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

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**Appeal No. 2022AP2138**
**Dodge County Circuit Court Case Nos. 2022TR004523**

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**In the Matter of the Refusal of Matthew E. Sullivan:**

**STATE OF WISCONSIN,**

Plaintiff-Respondent,

v.

**MATTHEW E. SULLIVAN,**

Defendant-Appellant.

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**AN APPEAL FROM THE JUDGEMENT OF CONVICTION AND THE DECISION OF THE TRIAL COURT DENYING MR. SULLIVAN'S REQUEST FOR AN ADJOURNMENT OF THE PROCEEDING, AND FINDING MR. SULLIVAN REFUSED CHEMICAL TESTING IN DODGE COUNTY, THE HONORABLE BRIAN A. PFITZINGER, JUDGE, PRESIDING**

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# THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT MATTHEW E. SULLIVAN

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## STATEMENT OF THE ISSUES

1. Did the Court err by not granting Mr. Sullivan's request to adjourn the proceeding to allow him to have counsel present?

   The trial court denied Mr. Sullivan's request.

2. Did Mr. Sullivan refuse to submit to chemical testing?

   The trial court answered: Yes

## STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

## STATEMENT OF THE CASE/FACTS

The defendant-appellant, Matthew E. Sullivan (Mr. Sullivan) was charged in the Dodge County, Wisconsin, with having operated a motor vehicle while under the influence of an intoxicant (OWI) contrary to Wis. Stat. §346.63(1)(a), with operating a motor vehicle with a prohibited alcohol concentration (PAC) contrary to Wis. Stat §346.63(1)(b), and having refused chemical test in violation of Wis. Stat. §343.305(9) on October 18, 2022.

The defendant timely filed a written request for a refusal hearing on October 25, 2022. A refusal hearing was scheduled for November 28, 2022. On November 23, 2022, Mr. Sullivan, by letter, requested a continuance of the scheduled refusal hearing. (R5:1/App.21) A refusal hearing was held on November 28, 2022, the Honorable Brian A. Pfitzinger, Judge, Dodge County Circuit Court presiding. On said date, Mr. Sullivan appeared at the hearing and again requested the Court to adjourn the hearing so that he could obtain counsel. (R18:4/App.3). The Court advised Mr. Sullivan the matter was noticed for a hearing on the Second, (meaning November 2, 2022). The reason Mr. Sullivan wanted an adjournment was so that he could have counsel present for the hearing. Mr. Sullivan

advised the Court he had intended to hire Attorney Snow, but because of the Thanksgiving holiday, could not get him retained. He further advised the Court that because Attorney Snow had a family issue, he could not be present (R18:7-9/pp.4-6). Attorney Snow was entered in as counsel of record on December 14, 2022.

The Court indicated to Mr. Sullivan that he had since the October 18, 2022 alleged violation date to hire counsel, and forced Mr. Sullivan to proceed with the hearing without counsel.

In terms of the actual refusal hearing, the Court found that Mr. Sullivan refused chemical testing. A Judgement of Conviction was entered on November 28, 2022. (R.10:1-2/ App. 1-2).

On December 14, 2022, the defendant, by former counsel, timely filed a Notice of Appeal.

Pertinent facts in support of this appeal were adduced at the refusal hearing held on November 28, 2022 and were introduced through the testimony of Dodge County Sheriff Deputy Andrew Dean, and Mr. Sullivan. Deputy Dean testified that on October 18, 2022, he was working in his capacity as a deputy sheriff for the Dodge County Sheriff's department. On said date, he was dispatched to the area of County Road A and

County Road C in the Town of Fox Lake, Wisconsin. (R18:13/App.7). When he arrived, another deputy was out in a field with a vehicle that contained two individuals. According to Dean, both individuals appeared heavily intoxicated. (R18:13-14/App.8-9). Dean had information that another officer responded initially, and as Deputy Dean was on his way, said officer radioed that "the driver of the vehicle had driven away and into a field." (R18:16/App.10), where the vehicle was observed by Deputy Dean.

The other deputy, Deputy Meier was "handling Mr. Sullivan" when Deputy Dean arrived. Mr. Sullivan was in the driver's seat, and eventually put into the back of the squad. EMS was called, and after EMS arrived to assess Mr. Sullivan, Deputy Dean spoke to Mr. Sullivan. (R18:15/App.9).

Upon speaking with Mr. Sullivan, Deputy Dean observed Mr. Sullivan to have slurred speech, red glassy eyes and unsteady balance "inside the back seat of the squad". Dean also observed a heavy smell of intoxicant coming from Mr. Sullivan. ***Id.***

Deputy Dean attempted to speak to Mr. Sullivan in the back seat of the squad, but Mr. Sullivan continuously responded "I don't know" to the deputy's questions. Because of the above

observations, Deputy Dean opined that Mr. Sullivan was impaired, and transported him to the Fox Lake City Hall. Dean intended to perform field sobriety testing at that location. (R18:17/App.11).

Deputy Dean also testified that he had information Mr. Sullivan was a diabetic, and on an insulin monitor. Dean was informed the monitor showed a blood sugar level in the 300s and showed Mr. Sullivan to be in that range for approximately six hours. (R18: 17-18/App.11-12).

At City Hall, Dean performed the horizontal gaze nystagmus test (HGN). Dean testified he observed indicators of impairment, including nystagmus at maximum deviation, prior to the onset of forty-five degrees, and lack of smooth pursuit in both eyes. (R18:18/App.12). Dean testified Mr. Sullivan appeared unsteady as he performed the HGN test.

The Court questioned Deputy Dean about injections that Mr. Sullivan claimed he had in his eyes. The Court specifically attempted to determine if said injections might affect the HGN test. (R18:18/App.12). Deputy Dean responded he did not know. (R18:19/App.13).

Deputy Dean attempted to perform the walk and turn and one leg stand test, but Mr. Sullivan said he could not perform those tests. (R18:20/App.14).

Subsequently, Mr. Sullivan was arrested for OWI, but as Deputy Dean indicated, he was also being evaluated by Fox Lake EMS for the diabetic issue. (R18:20/App.14). Mr. Sullivan also consented to a PBT with a result showing .19.

Deputy Dean testified he read Mr. Sullivan the Informing the Accused Form and requested Mr. Sullivan to submit to a chemical test of his blood. (R18:20-21/App.14-15). Deputy Dean testified Mr. Sullivan did not specifically refuse testing but kept saying "I don't know". (R18:21/App.15). Dean testified he advised Mr. Sullivan he needed an answer. However, the record is silent as to whether the officer explained to Mr. Sullivan that if Sullivan continued to say "I don't know" Deputy Dean would consider it as a refusal.

Mr. Sullivan questioned why Deputy Meier, the first office on the scene was not present for the hearing. (R18:22/App.16). Mr. Sullivan testified he was confused as to what was supposed to happen at the hearing. (R18:25/App.17). The Court explained to Mr. Sullivan what the Court was to consider. Mr. Sullivan testified his high blood sugar affects his

ability to "think straight", and indicated he gets confused at times. The Court examined Mr. Sullivan and pressed him on how he "accounted for the PBT of .19". (R18:25/App.18). Mr. Sullivan indicated he did not know. ***Id.***

Mr. Sullivan indicated confusion is what high blood sugar does to him, and this confusion occurred on the date of the alleged refusal and resulted in him saying "I don't know" to Deputy Dean's question about submitting to chemical testing. (R18:25-26/App.18-19).

The Court, without hearing argument, found Deputy Dean had probable cause to believe Mr. Sullivan operated his motor vehicle while impaired. (R18:26/App.19.) The Court relied primarily on the PBT evidence. ***Id.*** Additionally, the Court found Deputy Dean properly read the Informing the Accused form, and Mr. Sullivan clearly refused because Mr. Sullivan said "I don't know". (R18:27/App.20). The Court indicated it would "allow the refusal to go into place." ***Id.***

A Dispositional Order and Judgment of Conviction was entered on November 28, 2022. Mr. Sullivan timely filed a notice of appeal on December 14, 2022.

## STANDARD OF REVIEW

When reviewing the circuit court's finding of a refusal, appellate court will uphold the lower court's finding of facts unless they are clearly erroneous, but independently reviews application of those facts to constitutional principles, as questions of law. See ***State v. Blatterman,*** 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26, ***In re Smith,*** 2008 WI 23, ¶16, 308 Wis.2d 65, 746 N.W.2d 243.

Furthermore, whether to grant an adjournment of a proceeding lies within the discretion of the trial court. See ***Phifer v. State,*** 64 Wis.2d 24, 30, 218 N.W.2d 354 (1974). Reversal of the trial court's decision is appropriate only upon a showing the trial court erred in the exercise of its discretion. ***State v. O'Connell,*** 179 Wis.2d 598, 616, 508 N.W.2d 23, 30 (Ct.App. 1993). In looking at whether the trial court properly exercised discretion, a reviewing court examines the record to "determine whether the Court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process" ***State v. Bunch,*** 191 Wis.2d 502, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

## ARGUMENT

### 1. THE COURT ERRONEOUSLY DENIED MR. SULLIVAN'S REQUEST TO ADJOURN THE REFUSAL HEARING

A denial of a request for an adjournment is addressed to the sound discretion of the Court. ***State v. Anastas,*** 107 Wis.2d 270, 272, 320 N.W.2d 15 (Ct. App. 1982). In determining if the Court misused its discretion, the Court looks to among other things, "(1) the length of delay requested; (2) whether other continuances have been requested and received by the defendant; (3) the convenience or inconvenience to the parties, witnesses and court; (4) whether the delay seems to be for legitimate reasons; or whether its purpose is dilatory; and (5) other relevant factors." ***State v. Wollman,*** 86 Wis.2d 459, 470, 273 N.W.2d 225 (1978).

Here, the Court considered none of the above factors. While the Court indicated Mr. Sullivan had 20 plus days to have hired a lawyer, the Court did not address the length of delay being requested. The length of delay requested was simply a week so that he could hire counsel. The attorney he chose to represent him had a pressing family issue and would not be back until after the Thanksgiving holiday. The Court did not address

whether this was Mr. Sullivan's first request for an adjournment, it was. Further, the defendant had requested no continuances previously. Moreover, the Court did not address the third factor, or even comment on the inconvenience to the parties. Additionally, Mr. Sullivan filed a letter in advance of the hearing which would have limited any inconvenience to the State.

Finally, the delay was for legitimate reasons. While the Court failed to address this issue also, Mr. Sullivan desired to have specific counsel represent him prompted his request for an adjournment. The attorney he chose could not attend, so he requested the adjournment. His request was not a dilatory tactic.

Because of this, the Court failed to consider the above factors, the Court erroneously exercised its discretion by denying Mr. Sullivan's request for continuance.

## 2. SULLIVAN DID NOT REFUSE TO PERMIT CHEMICAL TESTING

The record is clear that Mr. Sullivan did not verbally refuse to permit chemical testing. When asked to submit, Mr. Sullivan, who was suffering from diabetic issues, said he did not know what to do. Wis. Stat. §343.305(9)5 provides the issues contested at a refusal hearing are limited to three. First, whether

the officer had probable cause to believe the suspect was operating a motor vehicle while impaired see §343.305(9)5a, second, whether the officer provided the warning required in Wis. Stat. §343.305(4), see §343.305(9)5b, and third, whether the suspect refused to permit chemical testing §343.305(9)5c. The issue herein deals with the third issue. Under subsection 5c, a person "shall not be considered to have refused the test if it is shown by a preponderance of the evidence that the refusal was due to a physical inability to submit to the test due to a physical disability unrelated to the use of alcohol…"

The State failed to establish is Mr. Sullivan refused to permit chemical testing. The record revealed Mr. Sullivan was suffering from high blood sugar and his blood sugar had been in the 300s for six hours. He was found passed out in a vehicle. Because of the condition of the defendant, officers requested emergency services to respond. (R18:16/App.10). Deputy Dean's testified Mr. Sullivan also was examined by "Fox Lake EMS" for his diabetic episode at the Fox Lake Police Department. (R18:20/App.14).

When Mr. Sullivan testified, his uncontroverted testimony was he could not even feel his feet (R18:24/App.17), and that his high blood sugar at the time of the request for

chemical testing confused him, and he could not think straight. (R18:24/App.17).

The defense acknowledges that once an accused is properly read the warning under the implied consent law, the "obligation of the accused is to take the test promptly or to refuse it promptly." ***State v. Neitzel,*** 95 Wis.2d 191, 289 N.W.2d 828 (1980). Anyone who operates a motor vehicle on a roadway open to the public in the State of Wisconsin is deemed to have consented to a "properly administered test to determine the driver's blood alcohol content." ***State v. Rydeski,*** 214 Wis.2d 101, 107, 571 N.W.2d 417, (Ct. App. 1997). Failure to submit is a refusal. The exception to this rule is if the failure to submit is due to a physical inability or disability unrelated to the consumption of alcohol. ***Id.***

***Rydeski*** also held an individual does not have to say "no" to the request for testing to constitute a refusal. An individual's conduct in certain situations could amount to a refusal. ***Id.*** at 106. In ***Rydeski,*** the officer asked Mr. Rydeski five times to submit to chemical testing. Mr. Rydeski repeatedly asked to use the restroom and became very agitated when officers refused that request. Rydeski refused to answer the officer's question as to whether he would submit to testing. ***Id.*** 105-106. The officer

marked the form as a refusal. ***Id.*** In its holding, the ***Rydeski*** court found conduct can amount to a refusal.

Mr. Sullivan's case is easily distinguishable from ***Rydeski.*** Mr. Sullivan did not refuse to answer the officer's question as to chemical testing. He simply said he did not know. That response was not because Mr. Sullivan was subjectively confused (Subjective confusion is not recognized as a defense. ***State v. Reitter,*** 227 Wis.2d 213, 229, 595 N.W.2d 646 (1999). The response stemmed from his medical condition which made him unable in his words to think straight. His medical issue was confirmed through the officer's testimony. (Mr. Sullivans blood sugar had been in the 300s for six hours).

Mr. Sullivan must establish a physical disability by a preponderance of the evidence. Because of the above, he has met that burden and the Court should have dismissed the refusal.

## CONCLUSION

Because the Court failed to address the stated factors in denying Mr. Sullivan's request for an adjournment, the trial Court erroneously exercised its discretion, and the refusal should be vacated and remanded for further proceedings. Alternatively, because Mr. Sullivan established by a preponderance of the evidence that his answer to the deputies request for chemical

testing was due to a physical disability, and because he did not refuse to permit chemical testing, the State failed to establish the third prong under Wis. Stat. §343.305(9)(a)5, thus, finding Mr. Sullivan refused to permit chemical testing was erroneous. The Court should reverse the judgment of conviction and vacate the refusal.

Dated this 20th day of April, 2023.

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 22 pages. The word count is 3908.

Dated this 20th day of April, 2023.

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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 20th day of April, 2023.

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 20th day of April, 2023.

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## APPENDIX