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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

Appellate Case No. 2022AP1539-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-VS-

ROGER A. WOLF, JR.,

Defendant-Appellant.

**APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN
THE CIRCUIT COURT FOR WOOD COUNTY, BRANCH I,
THE HONORABLE GREGORY J. POTTER PRESIDING,
TRIAL COURT CASE NO. 20-CT-363**

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & SINGH, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

ARGUMENT

I. THE INSTANT CASE IS DISTINGUISHABLE FROM *STATE v. TADYCH*, No. 2009AP1911, 2010 WI App 33, 323 Wis. 2d 824, 781 N.W.2d 551 (Unpublished).

The bulk of the State's argument in opposition to Mr. Wolf's brief is premised upon *State v. Tadych*, No. 2009AP1911, 2010 WI App 33, 323 Wis. 2d 824, 781 N.W.2d 551 (Ct. App. January 20, 2010)(unpublished). State's Response Brief, at pp. 8-13 [hereinafter "SRB"].¹ *Tadych* is, however, distinguishable from Mr. Wolf's case in significant ways.

Unlike *Tadych*, wherein the arresting officer did not have confirmation that Tadych had actually swerved to avoid striking a deer with his vehicle as he averred, in Mr. Wolf's case, law enforcement officers discovered a deer carcass at the scene of Mr. Wolf's accident which he *had* struck, thereby *confirming* his version of events. R24 at 17:7-14. Clearly, the veracity of Tadych's exculpatory excuse carries far less weight because its self-serving nature makes it suspect, unlike Mr. Wolf's truthful representation of what happened. Sergeant Dean even admitted that there was no physical evidence which indicated that "this was an accident that could have been avoided." R24 at 17:7-21. As Mr. Wolf pointed out in his initial brief, there are approximately 18,000 to 20,000 car-deer accidents every year in Wisconsin, and it is patently unreasonable to conclude that every one of them is evidence of an impaired driver.

This matter is further distinguishable from *Tadych* in that Tadych could not perform field sobriety tests "because of the medical treatment he was receiving" while he was lying on a gurney in a hospital emergency room being treated for his injuries. *Tadych*, 2010 WI App 33, ¶ 4. In this case, if Mr. Wolf was perfectly capable of submitting to a preliminary breath test while in the ambulance, he was also capable of performing an alphabet test, a counting backward test, a finger dexterity test, *etc.*, yet Sgt. Dean made no effort to administer any one of these tests.

The State likens Mr. Wolf's case to Tadych's because both made admissions to consuming intoxicants. SRB at p.13. Mr. Wolf's admission, however, had no

¹The State begins numbering the pages of its brief with the notation that its actual page two is page "i," and then continues sequentially therefrom using lower case Roman numbers until it reaches its actual page four where it begins with an Arabic "1." The State left its cover page unnumbered. The State's numbering format is contrary to § 809.19(8)(bm) which requires "**sequential [Arabic] numbering starting at '1' on the cover.**" Wis. Stat. § 809.19(8)(bm) (2021-22). Given this discrepancy, Mr. Wolf will refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as page one (1) as it should have been.

context because Sgt. Dean never asked “Mr. Wolf what he meant by that” nor “went into details as far as what he meant” R24 at 29:16-20. There were no “follow-up[questions] as to how many [drinks Mr. Wolf] had, what types he had, the time of his last drink, *et cetera*.” R24 at 29:21-24. This lack of context renders Mr. Wolf’s admission less than telling or inculcating. For example, an individual can be drinking “all day” at a family or company picnic and still be perfectly sober by the time he departs if his drinking was appropriately distributed across the time he was there. As Mr. Wolf identified in his initial brief, it is *not* illegal in Wisconsin to consume intoxicants and operate a motor vehicle. *State v. Gonzalez*, No. 2013AP2535-CR, 2014 WI App 71, Wisc. App. LEXIS 379 (Ct. App. May 8, 2014)(unpublished).² Absent questions which put Mr. Wolf’s admission into *context*, his statement can be taken as nothing more than the equivalent of “I’ve been engaging in perfectly legal, socially acceptable behavior all day.”

Finally, undercutting the State’s assertion that probable cause to administer a PBT existed in the instant matter are the facts that Sgt. Dean did not observe that Mr. Wolf had (1) bloodshot eyes or (2) slurred speech. R24 at 7:19-23. These latter observations typically accompany a suspicion of impaired driving in nearly 100% of operating while intoxicated arrests. Their absence—*especially* in light of the citizen witness’ failure to observe Mr. Wolf’s motorcycle crossing the centerline or driving in an erratic or otherwise unsafe manner—mitigates *against* a finding of probable cause to administer a PBT. R24 at 16:14-21.

II. THE CIRCUIT COURT’S CONCLUSION OF LAW.

The State never examines in any detail Mr. Wolf’s assertion that the lower court erroneously applied a *per se* rule to circumstances involving accidents and an odor of intoxicants when it concluded that “the case law is clear in that looking at the totality of the circumstances when there is an accident coupled with an odor of alcohol, that’s sufficient for a finding of probable cause.” R52 at 4:12-16. The closest the State comes to addressing Mr. Wolf’s assertion that no such bright-line rule exists is when it reflected on *Tadych* and noted that “the Court [of Appeals] found that the trial court made **specific findings as to the facts** relevant to its determination of probable cause to administer a PBT, . . .” SRB at p.10 (emphasis added).

Because it appears that the lower court concluded it *only* required an “odor” and an “accident” to find probable cause to administer a PBT, Mr. Wolf remains of the position that it applied an erroneous standard of review to his case because there

²This is a limited precedent opinion which may be cited for its persuasive value pursuant to Wis. Stat. § 809.23 (2021-22).

was far more to the totality of the circumstances of his case which, on balance and for the reasons set forth in his initial brief and this reply, did not establish probable cause to administer the PBT. It appears from the circuit court's decision that it chose to ignore this totality, and in Mr. Wolf's estimation, this is a reversible error.

CONCLUSION

For the reasons set forth in his initial brief and in this reply, Mr. Wolf respectfully requests that this Court reverse the judgment of the lower court.

Dated this 17th day of February, 2023.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:

Dennis M. Melowski

State Bar No. 1021187

Attorneys for Defendant-Appellant

Roger A. Wolf, Jr.

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,247 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

Dated this 17th day of February, 2023.

MELOWSKI & SINGH, LLC

Electronically signed by:

Dennis M. Melowski

State Bar No. 1021187

Attorneys for Defendant-Appellant

Roger A. Wolf, Jr.