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**DISTRICT IV**

August 24, 2023

To:

Hon. Todd J. Hepler  
Circuit Court Judge  
Electronic Notice

Margaret Anne Sorrentino  
Electronic Notice

Julie Kayartz  
Clerk of Circuit Court  
Columbia County Courthouse  
Electronic Notice

Malachi David Smalley  
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

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2023AP269

Columbia County v. Malachi David Smalley  
(L.C. # 2022TR2633)

Before Graham, J.<sup>1</sup>

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Malachi David Smalley appeals a judgment of conviction for a yellow traffic signal violation. On this court's own motion, this appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1), under the authority provided in WIS. STAT. RULE 809.83(2).<sup>2</sup>

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

<sup>2</sup> WISCONSIN STAT. RULE 809.21(1) provides in part that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily." And WIS. STAT. RULE 809.83(2) provides in pertinent part that a party's failure "to comply with a court order or with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for ... summary reversal."

Following a bench trial, the circuit court found Smalley guilty of violating WIS. STAT. § 346.37(1)(b), which provides that drivers facing a yellow light generally “shall stop before entering the intersection unless so close to it that a stop may not be made in safety.” Smalley filed a notice of appeal, and he timely filed an appellant’s brief in this court challenging his conviction. Columbia County, which is the respondent in this action, did not timely file a respondent’s brief, nor did it provide any explanation for its delay.

On June 28, 2023, this court sent a notice of delinquent brief to the parties, noting that the County’s brief had not been filed as required under WIS. STAT. RULES 809.19 and 809.82. This court ordered that, “unless within five days of the date of this order, the Brief of Respondent(s) is served and filed or an extension is requested under [WIS. STAT.] RULE 809.14, with good cause shown why the brief has not been timely filed, the judgment or order appealed from will be disposed of summarily and may be summarily reversed under RULE 809.83(2).”

The County failed to file a brief or otherwise respond to the delinquency order. On July 20, 2023, this court issued an order requiring the clerk to submit the appeal to this court to determine whether the appeal may be decided based solely on Smalley’s brief and the record.

On August 7, 2023, having continued to receive no filings of any kind from the County, this court issued an order advising the County that if it did not file a brief “within five days of the date of this order,” the court “will summarily reverse the judgment and order appealed from.”

The August 7 order noted the following:

The “[f]ailure to file a respondent’s brief tacitly concedes that the trial court erred,” *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993), and allows this court to assume that the respondent concedes the issues raised by the appellant. See *Charolais Breeding Ranches, Ltd. v.*

*FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) ....

When a respondent fails to brief an appeal, this court may exercise its discretion and summarily reverse the circuit court, provided the court determines that the respondent has abandoned the appeal or has acted egregiously or in bad faith. See *Raz v. Brown*, 2003 WI 29, ¶18, 260 Wis. 2d 614, 660 N.W.2d 647; see also *Blackdeer*, 176 Wis. 2d at 259-60 (summary reversal is appropriate sanction for a respondent’s violation of briefing requirements).

Despite this court’s repeated notices and warnings, the County has not filed a response brief as of the date of this order, nor has the County requested an extension of time to do so. Based on this history, I conclude that the County has abandoned this appeal. See *Raz*, 260 Wis. 2d 614, ¶18 (“the court of appeals may not grant summary reversal of a circuit court order on appeal as a sanction without a finding of bad faith, egregious conduct, or a *litigant’s abandonment of the appeal*” (emphasis added)); *id.*, ¶36 (when “the court of appeals elects to impose the drastic sanction of summary reversal for failure to file a response brief, it may do so only after unequivocally ordering the filing of a brief and clearly stating the consequences for failure to comply”).

By abandoning this appeal, the County has signaled that it no longer intends to prosecute its case against Smalley. I decline to develop arguments for the County in response to Smalley’s arguments on appeal. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992); *Gardner v. Gardner*, 190 Wis. 2d 216, 239 n.3, 527 N.W.2d 701 (Ct. App. 1994).

Therefore,

IT IS ORDERED that the judgment of conviction is summarily reversed pursuant to WIS. STAT. RULE 809.83(2) and the cause is remanded to the circuit court with directions to vacate the judgment.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*