STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.: 2014AP000220

WALTER J. KUGLER,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying Defendant's Motion to Suppress Evidence entered by the Honorable Donald J Hassin, Jr., Circuit Judge, Branch 9, Waukesha County

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("State") submits that oral argumentation is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE AND FACTS

On December 15, 2012 around 11:00 p.m. State Trooper David Schmidt was travelling westbound on I-94 in the city of Delafield when he noticed a white van on the right shoulder with its hazards on. (R.20, 4: 8-25, 5: 1-5; R-Ap. 4, 5.) Trooper Schmidt then activated his emergency lights and pulled up behind the vehicle. (R.20, 5: 7-18; R-Ap. 5.) He approached the car on the passenger side and made contact with the passenger, and the driver who was later identified as Mr. Walter Kugler. (R.20, 5: 7-25; R-Ap. 5.) The passenger and Mr. Kugler then explained to the Trooper that they were lost and looking for directions back to Janesville. (R.20, 6: 5-7; R-Ap. 6.) Trooper Schmidt noticed an odor of intoxicants coming from the vehicle, and then asked if Mr. Kugler and the passenger had been drinking. (R.20, 6: 12-25, 7:1-8; R-Ap. 6, 7.) Mr. Kugler deflected the question, and when Trooper Schmidt reasked the question, Mr. Kugler responded that he had one beer. (R.20, 7: 7-8, 27: 14-15, 29: 1-4; R-Ap. 7, 24, 26.)

Trooper Schmidt believed that Mr. Kugler might have been impaired, and asked him to exit the vehicle. (R.20, 6: 21-25, 7: 1-8; R-Ap. 6, 7.) It was at this time that Trooper Schmidt asked Mr. Kugler to submit to a preliminary breath test (PBT). (R.20, 14-17; R-Ap. 14-17.) Trooper Schmidt stated that he was performing his community caretaker function, and wanted to ascertain whether or not Mr. Kugler was able to continue

driving or if he needed someone to give him a ride. (R.20, 7: 20-24; R-Ap. 7.) Mr. Kugler refused to submit to the PBT, and Trooper Schmidt then continued with field sobriety tests because he was not going to let Mr. Kugler drive home based on his impairment. (R.20, 7:13-20; R-Ap. 7.)

The first test Trooper Schmidt administered was the Horizontal Gaze Nystagmus test. (R.20, 11:8-9; R-Ap. 11.) When administering this test, Trooper Schmidt noticed that Mr. Kugler's eyes were watery and blood shot, and he also noted that there was a lack of smooth pursuit in both eyes, nystagmus at maximum deviation that was sustained in both eyes, and the right eye showed nystagmus prior to 45. (R.20, 12: 9-11; 13: 13-21; R-Ap. 12, 13.) The second test administered was the Walk and Turn test. (R.20, 13: 22-24; R-Ap. 13.) Mr. Kugler performed the test, and Trooper Schmidt noted that he did the instructional stance in reverse, he started the test prior to being instructed, stepped off the line, stepped over his own feet almost losing his balance, and took one more step than instructed. (R.20, 15: 1-10, 15: 12-20, 16: 7-14; R-Ap. 15, 16.) The third test administered was the one legged stand. (R.20, 16: 15-17; R-Ap. 16.) Mr. Kugler performed the test, and Trooper Schmidt noted that he leaned over to his right side, and put his right foot down before the test was done. (R.20, 17:7-17; R-Ap. 17.) After all of these tests, Trooper Schmidt believed that Mr. Kugler was impaired and unable to safely operate a motor vehicle, and placed him under arrest. (R.20, 17: 23-25, 18: 1-3; R-Ap. 17, 18.)

Trooper Schmidt read the Informing the Accused form to Mr. Kugler, and Mr. Kugler indicated that he would refuse any evidentiary chemical test of alcohol in his system. (R.20, 19: 9-14; R-Ap. 19.) Trooper Schmidt then transported Mr. Kugler to the hospital, and withdrew Mr. Kugler's blood even though he had refused. (R.20, 19: 15-22; R-Ap. 19.) Trooper Schmidt stated he did not have a warrant for the withdrawal of Mr. Kugler's blood. (R.20, 19: 23-25; R-Ap. 19.) But the trooper also stated that he did understand that the Supreme Court does now require a warrant for a blood draw, but that law went into effect after Mr. Kugler's case. (R.20, 20: 1-6; R-Ap. 20.)

Subsequently, Mr. Kugler filed two motions in the trial court: (1) Motion to suppress evidence derived from unlawful arrest and unlawful detention; and (2) Motion for suppression of defendant's blood test result based upon warrantless blood draw. A motion hearing was held in front of the Honorable Donald J. Hassin, Jr. where Trooper Schmidt testified, and the court held that both of Mr. Kugler's motions were denied. In regards to unlawful arrest and detention, Judge Hassin held that there was a "bevy of indices" that demonstrated probable cause to arrest Mr. Kugler for OWI. (R.20, 48: 5-15; R-Ap. 28.) First, "the vehicle [was] stopped on the side of the road for no explainable reason in the middle of the night." (R.20, 48: 17-20; R-Ap. 28.) Additionally, the van was running and had its hazards lights on. (R.20, 48: 21-23; R-Ap. 28.) There was also a strong odor of

intoxicants coming from the vehicle when Trooper Schmidt approached, and then Mr. Kugler and his passenger said they were lost on their way to Janesville. (R.20, 48: 23-25, 49: 1-2; R-Ap. 28, 29.) Judge Hassin also took judicial notice that Janesville was 50-75 miles away from where Mr. Kugler actually was, and that was "unusual to say the least." (R.20, 48: 2-6; R-Ap. 28.) Furthermore, when Trooper Schmidt segregated the passenger and Mr. Kugler, he still noticed a strong odor of intoxicants coming from Mr. Kugler. (R.20, 49: 9-10; R-Ap. 29.) Mr. Kugler also "equivocate[d] with respect to answers to reasonable questions by the officer." (R.20, 49: 7-9; R-Ap. 29.) Last, Judge Hassin found that whether Mr. Kugler submitted to the PBT or not was "immaterial to the consequences of the continued actions of the officer." (R.20, 49: 17-22; R-Ap. 29.)

Judge Hassin also addressed Mr. Kugler's motion to suppress the blood test results because of a warrantless blood draw. Judge Hassin found that it was the law of Wisconsin on December 15, 2012 to have a forced blood draw. (R.20, 52: 20-22; R-Ap. 30.) Additionally, the court stated that *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.E.2d 696 (2013), was decided in April 2013, five months after Mr. Kugler's forced blood draw. (R.20, 53: 2-9; R-Ap. 31.) Judge Hassin held that just because *McNeely* was granted certiorari by the United States Supreme Court when Mr. Kugler's case occurred, it did not affect long-standing Wisconsin law that

allowed forced blood draws. (R.20, 55: 23-25, 56: 1-5; R-Ap. 33, 34.) And that to expect law enforcement to change their procedures based simply upon the United States Supreme Court accepting a case would be "overburdening and overwhelming." (R.20, 56: 1-5; R-Ap. 34.) Therefore, the blood test result was not suppressed. (R.20, 56: 6-10; R-Ap. 34.)

Mr. Kugler proceeded to a six-person jury trial where he was found guilty of operating while under the influence (OWI), first offense, and operating with a prohibited alcohol concentration (PAC), first offense. The court entered judgment of conviction on the OWI and the PAC was dismissed by operation of law.

Mr. Kugler now appeals the court's decision regarding the unlawful arrest and detention and the suppression of blood test results.

ARGUMENT

Mr. Kugler identifies the PBT in this case as "the community caretaker preliminary breath test," and argues that Trooper Schmidt's request for the PBT was an unreasonable search and seizure. Mr. Kugler further argues that because the request for the PBT was unlawful, it tainted all subsequent events and all evidence derived should have been suppressed. The State frames the issues in the case differently, and believes that the first issue for this Court to consider is whether the stop Trooper Schmidt performed was reasonable under the community caretaker standard. The State argues that Trooper Schmidt's stop satisfied all prongs in the three-part test first iterated in U.S. Supreme Court case *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 337 L.Ed.2d 706 (1973), and adopted by the courts in Wisconsin.

Second, the State analyzes the request by Trooper Schmidt for Mr. Kugler to submit to the PBT. Under the requisite probable cause standard set forth in *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), and using a common-sense approach with the facts found by the trial court, there was sufficient probable cause for Trooper Schmidt to ask Mr. Kugler to submit to the PBT. Alternatively, the State argues that Mr. Kugler does not have standing to challenge the request for PBT on appeal because he refused to submit to it and therefore was not aggrieved.

Third, the State analyzes whether there was probable cause to arrest Mr. Kugler for operating while under the influence. The State argues that Trooper Schmidt's subjective beliefs about performing a community caretaking function in Mr. Kugler's case do not defeat the objective determination of probable cause for arresting Mr. Kugler for OWI.

Therefore the State asks that this Court deny Mr. Kugler's request to reverse the trial court's decision to suppress evidence based on an unlawful request for a PBT.

Mr. Kugler also challenges the warrantless, forced blood draw done in this case. The State argues that under *State v. Reese*, 2014 WI App 27, 353 Wis. 2d 266, 844 N.W.2d 396, the good faith exception to the exclusionary rule applies and thus the blood test results should not be suppressed.

I. THE STOP TROOPER SCHMIDT PERFORMED ON MR. KUGLER WAS REASONABLE UNDER THE COMMUNITY CARETAKER STANDARD EVEN THOUGH THE STOP EVENTUALLY TURNED INTO A CRIMINAL INVESTIGATION.

A. Standard of Review

This Court independently reviews "whether an officer's community caretaker function satisfies the requirements of the Fourth Amendment and Article I, Section 11 of the federal and state Constitutions." *State v. Kramer*, 2009 WI 14, ¶ 16, 315 Wis. 2d 414, 759 N.W.2d 598.

B. Relevant Law

In order to evaluate the reasonableness of the stop in Mr. Kugler's case, one needs to look at the community caretaker standard. "Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what . . . may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Truax*, 2009 WI App 60, ¶ 9, 318 Wis. 2d 113, 767 N.W.2d 369 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 337 L.Ed.2d 706 (1973)). While performing these kinds of functions, police are allowed to "conduct a seizure within the meaning of the Fourth Amendment without probable cause or reasonable suspicion provided that the seizure based on the community caretaker function is reasonable." *Id.*

In order to evaluate whether a seizure was reasonable under the community caretaker function, a court needs to employ a three-part test and determine: (1) if a seizure within the meaning of the Fourth Amendment occurred; (2) if a seizure did occur, were the police engaged in a "bona fide community caretaker activity;" and (3) does "the public need and interest outweigh the intrusion upon the privacy of the individual." *Id.* ¶ 10 (citing *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)); *see also Kramer*, 2009 WI 14, ¶ 21.

The first prong of the community caretaker test is whether a seizure occurred. An officer activating his emergency lights and pulling up behind a legally-parked vehicle can constitute a seizure. *Kramer*, 2009 WI 14, ¶ 22.

In evaluating the second prong of the test, whether the police engaged in a bona fide community caretaker activity, a court looks at "whether police conduct is 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id.* ¶ 23 (quoting *Cady*, 413 U.S. at 441). Additionally, when assessing the third prong of the test, a court must consider four factors:

> (1) The degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. *Id.* ¶ 41 (quoting *Kelsey C.R.*, 2001 WI 54, ¶ 36, 243 Wis. 2d 422, 626 N.W.2d 777).

In *State v. Kramer*, 2009 WI 14, ¶ 30, 315 Wis. 2d 414, 759 N.W.2d 598, the Wisconsin Supreme Court held that a court needs to look at the totality of circumstances as they existed at the time of the law enforcement conduct; and further, that "when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns."

In *Kramer*, an officer activated his emergency lights and pulled up behind Kramer's vehicle that was legally parked on the side of a highway with its hazard lights on around 8:45 p.m. *Id.* ¶¶ 4, 5. The officer testified at the suppression hearing that he was checking to see if the driver needed any assistance. *Id.* ¶ 5. When the officer was asked at the suppression hearing if he believed anything illegal was going on in the car, he testified that he was not sure what was actually being done in the car but is always concerned whether a crime is taking place when he approaches a vehicle. *Id.* ¶ 6. When the officer did make contact with Kramer, he noticed that the driver's speech was slurred and that there was an odor of intoxicants coming from the vehicle. *Id.* ¶ 7.

The defendant in *Kramer* moved to suppress evidence of his intoxication, arguing that the officer's "activation of his emergency overhead lights while pulling up behind Kramer's car constituted a seizure" not supported by probable cause or reasonable suspicion. *Id.* ¶ 8. The court found that "[a]s an officer goes about his or her duties, an officer cannot always ascertain which hat [he] will wear—his law enforcement hat or [his] community caretaker hat." *Id.* ¶ 32. Because an officer's job is multifaceted, he or she "may have law enforcement concerns, even when the officer has an objectively reasonable basis for performing a community caretaker function." *Id.* The Court found that the second prong of the test, the "totally divorced" standard set forth in *Cady v. Dombrowski*, does not

literally mean that an officer needs to solely be in a community caretaker role or solely in a law enforcement role. *Id.* ¶ 35. Rather, as long as the officer articulates "an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met" the community caretaker standard. *Id.* ¶ 36.

Therefore, the Court found in *Kramer* that the officer "had an objectively reasonable basis for deciding that a motorist may have been in need of assistance when he stopped behind Kramer's vehicle." *Id.* ¶ 37. Even though the officer's intentions changed when he started talking with the defendant, "[t]he objectively reasonable basis for [the officer] making contact with Kramer was totally divorced from his subjective belief that criminal activity could have been taking place." *Id.* ¶ 39. The Court concluded that the officer's contact with Kramer was a "bona fide community caretaker function that was totally divorced from his law enforcement function." *Id.*

The third prong of the community caretaker test requires balancing the public interest versus an individual's privacy and looks at four different factors to determine whether this prong is satisfied. The first of the four factors a court should consider when evaluating this prong is looking at the public interest and exigency of the situation. The Court found that there is a substantial public interest "in ensuring that police assist motorists who

may be stranded on the side of a highway, especially after dark and outside an urban area when help is not close at hand." *Id.* ¶ 42.

In regards to the second factor, reasonableness of the force and authority used, the Court found in *Kramer* that the officer could not have "display[ed] less overt authority." *Id.* ¶ 43. Even though the officer activated his emergency lights, he did so as a safety precaution "to let other drivers know that there were vehicles parked on the shoulder of the highway." *Id.*

The Court assessed the third factor, whether an automobile was involved, and found that the officer reasonably performed his community caretaker function when he walked up to the Kramer's car and asked if he needed assistance. *Id.* ¶ 44. Finally, the Court held in regard to the fourth factor, feasible alternatives, that the officer had no feasible and available alternative other than approaching the Kramer's vehicle and asking if he needed assistance. *Id.* ¶ 45. After considering all of the four factors iterated, the Court held that the officer reasonably performed his community caretaker function and satisfied the third prong of the three-part test. *Id.*

The Court concluded in *Kramer* that a seizure not supported by probable cause or reasonable suspicion occurred in this case, but also "that the officer's conduct fell within the scope of his community caretaker function." *Id.* ¶ 48.

C. When Trooper Schmidt pulled up behind Mr. Kugler's vehicle on the side of the road on I-94 and made initial contact with him, he was engaged in a bona fide community caretaker activity because he was trying to determine if Mr. Kugler needed assistance, and therefore his actions were totally divorced from a criminal investigation.

The first prong in the community caretaker standard is whether a seizure occurred. Similar to *Kramer*, a seizure occurred in Mr. Kugler's case when Trooper Schmidt activated his emergency lights and pulled up behind Mr. Kugler's legally-parked white van on the side of the road on I-94.

The second prong in the community caretaker standard is whether Trooper Schmidt was engaged in a bona fide community caretaker activity, and whether when he pulled up behind Mr. Kugler, his actions were totally divorced from a criminal investigation. As the Court found in *Kramer*, law enforcement officers do not know when they approach a vehicle on the side of the road in the middle of the night whether they will wear their law enforcement hat or their community caretaker hat. Trooper Schmidt testified at the motion hearing that he approached Mr. Kugler's vehicle to see if he needed assistance. (R.20, 24: 16-19.) Similar to what the Court found in *Kramer*, Trooper Schmidt also had an objectively reasonable basis for believing that Mr. Kugler may have needed assistance when he pulled up behind his van. It is clear that Trooper Schmidt felt that Mr. Kugler could have needed assistance as he was sitting on the side of I-94 in the

middle of the night with his hazard lights on. Further, the reason Trooper Schmidt stopped was because he thought a motorist needed assistance, not because he was believing that he would be investigating an OWI offense. As the Court held in *Kramer*, this Court should find that the second prong of the community caretaker test is satisfied and that Trooper Schmidt was engaged in a bona fide community caretaker function totally divorced from his law enforcement function.

The third prong of the community caretaker standard is balancing the public interest versus an individual's privacy by using the four factors iterated by the Court in *Kramer*. Looking at the first factor, the public's interest, this Court should find that, like in *Kramer*, Trooper Schmidt and all patrol officers have a substantial public interest in assisting people like Mr. Kugler who are stranded on the side of a major highway in the middle of the night.

Looking at the second factor, reasonableness of the force used, Trooper Schmidt used the least amount of force he could have used when he pulled up behind Mr. Kugler's vehicle and activated his emergency lights. Trooper Schmidt did not use his squad PA system to order Mr. Kugler out of the vehicle, which would clearly demonstrate that Trooper Schmidt was not just performing a community caretaking function. Similar to the officer's reason in *Kramer*, Trooper Schmidt indicated during his testimony that he activated his emergency lights to warn other motorists

about what was going on and for the safety of everyone on the scene. (R.20, 24: 23-25, 25: 1-4.)

The third factor when balancing the public's interest versus an individual's privacy is whether an automobile was involved. As in *Kramer*, Mr. Kugler's van was involved in the stop Trooper Schmidt performed. But also like in *Kramer*, it was reasonable for Trooper Schmidt to then approach that vehicle and determine if anyone needed assistance.

Looking at the fourth factor, whether there were other reasonable and feasible alternatives, there was no other safe way for Trooper Schmidt to determine if Mr. Kugler needed assistance other than going up to his vehicle and asking. For example, Trooper Schmidt did not have a cell phone number that he could have contacted Mr. Kugler at and ask him over the phone if he needed assistance. The only way for Trooper Schmidt to assist a motorist on the side of a highway in the middle of the night was to walk up to the vehicle and ask him.

In Mr. Kugler's case, first, a seizure clearly occurred when Trooper Schmidt pulled up behind Mr. Kugler's vehicle with his squad lights activated. Second, Trooper Schmidt's objectively believed that Mr. Kugler could have needed assistance as his vehicle was pulled over on the side of I-94 with its hazards on in the middle of the night. As Trooper Schmidt's testimony demonstrates, he engaged in a bona fide community caretaker function totally divorced from a criminal investigation for OWI. Last,

balancing the public's interest versus an individual's privacy, and assessing the appropriate factors indicated in *Kramer*, Trooper Schmidt was trying to assist a stranded motorist and did so in a way that was not overtly intrusive. Therefore, this Court, like the Court in *Kramer*, should find that the stop Trooper Schmidt performed on Mr. Kugler's vehicle was reasonable under the community caretaker standard and under the Fourth Amendment and Article I, Section 11 of the U.S. and Wisconsin Constitutions.

II. TROOPER SCHMIDT HAD SUFFICIENT PROBABLE CAUSE TO REQUEST A PBT UNDER WIS. STAT. § 343.303.

Because the stop of Mr. Kugler's vehicle was reasonable, this Court needs to next determine whether Trooper Schmidt's request for a PBT was reasonable under Wis. Stat. § 343.303.

A. Standard of Review

An appeals court reviews the trial court's decision regarding probable cause to request a PBT *de novo*, while "accepting the trial court's findings of fact unless they are clearly erroneous." *State v. Felton*, 2012 WI App 114, ¶ 8, 344 Wis. 2d 483, 824 N.W.2d 871.

B. Relevant Law

Wisconsin Statutes Section 343.303 (2011–2012) allows a law enforcement officer to request a PBT if he or she has probable cause to believe that the suspect is operating while under the influence of an

intoxicant. In *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), the Supreme Court of Wisconsin further explained what level of probable cause was necessary for a law enforcement officer to request a PBT. The Court identified nine different levels of probable cause,[1] and stated that probable cause to request a PBT from a driver of a non-commercial vehicle is "a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest." *Id.* ¶ 51. The Court explained that the language of Wis. Stat. § 343.303 "confirms that [the Legislature] intended the PBT to function as a screening tool to be used prior to arrest" for an OWI. *Id.* ¶ 42. The Court reasoned that one of the purposes for Wis. Stat. § 343.303 was "[t]o provide maximum safety for all users of the highways of this state," and the PBT was a valuable tool to effectuate that purpose while law enforcement officers are investigating OWIs. *Id.* ¶ 46.

[1] From highest level of probable cause to the lowest level of probable cause:

1. Probable Cause for Bind Over
2. Probable Cause for a Criminal Complaint
3. Probable Cause for an Arrest Warrant
4. Probable Cause for a Warrantless Arrest
5. Probable Cause for a Search Warrant
6. Probable Cause for Driver's License Revocation
7. Probable Cause for a request to do a PBT of a non-commercial driver
8. Probable Cause for a request to do a PBT of a commercial driver

The Wisconsin Court of Appeals further explained in *State v. Felton*, 2012 WI App 114, ¶ 8, 344 Wis. 2d 483, 824 N.W.2d 871, that an officer can request a PBT when he or she "has a basis to justify an investigative stop but has not established probable cause to justify an arrest." Probable cause is a common-sense inquiry looking at "the plausibility of particular conclusions about human behavior." *Id.* ¶ 9. In *Felton*, the officer iterated multiple different factors that made him believe Felton was operating under the influence including that the defendant (1) had glassy and bloodshot eyes; (2) smelled of alcohol; (3) admitted to drinking three beers; (4) sitting too long at one stop sign and going through another stop sign; and (5) had previous OWI convictions. *Id.* While Felton exhibited certain signs of intoxication, he still successfully completed the field sobriety tests.[2] *Id.* ¶¶ 4, 9. The Court reasoned that even though Felton "successfully completed all of the properly administered field-sobriety tests," it did not "subtract from the common-sense view that Felton may have had a blood-alcohol level that violated Wis. Stat. § 346.63(1)." *Id.* ¶ 10.

Additionally, the Court noted that the officer "would have been fully justified in asking Felton to take a preliminary-breath test without even asking him to perform any field sobriety tests because they are not needed to establish probable cause to arrest someone for drunk driving, and, as [the

[2] The only field sobriety tests considered by the court were the one-leg-stand test and walk-and-turn test. *Felton*, 2012 WI App 114, ¶ 4. The Horizontal Gaze Nystagmus test was disregarded by the trial court and the appeals court because it was not properly given. *Id.*

court had] seen, the probable-cause standard is lower for assessing the validity of giving a preliminary-breath test than it is for an arrest." *Id*. (internal citations omitted) (citing *Washburn County v. Smith*, 2008 WI 23, ¶ 33, 308 Wis. 2d 65, 746 N.W.2d 243) (citing *Renz*, 231 Wis. 2d at 316). The court concluded that the officer had sufficient probable cause to request Felton to submit to a PBT under Wis. Stat. § 343.303 given the totality of circumstances. *Id.* ¶ 10.

C. Looking at the facts found by the trial court with a common sense approach, Trooper Schmidt had the requisite probable cause to request a PBT from Mr. Kugler even though it was before field sobriety tests were administered.

This Court must accept the facts found by Judge Hassin unless they are clearly erroneous, but reviews Trooper Schmidt's request for the PBT *de novo*. As described in *Renz*, a PBT is a screening tool for law enforcement to determine whether someone should be arrested for operating while under the influence. Looking at the totality circumstances, and using a common sense approach, there were multiple factors that would satisfy the level of probable cause to request a PBT. First, Trooper Schmidt smelled an odor of intoxicants coming from the vehicle, and when he separated Mr. Kugler from the passenger, he could still smell a strong odor of intoxicants. Second, Mr. Kugler initially deflects Trooper Schmidt's question of whether he was drinking, and then indicates he had one beer. Third, Trooper Schmidt finds out the Mr. Kugler is lost and is trying to get

to Janesville but is actually approximately 50 miles from his intended location.

Looking at these facts objectively with a common sense approach, it is reasonable to believe that Mr. Kugler is impaired by alcohol and that is the reason he is lost trying to get to Janesville in the middle of the night. Like the court stated in *Felton*, completing field sobriety tests are not necessary before asking for a PBT.

While Trooper Schmidt indicated that he would have allowed Mr. Kugler to call for a ride and not be arrested for OWI if he submitted to the PBT, that does not negate the objective facts that he indicated to the trial court during his testimony. It is clear that Trooper Schmidt had concerns about Mr. Kugler driving because he thought he was impaired in some way. (*See* R.20, 7: 20-24; R-Ap. 7.) The fact that Trooper Schmidt's subjective intentions when requesting the PBT were not necessarily for the purposes of establishing probable cause to arrest Mr. Kugler for OWI, it does not take away from the facts found by the trial court that indicated a possible impairment due to alcohol. Mr. Kugler also does not cite to any case law in any jurisdiction that holds a court should only consider the subjective intentions of a law enforcement officer when determining whether the request for a PBT was reasonable. Trooper Schmidt's subjective intentions are not completely irrelevant, and do indicate that Trooper Schmidt did have concerns that Mr. Kugler was impaired. But this Court should not

solely rely on the subjective intentions of an officer and disregard the objective facts found by the trial court when deciding whether a PBT was reasonable.

It is also important to reiterate that Mr. Kugler refused to submit to the PBT in this case. "The right to appeal is limited to parties aggrieved in some appreciable manner by the judgment." *Koller v. Liberty Mutual Insurance Co.*, 190 Wis. 2d 263, 266, 526 N.W.2d 799 (Ct. App. 1994). "A person is aggrieved if the judgment bears directly and injuriously upon his or her interest." *Id.* In Mr. Kugler's case he refused to submit to the PBT so cannot claim the issue on appeal because he was not aggrieved by the request of the PBT. Whether Trooper Schmidt had probable cause to request the PBT is immaterial because Mr. Kugler did not submit to it. Disregarding the refusal of the PBT, there were still sufficient facts to continue the OWI investigation because Mr. Kugler smelled of intoxicants, was lost trying to get to Janesville, and admitted drinking that night after first denying drinking.

Further, even if this Court assumes that Mr. Kugler is correct that the request for the PBT was unreasonable, the point is moot because there was still sufficient evidence to investigate Mr. Kugler for OWI including an odor of intoxicants, admitting to drinking after initially denying it, and being lost on his way to Janesville. Additionally, there was sufficient evidence demonstrating probable cause for Trooper Schmidt to arrest Mr.

Kugler for operating while under the influence without the refusal of the PBT, as will be discussed in the next section.

Therefore, this Court should find that Trooper Schmidt's request for Mr. Kugler to submit to a PBT was reasonable under Wis. Stat. § 343.303 and the probable cause standard established in *Renz*.

III. LOOKING OBJECTIVELY AT THE FACTS KNOWN TO TROOPER SCHMIDT WHEN HE ARRESTED MR. KUGLER, THERE WAS SUFFICIENT PROBABLE CAUSE TO ARREST MR. KUGLER FOR OWI.

A. Standard of Review

"Whether undisputed facts constitute probable cause is a question of law that [the appeals court] review[s] without deference to the trial court." *State v. Babbit*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (1994).

B. Relevant Law

A court looks at the totality of circumstances "to determine whether the 'arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe . . . that the defendant was operating a motor vehicle while under the influence of an intoxicant.'" *Babbit*, 188 Wis. 2d at 356. (quoting *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986)).

When evaluating an officer's probable cause determination for an arrest, the Supreme Court of Wisconsin has held that "the subjective intent of the officer (except for the facts that he knows) is not determinative of

whether the search violates constitutional principles that prohibit unreasonable searches and seizures." *State v. Sykes*, 2005 WI 48, ¶ 33, 279 Wis. 2d 742, 695 N.W.2d 277. In *State v. Sykes*, 2005 WI 48, ¶ 29, 279 Wis. 2d 742, 695 N.W.2d 277, the Court found that "characterizing law enforcement's presence during the changing of the locks [on an apartment] as a 'community caretaking/peacekeeping' function [did] not preclude an officer, once he ha[d] probable cause to arrest, from acting accordingly."

Sykes was arrested and charged with possession with intent to deliver cocaine after a search of an apartment of Stacy Hudson. *Id.* ¶¶ 3, 4. Hudson had leased the apartment, but did not stay there often, and one day Hudson found Sykes and his girlfriend inside refusing to leave. *Id.* ¶ 4. The owner of the apartment building then received permission from Hudson to change the locks. *Id.* ¶ 5. The owner of the apartment requested a law enforcement officer to be present when the locks were changing for security reasons. *Id.* ¶ 6. When the locksmith attempted to change the lock, he knocked on the door, and eventually a woman answered and tried to close door and keep anyone from entering. *Id.* ¶ 7. When they entered the apartment, there were several people in the living room, and the law enforcement called for additional officers to respond. *Id.* ¶ 8. It was during this time that the officer asked Sykes for identification, to which Sykes told him that his ID was in his wallet, and told the officer where the wallet was.

Id. ¶ 9. When the officer opened the wallet to find the ID, he found crack cocaine and proceeded to place Sykes under arrest. *Id.*

Sykes argued that the officers were performing a community caretaker function rather than "criminal investigative capacity" by being at Hudson's apartment when the locks were changed, and based on their reasons for being present, "they did not intend to arrest Sykes until contraband was found in his wallet." *Id.* ¶ 28. The Court cited to *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), in which the United States Supreme Court was "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Sykes*, 2005 WI 48, ¶ 29 (internal quotations omitted). Additionally, citing to U.S. Supreme Court case *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), the Wisconsin Supreme Court adopted the position iterated in *Devenpeck* that "[t]he fact that the officer does not have the state of mind [that] is hypothecated by the reasons [that] provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Sykes*, 2005 WI 48, ¶ 29 (internal quotations omitted) (internal citations omitted). A court must objectively look at an officer's actions rather than rely on the officer's subjective state of mind to promote impartial law enforcement. *Id.*

Wisconsin courts have also long-held that refusal to submit to field sobriety tests or a mandatory breathalyzer test are indicative of "consciousness of guilt." *State v. Babbitt*, 188 Wis. 2d 349, 359, 525 N.W.2d 102 (Ct. App. 1994); *see also State v. Albright*, 98 Wis. 2d 663, 668-69, 298 N.W.2d 196 (Ct. App. 1980). While Wisconsin courts have not held in a published case that refusal to take a PBT is also consciousness of guilt, multiple unpublished cases have held that refusal to submit to a PBT, like field sobriety tests or mandatory breath tests, are also evidence of consciousness of guilt when making a probable cause determination for arrest. *State v. Treleven*, No. 2009AP5-CR, 2009 WL 1874280, 2009 WI App 128, ¶ 15 (Wis. Ct. App. July 1, 2009) (citing *State v. Babbit*, 188 Wis. 2d 349, 359, 525 N.W.2d 102 (Ct. App. 1994)); *In re Schroeder*, No. 2008AP2539-CR, 2009 WL 1956279, 2009 WI App 128, ¶ 12 (Wis. Ct. App. July 9, 2009) (citing *State v. Babbit*, 188 Wis. 2d 349, 359, 525 N.W.2d 102 (Ct. App. 1994)).

C. In Mr. Kugler's case, even though Trooper Schmidt had the intent to perform a community caretaker function by pulling up behind Mr. Kugler's van to assist, his subjective intent does not negate the facts viewed objectively demonstrating probable cause to arrest for OWI.

Looking at the totality of circumstances and the facts Trooper Schmidt iterated at the motion hearing, a reasonable officer could believe that Mr. Kugler was operating a vehicle under the influence of alcohol.

As the Wisconsin Supreme Court held in *Skyes*, and the United States Supreme Court held in *Whren* and *Devenpeck*, this Court should also find that Trooper Schmidt's subjective intentions are not determinative of whether the search and seizure of Mr. Kugler for OWI is constitutional. Even though the *Sykes* case involved whether a search of the defendant's wallet was reasonable, and this case involves whether Mr. Kugler being arrested for OWI was reasonable, both cases still implicate Fourth Amendment search and seizure constitutional principles. Similarly to the officer in *Skyes*, Trooper Schmidt initially performed a stop of Mr. Kugler's vehicle to perform a community caretaking function and determine if he needed assistance. But, also similar the situation in *Sykes*, Trooper Schmidt's community caretaking function turned into an investigation for criminal activity, specially operating while under the influence. The fact that Trooper Schmidt initially stopped Mr. Kugler as part of a community caretaking function did not preclude him from investigating Mr. Kugler for OWI once he had reason to believe Mr. Kugler was operating while under the influence.

Because Trooper Schmidt's subjective intentions do not control the outcome of Mr. Kugler's case, it is necessary to look at the circumstances objectively and determine if it justifies a finding of probable cause to arrest Mr. Kugler for OWI. In this case, first, Mr. Kugler emanated a strong odor of intoxicants even after being segregated from his passenger who also

smelled of intoxicants. Second, Mr. Kugler first denied drinking, and then admitted drinking one beer. Third, Mr. Kugler was lost and trying to get to Janesville. Fourth, he refused to submit to a PBT, and courts have allowed that as evidence of consciousness of guilt.

Additionally, Mr. Kugler performed three different field sobriety tests, which all indicated a level of impairment. Trooper Schmidt first administered the HGN test, and noted that Mr. Kugler's eyes were watery and blood shot, that there was lack of smooth pursuit, nystagmus at maximum deviation that was sustained in both eyes, and the right eye showed nystagmus prior to 45. Mr. Kugler next performed the walk and turn test, and Trooper Schmidt noted that Mr. Kugler did the instructional stance in reverse, started prior to being instructed to, stepped off the line, stepped over his own feet almost losing his balance, and took one more step than instructed. Last, Trooper Schmidt asked Mr. Kugler to perform the one legged stand test, and noted that Mr. Kugler leaned over to his right side, and put his right foot down before the test was done.

Looking at the above referenced facts objectively, regardless of Trooper Schmidt's subjective intentions when he first pulled up behind Mr. Kugler's vehicle, there was sufficient indices to arrest Mr. Kugler for OWI. There was an odor of intoxicants, an admission of drinking, Mr. Kugler was lost, and Mr. Kugler showed signs of impairment on the field sobriety tests. This Court could also consider the fact that Mr. Kugler refused to submit to

a PBT indicating consciousness of guilt. But, even completely disregarding the refusal of the PBT, as Judge Hassin also noted during the motion hearing, there are still enough facts to demonstrate to this Court that Trooper Schmidt had probable cause to arrest Mr. Kugler for OWI.

Because the stop in this case was reasonable under the community caretaker standard, the request of the PBT was supported by the requisite level of probable cause, and there were sufficient facts for Trooper Schmidt to arrest Mr. Kugler for operating while under the influence, the State requests that this Court affirm the ruling of the trial court denying Mr. Kugler's motion to suppress.

IV. THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIES, AND THEREFORE THE WARRANTLESS BLOOD DRAW WAS LAWFUL.

Mr. Kugler also argues that the blood draw violated his right to be free from a warrantless seizure, and further, that the exclusionary rule should be applied to the present case where Mr. Kugler's blood was taken without a search warrant. The State concedes that Mr. Kugler's blood was taken in violation of his Fourth Amendment right to be free from warrantless seizures based on *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). But, the State argues that the exclusionary rule should not be applied in this case because Trooper Schmdit could not have known he was violating the Fourth Amendment at the time because he was

following well-established state precedent that allowed warrantless blood draws for operating while intoxicated offenses.

A. Standard of Review

This Court reviews a motion to suppress independently of the circuit court, and upholds the findings of the circuit court unless the findings were clearly erroneous. *State v. Reese*, 2014 WI App 27, ¶ 7, 353 Wis. 2d 266, 844 N.W.2d 396.

B. Relevant Law

The Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. Warrantless searches are per se unreasonable, subject to several clearly delineated exceptions. *State v. Faust*, 2004 WI 99, ¶ 11, 274 Wis. 2d 183, 682 N.W.2d 371.

Prior to *Missouri v. McNeely*, one well-established exception to the warrant requirement was a warrantless blood draw for OWI cases conducted pursuant to exigent circumstances. *See State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *abrogated by Missouri v. McNeely*, 133 S.Ct. 1552 (2013); *see also State v. Thorstad*, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240; *State v. VanLaarhoven*, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411; *State v. Riedel*, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789. In *State v. Bohling*, the court held that "the dissipation of alcohol from a person's blood stream constitutes a sufficient

exigency to justify a warrantless blood draw." *Bohling*, 173 Wis. 2d at 533. Further, the court found that a warrantless blood draw for an OWI arrest was permissible if: "(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." *Id.* at 533-34. This was the law in Wisconsin up until April of 2013 when *Missouri v. McNeely* was decided.

The Supreme Court of the United States in *Missouri v. McNeely*, held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," thereby abrogating *Bohling*. *McNeely*, 133 S.Ct. at 1568. The Court stated that "[t]o determine whether a law enforcement officer faced an emergency that justified acting without a warrant," a court must look at the totality of circumstances. *Id.* at 1559. Therefore, if an officer draws a suspect's blood without a warrant for an OWI offense, and without sufficient exigent circumstances, it is considered a violation of the Fourth Amendment. *Id.* at 1568. The Supreme Court of the United States did not decide, though, in *McNeeley* whether the good faith exception to the exclusionary rule applies

in cases prior to *McNeeley* being decided, and where there is case law in a state allowing for a warrantless blood draw for OWI offenses. But, in *State v. Reese*, the Wisconsin Court of Appeals did answer that question.

In *State v. Reese*, the Wisconsin Court of Appeals held that "because the officer reasonably relied on clear and settled Wisconsin Supreme Court precedent in obtaining warrantless blood draw and because exclusion in this case would have no deterrent effect, we conclude that the blood draw evidence should not be suppressed." *Reese*, ¶ 22. In *Reese*, the defendant was arrested and charged with operating a motor vehicle with a prohibited alcohol concentration as a seventh, eighth, or ninth offense. *Id.* ¶ 2. The defendant moved to suppress the evidence because he argued there was no probable cause to arrest him, and further argued that even if there was probable cause to arrest, the blood test results should be suppressed because they were obtained without a warrant. *Id.* ¶ 1. The court found that there was probable cause to arrest, and that the good faith exception should be applied to the warrantless blood draw. *Id.* ¶¶ 13, 22.

The court reasoned in *Reese* that the blood test results should not be suppressed and relied on similar reasoning as set forth in *State v. Dearborn*. *Id.* ¶¶ 20-22. In *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, the Wisconsin Supreme Court was faced with similar circumstances as those presented in *Reese*. The court had to determine whether the exclusionary rule should be applied to suppress evidence found

during a search of the defendant's vehicle as that search was unconstitutional under the newly held constitutional rule in *Arizona v. Gant*, 556 U.S. 332 , 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). *Id.* ¶ 2; *see also Reese*, ¶ 20. The *Reese* court recognized that in *Dearborn* the court faced two competing principles: "(1) the retroactivity rule; and (2) the good faith exception to the exclusionary rule." *Reese* ¶ 21. The retroactivity rule meant that new constitutional rules must be applied to all cases pending review. *Id.* In the *Dearborn* case it meant that the search of the defendant's vehicle was unconstitutional based on *Gant*. *Id.* ¶ 20. But, the *Reese* court also recognized that in *Dearborn* the good faith exception to the exclusionary rule was applied because "officers were following the 'clear and settled precedent,' which '[was] exactly what officers *should* do.'" *Id.* ¶ 21.

The court in *Reese* applied the same reasoning as the court did in *Dearborn* and found that the good faith exclusionary rule also applies to warrantless blood draws for OWI offenses where officers were following clear and settled Wisconsin precedent. *Id.* ¶ 22. The court reasoned that "the most important factor in determining whether to apply the good faith exception" is whether it would deter future police misconduct. *Id.* (internal quotations omitted). The court found that there would be no deterrent effect if the blood test results were suppressed "because the officer did not and could not have known at the time that he was violating the Fourth

Amendment." *Id.* Officers were following the well-settled law in Wisconsin and, like found in *Dearborn*, were doing "exactly what officers *should* do." *Id.*

C. In the present case, this Court should uphold the holding of the circuit court to deny Mr. Kugler's motion to suppress the blood test results because the Good Faith Exception to the Exclusionary Rule applies to the warrantless blood draw.

This Court should uphold the findings of the circuit court because Judge Hassin's findings were not clearly erroneous, and were directly in line with the Wisconsin Court of Appeal's holding in *State v. Reese*. Even if this Court reviewed the findings *de novo*, it would find that the good faith exception to the exclusionary rule applies.

In the present case, Trooper Schmidt testified that when Mr. Kugler refused to submit to an evidentiary chemical test of his blood, Trooper Schmidt had the blood drawn anyway. Trooper Schmidt acknowledged that he did not have a warrant for the blood draw, but also stated that he understood that the U.S. Supreme Court does now require a warrant for a blood draw. Additionally, he stated that he understood that the U.S. Supreme Court decision went into effect after Mr. Kugler's arrest on December 15, 2012.

It is clear that Trooper Schmidt was following the precedent set forth in the *Bohling* decision when he withdrew Mr. Kugler's blood on December 15, 2012. Furthermore, it is implicit in Trooper Schmidt's

testimony that the policy to withdraw blood without a warrant has since changed because of the *McNeely* decision in April of 2013. Like the court found in *Reese*, the officer was doing exactly what he should be doing by following Wisconsin case law precedent. Suppressing the blood test in this case would have no deterrent effect because the trooper did not and could not have known that he was violating the Fourth Amendment when he took Mr. Kugler's blood without a warrant. Therefore, the good faith exception to the exclusionary rule should be applied, and this Court should affirm the circuit court's ruling denying the Mr. Kugler's motion to suppress the blood test results.

CONCLUSION

For all the reasons stated above, the County respectfully requests that the Court affirm the circuit court's decision and deny Mr. Kugler's motions to suppress.

Dated this ___ day of ____, 2014.

Respectfully,

_____
Timothy A. Suha
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1056437

CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with proportional serif font. The length of this brief is 8,047 words long.

Dated this 29th day of July, 2014.

_____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 at Waukesha, Wisconsin this ____ day of ____, 2014.

Timothy A. Suha
Assistant District Attorney
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CERTIFICATION AS TO SUPPLEMENTAL APPENDIX (Wis. Stat. § 809.19(2)(b))

I hereby certify that the supplemental appendix conforms to the rules contained in Wis. Stat. § 809.19(2)(b) and complies with the confidentiality requirement.

I further certify that I have submitted an electronic copy of this supplemental appendix which complies with the requirements of Wis. Stat. § (Rule) 809.19(13) and that the content of the electronic copy of the supplemental appendix is identical to the content of the paper copy of the supplemental appendix.

Dated this ____ day of ____, 2014.

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SUPPLEMENTAL APPENDIX
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