

STATE OF WISCONSIN: CIRCUIT COURT: RACINE COUNTY:

STATE OF WISCONSIN,

Plaintiff,

Case No. 2007CM1799

v.

ERNESTO HERNANDEZ,

Defendant.

Notice of Motion and Motion to Dismiss the Complaint

PLEASE TAKE NOTICE that on the 20th day of November, 2007, at 1:30 p.m., or as soon thereafter as counsel may be heard, the above-named defendant will appear before that branch of the Racine County Circuit Court presided over by the Honorable Richard Kreul, and will then and there move the court to dismiss the complaint in this action for the reason that the complaint fails to allege sufficient facts which, if true, establish probable cause to believe that defendant committed either of the offenses alleged.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007.

LAW OFFICES OF JEFFREY W. JENSEN
Attorneys for the Defendant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.9484

STATE OF WISCONSIN,

Plaintiff,

Case No. 2007CM1799

v.

ERNESTO HERNANDEZ,

Defendant.

Memorandum of Law in Support of Motion to Dismiss the Complaint

Introduction

The defendant, Ernesto Hernandez ("Hernandez") is charged with two counts of hit-and-run involving injury contrary to Sec. 346.67(1), Stats.¹ The factual allegations in the complaint are to the effect that both counts occurred on the same date, at about the same time, and in the same general vicinity. Each count, though, involved a separate incident.

¹ 346.67 **Duty upon striking person or attended or occupied vehicle.**

(1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:

(a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(b) The operator shall, upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

With regard to the first incident the complaint alleges that:

Jana Breckenridge was operating a vehicle that had been traveling each on West Street, approaching the intersection of Blake Avenue and had the right of way. Hernandez's vehicle failed to stop for the stop sign and entered the intersection. Breckenridge's vehicle was forced to take evasive action and steered to the right, causing the vehicle to sideswipe a fire hydrant Hernandez failed to stop for the accidentJana Breckenridge complaint of pain to her legs and was transported to All Saints Hospital by Rescue.

With regard to the second incident, the complaint alleges:

Hernandez's vehicle continued east and went through the red light at the intersection of north Memorial Drive and West street, Stratman, who had been operating a vehicle owned by Mick's Auto Parts southbound on North Memorial Drive, was struck by Hernandez's vehicle Ernesto (Hernandez) then ran from the vehicle leaving the scene of the accident. . . . A passenger in Hernandez's vehicle, X.H. . . . complained of pain to his neck and back and was transported to All Saints Hospital by Rescue.

Finally, the complaint alleges that Ernesto Hernandez was interviewed by police and said that he ran from the vehicle because, "Ernesto stated that his brother, X.H., did not want him arrested for an accident and told him to run."

Argument

I. The complaint must allege sufficient facts within the four corners, when viewed in a common sense manner, to establish probable cause to believe that the defendant committed the offense alleged. Here, the complaint is deficient as to both counts.

A criminal complaint must meet probable cause requirements to confer personal jurisdiction. *State v. White*, 97 Wis. 2d 193, 197, 295 N.W.2d 346, 347 (1980). A criminal complaint is a self-contained charge that must set forth facts within its four corners that are sufficient, in themselves or together with reasonable inferences derived therefrom, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable. *State v. Haugen*, 52 Wis. 2d 791, 793, 191 N.W.2d 12, 13 (1971). If the criminal complaint fails to establish probable

cause, the court does not obtain personal jurisdiction, and the charge must be dismissed. The criminal complaint, however, is not to be read in a hypertechnical sense but, rather, is to be reviewed on a reasonable basis applying ordinary common sense. *State v. Gaudesi*, 112 Wis. 2d 213, 219, 332 N.W.2d 302, 305 (1983). Therefore, the facts alleged and the inferences that may be drawn from them must be sufficient to establish in a common sense way that there is probable cause to believe the defendant committed the offense charged. *See id.*

Here, the complaint purports to allege that Hernandez violated Sec. 346.67(1), Stats (hit-and-run involving injury). The elements of that offense are:

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle involved in an accident on a highway.
A vehicle is operated when it is set in motion.
2. The defendant knew that the vehicle he was operating was involved in an accident involving an attended vehicle.
3. The accident resulted in injury to any person.["Injury" means physical pain or injury, illness, or any impairment of physical condition.
4. The defendant did not immediately stop his vehicle at the scene of the accident and remain at the scene until he had fulfilled the following requirements:
 1. Gave his name, address, and the registration number of the vehicle he was driving to the person struck); and
 2. If it was requested and was available, exhibited his operator's license to (the person struck); and
 3. Rendered to any person injured in such accident reasonable assistance including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.
5. The defendant was physically capable of complying with the requirements I have just recited.

Wis. JI- Criminal 2670. Because the statute, by its very terms, applies to "striking" an occupied vehicle, it is required that there actually be a collision (i.e. contact between two

vehicles) before an obligation arises for the motorists to stop and exchange information. In, *Hayne v. Progressive Northern Ins. Co.*, 115 Wis. 2d 68, 75 (Wis. 1983) the Supreme Court explained:

Wisconsin's version of these statutes, however, is entitled "Duty upon striking person or attended or occupied vehicle." Section 346.67, Stats. (Emphasis added.) Section 346.67(1) (a) provides, in part: ". . . he shall give his name, address and the registration number of the vehicle he is driving to the person struck . . ." The reference to "striking" in sec. 346.67 supports our conclusion that the plain meaning of "hit-and-run" in sec. 632.32(4) (a) 2.b. includes a physical contact element.

A. Count one fails to establish probable cause because it fails to allege that there was any contact between the vehicles and because there is no allegation that the collision "resulted" in any injuries to the other driver.

Count one is plainly insufficient because, according to the factual allegations of the complaint, the Hernandez vehicle never made contact with the Breckenridge vehicle. Thus, Hernandez had no legal obligation to stop, to exchange information, nor to render aid.

Moreover, the statute requires that the collision result in injuries to another person. Here, the complaint alleges that following the accident Breckenridge had "pain in her legs." However, there is no fact alleged from which the court could infer that the pain was caused by the accident (for example, that Breckenridge had no pain in her legs before the accident).

For these reasons count one must be dismissed.

B. Count two fails to establish probable cause because the only person injured was the passenger in Hernandez's vehicle and this was the person who advised Hernandez to leave the scene.

The facts alleged in support of count two are that Hernandez's brother, "X.H.", had a sore neck and a sore back following the collision. There is no allegation that the driver of the other vehicle suffered any injuries.

Obviously, Hernandez's brother who is riding in the automobile with Hernandez knows the identity of the driver (i.e. they are brothers). Thus, there was no need for Hernandez to exchange information with X.H. More importantly, though, Hernandez remained at the scene long enough to render "reasonable" aid to X.H. It was X.H. who suggested that Hernandez leave the scene of the accident so that he would not be arrested.

For these reasons, count two must be dismissed.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007.

LAW OFFICES OF JEFFREY W. JENSEN
Attorneys for the Defendant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.9484