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DISTRICT II

December 6, 2023

To:

Hon. Gerad Dougville
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Michael D. Graveley
Kenosha Co. District Attorney
912 - 56th St.
Kenosha, WI 53140

John Holevoet
Electronic Notice

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

2023AP686

State of Wisconsin v. William Wayne Jones (L.C. #2023TR1392)

Before Gundrum, P.J.¹

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).

William Wayne Jones appeals from a judgment of the circuit court revoking his driver's license pursuant to WIS. STAT. § 343.305(9)(a) for unlawfully refusing to provide a sample of his blood for chemical testing when requested by a law enforcement officer. The State did not file a respondent's brief. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. For the following reasons, we summarily reverse.

¹ 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 unless otherwise noted.

On appeal, Jones contends his refusal was not unlawful because the law enforcement officer lacked probable cause to request a preliminary blood test (PBT) and without the PBT, the officer lacked probable cause to arrest him and request a chemical test. Alternatively, Jones contends he did not refuse to provide a sample of his blood but in fact consented to do so through his words and actions and by virtue of the fact he did not unequivocally revoke the consent that he provided as a result of Wisconsin's implied consent statute.

As noted, the State did not file a brief responding to Jones's contentions. On September 21, 2023, we entered an order advising the State that its respondent's brief was delinquent and requiring it to file a brief within five days. It failed to do so. On October 4, 2023, we warned the State that if it failed to file a respondent's brief, we could exercise our discretion and summarily reverse the circuit court, provided we determine the State has abandoned the appeal. *See Raz v. Brown*, 2003 WI 29, ¶18, 260 Wis. 2d 614, 660 N.W.2d 647; *see also State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 259-60, 500 N.W.2d 339 (Ct. App. 1993) (concluding summary reversal is appropriate sanction for respondent's violation of briefing requirements). We gave the State until October 20, 2023, to file its brief. It failed to do so. Finally, on October 27, 2023, we indicated that a respondent's brief was necessary to the resolution of the appeal and warned the State that its failure to file one would constitute an abandonment of the appeal, resulting in summary reversal, and we gave it until November 17, 2023 to file its brief. Despite these admonitions, the State still has not filed a respondent's brief or otherwise responded to our delinquency orders.

The "[f]ailure to file a respondent's brief tacitly concedes" that an error has occurred in the proceedings before the trial court, *see id.* at 260, and allows this court to assume that the respondent concedes the issues raised by the appellant, *Charolais Breeding Ranches, Ltd. v.*

FPC Secs. Corp., 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). Moreover, we will not abandon our independence by acting as both advocate—by developing a litigant’s argument for it—and judge. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992); *Gardner v. Gardner*, 190 Wis. 2d 216, 239-40, n.3, 527 N.W.2d 701 (Ct. App. 1994).

We decline to address the merits of the appeal under these circumstances. Jones’s appellate brief raises substantive arguments regarding the relevant facts and law. We concluded, and emphasized to the State, that a respondent’s brief is necessary to the resolution of this appeal. The failure to file such a brief constitutes an abandonment of the appeal. Based upon this, summary reversal is appropriate. See WIS. STAT. RULE 809.83(2). Accordingly, we reverse the judgment of the circuit court.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily reversed. See WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals