

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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

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CITY OF OSHKOSH,

Plaintiff-Respondent,

v.

JONATHAN D. BERGER,

Defendant-Appellant.

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

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BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT, CITY OF OSHKOSH

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## STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent does not request oral argument in this matter. Plaintiff-Respondent does not request publication of the Court's opinion in this matter.

## STATEMENT OF THE ISSUES

Did Officer Kawleski have probable cause to arrest Berger for Operating While Intoxicated?

Trial Court Answered: Yes.

## STANDARD OF REVIEW

This Court should uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *State v. Jackson*, 147 Wis. 2d, 434 N.W. 2d 386 (1989). Whether an investigative detention has occurred, and whether it was properly executed, are questions of law subject to a de novo review. *Id.* At 829, 434 N.W. 2d 386 *citing State v. Guzy*, 139 Wis. 2d 663, 407 N.W. 2d 548 (1987).

## STATEMENT OF THE CASE AND FACTS

On January 17, 2013, at approximately 11:30 p.m., Officer Kawleski of the City of Oshkosh Police Department was dispatched to the scene of what appeared to be a traffic accident at the intersection of 20<sup>th</sup> Ave. and South Park Ave. in the City of Oshkosh, Winnebago County, Wisconsin. A man named Ortiz had called the police reporting that there was a vehicle at this location with a flat tire and that there was oil all over the roadway. Ortiz also reported that he had stopped and spoke with the driver, later

identified as Defendant-Appellant Berger (hereinafter “Berger”), who appeared to be intoxicated. (APP. 3: 16-23). When Officer Kawleski arrived, he saw Berger’s vehicle stopped at an angle in the left lane of South Park, facing eastbound. (APP. 4: 7-10). The driver’s side door was open and Berger was in the driver’s seat, behind the wheel with the engine running. (APP. 5: 5-6, 12:13).

As Officer Kawleski approached, Berger got out of the vehicle and started speaking to him. As he did so, Kawleski noticed that Berger’s eyes were bloodshot and watery, and that his speech was slow and slurred. Berger also had a hard time standing, swaying back and forth nearly falling back into his car. (APP. 5: 17-25). Kawleski testified that Berger actually had to use the frame of the vehicle to maintain his balance and not fall down. (APP. 6: 5-6).

When Kawleski asked Berger what happened, Berger said that he had been at a bar (Packer’s Pub), that he had been alone in the car driving and that he was heading to the Hilton. (APP. 6: 10-16). Berger also said that he didn’t know how the accident had happened, and that he had not hit anything. (APP. 6: 16-18).

At this point, Kawleski smelled an odor of intoxicants on Berger’s breath and asked him if he had been drinking. (APP. 6: 23-4). Berger admitted that he had been drinking, saying that he had two pints of beer. (APP. 7: 1-2). Kawleski then requested Berger to perform field sobriety tests, but Berger refused. (APP. 7: 5-6). Minutes later, as other officers were arriving, Kawleski again asked Berger to perform field sobriety tests, and Berger again declined. (APP. 7: 15-17). Berger was then arrested on suspicion of

Operating While Intoxicated. (APP. 7: 18). Berger was subsequently processed and cited Operating While Intoxicated and Operating With a Prohibited Alcohol Concentration.

On May 17, 2013, a hearing was held in the Circuit Court on the issue of whether Officer Kawleski had sufficient cause to arrest Berger for suspicion of Operating While Intoxicated. The Circuit Court, Hon. Thomas J. Gritton presiding, found probable cause and denied Berger's Motion to Suppress his chemical test result.

At a bench trial held before Judge Gritton on November 18, 2013, Berger's chemical test was admitted and he was found guilty of both Operating While Intoxicated and Operating With a Prohibited Alcohol Concentration. This appeal followed.

#### ARGUMENT

##### OFFICER KAWLESKI HAD PROBABLE CAUSE TO ARREST BERGER FOR OPERATING WHILE INTOXICATED

Police officers have the right, duty and responsibility to investigate traffic accidents. *See e.g. State v. Gruen*, 218 Wis.2d 581, 582 N.W.2d 728 (CT. App. 1998). And an officer investigating an accident cannot reasonably perform his duty without speaking to the drivers involved - whether or not the officer suspects any violations of the traffic law have been committed. *Id.* Upon such investigation, a driver who has been involved in an accident, who has the odor of intoxicants on the breath, slurred speech and admits alcohol consumption is a driver who displays indications of intoxication sufficient to investigate further. *See, e.g. Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny and as

and as codified by Wis. Stats 968.24. (FN 1).

Such is the case here as Kawleski did not perform a traffic stop on Berger's vehicle, but was simply summoned to the scene of a traffic accident. Upon his arrival, Kawleski approached and spoke with Berger who displayed an odor of intoxicants, bloodshot eyes, slow and slurred speech, an inability to stand without assistance and a complete lack of ability to explain how the vehicle he admitted driving had come to rest in its current position and condition. When Berger, who was seen on a highway, behind the wheel of a damaged, but running automobile coupled his admission to the consumption of alcohol with a repeated – and unjustified - refusal to perform field sobriety tests, Kawleski not only had probable cause to arrest Berger, but really had no other choice than to do so since such information would be more than sufficient that for "a reasonable officer [to] conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]." *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). *State v. Babbit*, 188 Wis.2d 349, 525 N.W.2d 102 (Wis. 1994), citing *State v. Wolske*, 143 Wis. 2d 175, 420 N.W.2d 60 (Ct. App. 1988) (a defendant's refusal to submit to a field sobriety test may be used as evidence of probable cause to arrest).

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**Footnote 1:** **968.24 Temporary questioning without arrest.** After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

CONCLUSION

Officer Kawleski had a legal obligation to investigate Berger's traffic accident. The ultimate outcome of this obligation was the legal detection of Berger's intoxication. As a result, the Circuit Court's denial of Berger's motion to suppress should be affirmed.

Respectfully submitted this \_\_\_\_\_ day of March, 2014.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief and appendix conform to the rules contained in sections 809.19(8)(b) and (c). This brief has been produced with proportional serif font. The length of this brief is 5 pages. The Word Count is 1,107 words.

Respectfully submitted this \_\_\_\_\_ day of March, 2014.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stats. 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.

Respectfully submitted this \_\_\_\_\_ day of March, 2014.

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## APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stats. 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 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.

Respectfully submitted this \_\_\_\_\_ day of March, 2014.

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