STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

APPEAL NO. 2013AP000614
APPEAL FROM THE OUTAGAMIE COUNTY CIRCUIT COURT,
THE HONORABLE NANCY J. KRUEGER, PRESIDING

TOWN OF FREEDOM,

Plaintiff-Respondent,

v. Circuit Court No. 12 TR 7691

MATTHEW W. FELLINGER,

Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT, TOWN OF FREEDOM

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

TABLE OF AUTHORITIES (CONT.)

Page

I. STATEMENT OF ISSUES FOR REVIEW

1. Is reasonable suspicion, based upon the totality of the circumstances, the proper standard to apply to the administration of field sobriety tests?

   The Circuit Court answered "yes."

2. Did Officer Nechodom possess reasonable suspicion, based upon the totality of the circumstances, necessary to administer field sobriety tests?

   The Circuit Court answered "yes."

II. STATEMENT ON ORAL ARGUMENT

Plaintiff-Respondent does not request oral argument. Plaintiff-Respondent does not believe that the issues raised on appeal are matters of first impression as contended by Defendant-Appellant. The briefs of the parties will fully present and meet the issues on appeal and will fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or costs to the litigants. *Wis. Stat. § 809.22(2)(b).*

III. STATEMENT ON PUBLICATION

Plaintiff-Respondent does not request publication. Plaintiff-Respondent does not believe that the issues raised on appeal are matters of first impression as contended by Defendant-Appellant. The issues presented do not implicate the statutory factors supporting publication. *Wis. Stat. § 809.23(1).*

IV. STATEMENT OF THE CASE

A. Nature of the Case

The instant case stems from a traffic stop on June 23, 2012. Defendant-Appellant, Matthew W. Fellinger (hereinafter "Fellinger"), was pulled over by Town of Freedom Officer, Chris Nechodom (hereinafter "Officer Nechodom"), on County Highway E near Freedom High School. Ultimately, Fellinger was cited for speeding, operating while intoxicated (1st), and operating with a prohibited alcohol concentration (1st).

B . Procedural Background

Following the filing of the above-mentioned citations, Fellinger pleaded not guilty. (R. 3-1). Thereafter, Fellinger filed a motion to suppress evidence. (R. 7-1 to 7-7).

On January 29, 2013, the Circuit Court held a hearing on Fellinger's motion. (R. 14-1; A-App. 11). Officer Nechodom was the only witness to testify. (R. 14-3 to 14-29; A-App. 13-39). The Circuit Court determined that there was reasonable suspicion based on the totality of the circumstances and denied Fellinger's motion to suppress. (R. 14-34 to 14-37; A-App. 44-47).

On March 11, 2013, a brief court trial was held and Fellinger was found guilty of operating while intoxicated (1st). (R. 15-1 to 15-7; R-Supp-App. 1-7). Judgment of Conviction was filed on March 12, 2013. (R. 9-1; A-App. 3).

Fellinger filed a notice of appeal on March 11, 2013. (R. 12-1 to 12-2; R-Supp.-App. 10-11).

C. Statement of Facts

The pertinent facts of this matter are largely undisputed. The traffic stop and arrest for operating while intoxicated followed a common and predictable sequence of events.

1. The Initial Traffic Stop.

Officer Nechodom was working on the evening of June 23, 2012. (R. 14-4; A-App. 15). He was parked in the Freedom High School parking lot on County Highway E. (R. 14-6; A-App. 16). Officer Nechodom was running radar and watching the nearby intersection with a four-way stop. (R. 14-6; A-App. 16).

Fellinger's vehicle approached Officer Nechodom's location and it was speeding at thirty-five (35) miles per hour in a twenty-five (25) mile per hour zone. (R. 14-7; A-App. 17). Fellinger's vehicle then stopped at the stop sign. (R. 14-15; A-App. 25). The vehicle then passed Officer Nechodom's location and Fellinger was clocked at forty-one (41) miles per hour in a twenty-five (25) mile per hour zone. (R. 14-17; A-App. 27). Officer Nechodom proceeded to follow Fellinger's vehicle. (R. 14-7; A-App. 17).

Fellinger was then clocked at sixty (60) miles per hour in a forty-five (45) mile per hour zone. (R. 14-18; A-App. 28). Officer Nechodom then

initiated a traffic stop for speeding. (R. 14-8; A-App. 18). It was approximately 2:00 a.m. on an early Saturday morning. (R. 14-9 and 14-25; A-App. 19 and 35).

2. Contact With The Defendant.

After initiating the traffic stop, Officer Nechodom approached Fellinger's vehicle. (R. 14-8; A-App. 18). He immediately noted an odor of intoxicant coming from Fellinger's person or from the vehicle. (R. 14-9 and 14-23; A-App. 19 and 33). Officer Nechodom asked Fellinger about the odor and Fellinger said he had been drinking. (R. 14-9, 14-23, and 14-24; A-App. 19, 33, and 34). Fellinger stated that he had two beers. (R. 14-24; A-App. 34).

Officer Nechodom, with Fellinger still in his vehicle, asked Fellinger to complete an Alphabet test and a counting backwards test. (R. 14-10, 14-26, and 14-27; A-App. 20, 36, and 37). He indicated that he asked these questions to gauge Fellinger's ability to follow instructions. (R. 14-27; A-App. 37). He testified that Fellinger performed unsatisfactorily. (R. 14-11 and 14-26; A-App. 21 and 36). Officer Nechodom then asked Fellinger to exit the vehicle for the purpose of performing field sobriety testing. (R. 14-11; A-App. 21).

3. Officer Nechodom's Experience.

Officer Nechodom testified he has been an officer with the Town of Freedom Police Department for approximately thirteen years. (R. 14-4; A-

App. 14). His duties ranged from traffic stops to investigations among other activities. (R. 14-4; A-App. 14). Officer Nechodom testified he has been involved in "quite a few" OWI traffic stops and estimated five or six in the last year. (R. 14-4; A-App. 14). In addition, he has instructed on conducting OWI traffic stops and administering field sobriety tests. (R. 14-12 and 14-26; A-App. 22 and 36).

Officer Nechodom testified that he found OWI traffic stops more prevalent at nighttime. (R. 14-4 to 14-5; A-App. 14-15). He indicated, based on his training and experience, a majority of his OWI arrests have been in the late evening hours. (R. 14-9 to 14-10; A-App. 19-20). Officer Nechodom further testified that this was around the time of bar closing. (R. 14-10; A-App. 20). Officer Nechodom noted that it was also common for drivers to indicate that he or she "had a couple" or "had two." (R. 14-24; A-App. 34).

4. The Circuit Court's Findings.

Following the suppression hearing on January 29, 2013, the Circuit Court denied Fellinger's motion. (R. 14-37; A-App. 47). The Circuit Court noted certain elements of Officer Nechodom's testimony as relevant:

- The reasonable basis for the initial stop [based on speeding]. (R. 14-34; A-App. 44).
- The fact that speeding oftentimes plays a significant role in his OWI arrests. (R. 14-35; A-App. 45).

- The moderate odor of intoxicants coming either from the defendant's person or from the vehicle. (R. 14-34; A-App. 44).

- The 2:00 a.m. timeframe which correlates approximately with bar closing time. (R. 14-34; A-App. 44).

- The acknowledgement of drinking and the statement of the defendant that he had "a couple" or "two." (R. 14-35; A-App. 45).

- The unsatisfactory performance on the Alphabet test and counting backwards test. (R. 14-35; A-App. 45).

The Circuit Court also credited Officer Nechodom's lengthy tenure with the Town of Freedom Police Department and his experience in teaching field sobriety testing to officers in training. (R. 14-35; A-App. 45). The Circuit Court found Officer Nechodom's testimony to be "extremely credible." (R. 14-36; A-App. 46).

The Circuit Court ultimately found that "there was an objective basis and reasonable suspicion that Mr. Fellinger had been operating while under the influence based on the totality of those circumstances" and that "there was a reasonable basis based upon all of the observations of the officer for a further investigative stop." (R. 14-37; A-App. 47).

5. The Court Trial and Appeal.

On March 11, 2013, there was a brief court trial based upon the stipulated admission of three exhibits. (R. 15-1; R-Supp.-App. 1). Plaintiff-Respondent offered, and the following exhibits were received: (1)

the pertinent police report; (2) the informing the accused form; and (3) the pertinent lab report from the State of Wisconsin. (R. 15-2 to 15-4; R-Supp.-App. 2-4).

Based upon the three exhibits, the Circuit Court found Fellinger guilty of OWI and operating with a prohibited alcohol concentration. (R. 15-5; R-Supp.-App. 5). The speeding citation was dismissed by agreement of the parties. (R. 15-5; R-Supp.-App. 5). The Circuit Court then assessed penalties on the OWI and dismissed the operating with a prohibited alcohol concentration. (R. 15-6 to 15-7; R-Supp.-App. 6-7).

Fellinger immediately filed a notice of appeal on March 11, 2013. (R. 12-1 to 12-2; R-Supp.-App. 10-11).

V. ARGUMENT

A. Standard of Review

In reviewing a denial of a motion to suppress, the appellate court upholds the circuit court's findings of fact unless they are clearly erroneous. *State v. Popke*, 317 Wis. 2d 118, 126, 765 N.W.2d 569, 573 (2009). Whether those facts satisfy the constitutional requirement of reasonableness is a question of law that the appellate courts review de novo. *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548, 552 (1987).

B. The Circuit Court Was Correct In Denying The Motion To Suppress Where It Properly Found That Reasonable Suspicion Existed Sufficient To Warrant Extension Of The Traffic Stop And Administration Of Field Sobriety Tests.

Defendant-Appellant argues that the instant case presents novel issues that have not been addressed by Wisconsin courts. Plaintiff-Respondent respectfully disagrees and submits that the Circuit Court applied the correct standard and reached the proper conclusion.

Defendant-Appellant does not, and could not, challenge the initial stop for speeding. Rather, he claims that the Court should apply a higher standard than reasonable suspicion for an officer to proceed to field sobriety tests or, that in any event, Officer Nechodom did not have even reasonable suspicion in the present case. Defendant-Appellant is wrong on both accounts.

1. Reasonable Suspicion Is the Requisite Standard for Administering Field Sobriety Tests.

As stated, the Circuit Court properly applied the reasonable suspicion standard to the facts of this case. Multiple Wisconsin courts have recognized the standard applied to administering field sobriety tests is reasonable suspicion.

In *County of Dane v. Campshure*, the defendant asserted that an officer's request to perform field sobriety tests converted a traffic stop into an arrest and that such arrest was not supported by probable cause. *Campshure*, 204 Wis 2d 27, 29, 552 N.W.2d 876, 876 (Ct. App. 1996). The defendant's motion to suppress was denied when the circuit court held that the request to perform field sobriety tests was not an arrest but was

within the permissible scope of an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). *Id.* at 30. In affirming the circuit court, the appellate court noted that *State v. Swanson* holds that a request for field sobriety tests does not transform an otherwise lawful investigative stop into an arrest. *Id.* at 32 (citing *Swanson*, 164 Wis. 2d 437, 448, 475 N.W.2d 148, 153 (1991)).

Similarly, other cases have held that the proper standard is reasonable suspicion. In *State v. Hughes*, the appellate court noted:

> [T]he correct standard is the reasonable suspicion standard based on the totality of the circumstances. This standard is the result of balancing the interest of the individual in being free from intrusion and the interest of the State in detecting and preventing crime.

Hughes, No. 2011AP647-CR, 2011 WI App 136, ¶20, 337 Wis. 2d 430, 805 N.W.2d 736 (Ct. App. Aug 25, 2011) (unpub.) (citing *State v. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681, 686 (1996)) (R-Supp.-App. 14); *see also State v. Glover*, No. 2010AP1844-CR, 2011 WI App 58, ¶19, 332 Wis. 2d 807, 798 N.W.2d 321 (Ct. App. March 24, 2011) (unpub.) (stating "the circuit court's finding that the officer possessed the requisite reasonable suspicion to administer field sobriety tests is affirmed") (R-Supp.-App. 18).

Accordingly, this Court should reject Defendant-Appellant's invitation to apply a standard different than reasonable suspicion. The remaining question is whether, in this case, Officer Nechodom had

reasonable suspicion to request Fellinger to perform field sobriety tests. This Court, as did the Circuit Court, should answer in the affirmative.

2. Officer Nechodom Possessed Reasonable Suspicion Under the Totality of the Circumstances to Request Field Sobriety Tests.

Defendant-Appellant contends that Officer Nechodom did not even have reasonable suspicion in this case. However, his position is foreclosed by the pertinent facts and applicable case law.

As an initial matter, an officer possesses reasonable suspicion in an OWI traffic stop when he or she can point to "specific and articulable facts" and "*rational inferences* from those facts" to reasonably suspect that a motorist has drunk enough to impair the ability to drive. *Glover*, 2011 WI App 58, ¶17 (italics in original) (R-Supp.-App. 18). Further, although acts and circumstances themselves may constitute lawful behavior that falls short of "reasonable suspicion," taken together, the totality of those circumstances may constitute reasonable suspicion. *Id.* (citation omitted). "The question of what constitutes reasonable suspicion is a common sense test. Under all facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" *Hughes*, 2011 WI App 136, ¶13 (citing *State v. Jackson*, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989)) (R-Supp.-App 13).

In a markedly similar case, the defendant in *Glover* asserted the officer lacked reasonable suspicion because the only factor suggesting

impairment was "a slight odor of intoxicants emanating from within the vehicle." *Glover*, 2011 WI App 58, ¶16 (R-Supp.-App. 18). However, the appellate court opined:

> Contrary to Glover's assertion, the slight odor of intoxicants coming from the vehicle was not the only factor that contributed to the officer's suspicion that Glover might be impaired in his ability to drive. Glover admitted to drinking and had left a bar. The time of night, 1:19 a.m., around "bar time," is also a factor that contributes to the reasonable suspicion that Glover was operating his vehicle while under the influence of alcohol.
>
> ...
>
> For these reasons, the circuit court's finding that the officer possessed the requisite reasonable suspicion to administer field sobriety tests is affirmed.

Id. at ¶¶18 and 19 (R.-Supp.-App. 18).

Essentially the same factors (speeding, moderate odor of intoxicants, "bar close" time, and admission of drinking), plus some additional factors (claim of "two beers" and unsatisfactory Alphabet test and counting backwards test), support the existence of reasonable suspicion in the case at bar. Fellinger makes much of the facts that he was not stopped for erratic driving and that Officer Nechodom did not note the typical signs of intoxication (e.g. glassy eyes, slurred speech, lethargic or clumsy mobility, confusion, etc.) until after the field sobriety tests. (Defendant-Appellant Brief, p. 11). However, this same type of argument has been soundly rejected.

In *State v. Webley*, the defendant claimed that the officer did not have reasonable suspicion because the facts did not show the "classic hallmarks of impairment," including erratic driving, slurred speech, red and watery eyes, and slow movements. *Webley*, No. 2010AP747-CR, 2010 WI App 120, ¶6, 329 Wis. 2d 272, 789 N.W.2d 755 (Ct. App. July 29, 2010) (unpub.) (R-Supp.-App. 20-21). In rejecting the "classic hallmarks" argument, the *Webley* court noted: "The law does not require that those specific indicia of intoxication be present for there to exist reasonable suspicion to believe a driver is operating his or her motor vehicle while impaired." *Id.* Rather, the court endorsed the "common sense test." *Id.*

Here, the Circuit Court cogently analyzed the totality of the circumstances surrounding Officer Nechodom's stop of the defendant and applied the common sense test for reasonable suspicion. Based upon the enumerated factors, the Circuit Court correctly found the existence of reasonable suspicion and properly denied Fellinger's motion to suppress.

VI. CONCLUSION

For the reasons set forth above, Plaintiff-Respondent respectfully requests this Court to affirm the Circuit Court's denial of the Defendant-Appellant's motion to suppress evidence.

Dated at Appleton, Wisconsin this 19th day of June, 2013.

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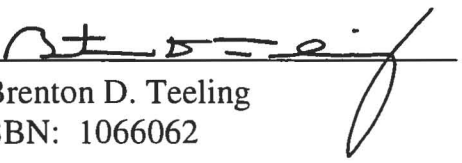
BY: 

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CERTIFICATION AS TO FORM AND LENGTH- WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,557 words.

Dated at Appleton, Wisconsin this 19th day of June, 2013.

BY: _____

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CERTIFICATION AS TO ELECTRONIC BRIEF-
WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, excluding supplemental appendix, which complies with the requirements of s. 809.12.

I further certify that this electronic brief is identical in content and format to the printed form of the brief as of this date.

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

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CERTIFICATION AS TO SUPPLEMENTAL APPENDIX- WIS. STAT. § 809.19(3)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; and (2) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the supplemental appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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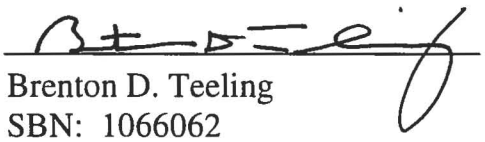
BY: 

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CERTIFICATION OF MAILING-
WIS. STAT. § 809.80(3)(b) and (4)

I, Brenton D. Teeling, hereby certify that on June 19, 2013, I caused this Brief and Supplemental Appendix of Plaintiff-Respondent to be sent via U.S. Mail to:

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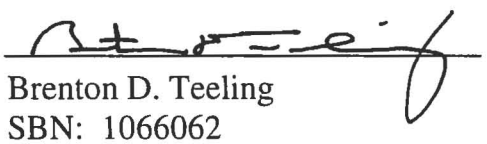
BY: 
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