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**02-23-2022**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

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Appeal No. 2021AP002054  
Waupaca County Case No. 2019CT000188

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**STATE OF WISCONSIN,**

Plaintiff- Respondent,

v.

**ROBIN D SMOLAREK,**

Defendant- Appellant.

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BRIEF OF DEFENDANT- APPELLANT

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APPEAL FROM THE CIRCUIT COURT FOR WAUPACA COUNTY  
THE HONORABLE TROY NIELSEN PRESIDING

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ISSUE PRESENTED FOR REVIEW

1. Did the officer have probable cause to believe that the Defendant-Appellant was operating under the influence of an intoxicant?

*The Circuit Court answered: Yes.*

*Defendant-Appellant submits: No.*

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is not requested. Publication is requested. The issues present questions of significance.

**STATEMENT OF THE CASE**

This is an appeal from a judgment entered in Waupaca County Circuit Court, the Honorable Troy L Nielsen presiding. The Defendant-Appellant, Robin Smolarek, was found Guilty of Operating with a Restricted Controlled Substance (3<sup>rd</sup>), contrary to Wis. Stats. §346.63(1)(am) (R71:1).

On, April 16, 2017, in the Town of Dayton, Wisconsin, a motor vehicle collision occurred and Smolarek was subsequently charged with the above offense two years later (R1:2).

On November 18<sup>th</sup>, 2020, the Defendant-Appellant filed a Notice of Motion and Motion to Suppress Blood Test. A Motion Hearing was scheduled for December 3<sup>rd</sup>, 2020 but was rescheduled and held on February 24<sup>th</sup>, 2021 and the Court issued a Decision denying Smolarek's Motion to Suppress the Blood Draw (R40:27,28).

A Plea and Sentencing Hearing was held on November 23<sup>rd</sup>, 2021 and Smolarek pled no contest to Operating with a Restricted Controlled Substance (R47:1).

**STATEMENT OF THE RELEVANT FACTS**

***A. The Accident***

Smolarek was involved in a motor vehicle collision on April 16, 2017 in Dayton, Wisconsin. He was intentionally run over by another driver in a pickup truck (R27:1, 2). Police observed that his motorcycle had been rear ended by a truck and subsequently dragged down the road (R40:9, 10). A short time later, at the residence of Donovan Burke, Trooper Burdick met with

Smolarek who was the registered owner of the motorcycle (R40:10). The trooper asked Smolarek some preliminary questions and inquired as to whether or not he needed medical attention, he answered in the affirmative (R40:11). Trooper Burdick did offer to give Smolarek a ride to the hospital but because of his injuries he was not able to bend his leg far enough to fit in the back of her patrol vehicle. Trooper Burdick helped Smolarek into Burke's mother's vehicle. She was in close proximity to Smolarek during this time and did not detect any odor of alcohol or marijuana on the defendant (R40:11).

Upon arriving at the hospital, despite her failing to observe any indicators of intoxication (R40:17), Trooper Burdick arrested Smolarek based on an alleged admission to smoking marijuana prior to the crash. She read Smolarek the informing the accused at 9:20PM citing an unverified admission that Smolarek was smoking marijuana (R29). However, Smolarek has contended he smoked only after the crash (R28:1) and Trooper Burdick herself could not attest to the fact that she knew Smolarek smoked marijuana before the accident (R40:18) nor did she contend that she believed Smolarek was under the influence of an intoxicant per her Alcohol Influence report taken at 10:30PM (R28:1) *See Figure 1*. The Court denied Smolarek's Motion to Suppress the Blood Draw (R40:28). The Defendant would go on to plead no contest (R47:1) and was subsequently convicted (R71:1).

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**ALCOHOL/DRUG INFLUENCE REPORT**  
Wisconsin Department of Transportation

Agency Case # 000047-3674

Document # KR701L4FB3

Page 1 of 2

Name	DOB	Sex	HA	GLD#	Arrest Time	Arrest Date	Incident Time	Incident Date
SMOLAREK, ROBIN DAVID	08/13/1985	M		E060803	10:38 PM	04/16/2017	08:11 PM	04/16/2017
Address				Department				
51081 ERICKSON RD				WI STATE PATROL NORWIS				
WAUPACA, WI 54981				Condition of Other Occupants				
Name of Other Occupants in Vehicle				N/A				
Description: Type, Color, Condition:				N/A				
BLOODY, JACKET, TSHIRT, JEANS								
Breath, Odor of Alcohol Beverage		Attitude		Speech				
NONE		COOPERATIVE		NO CONCERNS				
Signs or Complaints of Illness or Injury								
COMPLAINED OF ROAD RASH AND SHOWED MULTIPLE ROAD RASH WOUNDS AND WANTED TO GO TO HOSPITAL								
What first led you to suspect alcohol or drug influence?								
ADMITTED TO SMOKING MARIJUANA EARLIER IN THE DAY								
Optional: Is the subject under the influence of alcohol?				Is the subject's ability to operate a motor vehicle impaired?				
NO				YES				
Witness(es)								

**Pre-Interview Warning:** Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer and want one, a lawyer will be appointed for you without charge prior to any questioning. If you decide to start answering questions at this time, you can stop anytime during the questioning.

**Waiver of Rights:** I have read, or have had read to me the statement of my rights. I understand what my rights are. I am willing to answer questions at this time. I do not want a lawyer at this time. I understand and know what I am doing.

Date: 04/16/2017 Time: 22:41

Signature

Notes:

Witness:

1. Were you operating a motor vehicle?		
YES		
2. What street or highway were you on?		
RURAL RD TO K		
3. Where were you going?		4. Where were you coming from?
BACK TO DONAVANS		DONAVANS FROM OLD 22
5. What is today's date?		6. Time?
SUNDAY APRIL 16TH		NOT SURE 8:30 MAYBE BROUGHT IN
7. When did you sleep last?	8. How much sleep did you have?	9. Is that your normal amount?
THIS MORNING WOKE UP AROUND 10	8-7 HOURS	YES
10. Are you under doctor's care?	11. For what?	
NO		
12. Have you taken any prescription medication/drugs in the last 24 hours?		13. Time of last use?
NO		
14. Have you been to a dentist in the last 24 hours?		15. What time?
NO		
16. What kind of dental care did you receive?		
17. Do you have GERD?	18. Do you have diabetes?	19. Are you taking insulin?
NO	NO	NO
20. Were you injured externally?	21. Describe:	
NO		
22. On you have any physical defects?	23. Describe:	
NO		
24. Have you been drinking?	25. How much?	26. Time Started?
NO		
27. What have you been drinking?	28. Where were you drinking?	
29. With whom were you drinking?		

EXHIBIT

2-24 190718

28-1

Figure 1 Alcohol Influence Report with Highlighted Sections

## ARGUMENT

### I. THE ARREST FOR OPERATING UNDER THE INFLUENCE WAS CONDUCTED WITHOUT PROBABLE CAUSE TO BELIEVE A LAW VIOLATION HAD OCCURRED, WAS OCCURRING, OR ABOUT TO OCCUR

#### a. STANDARD OF REVIEW

“When reviewing a mixed question of fact and law, appellate courts engage in a two-part inquiry. The first inquiry relates to the circuit court’s findings of fact. Neither the court of appeals nor this court will reverse a circuit court’s findings of historical or evidentiary facts unless they are clearly erroneous. The second inquiry relates to the question whether the historical or evidentiary facts satisfy the relevant constitutional standard,” *State v. McMorris*, 213 Wis. 2d 156, 165, 570 N.W.2d 384, 388 (1997).

#### b. THE CIRCUIT COURT ERRED IN RULING THERE WAS PROBABLE CAUSE FOR THE ARREST

Probable cause to arrest is limited to an officer’s belief that a person was driving or operating a motor vehicle while under the influence of an intoxicant, *State v. Nordness*, 128 Wis. 2d 15, 34, 381 N.W.2d 300 (Wis. 1986). To determine whether probable cause exists for the arrest, the Court will look to the totality of the circumstances, or the information in the officer’s possession to determine whether a reasonable officer would conclude the Defendant probably committed the offense, *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102 (Wis. Ct. App. 1994).

In this case, the officer did not observe any driving and did not corroborate any of the indicators of intoxication on the scene, traveling to



the hospital, or at the hospital. Trooper Burdick does claim that Smolarek admitted he was smoking (R40:15), however nothing in the record supports that Smolarek indicated this to the Trooper before he was under arrest which according to the informing the accused was at 9:20PM, *See figure 2 below,*

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### INFORMING THE ACCUSED

SP4187 4/2010 s.343.305(4) Wis. Stats.

Wisconsin Department of Transportation

Police Number  
000047-3674

Under Wisconsin's Implied Consent Law, I am required to read this notice to you:

You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified.

In addition, your operating privileges will also be suspended if a detectable amount of a restricted controlled substance is in your blood.

Will you submit to an evidentiary chemical test of your BLOOD ? YES

I certify that I have read the above information to SMOLAREK, ROBIN DAVID

who has been arrested for a violation of 346.53(1)(A) OPERATING WHILE UNDER THE INFLUENCE(3RD)

and have provided him/her a copy of this form. He/She was identified by OTHER

E060803-1  
(Officer Number)

4/16/17 2120 Hrs a.m./p.m.  
(Date and Time) (Arrest)

WI STATE PATROL NCR/WSA  
(Agent)

x Tro. BURDICK  
(Law Enforcement Officer)



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Figure 2, Exhibit 3- Informing the Accused with Highlighted sections

Smolarek does admit to smoking after the crash, however, his official

statement wasn't taken until almost two hours after the informing the accused was read (R27:1). See figure 3 below.

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### TRAFFIC CRASH REPORT - Witness Statement

Wisconsin Department of Transportation  
Form 3400 (Rev. 10/2007)

Witness Name: Robin D. Smolarek Date: 6/13/1985  
Address: \_\_\_\_\_ Area Code Telephone Number: \_\_\_\_\_

City, State and Zip: \_\_\_\_\_ Crash Number: 47-3674  
Date Taken: 11:02 pm at Waukesha Hospital Ended: 11:29

Were you the ☒ Driver ☐ Passenger In what direction were you heading or facing? \_\_\_\_\_  
On what highway were you traveling? \_\_\_\_\_ In what lane were you? \_\_\_\_\_

NARRATIVE: In your own words, explain what happened.

*at my house looking for me*  
At Approx 7 or 7:30 pm I was at Donovan's house sitting in his garage. Someone knocked on the door Donovan answered the door and it was Tim. Donovan went outside to talk to him about 3 mins later I went outside. Tim was talking about an altercation that happened at Donovan's party about a year ago. After the altercation from the party Tim trashed Donovan's house. Donovan told Tim to leave. I was still outside. As Tim left he said "this isn't over". Tim left and as he was driving away he started talking smack. I got on my bike I went after him to get his license plate. I followed Tim down rd 22 onto Rural Rd. Tim stopped in front of the second house down Rural. He back checked me and got out of his truck. When I saw him get out I went around him on the right side and continued driving. I went past Sanders Rd. Towards Hwy K. I was going to take a left on Smith. But I did not because I saw him coming up behind me. I decided to continue.

You may draw a picture to help you explain what happened.

*Rob Smolarek*

EXHIBIT  
1  
2/24/1985

Please complete reverse side, also. X \_\_\_\_\_ (If more than one) \_\_\_\_\_ (Date)

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Figure 3 Exhibit 1-Witness statement with emphasis on time

When determining whether probable cause exists for purposes of an arrest in a suppression motion, the Court is required to consider the weight and credibility of the State's evidence and resolve any conflicts in testimony based on considered fact-finding, *State v. Wille*, 185 Wis. 2d

673, 518 N.W.2d 325 (Wis. Ct. App. 1994). A determination of probable cause requires a finding by the trial court that guilt is more than a possibility, *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (Wis. 1971).

The trial Court in this case could only point to a single hard fact in their decision, the Defendant was driving a motorcycle on the day in question (R40:28). There was no evidence to suggest that guilt was more than a mere possibility when the officer placed Smolarek under arrest at 9:20PM. We contend that the Circuit Court's finding was clearly erroneous.

### **CONCLUSION**

This Court should reverse the trial court and find there was no probable cause to arrest Smolarek for Operating a Motor Vehicle While Intoxicated. This Court should remand with an Order to Dismiss the case with prejudice.

Dated at Appleton, Wisconsin this 22<sup>nd</sup> day of February, 2022

Respectfully Submitted:

By: *Electronically signed by John Miller Carroll*  
John Miller Carroll  
State Bar #1010478

ADDRESS:  
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### FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1075 words.

Dated this 22<sup>nd</sup> day of February, 2022.

**Electronically signed by John Miller Carroll**

John Miller Carroll

State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 22nd<sup>th</sup> day of February, 2022.

**Electronically signed by John Miller Carroll**

John Miller Carroll  
State Bar #1010478