STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2024AP1104

v.

DEVRON MICHAEL GREEN
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE CIRCUIT COURT FOR WINNEBAGO COUNT, THE HONORABLE TERESA BASILIERE, PRESDING

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Cases Cited

Wisconsin Statutes Cited

I. Statement of Issue Presented for Review

1) Whether the record in this matter contains sufficient evidence to support the trial court's conclusion there was an unlawful refusal in this matter, and order an interlock?

Trial Court Answered: The record in this matter was sufficient to order an interlock device

II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument, as the matter under review concerns a traffic regulation. Wis. Stat. 752.31(2)(c); Wis. Stat. 809.23(1)(b)4.

III. Statement of the Case

On August 6, 2023 a named citizen witness observed Mr. Green driving a Jeep, swerving and nearly striking the citizen. R3:P2. The defendant was contacted by law enforcement, emitted an odor of intoxicants, had bloodshot eyes, showed 6/6 clues on the horizontal gaze nystagmus test, and was arrested for OWI. *Id.* Mr. Green was read the informing the accused form pursuant to the Wisconsin Implied Consent law, and refused to submit to the blood test requested by the police officer. *Id.* Accordingly, the Trooper obtained a search warrant for the defendant's blood. R2, R3.

The State Patrol filed citations for OWI (R1), Operating with a Restricted Controlled Substance (RCS)

(https://wcca.wicourts.gov/caseDetail.html?caseNo=2024TR002326&countyNo=70&index=0&mode=details), and Unlawful refusal (https://wcca.wicourts.gov/caseDetail.html?caseNo=2023TR007816&countyNo=70&index=0&mode=details).

At a pretrial hearing on May 22, 2024 the defendant plead guilty to the OWI, and the refusal and RCS citations were dismissed. R10. The proceeding was very summary. Mr. Green's counsel noted that the defendant was pleading to the OWI, the refusal would be dismissed, and "we're free to argue regarding the installation of the interlock device." R10:P2. The State noted that an affidavit in the record showed the Mr. Green "was read the informing the accused and refused to submit to the blood test, so [a] search warrant was obtained and the warrant was – the blood was secured pursuant to a warrant. The State believes that… 343.301(1g)(a) says, ["]the Court shall order an interlock if either of the following applies: 1., the person improperly refused to take a test under the implied consent form.["]" R10:P4.[1]

The Court found "there was a refusal here," and ordered the interlock device. R10:P5.

Mr. Green timely appeals.

[1] It appears I was paraphrasing. The statute in fact reads "[t]he person improperly refused to take a test under s. 343.305." I likely intended to say "under [the implied consent statute]," but reviewing this transcript reminds me that spoken text is different than written text, and I regret my imprecision in front of the trial court.

IV. Argument

1. There is sufficient evidence for the trial court to have found an unlawful refusal in this matter.

When reviewing the sufficiency of the evidence, a reviewing court will reverse a conviction only if the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found [probable cause][2] *State v. Poellinger,* 153 Wis.2d 493, 501 (1990). Thus, an appellate court must search the record to support the conclusion reached by the fact finder. *State v. Owen,* 202 Wis.2d 620, 634 (Ct.App.1996).

Mr. Green argues without a refusal finding after a hearing, a trial court may not order an interlock. 6 Brief of Appellant. (Under Mr. Green's logic, an OWI case with a .23 chemical result, where the defendant pleads guilty to the OWI, and the PAC is dismissed, similarly could not have an interlock requirement, without a full hearing and proof and conviction on the alcohol concentration at the time of driving).

[2] *Poellinger* concerns sufficiency of the evidence in a criminal case, where the burden of proof is beyond a reasonable doubt. In this refusal matter, the State's burden of proof is probable cause - "substantially less than at a suppression hearing." *State v. Wille,* 185 Wis.2d 673, 681, (Ct.App.1994). At a refusal hearing, the State is required to "present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant." *State v. Nordness,* 128 Wis.2d 15, 35, (1986). To that end, the State need persuade the circuit court only that the officer's account is plausible. *Id.* at 36; *Wille,* 185 Wis.2d at 681.

As Mr. Green states, Wis. Stat. 343.301(1g) sets forth the circumstances when an OWI sentencing court must order an interlock: after an improper refusal (343.301(1g)(a)(1), or after an OWI or OWI injury conviction with a BAC of 0.15g or greater, (343.301(1g)(a)(2)(a)), or a second or subsequent offense. (343.301(1g)(a)(2)(b)). The statute is silent about the quantum of evidence or procedural requirements necessary to sustain a factual finding of the conditions precedent for an interlock order - that there was a refusal, that the BAC was .15 or greater, or that there was a previous qualifying conviction.

No reported Wisconsin case has addressed this issue.

Factually this case is similar to *Wausau v. Fischer*, 2021 WI App 67, unpublished, and attached in the respondent's appendix. In that case, the municipal court dismissed a refusal accompanying an OWI citation, and after considering evidence, including a stipulation and "hearing evidence" on the facts of the refusal, the Court dismissed the refusal, and imposed the interlock device. *Id.,* ₱₱3-4.

Ms. Fischer contended the Court was without authority to order the interlock with a dismissed refusal, and that there was no evidence of the alcohol concentration. *Id.*, ₱5. The trial court (first reviewing court) found that Wis. Stat. 343.301 required the municipal court to order an interlock if, (just like in Mr. Green's case) it found that Ms. Fischer had improperly refused, regardless of whether the refusal citation was dismissed. *Id.,* ₱6.

(The rest of the *Wausau v. Fisher* decision concerns the application of Wis. Stat. 806.07 (relief from judgment), and appellate jurisdiction, inapposite in this matter).

The trial court found "there was a refusal here." R10. To come to this conclusion, the trial court in this matter appears to have simply listened to the facts from the State regarding the refusal, facts that Mr. Green did not contest in his argument in opposition to the interlock. PP4-5. The State's argument referenced and incorporated the sworn State Patrol affidavit. R10:P4. On review this Court should review this record as a whole, including the sworn affidavit, Mr. Green's failure to contest any facts in argument, and find the facts in the affidavit proved and uncontested.

For a refusal to be unlawful, there must be evidence that the officer had probable cause to believe the defendant was driving while under the influence or with a prohibited alcohol level, that the officer read the informing the accused form, and that the driver refused. 343.305(9)(a)5.

In this case, the officer was told that the defendant was swerving and nearly struck a civilian witness, the defendant emitted the odor of intoxicants, bloodshot eyes, and showed 6/6 clues on the horizontal gaze nystagmus. R3:P2. The defendant was read the informing the accused form. *Id.* The defendant refused to submit to the blood test requested by the police officer. *Id.*

Reviewing the sufficiency of this evidence, this court may reverse a conviction only if the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found the requisite elements of an unlawful refusal. This reviewing court can not make that finding. Relying on that record, this Court, like the reviewing trial court in *Wausau v. Fisher*, should conclude the unlawful refusal was proved, and the interlock mandatory, notwithstanding the dismissal of the refusal citation.

V. Conclusion

Because the factual refusal was proved, the trial court's finding of a refusal was correct, and the court did not err in ordering an interlock.

Dated at Oshkosh, Wisconsin this 10/10/2024

Electronically signed By:

Adam J Levin 10/10/2024

Adam J. Levin
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CERTIFICATION

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 1158 words.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 one or more initials or other appropriate pseudonym or designation 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 at Oshkosh, Wisconsin this October 10, 2024

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