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.

JAMES M. GREGG,

Defendant- Appellant,

Case No. 18-AP-1326

Milwaukee County Circuit Court Case Number: 17-TR-26646

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

BRIEF OF PLAINTIFF-RESPONDENT

CITY OF WEST ALLIS

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Statement of Issues

The Appellant, James Gregg, has framed the issue as follows:

"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"

It is the City of West Allis (hereafter "the City") position that the Circuit Court's actual answer to this issue as drafted by Mr. Gregg (i.e., the answer that would give him cause to appeal the Circuit Court's decision), would have been "Yes," meaning that the Circuit Court determined the arresting officer did have sufficient probable cause to arrest Mr. Gregg, thereby rendering his refusal to submit to an evidentiary chemical test unreasonable. A negative answer by the Circuit Court to the issue as drafted by Mr. Gregg would obviate the need for Mr. Gregg to appeal the findings by the Circuit Court. Rather, the negative response appears to be what Mr. Gregg is arguing this Court should determine.

Position on Oral Argument and Publication

The City expects that the parties' briefs "should 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. § 809.22(2)(b).

Further, pursuant to Wis. Stat. § 809.23, the Court's opinion should not be published because the issues involve: "well-settled rules of law to a recurring fact situation", the issues will be decided based on "controlling precedent and no reason appears for questioning or qualifying the precedent", "the decision is by one court of appeals judge", and it has "no significant value as precedent." See Wis. Stat. § 809.23(1)(b).

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ARGUMENT

There is a significant difference in how a court must analyze a refusal hearing as compared to the analysis afforded by a court in a bench trial or suppression hearing. Mr. Gregg conflates those two separate and distinct hearings and more importantly, the burden and objectives of those hearings. In the present case, Mr. Gregg is only challenging whether, as determined by the Milwaukee County Circuit Court, the information at the officer's disposal and as determined by the Circuit Court was sufficient to give a reasonable officer probable cause to believe that Mr. Gregg was the operator of the vehicle involved in the operating while intoxicated violation in question. An application of the correct standards supports the Circuit Court's conclusion that Officer Kaye did have probable cause to believe that Mr. Gregg was the operator of the vehicle and therefore this Court should uphold the determination by the Milwaukee County Circuit Court that Mr. Gregg's refusal was unlawful and improper.

I. STANDARD OF REVIEW:

Mr. Gregg is challenging whether Officer Kaye had probable cause to believe that Mr. Gregg was operating a motor vehicle while under the influence of an intoxicant. "Where the historical facts are undisputed, the question of whether there was probable cause for arrest is a question of law which this court may subject to an independent review." Village of Elkhart Lake v. Borzyskowski, 123 Wis. 2d 185, 189, 366 N.W.2d 506, 508 (Wis. Ct. App. 1985).

II. OFFICER KAYE HAD PROBABLE CAUSE TO BELIEVE THAT MR. GREGG WAS OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT.

Pursuant to Wisconsin Statute Section 343.305(9)(a)5.a through c., the issues at a refusal hearing are limited to:

a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol…

b. Whether the officer complied with sub. (4). [Commonly referred to as reading of the "informing the accused" form].

c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

See 343.305(9)(a)5.a through c. The only challenge levied by Mr. Gregg within this appeal is whether Officer Kaye had probable cause to believe that Mr. Gregg was the operator of the motor vehicle while Mr. Gregg was intoxicated, pursuant to Wis. Stat. §343.305(9)(a)5.a., and therefore the City will not be addressing any of the other issues that the Circuit Court had determined at the refusal hearing on June 1, 2018.

A. Refusal hearings require that a court analyze whether the officer's account of the facts is plausible and whether those facts provide a reasonable officer "probable cause to believe" that a person had operated a motor vehicle while under the influence of an intoxicant.

Within the context of a refusal hearing, Wisconsin Statute 343.305(9)(a)5, requires an officer to have "probable cause to believe the person was operating a motor vehicle while under the influence of an intoxicant" or some other variation of Wis. Stat. 346.63. This burden is further clarified within *In re Smith*, where the Wisconsin Supreme Court determined that,

> [I]n the context of a refusal hearing following an arrest for operating a motor vehicle while intoxicated, 'probable cause' refers generally to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. The burden was on the state in the instant case to present evidence sufficient to establish the officer's probable cause to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.

In re Smith, 2008 WI 23, ¶ 15, 308 Wis. 2d 65, 73–74, 746 N.W.2d 243, 247. Within Mr. Gregg's brief, the distinction between a probable cause hearing and a refusal hearing requiring a showing of "probable cause to believe" becomes obscure and is not explained. (*See* App. Brief pages 1, 4, 10, 12, and 14). Mr. Gregg conflates the two different burdens from two different types of proceedings and thereby confuses the issues and correct requirements at a refusal hearing.

The burden on the prosecution at a refusal hearing is explained in *State v. Nordness* and *State v. Wille*. In *Nordness*, the Wisconsin Supreme Court addressed a refusal hearing which focused on whether the defendant was the driver of the vehicle in question. *State v. Nordness*, 128 Wis. 2d 15, 19, 381 N.W.2d 300, 301 (1986). The Court determined that the issues at the hearing were strictly limited to

those reflected in Wis. Stat. § 343.305(9)(a)5. *Id.* The Court stated that the revocation hearing for the refusal was "a determination merely of an officer's probable cause, not as a forum to weigh the state's and defendant's evidence." *Id.* at 36, 308. Furthermore, the Court stated that the refusal hearing is not a forum for the "trial court to weigh the evidence between the parties. The trial court, in terms of a probable cause inquiry, simply must ascertain the plausibility of a police officer's account." *Id.* The Court in *Nordness* concluded that "under the totality of the circumstances and based on all of the facts available to the arresting officer at the time of arrest, a reasonable officer would believe that the defendant was driving the vehicle while under the influence of an intoxicant." *Id.*

In *State v. Wille*, the Wisconsin Court of Appeals relied heavily on the rationale in *Nordness*. *State v. Wille*, 185 Wis. 2d 673, 681-682, 518 N.W.2d 325, 328 (Wis. Ct. App. 1994). In *Wille*, the Court was confronted with a case involving a fatal car accident. Although no field sobriety tests were ever completed, the officer in *Wille* arrested Mr. Wille and requested that he submit to an evidentiary chemical test of his blood. Mr. Wille refused the blood draw. *Id.* The Court, referencing *Nordness*, stated that, "The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." *Id.* at 681, 328. In the context of a refusal hearing, the Court stated that, "the State need only show that the officer's account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witness." *Id.* Conversely, the Court stated that "determining probable cause for a

warrantless arrest in the context of a suppression motion" carried a greater burden and that "plausibility is not enough." *Id.* At 682, 238-329, The Court held that the State's burden at a "suppression hearing is significantly greater than the persuasion at a refusal hearing." *Id.*

B. Mr. Gregg's reliance on *Village of Cross Plains v. Haanstad* is misplaced and incorrectly applies that decision to a refusal hearing.

Mr. Gregg argues that he was not operating the vehicle in question and bases this on his analysis of *Village of Cross Plains V. Haanstad,* 288 Wis. 2d 573, 709 N.W.2d 447 (Wis. 2006), which relies on language from *Milwaukee Cty. v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Wis. Ct. App. 1980). The use of *Haanstad* is misplaced in the current proceedings because the Court in *Haanstad* was reviewing Ms. Haanstad's operation of a motor vehicle in the context of a court trial rather than in the context of a refusal hearing. As explained by the Courts in *State v. Wille* and *State v. Nordness*, a refusal hearing only requires a showing that the officer's account is plausible rather than the burden at a court trial that would implicate either "beyond a reasonable doubt' or the "clear and convincing" standard.

In the court trial, the court found that Ms. Haanstad had never manipulated any controls of the vehicle and therefore was not operating a motor vehicle. *Haanstad*, 288 Wis. 2d at 579, 709 N.W.2d at 450. That decision by the Court in *Haanstad* looked at whether there was sufficient evidence to convict Ms. Haanstad

rather than whether the officer on the scene had probable cause to believe Ms. Haanstad had operated the motor vehicle for a refusal hearing. The Court addressed a scenario that is beyond the required showing of plausibility at a refusal hearing, and therefore the ruling in *Haanstad* should have little to no bearing on the current proceedings.

Moreover, the present case involving Mr. Gregg goes beyond the facts in *Haanstad.* While the Court in *Haanstad* determined that Ms. Haanstad never manipulated any controls of the vehicle, *Id.* at 583, 452, the Circuit Court in the present case determined that the Audi was originally running when the officer arrived on scene and then was subsequently turned off. The reasonable assumption by Officer Kaye was that someone in the car at the time the officer arrived on the scene had deactivated the controls and had direct contact with the vehicle's controls to do so. That fact alone represents a significant departure from the finding in *Haanstad*, where there was unrefuted evidence of no manipulation what so ever, making Mr. Gregg's reliance on that case even more problematic.

Instead, this Court should rely on the analysis used for determining operation of a vehicle as discussed in *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985). The Court in *Borzyskowski* addressed this issue of operation of a vehicle through the lens of a refusal hearing and also relied largely on the language of *Proegler*. In *Borzyskowski*, an officer came upon a vehicle that was running but parked on the side of the road with the

hazard lights on and a beer can on the roof of the vehicle. *Borzyskowski*, 123 Wis. 2d at 187, 366 N.W.2d at 507. The officer made contact with the sole occupant of the vehicle who was seated in the driver's seat, and noted that Borzyskowski had an odor of intoxicants on his breath and red and glassy eyes. *Id.* The officer then conducted an OWI investigation and arrested Borzyskowski for said offense. *Id.* at 188, 508. At the police station, Borzyskowski became uncooperative and was determined to have refused the breathalyzer test. *Id.*

The Court stated that "the thrust of Borzyskowski's argument goes to whether there was *probable cause to believe* that he was operating the motor vehicle," the exact same issue as argued in the present case. *Id.* at 189, 508. (Emphasis added). The Court determined that the officer observed Borzyskowski "sitting behind the steering wheel of a motor vehicle whose engine was running. The vehicle was parked along a roadway in a place not designated for parking. It was reasonable for Officer Spakowicz to believe that Borzyskowski was physically manipulating the controls either by leaving the engine running or by restraining its movement. Both of these actions constitute 'operation' as it is defined in the statute and in *Proegler.*" *Id.* 189-190, 508. Accordingly, the Court in *Borzyskowski* determined that in the context of a refusal hearing, a reasonable officer would have probable cause to believe the person in the driver's seat of a running car was operating a motor vehicle by leaving that vehicle running or restraining its movement, both constituting "operation" of a motor vehicle. Through *Wille* and *Nordness,* we know that this is a plausibility consideration

rather than a function of the court weighing the evidence, as was the case in *Haanstad.*

C. The facts as determined by the Milwaukee County Circuit Court support the conclusion that Officer Kaye had probable cause to believe that Mr. Gregg was operating a motor vehicle while intoxicated.

Under the "probable cause to believe" plausibility framework delineated in *Wille* and *Nordness,* and through the analogous decision in *Borzyskowski*; we can now we can now address whether Officer Kaye had sufficient information to give a reasonable officer probable cause to believe that Mr. Gregg was operating a motor vehicle while intoxicated.

The following facts were determined by the Milwaukee County Circuit Court:

> 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.
>
> Transcript of Hearing dated June 1, 2018. Page 41.18 – 42.8.

"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." *Id.* Page 42.8 - 42.11. "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 exhaust coming out of the back tail pipe of the vehicle. He also observed two occupants inside the vehicle." *Id.* Page 42.12 - 42.17. "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." *Id.* Page 43.1 - 43.4. "Officer Kaye 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." *Id.* Page 43.4 - 43.7.

Upon making contact with Mr. Gregg, Officer Kaye determined the following facts as found by the Milwaukee County Circuit Court:

> In speaking with Mr. Gregg, Mr. Gregg told the officer they were there – he said something to the effect of in my notes ["]we're not doing anything wrong, we were just at Potawatomi, 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 has been consuming alcohol at that bar.

Id. Page 43.12 - 43.17. Further, the court found that, "The officer never observed Mr. Donlow, the passenger, behind the wheel of the vehicle, the Audi. He never observed Mr. Donlow sitting in the driver's seat of the vehicle." *Id.* Page 44.13 – 44.16.

When this Court aggregates the facts at the officer's disposal, it should conclude that a reasonable officer would find it plausible and have probable cause to believe that Mr. Gregg was the operator or operated the vehicle. There are

substantial facts that support the arrest and request for a chemical test of Mr. Gregg's blood. The officer knew that the vehicle had been at the location for less than an hour, beginning generally after bars begin to close. The officer knew that the car was running and had subsequently been turned off, presumably at the sight of officers. The officer knew that Mr. Gregg was in the driver's seat of that car that had just turned off. The officer never saw anyone but Mr. Gregg in the driver's seat. Mr. Gregg had informed the officer that his locations that evening transitioned between several different places. Mr. Gregg concedes that case law clearly indicates that an officer need not dispel all innocent explanations (App. Brief 13.) Accordingly, Officer Kaye had extensive facts that would lead a reasonable officer to conclude that he had probable cause to believe Mr. Gregg was operating a motor vehicle while impaired by an intoxicant.

When we apply these facts to the scenario in *Borzykowski*, the two scenarios play out almost identically. The two primary differences between the information that Officer Kaye had in the present case and the officer had in *Borzyskowski* were 1) the vehicle was still running at the time the officer in *Borzyskowski* made contact, and 2) that Mr. Borzyskowski had open intoxicants on the car and with him. Neither of these differences should impact this Court's analysis. First, regarding the difference in the a vehicle running versus turned off; the plausibility determination for Officer Kaye was even stronger than in *Borzykowski* because Office Kaye observed that the vehicle went from running to off within the time that he had pulled behind the vehicle. Unlike *Borzykowski*

where the vehicle remained in the same operating but unmanipulated state, Officer Kaye could be certain that the occupants of the vehicle he was investigating were awake, coherent, and capable of manipulating the controls of the vehicle. Moreover, turning off the car just as an officer arrives on the scene could be construed by a reasonable officer as an attempt to hide the operation of a motor vehicle and can be considered as evidence supporting consciousness of guilt.

The distinction in *Borzykowski* related to the open intoxicants being present is immaterial here because Officer Kaye obtained substantial evidence that Mr. Gregg was impaired by an intoxicant and that aspect of the present case is unchallenged. Effectively, both *Borzykowski* and the present case have unquestioned impairment. The only issue in either case was whether the person was operating a motor vehicle. Accordingly, the facts in the present case are sufficiently similar to those in *Borzykowski* that this Court should follow the rationale in *Borzykowski* regarding what constitutes operation of a motor vehicle through the context of a refusal hearing and determine that Mr. Gregg was operating the vehicle in question.

Conclusion

In the present case, Officer Kaye was faced with observations that put Mr. Gregg as the only plausible operator of the motor vehicle. This Court should analyze the information at the disposal of Officer Kaye by using the correct standard of plausibility, denoted as "probable cause to believe" both in case law

and Wis. Stat. § 343.305(9)(a)5. This Court's decision should be guided by the correct application of the law as set for above, as opposed to the application proposed by Mr. Gregg which incorrectly interchanges inapplicable and alternative standards. As such, this Court should follow the analysis in *Vill. of Elkhart Lake v. Borzyskowski* which is analogous to the facts of the present case and was decided within the context of a refusal hearing, rather than the incongruent facts and analysis in *Village of Cross Plains v. Haanstad.*

A refusal hearing is a patently different judicial review from that of a trial or suppression hearing on an OWI related offense. A refusal hearing is designed by Wis. Stat. § 343.305(9)(a)5.a through c to determine three very specific issues through the context of whether the "officer's account is plausible" rather than the court "weighing evidence for and against probable cause or determining credibility of the witness." *Wille*, 185 Wis. 2d at 681, 518 N.W.2d at 238. The only issue of contention in the present case is whether Officer Kaye had probable cause to believe that Mr. Gregg was operating a motor vehicle. Under the facts as they were found by the Milwaukee County Circuit Court, Officer Kaye did have probable cause to believe Mr. Gregg was the operator of the vehicle. Accordingly, the City is requesting that this Court affirm the decision made by the Milwaukee County Circuit Court and determine that Mr. Gregg's refusal was unlawful and improper.

[Signature Page to Follow]

Dated at West Allis, Wisconsin this 22 day of February, 2019.

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CERTIFICATION OF FORM, LENGTH, MAILING, AND ELECTRONIC COPY

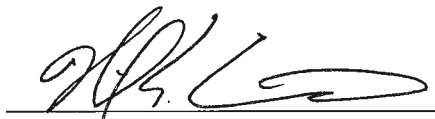
I hereby certify that this brief conforms to the rules contained in §809.19(8) (b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,597 words starting at the statement of issues through the signature on page 13.

Pursuant to Wis. Stat. §809.80(3)(b)1., I further certify that I have deposited in the United States mail for delivery to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage pre-paid, 10 copies of this brief for filing with the clerk and 3 copies of this brief for service on the Plaintiff- Appellant, James Gregg.

I further certify that I have submitted an electronic copy of this brief. Said documents comply with the requirements of Wis. Stat sec. 809.19(12), and that the text of the electronic copy of the brief is identical to the text of the paper copy.

Dated at West Allis, Wisconsin this 22 day of February, 2019.

CITY OF WEST ALLIS
Kail Decker, City Attorney

By: 

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