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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2020AP001465

In the matter of the refusal of Brian Steinert
Forest County

Plaintiff- Respondent ,

v.

Brian Steinert

Defendant-Appellant.

On Appeal From A Judgment of the Circuit Court
For Forest County, Case No. 20-TR-561
Honorable Leon D. Stenz, Presiding

Reply Brief of Appellant

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ARGUMENT**I. The Arresting Officer Lacked Capacity to Form The Necessary Opinion.**

The exact words "possibly had probable cause" (10-25:20-21) should not be expanded to mean "likely existed", "correctly suggested". The State has the burden to show the record establishes something at the scene the Circuit Court did not find - probable cause. The ability to opine a motorist has a detectable amount of meth at a given time is a question beyond the ability of the average person. State v. Chitwood, 369 Wis. 2d 132, 153, 879 NW 2d 786, 2016 WI App. 36 ¶32.

Deputy Connor Johnson lacked the capacity to opine if Steinert was driving with a detectable amount of meth.

The only basis in the record for Johnson to relate an unknown amount used about 9 hours ago was "speaking with DRE's in the Forest County Drug Task Force who advised me meth can stay in the system up to 24 hours" (10-9:18-21). This was the only basis for Johnson to form an opinion for probable cause purposes in this case.

It is speculative if meth is to a probability always present 9 hours later. There was nothing to tie the general statement Johnson relied upon to this case. State v. Pittman, 174 Wis. 2d 255, 269, 496 NW 2d 74 (1993). This

general statement does not comport with the facts of this case. Id. p.272. There is no relationship between 24 hours and 9 hours that evolves from a possibility to a probability. Since the Circuit Court made no determination as to expert qualifications this point is now reviewed independently. Id p.268.

The State cannot meet its burden to establish competence of Deputy Johnson at the scene. As a result probable cause cannot be found. State v. Conaway, 323 Wis. 2d 250, 256, 779 NW 2d 182, 2010 WI App. 7 ¶13.


Applying "can stay in the system up to 24 hours" to probable cause meth was present in a detectable amount after about 9 hours can only be done if this application is reliable. Seifert v. Balink, 372 Wis. 2d 525, 580, 888 NW 2d 816, 2017 WI 2 ¶130.

What is possible at 24 hours may or may not be probable at 9 hours. Possibilities are insufficient for probable cause. Dane County v. Sharpee, 154 Wis. 2d 515, 518, 453 NE 2d 508 (Ct. App. 1990). The record does not support a determination Deputy Johnson had the qualifications to opine meth probably was present at that time.

CONCLUSION

Brian Steinert respectfully requests the revocation order of July 30, 2020 be reversed and remanded with directions to deny further revocation pursuant to S.343.305(9) (a)5a and S.343.305(9) (d).

Respectfully submitted this 18th day of February, 2021.

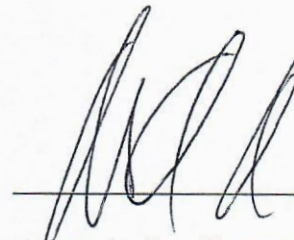


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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is three (3) pages.

Dated: February 18, 2021

A handwritten signature in black ink, appearing to read 'R.A. Kennedy, Jr.', is written over a horizontal line.

Robert A. Kennedy, Jr.
Attorney For Appellant

CERTIFICATE OF COMPLIANCE WITH RULE §809.62(4) (a)

I hereby certify that:

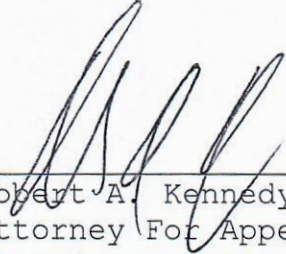
I have submitted an electronic copy of this brief, which complies with the requirements of §809.62(4) (a) and §809.19 (12).

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: February 18, 2021



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CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this 18th day of February, 2021. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

Charles Simono
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Dated: February 18, 2021



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