COURT OF APPEALS OF WISCONSIN
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2014AP000109

vs.

Andrew J. Kuster ,

Defendant-Appellant.

In the Matter of the Refusal of Andrew J. Kuster,
STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2014AP000227

vs.

Andrew J. Kuster ,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONROABLE JAMES L. CARSLON, PRESIDING, AND FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF AND APPENDIX OF RESPONDENT

Daniel A. Necci
District Attorney for
Walworth County, Wisconsin

BY: Diane M. Donohoo
Assistant District Attorney
Attorney for Plaintiff- Respondent
State Bar No. 1018090

ADDRESS:

P.O. Box 1001
Elkhorn, WI 53121
(262) 741-7198

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STATEMENT ON PUBLICATION

The State would not request publication because this is a one judge appeal and the issues of law are already well settled.

STATEMENT ON ORAL ARGUMENT

The State does not request oral argument in this case.

ARGUMENT

I. THE STOP

Officer Elder's stop of the defendant's vehicle was valid and his extension of the stop was reasonable under *State v. Post*, 2007 WI 60, 301 Wis. 2d 1 and *County of Dane v. Campshure*, 204 Wis.2d 27 (Ct. App. 1996).

A. The Standard of Review

When determining whether there is probable cause or reasonable suspicion to conduct a traffic stop, the court utilizes a two-step analysis because it is a mixed question of law and fact. *State v. Anagnos*, 2012 WI 64. The first step is applying a clearly erroneous standard to the circuit court's findings of fact. *Id*. The second step is a de novo review of whether there was in fact probable cause or reasonable suspicion. *Id*.

B. Officer Elder's stop of the defendant's vehicle was reasonable because he had probable cause of a traffic violation.

"Investigative traffic stops are subject to a constitutional reasonable requirement." *Post*, 2007 at P12. A traffic stop is constitutionally reasonable when a reasonable police officer has probable cause to believe that a traffic violation has been committed. *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118. Probable cause exists when a reasonable police officer has the information to believe that "guilt is more than a possibility." *Id.* at P14.

In the instant case prior to making the traffic stop, Officer Elder had probable cause of three distinct traffic violations. Officer Elder testified that he observed the defendant's vehicle accelerate and rev his engine loudly as he left the parking lot, which is a violation of City of Whitewater Ordinance Chapter 11 Section 11.31.010(a) (2000). (Motion Hearing, Page 22-23; hereinafter MH,

22-23). Officer Elder testified that he heard the defendant's tires break track with the pavement and spin excessively. (MH, 23). Officer Elder testified that he observed the defendant sped up to about 35 miles per hour in a 25 miles per hour posted zone, which is a violation of Wis. Stat. §346.57(5). (MH, 23). Officer Elder testified that the defendant's car remained stopped at a red flashing light with light traffic for 30-45seconds. (MH, 28). Officer Elder testified that he believed the defendant's vehicle was obstructing traffic. (MH, 29). Officer Elder testified that he ultimately activated his emergency lights and began approaching the vehicle on foot, when the vehicle began to pull away from him and make a left hand turn, a potential violation of Wis. Stat. §346.04. (MH, 30). Officer Elder testified that he returned to his vehicle and ultimately conducted a traffic stop on the defendant's vehicle. (MH, 31). Officer Elder testified that he informed the defendant he was stopped for erratic driving and the revving of the engine. (MH, 45). The defendant stated in response to being informed of revving his engine that he "had been driving stick shift…for less than a year." (MH, 45).

Officer Elder testified that he ultimately issued the defendant a ticket for excessive or unnecessary acceleration. (MH, 48). The Honorable Judge David M. Reddy found that the traffic stop was appropriate based on the unnecessary acceleration, the speeding, the long period of the vehicle being stopped, and the vehicle turning while the officer was walking up the vehicle. (MH, 89).

C. Even if no probable cause exists based on a traffic violation, Officer Elder had reasonable suspicion to stop the vehicle for operating a motor vehicle while under the influence of intoxicants.

Even if no probable cause exists for a traffic violation, a traffic stop may still be found reasonable when the officer has reasonable suspicion under the totality of the circumstances that a crime or traffic violation has been committed. *Popke*, 2009 WI at P23; *See also State v. Krier*, 165 Wis.2d 673 (Ct. App. 1991). In

this incident, Officer Elder had reasonable suspicion that the defendant was operating a motor vehicle while intoxicated. Even if the behavior may be innocent or may result in only a civil forfeiture, an officer has the right to temporarily freeze the situation to investigate further. *Krier,* 165 Wis. 2d at 678. Driving need not be illegal to give rise to reasonable suspicion. *Post*, 2007 WI at P24.

In *Post,* the Wisconsin Supreme Court found that reasonable inferences may be made from the accumulation of facts. *Id*. at P37 In *Post,* the driver was seen weaving in his lane, and the incident took place at night around "bar time". *Id*. at P36-37. The Wisconsin Supreme Court held that even though any one of these facts standing alone may be insufficient to rise to the level of reasonable suspicion of operating a motor vehicle while under the influence of intoxicants, cumulatively they did. *Id*. at P37.

Similarly in *Popke,* the Wisconsin Supreme Court found reasonable suspicion of operating a motor vehicle while under the influence of intoxicants when the officer observed a traffic violation, the event took place at 1:30 a.m., the events occurred within one block, and the officer observed erratic driving. *Popke,* 2009 WI at P27.

In *Anagnos*, the Wisconsin Supreme Court found reasonable suspicion of operating a motor vehicle while under the influence of intoxicants even if the officer does not testify that he suspected the defendant of operating while intoxicated. *Anagnos*, 2010 WI at P59-P60. In *Anagnos*, the officer observed unusual driving by the defendant which was further exacerbated by the time at night the driving occurred. *Id*. at P57-P58. The unusual driving consisted of turning over a barrier, twice accelerating rapidly, and making a left turn without signaling. *Id*. The Wisconsin Supreme Court held that reasonable suspicion is based on an objective test of "what a reasonable officer would suspect. in light of his training and experience." *Id*. at P60.

In the instant case, the officer observed a traffic violation. The officer observed the defendant driving erratically by accelerating quickly, speeding, stopping his vehicle for a long period of time, and moving while the officer was approaching the vehicle . The incident also took place at night around 12:17 a.m. (MH, 18). Cumulatively, the facts along with reasonable inferences from those facts should give rise to reasonable suspicion necessary for an investigative stop for operating a motor vehicle while under the influence of intoxicants.

D. Officer Elder had reasonable suspicion to extend the traffic stop to impose Standardized Field Sobriety Tests.

If the officer becomes aware of additional suspicious factors during the traffic stop which give rise to an articulable suspicion that the defendant has committed a separate offense, the stop may be extended. *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406 (quoting *State v. Betow*, 226 Wis. 2d 90 (Ct. App. 1999)). The court must determine whether the additional information discovered subsequent to the stop combined with the information previously acquired gave rise to reasonable suspicion that the defendant was operating under the influence of the intoxicants. *Colstad*, 2003 WI App at P19.

In *Colstad*, officers arrived to the scene of the collision where a child was injured and the defendant was involved. *Id.* at P2. The Wisconsin Court of Appeals found that the officer had reasonable suspicion to believe that the defendant was guilty of inattentive driving, a traffic violation. *Id*. at P14. The Wisconsin Court of Appeals found that the mild odor of intoxicants combined with the inattentive driving gave rise to reasonable suspicion that the defendant was operating under the influence of the intoxicants and the officer properly extended the stop to conduct field sobriety tests. *Id.* at P21.

In the instant case subsequent to the initial traffic stop, the officer became aware of additional suspicion factors. When speaking with the defendant, the officer detected the moderate odor of intoxicants. (MH, 32). The defendant admitted to having a few drinks. (MH, 33). The defendant gave inconsistent answers to the amount of drinks he consumed. (MH, 33). Combined with the officers earlier observations of the defendant's erratic driving, the observations gave rise to the reasonable suspicion that the defendant had been operating a motor vehicle while under the influence of an intoxicant.

II. THE ARREST

Officer Elder had probable cause to arrest the defendant with or without the refusal of the preliminary breath test for both the refusal motion and the suppression motion as set forth by the Wisconsin Supreme Court in *State v. Lange,* 2009 WI 49, 317 Wis. 2d 383.

A. Standard of Review

If the historical facts are undisputed probable cause is a question of law which is determined independently by the higher courts. *Washburn County v. Smith (In re Refusal of Smith*), 2008 WI 23, 308 Wis. 2d 65. The circuit court's findings of fact are upheld unless clearly erroneous. *County of Jefferson v. Renz*, 231 Wis. 2d 293 (1999).

B. Officer Elder had probable cause to arrest the defendant.

Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383 (quoting *State v. Higginbotham*, 162 Wis. 2d 978 (1991)). Probable cause is determined on a case by case standard. *Lange*, 2009 WI at P20. It is viewed in the light of the totality of the circumstances. *Id.* at P39. Probable cause to arrest does not need to be beyond a reasonable

doubt or even more likely than not. *Id*. at P38. Probable cause is sufficient if it would lead a reasonable officer to believe the defendant was probably under the influence of an intoxicant while operating his vehicle. *Id*.

The defendant in his interpretation of *Renz* has misstated what the court determined. The Wisconsin Supreme Court in *Renz* did not decide whether or not officers had probable cause to arrest prior to the administration of the preliminary breath test. *See*: *County of Jefferson v. Renz*, 231 Wis. 2d 293 (1999). The Supreme Court's determination was that a different degree of probable cause is required for the administration of a preliminary breath test. *Id*. at P2. The Supreme Court found that a lower degree of probable cause was required and that the State met that degree of probable cause to administer the preliminary breath test. *Id.* at P50. The Supreme Court did not provide an opinion on whether there was probable cause for arrest, merely stated what the lower courts held. *Id.* at P14 and Footnote 14. The Supreme Court in *Renz* also declined to comment on whether the horizontal gaze nystagmus test results were properly excluded because they had already determined probable cause existed without the horizontal gaze nystagmus test result. *Id.* at Footnote 15.

Field sobriety tests including the preliminary breath test are not a prerequisite for probable cause to arrest. *See: Smith*, 2008 WI at P33-36, and *Lange*, 2009 WI at P43 (Ziegler, J., concurring). In *Smith*, the Wisconsin Supreme Court found probable cause to arrest when the defendant had been driving in excess of the speed limit, had crossed the center line, had delayed in pulling over, had the odor of alcohol on his breath, had admitted to drinking, and had given inconsistent information about the amount of alcohol he had drank. *Smith*, 2008 WI at P36.

In the instant case, the defendant did submit to the standardized field sobriety tests. The officer asked the defendant to submit to the horizontal gaze nystagmus test. (MH,26) The defendant was not cooperative during the HGN test and failed to

move his eyes to maximum deviation after the officer requested him to do so and reinstructed him multiple times. (MH, 36) The officer only was able to notice four clues out of the six because the defendant's refusal to move his eyes to maximum deviation. (MH, 36-37). The officer asked the defendant to do the walk and turn test and the officer observed one clue. (MH, 38) Finally, the defendant was asked to do the one leg stand and the defendant swayed during the test. (MH, 38). Along with the odor of intoxicants, admission to drinking, inconsistent information about the amount of alcohol, the time of day, and erratic driving, the officer formed the opinion that the defendant was under the influence of intoxicants and was unable to safely operate a vehicle. (MH 39-40). The officer informed the defendant of this opinion prior to the refusal of the preliminary breath test and subsequently placed him under arrest. (MH, 71). Based on the totality of the circumstances, Officer Elder had probable cause to arrest the defendant for operating under the influence of an intoxicant.

C. The State has met the burden of persuasion to establish probable cause to arrest at both the suppression hearing and the refusal hearing.

The defendant contends that even though probable cause to arrest may exist in regards to the refusal motion, it does not exist in regards to the suppression motion. The State contends that the burden to prove probable cause to arrest has been met in regards to both hearings. The burden of persuasion to establish probable cause at a refusal hearing is substantially less than at a suppression motion. *State v. Wille*, 185 Wis. 2d 673 (1994). At a refusal hearing, the State need only show that the officer's account is plausible. *Wille*, 185 Wis. 2d at 681. The court does not weigh evidence or evaluate the credibility of witnesses. *Id*. At a suppression hearing, the court determines the credibility of the witnesses and weighs the evidence for and against. *Id*. at 682.

In the matter of the refusal, Officer Elder's account of the arrest was plausible. The credibility of the officer's account is not at

issue in a refusal hearing. The officer's account of what occurred demonstrated probable cause as discussed earlier. In the matter of the suppression motion, the circuit court weighed the credibility of the witnesses and found Officer Elder more credible than the defendant's mother who had not been present for the incident or the arrest. (MH, 87). The circuit court properly weighed the evidence and found the officer's account of what had occurred was a credible statement of the facts. Those findings of fact concerning the credibility of the witnesses and the credibility of the officer's account should be upheld because the defendant has failed to show that they are clearly erroneous.

D. The refusal of the preliminary breath test was not used to establish probable cause in this case but even if it was, the officer may rely upon that refusal for purposes of probable cause.

The officer had already formed the opinion that the defendant was under the influence and unsafe to drive prior to the refusal of the preliminary breath test. (MH, 40). Officer Elder informed the defendant of his decision and then another officer arrived with the preliminary breath test. (MH, 40). Therefore the refusal of the preliminary breath test was not taken into account when making the decision to arrest the defendant. The circuit court found that probable cause existed prior to the declination of the preliminary breath test. (MH, 90).

Even if the refusal of the preliminary breath test was taken into account, probable cause to arrest can be formed based upon the defendant's refusal to take a field sobriety test. *State v. Babbitt*, 188 Wis. 2d 349 (Ct. App. 1994). The court in *Babbitt* held that a person who complies with an officer's request for field sobriety test should be put in no worse position through that compliance than a person who refused to cooperate with the officer. *Babbitt*, 188 Wis. 2d at 360. A preliminary breath test is a tool that can be used by officers prior to making an arrest to help determine if there is probable cause

to arrest and thus a refusal to submit to a preliminary breath test should be treated the same as a refusal to take a field sobriety test.

III. THE BLOOD DRAW

The good faith exception should apply in the instant case and the results of the blood draw should not be suppressed, because Officer Elder relied upon clearly established Wisconsin precedent.

A. The Standard of Review

When reviewing a motion to suppress, the court determines independently whether the facts found by the circuit court satisfy applicable constitutional principles. *State v. Reese*, 2014 WI App 27.

B. The warrantless blood draw of the defendant was conducted in good faith upon the reliance of valid Wisconsin law and should be admissible.

In *State v. Bohling*, the Wisconsin Supreme Court held that the dissipation of alcohol in the blood alone is an exigent circumstance. *State v. Bohling*, 173 Wis. 2d 529 (1993) (abrogated by *Missouri v. McNeely*, 569 U.S. ___ (U.S. 2013)). Under *Bohling*, an officer can perform a warrantless blood draw when,

> (1)the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime,
> (2) there is a clear indication that the blood draw will produce evidence of intoxication,
> (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and
> (4) the arrestee presents no reasonable objection to the blood draw.

Bohling, 173 Wis. 2d. at 539.

The defendant only challenges the blood draw based on the first requirement espoused in *Bohling*. As the defendant concedes,

the law enforcement officer conducted the blood draw after the defendant had been arrested (Defendant's Brief, p. 6). As stated in previous sections, the arrest happened after the law enforcement officer observed the defendant's driving, performed field sobriety tests and smelled a mild odor of intoxicants from the defendant. The arrest was lawful and therefore the first requirement of *Bohling* is satisfied.

In *Dearborn*, the Wisconsin Supreme Court stated that good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court. *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252. In *Dearborn*, an officer searched the defendant's vehicle in compliance with Wisconsin law and recovered controlled substances. *Id.* at P8. During the defendant's appeal, the Wisconsin search law was deemed unconstitutional by a U.S. Supreme Court ruling. *Id.* at P12. Since the search took place when the officer acted in reliance of valid Wisconsin law at the time, the evidence recovered from the search was admissible and the good faith exception applied. *Id.* at P51.

In the instant case, the officer also acted in compliance with valid Wisconsin law at the time of the arrest and subsequent blood draw. On April 14, 2013, the officer performed a warrantless blood draw following the defendant's arrest relying on *Bohling*. Following the blood draw on April 17, 2014, the U.S. Supreme Court ruled in *Mcneely*, 569 U.S. ___, that the natural dissipation of alcohol in the blood stream is not a per se exigent circumstance therefore overruling *Bohling* and previously settled Wisconsin law. This situation is analogous to *Dearborn*. Thus the court should not suppress the blood draw because the good faith exception laid out in *Dearborn* applies.

C. A warrant is not required to submit blood lawfully seized for chemical analysis.

Although the defendant contends that the State should have obtained a warrant to submit the blood to chemical analysis, the Court of Appeals found that a warrant is not required following a lawful seizure of the blood. *State v. Vanlaarhoven*, 2001 WI App 275, 248 Wis. 2d 881 The defendant argues that *State v. Vanlaarhoven* is no longer valid law because it was based in part on *State v. Thorstad*, 2000 WI App 199, 238 Wis. 2d 666, which has since been overturned by the United States Supreme Court decision in *McNeely*. In *Vanlaarhoven*, the defendant consented to a blood draw, the results of which were used to convict the defendant. *Id*. at P2. The *Vanlaarhoven* court stated that examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. *Id*. at P16. The *Vanlaarhoven* held the law does not permit a defendant to parse the lawful seizure of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement. *Id*.

Thus the defendant's contention that the chemical analysis of blood required another warrant is flawed. The defendant argues that *Vanlaarhoven* is no longer valid because one of the holdings of *Vanlaarhoven* was based on *Thorstad* which was later overturned. While it is true that *Vanlaarhoven* partially relied on *Thorstad*, the court in its analysis of the necessity of a warrant once the blood has legally been drawn did not rely upon *Thorstad* and therefore should still be considered good law.

In the instant case, the blood draw occurred on April 14, 2013 and followed clear and settled Wisconsin precedent. Under *Dearborn*, the blood draw should be considered lawful based on the good faith exception and therefore a search warrant should not be required for analysis under *Vanlaarhoven*.

CONCLUSION

Officer Elder had probable cause to stop the defendant's vehicle for a traffic violation. Officer Elder also had reasonable suspicion to stop the vehicle and further extend the stop to perform field sobriety tests. Officer Elder had probable cause based upon the field sobriety tests and his earlier observations of the defendant to arrest him. Officer Elder relied upon good faith to seize the defendant's blood. For those reasons outlined above, the court should uphold the defendant's refusal and criminal conviction.

Dated this day ____ of July, 2014.

Respectfully submitted,

_____

Diane M. Donohoo
State Bar No. 1018090
Assistant District Attorney
For Walworth County

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and foot notes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4375 words.

I further certify that:

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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: July _____, 2014.

Signed,

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Diane M. Donohoo

APPENDIX

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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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.

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Diane M. Donohoo

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