

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RECEIVED

06-14-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

In the matter of the refusal of George R. Ferrell:

State of Wisconsin,
Plaintiff-Respondent,

v.

George R. Ferrell,
Defendant-Appellant

Appeal No.: 2012AP2602

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM A FINAL ORDER
ENTERED ON OCTOBER 09, 2012
IN THE CIRCUIT COURT FOR SAUK COUNTY, BRANCH I,
THE HON. PATRICK J. TAGGART PRESIDING.

Respectfully submitted,

STATE OF WISCONSIN
Plaintiff-Respondent

Sue Mueller
State Bar No. 1013430
Sauk County
Assistant District Attorney
515 Oak St.
Baraboo, WI 53913

TABLE OF CONTENTS

TABLE OF AUTHORITIES3

STATEMENT ON PUBLICATION.....4

STATEMENT ON ORAL ARGUMENT.....4

FACTS4

ARGUMENT8

I. THE ARREST OF GEORGE FERRELL WAS
LAWFUL BASED ON PROBABLE CAUSE TO
BELIEVE HE HAD OPERATED A MOTOR
VEHICLE WHILE IMPAIRED..... 8

A. The issue requires using a two-step Standard of
Review. 8

B. The totality of the circumstances provided a
sufficient basis for probable cause to arrest..... 8

CONCLUSION 14

CERTIFICATION..... 15

TABLE OF AUTHORITIES

Cases

State v. Anagnos, 2012 WI 64, 341 Wis. 2d 576, 815
N.W.2d 675..... 8

State v. Babbitt, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct.
App. 1994)..... 13

State v. Higginbotham, 162 Wis. 2d 978, 471 N.W.2d
24 (1991)..... 9

State v. Lange, 2009 WI 49, 317 Wis. 2d 383, 766
N.W.2d 551 (2009)..... 9, 10, 11, 12

State v. Pazek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971).
..... 9

Statutes

Wis. Stat. § 346.63 (2011-12). 11

Wis. Stat. § 809.23(1) (2011-12) 4

STATEMENT ON PUBLICATION

Using the criteria set forth in Wis. Stat. § 809.23(1) (2011-12), the State does not seek publication of this opinion.

STATEMENT ON ORAL ARGUMENT

This brief presents and meets the issues on appeal to a degree that oral argument would be an unjustified expenditure of court time. Therefore, oral argument is not necessary in this case.

FACTS

On January 13, 2012 at approximately 1:37 p.m., Trooper Theide of the Wisconsin State Patrol received information from dispatch of a possible domestic dispute with a male threatening a female along the shoulder of the roadway. R.14, p.4. The reporting party also indicated that the vehicle had been speeding prior to pulling over to the shoulder. *Id.* Theide continued to receive updates on this vehicle and driver from “several further calls.” R.14, p.5. The callers described the vehicle and reported it was speeding, making aggressive lane changes, and that it had “passed on the left”, which

Theide understood to mean passing on the left shoulder.

Id.

Approximately 25 minutes later and 30 miles down the road, Theide observed a vehicle matching the description of the earlier dispatch. R.14, p.5. Theide obtained a laser reading on the vehicle indicating the vehicle's speed was 82 mph. Once the vehicle passed his location, Theide pulled out behind it in an unmarked Crown Victoria cruiser; he observed no braking or slowing from the vehicle. R.14, p.7.

While following the vehicle at approximately 82 mph, Theide observed the vehicle move to the edge of the lane, make a sharp jerky correction to the center, then drift to the edge again. R.14, p.7. Theide observed this behavior repeat three times before the suspect vehicle caught up to slower traffic. *Id.* At that point, the vehicle made a sharp lane change before following a semi at a distance of approximately only three car lengths while traveling 65 to 70 mph. R.14, p.8. While the vehicle was in this position, Theide observed it drift once to the center line of the lane and once to the fog line, making very jerky corrections each time. *Id.*

Theide activated his emergency lights and siren in an attempt to stop the vehicle but received no immediate response or acknowledgement of his authority from the vehicle's operator. R.14, p.8. After taking an exit ramp from the highway, the vehicle eventually pulled to the shoulder and stopped. R.14, p.9.

Theide spoke to the driver (later identified as Ferrell) from the passenger side of Ferrell's car. When Theide asked Ferrell about his speed, Ferrell said he had been traveling between 85 and 90 mph. When Theide told Ferrell he had gotten a laser reading of 82 mph Ferrell laughed and said something on the order of, "way too fucking fast." R.14, p.10. Theide asked Ferrell for his driver's license and waited as it took Ferrell three times of going through his wallet before he eventually found it. R.14, p.11. During this contact, Theide observed that Ferrell appeared very rigid. R.14, p.11. Ferrell's hands were clenched on the steering wheel and his forearm muscles were extremely tense. R.14, p.12. Theide noted that Ferrell's pupils were extremely small (unusually so) and his eyes were

bloodshot. *Id.* Ferrell was answering questions in a very quick manner with speech that was a little slurred. *Id.* Theide returned to his squad and waited for a backup officer. R. 14, p.12-13.

Once a backup Trooper arrived at the stop, Theide returned to Ferrell's car and asked Ferrell to step out. R.14, p.14. As they moved to the rear of the car, Theide informed Ferrell that, to make sure Ferrell was okay to be driving, he was asking Ferrell to perform field sobriety tests. R.14, p.14-15. As Ferrell moved to the rear of his car, not only did he remain rigid, he held his arm out in front of him and began walking "like a mummy." R.14, p.14. Theide also noted that Ferrell was staring through him and described it as a "thousand yard stare". *Id.* After Theide instructed Ferrell to step back away from the lane of traffic, Ferrell turned around and leaned forward, placing his hands on the trunk of his car. R.14, p.15-16. Theide told Ferrell he wanted him to do field sobriety tests and Ferrell told him, no. R.14, p.16. Theide asked if that meant that Ferrell did not want to do any tests and Ferrell said, yes. Theide

then arrested Ferrell for operating a motor vehicle while intoxicated. *Id.*

ARGUMENT

I. THE ARREST OF GEORGE FERRELL WAS LAWFUL BASED ON PROBABLE CAUSE TO BELIEVE HE HAD OPERATED A MOTOR VEHICLE WHILE IMPAIRED.

A. The issue requires using a two-step Standard of Review.

Whether there existed probable cause to arrest is a question of constitutional fact. *State v. Anagnos*, 2012 WI 64, ¶ 21, 341 Wis. 2d 576, 586, 815 N.W2d 675, 680. A review of the circuit court's decision requires two-steps. *Id.* First, using the *clearly erroneous* standard, the Court reviews the circuit court's findings of historical fact. *Id.* Second, the Court reviews the application of the those historical facts to the constitutional principles independent of the circuit court's determinations. *Id.*

B. The totality of the circumstances provided a sufficient basis for probable cause to arrest.

In order for this arrest to be constitutionally valid it must be supported by probable cause. *State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 391, 766 N.W.2d 551, 555 (2009). Probable cause to arrest refers to that quantum of evidence which would lead a reasonable law enforcement officer to believe that the suspect probably committed a crime. *State v. Pazek*, 50 Wis. 2d 619, 624, 184 N.W.2d 836, 839 (1971). It is not necessary that such cause be sufficient to prove guilt beyond a reasonable doubt, nor even to prove guilt is more probable than not. *Id.* at 625. It is only necessary that the information is enough to lead a reasonable officer to believe that guilt is more than a possibility. *Id.*

Probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Lange*, 2009 WI 49, ¶20 (quoting *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)). In determining if probable cause existed, the Court applies an objective standard, considering the information available to the officer involved and that officer’s training and experience. *Id.*

The trial court based its decision on the totality of the circumstances. R.8, p.3. The trial court did not limit its finding to the brief list of “bad” facts cited by Ferrell. *Id.* While the court agreed that those facts alone would be sufficient, it is clear from the record the court considered other additional facts. *See Id.* The decision was correctly based on circumstances which include the Trooper’s testimony, Ferrell’s erratic and dangerous driving behavior, the Trooper’s observations during the stop, and Ferrell’s refusal to admit to field sobriety tests. *Id.*

Ferrell’s argument would, incorrectly, have the court find that “missing facts” cancel out existing facts. In *Lange*, the defendant urged the court to find the officer lacked probable cause. *See Lange*, 2009 WI 49. Similar to this case, *Lange* argued that without common indicators of intoxication such as admission to alcohol consumption by defendant, odor of intoxicants, slurred speech or difficulty balancing, known visits to a bar, inconsistent stories or explanations, intoxicated traveling companions, empty cans or bottles, and suggestive field sobriety tests, the officer lacked

probable cause to arrest. *Id.* at ¶ 21. The court responded by stating, “Although evidence of intoxicant usage-- such as odors, an admission, or containers-- ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required. The totality of the circumstances is the test.” *Id.* at ¶ 37. While the additional factors listed by Ferrell could certainly have strengthened probable cause, their absence in this case does not explain away nor negate the culpable facts that were gathered.

Ferrell was arrested for violating Wis. Stat. § 346.63, operating under influence of intoxicant or other drug. The statute’s language does not limit intoxicant to meaning alcohol. *See* Wis. Stat. § 346.63 (2011-12). Much of Ferrell’s argument focuses on, what is in his opinion, a lack of facts regarding the use of alcohol. That focus ignores the scope of the statute and discounts valuable indicators of influence of intoxicants observed by Theide; the trial court did not make that error.

Theide’s observations include a variety of indicators that when taken together satisfy the threshold of probable cause. In deciding the case the trial court

considered the information known to Theide, a Trooper with twenty-two years experience, and the totality of these indicators. R.8, p.1. Some of the facts considered by the court include the following:

- 1) Ferrell's dangerous and erratic driving behavior including speed, weaving within his lane, making sharp lane changes, drifting, and passing on the left. R.8, p.2-3.¹
- 2) Ferrell's rigid body and clenched hands. R.8, p.2.
- 3) Ferrell's bloodshot and unusually constricted pupils. *Id.*
- 4) Ferrell's movements with his arms straight out and his stare. *Id.*

¹ See *Lange*, 2009 WI 49, ¶ 24 (describing the driver's behavior as the type of dangerous driving that suggests the absence of a sober decision maker).

5) Ferrell's slurred speech and quick answers.

Id. at 4.

6) Ferrell's fumbling through his wallet while locating his license. *Id.*

7) Ferrell's refusal to undergo Standardized Field Sobriety Tests. *Id.* at 2.²

Taken as a whole and applying a common sense measure to them, these factors would lead a reasonable officer to find guilt of operating under the influence of an intoxicant more than a possibility. Probable cause for arrest existed.

² See *State v. Babbitt*, 188 Wis. 2d 349, 359, 525 N.W.2d 102, 105 (Ct. App. 1994) (establishing that refusal to submit to field sobriety tests is some evidence of consciousness of guilt and should be admissible for the purpose of establishing probable cause).

CONCLUSION

For the foregoing reasons, the Court should find that probable cause to arrest did exist and, therefore, affirm the decision of the trial court.

Dated this 12th day of June, 2013.

Respectfully submitted,

STATE OF WISCONSIN,

Sue Mueller,
State Bar No. 1013430
Sauk County
Assistant District Attorney

Joshua M. Cornell
Student Intern
Sauk County
District Attorney's Office

CERTIFICATION

I herby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,841 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 12th day of June, 2013.

SUE MUELLER
State Bar No. 1013430