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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

DISTRICT IV

Case No. 2018AP001455

In the Matter of the Refusal of Danny L. Waters:
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

v.

DANNY L. WATERS,

DEFENDANT-APPELLANT.

ON APPEAL FROM A FINDING THAT THE DEFENDANT
UNLAWFULLY REFUSED AN IMPLIED CONSENT TEST,
ENTERED IN THE LA CROSSE COUNTY CIRCUIT CASE
18-TR-201, THE HONORABLE SCOTT L. HORNE,
PRESIDING

BRIEF AND APPENDIX OF THE
PLAINTIFF-RESPONDENT

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**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

Publication is precluded by Wis. Stat. §
809.23(1)(b)(4) as this appeal shall be decided by
one judge. Oral argument is not requested.

SUPPLEMENTAL STATEMENT OF THE CASE

In accordance with Wis. Stat. § (Rule) 809.19(3)(a)2., the State exercises its option not to present a supplemental statement of the case. Relevant facts will be set forth in the Argument section.

ARGUMENT

I. Waters waived any claim that police unlawfully entered his home by failing to articulate this claim before the circuit court.

A. Introduction

Waters rests his challenge to the circuit court's finding of an unlawful refusal to submit to a chemical test not on the circuit court's examination of all the evidence considered in rendering its decision but rather on a newly-developed, two-part argument never presented to the circuit court.

Waters maintains first, based solely on the evidence gathered at the scene of the automobile crash, Deputy Welsch did not have probable cause to believe Waters was operating while intoxicated, and second, evidence gathered upon law enforcement locating and interviewing Waters at his home should apparently be excluded from consideration.

The State does not dispute that the information Deputy Welsch gained at the scene of the traffic crash alone was insufficient to support a probable

cause that Waters was operating a motor vehicle while intoxicated.

However, as the State will explain, by failing to articulate with sufficient clarity his remaining claim of unlawful police conduct before the circuit court, Waters waived this argument, precluding appellate review.

B. Waters' failure to assert a violation of his constitutional rights before the circuit court should bar such claim on appeal.

A circuit court may entertain claims at a refusal hearing that an arrest was unlawful due to unconstitutional seizure. *In re Refusal of Anagnos*, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675. However, “[f]or reasons of fairness and judicial economy, to preserve an issue for appeal, a party must ordinarily identify and present the issue clearly enough to permit the circuit court to address it and render a ruling.” *Marquez v. Herbeck*, unpublished opinion, 2010AP552, ¶ 19 (Dist. IV, Sept. 1, 2011) (citing *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 15, 273 Wis.2d 76, 681 N.W.2d 190).

“It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.” *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis.2d 486, 611 N.W.2d 727.

The circuit court convened a hearing pursuant to Wis. Stat. § 343.305(10)(a) solely based upon Waters filing a request for a refusal hearing (2; R-Ap. 101). Prior to the refusal hearing, Waters filed no written motion alleging violations of his constitutional rights, including, but not limited to, police entering his home.

At the commencement of the refusal hearing, Waters did not indicate any intent to challenge the legality of police contact with him at his home (16:3; R-Ap. 104). To the contrary, during Deputy Welsch's testimony, Waters' counsel interrupted witness questioning to further clarify the sole issue to be contested at the refusal hearing:

MR. SCHROEDER: And, Judge, Mr. Kellis can certainly go on, but we are limiting our challenge to the probable cause. We stipulate that there – the informing the accused was read and that Mr. Waters declined taking the test.

(16:12; R-Ap. 113).

By making this concession, Waters identified for the court and State the sole issue contested by Waters: whether Deputy Welsch had probable cause to believe Waters was a driving or operating a motor vehicle while under the influence of alcohol or with a prohibited alcohol concentration. *See* Wis. Stat. § 343.305(9)(a)(5)(a).

Conversely, Waters maintains, for the first time on appeal, that law enforcement lacked a constitutional basis to enter his home to conduct further investigation. Water's Br. at 8-10. Notably, Waters' new claim was so unarticulated and unexplored before the circuit court that

neither the circuit court nor the State were even aware that Waters intended to advance such argument.

The scope of questioning of Deputy Welsch demonstrates that neither party intended the legality of Deputy Welsch's contact with Waters inside his home to be at issue:

MR. KELLIS: Using a license plate from the information that was provided to you, were you able to locate the vehicle that was involved in the crash?

DEPUTY WELSCH: Yes.

MR. KELLIS: Okay. And where was that, do you recall?

DEPUTY WELSCH: It was an address off North Shore Drive, I don't remember the exact fire number.

MR. KELLIS: Okay. And did you ultimately arrive on scene at that location?

DEPUTY WELSCH: Yes.

MR. KELLIS: Okay. Who was it that had greeted you at that residence?

DEPUTY WELSCH: Danny.

MR. KELLIS: Is that Danny Waters?

DEPUTY WELSCH: Yes.

(16:6; R-Ap. 107).

MR. SCHROEDER: How long was it before you arrived at Mr. Waters' home?

DEPUTY WELSCH: From the time of the accident or --

MR. SCHROEDER: Yeah, from the time of the . . . I guess the initial response to the scene of the accident.

DEPUTY WELSCH: If memory serves, I arrived at his house at about twelve o'clock in the morning. Right around there. And I believe the initial call would have been around 11.

MR. SCHROEDER: So about an hour later.

DEPUTY WELSCH: Yeah.

MR. SCHROEDER: And you were -- you were -- you have a microphone on your -- on your person. Right?

DEPUTY WELSCH: I do, but it appears it wasn't functioning during the contact with Danny.

MR. SCHROEDER: And do you know why not?

DEPUTY WELSCH: I don't.

MR. SCHROEDER: Do you know when it became dysfunctional?

DEPUTY WELSCH: I do not; it was right at the start of my shift, so.

MR. SCHROEDER: And you went into Mr. Waters' home?

DEPUTY WELSCH: Yes.

MR. SCHROEDER: And you asked him some questions about drinking?

DEPUTY WELSCH: I did.

MR. SCHROEDER: So describe that conversation, if you would.

(16:15-16; R-Ap. 116-17).

At the conclusion of the refusal hearing, once all evidence had been presented, the court invited argument from both parties concerning the issue(s) to be decided by the court (16:22; R-Ap. 123). Given Waters' concession that the sole issue to be addressed by the court was whether Deputy Welsch had probable cause to believe Waters was operating while intoxicated, the State tailored its argument to the court concerning that lone issue:

MR. KELLIS: Your Honor, I'd ask that you find the refusal to be unreasonable. The defense is stipulated to two of the three things the State need prove here today. The only being – the only one not being whether there was probable cause for an arrest.

(16:22; R-Ap. 123).

Waters' only argument as to why the court should not find his refusal to submit to a chemical test as unreasonable was stated as follows:

MR. SCHROEDER: Yes, Judge. My argument would be that the officer had information that there was an accident, that Mr. Waters did provide the information, did not try to hide who he was or anything to that effect. Then the parties agreed to report the matter the following day. There was really no evidence or indication as to Mr. Waters being impaired, so I would simply argue that he didn't have the requisite level of suspicion to go to Mr. Waters' house at that hour and question him about the incident.

(16:23; R-Ap. 124).

The circuit court's ruling, too, revealed a lack of awareness that Waters intended to contest the constitutionality of Deputy Welsch's contact with Waters inside his residence. Upon hearing arguments from both counsel, the court made an oral ruling:

THE COURT: All right. I'm just first going to say to Mr. Waters I respect the fact that you had stopped and exchanged information –

THE DEFENDANT: Yeah, no –

THE COURT: -- with the other driver because too often that is not the case. It's an expectation, it's a requirement, it isn't always adhered to, particularly if individuals think they may be on the – on the line, so to speak.

THE DEFENDANT: Yeah.

THE COURT: So I respect the fact you made the decision to share that information.

To a certain extent, this is a close case. There are certainly factors that the defense can point to, including the acceptance of responsibility in terms of fulfilling the legal obligation, the fact that the other driver was aware that Mr. Waters had been drinking, apparently didn't communicate any personal observations regarding impairment, although there's no indication that the witness was questioned closely about that. However, the officer obviously had other information that Mr. Waters had been in the bar for about two and a half to three hours. There are the circumstances of the accident. This apparently is a slow speed accident where Mr. Waters had collided with another person in the parking lot after having consumed a significant amount of alcohol in the bar. The officer went to the residence, confirmed the amount. Mr. Waters had indicated that he had consumed six beers which certainly is a significant quantity. He confirmed that there was nothing that had been consumed after the accident, so other than the fact that the officer's contact was apparently an hour later, certainly the symptoms that the officer observed could not have been attributed to post-accident drinking.

The officer put the – Mr. Waters through the field sobriety tests. The HGN would certainly be indicative of impairment. There was indications in the walk and turn, apparently four clues out of eight, and then the third field test the results weren't that bad; apparently one clue out of the possible four. On the totality of the circumstances, the officer — and coupled with the rejection of the opportunity to submit a PBT – on the totality of the circumstances, the officer formed the opinion that Mr. Waters was impaired.

As I say, it isn't as clear as many cases; but to a probable cause standard, I think the officer did have sufficient basis for concluding that Mr. Waters was probably impaired and was justified in going through the informing the accused and asking Mr. Waters if he would submit to a test.

I'm going to make a finding that the officer had probable cause. And this is a two year revocation?

(16:23-26; R-Ap. 124-127).

The State maintains there is clear, distinguishable difference between a defendant's claim that police were not entitled to *travel to* his home to question him and a claim that police unconstitutionally *entered* his home to question him.

Due to Waters' failure to articulate this newly-developed claim to the circuit court with any clarity before or during the refusal hearing, neither counsel directed questions to Deputy Welsch to determine how he entered Waters' home, whether Waters or another individual invited police to enter Waters' home, whether police had secured a warrant to enter the home, or whether any other facts or circumstances permitted police to lawfully enter the home at that time.

While the exact circumstances were not described as to how Deputy Welsch entered the residence, Deputy Welsch confirmed it was Waters who "greeted" him at the residence (16:6; R-Ap. 107). Absent from the record is any indication that police forced entry into the home or otherwise entered the home without voluntary consent.

Further, given the lack of clarity concerning Waters' claim(s), the circuit court never ruled on the legality of police entry to Waters' home. Instead, Waters now requests that this court for the first time address a claim that he could have brought before the circuit court but inexplicably failed to do so.

The waiver rule is "not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." *Huebner*, 2000 WI 59, ¶ 11. The State maintains this principle should lead this court to find Waters has waived the claims he now makes on appeal and affirm the circuit court's decision.

Waters should not be entitled to limit the scope of the evidence supplied at the refusal hearing, concede the lone contested issue concerned whether Deputy Welsch had probable cause to believe he was operating while intoxicated, argue only that Deputy Welsch did not "have the requisite level of suspicion to go to his house at that hour and question him about the incident," and now advance a newly-developed argument on appeal relying on an incomplete evidentiary record.

Waters was entitled to assert before the circuit court that Deputy Welsch engaged in unlawful police conduct at his home, and as a result of his conduct, certain evidence gathered should have been excluded from the circuit court's consideration. Because he failed to so, Waters waived this claim and cannot logically establish that the circuit court erred by not considering claims he failed to clearly present.

III. The circuit court correctly concluded Deputy Welsch's observations supported a probable cause to believe Waters was operating a motor vehicle while intoxicated.

A. Standard of Review

Whether probable cause to arrest exists in a given case is a question of law that appellate courts determine independently of the circuit court, but benefiting from its analysis. *Washburn County v. Smith*, 2008 WI 23, ¶ 16, 308 Wis.2d 65, 746 N.W.2d 243.

B. Deputy Welsch detected numerous indicators of impairment supporting probable cause to believe Waters was operating a motor vehicle while intoxicated.

Having heard the entirety of the evidence presented at the refusal hearing, the circuit court concluded Deputy Welsch had probable cause to believe Waters was operating while intoxicated (16:24-26; R-Ap. 125-27). The court had before it the following observations supporting its decision:

- Waters admitted to being involved in an automobile accident at a bar (16:16; R-Ap. 117);
- In exchanging information with the other driver involved in the automobile accident, Waters expressed interest in not wanting to

deal with police at the time (16:13, R-Ap. 114);

- A bartender was unable to recall precisely how much Waters was drinking but noted Waters had been at the bar for two and a half to three hours (16:14, R-Ap. 115);
- Deputy Welsch observed that Waters' speech was "a little bit slow and slurred" (16:7; R-Ap. 108);
- Deputy Welsch observed the "slight odor of intoxicant" emitting from Waters (16:7; R-Ap. 108);
- Waters admitted he had consumed about six beers that evening with none of those drinks being consumed subsequent to his arrival at home (16:7, 16; R-Ap. 108, 117);
- Deputy Welsch, a law enforcement officer trained at Northeast Technical College, administered standardized field sobriety tests with Waters exhibiting five of six possible clues of impairment during the Horizontal Gaze Nystagmus test, four of eight possible clues of impairment during the Walk-and-Turn test, and one of four possible clues of impairment during the One-Leg-Stand test (16:9-11; R-Ap. 110-12); and
- Waters refused to submit to a preliminary breath test upon request (16:11; R-Ap. 112). *County of Jefferson v. Renz*, 222 Wis.2d 424, 443 n. 17, 588 N.W.2d 267 (Ct. App. 1998) (refusal to submit to preliminary breath test

may be considered evidence of consciousness of guilt for purpose of establishing probable cause to arrest), *rev'd on other grounds*, 231 Wis.2d 293, 603 N.W.2d 541 (1999).

While the State does not concur with the circuit court's assessment that this was a "close case," the State respectfully agrees with the circuit court that Deputy Welsch's observations supported a probable cause that Waters was operating while intoxicated. This court should affirm that decision.

Finally, as Waters' Brief-in-Chief fails to address whether the cumulative evidence actually considered by the circuit court was insufficient to support a probable cause to believe Waters was operating while intoxicated, he should be precluded from raising any new arguments in his reply. *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶34, 296 Wis. 2d 337, 723 N.W.2d 131 (arguments not fully developed in appellant's brief-in-chief afford the respondent no opportunity to respond, and will not be reviewed).

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the circuit court's finding of unlawful refusal.

Dated this 21st day of November, 2018.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,644 words.

John W. Kellis
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 at La Crosse, Wisconsin, this 21st day of November, 2018.

John W. Kellis
Assistant District Attorney

APPENDIX CERTIFICATION

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. § 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 s. 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 first names 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.

Dated this 21st day of November, 2018.

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on November 21, 2018, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-respondent's brief and appendix.

Dated this 21st day of November, 2018.

John W. Kellis
Assistant District Attorney