

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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COURT OF APPEALS

Appeal No. 2021AP001095

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TARAS O. HALIW,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
COLUMBIA COUNTY, BRANCH I, THE HONORABLE
TODD J. HEPLER, PRESIDING

Respectfully submitted,

TARAS O. HALIW,
Defendant-Appellant

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I BURDEN OF PROOF AND STANDARD OF REVIEW

A. Probable Cause Burden

While the State properly cites precedent for the somewhat relaxed probable cause burden at a refusal hearing, the fact of the matter remains that when evidence is gathered as the result of an unlawful arrest in violation of a defendant’s Fourth Amendment rights, it is the fruit of the poisonous tree and should be suppressed for any further use

in any case, including a refusal hearing. In other words, there should never have been a refusal hearing, because Mr. Haliw's alleged refusal should have been suppressed as a matter of Constitutional law.

B. Clearly Erroneous Standard

Appellant-Respondent's brief-in-chief does not display a "failure to grapple with the standard of review," as the State asserts. As the Defendant-Appellant has already pointed out, the trial court did not make detailed findings or determinations of credibility, outside of Mr. Owerko's credibility. As such, little of the issues in this appeal should be reviewed under a clearly erroneous standard. Rather, the totality of the circumstances should be reviewed *de novo* to determine whether the State has met its burden of establishing probable cause to support Mr. Haliw's arrest.

Again, Deputy Smit's testimony forms the only basis from which the trial court could reasonably have concluded that there was probable cause to believe that Mr. Haliw was driving the night of his arrest. If this Court accepts the State's position that the trial court "impliedly" found Deputy Smit's testimony credible, and adopted it as the factual basis for its decision, then it is the Defendant-Appellant's position that this was, in fact, clear error.

II. PROBABLE CAUSE DETERMINATION

The State claims that the Defendant-Appellant misstates

Deputy Crary's testimony regarding what Mr. Owerko said to him and what was in his report and argues that the record indicates that Mr. Owerko did tell Deputy Crary that Mr. Haliw was driving. Again, that conversation was recorded. And that recording reveals that Mr. Owerko only denied driving, not that he told Deputy Crary that Mr. Haliw was driving. Deputy Crary testified that his report's description of his interaction with Mr. Owerko indicated the same, but referenced another passage on the following page. In the exchange cited in the State's brief, counsel for the defendant read Deputy Crary said passage: "You [Deputy Crary] informed Taras that 'Ed told me that Taras was the driver.'" While the gist that line of questioning may not be crystal clear, it was that the passage on the following page referenced by the Deputy described what he told Mr. Haliw that Mr. Owerko said, rather than what Mr. Owerko actually said.

The Defendant-Appellant previously pointed out that Deputy Crary testified that he observed a set of footprints leading from the driver's side of the vehicle to the cabin in which Mr. Owerko was found. The State attempts to dilute this statement by citing some confusing and inconsistent prior testimony that it managed to extract from Deputy Crary with the aid of being given considerable latitude to lead him. Deputy Crary subsequently made it clear that there

were two sets of footprints, one leading from the driver's side to Mr. Owerko, and a second set originating at the passenger side which he did not follow and did not know to where they led (79:55-56).

Finally, the State argues that the Deputies did have probable cause to believe that the Defendant-Appellant was operating a motor vehicle while intoxicated. While the State's recitation of factors that could be construed as suggesting intoxication may be sufficient for a probable cause finding, for the reasons stated in the Defendant-Appellant's brief-in-chief, the evidence that Mr. Haliw was driving is not.

III. CONCLUSION

For the reasons stated above, the Defendant-Appellant respectfully requests that this Court reverse the trial court's denial of his motion to suppress and remand this matter for further proceeding.

Dated at Middleton, Wisconsin, December 17, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 5 pages and 642 words.

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