STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

APPEAL NO. 2015-AP-213

CASE NO. 2011-TR-3678
(LA CROSSE COUNTY)

JOSEPH WILLIAM NETZER,
DEFENDANT-APPELLANT.

REPLY BRIEF
OF
JOSEPH WILLIAM NETZER, DEFENDANT-APPELLANT
OF
JUDGMENT OF CONVICTION ENTERED OCTOBER 29, 2014 IN THE CIRCUIT COURT OF LA CROSSE COUNTY, THE HONORABLE JUDGE TODD W. BJERKE, PRESIIDING

JOSEPH WILLIAM NETZER
PRO SE

JOSEPH WILLIAM NETZER
1409 SOUTH 19TH STREET
LA CROSSE, WI 54601
608-785-1653

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITY

ARGUMENT

I.

DEFENDANT-APPELLANT IN THIS CASE, JOSEPH WILLIAM NETZER (JWN), RECEIVED INEFFECTIVE OR INADEQUATE ASSISTANCE OF COUNSEL

In his appeal, the Defendant-Appellant, Joseph William Netzer ("JWN"), never claimed this case was a criminal case or that there is necessarily a currently universally recognized right to counsel in this case in its civil case form, contrary to what seemingly is implied by the Plaintiff-Respondent, the State of Wisconsin ("State"). However, even though this is a civil case, it is arguably a quasi-criminal case and arguably when a defendant retains counsel it should not be unsupported by our judicial system that such a defendant should be able to expect, and perhaps have the legal right to legal counsel that performs at a minimal standard of competency which does not impair the defendant's other rights.

Arguably, the instant case is a quasi-criminal case because, even though the charge of a first offense operating a vehicle under the influence of a controlled substance in this case would be in violation of **Section 346.64(1)(am), Wis. Stats.** (hereinafter referred to as "first OUI"), and there is no associated jail time with such a conviction, in the instant case and in most first OUI cases the defendant is still arrested, placed in handcuffs, held in custody as if jailed, booked and fingerprinted. Unlike true civil cases, the outcome of a case with this type of charge impacts the defendant's reputation and future very likely the same as a criminal charge would and could result in a wide variety of police contact the next time, if there is a next time, definitively resulting in a criminal charge. Furthermore, even though JWN ultimately was convicted of a first offense OUI, the State could have also filed and attempted to prove criminal charges in this case, such as possession, etc., if it chose to - so in this case JWN was actually facing possible criminal charges.

There has been a long-running movement, a "Civil **Gideon** Movement (referring to **Gideon v. Wainwright**, 372 U. S. 335 (1963), to expand the rights of defendants to include a right to counsel in civil cases as well as criminal cases. There are already some civil cases, such as termination of parental rights, etc., which recognize a right to counsel. And, the same rationale for requiring a right to counsel in criminal cases applies to quasi-criminal cases and, specifically, to cases such as JWN's first offense OUI case as, like a criminal case, JWN's case involves an individual - and a juvenile at that - who faces in court an adversary with the power, influence, and resources of the State, faces severe and life debilitating penalties (including reduced employability/earning power, increased insurance costs and damage to reputation, etc.) if convicted, as well as possible incarceration if the State would have chose to add charges, and faces possible future incarceration if the State were successful in the instant case and there would be future cases that would rely on this case as a condition precedent to require jail in that next instance. Furthermore, the remedies that are often cited to ameliorate the impact of losing a true civil case (so as to justify not conferring the right to counsel in civil cases) - such as suing for malpractice - are likely insufficient to offset the damage caused by the severe penalties identified above.

Consequently, JWN urges this Court to be a leader in recognizing that a right to counsel should exist in a first OUI case such as this. But, in any event, even without a right to counsel, JWN urges the Court to recognize that when defendants in cases such as this first OUI case receive ineffective or inadequate assistance of counsel that in the instant case is so obviously below the standard for the average local attorney, then a reasonable remedy is to return the case to the trial court if not dismiss the case. In the instant case, given that JWN's attorney, Attorney Nathan Schnick ("Attorney Schnick"), acknowledged in his **Defendant's Brief in Response to Plaintiff's Motion to Deny Extension of Time Limits (R. p. 7, App. P. 139-141)** that he was unclear as to local court rules and failed to timely request a jury trial, which arguably very likely negatively prejudiced JWN's case, then it seems reasonable for this Court to at least remand this case to the trial court to set this matter for a jury trial.

Despite its statements to the contrary, the State was well aware that there were issues as to the effectiveness and adequacy of Attorney Schnick in the instant case. In addition to Attorney Schnick's own admissions in the afore-mentioned **Defendant's Brief in Response to Plaintiff's Motion to Deny Time Limits (R. p. 7, App. P. 139-141)** and the subsequent court hearings thereon followed up by the **Memorandum, Decision and Order (R. p. 9, App. 10-15)** of the trial court judge, the Honorable Judge Todd W. Bjerke ("Judge Bjerke"), JWN wrote several letters to Judge Bjerke, serving the District Attorney's Office with copies of same, that included the same claim that Attorney Schnick was not taking JWN's case seriously and not performing the duties he had promised JWN, including not requesting a jury trial in a timely manner **(See Reply App. p.1-6;** showing letters from September 20, 2012, January 4, 2013, and March 1, 2013**).** Arguably, because of Attorney Schnick's own admissions of his failures in the afore-mentioned **Defendant's Brief**, there is not the need for the **Machner** hearing (See **State v. Machner,** 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) that the State calls for in its brief to add further support from the lawyer himself to document the ineffectiveness and inadequacy of his representation of JWN.

It should be noted that in its brief, the State has made no claim or argument that deny JWN's claim that Attorney Schnick provided ineffective and inadequate legal counsel in this case.

And, even Judge Bjerke acknowledged the ineffectiveness of counsel by Attorney Schnick when Judge Bjerke stated in his **Memorandum, Decision and Order (R. p. 9, App. P. 10-15)** that

> "...despite the undiscovered issues for this trial, a delay in obtaining test results could be anticipated prior to the jury demand time limits passing. Therefore, the Defendant's attorney should have taken steps to assure that his client's rights were preserved at the time the plea was entered."

But, JWN respectfully takes issue on this appeal with the logic of Judge Bjerke in said **Memorandum** to deny an extension of time to make a jury

demand, as Judge Bjerke went on to state in said **Memorandum** that

> "Additionally, though it remains unclear as to what discrepancy took place while entering the plea, not knowing local rules [*on the part of Attorney Schick*] or other associated legal requirements is not an argument for excusable neglect. The Defendant could have requested an extension to the jury time limits at the time the plea was entered."

However, Judge Bjerke's assertion of the remedy is not true as Attorney Schnick informed JWN that JWN did not need to be present at the October 6, 2011 initial appearance (which was in front of a different judge - the Honorable Elliott Levine) so JWN was not present at the October 6, 2011 initial appearance. In fact, Attorney Schnick was not present at that hearing either. But, JWN's father, Jeff Netzer ("Mr. Netzer"), was present at that hearing and witnessed that the court never called his son's, JWN's, name out to the gallery and JWN therefore never really had the kind of initial appearance envisioned by Wisconsin law and JWN was never provided his **Section 45.34, Wis. Stats.** notices including the right to receive notice of the option for a jury trial and the right to a continuance before entering a plea. And, because of these circumstances and because all of Attorney Schnick's communications with JWN lead JWN to believe that a plea would not be entered until the adjourned initial appearance (which happened to be in June of 2012) after the blood test results were returned, JWN had no knowledge that a plea had been entered in his case on October 6, 2011 and JWN did not know that Attorney Schnick had not made a jury demand - which JWN had instructed to be done going back to the time when JWN initially retained Attorney Schnick. In fact, JWN did not know that a jury demand had not been made by Attorney Schnick until the first court hearing after the blood test results came back which was in June of 2012 and that is why Attorney Schnick moved the court for a jury trial at that time - because with JWN now knowing that a jury trial had not been previously requested, he instructed Attorney Schnick to make the demand as soon as he learned of these facts.

Wherefore, JWN prays that the Court on the basis above and for the sake of equity and fairness, will at a minimum remand this case to the trial court and allow JWN to request and receive a jury trial.

II

JOSEPH WILLIAM NETZER (JWN) WAS DENIED THE RIGHT TO A JURY TRIAL

The State is correct in its statement that **Section 345.43(1) Wis. Stats.** requires a defendant to request a jury trial and pay fees in order to preserve the right to a jury trial in a case such as this first OUI. However, it is sadly disappointing that the State emphasizes this when that same statute clearly says that the request is to be made within ten days after a plea and the State knows that JWN has consistently and truthfully informed the trial court and this Court that proceedings on October 6, 2011 at the initial appearance were faulty and JWN did not knowingly make a plea at that time. At the October 6, 2011 initial appearance the court should have called out JWN's name but it did not. JWN is not privy to what happened between Attorney Schnick and the trial court leading up to and just before the October 6, 2011 initial appearance, but JWN emphasized to Attorney Schnick from the moment that he was retained as counsel that JWN wanted to fight the charges against him and wanted a jury trial if there was to be a trial. In any event, neither the trial court nor Attorney Schnick notified JWN about a plea being entered. And, therefore, JWN was also not notified of his **Section 345.34** rights to receive notice of a right to a jury trial and his right to a continuance. Apparently, even Attorney Schnick believed, based upon his **Defendant's Brief (R. p. 7, App. P. 139-1411)** that a plea was going to be not formally entered until the adjourned initial appearance after the blood test results came back. It is objectionable that the State claims that "neither he [JWN] nor his trial counsel were forced by the circuit court to immediately enter a plea at the initial appearance [on October 6, 2011}"

given that the State knew of the phantom plea (with neither Attorney Schnick or JWN being present at the time of the October 6, 2011 initial appearance) as the State would have been the only party present at the actual appearance - and given the consistent protest JWN has documented about the plea in his pleadings and letters submitted to the trial court and the State ever since JWN first learned of the plea. As noted above, JWN's father was present at that initial appearance - but JWN was not present because of instructions from Attorney Schnick that JWN did not need to miss school to be present at this hearing - and JWN's name was never called out to the gallery at that time, so there was no way that JWN would have knowledge of a plea at that time and, in fact, JWN was under the impression based upon those facts and what he was told at the time by Attorney Schnick that there was no plea and there was nothing to be done until the test results came back.

As soon as JWN became aware that a jury demand had not been made he instructed Attorney Schnick, just as he did when he first retained Attorney Schnick, to set the case for trial by jury.

Given the errors of omission re **Section 345.34, Wis. Stats.** at the initial appearance and given JWN's attempts to correct the situation and request a jury trial as soon as he knew the facts of the status of his case, the rule in **Donohoo** should apply in this case and should allow JWN to have a jury trial on the facts of the underlying case. (Please See **City of Madison v. Donohoo**, 118 Wis. 2d 646, 348 N.W. 2d 70 (1984). The facts are very similar in this case to **Donohoo** in the sense that in that case a plea was entered for the Defendant without the Defendant fully understanding or knowingly making the plea and in the interests of justice the Court allowed the Defendant his **Section 345.34** rights and the opportunity to have a continuance and make a jury demand.

III

BLOOD TESTS USED IN THIS CASE SHOULD NOT BE ALLOWED IN EVIDENCE.

JWN has previously challenged the probable cause for his arrest and 'under influence' testing by Officer Paul Iverson ("Officer Iverson") of the University of Wisconsin - La Crosse Police Department ("UWL-PD") at trial(Please see **Transcript, December 27, 2013 (R. p. 56, App. P.87-106);** i.e.: (1) Officer Iverson claimed in his testimony that he witnessed JWN on East Avenue before the stop, but the police report of the other officer at the scene and police dash-cam contradict that testimony; (2) Officer Iverson acknowledged in his testimony that he failed to follow standard procedures of calling the City of La Crosse Police Department and getting the assistance of a DRE - Drug Recognition Expert (please see **Id. at p. 99**)).

Regarding the blood test itself, it was noted at trial that Officer Iverson kept on reading the Informed Consent form to JWN multiple times - five in fact - before JWN finally signed the form. In essence, it is argued that JWN essentially refused to take a blood test on four earlier occasions and Officer Iverson kept on asking JWN to sign the form and "voluntarily" agree to a blood test until he was able to break JWN down and get JWN to agree to the test on the fifth try. In other words, at trial evidence was offered to the trial court that Officer Iverson in essence coerced JWN into taking a blood test (Please see **Transcript, December 27, 2013 (R. p. 56, App. P. 103)**). There are also issues of contamination by Officer Iverson touching JWN where the blood was drawn before the blood draw, the qualifications and the ability of the nurse drawing the blood, Kelly Schallert, who drew JWN's blood in what she described as a very chaotic atmosphere (Please see **Transcript December 27, 2013 (R. p. 56, App. P. 115)**, and the chain of custody of the blood tubes from the hospital to Madison to the ultimate tester in Pennsylvannia and all of these issues have been raised at trial and on this appeal.

Also, the standards required by **Section 343.305(6)(a), Wis. Stats.** have not been complied with in order to make the blood test for JWN and the results derived therefrom valid under Wisconsin law. **Section 34.305(6)(a)** in relevant part states as follows:

> "Chemical analyses of blood or urine to be considered ***valid*** under this section **shall have been performed substantially according to methods approved by the laboratory of hygiene AND by an individual possessing a valid permit to perform the analyses issued by the department of health services..."

However, in this case, the blood allegedly from JWN was first sent to the Wisconsin State Laboratory of Hygiene ("WSLH") on August 22, 2011 but, without explanation by the State, not received by WSLH until one week later on August 29, 2011 (Please see **R. p---, App. P. 136).** The blood was then sent to a Pennsylvania company, NMS Labs. At trial, it was noted that NMS Labs does not substantially perform its testing using methods approved by the WSLH as, specifically, NMS Labs does not perform dual testing and does not double check its work as WSLH would do. According to **Section 343.305 (6)(a),** JWN was therefore deprived of the same test and same protections that any other Wisconsin citizen accused of an offense would have been entitled to.

Furthermore, contrary to the decision of the trial court, JWN believes that the testimony used to introduce the test results of NMS Labs is hearsay or defective and therefore not sufficient to admit the blood test results from NMS Labs into evidence. First, the State attempted to introduce this evidence through the testimony on January 17, 2014 of Laura Liddicoat, an employee of WSLH, and Judge Bjerke admitted the test results based upon that testimony but, after receiving briefs from the parties, subsequently reversed himself and ruled in essence that since the testing was performed by NMS Labs instead of WSLH and since Ms. Liddicoat did not have personal knowledge of the testing that her testimony was deficient in

allowing the test results into evidence. But, Judge Bjerke then allowed the State to continue the trial and have Ayako Chan-Hosokawa from NMS Labs testify on August 6, 2014 - a nearly eight month delay in the trial for the benefit of the unprepared State in a case that started in August of 2011. Judge Bjerke wrote in his **Findings of Fact, Conclusions of Law, and Decision (R. p. 18, App. P. 49-67, at p. 63)**

> "...Chan-Hosokawa was in a position to be 'closely connected to the tests and procedures involved in the case and [she] supervised or reviewed the testing'...Chan-Hosokawa personally reviewed the notes and results of the analyst who actually performed the test..."

JWN disagrees with this analysis by the trial court. Ms. Chan-Hosokawa had no personal knowledge of the test on the blood in question, her testimony showed that she did not directly supervise this testing but rather supervised operations in general, and her only reference to evaluate the results were notes. Ms. Chan-Hosokawa did not talk to the analyst who actually performed the testing. The State did not offer any support for why the actual analyst who performed the testing did not testify and there is no satisfactory claim by the State that the analyst was unavailable. That analyst should have testified, and lacking that testimony the test results should be inadmissible. It was exceedingly unfair and prejudicial to grant the State effectively an eight month "do-over" continuance to correct the State's own blunder of not presenting the proper witness to determine admissibility of the blood tests results especially when, in contrast, the trial court would not allow JWN to correct his attorney's mistake and allow for an extension of time to request a jury trial . This unfairness is even clearer when it is realized that JWN's request would not have delayed this case and would not have caused any harm to the States case and would have served the interests of justice whereas the continuance and the benefits afforded the State contribute to an appearance of favoritism toward the States case, improperly prejudiced JWN's case, and obviously delayed proceedings.

Additionally, the test results also fail to comply with the requirements of **Section 343.305(6)(a)** as the individual performing the testing did not have a valid permit to do so from the Wisconsin Department of Health Services.

CONCLUSION

For the reasons explained above, it is contended here that it is the legal, moral and equitable thing to do to reverse the decision of the trial court in this case. Therefore, Jwn respectfully prays that the Court will either dismiss the State's case or remand this case to the trial court so that JWN may request a jury trial.

Dated at La Crosse, Wisconsin on this 19th day of August, 2015.

Respectfully submitted,

X Joseph William Netzer

Joseph William Netzer
Defendant-Appellant, Pro Se

Joseph William Netzer
1409 South 19th Street
La Crosse, WI 54601
608-785-1653

CERTIFICATION

I hereby certify that this Reply Brief conforms to the rules contained in Sections 809.19(b), Wis. Stats. for a brief produced with a proportional serif font. The length of this brief is 2983 words.

X Joseph William Netzer
Joseph William Netzer
Defendant-Appellant, Pro Se

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12), WIS. STATS.

I hereby certify that:

I received the Plaintiff-Respondent's Brief on August 3, 2015 and I am filing this Reply Brief within statutory time limits in accordance with Section 809.19(4)(a) 1. I further certify that I am filing this Rply Brief *pro se* and therefore am not required to file an electronic brief under Section 809.19(12)(a).

Dated at La Crosse, Wisconsin, on this 19th day of August, 2015.

X Joseph William Netzer
Joseph William Netzer
Defendant-Appellant, Pro Se

CERTIFICATION OF MAILING

I received the Plaintiff-Respondent Brief by mail on August 4, 2015 and I am filing this Reply Brief within statutory time limits in accordance with Section 809.19(4)(a) 1, Wis. Stats. I also hereby certify in accordance with Section 809.80(4), Wis. Stats., that on August 19, 2015 I deposited in the United State mail for delivery to the Clerk of the Wisconsin Court of Appeals ten copies of this Reply Brief by Next-Day Mail (Express Mail) and by regular mail I deposited 3 copies of this Reply Brief for delivery to opposing counsel.

Dated this 19th day of August, 2015.

X Joseph William Netzer

Joseph William Netzer
Defendant-Appellant, Pro Se