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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 REPLY BRIEF OF THE DEFENDANT-APPELLANT
DEREK V. SCHROTH**

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TABLE OF AUTHORITIES**Page No.****CASES****Wisconsin Supreme Court**

State v. Nordness, 128 Wis.2d 15, 381 N.W.2d 300
(1986).

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ARGUMENT

The State contends the evidence adduced at the refusal hearing supported the trial court's conclusion that Mr. Schroth probably operated a motor vehicle while impaired. The State points to seven facts to support its conclusion.

A possibility or suspicion that the defendant committed an offense is not sufficient to establish probable cause. The State agrees more is needed. Brief of Plaintiff-Respondent page 2 citing to *State v. Weber*, 2016 WI 96, 372 Wis.2d 202, 887 N.W.2d 554. Defense acknowledges probable cause does not require the State to establish Mr. Schroth was the "actual driver" of the vehicle. *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300.

In *Nordness*, the Court found probable cause where the officer observed a vehicle weaving in the roadway, turned and then saw Nordness whom the officer recognized from previous contacts. The officer pursued Nordness with his emergency lights activated. Nordness turned into a driveway, and the officer observed Nordness alone in the vehicle. Nordness mumbled something to the officer and ran into the house.

The officer, over a loudspeaker, ordered Nordness out of the house. A woman came to the door and claimed she was driving the vehicle. Nordness eventually came to the door, and the officer made several observations indicating Nordness was impaired. *Nordness* at 21-24.

The *Nordness* court held the State does not have to establish the actual driver, and found the evidence sufficient to establish objectively that a “reasonable officer could conclude that there was probable cause to believe the defendant was driving while under the influence of an intoxicant.” *Id.* at 37. In *Nordness*, the officer had first-hand knowledge of the driver and the manner in which the vehicle was operated.

Conversely, unlike *Nordness*, here, Officer Rebedew did not observe Mr. Schroth in the vehicle, thus could not know if Mr. Schroth drove the vehicle to the location, did not know when or for how long the vehicle was parked in the grassy area, and did not observe deviant driving. Nor did anyone in the area, provide Officer Rebedew with said information. In terms of probable cause, the facts herein, are much weaker than those in *Nordness*.

Officer Rebedew’s conclusion must be based on more than a mere hunch. Here, Officer Rebedew’s conclusion that

Mr. Schroth operated a motor vehicle while impaired is merely a hunch. The evidence adduced at the refusal hearing would not lead a reasonable officer to believe that Mr. Schroth operated the motor vehicle while he was impaired.

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 10th day of August, 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 7 pages. The word count is 1258.

Dated this 10th day of August, 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, 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 electronic copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of August, 2021.

Respectfully submitted,

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