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**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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Cases

*Kenwood Equipment, Inc. v. Aetna Ins. Co.*, 48 Wis. 2d 472, 180 N.W.2d 750 (Wis. 1970).....1

## ARGUMENT

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

The State argues that, under the totality of the circumstances, Trooper Burdick had probable cause to arrest Mr. Smolarek for operating with a restricted controlled substance (3<sup>rd</sup>). 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 yet based on an alleged, uncorroborated admission Burdick arrests the Defendant for operating under the influence.

The State implies that Smolarek admitted to Trooper Burdick that he was smoking marijuana before he was under arrest. However, there is nothing but the officer's own testimony to confirm this fact. While respondent does mention a comment made by the Defendant's counsel at sentencing, none of this information was before the Circuit Court during the suppression hearing or when the Court rendered its decision. Furthermore, an attorney's words are not evidence, Kenwood Equipment, Inc. v. Aetna Ins. Co., 48 Wis. 2d 472, 180 N.W.2d 750 (Wis. 1970) and thus these statements should be given no weight to the determination of this appeal (R40).

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). Although the blood test would ultimately come back positive for THC, there was no evidence, which would suggest to a

reasonable officer, that the Defendant was driving with a restricted controlled substance in his blood before Burdick placed Smolarek under arrest at 9:20PM (R29). We contend that the Circuit Court's finding of probable cause was not supported by the evidence and 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 11<sup>th</sup> day of May, 2022.

Respectfully Submitted:

By: **Electronically signed by John Miller Carroll**  
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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 354 words.

Dated this 11<sup>th</sup> day of May, 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 11<sup>th</sup> day of May, 2022.

**Electronically signed by John Miller Carroll**

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