

## STATE OF WISCONSIN

## COURT OF APPEALS

## DISTRICT III

*in the matter of the refusal of  
Zachary Tyler Lafave - LaCrosse:  
CITY OF RHINELANDER,*

**RECEIVED**

NOV 30 2022

CLERK OF COURT OF APPEALS  
OF WISCONSIN

Plaintiff,-Respondent,

Case No. 2020AP001120 &amp;

vs.

2020AP001121

ZACHARY T. LAFAVE-LACROSSE,

Defendant, -Appellant,

---

APPELLANT'S BRIEF

---

Appeal from Oneida County Circuit Court

The Honorable Michael H. Bloom, Circuit Court Judge

Oneida County Circuit Court Case No. 2020TR000068 &amp; 2020TR000069

Prepared by:

Zachary T. LaFave-LaCrosse

1105 N. Dysart Rd #91

Avondale, AZ 85323

*Defendant-Appellant, pro-se*

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**(1) THE CIRCUIT COURT ERRORED IN ITS FINDINGS OF JUDGMENT AND DOES NOT COMPLY WITH THE DICTATES OF WIS. STAT. SECTION 346.63(1)(A) OWI (1<sup>st</sup>) AND APPROPRIATE CASE LAW. THE DECISION MUST BE OVERTURNED, WITH ORDER FOR DISMISSAL AND REMOVED FROM APPELLANT'S RECORD.**

**(2) THE CIRCUIT COURT ERRORED IN ITS FINDINGS OF JUDGMENT AND DOES NOT COMPLY WITH THE DICTATES OF**

**WIS. STAT. SECTION 343.305 (9)(a) AND APPROPRIATE CASE  
LAW. THE DECISION MUST BE OVERTURNED, WITH ORDER  
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**STATEMENT OF ISSUES**

1) Whether the Circuit Court erred in their decision to find Mr.

LaFave-LaCrosse guilty of OWI(1st) in accordance to Wis. Stat. 346.63(1)(A)

OWI (1<sup>st</sup>)

DECISION: Court finds ...Trial hearing 03/13/2020---GUILTY

.....Motion hearing 05/15/2020..... DENIED

2) Whether the Circuit Court erred in their decision to find Mr.

LaFave-LaCrosse guilty of Refuse to take test for Intoxication After arrest in

accordance to Wis. Stat. 343.305(9)(a)

DECISION: Court finds...Trial hearing 03/13/2020---GUILTY

.....Motion hearing 05/15/2020.....DENIED

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

No oral argument is necessary. The briefs should fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of this Court's time or cost to the parties. See Wis. Stat. 809.22 (2) (b).

This case does not meet criteria for publication. See Wis. Stat. 809.23 (1).  
The Court's opinion should not be published.

## **STATEMENT OF THE CASE**

### **1. Description of the nature of the case**

This is a civil proceeding case with respect to traffic regulations. Mr. LaFave-LaCrosse was cited for violation of Wis. Stat. 346.63(1)(A) OWI (1<sup>st</sup>) (L.C. #2020TR68) and 343.305(9)(a) Refuse to take a test for Intoxication after arrest. (L.C. #2020TR69) This appeal is regarding the Trial Court's Order for Judgment and Judgment finding Mr. LaFave-LaCrosse GUILTY on both charges and the DENIAL of Motions to Reconsider and Motions for New Trial-Reconsideration.

### **2. Procedural status**

On 01/18/2020, Mr. LaFave-LaCrosse was cited for violation of Wis. Stat. 346.63(1)(A) OWI (1<sup>st</sup>) (L.C. #2020TR68) and 343.305(9)(a) Refuse to take a test for Intoxication after arrest. (L.C. #2020TR69) (R:1; 1-1)(P-App 1)

On 01/18/2020, Informing the Accused (R:4; 1-1)(P-App 2)

On 03/13/2020, Trial Date and Hearing. The Trial Court found Mr. LaFave-LaCrosse guilty in both cases. Order for Judgment and Judgment filed 08/23/2023. (R:66; 1-2)(P-App 3-4)

On 04/02/2020, Mr. LaFave-LaCrosse filed Motion to Reconsider and Motion for New Trial- Reconsideration with Trial Court. (R:5; 1-3)(P-App 5-7) (R:5; 1-4 (L.C #2020TR69)(P-App 8-11)

On 04/14/2020, Notice of Hearing (R:6; 1-1)(P-App 12)

On 05/15/2020, Motion hearing held. Order for Judgment and Judgment filed 08/23/2023. (R: 66; 1-2)(P-App 3-4)

On 06/26/2020, Mr. LaFave-LaCrosse filed Notice of Appeal with the Trial Court. (R:11; 1-1)(P-App 13)

On 6/26/2020, Mr. LaFave-LaCrosse filed a Motion for Waiver of the Cost of Preparing the Transcript with Circuit Court. (R:16; 1-1)(P-App 14)

On 07/06/2020, Mr. LaFave-LaCrosse delivered a Statement of Transcript to the trial Court with instruction to have Court Reporter sign, when Trial Court makes decision on Motion to Waive the Cost of Preparing the Transcript. Trial Court filed in record. (R:17; 1-3)(P-App 15-17)

On 07/09/2020, Mr. LaFave-LaCrosse filed a Motion for 3-Judge Panel with Wis. Court of Appeals via fax. (R: 18; 1-8) (P-App 18-19)

On 07/09/2020 Order from Wis. Court of Appeals (R: 19; 1-1)(P-App 20)

On 07/09/2020, Mr. LaFave-LaCrosse filed a Motion to Extend Time to File Statement of Transcript with the Court of Appeals. (R:18; 1-8)(P-App 21-25)

On 07/17/2020, the Trial Court filed an Order Denying Defendant's Motion for Waiver of the Cost of Preparing the Transcript. (R:19; 1-1)(P-App 26)

On 07/23/2020, Court of Appeals GRANTS Motion to extend time to file Statement of Transcript. (P-App 27)

On 08/25/2020, Mr. LaFave-LaCrosse filed Notice of Appeal with the Trial Court. (R:26; 1-2)(P-App 28-29). Mr. LaFave-LaCrosse also files Motion to Stay. (R:27; 1-2)(P-App 30-31)

On 08/27/2020, the Trial Court entered Order DENYING Defendant's Motion to Stay. (R:29; 1-2)(P-App 32-33)

On 10/16/2020, Order from Wis. Court of Appeals. (R38; 1-1)(P-App 34)

On 04/05/2022, Court of Appeals Decision. (R:52; 1-8)(P-App 35-41)

On 05/24/2022, Mr. LaFave-LaCrosse filed a Motion for Extension of Time. (P-App 42)

On 05/25/2022, Mr. LaFave-LaCrosse signed and sent a Statement on Transcript to the Trial Court for signature and filing. Statement on Transcript filed on 06/22/2022 (R:59; 1-1) (P-App 43)

On 06/01/2022, filed Transcript of 03/13/2020 Court Trial. (R:56; 1-36) (P-App; Varies) filed Transcript of 05/15/2020 Motion Hearing. (R:57; 1-15) (P-App; Varies)

On 06/02/2022, Notice of Reporter Regarding Filing of Transcript was filed by Court Reporter, Lynn Penfield. (R:58 1-1) (P-App 44)

On 07/22/2022, Order from Wis. Court of Appeals. (R:60; 1-1) (P-App 45)

On 09/27/2022, Mr. LaFave-LaCrosse files Motion and Motion to Extend Time to File Appellant's Brief. (P-App 46-49)

On 09/30/2022, Order from Wis. Court of Appeals GRANT motion for extension of time. (P-App 50)

### **STATEMENT OF FACTS**

Mr. LaFave-LaCrosse was cited for violation of Wis. Stat. 346.63(1)(A) OWI (1<sup>st</sup>) and 343.305(9)(a) Refuse to take a test for Intoxication after arrest. (R: 1, 1-1) (P-App 1)

Trial hearing was held, no physical evidence submitted to the trial court that Mr. LaFave-LaCrosse violated Wis. Stat. 346.63(1)(A). The City of Rhinelander did not meet its burden of proof with respect to both citations. There was no evidence of violation under definition of Wisconsin State Statute clearly states: "Operate" means the physical manipulation or activation of any of the controls of the motor vehicle necessary to put it in motion. There was any objection to the facts and testimony provided that the Officer did not comply with Wis. Stat. 343.305(4).

The testimony given by City of Rhinelander witness, Officer Decker and by Mr. LaFave-LaCrosse indicated discrepancies that the City of Rhinelander could not dispute. Officer Decker's testimony indicated during direct examination...(R:56; pg 4-5) (P-App 51-52)

“(Q) And did you come upon a vehicle at about 2:35 that morning? (A) YES. (Q) And where was that? (A) ...it was a sweeping corner on Monico and Thayer Street. (Q) And what did you observe about that vehicle at that time? (A) it appeared the vehicle was up in a snowbank.”

Officer Decker does not indicate during her testimony that she saw or ever saw Mr. LaFave-LaCrosse driving or “operating” the vehicle prior to her “coming upon” the vehicle. When Officer Decker was asked by the City Attorney...(R:56; pg 13)(P-App 53)

“(Q) Did he indicate he had been driving the vehicle? (A) I can't recall”

Officer Decker goes on to testify... (R:56; pg 6)(P-App 54)

“(Q) Okay. What was he doing initially when you had contact with him? (A) He was sitting inside the vehicle.”

Officer Decker's does not specify where in the vehicle he was supposedly sitting. The testimony only indicates that Mr. LaFave-LaCrosse was sitting inside the vehicle. Even though Mr. LaFave-LaCrosse testifies...(R:56; pg 26)(P-App 55)

“Yes. I was not inside my vehicle when the officer showed up. I was outside my vehicle, walking back towards my vehicle, when the officer was there.”

During Direct Examination by City Attorney, Steven Michlig with Mr. LaFave-LaCrosse... (R:56; pg 18-19 )(P-App 57-58)

“(Q) How did that vehicle get in the snowbank? (A) It was icy conditions. (Q) Okay. You were driving? (A) No. (Q) Who was driving? (A) I had a designated driver. (Q) Who was driving the vehicle that night? (A) My mother.”

Later in testimony Mr. LaFave-LaCrosse reiterates his testimony that he was not driving nor “operating” the vehicle... (R:56 pg 25)(P-App 59)

“(Q) All right. and is it your defense to the charge that your mother was driving and – but you were not? (A) Correct. (Q) Okay. Is there a reason why your mother’s not here today to testify? (A) She’s at home watching the baby. (Q) Okay. So she couldn’t make it? (A) Correct. (Q) You weren’t able to make any other arrangements? (A) I tried to reach out to you yesterday for an extension.”

The City of Rhinelander Attorney, Steven Michlig does not go on to contest Mr. LaFave-LaCrosse’s testimony with respect that there was an attempt made to contact the City Attorney’s office for a request for an extension on hearing as Mr. LaFave-LaCrosse’s witness could not be present for the hearing to testify.

The trial court recognizes discrepancies in the testimony as to where Mr. LaFave-LaCrosse was in the vehicle at the moment the officer arrived on scene. (R:56; pg 28-29)(P-App 60-61)

“There is a discrepancy in the testimony between whether Mr. LaCrosse was in the vehicle at the moment Officer Decker first came upon the scene, and that he got out shortly thereafter or whether he was already outside of the vehicle. That distinction is relatively INCONSEQUENTIAL.” (emphasis added)

The trial court goes on to mention on it’s own personal opinion that whether or not Mr. LaFave-LaCrosse’s witness and designated driver did appear in court;

the Honorable Judge Bloom would not have weighed her testimony as fact. The trial Court concludes.... (R:56; pg 30, 32)(P-App 62, 64)

“and Mr. LaCrosse did not bring his mother to offer testimony to the effect that she was driving, which in my judgment was a smart decision on his part.”

“Do I know for sure what happened? No. Do I believe it? No. And it’s to Mr. LaCrosse’s credit that he didn’t bring his mother here to commit perjury.”

The trial court goes on to state... (R:56; pg 30-31)(A-App 62-63)

“I was not present at the intersection of Monico and Thayer street at 2:35am on January 18th, nor was I there minutes or hours leading up to 2:35am, I wasn’t there , so I don’t know. Prior to 2:35am Officer Decker wasn’t there, so she doesn’t know. Mr. Michlig wasn’t there, either. So I have to make what’s called a credibility determination, and this one’s easy. The standard in this case is NOT beyond a reasonable doubt. The standard is a preponderance of the evidence ....”

The City of Rhinelander’s Attorney Steven Michlig only defense in this case is that Mr. LaFave-LaCrosse’s had been drinking alcohol NOT that he was driving or “Operating” the vehicle but that he had drinks at a bar. The only physical evidence presented to the trial court was the witness, Officer Decker completed a field sobriety test in which Officer Decker testified that Mr. LaFave-LaCrosse failed. But during the Officer’s testimony, she clearly indicates concern about the environmental concerns that could hinder accurate results. Officer Decker testifies to her concern...(R:56; pg 6) (P-App 54)

“(Q)...did you ask him to perform any field sobriety tests? (A) I did. (Q) and did he agree to perform those? (A) He did. (Q) Did you have any concerns about the snow conditions or things of that nature in performing the tests at that time? (A) I did.”

Later in testimony from Mr. LaFave-LaCrosse also testified to his defense of the field sobriety test. (R:56; pg 27)(P-App 65)

“I also did indicate before the field sobriety test that I had received a concussion on January the 1st so my balance will be impaired.”

The City of Rhinelander attorney would also like you to believe that Mr. LaFave-LaCrosse could have operated the vehicle due to the fact of Mr. LaFave-LaCrosse’s proximity at the time Officer Decker “come upon” him that early morning, but fails to provide a reasonable, probable theory. Mr. LaFave-LaCrosse testified that he was not driving as mentioned earlier but gave further testimony... (R:56; pg 19-20)(P-App 58, 66)

“(Q) and at the time the officer arrived that morning, where was your mother? (A)She was walking back to the house to get her boyfriend and his car to pull the car out of the ditch. (Q) ...And where is her house? (A) 306 N. Pelham Street. (Q) ...and how far away would that be from where your vehicle was in the snowbank? (A) approximately a mile and a half.”

“(Q) ..How long do you think it took for the officer to conduct the field sobriety tests with you? (A) Approximately a half an hour. (Q) Yeah. So she was there about a half an hour.....(A) Correct.

In his testimony Mr. LaFave-LaCrosse clearly indicates that his mother, designated driver, went to get help. The City Attorney’s notion was that Mr. LaFave-LaCrosse’s designated driver was expected to walk a mile and a half in the middle winter, snow and ice covered roads and walkways and return in less than a half an hour, which was NOT practical nor probable.

In respect to the citation of refusal to take the test, the record shows that Mr. LaFave-LaCrosse did NOT refuse all testing. Mr. LaFave-LaCrosse only refused

the preliminary breath test under his own assumption of the law. Mr.

LaFave-LaCrosse provided testimony as to the reason for initial refusal. (R:56; pg 24)(P-App 67)

“(Q) ..but why didn’t you take the test? (A) I’m from Arizona where we have the right to refuse a Breathalyzer test. I did not know until after the fact that Wisconsin was an implied consent state.”

In Officer Decker's testimony she requested Mr. LaFave-LaCrosse to submit to a preliminary breath test after conducting the field sobriety test....(R56; pg 12-13)(P-App 68,53)

“(Q) Did you ask him to perform any other field sobriety tests? (A) I asked for a preliminary breath test, but that is not a test.” “(A) and he refused.”

“(Q) Okay. And what did you do at that time? (A) I placed him under arrest.”

“(Q) ...After you placed him under arrest, where did you take him? (A) to the Oneida County Jail.”

There was no objection to the fact that the Officer provided Mr. LaFave-LaCrosse with Informing the Accused (R:4; 1-1)(P-App 2). (Note time stamp). The objection is to when Mr. LaFave-LaCrosse was provided with that information. It was provided after his arrest, when the Officer should have provided it upon her initial request for the preliminary breath test. In accordance to the testimony already provided by Officer Decker, she placed Mr. LaFave-LaCrosse under arrest and taken directly to Oneida County Jail. Mr. LaCrosse’s testimony states that the information was provided to him after arrest and in processing at the Oneida County Jail. (R:56 pg 33)(P-App 69)

MR. LAFAVE-LACROSSE: “After the fact.”

The trial court orders judgment on both charges. Order for Judgment and Judgment filed on 08/23/2022. (R:66; 1-2) )(P-App 2-3)

Mr. LaFave-LaCrosse believes that the trial court erred with respect that the trial court's judgment holds no application of law and that the City of Rhinelander failed to support their obligation of burden of proof. Mr. LaFave-LaCrosse filed Motion to Reconsider and Motion for New Trial -Reconsideration on 04/02/2020 (Amended versions filed 04/23/2020). . (R:5; 1-3) (R:5; 1-4)(P-App —)

Motion hearings held, before Honorable Judge Michael Bloom. Mr. LaFave-LaCrosse attempted to present motions and oral argument to the court on 05/15/2020. (R:57 1-15)

Mr. LaFave-LaCrosse attempts to present his Motions to the trial court. (R:57; pg 3-4)(P-App 70-71)

MR. LAFAVE-LACROSSE: Yes. I'm here to present my motion to reconsider case number 2020TR68 and my motion for new trial, case number 2020TR69. The burden of proof was not met in accordance to Wisconsin state statute 346.63(3)(b): “Operate” means the physical manipulation or activation of any of the controls if a motor vehicle is necessary to put it in motion. The facts are the vehicle was parked, not running nor in a position of physical manipulation, nor was I, the defendant, in a position to activate the controls of the vehicle. The statute only requires that the defendant physically manipulate or activate any of the controls necessary to put the motor vehicle in motion. There was no evidence in this case that the defendant performed the requisite acts under this statute. There was no physical evidence submitted that I, the defendant, was operating the vehicle. No evidence in the case showed that the —I, the

defendant, had ever physically manipulated or activated the controls necessary to put the vehicle in action, and there is no circumstantial evidence that the defendant recently operated the vehicle. The testimony given by the witness was disputed, and the Court recognized the testimony had discrepancies. The witness testified that the defendant was in the car upon her arrival, yet later when asked she was unable to answer with clarity that I, the defendant, was in the car upon her arrival. The uncontested testimony verified that neither the witness nor any witness physically say I, the defendant, ever operating the vehicle. We therefore conclude that because there exists no evidence, direct or circumstantial, that the defendant—I, the defendant, touched any of the controls of the vehicle necessary to put into motion, as in *Village of Cross plans versus Haanstad, 2006 Wisconsin 16, 288....*”

THE COURT: “Mr. LaFave-LaCrosse, I apologize for interrupting you but, as I indicated, I’ve read your motions.....

The trial court interjects and does not want Mr. LaFave-LaCrosse to continue with presenting his motions on record.

The City of Rhinelander, Attorney Steven Michlig reiterates to the trial court his argument on record. (R:57; pg 7)(P-App 72)

“And in regards to recency, the location of the vehicle on the street which was found would indicate that it would not have been there a long time, and I think the testimony was consistent that the defendant had not been there a long time, both Mr. LaFave and from the officer who investigated the scene.”

This indication goes to show more for Mr. LaFave-LaCrosse’s testimony being factual, that Mr. LaFave-LaCrosse’s mother, designated driver, had recently left the scene to walk a mile and half away in the middle of winter, and return

within the timeframe already established of 30 minutes. The City of Rhinelander's implication shows no probability.

Mr. LaFave-LaCrosse was then given the opportunity to provide the court with further information regarding evidence. (R:57; pg 8)(P-App 73)

MR. LAFAVE-LACROSSE: " Yes. I'd just like to reiterate that there is no conclusive evidence that I was operating the vehicle; that that testimony is solely speculation."

The trial court does on to clarify relevant facts of Mr. LaFave-LaCrosse's argument...(R:57; pg 8-9)(P-App 73-74)

"because, Mr. LaFave-LaCrosse is correct as far as it goes when he says there, there is no witness who saw him driving the motor vehicle or otherwise operating a motor vehicle."

"and despite the fact that the officer didn't see him driving or didn't even necessarily see him in the vehicle..."

The trial court also acknowledges that field sobriety tests are inconclusive evidence. (R:57; pg 10)(P-App75)

"There are limitations on the ability of field sobriety tests to conclusively indicate intoxication,"

The trial court goes on to acknowledge the issue of refusal relative to Mr. LaFave-LaCrosse's argument. (R:57; pg 12)(P-App 76)

"Relative to Mr. LaFave-LaCrosse's arguments about the refusal in which he points out that he had held an Arizona driver's license and

was unaware of the implied laws in this state and the penalties associated therewith, as far as that goes I can believe that assertion;”

Mr. LaFave-LaCrosse goes on to clarify the record of his testimony and evidence. (R:57; pg 13-14)(P-App 77-78)

MR. LAFAVE-LACROSSE: “I’d like to reiterate that I wasn’t operating the vehicle, that a field sobriety test doesn’t indicate that I was above a legal limit, and I was only given the implied consent from after I was arrested and in processing at the jail at 3:10am.”

COURT: “All right. Well, an officer is not under any legal obligation to deliver the Informing the Accused information to a defendant until after they’ve been arrested. It’s BEFORE (emphasis added) the request—or before the blood or breath test is administered, which is always after arrest. So that’s noted, but that is not pertinent to the Court’s ruling.”

The trial court DENIES Motions. The Trial Court filed an Order for Judgment and Judgment on 08/23/2023. (R:66; 1-2) )(P-App 3-4)

Mr. LaFave-LaCrosse filed Notice of Appeal along with a Motion for Waiver of the Cost for preparing the Transcript with trial court.(R:11; 1-1 AP#2020AP146)(R:16; 1-1(P-App 13-14)

Trial Court DENIED Motion for Waiver of the Cost for Preparing the transcript. In accordance with the language in the Order.....(R:19; 1-1)(P-App 26)

“The above-captioned actions are civil proceedings relative to traffic regulation, an appeal of which, pursuant to sec. 809.40, Stats., is subject to the requirements of secs. 809.01 to 809.26, Stats.”

Mr. LaFave-LaCrosse filed Notice of Appeal on 08/25/2020. Mr. LaFave-LaCrosse argues the Trial Court's denial of Waiver of the Cost for preparing the Transcript and costs was in error and the transcripts for both hearings are needed to present case accurately and support Mr. LaFave-LaCrosse position that the trial court erred in judgment against him. (R:26; 1-2)(P-App 28-29)

Mr. LaFave-LaCrosse filed Motion to Stay with trial Court, within said motion, Mr. LaFave-LaCrosse requests stay on charges and findings of the court for the duration of time on appeal. (R:27; 1-2)(P-App 30-31)

The trial court DENIES Mr. LaFave-LaCrosse's Motion to stay. (R:29; 1-2)(P-App 32-33)

The Court of Appeals files Decision on appeal regarding Mr. LaFave-LaCrosse's motion for Waiver of the cost of Preparing the Transcript. In said decision the Court of Appeal finds..(R:52; 1-8)(P-App 35-41)

Therefore, although the circuit court used an improper standard in denying LaFave's motion to waive his transcript fees....

## ARGUMENT I

**THE CIRCUIT COURT ERRORED IN ITS FINDINGS OF JUDGMENT AND DOES NOT COMPLY WITH THE DICTATES OF WIS. STAT. SECTION 346.63(1)(A) OWI (1<sup>st</sup>) AND APPROPRIATE CASE LAW. THE DECISION MUST BE OVERTURNED, WITH ORDER FOR DISMISSAL AND REMOVED FROM APPELLANTS RECORD.**

**LANGUAGE OF ORDER**

The Circuit Court ordered: (R:66; 1-2) (P-App 3-4)

“The defendant was cited for operating a motor vehicle while under the influence of an intoxicant in Case No. 20TR68 and a Notice of Intent to Revoke Operating Privilege was filed relative to the same underlying incident in Case No. 20TR69. The defendant pled not guilty in Case No. 20TR68 and filed a timely request for a refusal hearing in Case No. 20TR69. A Bench trial was conducted relative to both matters on March 13, 2020, at which the court found the defendant guilty in Case No. 20TR68 and granted judgment accordingly. Relative to Case No. 20TR69, the court made findings pursuant to sec. 343.305(9)(a)5., and, in essence, found the defendant “guilty” of the refusal and imposed the concomitant revocation. On April 2, 2020, the defendant=t filed a Motion to Reconsider in Case No. 20TR68 and a Motion for New Trial-Reconsideration in Case No. 20TR69. A hearing was conducted relative to both motions on May 15, 2020, at which the court denied both the defendant’s motions. THEREFORE, IT IS HEREBY ORDERED, and judgment is hereby rendered that the above -captioned defendant, Zachary T. LaFave-LaCrosse, is adjudicated guilty and/or convicted of refusing to submit to a chemical test, contrary to sec. 343.305(9), Stats. in Case No. 20TR69. IT IS FURTHER ORDERED, and judgment is hereby rendered that the Motion to Reconsider filed by the above-captioned defendant, Zachary T. LaFave-LaCrosse, in Case No. 20TR68, and the Motion for New Trial-Reconsideration filed by the above-captioned defendant, Zachary T. LaFave-LaCrosse, in Case No. 20TR69, is DENIED.”

**SUPPORT FROM THE RECORD**

It is believed that the Trial Court erred in its conclusion of findings and judgment of conviction. The case was heard before Honorable Michael H. Bloom

on March 13, 2020, rendering GUILT verdict and Motion Hearing held on May 15, 2020 rendering DENIAL of motion on charges in accordance to 346.63(1)(a) OWI (1st).

The City of Rhinelander, City attorney, Steven Michlig did not meet its burden of proof on the fact of operation. Facts:

(1) The vehicle was parked, not running, nor was Mr. LaFave-LaCrosse in position of physical manipulation nor was Mr. LaFave-LaCrosse in a position to activate controls of the vehicle. That Fact was recognized by the court but justified at Trial hearing as ...(R:56; pg 28-29)(P-App 60-61)

COURT: "There is a discrepancy in the testimony between whether Mr. LaCrosse was in the vehicle at the moment Officer Decker first came upon the scene, and that he got out shortly thereafter or whether he was already outside of the vehicle. That distinction is relatively INCONSEQUENTIAL." (emphasis added)

and again at Motion Hearing (R:57; pg 8-9)(P-App 73-74)

COURT: "because, Mr. LaFave-LaCrosse is correct as far as it goes when he says there, there is no witness who saw him driving the motor vehicle or otherwise operating a motor vehicle."

COURT: "and despite the fact that the officer didn't see him driving or didn't even necessarily see him in the vehicle..."

In accordance with Wisconsin State Statute 346.63(3)(b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion. The statute only indicates that Mr. LaFave-LaCrosse

physically manipulates or activates any of the controls “necessary to put [the motor vehicle] in motion.” There is no factual evidence in this case that Mr. LaFave-LaCrosse performed the requisite acts under this statute.

(2) No physical evidence was submitted that the defendant was “operating” the vehicle. No evidence in this case showed that Mr. LaFave-LaCrosse had ever physically manipulated or activated the controls necessary to put the vehicle in motion. The testimony given by the witness was disputed and the court recognized the testimony had discrepancies. The uncontested testimony verified that neither the witness nor any witness physically saw the defendant ever operating the vehicle. Mr. LaFave-LaCrosse's own testimony was he was not driving and there was a designated driver that left to get assistance, The City of Rhinelander’s implication of Mr. LaFave-LaCrosse’s testimony was not factual and shows no probability within time restraint yet holds validity with the trial court. This case was founded under speculation, not facts.

So therefore conclude that because there exists no evidence, direct or circumstantial, that the defendant touched any controls of the vehicle necessary to put in motion defined by Statute to justify citation of 346.63(1)(a) OWI (1st)

(3) The City of Rhinelander’s evidence of Mr. LaFave-LaCrosse's field sobriety test under unfavorable conditions, blizzard conditions, snow and ice, was noted and uncontested. The City’s witness, Officer Decker also expressed concern with conditions. (R:56; pg 6) (P-App 54)

“(Q)...did you ask him to perform any field sobriety tests? (A) I did. (Q) and did he agree to perform those? (A) He did. (Q) Did you have any concerns about the snow conditions or things of that nature in performing the tests at that time? (A) I did.”

Mr. LaFave-LaCrosse also testified to his defense of the field sobriety test.

(R:56; pg 27)(P-App 65)

“I also did indicate before the field sobriety test that I had received a concussion on January the 1st so my balance will be impaired.”

The trial court also acknowledges that field sobriety tests are inconclusive evidence. (R:57; pg 10)(P-App 75)

“There are limitations on the ability of field sobriety tests to conclusively indicate intoxication,”

As field sobriety tests are not scientific tests but are observational tools and the perception of which is necessarily subjective. The procedures the officer employed in determining probable cause for intoxication should not have been admissible under such circumstances, upon the testimony given, deemed the findings inadmissible and then concluded that the officer had no probable cause due to the presented circumstances.

(4) The City of Rhinelander’s case against Mr. LaFave-LaCrosse did not have enough viable evidence to convict, yet the trial court rendered it’s decision solely of its own speculation. (R:56; pg 30-31)(A-App 62-63)

COURT “I was not present at the intersection of Monico and Thayer street at 2:35am on January 18th, nor was I there minutes or hours leaving up to 2:35am, I wasn’t there , so I don’t know. Prior to

2:35am Officer Decker wasn't there, so she doesn't know. Mr. Michlig wasn't there, either. So I have to make what's called a credibility determination, and this one's easy. The standard in this case is NOT beyond a reasonable doubt. The standard is a preponderance of the evidence ...."

#### **SUPPORT FROM STATUTE**

346.63 Operating under influence of intoxicant or other drug.

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(3) In this section:

(b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

#### **SUPPORT FROM CASE LAW**

**Village of Cross Plains v. Haanstad**, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.

2d 447, 04-2232.

"Haanstad had never physically manipulated or activated the controls necessary to put the vehicle in motion, and there was no circumstantial

evidence that the defendant recently operated the vehicle, while another person had operated the vehicle. The court concluded that Haanstad did not “operate” the motor vehicle as defined in Wis. Stat. 346.63(3)(b). We also find that this conclusion is consistent with prior Wisconsin cases therefore findings should have been not guilty.

## ARGUMENT II

**THE CIRCUIT COURT ERRORED IN ITS FINDINGS OF JUDGMENT  
AND DOES NOT COMPLY WITH THE DICTATES OF WIS. STAT.  
SECTION 343.305 (9)(a) AND APPROPRIATE CASE LAW. THE  
DECISION MUST BE OVERTURNED, WITH ORDER FOR DISMISSAL  
AND REMOVED FROM APPELLANT'S RECORD.**

### **LANGUAGE OF ORDER**

The Circuit Court ordered: (R:66; 1-2) (P-App 3-4)

“The defendant was cited for operating a motor vehicle while under the influence of an intoxicant in Case No. 20TR68 and a Notice of Intent to Revoke Operating Privilege was filed relative to the same underlying incident in Case No. 20TR69. The defendant pled not guilty in Case No. 20TR68 and filed a timely request for a refusal hearing in Case No. 20TR69. A Bench trial was conducted relative to both matters on March 13, 2020, at which the court found the defendant guilty in Case No. 20TR68 and granted judgment accordingly. Relative to Case No. 20TR69, the court made findings pursuant to sec. 343.305(9)(a)5., and, in essence, found the defendant “guilty” of the refusal and imposed the concomitant revocation. On April 2, 2020, the defendant filed a Motion to Reconsider in Case No. 20TR68 and a Motion for New Trial-Reconsideration in Case No. 20TR69. A hearing was

conducted relative to both motions on May 15, 2020, at which the court denied both the defendant's motions. THEREFORE, IT IS HEREBY ORDERED, and judgment is hereby rendered that the above-captioned defendant, Zachary T. LaFave-LaCrosse, is adjudicated guilty and/or convicted of refusing to submit to a chemical test, contrary to sec. 343.305(9), Stats. in Case No. 20TR69. IT IS FURTHER ORDERED, and judgment is hereby rendered that the Motion to Reconsider filed by the above-captioned defendant, Zachary T. LaFave-LaCrosse, in Case No. 20TR68, and the Motion for New Trial-Reconsideration filed by the above-captioned defendant, Zachary T. LaFave-LaCrosse, in Case No. 20TR69, is DENIED."

### **SUPPORT FROM THE RECORD**

It is believed that the Trial Court erred in its conclusion of findings and judgment of conviction. The case was heard before Honorable Michael H. Bloom on March 13, 2020, rendering GUILT verdict and Motion Hearing held on May 15, 2020 rendering DENIAL of motion on charges in accordance to 343.305(9)(a).

The City of Rhinelander, City attorney, Steven Michlig did not meet its burden of proof on the fact of operation. Facts:

The trial court should have reconsidered its ruling based on evidence and testimony during trial and motion hearing.

(1) During questioning in trial court Mr. LaFave-LaCrosse testified that he held an Arizona Driver's license and was unaware of the implied law in this state on the penalties associated with. Mr. LaFave-LaCrosse provided testimony as to the reason for initial refusal. (R:56; pg 24)(P-App 67)

“(Q) ..but why didn’t you take the test? (A) I’m from Arizona where we have the right to refuse a Breathalyzer test. I did not know until after the fact that Wisconsin was an implied consent state.”

The trial court affirms and does not dispute the testimony. (R:57; pg 12)(P-App 76)

COURT “Relative to Mr. LaFave-LaCrosse’s arguments about the refusal in which he points out that he had held an Arizona driver’s license and was unaware of the implied laws in this state and the penalties associated therewith, as far as that goes I can believe that assertion;”

The trial court goes on to solidify Mr. LaFave-LaCrosse’s defense when Mr. LaFave-LaCrosse should have been provided the Informing the Accused and standard showing no compliance with statute language or in subsec. (4) (R:56; pg 13-14)(P-App 77-78)

MR. LAFAVE-LACROSSE: “I’d like to reiterate that I wasn’t operating the vehicle, that a field sobriety test doesn’t indicate that I was above a legal limit, and I was only given the implied consent from after I was arrested and in processing at the jail at 3:10am.”

COURT: “All right. Well, an officer is not under any legal obligation to deliver the Informing the Accused information to a defendant until after they’ve been arrested. It’s BEFORE (emphasis added) the request—or before the blood or breath test is administered, which is always after arrest. So that’s noted, but that is not pertinent to the Court’s ruling.”

**SUPPORT FROM STATUTE**

**343.305 Tests for intoxication; administrative suspension and court-ordered revocation.**

**(1) Definitions.** In this section:

**(c)** “Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

**(2) Implied consent.** Any person who is on duty with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s.346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a), (am), or (ar), and may designate which of the tests shall be administered first.

(4) Information. At the time that a chemical test specimen is **requested** under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

**SUPPORT FROM CASE LAW**

**State v. Wilke**, 152 Wis. 2d 243, 448 N.W. 2d 13 (Ct. App.1989)

“Wilke reasserts the statutory argument she raised in the trial court. She argues that the officer did not inform her of all the information contained in sec. 343.305(4), stats. Therefore, there was no compliance with subsec. (4), and the trial court was required, under sec. 343.305(9)(d), to order that no action be taken against her operating privileges. We agree and reverse the revocation order.”

**CONCLUSION**

The Circuit Court erred in its findings, there was no application of law, nor application of standards of law. Even with the City of Rhinelander’s preponderance of evidence it still DOES NOT outweigh the testimony and factual evidence presented to the court. The City’s theory is impractical and improbable with that being said the evidence of this case lacks justification of conviction. The testimony of the City’s only witness is found to have discrepancies, the findings of the field sobriety test should have been marked as inconclusive and inadmissible as the witness testifies to her own concern before administration holding no weight

that the results yet was entered as factual evidence. This has led to an assumption of probable cause and a lawful arrest which is the argument of Mr. LaFave-LaCrosse.

Mr. LaFave-LaCrosse, Appellant respectfully requests that both cases be **reversed** with an **order of dismissal with prejudice and all charges be removed from his permanent record.**

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of November, 2022.

A handwritten signature in cursive script, reading "Zachary T. LaFave-LaCrosse", is written over a solid horizontal line.

Zachary T. LaFave-LaCrosse

*Defendant-Appellant (Pro Se)*

ORIGINAL of the  
foregoing sent by U.S. mail for filing  
with the Clerk of the Court of Appeals  
for the State of Wisconsin this 28<sup>th</sup> day of  
November, 2022 and

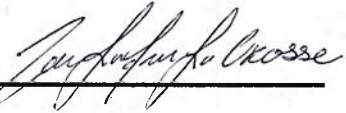
1 copy to:

City of Rhinelander Attn: Steven Michlig  
106 N. Oneida Ave

Rhineland, WI 54501  
*Plaintiff-respondent*

Oneida County Clerk of Courts  
PO Box 400; 1 S. Oneida Ave  
Rhineland, WI 54501

By:

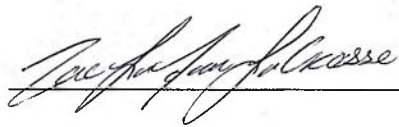
  
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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in  
§809.19(8)(bm) and (c) for a brief produced with a proportional serif font.

The length of this brief is 6763 words.

Date: 11-28-2022

Signature: 

**CERTIFICATION OF MAILING**

I certify that the original of this brief and appendix were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on 11-28-2022. I further certify that the brief and appendix were correctly addressed, and postage was pre-paid.


Also 1 copy of brief and appendix were sent to:

City of Rhinelander Attn: Steven Michlig  
106 N. Oneida Ave  
Rhinelander, WI 54501  
*Plaintiff-respondent*

Oneida County Clerk of Courts  
PO Box 400; 1 S. Oneida Ave  
Rhinelander, WI 54501

Date: 11-28-2022

Signature



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