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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED

Page

WISCONSIN STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

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ARGUMENT

Mr. Litke argues that the State waived challenges to the trial court's rejection of evidence in a motion hearing when the trial court applied the rules of evidence, and further argues that the trial court's findings of fact do not support the probable cause decision of the officer to administer the PBT test, and to arrest Mr. Litke. Appellant will address each of those arguments and other points raised in Respondent's Brief, in the order presented in that document.

I. There was no waiver of the misapplication of the evidentiary rules under Wisconsin Statute § 907.02 at a motion hearing on probable cause for arrest because Mr. Litke had never asked the court to do so, and the matter was fully presented before the trial court, allowing the court to correct its error.

Mr. Litke argues that the State waived any challenge to the court's incorrect application of the rules of evidence because the State did not object during the motion hearing. However, it is important to note that Mr. Litke never asked nor argued that the court should ignore the HGN test related to probable cause for arrest.

Mr. Litke filed two trial court motions/briefs. One motion challenged whether the officer was qualified under the new evidentiary standard under § 907.02 standard to testify at trial, as to the HGN test. (R18). The other motion/brief asked the court to find that Officer Ziese did not have probable cause to request Mr. Litke provide a breath sample into the PBT device. (R16).

The trial court decided to take testimony on both motions simultaneously, since much of the testimony could be overlapping. The trial court sua sponte decided to ignore the evidence of the HGN test as to probable cause to arrest. Mr. Litke had not made such a request.

Mr. Litke relies upon *State v. Huebner*, 2000 WI 59, 235 Wis. 2d 486, claiming that the State waived any challenge to the courts actions of ignoring culpable evidence when applying the rules of evidence to the motion, because this was not argued before the trial court. The case is not on point. In *Huebner*, a 6-person jury trial was conducted, consistent with the statutes at the time of the trial. Subsequent to the finding of guilty, Huebner challenged, claiming he was entitled to a 12-person jury trial. However, he never raised that challenge before the trial court. The Wisconsin Supreme Court found that Huebner had waived his challenge because, by waiting until after the trial, the trial court had no way to correct its error. (*Id*. at ¶50)

In the instant case, the court heard the foundational testimony as to Officer Ziese's training and experience in the administration of the HGN test. The testimony as to the HGN test was fully presented to the trial court. Officer Ziese explained the test, her training, and the results as to intoxication, which she observed in Mr. Litke. Further, as previously argued in Appellant's Brief, Wisconsin Statute § 901.04 specifically states that the rules of evidence do not apply in motion hearings, other than with respect to privilege.

Mr. Litke incorrectly argues that "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. Stats. Section 907.02 regarding the HGN test." (Respondent's Brief at pg. 2). The State only agreed, referring to Officer Ziese "I'm saying that this witness doesn't have the necessary knowledge or ability to testify to the underlying science related to it…" (R29:52, App. 152).

The issue in this case is not whether Officer Ziese is qualified under Wisconsin Statutes § 907.02 to testify as to the HGN test at trial, but rather whether she can rely upon that test in her decision to request a PBT sample or probable cause to arrest.

Mr. Litke also argues that the State did not present evidence as to the reliability of the HGN test. (Respondent's Brief at pg. 7). Although the State did not call independent scientists or present medical testimony, Officer Ziese described her training and experience in the administration of HGN test. (R29:10-12, App. 110-112). In cross-examination, she testified further as to her training in that test. (R29:40-44, App. 140-144). Officer Ziese explained the step-by-step procedures that she followed when administering that test to Mr. Litke. (R29:23-31, App. 123-131).

That cross examination included questions as to whether or not Officer Zeise had conducted her own studies as to the reliability of the HGN or whether she had personally conducted studies with control groups.

In cross examination, Officer Ziese testified as to her use of the field sobriety tests, including the HGN test in OWI related traffic stops and investigations.

The new evidence code under Wisconsin Statute § 907.02, nor the cases under *Daubert v. Merell Dow Pharm., Inc 509 U.S. 579(1993),* require that a witness applying proven scientific or technical theories to evidence, are themselves qualified in the underlying science. *Tuf Racing Products, Inc. v. American Suzuki Motor Corp*., 223 F.3d 585, C.A.7 (Ill.), 2000. Such testimony is only required when novel theories are used as a basis of the expert opinion. Only then is the testifying expert witness required to be qualified in establishing the validity of the underlying principles. "The principle of *Daubert* is merely that if an expert witness is to offer an opinion based on science, it must be real science, not junk science." *Id*. at 591.

Mr. Litke's argument, if followed, would invalidate previously proven scientific evidence. It does not! What Wisconsin Statutes § 907.02 requires is that the court make specific findings before expert testimony is proffered before the trial of fact.

However, the issue in the instant case is not whether Officer Ziese can testify to the HGN at trial, but whether she can utilize the clues seen in the administration of the HGN test in the decision to request a PBT breath sample of Mr. Litke. The change in the rules of evidence, which altered finding which the court must find prior to testifying at trial, has no impact on the officer's reliance on the HGN test in determining probable cause for arrest. Officer Ziese should be able to rely upon her training and her experience in administering the HGN test, in her decision to request a PBT sample, and to arrest.

Police officers rely on inadmissible evidence every day in their job, and the courts have found that is permissible. Hearsay can be a basis for arrest, even though it would be inadmissible before the trier of fact. *State v. Kutz*, 2003 WI App 205, 267 Wis. 2d 531. Most police officers probably don't fully understand the principles upon which the speedometer in their squads are based, or how a LASER or Radar gun works, yet can they can rely upon the readings of those instruments to

stop a speeding vehicle. Even the PBT is not admissible at trial, pursuant to Wisconsin Statutes § 343.303. And the officer doesn't need to know the underlying scientific principles upon which a PBT operates. The officer only has to properly operate it. For probable cause, it is enough if the officer is trained and experienced, and based upon that experience, reasonably believes that there is evidence of a crime.

But even without the results of the HGN test, there was probable cause to administer the HGN test and subsequent arrest.

II. In arguing that there was not probable cause to request the PBT sample, Mr. Litke confuses the difference between the trial court findings of fact, and the improper inferences that the court derived from those facts.

Mr. Litke argues that the "The Court acted appropriately considering the officer's testimony an reviewing the relevant video evidence and making factual conclusions." (Respondent's Brief at pg. 12). Mr. Litke refers to the inferences that the court made from the evidence as "factual conclusions." They are in fact "inferences" and the court incorrectly chose to ignore the reasonable inferences reached by Officer Ziese, from those same facts.

In discussing Mr. Litke's performance of the One Leg Stand test, Mr. Litke argues that the court declined to find that the raised arm and "wobble" in that test, constituted two clues, or that Litke failed the test. However, the court made no such statement. The court characterized the "hopping" described by Officer Ziese as "more of a wobbling for a minute" (R30:6, App. 184).

It is important to note that at no time did the judge find that Officer Zeise's testimony was not credible. The court merely described Mr. Litke's movement during the one leg stand as a "wobble" rather than a "hop." The court, later in the decision, again referenced the two clues:

> 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 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).

The court, in this analysis, is weighing the evidence for intoxication, the "wobble and the raised arm," against the evidence against the observation that Mr. Litke did well for the rest of the test. In so doing, court is making two mistakes. The role of the court is to look at the inferences from the viewpoint of those well versed in the field of law enforcement. *State v. Nieves*, 2007 WI App. 189 at ¶11, 304 Wis. 2d 182, 189. Officer Ziese, trained and experienced in OWI enforcement, interpreted clues of intoxication. The court is required to examine the evidence from the officer's perspective, not an independent weighing of the evidence in terms of guilt or innocence. Further, subsequent good performance on the rest of the One Leg Stand test neither negates nor lessens probable cause. *State v. Felton*, 2012 WI App 114 at ¶10, 344 Wis. 2d 483, 490,

In discussing Mr. Litke's driving without illuminated headlights, Mr. Litke again confuses the distinction between findings of fact, and that of inferences or conclusions, which could be drawn from those facts.

The trial court found that Litke was driving the vehicle at 11:33 p.m. without the required illuminated headlamps. (R30:3, App. 181). Respondent argues that "The Court "appropriately considered the fact that it was the passenger's vehicle and Mr. Litke's first time driving it, which provided a rational explanation that, taken alone, has no apparent correlation to indicia of intoxicated driving." (Respondent's Brief at pg. 12-13). However, Officer Ziese felt that it was a possible indication of impairment due to intoxicants. The court cannot reject a reasonable inference reached by Officer Ziese, even if the court feels that the explanation provided by Mr. Litke is also reasonable. The trial court is limited to reviewing whether the inferences, which the officer reached, were

reasonable. A police officer is not required to accept inferences, which point towards innocence, if there is an inference that points towards guilt. *State v. Nieves*, 2007 WI App. 189 at ¶14; 304 Wis. 2d at 189-190. *State v. Kutz*, 2003 WI App. at ¶12, 17, 267 Wis. 2d at 454, 548-49. The inference, which the officer believes, need not even be more probable than those pointing towards innocence. *State v. Sanders*, 2007 Wis. App. 44, 304 Wis. 2d 159. In the instant case, despite the explanation proffered by Mr. Litke, it was reasonable for Officer Ziese to interpret the operation of the auto with its lights off, as an indication of impairment due to intoxicants.

Mr. Litke again confuses the distinction between findings of fact and inferences or significance of those facts, in discussion regarding the trial courts observations as to the alleged "slightly slurred speech," testified to by Officer Ziese. (R29:17, App. 17). Having viewed the video, the court found "that there was not any significant slurring." It is important to note that, at no time in the hearing, nor in its ruling, did the court find that Officer Wiese's testimony was not credible. The court's opinion that there was not "significant slurring" does not contradict the officer's testimony that there was "slight slurring." The court, rather than consider the trained and experienced law officer's interpretation of the evidence, substituted its own judgment. The courts inference that the minor slurring was not a clue of intoxication is a possible inference, but not the only one. The officer's inference of the "slight slurring" was that it was significant as a clue of intoxication. That inference is reasonable. And one that the officer is entitled to make. *Supra*.

Mr. Litke attempts to argue that there was not probable cause in the instant case, by comparing the facts to those in *State v. Felton*, 2012 WI App. 114, 344 Wis. 2d 483. Mr. Litke argues that the absence of three clues of intoxication, present in *Felton*, but lacking in the instant case, results in there not being probable cause. Mr. Litke points to: 1) That Felton ran a stop sign; 2) Felton emitted an odor of intoxicants; and 3) the officer knew of Felton's prior OWI conviction. (Respondent's Brief at pg. 16). This reliance is misplaced. The court in *Felton* did not hold that it presented the bare minimum of evidence of

probable cause that must exist prior to the request for a PBT test.

It is also arguable that the driving of both Felton, and Litke, showed clues of intoxication, adopting the permissible inference of Officer Ziese.

It is relevant to note that Felton passed all of his FST's, in contrast to the "wobble" and "raised arm" evidenced by Mr. Litke. *Felton* at ¶10. The absence of some commonly found clues of intoxication is not necessary for probable cause for arrest. *State v. Lange*, 2009 WI 49, 317 Wis. 2d 457. Indeed, in *Lange*, there was no odor of admission of drinking, no field sobriety tests, nor was there evidence that Lange had bloodshot or glassy eyes. Bad driving alone was enough for the officer to arrest for OWI.

The role of the administration of the preliminary breath test is that of aiding an officer in the preliminary screening of an OWI suspect. This purpose is why there is a lower level of probable cause for the use of the PBT, in contrast to that of probable cause for arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541(1999).

In the instant case, the following were the findings of fact, upon which inferences of intoxication could be, and were relied upon by Officer Ziese:

1) Mr. Litke's operation of the auto at 11:33 p.m. without required illuminated headlamps. (R30:3, App. 181).

2) Mr. Litke did not look at Officer Ziese when she spoke to him, until she asked him why he wouldn't look at her. (R30:4, App. 182). (It is a reasonable inference that Mr. Litke, in a consciousness of guilt, avoided looking at Officer Ziese in an attempt to conceal his blood shot/glassy eyes and any potential odor of alcohol.)

3) Mr. Litke's eyes were "bloodshot and glassy." (R30:4, App. 182).

4) Mr. Litke admitted having consumed alcohol both earlier at a fish fry and more recently at a Bowling Alley, just before the traffic stop. (R30:4, App. 182).

5) Mr. Litke's slurred speech - not significantly slurred – as interpreted by the court. (R.30:6, App. 184).

6) Mr. Litke's showed 6 out of a possible 6 clues of intoxication in the performance of the Horizontal Gaze Nystagmus test. (R29:31, App. 131)[1]

7) Mr. Litke raised on arm from his side and "did slightly wobble without putting a foot down." (R30:5, App. 183).

Each of these facts, when evaluated by a police officer trained and experienced in OWI investigations, yields a reasonable inference of intoxication. Even if the court ignores the results of the HGN test, there still existed probable cause to request that Mr. Litke provide a breath sample into the PBT.

CONCLUSION

For the reasons stated above, and in Appellant's Brief, the Appellant respectfully asks the court to find that 1) The Horizontal Gaze Nystagmus 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 request that Mr. Litke provide a breath sample into the preliminary breath testing

[1] Because the trial court did not consider the HGN test in evaluating probable cause for arrest, the court did not make any findings as to the number of clues observed by Officer Ziese. The information contained above is based upon the motion hearing testimony.

device and, there was probable cause to arrest him for Operating While Intoxicated.

Dated this _____ day of February, 2014.

Respectfully submitted,

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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 2,797.

_____ _____
Date Ronald S. Dague
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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

_____ _____

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