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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

IN THE MATTER OF THE REFUSAL OF DEREK V. SCHROTH
STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2021AP733

v.

DEREK V. SCHROTH
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE FINAL ORDER ENTERED ON
APRIL 5, 2021 IN THE
WINNEBAGO COUNTY CIRCUIT COURT
THE HONORABLE SCOTT C. WOLDT, PRESIDING

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I. Statement of Issues Presented for Review

1. Whether probable cause existed to believe Mr. Schroth committed an OWI, allowing the officer require a blood sample?

Trial court answered: Yes

2. Whether there is sufficient evidence to support a finding the defendant refused to provide a chemical sample of his blood?

Trial court answered: Yes

II. Statement on Oral Argument and Publication

Because this is an appeal under Wis. Stat. 752.31(2)(b), the decision is not eligible for publication. The State believes the law and facts are simple enough that oral argument is not necessary.

III. Statement of the Case

The State believes Mr. Schroth's recitation of the facts of the case to be sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

The issues a court must decide in a refusal hearing are

- a. 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 violation of s. 346.63(1)....

- b. Whether the officer complied with [reading the informing the accused form]
- c. Whether the person refused to permit the test....

Wis. Stat. 343.305(9)(a)5.

Mr. Schroth contests whether there was probable cause for his arrest, and whether he refused the chemical sample. 7 Br. of Defendant-Appellant.

“Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” State v. Weber, 2016 WI 96, ¶ 20, 372 Wis. 2d 202, 216, 887 N.W.2d 554, 561.

When the defendant was arrested, Officer Rebedew knew the following facts:

1. The defendant was sitting in front of a freight depot. R17:P3.
2. Mr. Schroth's car was in a ditch behind the freight depot. R17:P4.

3. Mr. Schroth had dirt on his pants and forearm, R17:P4, and someone exiting Mr. Schroth's car from the ditch would have become muddy or put dirt on their pants and forearm. R17:P5.
4. Mr. Schroth had slurred speech, bloodshot eyes, was not able to form a "straight answer" about why he was on a sidewalk in front of a freight depot, or where he was going. R17:P3
5. Mr. Schroth told another officer he was golfing in Utica, and heading home. R17:P6.
6. Officer Rebedew concluded Mr. Schroth was under the influence of alcohol, and Mr. Schroth did not challenge this conclusion at the refusal hearing. R17:P6-7.
7. At no point in all his interaction with Officer Rebedew, did Mr. Schroth claim there was another driver, or that he drank alcohol after driving. R17:P9.

Any reasonable officer in possession of this evidence would conclude the defendant probably was drunk driving on the public highway (from Utica to the crash site) before the police contact. Mr. Schroth points out the that the officer did not establish the time of driving, (9 Br. of Defendant-Appellant) but that is not a requirement to establish probable

cause. Future investigation such as reviewing surveillance cameras (if any), interviewing golf partners, downloading cell phone geolocation, or any myriad subsequent investigation could establish time of driving, which frankly is mostly relevant at trial for blood admissibility under Wis. Stat. 885.235, not for the issue here of probable cause for OWI.

The State presented sufficient evidence that the defendant refused the blood test. “[T]he test is not whether [a reviewing] court is convinced or believes the evidence but whether ... this court can conclude the trier of the facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true. In order to reverse, we would have to hold that as a matter of law no [fact finder] could be so convinced by the credible evidence presented. State v. Zick, 44 Wis. 2d 546, 553, 171 N.W.2d 430, 434 (1969).

In this case Officer Rebedew testified that the defendant refused the blood draw, R17:P8. The State also offered into evidence the “Informing the Accused” document, which also shows the defendant refused the blood draw. R7. This evidence is sufficient to support the trial Court’s finding the defendant refused the blood test.

V. Conclusion

For the reasons set forth above, Officer Rebedew had probable cause to arrest the defendant for OWI, and sufficient evidence supports the trial court's finding the defendant refused the blood draw.

Dated at Oshkosh, Wisconsin this 27 day of July, 2021

Electronically Signed by:
Adam J Levin 7/27/21
WSBA No. 1045816
Assistant District Attorney
Winnebago County, Wisconsin
Attorney for the Respondent

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 832 words.

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 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 27 day of July, 2021 at Oshkosh, Wisconsin by:

Electronically Signed by:
Adam J Levin 7/27/21
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Assistant District Attorney
Winnebago County, Wisconsin
Attorney for the Respondent

