because his vehicle was going eastbound he was able to see into the compartment where the occupants were. The vehicle matched the description given by the caller so the officer did a U-turn at that point in time. He got behind the Audi that was parked in that location. He activated his squad lights as well as his spotlight. He parked his vehicle behind the Audi and he got out.

Sometime between the time that the officer initially saw the vehicle and when he finally made the stop of the vehicle or pulled up behind it, the Audi was turned off. The officer then made contact with the driver of the vehicle who was identified through his Wisconsin driver's license as being the defendant in this case, Mr. James Gregg. When the officer made contact with Mr. Gregg he observed that Mr. Gregg had the odor of intoxicants emanating from his car, the passenger compartment. There was also the passenger, Mr. London Dunlow, in the Audi.

In speaking with Mr. Gregg, Mr. Gregg told the officer that they were there--he said something to the effect of in my notes we're not doing anything wrong, we were just at Potowatomi, I won a substantial amount of money, and then we came to Uncle Fester's which is the bar that's located at that location nearby, and the defendant, Mr. Gregg, admitted that he had been consuming alcohol at that bar.

In his observations of the defendant, Officer Kaye testified that he had the odor of alcohol coming from his breath, his eyes were red and glassy which are indicia of alcohol consumption. As such, Mr. Kaye, the officer, asked Mr. Gregg to exit the vehicle to perform field sobriety tests. Mr. Gregg came out of the

driver's seat of the Audi which was operational at the time when he had first seen the Audi vehicle.

He asked Mr. Gregg to perform the field sobriety tests. Mr. Gregg did the HGN test. I won't beat a dead horse here because that's not really disputed that he was intoxicated. He did show clues, six of six clues, of intoxication on the HGN test. He further performed the walk and turn test. He showed I believe it was six of eight clues of impairment on the walk and turn test. And finally the officer required Mr. Gregg to perform the one leg stand and he showed two clues on that particular test.

The officer never observed Mr. Dunlow, the passenger, behind the wheel of the vehicle, the Audi. He never observed Mr. Dunlow sitting in the driver's seat of the vehicle. He didn't recall whether or not Mr. Dunlow said that he was driving.

Based upon the totality of the circumstances, his observations, the operation or the fact that the vehicle was running when he first came up to the vehicle, it was operated, and the fact that the defendant had clues of impairment on his field sobriety tests, his admission to drinking as well as the odor of alcohol and the red eyes, the officer arrested Mr. Gregg or he took him into custody and transported him to the West Allis Police

Department.

At that time the officer went through the informing the accused paperwork with the defendant at the station. He read the form verbatim to Mr. Gregg. That's what his testimony was. And at the bottom of the informing the accused, about two thirds of the way down, he asked will you submit to an evidentiary test of your breath. The response by the defendant that was placed on the form which is contained in Exhibit 1 of this particular hearing was no, and there are initials next to the defendant's response which Officer Jacob Kaye testified that Mr. Gregg placed there, and then at the bottom the officer signed his own name witnessing all of this. The chemical test for the BAC was refused by the defendant in this case.

So those are the facts and circumstances that were testified to by Officer Kaye. Now, in terms of the first prong, did the officer have probable cause to perform the stop and the subsequent arrest of Mr. Gregg in this instance? The really big question is not whether or not Mr. Gregg was impaired. I think that even the defense would say that Mr. Gregg was impaired based upon the observations of the officer, the field sobriety test as well as the poor performance on the field sobriety test. The question is whether or not Officer

Kaye saw the vehicle being operated.

While the vehicle may have been in the area of 58th and Mitchell Street outside of the bar called Uncle Fester's, Officer Kaye credibly came in and said he observed the silver Audi with its headlights on, illuminating, and that the vehicle was running. He saw exhaust coming out the exhaust pipe.

Operate under Wisconsin Jury Instruction Number 2663 means the physical manipulation of or activation of any of the controls of the motor vehicle necessary to put it in motion. Obviously the vehicle was on pursuant to the credible testimony of Officer Jacob Kaye in this case because he saw exhaust coming out. It was turned off when the officer came up to the car after he pulled behind it, but at the time that he initially observed this vehicle it was operating. It was being physically manipulated by the driver.

And the second thing is was Mr. Gregg the driver in this case? Mr. Gregg was observed behind the wheel of the car. At no time did the officer see Mr. Dunlow, the passenger, behind the wheel of the car. Mr. Gregg was actually talking to Officer Kaye from behind the wheel of the vehicle.

And so, as such, Mr. Gregg was able to manipulate the controls of the vehicle, meaning that he was

operating the vehicle at the time. So after Officer Kaye saw the indicia or the indicators; the red, glassy eyes and smelled the odor of intoxicants coming from Mr. Gregg's breath, it was fair and appropriate for him under the circumstances to actually ask Mr. Gregg to get out of the car and to perform the field sobriety tests to which Mr. Gregg performed poorly. He failed them.

And then based upon all of his observations, based upon the poor performance on the field sobriety test, it was appropriate, there was at that point in time probable cause to arrest, to place Mr. Gregg in custody for driving while under the influence of an intoxicant.

So, the question then becomes whether or not the defendant refused the test. We have credible testimony by Officer Kaye who didn't seem to have a beef in any way, shape or form with Mr. Gregg, that he took the defendant back to the West Allis Police Department. He read the informing the accused verbatim to the defendant, and then at the end of the reading of the informing the accused requirements pursuant to Section 343.305 sub 9 sub a, I think that's the right statutory provision, it's under 343.305, I know that for sure, the defendant refused to give a sample of his breath.

This isn't mere conduct. This is actually verbatim saying no, I do not want to give a sample, and he

indicated that to the officer and he initialed it on the form. So I am going to find that the officer informed the defendant in compliance with Section 343.305 of his right as the accused and that the defendant then refused to give the subsequent test that was requested of him as required under the implied consent law.

Further, there's been no testimony here on the record which would establish that the defendant was physically unable to submit to such a test due to disability or other illness unrelated to the use of alcohol or other controlled substances.

As such I believe that the City has met their burden of proof in this case, that, in fact, they have proven that there was a refusal in this case and that it was improper.

Therefore, the Court will find that Mr. Gregg actually refused to take the test, there was probable cause and the informing the accused was read and that the refusal was improper in this case.

Were penalties already imposed in municipal court for the refusal?

MR. CERWIN: Yes, they were in the municipal court. I'm not sure if there was a stay or anything along those lines.

The defense counsel might know better.

THE COURT: Attorney Szczewski, was there a stay granted for the stay of the suspension or revocation in municipal court?

MR. SZCZEWSKI: I believe that would be automatic, but I don't have anything additional confirming that.

I do have one request for clarification, though.

THE COURT: Yes, please.

MR. SZCZEWSKI: I just wanted to make sure that I understood the Court's ruling that under the Village of I think it's Cross Plains versus Haanstad merely being behind--being in the driver's seat, behind the wheel, by itself is not operation.

THE COURT: I'm finding that the vehicle was being operated because the officer not only saw that the defendant was in the driver's seat behind the wheel of the car but the car had exhaust coming out of the exhaust pipe. That indicates to me that the vehicle was on. It was operational.

MR. SZCZEWSKI: Right. Right. But it's operational but being behind the wheel of an operational vehicle does not in and of itself constitute--does not mean that the person sitting there is operating it and that's Village of Cross Plains versus Haanstad.

THE COURT: Operate means the physical

manipulation or activation of any of the controls of the motor vehicle necessary to put it in motion. If you have got the key in the ignition, that is I think adequate to--it's on, it could be put in motion at any point in time. He could have simply put it in drive in a moment, in a heartbeat.

MR. SZCZEWSKI: True. And that would constitute operating, putting it in drive, but in Village of Cross Plains versus Haandstad, which is Wisconsin 2006, Wisconsin 16, the circuit court concluded that sitting in the driver's seat of a running, parked motor vehicle without more was not operating a motor vehicle.

THE COURT: Well, your client had also said to the officer in his--or in the course of the conduct that he had come from Potawatomi, he had driven from there to Uncle Fester's, he had been in the car. I mean--

MR. SZCZEWSKI: Right.

MR. CERWIN: I don't mean to interrupt. I don't think-- I may be wrong. Defense counsel can correct me. I haven't read that case for a while. I don't think that's in the context of a refusal hearing which is--the burden or what I have to establish is that the officer had probable cause to believe.

So what I'm asserting is that the facts established that it is reasonable for the officer to believe that

this person was operating the vehicle based on facts including the car was on when he arrived, defendant is in the driver's seat, defendant admitting or making statements. I think in Haanstad is the person was passed out in the seat, like a bench seat of a truck, if I recall correctly.

THE COURT: I think you're right.

MR. SZCZEWSKI: Thereabouts. In the driver's seat. I want to make sure for probable cause versus, you know, enough proof to convict is a distinction.

THE COURT: That's a different burden.

MR. SZCZEWSKI: I just want to make sure that we're all on the same page as far as the legal definition of operating and that being behind--being--sitting in the driver's seat while the car is running is not operating under that Court's interpretation--the State Supreme Court's interpretation of the statute.

THE COURT: But this is again not a trial. This is a refusal hearing. So there was reasonable suspicion that he was operating because the vehicle was seen with the exhaust coming out of it, the defendant in the driver's seat, the keys in the ignition at the time, obviously later. And I'm not giving a lot of weight to the fact that the key was ultimately in his pocket, but for purposes of establishing reasonable suspicion, I

think it's certainly reasonable what the officer did, and I think there is reasonable suspicion.

MR. CERWIN: Just for clarification. This burden is probable cause to believe the officer.

THE COURT: I'm sorry. You are right. There was reasonable suspicion to make the stop in the first place once that the officer observed what the dispatch had received from the caller. Subsequently there was probable cause under the circumstances to believe that Mr. Gregg was, in fact, operating based upon the fact that the vehicle was seen on with exhaust coming out of it, its headlights on, the defendant is behind the wheel of a car. That's probable cause to believe that he, in fact, was operating.

MR. SZCZEWSKI: I just want to make sure we're--

THE COURT: Yeah. I'm trying to be on the same page. I mean, I can see where that might be an issue in terms of a greater burden of proof at trial for beyond a reasonable doubt, but this is probable cause and so that's a lower standard of proof. Does that make sense?

MR. SZCZEWSKI: It does.

THE COURT: All right. Thank you. I appreciate that. So--

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

CITY OF WEST ALLIS,

Plaintiff,

v. Case Number 17-TR-26646

JAMES M. GREGG,

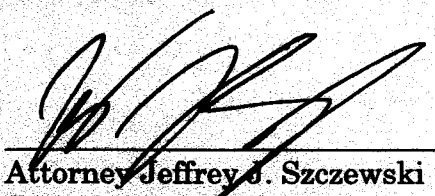
Defendant.

DEFENDANT'S NOTICE OF APPEAL

PLEASE TAKE NOTICE that Mr. James M. Gregg, the Defendant in the above-captioned action, appeals to the Court of Appeals for the First District of the State of Wisconsin, from the Implied Consent Refusal finding under Wis. Stat. § 343.305(9), entered by the Circuit Court for Milwaukee County, the Honorable Jean Marie Kies presiding, on June 1, 2018. This case presents an appeal of the type specified in Wis. Stat. §752.31(2)(c). This appeal is not entitled to preference under the statute.

Dated this 13th day of July, 2018.

SZCZEWSKI LAW, LLC



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