

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**Appeal No. 2013AP002804
Winnebago County Circuit Court Case Nos.
2013TR000957 and 2013TR001873**

CITY OF OSHKOSH,

Plaintiff-Respondent,

v.

JONATHAN D. BERGER,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT-APPELLANT'S
MOTION FOR SUPPRESSION OF EVIDENCE IN THE
CIRCUIT COURT FOR WINNEBAGO COUNTY, THE
HONORABLE THOMAS J. GRITTON, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT JONATHAN D. BERGER**

**By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997**

**Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)**

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STATEMENT OF THE ISSUES

Did City of Oshkosh Police Officer Nickolas Kawleski have probable cause to arrest Mr. Berger for operating a motor vehicle while under the influence of intoxicant?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Jonathan D. Berger (Mr. Berger) was charged in Winnebago County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on January 17, 2013. On February 25, 2013, in writing, Mr. Berger entered a not guilty plea to both charges. On April 17, 2013, Mr. Berger filed a motion for suppression of evidence challenging his arrest. On May 17, 2013, a hearing on the defendant's motion was held before the Honorable Thomas J. Gritton, Judge, Winnebago County Circuit Court. The Court orally denied the defendant's motion. (R.43:13-14/ A.App. 8-9). The Court signed an Order denying defendant's motion on November 20, 2013. (R.38:1/ A.App. 1).

On December 17, 2013, the defendant timely filed a Notice of Appeal. The appeal stems from the Court's Order denying Mr. Berger's motion for suppression of evidence.

The pertinent facts to this appeal were adduced at the motion hearing held on May 17, 2013 through the testimony of City of Oshkosh Police Officer Nickolas Kawleski. Officer Kawleski testified that on January 17, 2013 at approximately

11:30 p.m., he was dispatched to the scene of an apparent accident. (R.43:3/ A.App. 3). The person who made the call was identified as Mr. David Ortiz. Mr. Ortiz specifically did not observe how the accident occurred. When Officer Kawleski arrived on the scene, he observed a vehicle in the left lane of South Park Street facing eastbound. (R.43:4/ A.App. 4). The vehicle had a flat tire and there was oil on the roadway. There was no other traffic in the area but for Mr. Ortiz's vehicle. *Id.* Other officers on the scene attempted to determine if an accident had occurred, but were unable to determine if something was actually struck. *Id.*

Eventually, Officer Kawleski had contact with Mr. Berger. Mr. Berger was sitting in the vehicle that had the damage. He was sitting behind the wheel and the vehicle was running. (R.43:5/ A.App. 5). The vehicle was a rental vehicle and not titled to Mr. Berger. *Id.* Upon contact with Mr. Berger, Officer Kawleski noticed that Mr. Berger's eyes appeared bloodshot and watery and his speech was slow and slurred. He also observed Mr. Berger to be swaying back and forth when he exited the vehicle and stood up. *Id.* Mr. Berger stated that he was driving from the Packer's Pub to the Hilton Hotel, however, he indicated that did not hit anything and was not in an accident.

Officer Kawleski questioned Mr. Berger regarding his consumption of alcohol after he observed an odor of intoxicant coming from Mr. Berger. Mr. Berger indicated to Officer Kawleski that he had consumed two beers. (R.43:7/ A.App. 6). When Officer Kawleski asked Mr. Berger to perform field sobriety tests, Mr. Berger declined and indicated that he would rather not. Officer Kawleski asked Mr. Berger a second time to perform the field sobriety tests and Mr. Berger then indicated again that he would rather not. Officer Kawleski made the decision to arrest Mr. Berger. *Id.*

On cross examination, Officer Kawleski admitted that a second officer, Officer Flag, went into the Packer's Pub and spoke with the bartender. The bartender confirmed that Mr. Berger had been in the bar. She further confirmed that based on her contact with Mr. Berger, she did not believe that Mr. Berger appeared to be intoxicated. (R.43:10/ A.App. 7).

Officer Kawleski could not recall if an airbag in the vehicle was deployed, and failed to determine if Mr. Berger was injured. While Mr. Berger indicated that he was coming from Packers' Pub, Officer Kawleski acknowledged that he did not clarify with Mr. Berger if he was driving from Packers' Pub. *Id.* Likewise, Officer Kawleski did not question Mr. Berger as to

when he was driving, or for how long he had been at the location. No testimony was elicited that anyone had observed Mr. Berger to be driving in an erratic or unsafe manner.

While Officer Kawleski testified that he had been employed with the Oshkosh Police Department for 11 years, the City elicited no testimony detailing Officer Kawleski's experience or training in detecting impaired drivers. (R.43:2/A.App. 2).

The Court denied the defendant's motion finding that Officer Kawleski had the requisite level of probable cause to arrest Mr. Berger. The court found that the odor of intoxicant, bloodshot eyes, slurred speech, difficulty with gait, and declining to perform field sobriety tests amounted to probable cause for the arrest. (R.43:13-14/ A.App. 8-9). A written Order denying said motion was filed on November 20, 2013. Mr. Berger timely filed a Notice of Appeal on December 17, 2013.

STANDARD OF REVIEW

The question of whether probable cause to arrests exists is a question of law that the appellate court reviews without deference to the trial court. *State v. Kasian*, 207 Wis.2d 611, 558 N.W. 687 (Ct.App. 1996). When reviewing a motion to suppress, the appellate court upholds the circuit court's finding

of facts unless those findings are against the great weight and clear preponderance of the evidence. *State v. Dubose*, 2005 WI 126, ¶16, 285 Wis.2d 143, 699 N.W.2d 582. However, the application of constitutional principles to said facts is a question of law that is reviewed de novo. *Id.*

ARGUMENT

OFFICER KAWLESKI DID NOT HAVE THE REQUISITE LEVEL OF PROBABLE CAUSE TO ARREST MR. BERGER FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED

“A warrantless arrest is not lawful except when supported by probable cause. Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer’s knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. The burden is on the state to show that the officer had probable cause to arrest.” *State v. Lange*, 2009 WI 49, ¶19, 317 Wis.2d 383, 766 N.W.2d 551.

Furthermore, “probable cause to arrest does not require ‘proof beyond a reasonable doubt or even that guilt is more likely than not.’ It is sufficient that a reasonable officer would conclude, based upon the information in the officer’s possession,

that the ‘defendant probably committed [the offense].’” *State v. Babbitt*, 188 Wis.2d 349, 357, 525 N.W.2d 102 (Ct.App. 1994). The court applies an objective standard, “considering the information available to the officer and the officer’s training and experience.” *Lange* at ¶20. “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.” *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis.2d 531, 671 N.W.2d 660 citing to *State v. Pozo*, 198 Wis.2d 705, 712-13, 544 N.W.2d 228 (Ct.App. 1995).

Here, Officer Kawleski did not provide any testimony regarding his training and experience in detecting impaired drivers. In assessing probable cause, the court applies an objective standard, and considers “the information available to the officer and the officer’s training and experience.” *Lange* at ¶20. While the evidence adduced at the motion hearing revealed the information available to the officer, and that Officer Kawleski had worked for the Oshkosh Police Department for eleven years, the record is silent as to Officer Kawleski’s training and experience in detecting impaired drivers. The City asked no questions regarding his training, experience and/or participation in OWI investigations. We do not know Officer

Kawelski's level of training or his experience in making OWI arrests. It was unclear whether Kawleski was experienced or even trained in detecting impaired drivers. While he was employed for eleven years, it is uncertain if his eleven years were in the field or at a desk or if he had investigated multiple OWI incidents, or if this was his first OWI arrest.

The training and experience of the arresting officer is one factor the court takes into account under the totality of the circumstances determination. *State v. Young*, 212 Wis.2d 417, 429, 569 N.W.2d 84 (Ct.App. 1997). In *State v. Wille*, 185 Wis.2d 673, 683, 518 N.W.2d 325 (Ct.App. 2003), the court found that a reasonable officer conclusions based on his investigative experience may be considered. Because the City failed to establish the training and experience of Officer Kawleski, the court is without this information in employing the objective standard.

Here, the evidence is insufficient to establish that Mr. Berger was impaired when he operated the motor vehicle. Mr. Berger was found sitting in a vehicle that had a flat tire. Neither the citizen witness nor Officer Kawleski actually observed Mr. Berger operating the vehicle. He was found in a vehicle that was stopped. Moreover, there was no accident and no report

from any other citizen that suggested Mr. Berger was driving in an erratic or unsafe manner.

Officer Kawleski was uncertain as to whether an airbag was deployed, or whether he asked Mr. Berger if he was injured. (R.43:10/ A.App. 7). Mr. Berger advised Officer Kawleski that he had come from Packer's Pub, which was about a block away, and that he had consumed two pints of beer. A second officer, Officer Flag, proceeded to Packer's Pub, and confirmed with the bartender that Mr. Berger had been at the establishment. Moreover, based on the bartender's contact with Mr. Berger, the bartender concluded that Mr. Berger did not appear intoxicated. *Id.* The bartender provided this information to Officer Flag, and Flag provided the information to Officer Kawleski. *Id.*

Officer Kawleski testified that he observed Mr. Berger to have bloodshot and watery eyes, slow speech, and balance problems at the scene. However, Kawleski specifically did not recall questioning Mr. Berger about possible injuries. Because Officer Kawleski did not inquire as to whether Mr. Berger was injured, it is unclear as to whether the above observations were the result of the accident or alcohol consumption.

Additionally, while the fact that Mr. Berger stated he would rather not perform field sobriety tests is a fact that can be

considered, it is not necessarily dispositive in the probable cause determination. A court may consider a defendant's refusal to submit to field sobriety testing in its probable cause determination, *State v. Babbitt*, 188 Wis.2d 349, 525 N.W.2d 103 (Ct.App. 1994). However, such evidence is but one factor in the totality of the circumstances analysis. The totality of the facts and circumstances must be considered, no one factor should be determinative in the probable cause analysis. *County of Dane v. Sharpee*, 154 Wis.2d 515, 453 N.W.2d 508. . Probable cause is the quantum of evidence necessary to lead a reasonable officer to the conclusion that guilt is more than a possibility. *State v. Paszek*, 50 Wis.2d 619, 624-25, 184 N.W.2d 836 (1971). Mr. Berger's response to Officer Kawleski request to perform field sobriety tests was he would rather not. There is nothing in the record that Kawleski explained to Mr. Berger that he thought he might be impaired, or wanted to perform the tests to rule out impairment. Furthermore, there is nothing in the record that suggests that Mr. Berger was in anyway uncooperative or argumentative.

Even with the response that he would rather not perform field sobriety tests, the totality of evidence as adduced at the motion hearing, would not have led a reasonable officer to the

conclusion that guilt was more than a possibility. While the observations of Officer Kawleski might have risen to the level of reasonable suspicion to suspect that a violation had been committed, without more, they do not amount to probable cause to arrest.

CONCLUSION

Officer Kawleski's arrest of Mr. Berger was without probable cause and thus violated his right to be free from unreasonable seizures under both the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. Because of this, the trial court erred in denying his motion for suppression of evidence. The Court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 24th day of February, 2014.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.

Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 16 pages. The word count is 3573.

Dated this 24th day of February, 2014.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

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.

Dated this 24th day of February, 2014.

Respectfully submitted,

Piel Law Office

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of February, 2014.

Respectfully submitted,

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX