STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2013AP001606-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

ROSS TIMOTHY LITKE,

Defendant-Respondent.

ON APPEAL FROM A RULING SUPPRESSING EVIDENCE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE CAROLINA M. STARK, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

I. Should the circuit court have refused to consider clues of intoxication observed in the administration of the Horizontal Gaze Nystagmus test by a properly trained police officer at a motion hearing because the court felt the evidentiary burden for the presentation of evidence at trial was not met?

The trial court answered: Yes.

II. Was there probable cause for the administration of a preliminary breath test, or probable cause to arrest Mr. Litke for Operating While Intoxicated or Operating with a Prohibited Alcohol Concentration?

The trial court answered: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Plaintiff-Appellant (hereinafter the State) states that oral argument in this case is unnecessary because the legal issues can be fully developed in the written briefs. The State does not request that the decision be published.

STANDARD OF REVIEW

The trial court's findings of fact shall not be set aside unless clearly erroneous. *Olen v. Phelps*, 200 Wis. 2d 155, 160, 546 N.W.2d 176, 179 (Wis. Ct. App. 1996). A review of the circuit court's decision to admit evidence is one of erroneous exercise of discretion. *State v. Zivcic*, 229 Wis. 2d 119, 128, 598 N.W. 2d 565 (1999) (citations omitted). Whether probable cause exists for an arrest is a question of law that is reviewed without deference to the trial court. *State v. Kasian*, 207 Wis. 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Due process is a question of law that this Court decides de novo. *State v. Littrup*, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991).

STATEMENT OF THE CASE

Officer Jill Zeise, a Village of Brown Deer Police Officer, had been working as a police officer for ten years, six of them as a patrol officer. (R29:8, App.108). In addition to basic training required to be a law enforcement officer, Officer Zeise was trained and received a certification in the standard field sobriety tests (SFST's) in 2005. That training taught the administration of three tests: 1) The Horizontal Gaze Nystagmus test; 2) the walk and turn test; and 3) the one leg

stand. (R29:10-11, App.110-111). Officer Zeise has administered those tests approximately 40-50 times among her approximate 1200 traffic stops, which resulted in "more than 30, less than probably 50" arrests for Operating while Intoxicated. (R29:11-12, App.111-112).

On July 13, 2012, at about 11:30 p.m., Officer Zeise observed an auto coming towards her squad, traveling east, without the required illuminated headlights. After the auto passed, she activated her emergency lights, conducted a U-turn and conducted a traffic stop. (R29:13-15, App.113-115). The vehicle appropriately pulled over to the right and stopped. Officer Zeise made contact with the driver, Ross Litke, and noticed that he would not look at her, which she thought was unusual. When Officer Zeise told Mr. Litke that the headlights on the auto were not illuminated, Mr. Litke questioned it as if he hadn't realized that they weren't on, "oh, I don't have my lights on?" Mr. Litke explained that the auto was not his and that it belonged to the person seated in the front passenger seat. During this conversation, Officer Zeise noticed that Mr. Litke would not look at her. She also noticed that Mr. Litke "...did slur his speech slightly, not extremely slurred, but I did notice that he was not speaking as clearly." (R29:17, App.117).

After Officer Zeise questioned Mr. Litke as to why he would not look at her, he then faced her saying that he was nervous. Officer Zeise observed that the Mr. Litke's eyes were "glassy and bloodshot." (R29:18, App.118). Officer Zeise asked the Mr. Litke if he had been drinking, and was told that he "had a few three hours before I had stopped him." (R29:18, App.118).

Officer Zeise asked Mr. Litke to exit the vehicle and they continued to talk. She observed that his speech was still slurred. Officer Zeise smelled the strong odor of vinegar and cigarette smoke and was not able to detect the odor of alcoholic beverages. (R29:21, App.121).

Officer Zeise administered the Standard Field Sobriety Tests (SFST) to Mr. Litke and observed clues that, based upon her training and experience, indicated that Mr. Litke was impaired due to intoxicants. She testified that when she administered the Horizontal Gaze Nystagmus (HGN) test,

according to her training, she observed six clues. She explained that, based upon 6-observed clues, there was a high probability that Mr. Litke was intoxicated at .10 or higher. (R29:31, App.131).

Officer Zeise then administered two more of the SFST's. In the Walk and Turn Test, there were no clues observed. However, in the One-Leg-Stand test, Officer Zeise observed that the Mr. Litke raised his arms more than six inches from his sides, and that he "hopped on one occasion." (R29:34, App.134).

At this point, Officer Zeise felt that she had probable cause that Mr. Litke was impaired and intoxicated, and she requested that he provide a breath sample into a preliminary breath test (PBT) device. Mr. Litke blew into the instrument, which measured his alcohol/breath concentration at .147. (R29:37, App.137).[1]

Officer Zeise arrested Mr. Litke for Operating While Intoxicated and a subsequent test of his breath showed that his breath alcohol concentration showed a reported value of 0.08 grams per 210 liters of breath.

COURT PROCEEDINGS

Mr. Litke filed suppression motions alleging that probable cause did not exist which would allow Officer Zeise to administer the Preliminary Breath Test, and further, that without that test, there would not have been probable cause to arrest Mr. Litke. (R9)(R16). Those were supplemented by "Defendant's Notice of Motion and Motion in Limine to Limit Witness Testimony" (R18), which more specifically addressed defenses challenges to the admissibility of the HGN test at trial, pursuant to Wis. Stats. § 907.02(1).

[1] Although the officer was not initially sure as to the exact reading, and testified that it was .145 or .149, (R29:36, App.136), after reviewing her police report to refresh her recollection, she testified that the value was .147.

The court took testimony and considered all of the motions at the suppression hearing conducted on May 23, 2013. (R29, App.101-178).

At the hearing, the attorney for Mr. Litke asked questions of Officer Zeise, demonstrating that she was not qualified to testify as to the underlying scientific principles upon which the Horizontal Gaze Nystagmus test is based:

> Q: You are talking about them reciting the cause of nystagmus as potentially being alcohol related during that certification?
>
> A: That's correct.
>
> Q: Other than that, you don't have particularized scientific training in explaining why nystagmus can be alcohol related or what the physiological or causes of that are; is that a fair statement?
>
> A: That is a fair statement.
>
> Q: And so you have not conducted your own research for example, or experimentation in nystagmus testing other than the certification we just mentioned?
>
> A: Yes.
>
> Q: That is correct?
>
> A: That's correct.
>
> Q: The -- not to belabor the issue but, for example, you haven't conducted your reliability studies using sample groups versus controlled population nystagmus testing of impaired individual versus sober individual, correct?
>
> A: No, I have not.
>
> Q: And you can't recite for this Court the results of research and subjecting of he HGN process to scientific methods or peer review; is ht a fair statement?
>
> A: That is a fair statement.

(R29:42-43, App.142-143).

The court stopped testimony during the cross-examination as it related to the HGN test, and after a side-bar, made the following record:

> The Court: All right, we are going back on the record, and after a brief sidebar with Attorney Kolberg and Attorney Mastantuono, in essence, my understanding, Attorney Kolberg, that the State concedes at this point that the HGN test itself does involve scientific, technical, or specialized knowledge. And that, as part of today's hearing, the State either has not or will not be able to meet its burden of proof regarding specifically the 907.02 analysis and the application of the ***Daubert*** standard, that there is evidence to show that the underlying science itself is reliable; and therefore, Attorney Mastantuono could forgo cross-examination on the rest of HGN and move to the walk and turn and the other areas; is that correct?
>
> Ms. Kolberg: I want to simplify it and be real clear on what I am saying. I'm saying that this witness doesn't have the necessary knowledge or ability to testify to the underlying science related to it and I am not going to get into the other points because I know that that is a factor...I won't be arguing that she does have that underlying scientific knowledge or training.

(R29:52, App.152)

Continued cross-examination of Officer Zeise further clarified the observed clues of intoxication, which the officer observed during the One-Leg-Stand test:

> Q: And he began the test and at about six or seven, I believe that your testimony would be that he raised an arm in excess of six inches and hopped slightly?
>
> A: Yes.
>
> Q: And was it your testimony that he raised his arms to maintain his balance?
>
> A: That is the way I indicated, yes.
>
> Q: And the same with the slight hopping?
>
> A: Yes

(R29:60, App.160)

A DVD recording from Officer Zeise's squad, Exhibit #1, (R35) was received into evidence and both parties stipulated to the judge examining the video outside the presence of the attorneys and Mr. Litke, prior to the courts oral decision. (R29:64, App.164). The examination of that video shows Mr. Litke raise his right foot. After several seconds, the video shows that he leans slightly to his right, and his left arm moves further from his body. His left foot does not remain stationary. After the movement on his left foot, he returns his left hand closer to his body, as he was previously instructed. (R35@23h:48m:33s).

MOTION HEARING COURT RULING

Judge Carolina Stark issued an oral ruling as to the motion hearing on June 3, 2013. In that ruling, she made the following findings:

1) Officer Zeise observed a car, driven by Mr. Litke at approximately 11:33 p.m., without the required illuminated headlights.
2) There was another passenger in the auto driven by Mr. Litke, the owner of the auto.
3) Mr. Litke did not look at Officer Zeise, explaining that he was nervous.
4) Officer Zeise observed that Mr. Litke's eyes were bloodshot and glassy looking.
5) Mr. Litke admitted consuming a couple of drinks earlier in the evening. First at a fish fry about three to four hours before the stop, and more recently a couple of blocks from the stop at a bowling alley. He told Officer Zeise that he had another beer at the bowling alley a couple of hours earlier.
6) Officer Zeise smelled a strong odor of cigarettes and vinegar and did not detect any odor of alcohol.
7) Mr. Litke did not demonstrate any balance problems when exiting the auto nor during the administration of the Horizontal Gaze Nystagmus test.
8) The trial court ruled that reliability of the underlying science or methods upon which the HGN test is based had not been proven, and so the court found that the clues of intoxication from the administration of the

HGN were not admissible and the court did not consider them in evaluating probable cause at the motion hearing.

9) Mr. Litke did not demonstrate any clues of intoxication during the Walk-and-Turn test.
10) Mr. Litke, in performing the One-Leg-Stand test, did slightly wobble without putting a foot down an did raise his arms from his side, moving them slightly.[2]
11) Mr. Litke answered all questions and followed all of the officer's instructions.
12) Judge Stark, based upon her viewing of Exhibit No. 1, the DVD video from the squad, "my finding is there was not any significant slurring and that is based upon my viewing of Exhibit No. 1, which has an audio component which is actually pretty good. So I find there wasn't any significant slurring.

(R30:3-10, App.181-188).

The trial court judge found, that based upon the above facts:

> I find ultimately that the officer under the totality of circumstances did not have probable cause necessary to administer a preliminary breath test, without the preliminary breath test we do not have the next level of probable cause necessary for the arrest; therefore, the evidence obtained after the arrest would not be admissible at trial.

(R30:7-8, App.185-186).

ARGUMENT

I. THE CIRCUIT COURT APPLIED THE WRONG STANDARD TO THE ADMISSIBILITY OF EVIDENCE AT A MOTION HEARING AND IMPROPERLY REFUSED TO CONSIDER THE

[2] Judge Stark noted that the officer categorized the performance as hopping, which Judge Stark "thought it was more of a wobbling for a minute." Judge Stark also commented that the officer "and she also, [referring to the "hopping"], identified a raised arm as two clues in the one leg stand test." (R30:6)

HORIZONTAL GAZE NYSTAGMUS TEST ADMINISTERED BY A PROPERLY TRAINED POLICE OFFICER.

The trial court improperly refused to consider the evidence of intoxication from the administration of the Horizontal Gaze Nystagmus test when it found that Officer Ziese was not qualified as an expert on the underlying scientific principles upon which HGN is based. (R29:52, App.152; R30:10, App.188). In so doing, the court incorrectly applied the evidentiary requirements under § 907.02, which are for trial experts, to that of testimony at a motion hearing.

Wis. Stats. § 907.02 Testimony by Experts:

> (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

The evidence code, changed in 2011, set a gatekeeper function upon the courts in determining what opinion testimony could be proffered at trial. With the adoption of this new statutory language, adopted from the Federal Rules of Evidence, Wisconsin became a "*Daubert*" state, and now follows the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). The role of the court under § 907.02, "*Daubert*," is that of a "gate keeper" in making sure that the expert testimony "will assist the trier of fact." *Id*.

However, the rules of evidence, other than with respect to privilege, do not apply to motion hearings. Wisconsin Statutes § 901.04. *State v. Jiles*, 2003 WI 66 ¶29, 262 Wis. 2d 457, 476, 663 N.W.2d 798.

The findings of admissibility at trial have no role in determining what evidence is admissible in pretrial hearings.

There are no Wisconsin cases dealing specifically with this issue post "*Daubert*," partially due to the recent change in the Wisconsin evidentiary code. But the federal courts have addressed this: *Unites States v. Ozuna*, 561 F.3d 728 (7th Cir. 2009), cert denied, 559 U.S. 970 (2010), where the Court found that "*Daubert*" does not apply to evidence at a suppression hearing. "We see no persuasive reason to disregard the Rules of Evidence and impose a new requirement on the district court judges to conduct a Daubert analysis during suppression hearings." *Id*. at 736.

In the instant case, the trial court's rejection of the Horizontal Gaze Nystagmus test clues of intoxication because the officer could not meet all of the requirements under Wis. Stats. § 907.02, was an erroneous exercise of discretion. *State v. Zivcic*, 229 Wis. 2d 119, 128, 598 N.W. 2d 565 (1999).

Further, in *Zivcic*, the court found that the HGN test is reliable when administered by a trained police officer. The court held that not only are the results of the HGN test admissible, but that a second witness is not necessary to explain the underlying scientific foundations to a jury at trial:

> To the extent that Zivcic argues that a second expert witness, in addition to the law enforcement officer, is required to testify before the HGN test results may be admitted, we cannot agree. As long as the HGN test results are accompanied by the testimony of a law enforcement officer who is properly trained to administer and evaluate the test, the mandates of § 907.02, STATS., are satisfied. As such, we are more persuaded by the line of foreign cases cited by the State, indicating other jurisdictions have reached similar conclusions. See *State v. Murphy*, 451 N.W.2d 154, 158 (Iowa 1990); *State v. Berger*, 551 N.W.2d 421, 424 (Mich. Ct. App. 1996); *State v. Bresson*, 554 N.E.2d. 1330, 1334 (Ohio 1990).
>
> Accordingly, we conclude, on this issue of first impression, that the trial court did not erroneously exercise its discretion in ruling there was a sufficient foundation to qualify Pauley as an expert witness and admit his testimony regarding the HGN test.

State v. Zivcic, 229 Wis. 2d at 128-129.

Officer Zeise, trained and experienced in the administration of the HGN test, observed 6-clues of intoxication when she tested Mr. Litke. (R29:29, App.129). That testimony should have been considered by the court in the determination of probable cause for arrest.

Admittedly, *Zivcic* predates the revisions of the Wisconsin Evidentiary Code under which the instant case is being litigated. However, scientific and technical evidence that were reliable and admissible prior to the changes to § 907.02, didn't cease to be reliable because of a change in the qualifications of witnesses at trial. The changes in the evidentiary code does require that the trial court make specific findings, prior to the testimony being admissible at trial, do not affect the use of that evidence at a motion hearing.

Whether or not Officer Ziese would be qualified to testify as to the results of the test at trial under the new evidentiary code was not fully developed in the motion hearing because the court stopped the testimony on the HGN test.

But, the underlying reliability of the HGN test has long been accepted in Wisconsin, and at a motion hearing, where the rules of evidence do not apply, the trial court should have considered the results of that test in evaluating probable cause for the administration of the PBT and subsequent arrest.

II. THE TRIAL COURT IMPROPERLY FOUND THAT THERE WAS NEITHER PROBABLE CAUSE FOR THE ADMINISTRATION OF A PRELIMINARY BREATH TEST NOR PROBABLE CAUSE TO ARREST MR. LITKE.

A. PROBABLE CAUSE TO ADMINISTER PBT

The court found that the evidence of intoxication or impairment, upon which Officer Zeise relied upon in requesting that Mr. Litke provide a breath sample into the Preliminary Breath Testing device (PBT), did not rise to the level of probable cause, and thus suppressed the PBT results and

evidence from the subsequent chemical test of Mr. Litke's breath. That was error.

Even without considering the results of the HGN test, there was still more than enough evidence, upon which the trial court should have found probable cause in order to administer the Preliminary Breath Test.

The "probable cause" to request an individual provide a breath sample into a PBT device, requires less evidence of intoxication than that of "probable cause" to arrest. *State v. Renz*, 231 Wis. 2d 293, 304–305, 308–309, 310–311, (1999), 603 N.W.2d 541. The Supreme Court in *Renz* explained that the "probable cause" concept has various roles in the law, depending on what is at issue. *Id*.

The Wisconsin Court of Appeals, in *State v. Kutz*, has held that the role of the trial court in assessing whether probable cause exists is limited to the following:

> [i]n determining whether probable cause exists, the court applies an objective standard, and is not bound by the officer's subjective assessment or motivation. The court is to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account. The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department. When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.

State v. Kutz, 2003 WI App 205, ¶ 12, 267 Wis. 2d 531, 545, 671 N.W.2d 660.

In the present case, the trial court engaged in an inappropriate weighing of the inferences. The trial court discussed that a possible innocent explanation for the fact that Mr. Litke was driving without the required illuminated headlamps, at 11:33 p.m., (R29:13, App.113; R30:8, App.186), was that it wasn't his vehicle. And the court noted that Mr. Litke did fairly well on other tasks that he performed.

"I note in my findings of fact that, while the [sic] testified that she notices a slight slurring, my finding is there was not any significant slurring and that is based upon my viewing of Exhibit no. 1." (R30. App.184).

After viewing the One-Leg-Stand on the DVD (R35) the court:

> . . . while the officer testified that she saw what she identified as two clues, the slight wobble and the raised arms early on, as I watched that, yes, there was a slight wobble and he did raise his arms; but after that initial slight wobble and his arms stayed in the same place effectively after that initial movement throughout the rest of the test, I thought he performed it pretty well.

(R30:10, App.188).

In so doing, the trial court substituted its own judgment and opinion as to the significance of the observations, rather than determining whether the decision of Officer Zeise, a trained and experienced officer, was reasonable. Officer Zeise is not required to adopt possible innocent explanation for the conduct, which also supported her decision to administer the PBT test.

The officer's "conclusions that need not be unequivocally correct or even more likely correct than not." *State v. Pozo*, 198 Wis. 2d 705, 711, 544 N.W.2d 228 (Ct. App. 1995). It is enough if they are sufficiently probable that reasonable people-not legal technicians-would be justified in acting on them in the practical affairs of everyday life. *State v. Wisumierski*, 106 Wis. 2d 722, 739, 317 N.W.2d 484 (1982).

"This requirement deals with probabilities and need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985).

Whether an officer properly requests a PBT is governed by Wis. Stat. § 343.303, which provides, in relevant part, that:

> 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, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63 (7) or a local ordinance in conformity therewith, 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.

A probable cause determination is made '"looking at the totality of the circumstances" and is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior."' *State v. Goss*, 2011 WI 104, ¶ 25, 338 Wis. 2d 72, 90, 806 N.W.2d 918 (quoting *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 392, 766 N.W.2d 551). Probable cause to request a breath sample for a PBT requires "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, . . . but less than the level of proof required to establish probable cause for arrest." *County of Jefferson v. Renz*, at 316.

The common-sense inquiry here is: What did Officer Zeise know that led her to give Mr. Litke a preliminary-breath test? Such an inquiry in this case reveals the following:

The time of the traffic stop, was 11:33 p.m., July 13, 2012, a Friday. (R29:13, App.113). The time of night and day of the week are factors that the officer can consider in assessing if an individual is intoxicated. *Lange* at 397.

Further, that the headlights were not illuminated at that time of night is a second factor, or clue. Mr. Litke's explanation that the auto belonged to the passenger, not to him, does nothing to lessen the significance that he hadn't noticed that the lights were not on. (R29:13, App.113; R30:4, App.182).

Next, Mr. Litke avoided looking at the officer, something she thought unusual. When he did turn to the officer, she observed that his eyes were bloodshot and glassy looking. (R29:18, App.118; R30:4, App.182).

Mr. Litke admitted consuming a couple of drinks earlier in the evening, first at a fish fry and one beer at a bowling alley. (R29:18-19, App.118-119; R30:8, App.186).

Officer Zeise observed 6-clues of intoxication during the administration of the HGN test. (R29:31, App.131).

There were additional clues of intoxication observed by Officer Zeise in the administration of the One-Leg-Stand test. Officer Zeise testified that there were two clues, hopping and raising of his arms. The court, based upon viewing the video, characterized the "hopping" as more of "slight wobble without putting his foot down." (R29:34, App.134; R30:6,10, App.184, 188; (R35@23h:48m:33s). Regardless of the characterization of the movements made by Mr. Litke in his performance of the One-Leg-Stand test as "hopping" or "a wobble," a viewing of the video shows him leaning slightly to his right, moving his left arm further from his body, and compensating for a loss of balance with a movement of his right foot. That conduct supports the officer's opinion that there was evidence of intoxication in Mr. Litke's performance of that test

The State does not challenge that Mr. Litke did not demonstrate some other commonly seen clues of intoxication. These include that he answered all questions, correctly performed the Walk and Turn test and followed instructions. No odor of alcohol was detected on his breath. It is possible that an odor of alcohol could have been masked by a strong odor of the "vinegar chicken" which he said he had consumed. (R29:20, App.120). However, the absence of some commonly seen clues does not undermine the beliefs of Officer Zeise that Mr. Litke was in fact impaired due to intoxicants.

The court should not have looked for evidence that Mr. Litke was not impaired, but rather evaluated whether Officer Ziese's decision to administer the PBT was reasonable, based upon her training and experience applied to her observations in this case.

> 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. The reasonable inference to be drawn from the facts in the present case is the one the officers drew: The defendant was impaired by an intoxicant.

Lange at 398.

The above observations, clues of intoxication, are exactly the type of situation for which the legislature has set for the use of the PBT.

This was discussed by the Wisconsin Supreme Court in *State v. Renz* at 310-11:

> After stopping the vehicle and contacting the driver, the officer's observations may cause the officer to suspect the driver of operating the vehicle while intoxicated. If the observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. However, the driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances.

The Supreme Court went on to discuss the legislative history and the intended purpose of the PBT test as one to facilitate keeping the roadways safe, and thus why the evidence to request a PBT is less than that of probable cause to arrest. The current law as it relates to the PBT was last revised in 1981:

> § 2051(13)(b), ch. 20, Laws of 1981. These purposes appear to be best served if an officer can request a PBT while investigating whether a driver has violated the OWI laws, before probable cause for arrest has been established. As stated above, the petitioner's interpretation maximizes highway safety, because it makes the PBT an effective tool for law enforcement officers investigating possible OWI violations. It also encourages vigorous prosecution of OWI violations, because it allows PBT results to be used to show the existence of probable cause for an arrest.

Renz at 315.

Even if one ignores the evidence of the clues observed in the administration of the HGN test, the other observations of Mr. Litke by Officer Zeise rise to the level of probable cause for the arrest of Mr. Litke for OWI. Since the level of evidence necessary for probable cause to request a PBT sample is less than that for arrest, Officer Zeise clearly had the legal authority to request that Mr. Litke provide a breath sample into the PBT.

The results of the PBT administered in this case showed a prohibited alcohol concentration of 0.14. (R29:37, App.137).

B. PROBABLE CAUSE TO ARREST FOR OWI/PAC

The second probable cause determination in this case involves whether the officer had probable cause to arrest Mr. Litke for operating a motor vehicle while under the influence of an intoxicant. A law enforcement officer has probable cause to arrest for OWI when the quantum of evidence would lead a reasonable officer to believe the defendant was operating a motor vehicle while under the influence of an intoxicant. L*ange*, 2009 WI 49 ¶19, 317 Wis. 2d 383, 391, 766 N.W.2d 551 (citing *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996)).

Although defense may argue that there was not probable cause to arrest Mr. Litke prior to the administration of the PBT, once the result of the PBT was known to the officer, there was certainly probable cause to arrest Mr. Litke for Operating while Intoxicated and Operating with a Prohibited Alcohol Concentration. The legislature and courts have designated that purpose for the PBT. *Renz* at 315.

CONCLUSION

For the foregoing reasons, this Court should find, 1) that the Horizontal Gaze Nystagmus Test is admissible as evidence that an individual is impaired due to intoxicants, for purposes of finding probable cause to arrest; and 2) that there existed probable cause for Officer Zeise to have Mr. Litke provide a breath sample into the preliminary breath testing device and, there was probable cause to arrest him for Operating While Intoxicated.

Dated this _____ day of December, 2013.

Respectfully submitted,

JOHN T. CHISHOLM
District Attorney
Milwaukee County

_____
Ronald S. Dague
Assistant District Attorney
State Bar No. 1015746

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 5,170.

_____ _____
Date Ronald S. Dague
Assistant District Attorney
State Bar No. 1015746

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19 (12)

I hereby certify that:

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_____ _____

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