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DISTRICT IV

12-06-2012

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2012 AP 1663
Circuit Court Case No. 2011 TR 7630

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TRAVIS M. RANTA,
Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT
FOR SAUK COUNTY, BRANCH 2,
THE HONORABLE JAMES EVENSON PRESIDING

Respectfully submitted,

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STATEMENT OF ISSUES

- I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE RANGER HAD PROBABLE CAUSE TO BELIEVE RANTA WAS OPERATING WHILE UNDER THE INFLUENCE OF AN INTOXICANT AND, THEREFORE, ERRED WHEN IT CONSIDERED THE PBT RESULT IN ASSESSING PROBABLE CAUSE TO ARREST.

Answer: YES

STATEMENT ON ORAL ARGUMENT

The defendant-appellant does not request oral argument of the issue presented in this case, but stands ready to so provided this Court believes that oral argument would be useful in the exposition of the legal arguments presented.

STATEMENT ON PUBLICATION

The defendant-appellant does not request the decision of this Court be published.

STATEMENT OF CASE

On August 13, 2011, Travis M. Ranta (herein referred to as "Ranta") was issued a citation for Operating Under the Influence of an Intoxicant in violation of Wis. Stat. § 346.63(1)(a)¹, first offense. Then, on August 30, 2011, Ranta was issued a citation for "Prohibited Alcohol Content" in violation of Wis. Stat. § 346.63(1)(b), first offense (R. 1). On September 26, 2011, Ranta filed a Motion to Dismiss and/or Suppress Unlawful Arrest (R. 6 & 7). On November 16, 2011, a Motion Hearing was held in front of the Honorable James Evenson (R. 33). At the conclusion of the Hearing, the circuit court denied Ranta's Motion (R. 33). Ranta filed a Notice of Appeal on July 25, 2012 (R. 35).

1 All references to the Wisconsin Statutes are to the 2009-2010 version unless otherwise noted.

STATEMENT OF THE FACTS

On August 13, 2011 at approximately 7:05 p.m. Kenneth Lane was working as a ranger with the State of Wisconsin Department of Natural Resources at Devil's Lake State Park (R. 33:5, 22-23). On that date and time, Ranger Lane went to campsite number 361 to assist with an investigation of a disturbance and underage drinking situation (R. 33:23). While at the campsite, Ranger Lane met with Ranta (R. 33:24). At that time, Ranger Lane noticed Ranta was intoxicated (R. 33:24). The Ranger testified Ranta was belligerent, uncooperative, and loud (R. 33:24). Ranger Lane also testified Ranta staggered while walking around the campsite, he had a strong odor of alcohol on his breath, and he had slurred speech (R. 33:24).

While at the campsite, Ranger Cowan advised Ranger Lane that Ranta had a preliminary breath test result of .15 (R. 33:25). However, the Ranger admitted he was not with Ranger Cowan when Ranger Cowan administered the PBT and could not testify if the PBT was working correctly (R. 33:52-53). The Ranger did not have any personal knowledge as to what time Ranger Cowan administered the PBT (R. 33:53). In addition, Ranger Lane admitted there are two common factors that tend to produce high PBT results, that being residual mouth alcohol and breath contaminations (R. 33:52).

Some time later, Ranger Lane received a transmission that Ranta's truck was leaving (R. 33:27). Ranger Lane used stationary radar to determine Ranta's vehicle was traveling 30 miles per hour in a 15 mile per hour speed zone (R. 33:28-29). Ranger Lane followed the vehicle and stopped the vehicle (R. 33:30).

Ranger Lane testified when he made contact with Ranta, he smelled an odor of alcohol and observed Ranta had bloodshot eyes (R. 33:31). Ranger Lane then requested Ranta perform field sobriety tests (R. 33:31).

First, Ranger Lane requested Ranta to perform the walk and turn test (R. 33:31). The Ranger testified Ranta only exhibited one clue on the walk and turn test (R. 33:31 & 46). Ranger Lane testified one clue is "less than what the training requires to indicate a .10" (R. 33:46). Ranger Lane testified he was trained to observe eight clues on the walk and turn test and two or more clues is considered a failure of the test (R. 33:46-47).

The clue Ranger Lane testified he observed on the walk and turn test was that Ranta failed to touch heel to toe on one of the eighteen steps (R. 33:47-48). However, Ranger Lane could not recall which step Ranta failed to touch heel to toe (R. 33:47). Further, the Ranger acknowledged not touching heel to toe in and of itself is not a clue (R. 33:47). He

went on to state, "It needs to be more than six inches or I mean more than a half an inch" when testifying to the amount of space needed between the heel and toe to be considered a clue (R. 33:47).

The next test Ranger Lane administered was the horizontal gaze hystagmus test (R. 33:31 & 48). Ranger Lane testified, when conducting this test, he was looking for six clues and four clues is considered failing (R. 33:48). Ranta passed this test, exhibiting only two clues, hystagmus at maximum deviation in both eyes (R. 33:32 & 48). Ranger Lane could not recall asking Ranta if he had any eye abnormalities and acknowledged as part of his training he was advised that people exhibit jerkiness at maximum deviation even when they are unimpaired (R. 33:49-50).

Finally, Ranger Lane requested Ranta perform the one leg stand test (R. 33:32). Ranta exhibited no clues on this test (R. 33:32 & 50-51). Ranger Lane then administered a PBT, the result of the PBT was .11 (R. 33:37).

Ranger Lane testified he did not believe Ranta was under the legal limit when he requested Ranta to submit to the PBT (R. 33:34). Ranger Lane testified he based this opinion on the fact that, based on his training and experience, the rate of alcohol elimination in people is at a rate of less than .02

per hour (R. 33:32 & 34). However, the Ranger acknowledged he does not have any medical training regarding the dissipation of alcohol in a person's system (R. 33:40). His testimony was merely based on what someone told him at a training. However, he could not remember when that training took place (R. 33:40).

STANDARD OF REVIEW

In reviewing a motion to suppress, this Court applies a two-step standard of review. State v. Eason, 2001 WI 98, ¶9, 245 Wis.2d 206, 221, 629 N.W.2d 625. First, this Court reviews the circuit court's findings of historical fact under the clearly erroneous standard. Second, this Court reviews the application of constitutional principles to those facts de novo. Id.

ARGUMENT

- I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE RANGER HAD PROBABLE CAUSE TO BELIEVE THAT RANTA WAS OPERATING WHILE UNDER THE INFLUENCE OF AN INTOXICANT AND, THEREFORE, ERRED WHEN IT CONSIDERED THE PBT RESULT IN ASSESSING PROBABLE CAUSE TO ARREST.

Case Law

"If a law enforcement officer has probable cause to believe that the person is violating or has violated Wis. Stat. § 346.63(1)..., the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose." Wis. Stat. §

343.303. The Wisconsin Supreme Court concluded that the legislature intended "probable cause to believe" in the first sentence of Wis. Stat. § 343.303 to refer to a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the "reason to believe" necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause to arrest. County of Jefferson v. Renz, 231 Wis.2d 293, 317, ¶51, 603 N.W.2d 541 (1999).

A warrantless arrest is not lawful except when supported by probable cause. State v. Lange, 2009 WI 49, ¶19, 317 Wis.2d 383, 391, 766 N.W.2d 551. Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle under the influence of an intoxicant. Id. The burden is on the State to show that the officer had probable cause. Id.

Argument

In Renz the Supreme Court concluded that the officer possessed the required degree of probable cause to request

that Renz submit to a PBT. Renz, 231 Wis.2d at ¶50. The Supreme Court based its conclusion on several indicators of intoxication exhibited by Renz. Id. at ¶49. Renz's car smelled strongly of intoxicants. He admitted to drinking three beers earlier in the evening. Id. Renz exhibited one of four clues on the one-legged stand test. Id. at ¶8. He exhibited two of eight clues on the heel-to-toe test and exhibited all six clues on the HGN test. Id. at ¶9 & 11. Finally, Renz touched the bridge of his nose, rather than the tip of his nose on the finger-to-nose test. Id. at ¶49.

Ranta argues the instant case is distinguishable from Renz. Unlike Renz, according to Ranger Lane's testimony, Ranta passed all of the standard field sobriety tests (R. 33:46-51). Unlike Renz, who exhibited two of eight clues on the walk and turn test, Ranta only exhibited one clue (R. 33:31 & 46). Ranta's only error on the walk and turn test consisted of failing to touch heel to toe on one of the eighteen steps (R. 33:47-48). However, the Ranger could not testify to which step Ranta missed (R. 33:47). In addition, it was unclear from the Ranger's testimony whether he even knew how much space was required between the heel and toe to consider the space between as a clue (R. 33:47).

Unlike Renz, who exhibited all six clues on the HGN

test, Ranta only exhibited two clues on the HGN test, nystagmus at maximum deviation in both eyes (R. 33:32 & 48). Regarding the two clues observed, the Ranger testified he did not ask Ranta if he had any eye abnormalities and the Ranger acknowledged that people exhibit jerkiness at maximum deviation even when they are unimpaired (R. 33:49-50).

Unlike Renz, who exhibited one of four clues on the one leg stand test, Ranta exhibited zero clues (R. 33:32 & 50-51). Therefore, Ranta argues the standard field sobriety test results do not provide any indicia of intoxication because he passed every test he was required to perform.

Further, Ranta asserts the circuit court erred in considering his demeanor earlier in the evening when determining the Ranger had probable cause to believe Ranta was operating while intoxicated. The Ranger testified Ranta was belligerent, uncooperative, and loud during his first contact with Ranta (R. 33:24). Further, he testified Ranta staggered, had a strong odor of alcohol, and slurred speech (R. 33:24). However, Ranger Lane did not testify that Ranta exhibited any of these attributes at the time of the stop, except for an odor of alcohol on Ranta's breath. Specifically, Ranger Lane testified Ranta had an odor of alcohol on his breath and observed bloodshot eyes at the

time of the stop (R. 33:31). Ranta asserts the circuit court may have considered the fact that he consumed intoxicants earlier in the evening, as the officer did in Renz. Id. at ¶49. However, Ranta asserts the circuit court should not have considered his demeanor exhibited earlier in the evening because he did not exhibit the same demeanor at the time of the stop.

In addition, Ranta asserts the circuit court clearly erred in allowing Ranger Lane to testify as to the rate of alcohol elimination in an individual, and erred in relying on that testimony, because Ranger Lane was not qualified to testify to the rate of alcohol elimination (R. 33:32 & 34). According to Wis. Stat. § 907.02, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion..." Ranta asserts scientific training is required for a witness to testify as to blood alcohol calculations. Ranger Lane did not have any medical training regarding the dissipation of alcohol in a person's system. (R. 33:40). The only training Ranger Lane had regarding alcohol elimination was that someone told him

about it at a training at some unknown time (R. 33:40).

Ranta argues without expert testimony as to alcohol elimination in the human body, the result of the first PBT from earlier in the evening should not have been considered by the circuit court. Ranta asserts that just because he had a PBT result of .15 earlier in the evening does not mean that he was over the legal limit hours later. If the State asserts that position, the State would have to present expert testimony to support that assertion. However, again, Ranta acknowledges that general knowledge of drinking earlier in the evening could have been considered by the circuit court.

Even if this Court finds under the circumstances the first PBT could be considered, Ranger Lane was not present when the PBT was administered. He did not know what time the PBT was administered. Finally, the Ranger acknowledged residual mouth alcohol and breath contaminations are common factors causing high PBT results and without the Ranger being present at the time of the test, he could not testify if these factors were present (R. 33:52-53). Therefore, even if the circuit court could have considered the first PBT, the circuit court failed to recognize that the Ranger had no personal knowledge of the test result or its

accuracy.

Finally, Ranta asserts Ranger Lane's remaining observations, of an odor of alcohol and bloodshot eyes, do not rise to the level of probable cause required to request a PBT. Ranta acknowledges that if this was a case where he was subject to the .02 PAC standard, an odor of alcohol would be enough to authorize Ranger Lane to request a PBT. State v. Goss, 2011 WI 104, ¶2, 338 Wis.2d 72, 75-76, 806 N.W.2d 918. However, Ranta was not subject to the .02 PAC standard because this case involves a first offense, Operating While Intoxicated citation. Ranta has not found any case law indicating a PBT can be administered based on the odor of alcohol and bloodshot eyes when dealing with a .08 PAC standard.

Ranta argues if the circuit court was unable to consider the PBT result, then Ranger Lane lacked probable cause to arrest Ranta. Ranta asserts the only indicators of alcohol consumption the circuit court could have relied on was an odor of alcohol and bloodshot eyes. As stated above, Ranta argues those two indicators are not enough to request a PBT. If those two indicators are not enough to request a PBT, it follows, those two indicators are not enough to establish probable cause to arrest.

CONCLUSION

Ranta asserts the circuit court erred in finding that Ranger Lane had probable cause to believe that Ranta was operating while under the influence of an intoxicant and, therefore, erred when it considered the PBT result in assessing probable cause to arrest.

First, Ranta asserts the facts of his case are markedly different from the facts in the Renz case. Ranta easily passed all of the standard field sobriety tests. Renz did not. Ranta asserts the standard field sobriety test results did not provide Ranger Lane with any indicia of intoxication. Ranta further asserts his actions observed earlier in the evening should not have been considered by the circuit court in the circuit court's assessment of probable cause. Ranta also asserts the circuit court should not have considered the Ranger's testimony regarding the rate of alcohol elimination in the human body. If the court erred in considering Ranta's actions and the alcohol elimination testimony, the only facts remaining for the circuit court to consider were an odor of alcohol, bloodshot eyes, and knowledge of prior alcohol consumption. Ranta asserts these facts do not support the level of probable cause required to administer a PBT. Therefore, it follows, that Ranger Lane did not have probable

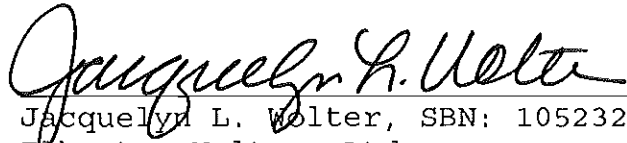
cause to arrest.

Dated this 6th day of December, 2012.

Signed,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b) & (c) (2009-2010) in that it is Desktop Publishing or Other Means (monospaced font, 10 characters per inch, double spaced, a 1.5 inch left margin, and all other margins 1 inch). The length of the brief is 18 pages.

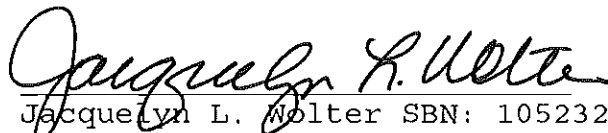
Three copies of the appellant's brief were served by U.S. Mail on counsel for the State of Wisconsin, the Plaintiff-Respondent.

Dated this 6th day of December, 2012.

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CERTIFICATE OF COMPLIANCE WITH RULE § 809.19(12)

I hereby certify that I have submitted one electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 6th day of December, 2012.

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