STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2013 AP 000614

TOWN OF FREEDOM,

Plaintiff – Respondent,

v.

MATTHEW W. FELLINGER,

Defendant – Appellant.

REPLY BRIEF & APPENDIX OF DEFENDANT – APPELLANT

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

JOHN MILLER CARROLL LAW OFFICE

John Miller Carroll
State Bar No. 1010478
Attorney for Defendant – Appellant

226 S. State St.
Appleton WI 54911
(920) 734-4878

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I. INTRODUCTION

In the opening brief, the Defendant-Appellant, Matthew W. Fellinger ("Fellinger"), sufficiently demonstrates 1) that standardized field sobriety tests are a "search" within the meaning of the Fourth Amendment, 2) that the quantum of evidence to administer field sobriety tests should be higher than reasonable suspicion, and 3) that 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 operating while intoxicated offense.

With brevity in mind, Fellinger will neither restate his statement on case or facts, nor supporting legal arguments from his Brief-in-Chief in an in-depth manner. Rather, Fellinger will briefly touch on arguments raised by the State in its response brief.

II. THE TOWN OF FREEDOM FAILS TO REFUTE CERTAIN ARGUMENTS OF THE DEFENDANT AND THUS SHOULD BE CONSIDERED CONCEDED

Wisconsin appellate courts deem unrefuted arguments conceded. *Charolais Breeding Ranches, LTD. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979). ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.")

This Court should find that the Town of Freedom ("the Town") has either failed to refute or has expressly conceded Fellinger's position that the field sobriety tests constitute a search within the meaning of the Fourth Amendment.

III. THE TOWN OF FREEDOM'S OPINION ON THE CIRCUIT COURT'S DENIAL OF FELLINGER'S MOTION TO SUPPRESS

The Town argues that the instant appeal raises issues that have been previously addressed by Wisconsin courts. However, despite this contention the Town fails to cite any authorities which clearly determine whether or not field sobriety tests are a search; or what the requisite quantum of evidence is required to request field sobriety tests. Fellinger

directs the Court of Appeals to *State v. Blicharz*, 2010 WI App 145, 330 Wis. 2d 99, 791 N.W.2d 405 in which the Court of Appeals decided the case under the "reasonable suspicion" test, but acknowledged; "While Wisconsin courts have not resolved whether "reasonable suspicion" or "probable cause" is the proper test needed to request a field sobriety test, Blicharz concedes that reasonable suspicion is an appropriate test to use."

a. Town of Freedom's Position on Requisite Standard Required for Administering Field Sobriety Tests

The Town cites multiple cases in support of their position on reasonable suspicion as the requisite standard required for field sobriety tests, among them; *County of Dane v. Campshure*, 204 Wis. 2d 27, 29, 552 N.W.2d 876 (Ct. App. 1996), *State v. Swanson*, 164 Wis. 2d 437, 448, 475 N.W.2d 148, 153 (1991), and *State v. Hughes*, No. 2011AP647-CR, 2011 WI App. 136 ¶20, 337 Wis. 2d 430, 805 N.W.2d 736 (Ct. App. Aug. 25, 2011). The Town offers these cases as evidence that the proper test should be less than probable cause because field sobriety tests do not transform an otherwise legal stop into an arrest. However, Fellinger has never claimed that he was under arrest at the time of the field

sobriety tests, or that the proper test should be equal to the probable cause required to arrest. Fellinger's brief plainly indicated that the proper test should be somewhere higher than reasonable suspicion and less than probable cause required to arrest; as is required to administer a preliminary breath test.

Fellinger further asserts that prior decisions by Wisconsin courts clearly indicate that the quantum of evidence necessary to require field sobriety tests should be higher than mere reasonable suspicion.

First, Fellinger draws the Court's attention to the similarities between the Court's definition of probable cause and the level of reasonable suspicion required to administer field sobriety tests. In *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 127-28, 765 N.W.2d 569, 574, probable cause refers to the:

> "'quantum of evidence which would lead a reasonable police officer to believe' " that a traffic violation has occurred. *Johnson v. State,* 75 Wis.2d 344, 348, 249 N.W.2d 593 (1977) (citation omitted). The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that "'the information lead a reasonable officer to believe that guilt is more than a possibility.' " ***128** *Id.* at 348–49, 249 N.W.2d 593 (citation omitted). In other words, probable cause exists when the officer has

> "reasonable grounds to believe that the person is committing or has committed a crime." *Id.* at 348, 249 N.W.2d 593 (quoting Wis. Stat. § 968.07(1)(d)).

Similarly, "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience[?]" *Id.,* ¶ 8. An officer has reasonable suspicion if he or she is " 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion." *State v. Post,* 2007 WI 60, ¶ 10, 301 Wis.2d 1, 733 N.W.2d 634 (citation omitted).

Going further, in *State v. Betow,* 226 Wis.2d 90, 94–95, 593 N.W.2d 499 (Ct.App.1999), the Court of Appeals determined that "in reviewing whether the officer's further investigation and request for field sobriety tests was warranted, we apply the same standard as for an initial stop." Following this rationale it would seem obvious that the requisite quantum of evidence to administer field sobriety tests is clearly more than reasonable suspicion, but less than

the probable cause required for arrest, as Fellinger previously submitted.

As Wisconsin's Supreme Court has previously described:

> "probable cause" does not refer to a uniform degree of proof, but instead varies in degree at different stages of the proceedings. For example, the probable cause required for issuance of a warrant is less than the probable cause needed to bind a defendant over for trial after a preliminary hearing. *State v. Knoblock,* 44 Wis.2d 130, 134, 170 N.W.2d 781 (1969); *State v. Berby,* 81 Wis.2d 677, 683, 260 N.W.2d 798 (1978); *State v. Dunn,* 121 Wis.2d 389, 396, 359 N.W.2d 151 (1984). *See also Taylor v. State,* 55 Wis.2d 168, 173, 197 N.W.2d 805 (1972)(noting that a preliminary hearing requires more evidence than other preliminary probable cause determinations) *and State v. Wille,* 185 Wis.2d 673, 682, 518 N.W.2d 325 (Ct.App.1994)(holding that the level of proof needed to establish probable cause at a hearing on the revocation of a driver's license is less than that needed to establish probable cause at a suppression hearing).

County of Jefferson v. Renz, 231 Wis.2d 293, 603 N.W.2d 541 (1999).

It is therefore understandable that field sobriety tests can also be administered under the probable cause test, albeit less than probable cause to arrest.

Moreover, as was addressed in *State v. Colstad,* 2003 WI App 25, ¶ 8, 260 Wis.2d 406, 659 N.W.2d 394., a request that a driver perform field sobriety tests constitutes a greater invasion of liberty than an initial police stop or encounter, and

must be separately justified by specific, articulable facts showing a reasonable basis for the request. *See id.,* ¶ 19.

If the field sobriety test's invasion of liberty is greater than that of the initial stop then reasonably the requisite quantum of evidence would be at least equal to that of the initial stop. Requiring less evidence for a greater invasion of liberty does not balance the rights of an individual with the rights of the public.

b. Town of Freedom's Position on Officer Nechodom's Reasonable Suspicion to Administer Field Sobriety Tests

In its response brief, the Town correctly states that an officer must possess "specific and articulable facts" and "rational inferences from those facts" to reasonably suspect that a motorist's ability to control a motor vehicle has been impaired. (*See* Resp. Br. at pp. 10). The Town's argument, however, fails to establish how the factors in the instant case add up to reasonable suspicion that Fellinger was operating while intoxicated.

One factor relied upon in the Circuit Court's decision and, the Town's response brief, is Fellinger's acknowledgment of drinking. (*See* Resp. Br. at p. 6). In cases

previously decided by the Court of Appeals a vague admission of drinking has been distinguished from an admission of drinking a specific amount.

> "Further, while the deputy was not required to credit Leon's claim of having had no more than one beer, along with food, approximately two hours earlier, the deputy was not presented with a suspiciously vague admission of "some" drinking or "a few" drinks, nor with an admission to multiple drinks or drinking hard liquor. Leon consistently provided the deputy with an explanation for the smell of alcohol that would not have supported an inference of impairment, and there was no evidence to the contrary, such as a statement from another witness or empty bottles or cans."

Cnty. of Sauk v. Leon, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929.

The Circuit Court also relied on Fellinger's alleged unsatisfactory performance on the Alphabet test and the counting backwards test. (*See* Resp. Br. at p. 6). However, Fellinger asserts that these tests also fall into the category of field sobriety tests, and therefore Officer Nechodom should have possessed, at the very minimum, reasonable suspicion to believe Fellinger was operating while intoxicated before requiring him to submit to these tests.

When the above listed factors are subtracted from the equation the only factors which remain are the fact that

Fellinger was travelling slightly over the speed limit, a mild odor of intoxicants, and the time of night. Relying on these factors as adequate reason to require field sobriety tests equates to the proposition that anyone traveling a few miles over the speed limit, at a late time of night, who has consumed any amount of alcohol must be intoxicated. Obviously this is absurd notion. Wisconsin laws do not restrict citizens from driving after a certain time of day, or after consuming alcoholic beverages, only driving while intoxicated. *See* Wis. Stat. § 346.63(1)(a) (does not prohibit operating a motor vehicle after having consumed alcohol, but instead prohibits driving "[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving.").

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 _____th day of _____, 2013.

Respectfully Submitted,
JOHN MILLER CARROLL
LAW OFFICE

By: _____

John Miller Carroll
State Bar #1010478
226 S. State St.
Appleton, WI 54911
(920) 734-4878

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 1,843 words.

Dated this ___th day of _____, 2013.

_____

John Miller Carroll
State Bar #1010478

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 ____th day of _____, 2013.

_____

John Miller Carroll
State Bar #01010478