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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2019AP001082-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. DOTSON,

Defendant-Appellant.

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On Appeal from the Judgment of Conviction Entered in the Circuit Court for Brown County, the Honorable William Atkinson, Presiding

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUE PRESENTED

Did the state meet its burden of proving that the officer had reasonable suspicion to believe that Dotson was operating his vehicle under the influence of an intoxicant to a degree which rendered him incapable of safely driving, or with a blood alcohol concentration at or above 0.08, before conducting field sobriety tests?

The circuit court found that the officer had reasonable suspicion that Dotson had been *consuming alcohol*. (60:7-8; App. 139-40).

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, as the briefs can adequately set forth the arguments. This case does not qualify for publication because it is a misdemeanor appeal. *See* Wis. Stat. §§ 809.23(1)(b)4 & 751.31(2)(f).

## STATEMENT OF THE CASE

The state filed a criminal complaint against Michael A. Dotson alleging two counts: (1) operating a motor vehicle while intoxicated, as a second offense, contrary to Wis. Stat. §§ 346.63(1)(a) & 346.65(2)(am)2, and (2) operating a motor vehicle with a prohibited alcohol concentration, as a second offense, contrary to Wis. Stat. §§ 346.63(1)(b) & 346.65(2)(am)2. (1).

Dotson filed a notice of motion and motion to suppress evidence. (14; App. 152-58). A hearing on the suppression motion was held on November 30, 2017. (59).[1] The officer who

[1] The Honorable Thomas J. Walsh presided over the suppression hearing on November 30, 2017 and made the oral ruling on January 29, 2018. (59;

arrested Dotson was the sole witness. (59:2; App. 102). Video recorded by a law enforcement squad camera was introduced as Exhibit 1. (59:23; App. 118).[2] Both parties then submitted a final brief before the oral ruling. (16;17; App. 159-64). In his final brief, Dotson argued that (1) Dotson's statements should be suppressed because they were obtained in violation of *Miranda*, and (2) without Dotson's statements, Officer Hock did not have reasonable suspicion of an OWI and had no basis to conduct field sobriety tests. (16:5-6; App. 159-64).

In an oral ruling dated January 29, 2018, the court granted Dotson's motion to suppress his statements, but found that the officer had reasonable suspicion to pursue the investigation and denied the remainder of the suppression motion. (60:7-8; App. 139-40).

Following the court's denial of his suppression motion, Dotson pled no contest to count one, and count two was dismissed. (63:2,4; App. 165). The court imposed 10 days of jail, 12 months of ignition interlock, and 12 months of DOT license revocation. (63:7; App. 165).

## STATEMENT OF THE FACTS

On February 12, 2017, Officer Robby Hock of the Green Bay Police Department, who had 11 years of experience as a police officer, was on patrol for the OWI Task Force. (59:5-7). At approximately 1:21 a.m., Officer Hock made a traffic stop on a vehicle that appeared to have an unregistered temporary license plate. (59:8; App. 103). The invalid

60). Per the judicial rotation plan, the case then transferred to the Honorable William Atkinson, who presided over the plea and sentencing hearing on April 13, 2018. (63).

[2] The court of appeals granted Dotson's motion to supplement the record to include the squad car video footage that was received into evidence as exhibit one at the November 30, 3017 suppression hearing. Because the exhibit does not have its own number on the index or supplemental index, Dotson will cite to page 23 of the suppression hearing – when this exhibit was received into evidence (59:23).

temporary license plate violation was the sole basis for the stop. (59:10; App. 105).

Officer Hock had not observed any bad or unsafe driving. (59:10,26-27; App. 105, 121-22). When Officer Hock turned on his emergency lights, the vehicle pulled over in a normal fashion. (59:11, 21-22; App. 106, 116-17). The traffic stop took place in a "bar district," and Officer Hock remembered seeing this vehicle earlier in the night parked at a nearby bar. (59:8-9; App. 103-04).

After the vehicle pulled over, Officer Hock approached the driver's side window. (59:11; App. 106). Officer Hock observed that the driver's side window was open approximately six inches and that the driver, later identified as Dotson, was smoking a cigarette. (59:11; App. 106). Officer Hock asked Dotson for his information and registration, and Dotson complied with the officer's request. (59:12-14, 29; App. 107-09).

After receiving the identifying information, Officer Hock returned to his squad car, ran Dotson's name through his database, and discovered that Dotson had an outstanding warrant for a commitment order in a paternity action out of Kenosha. (1:2; 16:1; 59:11-14; App. 106-09; 60:6). Officer Hock returned to Dotson's vehicle to detain him on the arrest warrant. (59:15; App. 110). Officer Hock informed Dotson that he had a warrant for his arrest, and he instructed Dotson to step out of the vehicle. (59:15; App. 110). Dotson, who was talking on the phone at the time trying to make arrangements for his vehicle, started to roll up his window and did not step out of the vehicle right away. (59:15; App. 110; 1:2; 59:23 Timestamp 7:08-7:30). Officer Hock then took out his window punch with the intention of shattering the window, but Dotson opened the door before that could happen. (59:15; App. 110; 59:23 Timestamp 7:25-7:30).

Dotson then willingly stepped from his vehicle. (59:16; App. 111). After Dotson stepped out of the vehicle, Officer Hock placed him under arrest for the warrant. (59:16; App. 111). At that point, Officer Hock smelled the odor of intoxicants on Dotson's breath. (59:16; App. 111). Officer Hock did not remember whether the odor was mild or strong. (59:16-17; App. 111-12).

Officer Hock did not observe glassy or watery eyes, and he did not recall Dotson being unsteady on his feet or having any slurred speech. (59:31; App. 126).

After Dotson was taken into custody – and without giving Dotson his *Miranda* rights – Officer Hock asked Dotson if he had been drinking. (59:17; App. 112). Dotson replied with statements that the circuit court later suppressed due to the officer's *Miranda* violation. (59:17,24; App. 119; 60:8; App. 140).

Officer Hock then drove Dotson to the sally port of a nearby hospital, where he conducted field sobriety tests. (59:18-19; App. 113-14). The field sobriety tests led to additional investigation, including a preliminary breath test which returned a reading of 0.14%, and a blood draw. (59:33-34, 39; App. 131). Officer Hock then arrested Dotson for driving under the influence of an intoxicant. (59:28-30; App. 123-25).

Dotson filed a motion to suppress the statements obtained in violation of *Miranda* as well as all evidence obtained therefrom, and argued that Officer Hock did not have reasonable suspicion of an OWI and had no basis to conduct field sobriety tests. (16:5-6; App. 152-58).

At the suppression hearing on November 30, 2017, Officer Hock testified that he decided to administer field sobriety tests based on the following details:

- The time of day (1:21 a.m.) (59:8,36; App. 103, 128)

- The location, which was a bar district (59:9,36; App. 104, 128)

- The fact that Dotson had his window open six inches (59:11-12,36; App. 106-07, 128)

- The fact that Dotson was smoking a cigarette (59:11-12,36; App. 106-07, 128)

- The smell of alcohol on Dotson (59:31-32; App. 126-27).

In its oral ruling on January 29, 2018, the circuit court first reviewed on the record all the evidence from the suppression hearing. (60:2-6; App. 134-38). The court suppressed Dotson's statements, but found that even without Dotson's statements, the officer had reasonable suspicion that Dotson had been consuming alcohol:

> I'm satisfied the officer smelled [the odor of intoxicants] when he was on the scene. He didn't need to know the answer of whether or not the defendant was drinking. He already knew that answer. In fact, the defendant by his – the mere smell of his breath the officer could tell he had consumed alcohol.
>
> So I'm satisfied of the following: … that this officer not only had reasonable suspicion to make the stop and pursue this investigation but probable cause to make an arrest.
>
> The officer as I've already outlined had information the time of day it was that this stop was being made, the fact that it was in one of our bar districts here in town right near The Sardine Can, the fact that the defendant's vehicle had been observed at a bar by this officer earlier in the evening. The officer even outlined the name of the bar that he saw it. The fact that the window did not come down fully when the – when he was stopped, the fact that he was

> smoking a cigarette, all these things indicating a desire upon reflection that – that the odor be disguised. The fact that once the defendant did get out of the vehicle the odor was smelled, and so the officer knew that the defendant had been or reasonable suspicion that he had been consuming alcohol.
>
> I'm satisfied for all of these reasons that the officer – the evidence here meets the appropriate standard for proceeding, and, therefore the motion's going to be denied.

(60:7-8; App. 139-40). This appeal follows.

## ARGUMENT

### I. Law enforcement lacked reasonable suspicion to believe that Dotson was under the influence of an intoxicant to a degree which rendered him incapable of safely driving, or that he had a blood alcohol concentration at or above 0.08. As such, the field sobriety tests were unlawful, and the evidence obtained during and after the field sobriety tests must be suppressed.

#### A. General Principles of Law

The Fourth Amendment of the U.S. Constitution and Article 1, Section 11 of the Wisconsin Constitution prohibit unreasonable seizures. Whether law enforcement violated the Fourth Amendment is a question of constitutional fact, which is reviewed under a two-step standard of review. The circuit court's factual findings are upheld unless they are clearly erroneous. *State v. Fields*, 2000 WI App 218, 239 Wis. 2d 38, 619 N.W.2d 279. However, whether a detention meets constitutional standards is a question of law subject to de novo review. *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124.

A traffic stop is a seizure for purposes of the Fourth Amendment. *State v. Arias*, 2008 WI 84, ¶ 29, 311 Wis. 2d 358, 752 N.W.2d 748 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). In order to be lawful, an investigative seizure must be supported by reasonable suspicion. *Terry*, 392 U.S. at 20-22. In analyzing the constitutionality of a seizure, a reviewing court first determines whether there was reasonable suspicion to justify the seizure at its inception. *Id*. The reviewing court then must determine whether the investigative means used were "the least intrusive means reasonably available to verify or dispel the officer's suspicion." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

The scope of a lawful seizure may be enlarged under these same criteria if a law enforcement officer "becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense separate and distinct from the acts that prompted the officer's intervention in the first place. *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). In analyzing the constitutionality of the new investigation, the validity of the extension is tested in the same manner, and under the same criteria, as the initial stop. *Id*.

The state bears the burden of proving the constitutionality of a Fourth Amendment seizure. *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634, 638.

An order denying a motion to suppress evidence may be reviewed on appeal notwithstanding a no contest or guilty plea. Wis. Stat. § 971.31(10).

**B. The officer lacked reasonable suspicion to conduct field sobriety tests.**

After Mr. Dotson was initially stopped, the scope of the seizure that followed was unconstitutional because Officer Hock conducted field sobriety tests without reasonable suspicion that Dotson was operating while under the influence of an intoxicant or with a blood alcohol level at or exceeding 0.08.

Reasonable suspicion is "suspicion grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." *State v. Colstad*, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 659 N.W.2d 394 (citations omitted). An officer's inchoate and unparticularized suspicion, or hunch, is insufficient under this standard. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (internal citation omitted). Reasonableness is a common sense test based on the totality of the facts and circumstances known to the officer at the time of the stop. *State v. Post*, 301 Wis. 2d 1, ¶ 13.

Dotson was charged with one count of operating a motor vehicle while intoxicated under Wis. Stat. § 346.63(1)(a), which provides: "(1) No person may drive or operate a motor vehicle while: (a) under the influence of an intoxicant … *to a degree which renders him or her incapable of safely driving*." (emphasis added).

Driving while under the influence of an intoxicant requires proof that a person's ability to drive has been impaired by the consumption of an alcoholic beverage. See WIS JI – CRIMINAL 2663. Not every person who has consumed alcoholic beverages is "under the influence." WIS JI-CRIMINAL 2663. Before conducting field sobriety tests, an officer must have reasonable suspicion that the "person has consumed *a sufficient amount of alcohol* to cause the person to

be less able to exercise the clear judgment and steady hand necessary to control a motor vehicle." WIS JI-CRIMINAL 2663 (emphasis added).

Dotson was also charged with one count of operating with a prohibited alcohol concentration under Wis. Stat. § 346.63(1)(b), which provides: "(1) No person may drive or operate a motor vehicle while: (b) the person has a prohibited alcohol concentration." Wis. Stat. § 340.01(46m) states that "prohibited alcohol concentration" means an alcohol concentration of 0.08 or more if the person has two or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307(1). Dotson was subject to the 0.08 limit. (1).

The facts and the reasonable inferences from them do not give rise to a reasonable suspicion that Dotson had consumed enough alcohol to impair his ability to drive or to reach a 0.08 blood alcohol concentration.

Significantly, there was zero indication of any bad or even questionable driving – there was no weaving (59:26; App. 121), no erratic or unsafe driving (*see* 59:10; App. 105), and nothing unusual about the way Dotson pulled over (p. 59:11, 21-22; App. 106, 116-17). "When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial." *County of Sauk v. Leon*, No. 2010AP001593, ¶20, unpublished (Ct. App. Nov. 24, 2010)(App. 147).[3]

Furthermore, Officer Hock testified that he did not observe glassy or watery eyes, slurred speech, and he did not recall Dotson having any balance problems. (59:31; App. 126).

[3] *Leon* meets the criteria for unpublished persuasive authority under Wis. Stat. § 809.23(3)(b), as it is an authored opinion by a single judge under s. 752.31(2)(f), and it was issued after July 1, 2009. In accordance with Wis. Stat. § 809.23(3)(c), a copy of *Leon* is included in the appendix to this brief.

When Officer Hock first approached Dotson's vehicle and conversed with Dotson, Officer Hock observed that the driver's side window was open approximately six inches and that Dotson was smoking a cigarette. (59:11). Officer Hock testified that it is not unusual for a driver of a vehicle to be smoking. (59:12; App. 107). Officer Hock noted that when a driver only rolls his window down six inches, rather than all the way, it could mean the person is trying to conceal something in the vehicle, or it could mean the person is trying to cover up a smell, or it could simply mean the person does not like the police. (59:12; App. 107).

Up to that point, Officer Hock had the following arguably adverse objective facts: (1) Dotson was smoking a cigarette, (2) Dotson rolled his window down six inches, (3) it was 1:21 a.m., (4) he was in a bar district, and (5) he had seen Dotson's car parked at a bar earlier in the night.

Officer Hock testified that, at that point and with that information, "I thought that [Dotson] might be [possibly intoxicated], but I don't have anything to go on at that point…" (59:13; App. 108). While the reasonable suspicion determination is an objective test, it is worth noting that Officer Hock subjectively did not believe that those set of facts led to reasonable suspicion of an OWI – in other words, it was just a hunch at that point.

After Dotson stepped out of the vehicle, Officer Hock placed Dotson under arrest for the warrant. (59:16; App. 111). It was at this moment that Officer Hock smelled the odor of intoxicants on Dotson's breath.[4] (59:16-17; App. 111-12).

It is evident from Officer Hock's testimony that what tipped the scales in Officer Hock's mind from "hunch" to

[4] Officer Hock did not remember whether the odor was mild or strong, and Dotson has found nothing in the record indicating the strength of the smell. (59:16-17; 1:2).

"reasonable suspicion" was the odor of alcohol he smelled after Dotson had exited the vehicle. (59:19, 32, 37-38: App. 114, 127, 129-30). Officer Hock testified that if he had not smelled the odor of intoxicants on Mr. Dotson when he placed him under arrest, then he would not have done the field sobriety tests and would have instead taken him to the Brown County Jail on the warrant. (59:38; App. 130).

The problem with this is that the mere odor of alcohol, combined with the other clues, does not tell us whether Dotson had consumed enough alcohol to impair his ability to drive or to reach a 0.08 blood alcohol concentration. It only tells us that Dotson had been drinking, but drinking before driving is not in illegal in Wisconsin. See WIS JI-CRIMINAL 2663 ("Not every person who has consumed alcoholic beverages is 'under the influence' as that term is used here…"). What is illegal is driving under the influence of an intoxicant or with a prohibited alcohol concentration, which requires proof that the person is under the influence of an intoxicant "to a degree which renders him or her incapable of safely driving" or has a blood alcohol concentration of 0.08 or more. Wis. Stat. § 346.63(1)(a) & (b).

The court set forth the following specific factors that it believed gave rise to reasonable suspicion: (1) the time of day, (2) it was in a bar district, (3) the officer had seen Dotson's car parked at a bar earlier in the evening, (4) Dotson did not put his window down fully, (5) Dotson was smoking a cigarette, and (6) Officer Hock smelled alcohol on Dotson after he came out of the vehicle. (60:8; App. 140).

The court had also noted earlier in its statements that there was some delay in Dotson exiting the vehicle. (60:5; App. 137). It was approximately 35 seconds from the time Officer Hocks asked Dotson to step out of the vehicle and informed him of the warrant, until he did step out. (59:23 Timestamp 6:55-7:30). During this time, Dotson was on the phone trying

to make arrangements for someone to pick up his vehicle. (59:23 Timestamp 7:00-7:30).

While a series of acts can, in the aggregate, provide reasonable suspicion, this particular constellation of facts is inadequate to provide reasonable suspicion of an OWI or operating with a PAC. These facts are devoid of any evidence regarding how much alcohol Dotson had consumed or whether Dotson's ability to drive his vehicle was impaired, such as physical indicia of actual impairment (bloodshot or glassy eyes, slurred speech, unsteady gait, bad or unusual driving) or an admission to drinking a certain quantity.

Dotson has not found any published case law on similar facts without any bad or unusual driving. An unpublished case offering persuasive value is *County of Sauk v. Leon*, No. 2010AP001593, unpublished (Ct. App. Nov. 24, 2010)(App. 141-51). In *Leon*, an officer on routine patrol noticed a disturbance on the side of a frontage road at 11:04 p.m. *Id*. ¶ 2,4-5. The officer stopped to investigate and observed a man (later identified as Leon) and woman "flailing their arms." *Id*. ¶ 4. The couple appeared to be having an argument as they stood beside a parked car on the frontage road. *Id*. ¶¶ 2, 4-5. The officer smelled alcohol on Leon's breath, and Leon admitted to consuming one beer with dinner an hour or two earlier and driving the car on the frontage road. *Id*. ¶¶ 2, 9-10. The officer did not notice any other outward signs that Leon was intoxicated, such as trouble with balance, bloodshot or watery eyes, or slurred speech. *Id*. ¶ 10.

The court of appeals held that these facts did not provide reasonable suspicion for the field sobriety tests. ¶ 28. The court found that Leon's role in the argument with the woman, including flailing his arms, would not suggest to a reasonable police officer that Leon had been driving while impaired or with a prohibited blood alcohol level. *Id*. ¶¶ 23-24. The court also noted that the incident occurred around 11:00 p.m. on a

Friday evening, but stated that even if it had occurred around "bar time," that still would not have been enough for reasonable suspicion. *Id*. ¶ 25.

This Court should reach the same conclusion here. Smoking a cigarette, putting a window down six inches, driving at 1:21 a.m. in a bar district, being parked at a bar earlier in the evening, and emitting an odor of unspecified intensity, are facts that only provide reasonable suspicion that Dotson had consumed alcohol before driving.[5] They are not, however, sufficient "building blocks" supporting reasonable suspicion that Dotson had consumed enough alcohol to impair his ability to safely control the vehicle, or that he had consumed enough alcohol to reach a blood alcohol concentration of 0.08 Wis. Stat. § 346.63(1)(a) & (b); WIS JI-CRIMINAL 2663; *see State v. Waldner*, 206 Wis. 2d 51, 58. Neither do these facts meet *Leon's* standard which requires the other factors to be "more substantial" when there is no bad driving, in order to find reasonable suspicion. *County of Sauk v. Leon*, No. 2010AP001593, ¶20, unpublished (Ct. App. Nov. 24, 2010) (App. 147).

### C. The evidence obtained pursuant to and after the field sobriety tests must be suppressed.

Under the exclusionary rule, the remedy for an unconstitutional seizure is to suppress the evidence it produced. *State v. Washington*, 2005 WI App 123, ¶ 10, 284 Wis. 2d 456, 700 N.W.2d 305 (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85, 487-88 (1963)).

When a defendant enters a plea following the circuit court's denial of a suppression motion, and a reviewing court

[5] This appears to be the erroneous standard the circuit court relied on when denying the motion to suppress: "The fact that once the defendant did get out of the vehicle the odor was smelled, and so the officer knew that the defendant had been or *reasonable suspicion that he had been consuming alcohol*." (60:8).

determines that the circuit court erred, the defendant should be allowed to withdraw his plea unless the state can prove that there was no reasonable probability that the court's error contributed to the plea. *State v. Semrau*, 2000 WI App 54, ¶ 36, 233 Wis. 2d 508, 608 N.W.2d 376. Here, the state cannot meet this test because granting suppression would have eliminated the state's evidence against Dotson – including the results of the field sobriety tests and the subsequent blood test.

Had the circuit court properly granted suppression, then Dotson would not have entered a plea to the charge. As such, Dotson respectfully asks this Court to reverse the circuit court's order and remand with directions to suppress the evidence and to allow Dotson to withdraw his plea.

## CONCLUSION

WHEREFORE, for the reasons stated above, Mr. Dotson respectfully asks this Court to reverse the circuit court and remand with directions to grant suppression all evidence obtained during and after administration of field sobriety tests, and to allow Dotson to withdraw his plea.

Dated this 24th day of September, 2019.

Respectfully submitted,

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## CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 4,008 words.

Dated this 24th day of September, 2019.

Signed:

_____

Christina C. Starner

## 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 § 809.19(12). I further certify that:

This electronic brief is identical in context and format to the printed form of the brief filed on or after 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 24th day of September, 2019.

Signed:

_____

Christina C. Starner

# APPENDIX

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## CERTIFICATION AS TO 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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 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 trial 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 person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of September, 2019.

Signed:

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**CERTIFICATION AS TO MAILING**

I hereby certify pursuant to Wis. Stat. § 809.80(4) that this brief was deposited in the United States mail for delivery by first class or priority mail on September 24, 2019. Postage has been pre-paid. This brief is addressed to: ADA Eric Enli, 300 East Walnut Street, Green Bay, WI 54301 and Sheila Reiff, WI Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 24th day of September, 2019.

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