STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2013 AP 000614

TOWN OF FREEDOM,

Plaintiff – Respondent,

v.

MATTHEW W. FELLINGER,

Defendant – Appellant.

BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE NANCY KRUEGER PRESIDING

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ISSUES PRESENTED FOR REVIEW

Are the Standardized Field Sobriety Tests a "search" within the meaning of the Fourth Amendment?

The Circuit Court answered: No.
The Defendant-Appellant submits: Yes.

Should the quantum of evidence to conduct a field sobriety test search be higher than reasonable suspicion?

The Circuit Court answered: No.
The Defendant-Appellant submits: Yes.

Did the officer have reasonable suspicion to conduct field sobriety tests?

The Circuit Court answered: Yes.
The Defendant-Appellant submits: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. However, publication is requested, as the issues presented for review present questions of constitutional interpretation, and the administration of a highly litigated area of the Wisconsin criminal justice system.

STATEMENT OF THE CASE

This is an appeal from a judgment, entered in Outagamie County Circuit Court, the Honorable Nancy Krueger presiding, in which the Defendant-Appellant,

Matthew W. Fellinger ("Fellinger"), was found guilty of Operating While Intoxicated (1st Offense). (R. 9).

On June 29, 2012, the Town of Freedom filed a citation in the Outagamie County Circuit Court charging Fellinger with, Operating While Intoxicated (1st Offense), contrary to Wis. Stat. § 346.63 (1)(a). (R. 1). Fellinger ultimately pleaded not guilty. (R. 3).

On or about October 3, 2012, Fellinger filed a *Motion to Suppress Evidence* in the circuit court. (R.7:1-7). Accordingly, a motion hearing was held on January 29, 2013. (R. 14, 1-43). At the January 29th hearing, the circuit denied Fellinger's motion. (R. 8).

Following the circuit court's ruling denying the motion, a Court Trial was held on March 11, 2013. (R.15:1-9). Fellinger was found guilty of Operating While Intoxicated (1st Offense). (R. 9). Following the finding of guilt, the circuit court imposed an eight (8) month driver's license revocation; and, ordered an alcohol and drug assessment; in addition to a forfeiture. (R. 15:7).

The Judgment of Conviction was entered on July March 12, 2013. (R. 18). This appeal follows.

STATEMENT OF THE FACTS

As indicated above, a Citation (R.1) was filed on June 23, 2012 (R.1) charging Fellinger with Operating While Intoxicated (1st Offense). Fellinger was stopped for violating the posted speed limits in the Town of Freedom by Officer Christopher Nechodom (Officer Nechodom). Upon making contact with Fellinger, Officer Nechodom alleges to have observed a moderate odor of intoxicants coming from Fellinger's vehicle. (R. 14:9) Officer Nechodom determined that the mere odor of intoxicants, combined with the time of night, absent other personal idicia of intoxication, were reasonable clues to determine that suggested that Fellinger was intoxicated. As such, Officer Nechodom administered field sobriety tests; which Fellinger allegedly performed unsatisfactorily. Following the FSTs, Fellinger submitted to the preliminary breath test and was ultimately arrested for Operating While Intoxicated (1st Offense).

Also indicated above, Fellinger filed a *Motion to Suppress Evidence* on October 3, 2012. (R. 7). Fellinger contended that Officer Nechodom lacked probable cause to detain him and lacked either reasonable suspicion or probable cause to require him to perform standardized field sobriety

tests. Fellinger argued that the standardized field sobriety tests ("FSTs") are a "search" in the constitutional sense, as such an officer must have, at a minimum, a quantum of evidence higher than reasonable suspicion, but lower than probable cause to require a person submit to this "search." Fellinger contended that all Officer Nechodom possessed at the time he administered the FSTs was an unparticularized hunch that Fellinger was intoxicated. (R. 7:1-7).

On October 3, 2012, the circuit court orally denied Fellinger's motion. Essentially, the circuit court held that the FSTs are not a "search" within the meaning of the Fourth Amendment. Therefore, all that is required to perform FSTs is reasonable suspicion under the totality of the circumstances. (R. 14:37-38). Going further, the circuit court held that in the instant case the officer had reasonable suspicion to perform the FSTs. (R. 14:38-39).

ARGUMENT

I. THE STANDARDIZED FIELD SOBRIETY TESTS ARE A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT

a. Standard of Review

An appellate court is not bound by the circuit court's conclusions of law and decides the issues *de novo*. State v. *Foust,* 214 Wis.2d 568, 571-72, 570 N.W.2d 905 (Ct. App.1997).

b. Field Sobriety Tests Constitute A "Search" Within The Constitutional Sense

The Fourth Amendment to the United States Constitution declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> United States Const., Amend. IV.

The question as to whether FSTs, specifically the Horizontal Gaze Nystagmus, Walk-and-Turn and One-legged Stand tests, are a "search" within the meaning of the Fourth Amendment has never been addressed by Wisconsin courts. Therefore, an issue of first impression is presented. Fortunately, several other jurisdictions have had the

opportunity to interpret the instant issue and therefore provide guidance to the case at hand. *See e.g.,* Berg v. Schultz, 190 Wis.2d 170, 177, 526 N.W.2d 781 (Ct. App. 1994) ("Because this is a case of first impression, we look to other jurisdictions for guidance.").

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984). An inherent right as a human being is to control and coordinate the actions of their own body. Hence, a fundamental expectation of privacy is implicated when a person is subject to the performance of FST.

Essentially, all jurisdictions that have had the occasion to address the issue have held that FSTs constitute a "search" in the constitutional sense. In *People v. Carlson*, 677 P.2d 310 (Colo. 1984), the Colorado Supreme Court held that FST "constitutes a full 'search' in the constitutional sense of that term[.]" *Id*. at 317. *Also see e.g.* *United States v. Hopp*, 943 F. Supp. 1313 (D. Colo. 1996) (holding FST are searches within the meaning of the Fourth Amendment); *and also* *State v. Lamme*, 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), affirmed, 216 Conn. 172, 579 A.2d 484 (Conn. 1990);

State v. Little, 468 A.2d 615 (Me. 1983); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (Ariz. 1986); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544 (Haw. 1984); *Blasi v. State*, 167 Md. App. 483, 893 A.2d 1152 (Md. Ct. App. 2006).

II. THE QUANTUM OF EVIDENCE TO REQUIRE FSTs SHOULD BE HIGHER THAN REASONABLE SUSPICION

The threshold determination that FST are "searches" within the meaning of the Fourth Amendment having been established, the question now becomes what quantum of evidence attaches to the FST search in order to be constitutional. The Fourth Amendment calls for this determination. As is no surprise, no Wisconsin court has addressed the issue. Fellinger turns to other jurisdictions.

At the outset, Fellinger acknowledges that there is a split in authority amongst the jurisdictions having addressed the instant issue. Some courts have held the quantum of evidence required is reasonable suspicion[1], while some courts hold probable cause[2] is required.

[1] *See e.g.,* *State v. Lamme*, 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), affirmed, 216 Conn. 172, 579 A.2d 484 (Conn. 1990); *State v. Little*, 468 A.2d 615, 617-18 (Me. 1983); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 175-76 (Ariz. 1986); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544, 552-53 (Haw. 1984).

Fellinger finds *People v. Carlson*, 677 P.2d 310 (Colo. 1984) to be particularly persuasive. In *People v. Carlson*, the Colorado Supreme Court held:

> We are left then with the issue of the validity of the roadside sobriety tests, a matter not considered below. A roadside sobriety test involves an examination and evaluation of a person's ability to perform a series of coordinative physical maneuvers, not normally performed in public or knowingly exposed to public viewing, for the purpose of determining whether the person under observation is intoxicated.
>
> Since these maneuvers are those which the ordinary person seeks to preserve as private, there is a constitutionally protected privacy interest in the coordinative characteristics sought by the testing process. Although some forms of governmental intrusion are so limited in scope as to be justified on a lesser quantum of evidence than probable cause, see, e.g., *Michigan v. Long*, supra; *Terry v. Ohio*, supra, a roadside sobriety test does not fall into this category.
>
> Roadside sobriety testing constitutes a full "search" in the constitutional sense of that term and therefore must be supported by probable cause. The sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect. Intrusions into privacy for the exclusive purpose of gathering evidence of criminal activity have traditionally required, at the outset of the intrusion, probable cause to believe that a crime has been committed. See *Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641, 78 L.Ed.2d 477 (1984); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).
>
> *Id*. at 316-17.

Acknowledging the persuasive value, Fellinger urges the Court to find, as a matter of first impression, that the level of suspicion in Wisconsin should be probable cause, but not

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[2] *See e.g.* *People v. Carlson*, 677 P.2d 310 (Colo. 1984); *United States v. Hopp*, 943 F. Supp. 1313 (D. Colo. 1996)

to the extent of probable cause to arrest. Rather, Fellinger suggests a quantum of evidence that is *more* than reasonable suspicion, but *less* than probable cause to arrest. Fellinger makes this suggestion by analogically applying the rationale of decision rendered by the Wisconsin Supreme Court in *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999).

In *Renz*, the Wisconsin Supreme Court was faced with interpreting the "probable cause" language as used in Wis. Stat. § 343.303. *Id*. The Renz court held that "probable cause," as that term is used in sec. 343.303, refers "to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest." *Renz*, 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999).

Fellinger submits that rationale of *Renz* is should be applied here. Firstly, similar to a FST, a PBT constitutes as "search" under the federal and state constitutions.[3] Secondly,

[3] In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616–17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the U.S. Supreme Court held: "Subjecting a person to a breathalyzer test, which generally requires the

and more importantly, such a standard sufficiently protects the citizen's right to be from unreasonable searches and seizures.

Fellinger acknowledges the state's legitimate interest in keeping impaired drivers off the road. However, in weighing the burden FSTs impose on the individuals' right to be free from unreasonable searches, Fellinger contends that the reasonable suspicion standard is insufficient. A FST search, conducted on the roadside, can prove to be a time consuming, frightening, annoying and an embarrassing intrusion. For this very reason, a quantum of evidence that is greater than reasonable suspicion, but less than probable cause to arrest is appropriate.

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production of alveolar or 'deep lung' breath for chemical analysis, ... implicates similar concerns about bodily integrity and, like the blood-alcohol test ... considered in *Schmerber* [*v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)], should also be deemed a search. [Citations omitted.]" *Accord* *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980) ("While the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, such a search can be conducted if incident to arrest or if a police officer has probable cause to arrest.");

III. UNDER EITHER STANDARD, THE OFFICER LACKED THE REQUISITE QUANTUM OF EVIDENCE TO REQUEST THE FST SEARCHES BECAUSE THE OFFICER ENCOUNTERED CIRCUMSTANCES THAT DID NOT ESTABLISH THAT THE DEFENDANT WAS COMMITTING AN OWI

FSTs are designed to determine if a person is operating with a blood alcohol concentration of .10 or higher. In this case, the officer did not encounter circumstances which could reasonably lead him to believe that Fellinger had a blood alcohol concentration of .10 or higher, or that he was even intoxicated. According to Officer Nechodom, the only factors that indicated that Fellinger was intoxicated were the moderate odor of alcohol and the time of night that he was stopped. (R. 14:9) Admittedly, Officer Nechodom did not observe any erratic driving; Fellinger was simply stopped for speeding. Furthermore, Officer Nechodom did not observe any of the typical signs of intoxication, such as; glassy eyes, slurred speech, lethargic or clumsy mobility, confusion, etc. until after the initial FSTs were conducted. (R. 14:18, 25) In fact, Officer Nechodom confirmed that Fellinger answered his questions clearly and coherently. (R. 14:22)

What Officer Nechodom did encounter, was a situation where the facts indicated that Fellinger had consumed some

alcohol some time prior to driving. Fellinger indeed admitted to consuming some amount of alcohol. (R. 14:24). However, the mere consumption of alcohol before driving is not unlawful. Not only is this reality evinced by the plain language of the statute itself (Wis. Stat. § 346.63), but is also made clear by the pattern jury instructions: "not every person who has consumed an alcoholic beverage is 'under the influence' as that term is used here." (WIS JI-CRIMINAL 2663). Put another way, Wisconsin has not prohibited driving after consuming alcohol.

The facts of the instant case only support a conclusion that Fellinger had consumed alcohol; there were no articulable facts suggesting that he was intoxicated. To violate Wisconsin's OWI law, the prosecution must establish that the individual's ability to drive was impaired as a consequence of consuming intoxicants. *See* Wis. Stat. § 346.63 (1)(a). It is therefore necessary that an officer possess objective facts justifying a legitimate suspicion that the individual's ability to drive is in fact impaired as a consequence of alcohol consumption for that officer to be justified in administering FSTs – whether or not, the Court holds the FSTs to be a constitutional "search."

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court of Appeals reverse the circuit court's ruling denying the Defendant-Appellant's motion to suppress evidence.

Dated this 17th day of May, 2013.

Respectfully Submitted,
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FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby 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 2, 165 words.

Dated this 17th day of May, 2013.

_____

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ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 17th day of May, 2013.

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