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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appeal No. 2021AP000484
Washington County Circuit Court Case Nos. 2020TR000836

In the Matter of the Refusal of Edward R. Gasse:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD R. GASSE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MR. GASSE REFUSED
CHEMICAL TESTING IN WASHINGTON COUNTY,
THE HONORABLE , JUDGE, PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT EDWARD R. GASSE**

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ARGUMENT

Initially, the State argues the defense waived review of all issues at the refusal hearing because the Court in its Decision and Order wrote that issue one and two were not in dispute. The defense did not stipulate to any issue, and the State specifically elicited evidence regarding each issue including probable cause. Under Wis. Stat. 343.305(9)(a)5, there are three issues to be determined at a refusal hearing. First, whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence, second whether the officer complied with the provisions of the implied consent law, and third whether the person refused to permit the test.

The defense did not stipulate to any of the issues. Wis. Stat. 343.305(9)(d) requires “at the close of the hearing, or within five days thereafter, the court shall determine the issues under par (a)5. Furthermore, “if all issues are determined adversely to the person, the court shall proceed under sub. (R.29:18/Reply.App.1).

Thus, the Court is required by statute to determine each issue. The defense did not waive any issue, timely filed the refusal hearing demand, and thus the court is obligated by statute to determine each of the three issues.

Further, if the only issue, as the State claimed, was issue three, then there would have been no need to put in the evidence regarding probable cause.

The defendant should not be precluded from raising the issue of probable cause on appeal.

Finally, the State argues, regardless, Officer Farnsworth possessed the requisite level of suspicion to arrest. In part, the State suggest Mr. Gasse failed the field sobriety tests. Officer Farnsworth performed one test, the Horizontal Gaze Nystagmus test (HGN). The officer's testimony regarding the HGN test was he observed "lack of smooth pursuit, nystagmus prior to 45 degrees, and nystagmus onset of maximum deviation." He did not specify if he observed the above in one eye or both. Farnsworth also testified he looked for vertical nystagmus but could not "get an accurate reading." (R.29:18/Reply.App.2). There was no testimony from Officer Farnsworth that the above suggested alcohol impairment.

Furthermore, Farnsworth specifically did not perform the walk and turn test or the one leg stand test because of Mr. Gasse's physical limitations. Officer Farnsworth had training in performing "nonstandard field sobriety tests" but did not. When pressed by the State as to why he did not perform "nonstandard

field sobriety tests”, Farnsworth replied “I guess I don’t have a reason for not performing any non-standardized tests.” (R.29:19/Reply.App.3).

The defense brief in chief adequately addresses the lack of probable cause, and no further argument will be reiterated here.

CONCLUSION

Because the parties did not stipulate to any of the issues of the refusal hearing, because the defendant did not waive any issues of the refusal hearing, and because the court is required to determine each issue, the defendant should not be precluded from raising the probable cause issue herein. Further, because Officer Farnsworth did not have the requisite level of probable cause to believe Mr. Gasse operated a motor vehicle while impaired, the court should have dismissed the refusal failure to do so was error. The court should reverse the trial court order and dismiss the refusal.

Dated this 9th day of September, 2021.

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 1353.

Dated this 9th day of September, 2021.

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, including 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 electronic copy of the brief filed with the court and served electronically on all opposing parties.

Dated this 9th day of September, 2021.

Respectfully submitted,

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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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; 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 a 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 9th day of September, 2021.

Respectfully submitted,

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APPENDIX