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

**Appeal No. 2021AP000733
Winnebago County Circuit Court Case Nos. 2020TR004273**

In the Matter of the Refusal of Derek V. Schroth:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEREK V. SCHROTH,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MR. SCHROTH REFUSED
CHEMICAL TESTING IN WINNEBAGO COUNTY, THE
HONORABLE SCOTT C. WOLDT, JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT DEREK V. SCHROTH**

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STATEMENT OF THE ISSUES

Did the officer have the requisite level of suspicion to believe that Mr. Schroth was driving or operating a motor vehicle while he was under the influence of an intoxicant, as required under Wis.Stat. §343.305(9)(a)5a?

And did Mr. Schroth refuse to permit chemical testing as required under Wis.Stat. §343.305(9)(a)5c?

The trial court answered both questions yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Derek V. Schroth (Mr. Schroth) was charged in the Winnebago County, with having operated a motor vehicle while under the influence of an intoxicant (OWI) contrary to Wis. Stat. §346.63(1)(a), with having operated a motor vehicle with a prohibited alcohol concentration (PAC) contrary to Wis. Stat. §346.63(1)(b), both as felony fourth offenses and with refusing to submit to a chemical test in violation of Wis. Stat. §343.305(9) on June 23, 2020. The court commissioner dismissed the OWI and PAC charges at the preliminary hearing stage.

The defendant, by counsel, timely filed a written request for a refusal hearing on June 29, 2020. A refusal hearing was held on April 1, 2021, the Honorable Scott C. Woldt, Judge, Winnebago County Circuit Court presiding. On said date, the court found that Mr. Schroth unlawfully refused chemical testing, finding that City of Oshkosh police officer Joey Rebedew had the requisite level of probable cause to believe that Mr. Schroth was operating a motor vehicle while under the influence of an intoxicant, and that Mr. Schroth refused chemical testing. A Judgement of Conviction was entered on April 1, 2021. (R. 9:1/ A.App. 1).

On April 23, 2021, the defendant timely filed a Notice of Appeal.

Pertinent facts in support of this appeal were adduced at the refusal hearing held on April 1, 2021 and were introduced through the testimony of City of Oshkosh police officer Joey Rebedew. Officer Rebedew testified that on June 23, 2020, he was working in his capacity as a police officer for the City of Oshkosh. On said date, he was dispatched to 2701 South Oakwood Road. Employees of an area business reported there was a male at the location that seemed to be in distress.(R17:3/ A.App. 3). The employees were not sure what was going on, or how the male got there. *Id.*

Once Officer Rebedew arrived on scene, he made contact with Mr. Schroth who was sitting on the sidewalk “just in front of the business.” *Id.* Mr. Schroth appeared to have slurred speech and red bloodshot eyes. Officer Rebedew testified Mr. Schroth did not give him a straight answer as to “why he was there or where he was going.” *Id.* Furthermore, Mr. Schroth’s clothing and forearm had dirt on them. (R. 17:4/ A.App. 4).

Officer Rebedew had concerns Mr. Schroth was intoxicated, and questioned him as to whether he had consumed alcohol. *Id.* Mr. Schroth admitted to drinking two drinks.

Officer Schroth also questioned Mr. Schroth about the location of his vehicle. Mr. Schroth could not give the officer an explanation as to how the vehicle arrived at that location. *Id.* Officer Rebedew observed the vehicle in “what appeared to be in a gorge behind the parking lot on the west side.” It appeared to be in a ditch. (R.17:4-5/ A.App. 4-5). Officer Rebedew opined that someone who exited the vehicle would have gotten dirt on them when exiting. (R.17:5/ A.App. 5). He also testified there was no one else around. *Id.*

Officer Rebedew looked for and found tire tracks, but “could not tell whether tire tracks led to the public highway.” (R.17:5/ A. App. 5).

Mr. Schroth mentioned to the officer he was at a golf outing or other event before this at Utica Golf Course, and he was headed home. (R.17:6/ A.App. 6). Mr. Schroth then performed and failed field sobriety testing. Officer Rebedew concluded Mr. Schroth was impaired, and transported him to Mercy Medical Center for a blood draw. (R.17:7/ A.App. 7).

Rebedew testified he read Mr. Schroth the Informing the Accused form, and subsequently Mr. Schroth refused testing. (R.17:8/ A.App. 8).

On cross-examination, Officer Rebedew admitted he did not know the exact time when he was dispatched. He believed it was closer to evening, but it was still light out. (R.17:9/ A.App. 9). When he arrived on the scene, Mr. Schroth was not in the vehicle, and Officer Rebedew had no information anyone observed Mr. Schroth operating the vehicle *Id.*, or saw or heard an accident. (R.17:11/ A.App. 11).

Further, Officer Rebedew admitted, the area where the vehicle was located, was not adjacent to the roadway. (R.17:10/ A.App. 10). The weather was clear and sunny. (R.17:11/ A.App. 11). According to Rebedew, “later on” Mr. Schroth admitted to another officer he had driven the vehicle, but he had told Officer Rebedew he did not drive the vehicle. The record is unclear as to when this conversation occurred. (That is, before or after the request for chemical testing.)

Counsel asked Officer Rebedew, “and when you asked him to submit to the test was his response? Did he say no, do you remember, or did he say something else?”

Officer Rebedew said he did not recall what Mr. Schroth’s response was when asked to submit to chemical testing. (R.17:13/ A.App. 13). Counsel further inquired, and Officer Rebedew said “I don’t recall exactly what he said when I asked

him.” (R.17:13/ A.App. 13), which clearly contradicts his testimony on direct where he said Mr. Schroth refused to give a sample of his blood.

The State argued the evidence established probable cause that Mr. Schroth drove while impaired and refused chemical testing. (R.17:15-16/ A.App. 15-16). The defense argued the State failed to establish impairment at the time of driving, in fact, the State failed to establish a time frame at all. Further, the defense argued the State did not establish a refusal, because the officer testified he could not remember what Mr. Schroth said when asked to submit to chemical testing. (R.17:16/ A.App. 16).

The court found while Officer Rebedew could not remember “exactly” what Mr. Schroth said when asked to submit to testing, Officer Rebedew did testify Mr. Schroth refused chemical testing. (R.17:16/ A.App. 16). The court erroneously found the evidence showed “there was a complaint of someone driving in the parking lot of a business” (this was never established at the refusal hearing) and there were issues with the person. When officers arrive there is a vehicle running in a ditch, registered to Mr. Schroth, Mr. Schroth says he is coming from a golf outing, from which the court concluded he

was driving on a highway. The court found Mr. Schroth “guilty” of refusing. *Id.*

A Judgment of Conviction finding the refusal improper was entered on April 1, 2021. Mr. Schroth timely filed a notice of appeal on April 23, 2021.

STANDARD OF REVIEW

When reviewing the circuit court’s finding of a refusal, appellate court will uphold the lower courts finding of facts unless they are clearly erroneous, but independently reviews application of those facts to constitutional principles, as questions of law. See *State v. Blatterman*, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26, *In re Smith*, 2008 WI 23, ¶16, bri308 Wis.2d 65, 746 N.W.2d 243.

ARGUMENT

Pursuant to Wis. Stat. §343.305(9)(a)5, a court considers three issues 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 of alcohol...and whether the person was lawfully placed under arrest for a violation of s. 346.63(1).” Second, whether the officer provided the implied consent warning as required under Wis. Stat.

§343.305(4). Third, “whether the person refused to permit the test.”

Mr. Schroth contends the first and third issue have not been met herein, and thus argues the court erred in revoking his license.

C. BASED ON THE FACTS ADDUCED AT THE REFUSAL HEARING, THE COURT ERRED IN FINDING OFFICER REBEDEW HAD THE REQUISITE LEVEL OF SUSPICION TO BELIEVE MR. SCHROTH WAS DRIVING OR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, protects individuals against unreasonable seizures. “A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment...” *State v. Sykes*, 2005 WI 48, ¶14, 279 Wis.2d 742, 695 N.W.2d 277 citing to *State v. Fry*, 131 Wis.2d 153, 169, 388 N.W.2d 565 (1986). In the context of a refusal hearing, probable cause “exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ...that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986) see also *In re*

Smith, 2008 WI 23, ¶15, 308 Wis.2d 65, 746 N.W.2d 243. Probable cause requires that at the moment of arrest, an officer knew of facts and circumstances that were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985). A reasonable police officer need only believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The State has the burden to show the evidence known to the arresting officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of operating a motor vehicle while impaired. *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551, see also *In re Smith*, 2008 WI 23 at ¶15. Probable cause is determined on a case-by-case basis using the totality of the circumstances. *State v. Kasian*, 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996)

This is not a case where the officer observed the defendant operating the motor vehicle or observed deviant driving. see *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551 (Wildly dangerous diving alone might suggest the absence of a sober driver) see also *In re Smith*, 2008 WI 23,

308 Wis.2d 65, 746 N.W.2d 243, (At the time of the arrest, the Deputy knew that the defendant had been driving well in excess of the speed limit late at night on a two-lane highway, and observed the defendant cross the centerline twice).

Here, the officer did not, nor did anyone else, observe any driving. Further, the State failed to establish the time or approximate time of driving, and contrary to the court's factual finding, there is no evidence anyone observed Mr. Schroth operating the motor vehicle in a public place. In concluding that Mr. Schroth operated his motor vehicle while impaired, the court found "the information to this officer is that there is a complaint of someone driving in the parking lot of a business and there are issues with that person." (R.17:17/ A.App. 17). The factual finding that someone complained that a person was driving around in the parking lot is clearly erroneous. There is no evidence in the record to support this finding. In fact, Officer Rebedew's testimony is contrary to this finding. He testified officers were dispatched to the area "because a male seemed to be in distress. They weren't sure exactly what was going on or how he got there..." (R.17:3/ A.App. 13). The court's finding that Mr. Schroth was observed driving around the parking lot is clearly erroneous, and not supported by the record.

The State's burden here is not simply to establish probable cause that Mr. Schroth was impaired, they must also establish probable cause that Mr. Schroth operated his vehicle while impaired. On the record in this case, the state failed to establish probable cause that Mr. Schroth was impaired when he operated the vehicle. It is apparent the vehicle was not on a public roadway or even near the roadway when Officer Rebedew arrived. Rebedew testified the vehicle was in a ditch behind a business, and in an area not open to the public. (R.17:14/ A.App. 14). Further, the evidence on this record did not even establish the time when the officers arrived. When Officer Rebedew was asked what time the dispatch occurred, he testified he did not know the exact time. (R.17:9/ A.App. 9).

Officer Rebedew did not estimate when he thought the vehicle was last driven and had no witnesses who observed Mr. Schroth operating the vehicle. Without more, the state failed to establish Mr. Schroth was probably operating his vehicle while impaired.

B. THE COURT ERRED IN FINDING MR. SCHROTH REFUSED CHEMICAL TESTING

Finally, the State failed to establish Mr. Schroth refused to permit the test. And thus, based on the evidence in this

record, the trial court erred in finding Mr. Schroth refused to permit chemical testing. Once an accused is properly read the warning under the implied consent law, the “obligation of the accused is to take the test promptly or to refuse it promptly.” *State v. Neitzel*, 95 Wis.2d 191, 289 N.W.2d 828 (1980). Here, on direct-examination Officer Rebedew testified he read Mr. Schroth the Informing the Accused Form. (R.17:8/ A.App.) and after reading the form Mr. Schroth refused the test. However, upon further examination during cross, Officer Rebedew conceded he could not remember what Mr. Schroth said when requested to submit to chemical testing.

Counsel asked “And when you asked him to submit to the test what was his response? Did he say no, do you remember, or did he say something else?” Officer Rebedew specifically said “I don’t recall.” (R.17:13/ A.App. 13).

The court found Officer Rebedew did not remember exactly what was said but did remember “he refused to take the test.” (R.17:16/ A.App. 16). This finding is clearly erroneous, and contrary to Officer Rebedew’s own testimony. Officer Rebedew’s own testimony is ambiguous at best, and casts doubt on whether Mr. Schroth refused to permit chemical testing.

Because of the above, the State failed to establish that Mr. Schroth refused to permit the test.

CONCLUSION

Because the State failed to establish the first and third issue under Wis. Stat. §343.305(9)(a)5, the trial court erred in finding Officer Rebedow had probable cause to believe Mr. Schroth operated his motor vehicle while impaired and refused to permit chemical testing. The Court should reverse the judgment of conviction and vacate the refusal.

Dated this 28th day of June, 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 21 pages. The word count is 3861.

Dated this 28th day of June, 2021.

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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 June, 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 28th day of June, 2021.

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APPENDIX