STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Number 2013 AP 001606-CR
Milwaukee County Circuit Court Case 2012 CT 002011

STATE OF WISCONSIN,

Plaintiff – Appellant,

v.

ROSS TIMOTHY LITKE,

Defendant – Respondent.

APPEAL FROM AN ORDER SUPPRESSING EVIDENCE AND LIMITING TESTIMONY IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE CAROLINA M. STARK, PRESIDING.

BRIEF OF DEFENDANT-RESPONDENT

MASTANTUONO & COFFEE S.C.
Attorney Craig Mastantuono
State Bar No. 1020125
Attorney Leah R. Thomas
State Bar No. 1087899

219 N. Milwaukee St., Suite 5B
Milwaukee, Wisconsin 53202
(414) 276-8662

Attorneys for Defendant-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Statutes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Litke, the Defendant-Respondent, does not believe that oral argument would likely assist the Court in the resolution of this appeal. Further, he does not believe that the decision warrants publication.

STATEMENT OF THE CASE

I. Nature Of The Case, Procedural Status And Disposition In The Trial Court.

A motion hearing was held on May 23, 2013, before the Honorable Carolina Stark, on two defense pretrial motions: a Motion to Suppress Physical Evidence and Statements (R.16), and a Motion in Limine to Limit Witness Testimony (R.18).

The defense Motion to Suppress Evidence (R.16)[1] asserted that Officer Zeise lacked sufficient probable cause to administer the preliminary breath test (PBT), and lacked probable cause to arrest Mr. Litke for operating while intoxicated. The State did not file any written response.

Prior to the motion hearing, the defense filed a Motion to Limit Witness Testimony, regarding the horizontal gaze nystagmus (HGN) field sobriety test, arguing that the State "must offer a preliminary showing that the proffered testimony meets the requirements of Wis. Stat. § 907.02(1), and the *Daubert* [*v. Merrell Dow Pharm., Inc.,* 509 U.S. 579

[1] The motion originally filed on September 14, 2012 (R.9), was re-filed on March 13, 2013 (R.16) as an Amended Motion with additional information in paragraph 2c including facts of the HGN administration from Officer Zeise's squad video (R.35).

(1993)] case and its progeny." (R.18:9.) Litke asserted that HGN testimony required scientific, technical, or specialized knowledge to interpret the test results for the trier of fact, and therefore required expert qualification of a witness pursuant to Wis. Stat. § 907.02, which was amended to conform with *Daubert* and its progeny. Absent scientific training, the defense challenged a police officer's base of knowledge to be qualified as an expert. Additionally, the defense argued that the HGN test itself failed to meet the statutory reliability requirements. Finally, the defense requested that the Trial Court hear this motion prior to determining the suppression motion. (R.18:1.) The State did not respond to this motion.

At the motion hearing, the State stipulated that Officer Zeise lacked the scientific knowledge or training to be qualified to testify as an expert pursuant to Wis. Stat. § 907.02 regarding the HGN test. (R.29:52.) The State also failed to proffer any evidence regarding the HGN test's reliability, and did not request a subsequent hearing for that purpose or assert that it intended to offer a qualified expert at trial. The Court ruled that the parties stipulated that the officer lacked the necessary qualifications to testify regarding the HGN results and declined to receive further testimony regarding HGN results. (R.29:51-53.) The Court withheld a decision regarding the reliability of the HGN test itself, the arrest, and the suppression. (R.29:76.)

After the motion hearing on May 23, 2013, the Trial Court issued an oral decision and order on June 4, 2013. (R.23; R.30.) The Court held that the State failed to demonstrate the "reliability of the underlying science or

methods of the HGN test," and therefore it would not consider testimony about how Officer Zeise administered the test or Litke's performance. (R.30:9-10.) The Trial Court clarified that it would, however, consider that it was performed, and that Litke stood without swaying or balance problems. (R.30:9.)

As to the Motion to Suppress, the Court held that Officer Zeise lacked probable cause to administer the PBT, and, without consideration of the PBT, also lacked probable cause to arrest Litke for operating while intoxicated. (R.30:7-8.) The Court explained:

> [A]t the time Officer Zeise started to perform and conducted the preliminary breath test with the defendant, the information she had was that he had driven without headlights on a short distance, a couple of blocks, in someone else's car that he was driving for the first time, not only as he indicated but also as confirmed by the passenger.
>
> Officer Zeise had not seen the defendant engage in any particularly bad driving, by that I mean any moving violation such as speeding, swerving, deviating from a lane, going the wrong way down the street contrary to the required flow of traffic or direction of traffic. The defendant had stopped his car promptly, he parked appropriately; while he did appear nervous and had bloodshot, glassy eyes and had admitted to drinking alcohol earlier in the evening, the officer did not detect the odor of alcohol. He answered her questions and followed her instructions promptly, appropriately, without any significant slurring of the speech.
>
> The conversation that they had was pretty free flowing, I don't think that that, [sic] in watching and listening to the video, indicated any sign of impairment. He exited the car without any balance coordination problems, he followed the instructions for the field sobriety tests without problems and without swaying or balance problems during the instructional portions of the tests or even in between the tests, as I watched the video; watching what he was doing between the tests, there weren't any swaying, balance problems, coordination problems, or significantly slurred speech.

> I am noting that ultimately, while I did make a couple of fact findings related to HGN, that the officer performed that test and that during that test he stood through it without swaying or balance problems. I am not considering the officer's testimony about how she conducted the test or his performance on the actual parts of the test . . . .
>
> Moving on to the walk and turn test, again, he performed very well, there were absolutely no clues under the standardized field sobriety testing regime; and again, as I watched the video, he didn't exhibit any signs of impairment in my analysis.
>
> The one leg stand, 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.
>
> And under all of those circumstances, like I said, I find that the officer did not have the probable cause necessary to administer the preliminary breath test.

(R.30:8-10.) The State appealed from Judge Stark's order granting Litke's motions. (R.27.)

II. Statement Of Relevant Facts.

Brown Deer Police Officer Jill Zeise stopped the vehicle that Litke was driving for operating without headlights illuminated at approximately 11:30 p.m. on July 13, 2012. (R.30:3.) She did not observe any moving violations, such as speeding, or bad driving, such as lane deviation. (R.29:45; R.30.8.) Upon activating her lights, Litke stopped the vehicle right away and without incident. (R.29:45; R.30:3,8.) He pulled the vehicle over next to the curb so as not to impair traffic. (R.29:45; R.30:8.)

Once stopped, Officer Zeise advised Litke that the vehicle's headlights were not illuminated. He did not know

the lights were not on, and stated that it was his first time driving the vehicle. (R.29:45-46; R.30:4,8.) The passenger confirmed that it was his vehicle. (R.29:17,48; R.30:4,8.)

Litke advised that he was coming from a bowling alley, Brown Deer Lanes, which was just a couple of blocks away. (R.29:46; R.30:4.) That he had one beer at the bowling alley when he first arrived, about three hours before the stop, (R.29:19), and a couple of drinks at a fish fry before that, about three to four hours prior (R.30:4). He complied with Officer Zeise's request for his driver's license without any difficulty or problems. (R.29:47; R.30:5.) While Litke was nervous (R.29:17; R.30:4), he was fully cooperative with Officer Zeise (R.29:47,49).

During her interaction with Litke, Officer Zeise noted that he had glassy and bloodshot eyes, and slightly slurred speech. (R.29:18,46-47.) She did not have any difficulty understanding him, and he was able to appropriately answer all of her questions. (R.29:47; R.30:6.) Officer Zeise did not detect any odor of alcohol during her interaction with Litke while he was in the vehicle, noting only vinegar, apparently from buffalo wings in a take-home container in the car, and cigarettes. (R.29:49; R.30:5.) She did not smell the odor of intoxicants after Litke exited the vehicle, and the State concedes that there was no odor of alcohol on Litke's breath. (State's Br. at 15.)

Officer Zeise then had Litke exit the vehicle to complete field sobriety tests; he complied and was not difficult or resistive in any way. (R.29:22; R.30:5.) As Litke exited, he did not show any balance or coordination problems.

(R.30:5.) While Officer Zeise instructed Litke on performing the field sobriety tests, Litke was steady, and did not sway or lose his balance. (R.29:56,58; R.30:5.)

Officer Zeise first administered the horizontal gaze nystagmus (HGN) test. (R.29:30,51.) Litke did not sway or lose balance while listening to instructions. (R.30:5.)

Litke then successfully completed the walk and turn test, as Officer Zeise detected zero clues. (R.29:33, 56-58.) Again, Litke did not lose his balance or sway while he received instructions. (R.29:56; R.3:5.) He walked on an imaginary straight line, placed each of his nine steps heel-to-toe, correctly executed the pivot turn, and proceeded another nine steps in the same manner. (R.29:56-57.)

Litke completed the one-leg stand test by balancing on one leg for 30 seconds, until Officer Zeise told him to stop. (R.29:33, 57-58; R.30:5.) Officer Zeise testified that she observed two clues: that he raised his arms, and hopped one time. (R.29:34, 59-60.) Officer Zeise did not observe the other clue: putting the foot down. (R.29:34.) Again, Litke maintained his balance while receiving instructions to complete the test. (R.29:58-59.)

Finally, Officer Zeise administered a preliminary breath test (PBT), which provided a reading of .149. (R.29:36,37,60; R.30:6.) She subsequently arrested Litke for Operating While Intoxicated. (R.29:37,60; R.30:6.)

STANDARD OF REVIEW

Factual determinations made by the Trial Court will be upheld unless they are clearly erroneous. *County of Jefferson v. Renz*, 231 Wis. 2d 293, ¶ 48 (1999) (internal citations omitted). Probable cause is a legal issue that the court "determines independently of the circuit court and court of appeals but benefiting from their analyses." *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383.

ARGUMENT

I. The State Failed to Object to the Application of the Rules of Evidence and *Daubert* Analysis Regarding the Admissibility of the HGN Test Before the Trial Court, Therefore Waiving This Issue on Appeal. Further, the Trial Court is Permitted to the Apply Rules of Evidence at a Motion Hearing.

As an initial matter of clarification, the State misconstrues the Trial Court's ruling in its argument before this Court. (State's Br. at 9-11.) The Trial Court made two rulings regarding the HGN test. First, pursuant to stipulation by the parties[2], the Court ruled that Officer Zeise lacked the scientific knowledge or training to testify as an expert pursuant to Wis. Stat. § 907.02. (R.29:52). Second, because the State failed to respond to the defense's objection regarding the reliability of the HGN test itself, proffering no evidence of its own on that issue, the Trial Court declined to

[2] 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 . . . I won't be arguing that she does have that underlying scientific knowledge or training." (R.29:52.)

admit the HGN test in its probable cause determination. (R.30:9-10.)

In its appeal, the State does not address its failure to request that the Trial Court consider the HGN to be reliable and therefore admissible. The State also asserts for the first time on appeal that because the rules of evidence do not apply at a motion hearing, the Trial Court improperly refused to consider the Officer's HGN testimony. Because the State did not address either of these rulings before the Trial Court in a manner consistent with its appeal, the State's position before this Court fails.

A. The Argument is Waived.

The State did not object to the Trial Court's *Daubert* analysis of Officer Zeise's HGN testimony at the motion hearing. In fact, the State made no objection whatsoever to the Trial Court's reliance on Wis. Stat. § 907.02 concerning the officer's testimony. Because the State raises the argument that the rules of evidence do not apply at a motion hearing for the first time on appeal, the issue is waived.

Issues that are not presented before the Trial Court are not preserved, and therefore are deemed waived. *State v. Huebner,* 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 492-93 (internal citations omitted). The State failed to file any written argument in response to Litke's written motion to exclude testimony before the motion hearing, or to present any evidence at the motion hearing regarding the HGN test's

reliability[3] or the officer's ability to interpret the HGN results. The State did not request an adjournment for either of those purposes, nor did it assert that it intended to offer a qualified expert at trial. And finally, as already noted, the State stipulated that the officer lacked the qualifications necessary to present HGN testimony pursuant to Wis. Stat. ¶ 907.02. (R.29:52.)

This fundamental principle of appellate review is commonly known as the "waiver rule." *Huebner,* 235 Wis. 2d 486 at ¶11. The party raising an issue on appeal, the State, bears the burden of showing that the issue was presented to the Trial Court. *Id.* at ¶10. The State has failed to meet that burden.

B. The Court is Not Prohibited from Applying the Rules of Evidence at a Motion Hearing.

The Trial Court properly excluded the HGN test from the probable cause determinations because it is permitted to apply rules of evidence at a motion hearing. The State cites *State v. Jiles*, 2003 WI 66, ¶29, 262 Wis. 2d 457, in support of its argument that the rules of evidence do not apply at motion hearings, and that the Trial Court should have admitted the HGN test under the circumstance in which its admissibility was challenged and proffered. (State's Br. at 9.)

[3] The State argues that the HGN test was found to be reliable in *State v. Zivcic*, 229 Wis. 2d 119, 128 (1999) (holding that the HGN test satisfied the mandates of Wis. Stat. § 907.02). (State's Br. at 10-11.) However, reliance on this case is erroneous. That opinion, written in 1999, pre-dates the 2011 amendment of Wis. Stat. § 907.02 that adopted the more rigorous *Daubert* standard changing the court's gatekeeper function, whether the HGN evidence will be presented to the trier of fact, and by whom.

However, *Jiles* is hardly a case of broad precedent, let alone one providing guidance on the issue before this Court.

In *Jiles*, the Wisconsin Supreme Court addressed a "fact-specific" motion to suppress the defendant's statement in which the Trial Court admitted a police report rather than live testimony and found that the state had met its burden of proof. *Id.* at ¶5. The Supreme Court reversed, holding that, while the rules of evidence do not apply at suppression hearings, that the hearing in that case was inadequate. *Id.* at ¶48-49.

The *Jiles* Court's holding did not turn on the evidentiary issue of hearsay admission, and the Court did not cite a blanket prohibition against a Trial Court's discretion to apply the rules of evidence. Addressing the application of the rules of evidence at a motion hearing, the *Jiles* Court only stated that "[t]he defendant cannot prevail on an argument that the court *must* apply the rules of evidence at a suppression hearing." *Id.* (emphasis in original). It cited Wis. Stat. § 901.04(1), regarding preliminary questions, which states "the judge is bound by the rules of evidence only with respect to privileges and as provided in § 901.05." *Id.* at ¶29. However, neither that language nor the Court's opinion makes use of the rules of evidence at motion hearings either prohibited or required as a blanket rule, nor has the State pointed to other authority for a bright-line rule on this issue. In fact, the rules of evidence are routinely applied at evidentiary pre-trial motion hearings in Trial Courts across Wisconsin, as they were in this case, without objection from the State. *Jiles* was

ultimately decided on an analysis of whether what happened was fair, and in that case, the defendant prevailed.

Applying principles of fundamental fairness to the present case, done in *Jiles*, also renders a conclusion in favor of defendant Litke. The defense objected to admission of the HGN evidence prior to the hearing, relied upon a stipulation and failure to respond by the State at the motion hearing, and now must respond to the State's change in position prompted by the desire for a different result. Given the State's waiver and current change in position, it was not treated unfairly and should not prevail.

II. The Trial Court Properly Made Factual Determinations Regarding Litke's Performance of the Field Sobriety Tests, and Properly Held that the Officer Lacked Probable Cause to Administer a PBT, and to Arrest Litke.

Factual determinations made by the Trial Court will be upheld unless they are clearly erroneous. *County of Jefferson v. Renz*, 231 Wis. 2d 293, ¶ 48 (1999) (internal citations omitted). In arguing that the Trial Court substituted its judgment for that of Officer Zeise, the State fails to recognize that the Trial Court must first make factual determinations, which are then applied to the legal standards.

A. Trial Court's Factual Determinations.

The Trial Court did not, as the State asserts, substitute its own judgment for Officer Zeise's. (State's Br. at 12.) Rather, the Trial Court made appropriate factual determinations based upon Officer Zeise's testimony and review of the squad video. At the motion hearing, the State stipulated to the admission of Officer Zeise's squad video for

the Trial Court to review independently. (R.29:64.) The State now takes issue with the Court's factual determinations because it did not prevail, essentially arguing that the Trial Court was bound to reach the same conclusions that the officer did. This position is simply not consistent with the Trial Court's function as the trier of fact, critical to our adversarial system. The Court acted appropriately, considering the officer's testimony and reviewing the relevant video evidence, and making factual conclusions.

Officer Zeise testified that Litke's speech was "slightly" slurred (R.29:46-47); the Trial Court found that Litke did not exhibit any "significant slurring" (R.30:6). The Court's factual finding was a minor distinction from the officer's characterization. The Officer testified that Litke's performance on the one leg stand test was marked by slight hopping one time and raising his arms from his side. (R.16:2; R.29:34,60.) The Trial Court ultimately found that Litke slightly wobbled and raised his arms from his side. (R.30:6.) Based upon these factual determinations, the Trial Court declined to rule that this constituted two or more clues of intoxication or a failure of the test, and found that Litke performed the test "pretty well." (R.30:10.)

Finally, concerning Litke's driving, the Trial Court found that he displayed no bad or remarkable driving, and that he explained that his headlights were not on because the car was not his. (R.30:8.) The Court appropriately considered the fact that it was the passenger's vehicle and Litke's first time driving it, which provided a rational explanation that,

taken alone, has no apparent correlation to indicia of intoxicated driving.

The Trial Court then used these factual determinations toreach the legal conclusions that Officer Zeise lacked probable cause to administer the PBT, and to arrest Litke. These determinations were proper, and in no way usurped the authority and discretion afforded to the Trial Court. The distinctions between the officer's testimony and the Trial Court's conclusions after reviewing all of the evidence before it were minor, and not clearly erroneous. They should be upheld.

B. Lack of Probable Cause to Administer a PBT.

The information known to Officer Zeise at the time that she requested Litke to submit to a PBT failed to rise to the level of probable cause necessary to support that request. The probable cause necessary to support administration of a PBT is greater than reasonable suspicion necessary for an investigative stop, but less than probable cause necessary for an arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316 (1999). Probable cause is a legal issue that the court "determines independently of the circuit court and court of appeals but benefiting from their analyses." *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383.

In *Renz*, the Wisconsin Supreme Court determined that the defendant displayed eight indicia of intoxication during a traffic stop that supported probable cause to administer a

PBT. 231 Wis. 2d 293 at ¶49. The eight indicia[4] were: (1) Renz's car smelled strongly of intoxicants; (2) he admitted to drinking "three beers earlier in the evening," at ¶5; (3) he could not hold his foot up for 30 seconds in the one leg stand test; (4) he restarted the one leg stand test at the wrong number; (5) he appeared unsteady in the walk and turn test[5]; (6) he left space between his steps; (7) he stepped off of the imaginary line; and (8) he could not touch his finger to his nose. *Id.* at ¶49. The Court balanced these indicia with the mitigating circumstances that Renz did not have slurred speech, and that he was able to substantially complete all of the tests, ultimately finding that there was probable cause to administer the PBT. *Id*.

The present case is distinguishable from *Renz*. First, of the eight indicia noted in *Renz*, six were related to the defendant's performance of the field sobriety tests, as opposed to Litke, who displayed one: during the one leg stand he raised his arms from his side.[6] And second, the officer in *Renz* detected a strong odor of intoxicants coming from the defendant, *id*. at ¶4; Officer Zeise did not detect an odor of

---

[4] The *Renz* Court did not consider the HGN test in the probable cause determination. The Court sustained the defense objection to testimony on the HGN test, asserting that it was not admissible without independent expert testimony to establish the test's validity. 231 Wis. 2d 293 at ¶13. The Court of Appeals did not address whether it was properly or improperly excluded because it found probable cause for the PBT. *Id.* at ¶50 n.15.

[5] The *Renz* Court refers to the "heel-to-toe" test. 231 Wis. 2d 293 at ¶49.

[6] The State erroneously asks this Court to consider facts regarding Litke's performance of the one leg stand test, such as leaning, which was not part of the testimony at the motion hearing or decided by the trial court (State's Br. at 15), and is therefore not properly before this Court for consideration.

intoxicants coming from the defendant in the present case. For all of these reasons, *Renz* is distinguishable.

This Court also addressed the issue of probable cause to administer a PBT in *State v. Felton*, 2012 WI App 114, 344 Wis. 2d 483. There, the Court determined that the defendant displayed the following indicia to establish probable cause to administer a PBT: (1) that Felton remained at a stop sign too long, subsequently went through another stop sign at twenty miles per hour without slowing down, and stopped at the third sign, *id.* at ¶2, (2) he smelled of alcohol; (3) the officer was aware of Felton's prior drunk driving convictions when affecting the arrest, (4) he had glassy and bloodshot eyes, and (5) he admitted to drinking three beers, two hours before the stop. *Id.* at ¶¶ 2, 9. Felton successfully completed all of the field sobriety tests[7], although he faltered one time. *Id.* at ¶10.

Felton is distinguishable, first, because the driving in that case clearly indicated intoxication. Felton's pattern of driving – remaining at a stop sign for too long, then driving through the next one at twenty miles per hour without slowing, and stopping at the third sign – was far different than the defendant's driving in the present case, given the Trial Court's conclusion that Litke displayed no bad driving[8], and

[7] The *Felton* Trial Court held that the HGN test was not properly administered, and disregarded it. This Court excluded it from the probable cause determination due to finding the requisite probable cause without it. 344 Wis. 2d 483 at ¶4.

[8] Litke was not speeding, swerving, deviating from a lane, driving against the flow of traffic, or committing any other moving violation. (R.30:8.)

that he explained the reason the headlights were off to the officer.[9] (R.30:6,8-10.)

The second significant distinction between *Felton* and the present case is the odor of alcohol. The officer in *Felton* detected a "strong odor of intoxicants coming out of the car." 344 Wis. 2d 483 at ¶3. However, in the present case, Officer Zeise did not detect any odor of alcohol during her interaction with Litke. (R.29:49; R.30:5.) The State concedes that there was no odor of alcohol on Litke's breath. (State's Br. at 15.)

Lastly, the *Felton* Court placed considerable weight on the officer's knowledge of the defendant's previous operating while intoxicated convictions prior to the decision to administer the PBT. 344 Wis. 2d 483 at ¶9. Unlike the officer in *Felton*, Officer Zeise did not testify that she considered Litke's prior operating while intoxicated convictions in her decision to administer the PBT, or to arrest.

These significant factual distinctions between *Felton* and the present case leave the State with only a modicum of remaining similarities – bloodshot and glassy eyes, and an admission to drinking – which are insufficient to justify this Court's reversal of the Trial Court's conclusion of law. While *Felton* is also similar to the present case as Litke successfully completed the field sobriety tests, the *Felton* Court did not consider the field sobriety tests in the probable cause analysis. 344 Wis. 2d 483 at ¶10. Further, it can hardly be argued that

[9] An officer has some duty to investigate possible innocent explanations for erratic driving. *State v. Swanson*, 164 Wis. 2d 437, 543-54 n.6 (1991), *overruled on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742.

passage of the field sobriety tests weighs *against* Litke in the probable cause determination.

The Trial Court reached the proper legal conclusion that, based upon all of these circumstances, Officer Zeise lacked sufficient probable cause to administer the PBT. (R.30:10.) Therefore, the PBT result was properly excluded from the probable cause to arrest determination. The result of a PBT taken without probable cause cannot be used in the officer's decision to arrest. *State v. Repenshek*, 2004 WI App 229, ¶21, 277 Wis. 2d 780 (stating that the *Renz* Court reasonably assumed this, although not directly expressed).

C. Lack of Probable Cause to Arrest.

The Trial Court properly held that, without the PBT result, Officer Zeise lacked the probable cause necessary to arrest Litke for operating while intoxicated. (R.30:8.) Probable cause requires that the quantum of evidence known to the officer at the time of arrest would lead a reasonable officer to believe that the defendant was operating while under the influence of an intoxicant. *Lange*, 317 Wis. 2d 383 at ¶19.

The probable cause to arrest determination employs the same factors as the determination to administer the PBT discussed above. Therefore, without the PBT result and for the reasons discussed above, Litke's arrest was not supported by probable cause to believe that he was probably operating a vehicle while under the influence of an intoxicant or with a restricted blood alcohol concentration.

CONCLUSION

Based upon the foregoing, Litke respectfully requests that this Court affirm the Trial Court's rulings, that the State failed to meet its burden regarding the reliability of the underlying science or methods of the HGN test and it should therefore not be considered in determining probable cause, and that neither the PBT nor the arrest were supported by probable cause.

Respectfully submitted this 21st day of January, 2014.

MASTANTUONO & COFFEE S.C.
Attorney Craig Mastantuono
State Bar No. 1020125
Attorney Leah R. Thomas
State Bar No. 1087899
219 N. Milwaukee St., Suite 5B
Milwaukee, Wisconsin 53202
P (414) 276-8662

By: _____
Craig Mastantuono
Attorney for Mr. Litke

ELECTRONIC BRIEF CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wisconsin Statute section 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

_____
Craig Mastantuono
State Bar No. 1020125

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wisconsin Statute section 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,658 words.

_____
Craig Mastantuono
State Bar No. 1020125

CERTIFICATION OF MAILING

I hereby certify that on this 21st day of January, 2014, pursuant to Wisconsin Statute section 809.80(3)(b) and (4), the original and nine copies of the Brief of Defendant-Respondent were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Plaintiff-Appellant via United States first-class mail in properly addressed, postage paid envelopes.

_____
Craig Mastantuono
State Bar No. 1020125