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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appeal No. 2022 AP 000387
Winnebago County Circuit Court Case Nos. 2021TR008305

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRYNTON C. FOSTON,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MR. FOSTON REFUSED
CHEMICAL TESTING, IN WINNEBAGO COUNTY, THE
HONORABLE SCOTT C. WOLDT, JUDGE, PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT BRYNTON C. FOSTON**

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Excerpts from Refusal Hrg.- 02/21/2022.	Reply.App.1

ARGUMENT

The State argues Officer Katsma had the requisite level of suspicion to request field sobriety tests. While the officer made some physical observations of Mr. Foston, there is nothing in the record tying the observations to alcohol consumption. Officer Katsma did not question Mr. Foston about consuming alcohol, and specifically did not observe an odor of alcohol coming from Mr. Foston. Officer Katsma testified he was “within inches” of Mr. Foston’s face. Yet he still did not testify he observed an odor of alcohol. (R.21:5/Reply.App.1)

The State suggests “there are many impairing substances other than alcohol, many of which are odorless.” Brief of Plaintiff-Respondent, page 4. While this is true, Officer Katsma specifically testified he requested the field sobriety tests because he believed Mr. Foston had been “drinking”. (R.21:5/Reply.App.1)

The evidence adduced at the Refusal Hearing is insufficient to establish that Mr. Foston had been drinking, or to establish the requisite level of probable cause to continue to detain Mr. Foston for field sobriety test.

The brief of Defendant-Appellant adequately addresses the issue, and no further argument will be made.

Dated this 2nd day of August, 2022.

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 9 pages. The word count is 954.

Dated this 2nd day of August, 2022.

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 paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of August, 2022.

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 first names and last initials 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 2nd day of August, 2022.

Respectfully submitted,

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APPENDIX