

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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Appeal No. 2018AP 001428
Kenosha County Circuit Court Case Nos. 2016TR016201

In the Matter of the Refusal of Michal R. Pace:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. PACE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MR. PACE REFUSED
CHEMICAL TESTING, IN KENOSHA COUNTY, THE
HONORABLE MARY KAY WAGNER, JUDGE,
PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT MICHAEL R. PACE**

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ARGUMENT

The respondent compares both *In re Smith*, 2008 WI 23, 308 N.W.2d 65, 746 N.W.2d 243 and *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 to the referenced matter in arguing that probable cause exists. Brief of Respondent- page 10-11. However, a careful examination of each case shows each case is factually distinguishable from the facts herein. Respondent argues the Court in *In re Smith* found probable cause despite the lack of several indicia of intoxication. Brief of Respondent – page 10. While this is true, the facts adduced in *Smith* are significantly different than those here. In *Smith*, the stop occurred near bar time, here the stopped occurred in the middle of the afternoon. Further, in *Smith*, the defendant was traveling 21 miles per hour in excess of the posted limit, the defendant had a “delayed response” in pulling over, cross the double-yellow centerline twice, the officer observed an odor of intoxicant coming from the vehicle, and the defendant admitted consuming “a couple of beers”. Later in the encounter, the defendant said he would be lying if he said he had only consumed a couple beers. *In re Smith* at ¶¶8-12. Conversely, here, the record is silent as to how fast Mr. Pace’s vehicle traveled, and there is no evidence that Mr. Pace had delayed

reactions when Trooper Lawson activated his lights. Furthermore, the video offered into evidence at best shows minor deviations - Mr. Pace did not cross into the oncoming lane of traffic. The indicia of intoxication apparent in *Smith* are significantly greater than those herein.

Likewise, in *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325, the indicia of intoxication are significantly greater than those herein. In *Wille*, the Rock County Sheriff's Department responded to a traffic accident at 8:30 p.m. The defendant's car was on fire in the middle of the road, and the passenger in Wille's vehicle was lying on the highway shoulder. *Wille* at 677-78. Evidence revealed that Mr. Wille drove his vehicle into the rear end of another vehicle parked on the shoulder of the highway. *Id.* at 684. Officer's smelled the odor of intoxicants, but could not determine the source. *Id.* at 677-78. A firefighter smelled the odor of intoxicant on Wille. *Id.*

Wille was transported to the emergency room where deputies smelled a strong odor of intoxicant coming from him. Wille told officers in the room that he had to quit doing this type of behavior. The Court found this statement established evidence of Wille's consciousness of guilt. *Wille* at 684-685. Unlike Mr. Pace's case, in *Wille* there was a significant accident, an odor of

intoxicant, but most importantly, consciousness of guilt. The magnitude of the erratic driving and the consciousness of guilt, played a significant role in the Court's finding of probable cause. *Id.* at 684. The evidence in *Wille* shows significant indicia of intoxication not present herein.

Thus, contrary to the Respondent's contention, careful examination of both *In re Smith* and *Wille* show they are factually distinct from Mr. Pace's case.

Finally, the Respondent places great significance on the testimony of Trooper Lawson indicating Mr. Pace performed field sobriety tests and failed those tests. However, the Respondent elicited no testimony from Lawson as to the specific tests performed, or the specific performance suggesting Mr. Pace failed. Based on the evidence adduced at the refusal hearing, the Court could not have concluded Mr. Pace's performance on the tests suggested impairment. In other words, the Respondent failed to establish "specific articulable" facts suggesting impairment. Without evidence establishing the specific tests performed, and their relevancy to potential intoxication, the conclusion Mr. Pace failed those tests is of minimum significance. See *County of Jefferson v. Renz*, 222 Wis.2d 424, 588 N.W.2d 267 (Ct. App. 1998) *reversed on other*

grounds County of Jefferson v. Renz, 231 Wis.2d 293, 603 N.W.2d 541 (1999). The appellate court in *Renz* determined that without some testimony indicating the relevance of field sobriety tests, the Court could not attach much significance to it “as an indicator of capacity to drive safely.” *Renz*, 222 Wis.2d 424, 445, 588 N.W.2d 267, *reversed on other grounds County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999). Because of this, and contrary to the Respondent’s contention, Lawson’s conclusion that Mr. Pace failed the field sobriety tests is of little significance to the probable determination.

CONCLUSION

Because of the above, the trial court erred in finding that Trooper Lawson had probable cause to arrest Mr. Pace. The Court should reverse the order and vacate the refusal.

Dated this 28th day of November, 2018.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 10 pages. The word count is 1442.

Dated this 28th day of November, 2018.

Respectfully Submitted

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of November, 2018.

Respectfully submitted,

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