

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2010AP001113CR

JASON GOSS,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF
CONVICTION ENTERED IN CIRCUIT COURT FOR EAU
CLAIRE COUNTY, HONORABLE LISA STARK PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

1. Does section 343.303 of the Wisconsin Statutes require probable cause that the defendant was intoxicated before a law enforcement officer may require a person to submit to a preliminary breath test when there has been no injury or homicide and the defendant has attained the legal drinking age?

The Trial Court held that probable cause of intoxication was not required.

2. Did the Trial Court err when it denied Mr. Goss's Motion to suppress physical evidence in this matter because the preliminary breath test was administered without probable cause as required by *County of Jefferson v. Renz* and Section 343.303 Wis. Stats.?

Position on Oral Argument and Publication

Neither Oral Argument nor Publication is requested.

Statement of the Case

On October 14, 2008, Jason Goss was charged with one count of Operating While Intoxicated as a 5th offense contrary to Wis. Stats. § 346.63(1)(a). R1:1. The matter was set for a Preliminary Hearing on December 16, 2008. At that hearing, the State presented one witness, Officer Jason O'Malley, Mr. Goss's certified driving record, and a report from the State Hygiene Laboratory with the results of Mr. Goss's blood test. See *Generally* R33. Based on this evidence, Mr. Goss was bound over for further proceedings. R33:14.

Mr. Goss moved to suppress certain statements and all other evidence derived from those statements because the statements were obtained as the result of a custodial interrogation conducted without informing Mr. Goss of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). R11. An evidentiary hearing was held on March 6, 2009, and the issue was fully briefed by both parties. Judge Stark issued her decision denying the Defendant's motion in an oral ruling on May 20, 2009. R37:29.

In her oral ruling, Judge Stark ruled that Mr. Goss's statements to Officer O'Malley were the result of a custodial interrogation and that they should be suppressed. R37:3. She also ruled that the State had not met its burden of proving that Officer O'Malley learned that Mr. Goss was on probation independent of the illegal interrogation. R37:24. Judge Stark decided that the smell of alcohol alone under the circumstances was sufficient evidence for Officer O'Malley to investigate further by ordering a preliminary breath test and field sobriety tests, and therefore, the result of that test was not the fruit of the illegal interrogation. R37:25.

On January 4th, 2010, Jason Goss pleaded guilty to Operating While Intoxicated as a 5th offense as charged in the information. R40:18. His sentence was withheld, and he was placed on probation for a period of three years. This appeal follows. R40:25

Facts

The facts of this case were established through the testimony of Officer Joshua O'Malley at a Preliminary Hearing on December 16, 2008 and at an evidentiary Motion Hearing on March 6, 2009.

Officer Jason O'Malley is an officer of the Eau Claire Police Dept. with nearly five

years of experience. R36:10. On approximately 8:30 P.M. on the evening of October 12, 2008, Officer O'Malley performed a traffic stop a vehicle operated by Jason Goss because he had difficulty reading the rear license plate. R36:6. The vehicle had a defective plate lamp, and the plate itself was excessively dirty. R33:4.

Officer O'Malley made contact with the driver, and identified Mr. Goss by his Wisconsin Identification card. R33:5. Mr. Goss admitted that his driver's license was revoked in Wisconsin. After this was confirmed when Officer O'Malley "ran him through headquarters," Mr. Goss was asked to exit his vehicle and placed under arrest. *Id.*

After Mr. Goss was taken into custody and while Officer O'Malley was securing him in the rear seat of the squad car, Officer O'Malley detected an odor of intoxicants. R36:7. He began to question Mr. Goss about whether he had consumed intoxicants. *Id.* In response to this questioning, Mr. Goss admitted that he had consumed two beers and stated that he was currently on probation. R33:6. Mr. Goss was not advised of his rights pursuant to *Miranda v. Arizona* prior to this interrogation.

Officer O'Malley administered a preliminary breath test on Mr. Goss, which

revealed a blood alcohol concentration of .084. R36:8. Finally, Mr. Goss was arrested and taken to Luther Hospital where a sample of his blood was taken as evidence. R33:7. A chemical test of that blood sample revealed a blood alcohol concentration of .080g/ml. R8.

Argument

I. THE COURT ERRED WHEN IT DENIED MR. GOSS'S MOTION TO SUPPRESS THE RESULTS OF THE PRELIMINARY BREATH TEST AND ALL DERIVATIVE EVIDENCE BECAUSE THE PRELIMINARY BREATH TEST WAS ADMINISTERED WITHOUT PROBABLE CAUSE AS REQUIRED BY COUNTY OF JEFFERSON V. RENZ AND SECTION 343.303 OF THE WISCONSIN STATUTES.

The Trial Court erred when it found that Officer O'Malley had probable cause to administer a preliminary breath test on Mr. Goss independent of any information uncovered during an unmirandized custodial interrogation. The Trial Court found that the mere fact that Officer O'Malley smelled alcohol while strapping Mr. Goss into the back seat of his squad car, along with the fact that his license had been revoked and he had four prior convictions for Operating While Intoxicated, constitutes probable cause to administer a preliminary breath test under § 343.303.

Under Wis. Stats. § 343.303, an officer may require a person to submit to a preliminary breath test if there is "probable cause to believe" the person is guilty of operating while intoxicated contrary to §346.63(1)(a) of the Wisconsin Statutes. *Wis. Stat.* §343.303. In this context, "probable cause to believe" is a burden of proof greater than the "reasonable suspicion" required for an investigative stop but less than the "probable cause" necessary for an arrest. *County of Jefferson v. Renz*, 231 Wis.2d 293, ¶51 (1999). The test is one that takes into account commonsense interpretations of the totality of the circumstances, and it requires "more than a mere possibility" that a person has violated § 346.63(1). *State v. Sharpee*, 154 Wis.2d 515, 518 (Ct. App. 1990).

Notably, section 343.303 does not authorize an officer to administer a preliminary breath test if there is probable cause to believe a person has operated a motor vehicle with a prohibited alcohol concentration. The statute specifically lists several violations including 346.63(1) (operating while intoxicated), 346.63(2m) (absolute sobriety for minor drivers), 346.63(2) or (6) (causing injury with a motor vehicle with a prohibited alcohol

concentration), 940.25 (causing injury by the intoxicated use of a motor vehicle), and 940.09 (homicide by the intoxicated use of a motor vehicle). Wis. Stats. § 343.303. Notably, section 346.63(1)(b) is absent from this list, indicating that unless there is an injury, an officer must have probable cause of *intoxication* and not merely a prohibited alcohol concentration.

Whether certain facts constitute probable cause under the circumstances is a question of law that is reviewed *de novo*. *State v. Babbitt*, 188 Wis.2d 349, 357 (Ct. App. 1994). Further, factual findings of the Trial Court should not be overturned unless clearly erroneous. *State v. Eckert*, 203 Wis.2d 497, 518 (Ct. App. 1996).

In *County of Jefferson v. Renz*, the Supreme Court of Wisconsin applied the intermediate probable cause standard of § 343.303 to a particular set of facts. In that case, the defendant exhibited several indicators of intoxication before the officer asked him to submit to a preliminary breath test. First of all, he admitted to drinking three beers earlier. His car also smelled "strongly" of alcohol. He was asked to perform field sobriety tests, including the "one-legged stand" test, the "heel-to-toe"

test, and the "finger-to-nose" test. Although he was able to substantially complete these tests, they revealed several indicators of intoxication. Under these circumstances, the Supreme Court found that there was probable cause to administer the test, saying this was "exactly the sort of situation in which a PBT proves extremely useful..." *Renz*, 231 Wis.2d at ¶¶49-50.

Renz does not define the minimum level of proof necessary to constitute probable cause under § 343.303 Wis. Stats. It does hold, however, that at minimum it requires more proof than is necessary to require a preliminary breath test from a commercial driver. *Renz*, 231 Wis.2d at 603. Section 343.303 authorizes a preliminary breath test whenever an officer "detects any presence of alcohol" on a commercial driver. Wis. Stats. §343.303.

The Trial Court found that the Officer O'Malley had the following facts at his disposal when he decided to administer the preliminary breath test: 1) Mr. Goss had a revoked driver's license, 2) Mr. Goss had four prior OWI convictions, and 3) Mr. Goss smelled like intoxicants while he was being buckled in

in the back of Officer O'Malley's squad car.¹ R36:25. Notably, there is no indication that the odor of intoxicants was "strong," and there is no evidence that it came from Mr. Goss's breath. *Id.* Additionally, there is no evidence in the record that Mr. Goss was in any way impaired by alcohol or any other intoxicant.

Under the circumstances, Officer O'Malley lacked probable cause to require Mr. Goss to submit to a preliminary breath test, and the Trial Court's ruling should be reversed. The Trial Court relied upon the fact that Mr. Goss had four previous OWI convictions and that he was prohibited from operating a motor vehicle with even a .02 blood alcohol concentration. This is irrelevant because section 343.303 requires probable cause that a person was operating while intoxicated, not operating with a prohibited alcohol concentration.

Further, by allowing Officer O'Malley to require a preliminary breath test based solely upon the smell of alcohol, the Trial Court has in effect lowered the burden of proof to the same level required for commercial drivers:

¹ Additional facts were discovered during what was found to be a custodial interrogation without the benefit of *Miranda* warnings. The Trial Court found that those facts should be excluded for the purpose of determining whether Officer O'Malley had probable cause to administer the preliminary breath test, and that finding is not challenged upon appeal.

merely detecting the presence of alcohol or an intoxicant. As the Wisconsin Supreme Court stated in *County of Jefferson v. Renz*, whatever the minimum threshold of proof is, it is higher than that required for commercial drivers.

Officer O'Malley lacked probable cause to administer a preliminary breath test under section 343.303 of the Wisconsin Statutes. The result of the test should be excluded because it was taken in violation of Mr. Goss's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Sections 8 and 11 of the Wisconsin Constitution. This Court should reverse the Judgment of Conviction and order denying Mr. Goss's motion to suppress.

Conclusion

The Trial Court improperly considered the fact that Mr. Goss had four prior OWI convictions as evidence in support of its finding that there was probable cause to require him to submit to a preliminary breath test under section 343.303 of the Wisconsin Statutes. Without evidence of an injury or that the defendant is underage, the law requires probable cause that a person is operating while intoxicated contrary to Wis.

Stats. § 346.63(1)(a). Where, as here, the officer observed no evidence of actual intoxication, there can be no probable cause. Mr. Goss asks this Court to reverse the Trial Court's finding that there was probable cause to administer the preliminary breath test and to reverse the Judgment of Conviction dated January 4, 2010.

Dated at River Falls, Wisconsin this 22nd day of June, 2010.

Respectfully Submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: monospaced font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of characters per line. The text is 13 point type and the length of the brief is 12 pages (2,566 words).

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Certification of Appendix

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the

portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Certification of Electric Filing

I hereby certify, pursuant to Rule 809.19(12)(f), that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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