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DISTRICT IV

12-21-2012

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2012-AP-1663

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TRAVIS M. RANTA,

Defendant-Appellant

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM JUDGMENT OF CONVICTION
AND AN ORDER DENYING SUPPRESSION OF EVIDENCE
ENTERED IN THE CIRCUIT COURT FOR SAUK COUNTY,
THE HON. JAMES EVENSON, PRESIDING

Respectfully submitted,

STATE OF WISCONSIN,
Plaintiff-Respondent

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	3
Statement of the Issues	4
Statement on Publication and Oral Argument	4
Statement of the Case and Facts	5-7
Argument	8-12
THE OFFICER HAD SUFFICIENT PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT WAS VIOLATING THE OWI LAWS TO REQUEST THAT DEFENDANT SUBMIT TO A PRELIMINARY BREATH TEST.	
Conclusion	13
Certifications	14-15

TABLE OF AUTHORITIES

Cases Cited	<u>PAGE</u>
<i>County of Jefferson v. Renz</i> 231 Wis.2d 293, 603 N.W.2d 541 (1999)	8,10-12
<i>State v. Babbitt</i> , 188 Wis.2d348, 525 N.W.3d 102 (1994)	11
<i>State v. Kasian</i> , 207 Wis.2d 611, 558 N.W.2d 687 (Wis.App. 1996)	8
<i>State v. Wille</i> , 185 Wis.2d 673, 518 N.W.2d 325 (Wis.App. 1994)	8
<i>State v. Richardson</i> , 156 Wis.2d 128, 456 N.W.2d 830 (1990)	8

Statutes Cited	<u>PAGE</u>
Section 343.303 Wis. Stats.	9

STATEMENT OF THE ISSUES

Did the DNR Ranger have sufficient probable cause to request that Defendant submit to a Preliminary Breath Test?

The Court answered yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Plaintiff-Respondent recognizes that this appeal, as a one judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought. Plaintiff-Respondent does not seek oral argument as the briefs should adequately present the issues on appeal.

STATEMENT OF THE CASE AND FACTS

The Defendant-Appellant's, (hereafter Ranta) Statement of Case is correct.

The first witness called at the Suppression hearing on November 16, 2011 was Patrick Cowan, a certified police officer with the State of Wisconsin, DNR, Devil's Lake State Park, with 10 years of law enforcement experience, and a bachelor's degree in criminal science and law enforcement and law enforcement certifications from Wisconsin Technical College. (33:4,5) Cowan was working at the Park on Saturday, August 13, 2011 and after 5:50pm he was called to a disturbance at site 361 at the United States campground. (33:4-6) When Cowan arrived at the campsite, he saw a case of Bud Light beer, some open, and an open can inside a black Ford Ranger. (33:7) Cowan spoke with Travis Ranta, who told Cowan that all the alcohol at the site belonged to Ranta, and that he'd been drinking it. Ranta also stated the Ford Ranger was his vehicle. (33:8). Cowan described Ranta's behavior as "loud, boisterous a little bit, had a very extreme attitude and discontent in regards to the situation." (33:9) At about 6:30 or quarter to seven, and about 10 or 15 minutes before he was given a preliminary breath test, (PBT), Cowan saw Ranta drinking at the campsite. (33:21) The decision was made to evict Ranta and his underage companions for disorderly conduct and drinking, and a preliminary breath test was

administered to Ranta at 7:20 pm to determine if he was safe to drive. (33:9,10) The result of the PBT was a .156. Cowan used a Department of Transportation approved Alco-Sensor IV for the PBT, which he operated according to his training. (33:13)

Officer Ken Lane was at the campsite at that time, was told about the PBT, and was having a discussion with Ranta about who would drive Ranta's truck. (33:11, 26) Cowan heard Ranta tell Lane that nobody was going to drive his truck but Ranta. (33:11, 26)

At about 20 minutes after eight, Cowan was called to a disturbance at the concessions store at the Ice Age Campground. From the description of the witnesses to the disturbance, Cowan believed one of the people involved was Ranta, and Cowan saw Ranta's truck drive by the parking lot of the store at 30 to 35 mph in a 15 mph zone. (33:11,12) Cowan advised Lane to look for Ranta's Ford Ranger. (33:12)

Ranger Ken Lane also testified at the Suppression hearing. Lane has been a ranger employed by the DNR since April 12, 1982 and is a graduate of the police academy and is a certified law enforcement officer. Lane testified that he was at campsite 361 at 7:05 on August 13, 2011, and spoke with Ranta who was intoxicated, belligerent, uncooperative, loud, staggering, with slurred speech and a strong odor of alcohol on his breath. (33:22-24) Lane was advised that

Ranta's PBT result was .15.

6

While Lane was trying to find a legal driver for Ranta's truck, Ranta insisted he was going to drive his truck. (33:26) Lane believed Ranta was "in no shape to drive," and Lane was "firmly adamant" that Ranta not do so. (33:26)

Later, Lane was notified that Ranta's truck was on the move and found the truck and clocked Ranta on radar at 30 mph in a 15 mph area. (33:29) Lane stopped Ranta's truck at 12 minutes after nine, (33:53) and when speaking with Ranta, Lane observed an odor of alcoholic beverages on Ranta's breath and Ranta's eyes were bloodshot. (33:31) Ranta did well on field sobriety tests, having 1 clue on the heel to toe test, 2 clues on the HGN test and no clues on the one leg stand. (33:31,32) However, based on his training and experience, Lane knew that the elimination rate of alcohol in people is less than .02 per hour, (33:34), and therefore "in the period of 2 hours it would be impossible to go from a .15 to below .08." (33:35) Ranta's PBT result was .11 and Lane was not surprised because this result was consistent with his calculations. Ranta was placed under arrest. (33:37)

ARGUMENT

THE RANGER HAD SUFFICIENT PROBABLE CAUSE TO BELIEVE THAT RANTA WAS VIOLATING THE OWI LAWS TO REQUEST THAT RANTA SUBMIT TO A PRELIMINARY BREATH TEST.

A trial court's findings of fact should be upheld unless they are clearly erroneous. *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830 (1990). However, whether those facts satisfy a statutory standard of probable cause is a question of law which the Court of Appeals reviews *de novo*. *Richardson* at 137-138; *State v. Kasian*, 207 Wis.2d 611, 621, 588 N.W.2d 687 (Ct.App. 1996). In determining whether certain facts establish probable cause for an arrest, a court must determine whether the circumstances were such, that a reasonable law enforcement officer could conclude that the defendant probably committed the offense. *State v. Wille*, 185 Wis. 2d 673, 682, 518 N.W. 2d 325, 329 (Wis.App. 1994). Applied to an arrest for OWI, a court must look at the totality of the circumstances to determine whether the arresting officer's knowledge at the time the arrest was made, would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of intoxicants. *Kasian*, 207 Wis. 2d at 621.

Relying on *County of Jefferson v. Renz*, 231 Wis.2d 293,

603 N.W.2d 541 (1999), the State submits that the facts

8

known to Ranger Lane were sufficient to establish the "probable cause to believe" as required by section 343.303 Wis. Stats.

The issue in *Renz* was whether a law enforcement officer was required to have "probable cause to arrest" prior to asking a suspect to submit to a PBT pursuant to section 343.303 Wis. Stats.. Section 343.303 provides, in pertinent part,

"If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, . . . 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. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6), 940.09 (1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305 (3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305 (3). . .

In interpreting that statute, the Wisconsin Supreme Court concluded,

"We therefore determine that neither case law nor legislative history compels us to interpret the first sentence of Wis. Stat. § 343.303 in a manner that undermines the meaning of the second and third sentences of the statute. Instead, we conclude that the context, history and purpose of from a commercial driver, but less than the level of proof required to establish probable cause for arrest. Under this construction, the second and third sentences function sensibly. An officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of OWI, and the PBT result will be admissible to show probable cause for an arrest, if the arrest is challenged. The context, history, and purpose of the statute strongly support this reasonable construction." *Renz*, at 315-316

The officer in *Renz* stopped *Renz* for a loud exhaust, not indicative of impaired driving. The officer in *Renz* noticed a strong odor of intoxicants on *Renz* who admitted consuming three beers earlier in the evening. *Renz* submitted to five field sobriety tests. He recited the alphabet correctly, displayed one clue on the one leg stand, displayed two clues on the heel to toe test and touched the bridge of his nose with his left hand on the finger to nose test. *Renz* had six clues on the HGN, which the officer believed indicated a blood alcohol level of at least .10%; however, the trial court in *Renz* did not allow the officers testimony on, or consider the results of, the HGN test.

Based on the facts before him, the officer in *Renz*

requested Renz to submit to a PBT. After a PBT result of .18%, Renz was arrested. The Supreme Court noted that the

facts presented in *Renz*, where defendant exhibited several indicators of intoxication but did not have slurred speech and was substantially able to complete all the field sobriety tests, presented the precise scenario envisioned by the legislature for employing a PBT: "The officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest. We conclude that the officer had the required degree of probable cause to request the defendant to submit to a PBT." *Renz* at 317.

Here, Ranger Lane also appropriately used the PBT as the legislature intended, as a "screening test before establishing probable cause for an OWI arrest." *Renz* at 307. Ranger Lane observed that defendant displayed several indicators of intoxication at the time of the stop: Ranta was speeding twice the speed limit leaving a disturbance, and Ranta had an odor of intoxicates on his breath and bloodshot eyes. But, Ranta did well on the field sobriety tests.

Ranger Lane considered the totality of the circumstances. "In determining whether probable cause existed, we look to the totality of the circumstances. *State v. Babbitt*, 188 Wis.2d348, 356, 525 N.W.2d 102 (1994). Ranger Lane could not,

and should not as a reasonable officer have ignored what he knew of the defendant's behavior and condition two hours before the stop, which included behavior consistent with a PBT reading of .156. Ranger Lane could not and should not as a reasonable officer ignore his training and

experience which included elimination rates which allow him to calculate the defendant's BAC at the time of the stop. So faced with conflicting evidence of the degree of defendant's level of intoxication, Ranger Lane properly used the PBT for its intended purpose: "an effective tool for law enforcement officers investigating possible OWI violations." *Renz* at 315.

CONCLUSION

Based upon the totality of the circumstances, Ranger Lane had the probable cause necessary under section 343.303 Wis. Stats. to request a preliminary breath test of this Defendant. The decision of the Court to deny the Defendant's motion should stand.

Dated this 18th day of December, 2012.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 15 pages.

Dated: December 18, 2012

Signed,

Sue Mueller
State Bar No. 10103430

Attorney's Certification

I, Sue Mueller, hereby certify in accordance with Section 809.19(12)(f) Wis. Stats, that I have filed an electronic copy of a brief, with is identical to this paper copy.

Dated: December 18, 2012

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