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

**Appeal No. 2023AP002120
Fond du Lac County Circuit Court Case Nos. 2022CT23**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MITCHELL D. BUTSCHLE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT RULING DENYING THE DEFENDANT-
APPELLANT MOTION FOR SUPPRESSION OF
EVIDENCE, IN FOND DU LAC COUNTY, THE
HONORABLE PAUL G. CZISNY, JUDGE, PRESIDING**

**THE REPLY BRIEF OF THE DEFENDANT-APPELLANT
MITCHELL D. BUTSCHLE**

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State v. Lange, 2009 WI 49, 317 Wis.2d383, 766 N.W.2d
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ARGUMENT

The State claims Deputy Vis had the requisite level of probable cause to arrest Mr. Butschle. Brief of Plaintiff-Respondent, page 6. The State points to the following facts; (1) Mr. Butschle pulled to the side of the road slowly, (2) Vis observed an odor of intoxicant, (3) Mr. Butschle had bloodshot and glassy eyes, (4) Mr. Butschle exhibited six clues on the HGN test and (5) Vis observed two of four potential indicators of impairment on the one leg stand test. (However, Deputy Vis testified he only observed one clue on the one leg stand test (R.45: 9/Reply App.1). “Probable cause to arrest...refers to that quantum of evidence within the arresting officer’s knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while [impaired].” *State v. Lange*, 2009 WI 49, ¶19, 317 Wis.2d 282, 766 N.W.2d 551.

Here, Mr. Butschle’s driving did not suggest impairment. This is not a case where there was a complaint about Mr. Butschle’s driving, or where the officer stopped Mr. Butschle because he observed impaired driving. The stop was for a non-moving violation: a registration violation. Subsequently, Deputy Vis observed an odor of intoxicant coming from Mr. Butschle and

his eyes to be bloodshot and glossy. Obviously, both might be considered potential indicators of intoxication, but alone do not provide probable cause for arrest for OWI. *See State v. Tullberg*, 2014 WI 134, ¶35, 359 Wis.2d 421, 857 N.W.2d 120.

However, there was no testimony from the motion hearing that Mr. Butschle's speech was impaired, and no testimony that his normal motor coordination was impaired. Vis conceded Mr. Butschle's motor coordination was unimpaired. R.45:16-17 /Reply App.2-3) Clearly, prior to the field sobriety testing, Deputy Vis did not have the requisite level of probable cause to arrest Mr. Butschle.

Deputy Vis performed three field sobriety tests. Mr. Butschle passed the walk and turn test with zero clues of impairment (the officer said there was an issue on step 3, but not enough for the officer to count as a clue of impairment.). On the one leg stand test two indicators suggests potential impairment. Here, Deputy Vis said Mr. Butschle slightly swayed while his foot was in the air but performed the remainder of the test without any issue. Based on Deputy Vis' training, one clue did not amount to potential impairment.

Finally, there is the horizontal gaze nystagmus test. Vis testified, over defense counsel's objection, that six clues on this

test shows a 77% chance an individual was over .10. A preliminary breath test taken at the scene showed Mr. Butschle was well under .10 as he blew .048. This casts serious doubt on the deputy's testimony and is consistent with the fact that Deputy Vis observed no signs of impaired driving. Mr. Butschle's speech and motor coordination were unimpaired, and Mr. Butschle showed only one clue (slight sway) on two of the field sobriety tests.

Employing the totality of the circumstances analysis, the facts adduced at the motion hearing in Mr. Butschle's case do not rise to the level of probable cause to believe Mr. Butschle operated his motor vehicle while impaired. The "quantum of evidence" within Deputy Vis' "knowledge would [not have] led a reasonable law enforcement officer to believe that [Mr. Butschle] was operating a motor vehicle while [impaired]." see *Lange* at ¶19

CONCLUSION

Because of this, the State's argument fails, the trial court erred in finding that the Deputy Vis had probable cause to arrest Mr. Butschle for operating a motor vehicle while impaired, and this. Court should vacate the Judgement of Conviction, and reverse the order denying Mr. Butschle's motion.

Dated this 9th day of April, 2024.

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 12 pages. The word count is 1569.

Dated this 9th day of April, 2024.

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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 9th day of April, 2024.

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 9th day of April, 2024.

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APPENDIX

Excerpts from Motion Hearing App.1