STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2014 AP 000353-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS ANKER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF CONVICTION DATED FEBRUARY 11, 2014 IN THE CIRCUIT COURT OF SHAWANO COUNTY
The Honorable James Habeck, Presiding
Trial Court Case No. 2012CF000283

Respectfully submitted:

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ISSUE PRESENTED

I. WHETHER THERE WAS PROBABLE CAUSE TO ARREST THE DEFENDANT.

The circuit court answered: Yes.

STATEMENT ON PUBLICATION

The appellant does not believe the Court's opinion in this case will meet the criteria for publication insofar as it can be resolved by rote application of existing law to the undisputed facts.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issue presented.

STATEMENT OF THE CASE

On November 13, 2012, the plaintiff-respondent, State of Wisconsin, filed a criminal complaint charging the defendant-appellant, Thomas Anker, with Causing Injury by Intoxicated Use of a Motor Vehicle, among other charges. (R1). On March 27, 2013, Anker filed a motion to suppress based on a lack of probable cause to arrest him. (R15). On July 19, 2013, the circuit court conducted an evidentiary hearing on Anker's motion. (R47). At the conclusion of that hearing, the court denied Anker's motion. (R47-106-110).

On December 18, 2013, Anker pled guilty to several of the charges set forth in the criminal complaint. (R32). On February 11, 2014, the circuit court sentenced Anker to three years in prison followed by three years of extended supervision. (R48). This appeal followed. (R36).

STATEMENT OF THE FACTS

On November 11, 2012, at approximately 12:30 p.m., state conservation warden James M. Horne was sitting in his office working on a report when he decided to run out to his truck for some equipment to bring back to the office. (R47-4-5). While in his truck, however, Horne happened to overhear radio traffic suggesting someone with a possible head injury was in the woods behind a McDonalds restaurant. (R47-4-6). As there was a McDonalds in proximity to his office, Horne stayed in his truck and called dispatch to learn which Shawano McDonalds had been referenced. (*Id.*). Upon learning it *was* the McDonalds

near his location, he stayed in his *unmarked* Dodge pickup truck and drove in that direction. (R47-6, 8).

As Horne was driving in that direction, he noticed other squad cars in the area and thus decided to drive southbound on Lakeland Road to where it ended at Richmond Street and set up with a view north back up Lakeland Road. (R47-6). While stationed there, he heard over the radio that the individual in question was wearing a white T-shirt. (R47-6). Moments thereafter Horne saw, at a distance, an individual emerge from the woods on the west side of Lakeland Road, cross the road, and then enter a wooded lot on the east side of the road, just south of the entrance road leading to Wal-Mart and Goodwill. (R47-6).

Accordingly, Horne moved his unmarked truck in an attempt to make contact with the individual. (R47-7). Horne drove north back up Lakeland Road and turned right on a road that led to Wal-Mart and then looked back south into the wooded area the individual had entered but did not see him. (*Id*.). Horne therefore drove into the Wal-Mart parking lot and parked by some vehicles next to the building. (*Id*.). While parked there, an unknown individual happened by in a car and told Horne he had witnessed an accident and saw the individual head into the woods. (R47-7-8). He asked Horne if he was looking for that individual and Horne said he was, whereupon the motorist left. (*Id*.).

As soon as the unknown motorist left, Horne noticed the individual in the white T-shirt calmly walk out from the other side of the woods. (R47-8). The individual then began walking

south which happened to be away from Horne's location, though Horne testified he was certain the individual had **not** seen or noticed him. (*Id*.). Horne noticed the individual was bleeding from his head and had blood on his T-shirt and arms, and appeared to have lost his shoes. (*Id*.). Horne followed the individual and then got out of his car and told the individual he should stop. (R47-9). The individual looked back at Horne while walking a few more feet and at a slightly quicker pace, whereupon Horne commanded him to stop, told him he was under arrest, and quickly placed him in handcuffs. (*Id*.). Horne secured the individual, who turned out to Be Anker, in his truck and held him in custody until turning him over to Officer Dan Conradt. (R47-10, 12, 14).

ARGUMENT

I. HORNE LACKED PROBABLE CAUSE TO ARREST ANKER.

A. Applicable Legal Standards

The Fourth Amendment to the United States Constitution provides for "the right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ." Whether an officer has probable cause to arrest an individual and search him pursuant to that arrest is a matter of federal constitutional law. "Probable cause" to arrest is a requirement of the Fourth Amendment of the United States Constitution, binding upon the individual states through the Fourteenth Amendment. *Giordenello v. United States*, 357 U.S. 480, 485 (1958). Section 11, Article I of the Wisconsin Constitution is substantially the same as the Fourth Amendment and the standards and principles surrounding the Fourth Amendment are generally applicable to the construction of sec. 11, art. I. *Browne v. State*, 24 Wis. 2d 491, 503, 129 N.W.2d 175 (1964).

This Court applies a *de novo* standard of review to the question of whether there is probable cause to arrest an individual. In other words, when reviewing a circuit court's denial of a motion to suppress evidence, this Court will determine *de novo* whether the facts, here undisputed, satisfy the constitutional standards regarding probable cause to arrest. *See State v. Mitchell*, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992); *State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990); *State v. Riddle*, 192 Wis. 2d 470, 475, 531

N.W.2d 408 (Ct. App. 1995). Accordingly, this Court will not defer in any way to the manner in which the circuit court resolved the legal issue, but instead, will review the issue independently. *Id*.

The State has the burden of showing that a police officer had probable cause to arrest an individual. *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994).The totality of the circumstances must be analyzed to determine whether probable cause existed for an arrest on a case-by-case basis. *State v. Cheers*, 102 Wis. 2d 367, 306 N.W.2d 676 (1981). The existence of probable cause is a question of constitutional fact, subject to a mixed standard of review whereby this Court will uphold the circuit court's findings of fact unless they are clearly erroneous, but whether those facts established probable cause is a legal question reviewed *de novo*. *State v. Anagnos*, 2012 WI 64, ¶21, 341 Wis. 2d 576, 815 N.W.2d 675.

B. The Circuit Court Found The Arrest Of Anker Occurred When Horne Commanded Him To Stop And Advised Him He Was Under Arrest, And Such Finding Was Not Clearly Erroneous.

The circuit court understandably found the arrest occurred when Horne commanded Anker to stop, told him he was under arrest, handcuffed him, and escorted him to his truck. The circuit court recognized that while subjectively Horne may have intended something else, the test for determining when an arrest occurs is objective in nature:

> I think Warden Horne was clearly under the impression that he was temporarily detaining someone until a police officer did arrive. . . . but he used this language. So I think the time of the arrest here is significant in this particular regard. . . . So then he says, stop, you're under arrest, and pulls out handcuffs. I do agree with Attorney Verrilli, that's a logical standpoint to believe you aren't free to go, aren't free to do anything. Plus, then the warden led . . . Mr. Anker back to the truck at the time. . . . So I think we did have an earlier arrest here.

(R47-107-110).

Such a finding was not clearly erroneous on this record. Consequently, the fact the arrest occurred quickly and at that critical point in time is unassailable on appeal. *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984)(appellate court applies deferential, clearly erroneous standard to circuit court's findings of evidentiary fact). The analysis therefore turns to whether at that point in time the facts known to Horne rose to the level of probable cause to arrest Anker.

C. The Facts Known To Horne Did Not Rise To The Level Of Probable Cause.

The State failed to meet its burden of proof at the suppression hearing in this case. The problem confronting the was the paucity of information Horne possessed, at the critical point in time, upon which to base an arrest. Such is evident from

the fact Horne never articulated, at any time during his testimony, what crime Anker probably had committed. So scarce and amorphous was the information Horne actually possessed at the critical juncture that he could not have formulated a probability Anker had committed *any* crime.

At the time Horne arrested Anker, he knew only that Anker had somehow been involved in an automobile accident from which emerged injured. Horne, however, did **not** know whether Anker had been a pedestrian or a vehicle occupant, a driver or a passenger (assuming the latter), in the vehicle at fault or in the blameless vehicle, or even whether the accident involved two vehicles and if so, whether one of the two was at fault. He knew Anker had suffered a head injury and therefore could possibly have been disoriented. Indeed, before arresting Anker, he observed that Anker's head, shirt and arms were all covered in blood.

In fact, Horne's inability to articulate what crime Anker probably committed, and the small amount of information actually communicated to him, *State v. Friday*, 140 Wis. 2d 701, 712-714, 412 N.W.2d 540 (Ct. App. 1987), makes it challenging, on this record, to even argue Horne had reasonable suspicion to conduct a *Terry* stop of Anker. A fair characterization of the record would be that Horne had "a hunch" Anker may have committed a crime, but not specific and articulable facts to reasonably suspect he had done so. *State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729 (reasonable suspicion requires specific and articulable facts warranting reasonable belief criminal activity is afoot; mere

hunch that person has been involved in criminal activity insufficient).

The State will no doubt point to Anker's momentary delay after Horne told him "he *should* stop," (R47-9)(emphasis added), and attempt to construe such as flight. The problem, however, is the record does not admit of such a construction. First, Anker had a bleeding head injury and appeared disoriented. The possibility of irrational response from him was already on the table. Second, Horne did not initially command Anker to stop, but merely suggested he should do so. Third, Anker took only a few more steps and immediately stopped when commanded to do so.

The greatest problem with a "flight" argument, however, is that Anker could not have recognized Horne as a law enforcement official. Horne was *not* in a marked police vehicle, but instead, in an unmarked pick-up truck Horne himself said "blended in." (R47-9). Nor was Horne in uniform, or the State surely would have elicited such evidence during the suppression hearing at which *it* had the burden of proof. *Wille, supra*. Absent any basis to establish Anker would have, could have, or should have viewed Horne as a law enforcement official at the time he told Anker he *should* stop, the decision not to immediately stop cannot lead to a reasonable inference of flight. Such is particularly true when juxtaposed to the fact Anker did stop, and immediately, when Horne *commanded* him to do so, told him he was under arrest, and displayed handcuffs, which is precisely when a reasonable person would have understood Horne was law enforcement. When confronted with that

information, Anker instantly submitted to that show of authority. *United State v. Mendenhall*, 446 U.S. 544, 553 (1980).

Herein lies one problem with the circuit court's decision: it placed significant weight on the fact Anker delayed his stop, despite the fact Anker pointed out the flaw in the putative inference the State wished it to draw. (R47-9). Indeed, the State's failure to meet its burden on this point is betrayed by the prosecutor's argument on the matter:

> Now, **I'm <u>assuming</u> Warden Horne was wearing his DNR uniform**, because when he's on duty, I've not seen him where he's not wearing one. So he was -- would have been readily identifiable as an officer or as a warden. In any event, badge, gun, all of that, squad, the truck.

(R47-98)(emphasis added). There was no evidence Horne had a badge or gun (and evidence to believe he did not as he had run out to his truck expecting to immediately return to his office). More definitively, there was no "squad," only the unmarked truck that "blended in." What is left, then, is flawed deductive reasoning (a *particular affirmative* does not lead to a *universal affirmative*) masquerading as evidence the State then uses to characterize Anker's conduct and divine his state of mind.

The circuit court, of course, never made a finding that Horne was in uniform. (R47-106-110). And the prosecutor cannot be permitted to supply missing testimony by speculating, based on *his personal observations* (completely divorced from the events in question), as to facts not of record. *State v. Mayo*,

2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (improper for prosecutor to comment on facts not in evidence during argument); *Gallinger v. Lake Shore Traffic Co.*, 67 Wis. 529, 30 N.W. 790, 795 (1886)(attorney should not be permitted to argue from assumed facts in the absence of "proof" of such facts). If Horne had been in uniform, in which case the State would have wished to rely on that fact, then the State was/would be/would have been obliged to prove that fact. Given the obvious relevance of the issue, the only logical assumption from the failure to elicit such proof is that Horne *was not* in uniform. The State should not be allowed, *ex post facto*, to clothe Horne in a law enforcement uniform. Moreover, appellate courts render decisions based upon the record before them, and cannot fill in factual gaps with speculation. *Sedlet Plumb. & Heating, Inc. v. Village Ct., Ltd.*, 61 Wis. 2d 479, 483, 212 N.W.2d 681 (1973).

Once the flawed idea that Anker's few steps had any probative value is excised from the circuit court's decision, all that remains is:

> There had been a crash in the area. We're talking about a relatively confined geographic area. That a person had fled the area. The person was wearing a white T-shirt, had blood around the head area, and apparently no shoes. . . . So then the warden places himself in an area where he knows he's close geographically to the sight (sic) the person had left from. . . . And so now he's seeing a person run across the road that's got the white shirt, appears to have some problems similar to what he heard. The warden drives into

> the Wal-Mart parking lot . . . He has the other person approach him and tell him again some more information about this situation.

(R47-107-110). It is perhaps debatable whether this would have given Horne a reasonable basis to stop and temporarily detain Anker. It cannot, however, be reasonably argued that Horne had a reasonable basis to straightaway handcuff and arrest Anker.

Finally, it is alarming that in reaching its decision the circuit court appears to have relied on information Horne did not have until *after* the arrest to justify his decision *to* arrest Anker:

> When I put those circumstantial evidence together, **and the warden had the following impressions very quickly that he could smell an odor, that there was slow reaction.** He mentioned the slow reaction already in the moving away from him. Even prior to the cuffing, the warden mentioned that.

(R47-109-110)(emphasis added). To the extent the "odor of alcohol" crept into the probable cause analysis, the circuit court's decision was erroneous.

Nor was there any evidence of any "slow reaction" by Anker in the record. The ambiguous manner in which the court referenced that matter implies there was evidence Anker appeared lethargic; if so, such would be clearly erroneous. Section 805.17, Stats. On the contrary, the record revealed Anker was *quick* to react. He quickened his pace when an

individual suggested he should stop and then did stop on a dime when ordered to do so and told he was under arrest. That the circuit court transmogrified Anker's stopping only under command into some brand of lethargy which it then used, in part, to legitimize the arrest, illustrates how little material was actually available for the court to reach that legal conclusion.

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe the defendant probably committed a crime. *Henry v. United States*, 361 U.S. 98, 102 (1959). The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. *Wong Sun v. United States,* 371 U.S. 471 (1963). The particular facts of this case do not measure up to the probable cause standard. Perhaps, and only perhaps, it would have been reasonable to temporarily detain Anker for questioning. To straightaway arrest Anker, however, was not lawful given the paucity of information Horne possessed.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, the appellant respectfully requests this Court vacate the judgment of conviction and remand the matter with instructions that Anker's motion to suppress be granted.

Dated this 24th day of March, 2014.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,930 words.

Dated this 24th day of March, 2014.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

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.

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, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of March, 2014.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the brief-in-chief and appendix in *State v. Anker*, Appeal No. 2014 AP 000353, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of March, 2014.

/s/ Rex Anderegg
Rex Anderegg