

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

RECEIVED

12-23-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2013 AP 002536

VILLAGE OF LITTLE CHUTE,

Plaintiff – Respondent,

v.

RONALD A. ROSIN,

Defendant – Appellant.

BRIEF 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ISSUE PRESENTED FOR REVIEW.....	1
STATEMENT ON ORAL ARGUMENT.....	1
STATEMENT ON PUBLICATION.....	1
STATEMENT OF THE CASE.....	1-2
STATEMENT OF THE FACTS.....	3-4
ARGUMENT.....	5-12
I. THE STANDARIZED FIELD SOBRIETY TESTS ARE A “SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT.....	5-7
A. Standard of Review.....	5
B. Field Sobriety Tests Constitute a Search with the Constitutional Sense.....	5-7
II. THE QUANTUM OF EVIDENCE TO REQUIRE FSTS SHOULD BE HIGHER THAN REASONABLE SUSPICION.....	7-10
III. UNDER EITHER STANDARD, THE OFFICER LACKED THE REQUISIT QUANTUM OF EVIDENCE TO REQUEST THE FST SEARCHES BECAUSE THE OFFICER ENCOUNTERED CIRCUMSTANCES THAT DID NOT ESTABLISH THAT THE DEFEDANT WAS COMMITTING AN OWI.....	11-12
CONCLUSION.....	13
CERTIFICATION OF FORM AND LENGTH.....	14
CERTIFICATION OF ELECTRONIC BRIEF.....	14
APPENDIX.....	App. 1-- App. 54

TABLE OF AUTHORITIES

Cases

<u><i>Berg v. Schultz</i></u> , 190 Wis.2d 170, 177, 526 N.W.2d 781 (Ct. App. 1994).....	6
<u><i>Blasi v. State</i></u> , 167 Md. App. 483, 893 A.2d 1152 (Md. Ct. App. 2006).....	7
<u><i>County of Jefferson v. Renz</i></u> , 231 Wis.2d 293, 603 N.W.2d 541 (1999).....	9
<u><i>People v. Carlson</i></u> , 677 P.2d 310 (Colo. 1984).....	6, 8
<u><i>State v. Foust</i></u> , 214 Wis.2d 568, 571-72, 570 N.W.2d 905 (Ct. App.1997)...	5
<u><i>State v. Lamme</i></u> , 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), affirmed, 216 Conn. 172, 579 A.2d 484 (Conn. 1990).....	6
<u><i>State v. Little</i></u> , 468 A.2d 615 (Me. 1983).....	7
<u><i>State v. Superior Court</i></u> , 149 Ariz. 269, 718 P.2d 171 (Ariz. 1986).....	7
<u><i>State v. Wyatt</i></u> , 67 Haw. 293, 687 P.2d 544 (Haw. 1984).....	7
<u><i>United States v. Hopp</i></u> , 943 F. Supp. 1313 (D. Colo.1996).....	6
<u><i>United States v. Jacobsen</i></u> , 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984).....	6

Statutes

Wis. Stat. § 343.303.....	9
Wis. Stat. § 346.63.....	12

Constitution

Fourth Amendment United States Constitution.....	5
--	---

ISSUES PRESENTED FOR REVIEW

Are the Standardized Field Sobriety Tests a “search” within the meaning of the Fourth Amendment?

<i>The Circuit Court answered:</i>	No.
<i>The Defendant-Appellant submits:</i>	Yes.

Should the quantum of evidence to conduct a field sobriety test search be higher than reasonable suspicion?

<i>The Circuit Court answered:</i>	No.
<i>The Defendant-Appellant submits:</i>	Yes.

Did the officer have reasonable suspicion to conduct field sobriety tests?

<i>The Circuit Court answered:</i>	Yes.
<i>The Defendant-Appellant submits:</i>	No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. However, publication is requested, as the issues presented for review present questions of constitutional interpretation, and the administration of a highly litigated area of the Wisconsin criminal justice system.

STATEMENT OF THE CASE

This is an appeal from a judgment, entered in Outagamie County Circuit Court, the Honorable Nancy Krueger presiding, in which the Defendant-Appellant, Ronald

A. Rosin (“Rosin”), was found guilty of Operating While Intoxicated (1st Offense). (R. 6).

On November 16, 2012, the Village of Little Chute filed a citation in the Village of Little Chute Municipal Court charging Rosin with, Operating While Intoxicated (1st Offense), contrary to Wis. Stat. § 346.63 (1)(a). (R. 1). Rosin was ultimately convicted by the municipal court and appealed to the circuit court. (R. 1).

On or about November 13, 2013, Rosin filed a *Motion to Suppress Evidence* in the circuit court. (R.3). On November 13, 2013, prior to the court trial, the trial court reviewed and denied the motion.

Following the circuit court’s ruling denying the motion, a Court Trial was held on November 13, 2013. (R.11). Rosin was found guilty of Operating While Intoxicated (1st Offense). (R. 6). Following the finding of guilt, the circuit court imposed an eight (8) month driver’s license revocation; ordered an alcohol and drug assessment; and, a one year ignition interlock requirement; in addition to a forfeiture. (R. 6).

The Order finding guilt was entered on November 14, 2013. (R. 6). This appeal follows.

STATEMENT OF THE FACTS

As indicated above, a Citation (R.1) was filed on November 16, 2012 (R.1) charging Rosin with Operating While Intoxicated (1st Offense). Rosin was stopped for making a wide left hand turn in the Village of Little Chute by Fox Valley Metro Officer Michael Grumann (Officer Grumann). Upon making contact with Rosin, Officer Grumann alleges to have observed a slight odor of intoxicants coming from Rosin's vehicle. (R. 14:9) Officer Grumann determined that the mere odor of intoxicants, combined with the time of night, absent other personal idicia of intoxication, were reasonable clues to determine that suggested that Rosin was intoxicated. As such, Officer Grumann administered field sobriety tests; which Rosin allegedly performed unsatisfactorily. Following the FSTs, Rosin submitted to the preliminary breath test and was ultimately arrested for Operating While Intoxicated (1st Offense).

Also indicated above, Rosin filed a *Motion to Suppress Evidence* on November 13, 2013. (R. 3). Rosin contended that Officer Grumann lacked probable cause to detain him and lacked either reasonable suspicion or probable cause to require him to perform standardized field sobriety tests.

Rosin argued that the standardized field sobriety tests (“FSTs”) are a “search” in the constitutional sense, as such an officer must have, at a minimum, a quantum of evidence higher than reasonable suspicion, but lower than probable cause to require a person submit to this “search.” Rosin contended that all Officer Grumann possessed at the time he administered the FSTs was an unparticularized hunch that Rosin was intoxicated. (R. 7:1-7).

On November 13, 2013, the circuit court orally denied Rosin’s motion. Essentially, the circuit court held that the FSTs are not a “search” within the meaning of the Fourth Amendment. Therefore, all that is required to perform FSTs is reasonable suspicion under the totality of the circumstances. (R. 11). Going further, the circuit court held that in the instant case the officer had reasonable suspicion to perform the FSTs. (R. 11).

ARGUMENT

I. THE STANDARDIZED FIELD SOBRIETY TESTS ARE A “SEARCH” WITHIN THE MEANING OF THE FOURTH AMENDMENT

a. Standard of Review

An appellate court is not bound by the circuit court’s conclusions of law and decides the issues *de novo*. State v. Foust, 214 Wis.2d 568, 571-72, 570 N.W.2d 905 (Ct. App.1997).

b. Field Sobriety Tests Constitute A “Search” Within The Constitutional Sense

The Fourth Amendment to the United States Constitution declares:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
United States Const., Amend. IV.

The question as to whether FSTs, specifically the Horizontal Gaze Nystagmus, Walk-and-Turn and One-legged Stand tests, are a “search” within the meaning of the Fourth Amendment has never been addressed by Wisconsin courts. Therefore, an issue of first impression is presented. Fortunately, several other jurisdictions have had the

opportunity to interpret the instant issue and therefore provide guidance to the case at hand. *See e.g., Berg v. Schultz*, 190 Wis.2d 170, 177, 526 N.W.2d 781 (Ct. App. 1994) (“Because this is a case of first impression, we look to other jurisdictions for guidance.”).

“A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984). An inherent right as a human being is to control and coordinate the actions of their own body. Hence, a fundamental expectation of privacy is implicated when a person is subject to the performance of FST.

Essentially, all jurisdictions that have had the occasion to address the issue have held that FSTs constitute a “search” in the constitutional sense. In *People v. Carlson*, 677 P.2d 310 (Colo. 1984), the Colorado Supreme Court held that FST “constitutes a full ‘search’ in the constitutional sense of that term[.]” *Id.* at 317. *Also see e.g. United States v. Hopp*, 943 F. Supp. 1313 (D. Colo. 1996) (holding FST are searches within the meaning of the Fourth Amendment); *and also State v. Lamme*, 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), affirmed, 216 Conn. 172, 579 A.2d 484 (Conn. 1990);

State v. Little, 468 A.2d 615 (Me. 1983); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (Ariz. 1986); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544 (Haw. 1984); *Blasi v. State*, 167 Md. App. 483, 893 A.2d 1152 (Md. Ct. App. 2006).

II. THE QUANTUM OF EVIDENCE TO REQUIRE FSTs SHOULD BE HIGHER THAN REASONABLE SUSPICION

The threshold determination that FST are “searches” within the meaning of the Fourth Amendment having been established, the question now becomes what quantum of evidence attaches to the FST search in order to be constitutional. The Fourth Amendment calls for this determination. As is no surprise, no Wisconsin court has addressed the issue. Rosin turns to other jurisdictions.

At the outset, Rosin acknowledges that there is a split in authority amongst the jurisdictions having addressed the instant issue. Some courts have held the quantum of evidence required is reasonable suspicion¹, while some courts hold probable cause² is required.

¹ See e.g., *State v. Lamme*, 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), affirmed, 216 Conn. 172, 579 A.2d 484 (Conn. 1990); *State v. Little*, 468 A.2d 615, 617-18 (Me. 1983); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 175-76 (Ariz. 1986); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544, 552-53 (Haw. 1984).

Rosin finds People v. Carlson, 677 P.2d 310 (Colo. 1984) to be particularly persuasive. In People v. Carlson, the Colorado Supreme Court held:

We are left then with the issue of the validity of the roadside sobriety tests, a matter not considered below. A roadside sobriety test involves an examination and evaluation of a person's ability to perform a series of coordinative physical maneuvers, not normally performed in public or knowingly exposed to public viewing, for the purpose of determining whether the person under observation is intoxicated.

Since these maneuvers are those which the ordinary person seeks to preserve as private, there is a constitutionally protected privacy interest in the coordinative characteristics sought by the testing process. Although some forms of governmental intrusion are so limited in scope as to be justified on a lesser quantum of evidence than probable cause, see, e.g., Michigan v. Long, supra; Terry v. Ohio, supra, a roadside sobriety test does not fall into this category.

Roadside sobriety testing constitutes a full "search" in the constitutional sense of that term and therefore must be supported by probable cause. The sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect. Intrusions into privacy for the exclusive purpose of gathering evidence of criminal activity have traditionally required, at the outset of the intrusion, probable cause to believe that a crime has been committed. See Michigan v. Clifford, 464 U.S. 287, 104 S. Ct. 641, 78 L.Ed.2d 477 (1984); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

Id. at 316-17.

Acknowledging the persuasive value, Rosin urges the Court to find, as a matter of first impression, that the level of suspicion in Wisconsin should be probable cause, but not to

² See e.g. People v. Carlson, 677 P.2d 310 (Colo. 1984); United States v. Hopp, 943 F. Supp. 1313 (D. Colo. 1996)

the extent of probable cause to arrest. Rather, Rosin suggests a quantum of evidence that is *more* than reasonable suspicion, but *less* than probable cause to arrest. Rosin makes this suggestion by analogically applying the rationale of decision rendered by the Wisconsin Supreme Court in County of Jefferson v. Renz, 231 Wis.2d 293, 603 N.W.2d 541 (1999).

In Renz, the Wisconsin Supreme Court was faced with interpreting the “probable cause” language as used in Wis. Stat. § 343.303. *Id.* The Renz court held that “probable cause,” as that term is used in sec. 343.303, refers “to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the ‘reason to believe’ that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest.” Renz, 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999).

Rosin submits that rationale of Renz is should be applied here. Firstly, similar to a FST, a PBT constitutes as “search” under the federal and state constitutions.³ Secondly,

³ In Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616–17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the U.S. Supreme Court held: “Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or ‘deep lung’ breath for chemical analysis, ... implicates similar concerns about bodily integrity and, like the blood-

and more importantly, such a standard sufficiently protects the citizen's right to be from unreasonable searches and seizures.

Rosin acknowledges the state's legitimate interest in keeping impaired drivers off the road. However, in weighing the burden FSTs impose on the individuals' right to be free from unreasonable searches, Rosin contends that the reasonable suspicion standard is insufficient. A FST search, conducted on the roadside, can prove to be a time consuming, frightening, annoying and an embarrassing intrusion. For this very reason, a quantum of evidence that is greater than reasonable suspicion, but less than probable cause to arrest is appropriate.

III. 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 OWI

alcohol test ... considered in *Schmerber* [*v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)], should also be deemed a search. [Citations omitted.]” *Accord Milwaukee County v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980) (“While the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, such a search can be conducted if incident to arrest or if a police officer has probable cause to arrest.”);

FSTs are designed to determine if a person is operating with a blood alcohol concentration of .10 or higher. In this case, the officer did not encounter circumstances which could reasonably lead him to believe that Rosin had a blood alcohol concentration of .10 or higher, or that he was even intoxicated. According to Officer Grumann, the only factors that indicated that Rosin was intoxicated were the slight odor of alcohol and the time of night that he was stopped. (R. 1) Furthermore, Officer Grumann did not observe any of the typical signs of intoxication, such as; slurred speech, lethargic or clumsy mobility, confusion, etc. until after the initial FSTs were conducted. (R. 1). In fact, Officer Grumann noted that Rosin's speech was not slurred. (R. 1).

What Officer Grumann did encounter, was a situation where the facts indicated that Rosin had consumed some alcohol some time prior to driving. Rosin indeed admitted to consuming some amount of alcohol. (R. 1). However, the mere consumption of alcohol before driving is not unlawful. Not only is this reality evinced by the plain language of the statute itself (Wis. Stat. § 346.63), but is also made clear by the pattern jury instructions: "not every person who has

consumed an alcoholic beverage is ‘under the influence’ as that term is used here.” (WIS JI-CRIMINAL 2663). Put another way, Wisconsin has not prohibited driving after consuming alcohol.

The facts of the instant case only support a conclusion that Rosin had consumed alcohol; there were no articulable facts suggesting that he was intoxicated. To violate Wisconsin’s OWI law, the prosecution must establish that the individual’s ability to drive was impaired as a consequence of consuming intoxicants. *See* Wis. Stat. § 346.63 (1)(a). It is therefore necessary that an officer possess objective facts justifying a legitimate suspicion that the individual’s ability to drive is in fact impaired as a consequence of alcohol consumption for that officer to be justified in administering FSTs – whether or not, the Court holds the FSTs to be a constitutional “search.”

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 20th day of December, 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 2, 320 words.

Dated this 20th day of December, 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 20th day of December, 2013.

John Miller Carroll
State Bar #01010478