

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1355-CR

Cir. Ct. No. 2010CT52

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUKE T. NIRMAIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County:
JOSEPH D. BOLES, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Luke Nirmaier appeals a judgment of conviction for operating while intoxicated, third offense. Nirmaier asserts that, after concluding the officer lacked probable cause to arrest him for operating while

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

intoxicated, the court misapplied WIS. STAT. § 343.305(3)(ar)1. when it determined Nirmaier's blood test results did not need to be suppressed. We affirm.

BACKGROUND²

¶2 The State charged Nirmaier with operating while intoxicated and operating with a prohibited alcohol concentration, both as third offenses. Nirmaier moved to dismiss, asserting, in part, that the officer did not have probable cause to place him under arrest for operating while intoxicated.

¶3 At the motion hearing, officer Bruce Whitaker testified that on April 21, 2010, he was dispatched to a motorcycle accident. When he arrived at the scene, he observed a male, subsequently identified as Nirmaier, standing next to a motorcycle that was lying on its side. Whitaker observed "extensive injuries to [Nirmaier's] face and head." Specifically, there was a "very large hematoma or bruise on his right temple area and significant damage to his chin. It appeared part of his chin had been partially removed from the lip area from some sort of collision with the ground." Whitaker also observed the motorcycle was damaged.

¶4 Whitaker had Nirmaier sit on the sidewalk "so that he would not fall down or get faint." At that point, an ambulance arrived. Whitaker assisted emergency medical technicians in stabilizing Nirmaier's neck and head and placing him in a cervical collar. Whitaker testified that he could smell alcohol on

² We note that Nirmaier failed to provide citations to the record in his statement of the facts and failed to provide a recitation of WIS. STAT. § 343.305(3)(ar)1. We admonish counsel that WIS. STAT. RULES 809.19(1)(a), (d)-(e) require appropriate references to the record and legal authorities.

Nirmaier and when one of the EMTs asked Nirmaier if he had been drinking, Nirmaier responded, “yes” and “attempted to nod his head.”

¶5 Once in the ambulance, Whitaker placed Nirmaier under arrest for operating while intoxicated. At the hospital, Whitaker read Nirmaier the informing the accused form and requested a blood draw, to which Nirmaier consented.

¶6 The court found that, while Whitaker had probable cause to believe Nirmaier had operated the motorcycle, “the only evidence the officer had that the defendant was impaired was the accident, the smell of alcohol on the defendant’s person, and the defendant’s admission he had been drinking.” The court determined that “this evidence is insufficient to show that the defendant probably operated the motorcycle while he was impaired.” It granted Nirmaier’s motion to dismiss.

¶7 The State moved for reconsideration, asserting that the court erred by dismissing the case after it determined Whitaker lacked probable cause to arrest Nirmaier for operating while intoxicated. The State contended the proper remedy for a determination of lack of probable cause to arrest is suppression of the evidence. However, the State argued that, even if Whitaker lacked probable cause to arrest Nirmaier for operating while intoxicated, the blood test result would not be subject to the exclusionary rule. Specifically, the State asserted that because the accident caused substantial bodily harm to a person and Whitaker detected the

presence of alcohol, Whitaker was permitted to request a blood test pursuant to WIS. STAT. § 343.305(3)(ar)1.³

¶8 The court granted the State's reconsideration motion. Nirmaier subsequently pled no contest to operating while intoxicated.

DISCUSSION

¶9 WISCONSIN STAT. § 343.305(3) outlines different scenarios in which an officer may invoke the implied consent law and request a chemical test of an individual's breath, blood, or urine. Although an officer normally invokes the implied consent law after arresting an individual for an alcohol or drug related operating offense, *see* WIS. STAT. § 343.305(3)(a), an officer may also invoke the implied consent law *before* arrest in limited, specified circumstances, *see e.g.*, WIS. STAT. § 343.305(3)(am), (ar). Subdivision 343.305(3)(ar)1., which was enacted on March 15, 2010 and became effective on March 30, 2010, allows an

³ WISCONSIN STAT. § 343.305(3)(ar)1. provides:

If a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm, as defined in s. 939.22(38), to any person, and a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, the law enforcement officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2) [Implied consent]. Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

officer to request a chemical test before arrest if an individual is involved in an accident that causes substantial bodily harm to a person and the officer detects the presence of alcohol or drugs. *See* 2009 Wis. Act 163; *see also* Wis. Legislative Council Act Memo for 2009 Wis. Act 163 (April 19, 2010), available at <https://docs.legis.wisconsin.gov/2009/related/lcactmemo/sb303.pdf>.

¶10 On appeal, Nirmaier argues WIS. STAT. § 343.305(3)(ar)1. “was misinterpreted and misapplied as relieving the State from showing probable cause for arrest.” He also asserts “the State[’]s argument in the motion to reconsider is in error as to the application of the exclusionary rule.”

¶11 Nirmaier, however, fails to develop an argument in support of his contentions. Specifically, he fails to explain how the circuit court “misinterpreted and misapplied” WIS. STAT. § 343.305(3)(ar)1., or why the State’s argument before the circuit court in regard to the exclusionary rule was erroneous. We decline to develop his arguments for him. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not address issues on appeal that are inadequately briefed).

¶12 The State responds that it did not need probable cause to arrest Nirmaier for operating while intoxicated in order to request a blood draw because it could have obtained one pursuant to WIS. STAT. § 343.305(3)(ar)1. Therefore, it asserts the blood test results should not be suppressed. Nirmaier has failed to file a reply brief in response to the State’s arguments; therefore, they are deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

