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

**Appeal No. 2023AP000755
Jefferson County Circuit Court Case Nos. 2023TR000124**

In the Matter of the Refusal of Jacob Karl Schindler:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB KARL SCHINDLER,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING MR. SCHINDLER'S REFUSED
CHEMICAL TESTING IN JEFFERSON COUNTY, THE
HONORABLE BENNETT J. BRANTMEIER, JUDGE,
PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT JACOB KARL SCHINDLER**

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STATEMENT OF THE ISSUES

Did Deputy Eisenberg possess sufficient probable cause to believe Mr. Schindler operated a motor vehicle while under the influence of an intoxicant?

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, Jacob Karl Schindler (Mr. Schindler) was charged in the Jefferson County, with having operated a motor vehicle while under the influence of an intoxicant (OWI) contrary to Wis. Stat. §346.63(1)(a), with operated a motor vehicle with a prohibited alcohol concentration (PAC) contrary to Wis. Stat. §346.63(1)(b), both as fourth offenses and with refusing to submit to a chemical test in violation of Wis. Stat. §343.305(9) on January 7th, 2023.

The defendant, by counsel, timely filed a written request for a Refusal Hearing on January 13, 2023. A Refusal Hearing was held on April 13, 2023, the Honorable Bennett J. Brantmeier, Judge, Jefferson County Circuit Court presiding. On said date, the Court found that Mr. Schindler unlawfully refused chemical testing, finding Jefferson County Sheriff Deputy Ehrin Eisenberg had the requisite level of probable cause to believe Mr. Schindler was operating a motor vehicle while under the influence of an intoxicant, properly read the Informing the Accused and that Mr. Schindler refused chemical testing. (R16:1). A Dispositional Order/Judgment was entered on April 13, 2023. (R.18:1 / A.App.1).

On April 27, 2023, the defendant timely filed a Notice of Appeal.

Pertinent facts in support of this appeal were adduced at the Refusal Hearing held on April 13, 2023 and were introduced through the testimony of Jefferson County Sheriff's Deputy Ehrin Eisenberg. Deputy Eisenberg was working third shift on January 7th, 2023. At 11:33 p.m. on that date, officers were dispatched to the area of County Highway F and County Highway CI in the Town of Sullivan, Jefferson County. (R:30:4/ App.2). Dispatch indicated a vehicle had run off the road. *Id.* However, officers had no information as to when the vehicle had driven off the road, inasmuch as Deputy Eisenberg's recollection was the caller had come upon the vehicle in the ditch, but the called did not actually observe it drive off the road. (R:30:17 / App.12).

Deputy Eisenberg arrived on the scene, and observed Mr. Schindler's vehicle in the ditch. Eisenberg believed the vehicle went through a stop sign and went down into the ditch in a "ravine-like area at a T-intersection." Eisenberg did not know who made the call, but the caller indicated the driver was fine. (R:30:4/ App.2).

Upon exiting the squad, Deputy Eisenberg heard the car engine revving “almost like he was trying to – or somebody was trying to, um, get the vehicle out.” (R:30:5/ App.3).

Deputy Eisenberg contacted Mr. Schindler as Mr. Schindler was seated in the driver’s seat of the vehicle. (R:30:6/ App.4). Eisenberg asked Schindler to turn off the vehicle and after multiple commands he finally complied and turned the vehicle off. Officers subsequently requested Mr. Schindler to exit the vehicle. (R:30:7 / App.5). Mr. Schindler did not exit the vehicle. *Id.*

While Mr. Schindler was seated in the vehicle, Deputy Eisenberg observed an odor of an intoxicant coming from the vehicle. He also observed Mr. Schindler to have bloodshot, glassy eyes and slurred speech. (R:30:7 / App.5).

A second deputy, Deputy Ritzman was also on the scene. Deputies once again asked Mr. Schindler to remove himself from the vehicle, but he did not. (R:30:8 /App.6). Deputies proceeded to open the door of the vehicle, asking again that Mr. Schindler exit the vehicle, Mr. Schindler reached for a pen, and officers grabbed onto Mr. Schindler and pulled him out of the vehicle. (R:30:8 / App.6).

Deputies pulled him to the ground, eventually assisted him to his feet and stabilized him against his vehicle. (R:30:8 / App.6). Deputy Eisenberg testified she told Mr. Schindler to place his hands behind his back multiple times, but felt resistive tension and officers could not immediately put the handcuffs on Mr. Schindler. Eisenberg gave two to three knee strikes to the back of Mr. Schindler's leg, and eventually able to grab his right arm and place it into handcuffs. (R:30:9 / App.7).

According to Eisenberg, at the point he placed Mr. Schindler in handcuffs, other than the above indicia, he had no other indicia of intoxication. (R:30:9 / App.7). Furthermore, at the moment Mr. Schindler was removed from the vehicle, and handcuffed, Deputy Eisenberg conceded officers did not know Mr. Schindler had prior OWI convictions. (R:30:7 / App.5). Eisenberg further conceded the running of Mr. Schindler's driving record occurred after Mr. Schindler was taken into custody. *Id.* Furthermore, only after placing Mr. Schindler in custody did officers receive the information that Mr. Schindler was subject to a .02 alcohol standard. *Id.* Eisenberg acknowledged Mr. Schindler was handcuffed in the back of a squad car when deputies made the determination that he had prior offenses. (R:30:22 / App.14).

Eisenberg conceded based on his training he could not determine how much alcohol one would have to drink to get to a .02 standard.

Deputy Eisenberg testified Mr. Schindler was taken into custody for “investigation of operating while intoxicated.” (R:30:10 / App.8).

After he was in custody, deputies requested Mr. Schindler to perform field sobriety tests. Mr. Schindler was handcuffed in the back of one of the deputy’s squad cars when the request for field sobriety test were made. Mr. Schindler stated no he would not perform the tests. (R:30:11 / App.9). Deputy Eisenberg said the lack of cooperation was a sign of potential intoxication. *Id.*

When Deputy Eisenberg asked Mr. Schindler if he had consumed alcohol that day, Mr. Schindler indicated he does not answer questions. (R:30:12 / App.10) Eisenberg said the arrest for OWI was based on the run off, odor of intoxicant, his slurred speech and blood shot and glassy eyes. (R:30:12 / App.10). He specifically testified the time of day was not a factor in his determination. *Id.*

Deputy Eisenberg read Mr. Schindler the Informing the Accused form and Mr. Schindler refused the test of his blood. (R:30:14 / App.11).

On cross-examination, Deputy Eisenberg acknowledged not knowing who made the initial call, however, Eisenberg believed the caller came upon the vehicle in the ravine, rather than observing it drive into the ravine. (R:30:18 / App.13). Eisenberg also stated she did not see any airbag deployment and did not observe any damage to the vehicle. (R:30:18 / App.13). Deputy Eisenberg also conceded that from the odor of intoxicant Eisenberg could not determine if Mr. Schindler was impaired. (R:30:23 / App.15). Eisenberg also conceded he did not know Mr. Schindler's normal speech pattern, and conceded Mr. Schindler had the absolute right not to answer the officer's questions. (R:30:24 / App.16).

Eisenberg also did not know for how many minutes Mr. Schindler was in handcuffs in the squad prior to the officer asking Mr. Schindler to perform field sobriety tests. (R:30:26 / App.17). Furthermore, Deputy Eisenberg did not request Mr. Schindler to submit to a preliminary breath test. Eisenberg further testified he eventually placed the handcuffs in front of Mr. Schindler due to the fact that Mr. Schindler was cooperative. (R:30:29 / App.18).

The State argued the evidence sufficiently established probable cause to believe Mr. Schindler operated a motor

vehicle while impaired. (R:30:30-31/ App.19-20). The defense disagreed arguing the evidence was insufficient to establish probable cause to believe Mr. Schindler operated his motor vehicle while impaired. (R:30:31-32 / App.20-21).

The court found Deputy Eisenberg had probable cause to believe Mr. Schindler operated a motor vehicle while intoxicated, based on the odor of alcohol, slurred speech, bloodshot eyes and the vehicle run-off. (R:30:32-33 / App.21-22). The Court found the refusal improper, and revoked Mr. Schindler's operating privileges, among other things. *Id.*

A Dispositional Judgment/Order finding the refusal improper was entered on April 13, 2023. Mr. Schindler timely filed a notice of appeal on April 27, 2023.

STANDARD OF REVIEW

When reviewing the circuit court's finding of a refusal, appellate court will uphold the lower courts 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, bri308 Wis.2d 65, 746 N.W.2d 243.

ARGUMENT

Pursuant to Wis. Stat. §343.305(9)(a)5, a Court considers three issues at a Refusal Hearing. First, “whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol...and whether the person was lawfully placed under arrest for a violation of s. 346.63(1).” Second, whether the officer provided the implied consent warning as required under Wis. Stat. §343.305(4). Third, “whether the person refused to permit the test.”

Mr. Schindler challenges the first issue, contending deputies did not have the requisite level of probable cause to believe Mr. Schindler operated his motor vehicle while impaired, and thus argues the Court erred finding the refusal improper and revoking his license.

A. BASED ON THE FACTS ADDUCED AT THE REFUSAL HEARING, THE COURT ERRED IN FINDING DEPUTIES HAD THE REQUISITE LEVEL OF SUSPICION TO BELIEVE MR. SCHINDLER OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, protect

individuals against unreasonable seizures. “A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment...” *State v. Sykes*, 2005 WI 48, ¶14, 279 Wis.2d 742, 695 N.W.2d 277 citing to *State v. Fry*, 131 Wis.2d 153, 169, 388 N.W.2d 565 (1986). In the context of a refusal hearing, probable cause “exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ...that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986) see also *In re Smith*, 2008 WI 23, ¶15, 308 Wis.2d 65, 746 N.W.2d 243. Probable cause requires that at the moment of arrest, an officer knew of facts and circumstances that were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985). A reasonable police officer need only believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The State has the burden to show the evidence known to the arresting officer at the time of the arrest would lead a reasonable officer to believe that

the defendant was probably guilty of operating a motor vehicle while impaired. *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551, see also *In re Smith*, 2008 WI 23 at ¶15. Probable cause is determined on a case-by-case basis using the totality of the circumstances. *State v. Kasian*, 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996)

Here, the deputies are dispatched to a vehicle that has run off the road. Deputies provided no testimony showing their knowledge as to when this runoff might have occurred. Deputies contacted Mr. Schindler and observed an odor of intoxicant. Deputy Eisenberg conceded on cross-examination that the odor of intoxicant only established consumption and does not establish impairment. Eisenberg also testified Mr. Schindler had slurred speech, but also conceded he had never met Mr. Schindler. Eisenberg testified these indicia provided the reason for him to believe that Mr. Schindler was operating his motor vehicle while impaired.

“[A] law enforcement officer may consider numerous factors in order to determine probable cause to arrest. Probable cause may be established through a showing of erratic driving and subsequent ‘stumbling’ of the driver after getting out of the motor vehicle.” *State v. Kennedy*, 2014 WI 132, 359 Wis.2d

454, 856 N.W.2d 834 citing to *State v. Welsh*, 108 Wis.2d 319, 333-35, 321 N.W.2d 245 (1982) overruled on other grounds, *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

Consciousness of guilt coupled with the odor of intoxicant and a motor vehicle accident provided sufficient probable cause to believe a motorist operated a motor vehicle while under the influence of an intoxicant. See *State v. Wille*, 185 Wis.2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994). Furthermore, an officer's observation of erratic driving (vehicle crossing the centerline), coupled with an odor of alcohol, bloodshot and glassy eyes, poor balance and the refusal to perform field sobriety tests provided officer with probable cause to believe a motorist was operating a motor vehicle while impaired. *State v. Babbitt*, 188 Wis.2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994).

Moreover in *State v. Kasian*, 207 Wis.2d 611, 22, 558 N.W.2d 687 (Ct. App. 1996) the nature of an accident coupled with slurred speech and a strong odor of intoxicant provided probable cause to believe Kasian was operating the vehicle while impaired. In *Kasian*, the nature of the accident, a vehicle striking a telephone poll and the defendant lying outside the

vehicle coupled with the strong odor of intoxicant and slurred speech provided sufficient probable cause to believe Mr. Kasian operated his vehicle while impaired.

In *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551 the court found “wildly dangerous” diving alone might suggest the absence of a sober driver, even without other indicia of intoxication. see also *In re Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, (At the time of the arrest, the Deputy knew that the defendant had been driving well in excess of the speed limit late at night on a two-lane highway, and observed the defendant cross the centerline twice.)

Here, the deputies were dispatched to a vehicle that was in the ravine. Other than the vehicle location in the ravine, deputies did not observe any driving let alone “wildly erratic” driving and had no information that anyone else observed operation of the vehicle. According to Eisenberg, there was no damage to the vehicle.

Further, the deputies did not provide any testimony concerning the time the vehicle went into the ravine, or any testimony as to how long the vehicle had been there.

More importantly, Deputy Eisenberg conceded the odor of intoxicant he observed would not tell him if Mr. Schindler

was impaired. Eisenberg further acknowledged he was unaware as to Mr. Schindler's normal speech pattern. Further, Eisenberg acknowledged he did not make any observations as to Mr. Schindler's balance, and there was no testimony about Mr. Schindler having impaired motor coordination.

Here, the deputies asked Mr. Schindler to exit the vehicle, he did not immediately comply, the deputy observed him reach for a pen, the deputies then opened the door of his vehicle, took hold of Mr. Schindler, pulled him out of the vehicle, handcuffed him and placed him in the rear of a squad car. The deputy provided no testimony as to how long he had been in handcuffs or in the back of the officer's squad.

Unlike *Lange*, this is not a case where officers observed "wildly erratic" driving, or observed any driving. See *In re Smith*. Further, unlike *Kasian*, there is no accident here, the vehicle is in a ravine, but there is no damage and no airbag deployment. The fact that the vehicle crashed into a tree and the driver was lying next to the vehicle injured in *Kasian* provided support for a probable cause determination, those facts do not exist in Mr. Schindler's case. More importantly, this is not a case where the officers have an admission or consciousness of guilt as in *Wille*.

Furthermore, Deputy Eisenberg conceded the time of day did not factor into his probable cause decision. Based on the record at the refusal hearing it could not have been a factor inasmuch as the State did not establish the time of operation

The State burden here is not simply to establish probable cause that Mr. Schindler was impaired, they must also establish probable cause that Mr. Schindler operated his vehicle while impaired. On the record in this case, the State failed to establish probable cause that Mr. Schindler was impaired when he operated the vehicle.

CONCLUSION

Because the State failed to establish Deputy Eisenberg had probable cause to believe Mr. Schindler was operating his motor vehicle while under the influence of an intoxicant, the Court should reverse the Judgment of Conviction and vacate the Refusal.

Dated this 30th day of August, 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 25 pages. The word count is 4475.

Dated this 30th day of August, 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 30th day of August, 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 30th day of August, 2023.

Respectfully submitted,

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APPENDIX

Conviction Status Report	App.1
Excerpts from Refusal Hearing 04/13/2023	App.2

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