STATE OF WISCONSIN
IN SUPREME COURT

No. 2010AP1113-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON E. GOSS,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF AN UNPUBLISHED DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION OF THE WISCONSIN COURT OF APPEALS DISTRICT III/IV AFFIRMING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY, THE HONORABLE LISA STARK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUE

Whether there is sufficient probable cause to administer a preliminary breath test, pursuant to Wis. Stat. § 343.303, when the officer detects an odor of an intoxicant emanating from the subject, and the officer was aware the subject had previously been convicted of four OWI offenses, which pursuant to Wis. Stat. § 340.01(46m)(c), lowers his prohibited alcohol concentration to .02?

The court of appeals affirmed the trial court in holding that the odor of intoxicants, in conjunction with knowledge that Goss had four prior OWI convictions, is sufficient probable cause for the administration of the preliminary breath test.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to have the petition for review granted by this court, the State requests both oral argument and publication of the court's opinion.

STATEMENT OF FACTS

At approximately 8:30 p.m. on October 12, 2008, Officer Joshua O'Malley, a five-year veteran of the Eau Claire Police Department, made a traffic stop on a vehicle being driven by Jason Goss (33:3; 36:6, 10). The stop was made because the vehicle license plate lamp was not working, and a large amount of dirt over the license plate made it impossible to read the numbers and letters on the plate (33:4). Officer O'Malley made contact with Goss, who identified himself with a Wisconsin identification card and who advised O'Malley that his driving status was revoked (33:5; 36:6). Officer O'Malley then contacted headquarters who confirmed that Goss was revoked and advised that Goss had four prior OWI convictions (33:5, 12; 36:8-9). Officer O'Malley then placed Goss into custody for the offense of operating after revocation-second offense (33:6; 36:7), and put Goss in the back seat of his squad car (33:6; 36:7).

While placing Goss in his squad, Officer O'Malley noticed the smell of an intoxicant emanating from Goss's person (33:6; 36:7). Officer O'Malley then administered the preliminary breath test (PBT) to Goss resulting in a reading of .084 (33:6-7; 36:8). Officer O'Malley was in part motivated to perform the PBT test on Goss, because of Goss's low prohibited alcohol content threshold (PAC) of .02 (36:9). Subsequent to the administration of the

PBT test, Officer O'Malley ran Goss through field tests and ultimately arrested Goss for OWI-fifth offense (1:1; 33:7).

ARGUMENT

Introduction

While many issues were raised and resolved at the trial court, including *Miranda* violations and Goss's status as a person on probation, this case has been distilled into one legal question. The question is whether the odor of an intoxicant on Goss's person, combined with Officer O'Malley's knowledge that Goss had four prior OWI offenses, and thus had a PAC level of .02, is sufficient justification for the administration of the PBT. Goss argues odor alone is not sufficient, pointing to the statutory language of Wis. Stat. § 343.303 and this court's holding in *County of Jefferson v. Renz* for support. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999); *see* appellant's brief at 12.

The state respectfully counters that Goss's reliance on *Renz* is misplaced. This court, in *Renz,* was reconciling the contradiction in Wis. Stat. § 343.303, which at once limits the admissibility of a PBT result to showing probable cause, while requiring law enforcement to have probable cause before administering the test. This court dealt with this legal *non sequitur* by creating a middle standard; the probable cause needed for the administration of the PBT being somewhat less than the probable cause necessary for an arrest, but somewhat more than the mere presence of alcohol. *Renz*, 231 Wis. 2d 293, ¶ 35. However, this court was applying their PBT analysis within the context of an OWI arrest, an arrest requiring probable cause of impairment. This court was not faced with the question as to what would be necessary to justify the administration of a PBT test for a subject with a .02 threshold, where a showing of impairment would not be necessary. Nor could this court deal with that issue in *Renz*, since *Renz* was decided on December 22, 1999, and

the statute lowering the PAC threshold for a third offender to .02 was enacted over four months later, on May 3, 2000. (1999 Wisconsin Act 109 creating Wis. Stat. § 340.01(46m)(c)). Consequently, the state contends that if this court in *Renz* had the luxury of the knowledge of a statute creating a .02 threshold for third offenders, they would have reached the conclusion that their middle standard of probable cause for administering a PBT would be satisfied by the odor of an intoxicant, combined with knowledge that the subject had four prior OWI convictions.

THE ODOR OF AN INTOXICANT EMANATING FROM GOSS'S PERSON COMBINED WITH KNOWLEDGE THAT GOSS HAD FOUR PRIOR OWI CONVICTIONS IS SUFFICIENT PROBABLE CAUSE FOR THE ADMINISTRATION OF THE PBT.

A. Applicable law.

In reviewing a denial of a motion to suppress, the trial court's findings of fact are to be upheld unless clearly erroneous. *State v. Waldner,* 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, whether a search is valid, is a question of constitutional law to be reviewed *de novo*. *State v. Guzman,* 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992). Statutory interpretation is a question of law that this court reviews *de novo*. *Renz,* 231 Wis. 2d 293, ¶ 18.

The 1999 Wisconsin Act 109, enacted on May 3, 2000, and published on May 17 2000, created Wis. Stat. § 340.01(46m)(c), establishing a lower PAC of .02 for people with three or more prior OWI convictions. Wisconsin Stat. § 343.303 requires that the police have probable cause to believe that a subject has violated Wis. Stat. § 346.63(1) (which includes operating a vehicle with a PAC pursuant to (1)(b)) as a justification for the administration of the PBT. The Wisconsin Supreme Court

in *Renz,* held that the phrase "probable cause to believe" in Wis. Stat. § 343.303 means less than the probable cause needed to make an arrest. *Renz*, 231 Wis. 2d 293, ¶ 35. The *Renz* court further opined that the probable cause necessary for the administration of a PBT as an evidentiary tool for an OWI investigation would require more than the mere presence of alcohol. *Id.* The *Renz* court did not deal with the issue as to what would be the requisite probable cause for the lawful employment of the PBT when investigating whether a subject is above a PAC limit of .02. This issue is raised here as a matter of first impression.

A fair summary of the applicable law is that a subject with four prior OWI convictions has a PAC limit of .02; four times lower than the legal limit for Wisconsin drivers with less than three prior OWI convictions. The PBT is a screening test for detecting whether a person has violated the OWI statute, and may be performed during the investigatory phase of the contact and prior to the arrest, and requires as a justification less than the probable cause necessary to arrest. This reduced probable cause, a middle level standard articulated by the Wisconsin Supreme Court in *Renz,* requires more than the presence of alcohol for the administration of the PBT in a standard OWI investigation, but has not yet been applied by Wisconsin courts for the use of the PBT in furtherance of an investigation of a subject with a minimal .02 PAC threshold.

B. Application of the facts to the law.

The facts in this case are not in dispute. The contention is over how those facts should be applied within the statutory context of Wis. Stat. § 343.303 (preliminary breath screening test statute) and Wis. Stat. § 340.01(46m)(c) (statute creating a PAC threshold of .02 for people with three or more OWI convictions). The

pertinent trial court findings of fact, amply supported by the record, and unchallenged at appeal, are as follows:

1) Officer O'Malley made a lawful traffic stop of Goss's vehicle at approximately 8:30 p.m., October 12, 2008 (37:20).

2) Officer O'Malley arrested Goss and took him into custody on the charge of operating after revocation (37:20, 22).

3) Officer O'Malley placed Goss in his squad car and smelled intoxicants on Goss's person (37:22-23).

4) Officer O'Malley learned from headquarters that Goss had four prior convictions for OWI (37:23).

5) Officer O'Malley administered the PBT to Goss resulting in a reading .084 (37:23).[1]

Based on these findings of fact the trial court correctly phrased the core issue:

> The question is then: Based upon the fact the officer knew this gentleman's license was revoked, he had four prior offenses and he smelled like intoxicants and the officer clearly knew that the blood alcohol permissible is .02, is that enough to request a preliminary breath test and field sobriety tests?

(37:24).

[1] Goss also admitted to having consumed alcohol, but those statements were suppressed by the trial court because O'Malley had not advised Goss of his *Miranda* rights. There was also ample discussion as to whether Officer O'Malley knew that Goss was on probation and whether he was on a no-drink order, but the trial court opined that the state had not met its burden of proof as to this issue, and thus dismissed it from its analysis. Field sobriety tests were performed by Goss after the PBT was administered, but the results of these tests are not in the record and irrelevant for our purposes as they occurred after the challenged PBT test was administered.

Goss relies heavily on this court's holding in *Renz* to support his contention that the odor of an intoxicant on his person was not a sufficient basis for the administration of the PBT. The state agrees with Goss that *Renz* is critical to this case but disagrees that it supports his position. Rather, the state argues that *Renz*, in articulating a reduced standard of probable cause for the employment of the PBT, supports the state's contention that the odor of an intoxicant and knowledge that Goss had a limited PAC threshold of .02 is sufficient probable cause for using the PBT. Indeed, it could be argued, though it is not necessary to do so in this case, that a PAC level of .02 is so low that odor by itself would be enough to support an arrest for operating with a PAC.

The problem with Goss's reliance on *Renz*, as dispositive of the issue at bar in his favor, is that *Renz* set up a middle standard for a PBT in an OWI investigation; an investigation where the officer must find clues of impairment. In an OWI impairment context, it makes sense for this court to require more than the presence of alcohol to meet their newly created middle standard. However, this case involves an investigation as to whether a subject has a PAC of .02, a level four times less than what is required to show a PAC for a standard OWI case, and a level which does not require evidence of impairment. It makes no sense to argue that the *Renz* holding would require the same justification for a PBT for a .02 investigation, as it does for a standard OWI investigation where an officer needs to find evidence of impairment and is dealing with a PAC at least four times higher.

In essence, Goss wants to interpret *Renz* as creating a bright-line rule requiring more than the presence of alcohol to justify a PBT, regardless of what type of OWI offense is being investigated. This is contra to the heart of the *Renz* holding, establishing a reduced probable cause standard for the administration of the PBT. There is nothing in the opinion to suggest that this middle standard is not flexible as to its requirements, depending on the

type of offense involved. Goss is selling *Renz* short, arguing in effect that it is an inflexible opinion setting up a rigid test that must be met even if laws change. This court, in *Renz*, was dealing with the fluid concept of probable cause. Goss's suggestion that even if the probable cause for an arrest changes, the lesser probable cause for the administration of the PBT cannot, is illogical and not supported by *Renz.*

In the instant case, Officer O'Malley knew that Goss had four prior OWIs, knew therefore that Goss had a PAC threshold of .02, and smelled the odor of an intoxicant emanating from Goss's person. This could arguably be construed as probable cause to arrest; it clearly, at a minimum, satisfies the *Renz* requirement of a reduced probable cause for employing a PBT. To find otherwise, could in effect render the .02 statute largely unenforceable, as at that low a level the odor of intoxicants often would be the only evidence present, as a person at .02, or slightly higher, would often not show any other signs of drinking in either their physical presentation or their driving. Accordingly, for all the reasons argued above, the state submits that *Renz* supports its contention that there was a sufficient legal basis for Officer O'Malley to administer the PBT test to Goss.

In addition to *Renz*, Goss relies on the statutory language of Wis. Stat. § 343.303 for support. Goss's theory is since the legislature required probable cause for the administration of the PBT but only required the presence of alcohol for a PBT for a commercial driver, it follows that the police must have more than the presence of alcohol to perform a PBT on any non-commercial driver (Goss's brief at 18-19). Goss also argues that the lower standard for a PBT for a commercial driver was consistent with the legislative intent to regulate commercial motor vehicles in the interest of public safety (Goss's brief at 19). There are three major flaws in Goss's argument: 1) Wis. Stat. § 343.303 pre-dates the creation of the .02 PAC threshold for OWI third or more offenders by more than ten years; 2) Wis. Stat. § 343.303

had flaws in its draftsmanship as it required probable cause for a PBT and yet limited a PBT's function to the formulation of probable cause; it is this illogical combination of requirements that this court remedied in *Renz*; and 3) While it is true that the legislature wished to heavily regulate commercial drivers in the interest of public safety, it is also true that the legislature wished to vigorously regulate habitual OWI offenders in enacting 1999 Wisconsin Act 109.

The PAC threshold for a commercial driver is .04, (346.63(5)(a)) while the threshold for a driver with three prior OWI convictions is .02. It is implausible to argue, as Goss seemingly does, that the probable cause necessary for a PBT for Goss, a person with four prior convictions, is greater than the probable cause necessary for a PBT for a commercial driver, a person whose PAC threshold is twice as high as Goss's.

Goss has demonstrated himself to be a threat to public safety with four prior OWI convictions. Accordingly, he is rightfully burdened with a PAC threshold four times less than people with fewer than three OWI convictions.[2] The legislature has enacted laws to aggressively regulate Goss's driving. Therefore, the state respectfully submits that both the trial court and the court of appeals were correct in finding that the odor of an intoxicant combined with knowledge that Goss was a four-time OWI offender with a .02 threshold was a sufficient basis for lawfully administering the PBT.

[2] The legislature recently has increased the group of people with .02 PAC thresholds by the enactment of 2009 Wisconsin Act 100; expanding Wis. Stat. § 340.01(46m)(c) to include people under an ignition interlock order. It is clear that the Wisconsin legislature intends to crack down on repeat OWI offenders, lending further credence to the state's argument for a flexible reading of *Renz* to allow for the PBT to be a practical screening tool for .02 PAC investigations.

CONCLUSION

For the foregoing reasons, Goss's judgment of conviction, the trial court's denial of his motions to suppress, and the appellate courts affirmance of the trial court, should be affirmed.

Dated this 13th day of June, 2011.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,671 words.

Dated this 13th day of June, 2011.

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DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of June, 2011.

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