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STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT III

COUNTY OF ONEIDA,

Plaintiff-Respondent,

APPEAL NO.: 2014AP002766

vs.

RANDALL J. BUSAROW,

Defendant-Appellant.

RESPONDENT' S BRIEF

ONEIDA COUNTY CIRCUIT COURT
THE HON. PATRICK F. O'MELIA, presiding
Trial Court Case Nos.: 14 TR 1083 and 14 TR 1084

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**STATEMENT OF ORAL ARGUMENT
AND PUBLICATION**

There is no need for oral argument or publication in this case. This case can be decided by applying applicable and well-recognized case law. The statutory criteria for publication under Wis. Stats. § 809.23 are not met.

STATE OF WISCONSIN
COURT OF APPEALS
DIVISION III

STATE OF WISCONSIN,

Plaintiff-Respondent,

APPEAL NO. 2014AP002766

vs.

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BRIEF OF PLAINTIFF-RESPONDENT

ARGUMENT

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT BUSAROW WAS UNDER THE INFLUENCE OF ALCOHOL AT THE TIME HE OPERATED THE MOTOR VEHICLE WITHOUT THE USE OF THE INTOXIMETER RESULT

Busarow was convicted of violating Section 346.63(1)(a) of the Wisconsin Statutes. This statute is violated by one who operates or drives a motor vehicle on a highway while under the influence of an intoxicant. Wisconsin Jury Instruction 2663B sets forth the elements for this offense. The first element is that the defendant drove or operated a motor vehicle on a highway. The defendant does not dispute that he operated the motor vehicle on a highway.

The second element is that the defendant was under the influence of an intoxicant at the time the defendant drove or operated a motor vehicle.

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of the consumption of an alcoholic beverage.

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." (WIS JI-Criminal 2663B; Appx: 1)

The parties agree that the question on appeal is whether viewing the evidence most favorably to the county, there is sufficient evidence in the record to permit the trial court to determine by clear, satisfactory, and convincing evidence that Busarow was under the influence of alcohol at the time he operated a motor vehicle. Further, that in reviewing the sufficiency of the evidence the appellate court does not disturb the trial court's findings unless they are contrary to the great weight and clear preponderance of the evidence. (Appellant's Brief, 12-13)

The facts are undisputed. Busarow did not call any witnesses nor did he put on any evidence to refute the testimony of the County's witness.

When questioned about his drinking, Busarow at first denies consuming alcohol but later admits to consuming two or three beers at 4 or 5 in the afternoon. (R7,23:55) His initial denial and obvious minimizing of his drinking is an admission that his alcohol consumption caused his poor driving. The results of the field sobriety test are certainly inconsistent with his consuming only two or three beers seven or eight hours earlier. Further, when Busarow agreed to voluntarily answer questions on the alcohol/drug influence report he declined to answer the questions "have you been drinking?," "what have you been drinking?" and "where were you drinking?" This conduct is clearly an admission of guilt on behalf of Busarow. (Appx: 2)

There is no dispute that Busarow was unable to safely control his vehicle resulting in what the court characterized as a "bad accident", noting that a pretty sizable tree had been sheared off and extraction by fire personnel was necessary. (R11:45) In making its findings the trial court noted that Busarow offered no reasonable explanation for the crash. Further that he offered no

reasonable explanation at a time when a sober person would most likely do so. (R11:45)

Busarow stated he had been drinking with a friend at Lake Nokomis. (R7,23:57) He had nothing to drink at the bar where the officer picked him up. (R723:58) When asked when he had his last drink he indicated "whatever time it took for me to walk from here to there and about a half an hour before that..." (R7,00:23) The half an hour would be consistent with the amount of time a person would need to drive from Lake Nokomis to the point of the accident.

Busarow indicated that he was not drinking in his vehicle. (R7,23:58) In answering questions on the alcohol/drug influence report, Busarow admitted that he was involved in a crash and indicated that he had not been drinking or using drugs since the crash. (Appendix 2)

Field sobriety tests were begun at approximately 11:59 p.m. (R7,23:59) Deputy Semmerling testified that he had training and experience in the administration of field sobriety tests. (R11:11) The first test that was administered to Busarow was the HGN test. The officer testified that this test has six possible clues for intoxication. He further testified that he observed all

six clues of intoxication when administering the test to Busarow. (R11:12)

The second test offered was the heel to toe test. While Busarow was performing this test, Deputy Semmerling observed that he stepped out of the instructional stance, stepped off the line on the third step coming back and lost his balance, stepped back and then continued forward on the sixth step returning. (R11:13) Deputy Semmerling testified that there are four possible clues for intoxication on this test. He further indicated that two clues would be an indication of intoxication. In administering the test to Busarow, Deputy Semmerling indicated that he observed two clues indicating that Busarow was intoxicated. (R11:14) In reviewing the video, the court found that it was rather obvious that the defendant was unable to complete the walking and that he dramatically lost his balance during the test. (R11:46-47)

The third test was the one leg stand. In performing the test, Deputy Semmerling observed that Busarow put his foot down at approximately 15 seconds. Deputy Semmerling indicated that he observed one clue of intoxication out of four possible. He further indicated that for the test to

conclude the defendant was intoxicated, two clues would be necessary. (R11:14-15)

In making its findings, the trial court not only noted that the defendant put his foot down but that he failed to keep counting as the officer had instructed him. (R11:47)

The court noted that Busarow was extremely cooperative. Accordingly, the court appropriately inferred that he would not wait but rather reported the accident at the closest place available. (R11:43-44) The court then infers that the accident occurred two hours and 50 minutes before the taking of the intoximeter test at 1:49 a.m. Or at about 11:00 p.m. (R11:44)

Although the court was willing to infer that the intoximeter test was given within the three hours of the driving, the court did not use the intoximeter result in making its finding that the defendant operated a motor vehicle while intoxicated. "That he was not able to manipulate the control safely as exhibited by the accident and ultimately revealed through the field sobriety test that he just was impaired, legally so." (R11:48)

Busarow's argument hinges on the court rejecting the trial courts admission of the intoxilizer result into evidence. However, a close reading of the record indicates

that the trial court did not use the intoxilizer result in making its determination that the defendant was under the influence of an intoxicant at the time he operated the motor vehicle. Since the prohibited alcohol concentration charge was dismissed, this court need not review the trial courts admission of the intoxilizer evidence.

The only question the trial court needed to resolve was why was Busarow unable to manipulate the controls of his vehicle safely. The court noted that the roadway was clear. Further, that Busarow offered no explanation for the accident even though the court noted that if there had had been an explanation other than the alcohol, a sober person would have given it. Busarow failed two of the three sobriety tests with the court noting that he dramatically lost his balance on the walk and turn test. Busarow indicated that he had not been drinking in the vehicle and that he had not consumed alcohol after the accident. The evidence does not give rise to any other reasonable inference but that Busarow lost control of his vehicle because of his consumption of alcohol.

It is not necessary that an exact determination of when the accident occurred be calculated. The court noted Busarow's extreme cooperation and inferred that he went to

the closest place to report the accident. The court found that the accident occurred about one hour before the field sobriety tests were administered at midnight. Since Busarow indicated he had stopped drinking a half an hour before the accident and had not consumed alcohol after the accident, it was appropriate for the trial court to infer that the field sobriety tests provided sufficient evidence as to the impaired nature of Busarow at the time of the accident.

CONCLUSION

The evidence viewed most favorably to the county, is sufficient to support the trial court's finding by clear, satisfactory and convincing evidence that Busarow was under the influence of alcohol at the time he operated a motor vehicle. Accordingly, it is respectfully requested that this court affirm the trial court's judgment of conviction.

Respectfully submitted on February 27, 2015.

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