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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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

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ARGUMENT

Citing to ***State v. Gruen,*** 218 Wis.2d 581, 582 N.W.2d 728 (Ct. App. 1998), the City argues that the officer had the right, duty and responsibility to investigate the incident herein. Brief of Respondent-Plaintiff page 3. However, the issue is not whether Officer Kawleski conducted a valid ***Terry*** investigation, but rather whether the evidence available to Officer Kawleski, based on his training and experience amounted to probable cause to arrest.

The City does not contest or respond to the defendant's argument that it failed to put forth any evidence regarding Officer Kawleski's training and experience in investigating and detecting impaired driving. In determining whether probable cause for an arrest exists, the court applies an objective standard, "considering the information available to the officer and the officer's training and experience." ***State v. Lange,*** 2009 WI 49, ¶20, 317 Wis.2d 383, 766 N.W.2d 551. "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, 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.

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.

It was unclear as to whether Mr. Berger was injured or whether the observations of Mr. Berger's speech and balance were the result of an injury or impairment. (R.43:10/ ReplyApp. 1). Mr. Berger advised Officer Kawleski that he had come from Packer's Pub, which was about a block away, and that he had consumed only two pints of beer. The bartender at Packers Pub confirmed that Mr. Berger had been at the establishment and that he did not appear intoxicated. ***Id***. The bartender provided this information to Officer Flag, and Flag provided the information to Officer Kawleski. ***Id.***

Officer Kawleski asked Mr. Berger if he would like to perform field sobriety tests, and Mr. Berger stated that he would rather not. A court may consider a defendant's refusal to submit to field sobriety testing in its probable cause determination, ***State v. Babbit,*** 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. 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's 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 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 7th day of April, 2014.

Respectfully Submitted

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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 13 pages. The word count is 2048.

Dated this 7th day of April, 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, 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 7th day of April, 2014.

Respectfully submitted,

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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 7th day of April, 2014.

Respectfully submitted,

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APPENDIX

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