STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2014 AP 816, 2014 AP 817, 2014 AP 818

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

FREDERICK C. THOMAS III,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
MARCH 26, 2014 IN THE CIRCUIT COURT
FOR MONROE COUNTY, BRANCH III,
THE HON. DAVID J. RICE PRESIDING.

Respectfully submitted,

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STATEMENT OF THE ISSUES

I. THE SEIZURE OF APPELLANT'S PERSON WAS NEITHER JUSTIFIED AT ITS INCEPTION NOR PROPERLY LIMITED IN SCOPE.

A. Standard of review.

B. The trial court's finding that Mr. Thomas could have been expected to see the trooper's headlights is clearly erroneous based on the squad video.

C. Mr. Thomas took quick and able action to avoid a minor collision that would have been Trooper Holtz's fault. Under the totality of the facts, Mr. Thomas committed no traffic violation; therefore, the traffic stop was unauthorized.

D. Trooper Holtz expanded the scope of the stop from a lane deviation to a detention for intoxicated driving without sufficiently reasonable OWI-related suspicion.

II. TROOPER HOLTZ SUBJECTED MR. THOMAS TO A PRELIMINARY BREATH TEST WITHOUT THE REQUISITE DEGREE OF PROBABLE CAUSE; THEREFORE, ALL DERIVATIVE EVIDENCE SHOULD BE SUPPRESSED AND HIS CONVICTIONS SHOULD BE REVERSED.

A. Standard of review.

B. Trooper Holtz lacked the degree of probable cause necessary to request a preliminary breath test.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On January 15, 2013, at approximately 8:38 p.m., Trooper Jason A. Holtz of the Wisconsin State Patrol was eastbound on Highway 21 near its Interstate Highway 94 junction. (R. 25, p. 11.) In that area, Highway 21 is a four-lane, two-way, divided highway. (R. 25, p. 12.) Appellant Frederick C. Thomas III was traveling eastbound in the right-hand lane. (Id.) The pertinent driving behavior of both Trooper Holtz and Mr. Thomas was captured on the trooper's squad video, which was received into evidence at the suppression hearing. (R. 17.)

At the suppression hearing, Trooper Holtz testified that based on his experience, out-of-state drivers often have to slow down at this interchange to figure out which turn to take. (Id.) He testified that Mr. Thomas was in one such "slow moving vehicle." (Id.) Trooper Holtz traveled in the left lane, but did not close the short distance between himself and this slow-moving vehicle for at least 36 seconds. (Id.) Moreover, for at least 10 seconds immediately preceding the traffic stop, Trooper Holtz slowed *his* approach and lingered in the area immediately to the rear and left of the slow-moving vehicle, where a motorist's visibility is diminished. (Id.)

Trooper Holtz acknowledged on cross-examination that Mr. Thomas would have had to enter the left lane to access certain turns. (R. 25, p. 22.) Mr. Thomas evidently identified his turn and moved over to the left lane. (R. 17.) Predictably, he began to cut off Trooper Holtz, who had been lingering in his blind spot for approximately 10 seconds. (Id.) Trooper Holtz testified that all Mr. Thomas did was cross the dashed white line. (R. 25, p. 21.) Mr. Thomas ably avoided the accident before his vehicle had completely moved into the left lane and then moved back into his lane. (R. 17.) Trooper Holtz pulled him over immediately thereafter. (Id.)

Trooper Holtz made contact with Mr. Thomas and noted the odor of intoxicants. (R. 25, p. 14.) At the suppression hearing, Trooper Holtz failed to characterize the odor as strong, moderate, or weak. (R. 25.) He also testified that Mr. Thomas's eyes appeared "glassy," but offered no testimony on that phrase's meaning or significance. (Id.) Mr. Thomas stated that he had a couple of drinks and Trooper Holtz ordered him out of his vehicle less than one second after that statement. (R. 17.)

Trooper Holtz agreed on cross-examination that Mr. Thomas was cooperative and had no issues maintaining his balance as he stepped out of his vehicle. (R. 25, pp. 30, 33.) He agreed that 8:38

p.m. is several hours before "bar time." (R. 25, p. 25.) He tracked the conversation as it progressed. (Id.) He was responsive to the trooper's questions. (Id.) He had no difficulty producing his driver's license when asked. (Id.)

Based only upon the foregoing, Trooper Holtz had Mr. Thomas submit to field sobriety tests. (R. 25, p. 14.) Due to Mr. Thomas's advanced years, Trooper Holtz administered only the horizontal gaze nystagmus test ("HGN"), doing away with the remaining two-thirds of the field sobriety test battery. (R. 25, p. 17.) Trooper Holtz acknowledged the existence of non-alcohol-related causes of nystagmus and even agreed that some people have naturally occurring nystagmus. (R. 25, p. 26.) Trooper Holtz offered Mr. Thomas no alternative field sobriety testing, such as finger dexterity or alphabet tests. (R. 25, p. 31.) Trooper Holtz admitted on cross-examination that he was not sure how a person's performance on HGN correlates to his or her ability to drive. (R. 25, p. 32.) At first he testified that HGN helps to identify those people who have merely consumed alcohol. (R. 25, p. 26.) He later changed that testimony, with the lower court's help, indicating that six or more "clues" on the HGN indicates a likelihood that an individual has a blood alcohol concentration of .10 or above. (R. 25, p. 44.) The court

inquired into specifics and Trooper Holtz testified that Mr. Thomas demonstrated (1) lack of smooth pursuit, (2) onset of nystagmus prior to 45 degrees, and (3) clear nystagmus at maximum deviation. (R. 25, pp. 16, 45.)

However, Trooper Holtz also testified that all of his training relating to field sobriety testing was using materials from the National Highway Traffic Safety Administration (NHTSA). (R. 25, p. 24.) He testified that he has performed the HGN test between 800 and 900 times. (R. 25, p. 45.) NHTSA's training materials for performing the field sobriety tests instruct law enforcement officers, prior to the HGN, to check for both (1) equal pupil size and (2) equal tracking of the stimulus in both eyes.[1] Trooper Holtz did not testify that he did so. (R. 25.)

Armed only with that additional HGN-related information, Trooper Holtz requested a preliminary breath test ("PBT"). (R. 25, p. 17.) The result came back over .08 and Trooper Holtz then arrested Mr. Thomas. (R. 25, p. 18.)

Mr. Thomas was then cited for operating while intoxicated –

[1] Nat'l Highway Traffic Safety Admin., U.S. Dept. of Transp., DWI Detection and Standardized Field Sobriety Testing: Participant Manual VIII-6, 19 (2004 ed.) ("If any one of the standardized field sobriety test elements is changed, the validity is compromised.").

1st offense, driving with a prohibited alcohol concentration – 1st offense, unsafe lane deviation, and failure to signal turn, contrary to Wis. Stat. §§ 346.63(1)(a), 346.63(1)(b), 346.13(1), and 346.34(1)(b), respectively. Mr. Thomas appeared for a contested suppression hearing on May 8, 2013 in the Monroe County Circuit Court, the Honorable David Rice presiding. (R. 25.) Judge Rice denied Mr. Thomas's motion to suppress by written decision on May 31, 2013. (R. 31.)

In his written decision, Judge Rice found that the squad video captured the relevant driving behavior of both Trooper Holtz and Mr. Thomas. (R. 31, p. 1.) The lower court found that when Trooper Holtz finally drew even with Mr. Thomas's rear bumper, "the defendant abruptly turns to his left without signaling and enters the trooper's lane, almost causing a collision. Trooper Holtz immediately activated his lights and siren, and defendant pulled over and stopped." (Id.) The trial court did not explicitly find that Mr. Thomas violated any specific statute in the suppression hearing decision and order. (R. 31.) The court found that Mr. Thomas said he could not see the trooper's vehicle. (Id.)

Upon Trooper Holtz's approach, the trial court found that the trooper "noticed the odor of an alcoholic beverage coming from the

interior of the car." (R. 31, p. 2.) He also noticed that the driver's eyes were "glassy." (Id.) "He asked the driver whether he had been drinking," and Mr. Holtz stated that he had a couple. (Id.) "Holtz then asked [Mr. Thomas] to exit his vehicle." (Id.)

The trial court found that "the standard field sobriety tests are the HGN test, the walk and turn test, and the one-leg stand." (R. 31, p. 3) While Trooper Holtz conducted the HGN and observed possible indicia of intoxication, the trial court found that Trooper Holtz "concluded, that based on [Mr. Thomas's] statement about his low blood pressure and his age, his alleged medical condition could affect the validity of the walk and turn test and the one-leg stand. Therefore, Trooper Holtz dispensed with those tests." (Id.) The trooper then "asked Thomas to take a preliminary breath test (PBT). The result was .164. Holtz then placed Thomas under arrest for driving while under the influence of an intoxicant." (R. 31, p. 4.) The trial court found that Trooper Holtz had probable cause to request a PBT. (R. 31, p. 11.)

Further, the trial court found that:

> Holtz testified that he made the arrest based on totality of circumstances [sic] which included Thomas' unsafe lane deviation without signaling, the odor of an alcoholic beverage emanating from the interior of his vehicle, his admission that he had been drinking 'a couple,' the HGN test results, and the PBT result.

(Id.)

On February 28, 2014, the parties stipulated to the facts contained in Trooper Holtz's report for purposes of trial only. (R. 47, p. 4.) The parties and trial court specifically noted that the appellant reserved his right to appeal the denial of the motion to suppress. (R. 47, p. 10.) On March 26, 2014, Judge Rice found the appellant guilty of all four offenses, and sentenced him on all except the prohibited alcohol concentration. (R. 48, pp. 4–9.) The lower court ordered the appellant to pay a forfeiture and costs, totaling $899.00, and revoked his operating privileges for seven months. (R. 48, p. 10.) On both of the two other traffic tickets, the appellant was ordered to pay a forfeiture and costs of $175.30. (R. 48, p. 9.) Appellant now appeals from the lower court's May 31, 2013 order denying his motion to suppress. (R. 39.)

ARGUMENT

I. THE SEIZURE OF APPELLANT'S PERSON WAS NEITHER JUSTIFIED AT ITS INCEPTION NOR PROPERLY LIMITED IN SCOPE.

Analyzing the constitutionality of an OWI traffic stop involves a two-prong inquiry. The first issue is whether the seizure was justified at its inception. Terry v. Ohio, 392 U.S. 1, 19–20 (1968). The second issue is whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place. Terry, 392 U.S. at 19–20; State v. Arias, 311 Wis.2d 358, 378, 752 N.W.2d 748, 757 (2008).

The record lacks any indication that Trooper Holtz had the requisite suspicion for the State to succeed on either prong. Any evidence discovered pursuant to that interaction should have been suppressed at trial. Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."). Therefore, the appellant respectfully requests that this Court reverse the lower court's order denying his motion to suppress.

A. Standard of review.

Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. State v. Popke, 317

Wis.2d 118, 126, 765 N.W.2d 569, 573 (2009) (citing State v. Mitchell, 167 Wis.2d 672, 684, 482 N.W.2d 364, 368 (1992)). A finding of constitutional fact consists of both the circuit court's findings of historical fact and their application to constitutional principles. Popke, 765 N.W.2d at 573. Therefore, appellate courts undergo two steps. First, this Court reviews the lower court's findings of historical fact and corrects those that are clearly erroneous. State v. Williams, 241 Wis.2d 631, 643, 623 N.W.2d 106, 112 (2001). Second, this Court reviews the determination of reasonable suspicion *de novo*. Williams, 623 N.W.2d at 112. Under a *de novo* standard of review, this Court owes no deference to the lower court's legal conclusions. Id.

B. The trial court's finding that Mr. Thomas could have been expected to see the trooper's headlights is clearly erroneous based on the squad video.

Even cursory examination of the squad video reveals that Trooper Holtz's squad car's headlamp beams pointed downward and illuminated the ground directly in front of him. (R. 17.) Overhead streetlamps also illuminated the road. (Id.) To the extent that the roadway is lit by such other sources, the directional nature of Trooper Holtz's headlamp beams would be difficult to notice by even the most cognizant driver in Mr. Thomas's position. There was

no fog, rain, or snow to reflect the light toward Mr. Thomas's line of sight. (Id.) Only one other car is visible on the roadway. (Id.) Given the totality of these facts, and the fact that Trooper Holtz lingered in Mr. Thomas's blind spot at a low speed, Mr. Thomas was not on notice that another vehicle was present on the roadway. In this regard, Appellant asks this Court to conclude that the lower court's factual findings are clearly erroneous to the extent that they mischaracterize that which can be more accurately discerned by watching the video.

C. Mr. Thomas took quick and able action to avoid a minor collision that would have been Trooper Holtz's fault. Under the totality of the facts, Mr. Thomas committed no traffic violation; therefore, the traffic stop was unauthorized.

Traffic stops are seizures under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809–10 (1996). They are therefore subject to the constitutional imperative that they be reasonable under the circumstances. Id. at 810. An officer may conduct a traffic stop when there is probable cause to believe a traffic violation has occurred. Popke, 765 N.W.2d at 574. However, police may not predicate a lawful traffic stop upon a mistake of law. State v. Brown, 2014 WI 69, ¶ 40, 850 N.W.2d 66; *see also* Bryan v. United States, 524 U.S. 184, 196 (1998) ("There is no good faith

exception to the exclusionary rule for police who enforce a legal standard that does not exist.").

An accident is not *per se* proof that an individual violated a traffic law. Grana v. Summerford, 12 Wis.2d 517, 521, 107 N.W.2d 463, 465 (1961). *A fortiori*, the fact that an accident *nearly* occurred does not, without more, prove a violation. Simply put, the traffic statutes upon which Trooper Holtz based his decision to seize Mr. Thomas do not impose an absolute obligation upon drivers to avoid accidents, although Mr. Thomas adeptly did just that. Millonig v. Bakken, 112 Wis.2d 445, 455, 334 N.W.2d 80 (1983). Rather, they "merely restate the common law standard of prudent conduct." Millonig, 112 Wis.2d at 455. Although neither Grana nor Millonig deals with the exact statutes here at issue, they are on point because Wis. Stat. § 346.34(1)(a)(3)[2] does not demand omniscience; rather, it

[2] Granted, Mr. Thomas was erroneously charged with and found guilty of violating Wis. Stat. § 346.34(1)(b), which provides that "no person may *turn* any vehicle without giving an appropriate signal" (emphasis added). However, sec. 346.34(1)(a)(3), the relevant provision, draws a distinction between turning, on the one hand, and "[moving] right or left upon a roadway" on the other, which is the conduct at issue here. Since "[s]tatutory language is read where possible to give reasonable effect to every word," (1) turning and (2) moving left or right cannot be read to mean the same thing. State ex rel. Kalal v. Circuit Court for Dane Cnty., 271 Wis.2d 633, 663, 681 N.W.2d 110 (2004). Under the present facts, Mr. Thomas need not have signaled his maneuver. The verdict on that ticket, however, is not raised in this appeal.

merely directs drivers to move right or left upon a roadway "with reasonable safety."

Trooper Holtz testified that Mr. Thomas was traveling at a speed that was lower than usual for that stretch of highway. (R. 25, p. 21.) He testified that out-of-town vehicles in this area frequently reduce their speed to ensure they take the correct turn. Knowing this, Trooper Holtz elected to linger in Mr. Thomas's blind spot. When Mr. Thomas predictably failed to notice the squad car, which would have been difficult to notice under the circumstances, Trooper Holtz pulled him over. Again, the relevant provisions of the traffic code merely restate the common law standard of prudent conduct. Therefore, a police officer who *causes* aberrant driving behavior may not then use that behavior to justify a stop. The video establishes that Mr. Thomas violated no Wisconsin traffic law.

Suffice it to say that where statutes demand a driver to use "reasonable safety," the unsafe driving of other motorists, including law enforcement officers, is relevant. Trooper Holtz lingered in a position where drivers ought not linger, giving rise to the very conduct that a reasonable driver would foresee under such circumstances; that is, being cut off. That Mr. Thomas was able to avoid the collision speaks to his alertness and awareness. At the

suppression hearing, Trooper Holtz suggested two possible grounds for the traffic stop. The first was addressed above, and the second was the "unsafe lane deviation" offense contained in Wis. Stat. § 346.13(1).

But sec. 346.13(1) demands only that "the operator of a vehicle drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear." In this context, the word "ascertain" does not reflect the legislature's intent to demand omniscience from Wisconsin drivers. Rather, the statute directs drivers to do that which is possible under the circumstances – to do all that they can.

The State failed to prove at the suppression hearing that Mr. Thomas violated any traffic law. The fact that he avoided the accident evinces the fact that he was driving with "reasonable safety" as required by sec. 346.34(1)(a)(3), and that he similarly met the standard of ascertaining his surroundings from sec. 346.13(1). Trooper Holtz illegally seized Mr. Thomas; therefore, any evidence discovered after the traffic stop must be suppressed. Mapp, 367 U.S. at 655.

D. Trooper Holtz expanded the scope of the stop from a lane deviation to a detention for intoxicated driving without sufficiently reasonable OWI-related suspicion.

Even assuming for the sake of argument that the original seizure was justified, requiring Mr. Thomas to exit his vehicle and perform field sobriety tests was unreasonable under the circumstances. When analyzing the reasonableness of police actions extending a lawful traffic stop, courts are to examine, under the totality of circumstances: (1) the public interest served by the action taken; (2) the degree to which the continued seizure advances the public interest; and (3) the severity of the resulting interference with the suspect's liberty interest. Arias, 311 Wis.2d at 381.

This Court's decision in State v. Kolman is instructive on this issue. 339 Wis.2d 492, 809 N.W.2d 901 (Ct. App. January 12, 2012) (unpublished but cited for persuasive authority pursuant to Wis. Stat. § 809.23(3)). The trooper in that case pulled over the defendant for a minor non-moving violation. Kolman, 339 Wis.2d at ¶ 3. The trooper testified to the defendant's "bloodshot *and* glassy eyes," and explained the significance of that observation in light of her training and experience. Id. at ¶ 4 (emphasis added).

But in this case, Trooper Holtz testified only to the defendant's "glassy eyes" and unlike the trooper in Kolman, did not

explain the meaning or significance of that observation. Therefore, the only possible justifications remaining were the odor of alcohol, the severity of which Trooper Holtz did not describe, and Mr. Thomas's statement that he had a couple of beers. Immediately after this statement, Trooper Holtz directed Mr. Thomas to step out of his vehicle. This intrusion was significantly more severe than anything that occurred in Kolman. In that case, the "interference with Kolman's liberty interest resulting from the request was minimal [because] the request could not have extended the stop by more than a minute or so, and did not require her even to leave the driver's seat." Id. at ¶ 24. Both the duration and intensity of the expansion in this case were more egregious because Trooper Holtz had Mr. Thomas actually exit his vehicle and submit to field sobriety tests and a PBT.

This Court's decision in Cnty. of Sauk v. Leon is also instructive on the expansion issue. 330 Wis.2d 836, 794 N.W.2d 929 (Ct. App. November 24, 2010) (unpublished but cited for persuasive authority pursuant to Wis. Stat. § 809.23(3)). This Court concluded in that case that "there were virtually no indicia of actual impairment," and held that:

> Without more, an admission of having consumed one beer with an evening meal,

> together with an odor of unspecified intensity, are not sufficient "building blocks" representing specific and articulable facts supporting reasonable suspicion that [a person] had become less able to exercise the clear judgment and steady hand necessary to control his car due to drinking.

Leon, 330 Wis.2d at ¶ 28. This Court then cited Wis. Stat. § 346.63(1)(a) to reiterate the important point that Wisconsin's OWI laws do not necessarily prohibit operating a motor vehicle after having consumed alcohol. Id. The holding in Leon comports with common sense. A driver's statement that he drank a small amount of alcohol before driving does not add an additional incriminating fact to the officer's basis of knowledge. Simply put, if a police officer has noted the odor of alcohol, the driver's statement does not tell the officer anything he or she did not already know. Mr. Thomas's statement therefore adds nothing to the quantum of proof necessary to justify an intensified and OWI-related investigation.

Importantly, Trooper Holtz, like the deputy in Leon, testified only to an odor of alcohol "of unspecified intensity." Id. Characterizing "the odor as strong, moderate, or weak . . . can be a factor in determining reasonable suspicion, and the deputy did not imply any particular level of intensity." Id. at ¶ 9, n.3. No such testimony exists in this case; the record is bare.

While the Leon court distinguished its factual scenario from "the many cases in which a law enforcement officer has observed weaving, evasive driving, speeding, excessively slow driving, or other erratic or dangerous behavior behind the wheel," it bears repeating that no such driving exists in this case. 330 Wis.2d at ¶ 19. Mr. Thomas was not driving erratically before the stop. Before Trooper Holtz lingered in his blind spot, Mr. Thomas drove cautiously, as other out-of-state drivers often do in that area. Although he eventually had to avoid a minor collision, his movement into the left lane was appropriate and measured; so too was his movement back into the right lane.

The severity of this seizure is unreasonable based on the limited nature of Trooper Holtz's evidence at that point. Again, Trooper Holtz did not testify to the meaning or significance of Mr. Thomas's "glassy eyes." Glass has several properties. It is hard, brittle, and sometimes transparent. The record does not reflect to which of these properties, if any, Trooper Holtz was referring. Neither does the record reflect what relevance glassy eyes have regarding the charged offenses. Therefore, the only evidence truly counting against Mr. Thomas is the vague "odor of alcohol" testimony and Mr. Thomas's statement that he had a couple of beers,

which would neither have impaired him, nor, as discussed above, added anything incriminating to the trooper's basis of knowledge. These facts do not justify the severe intrusion in this case. It is well settled that the mere consumption of alcohol is not indicative of impairment. See Wis. J.I.—Criminal 2663 (2004).

Since the record from the suppression hearing is insufficient to support a finding that Trooper Holtz permissibly extended the scope of the encounter, all derivative evidence should have been suppressed in the lower court. State v. Koller, 248 Wis.2d 259, 282, 635 N.W.2d 838 (Ct. App. 2001) (reiterating that the State bears the burden of proving the constitutionality of contested evidence at a suppression hearing by a preponderance of the evidence).

II. TROOPER HOLTZ SUBJECTED MR. THOMAS TO A PRELIMINARY BREATH TEST WITHOUT THE REQUISITE DEGREE OF PROBABLE CAUSE; THEREFORE, ALL DERIVATIVE EVIDENCE SHOULD BE SUPPRESSED AND HIS CONVICTIONS SHOULD BE REVERSED.

Even assuming the initial stop was justified at its inception and properly limited in scope, Trooper Holtz lacked the degree of probable cause necessary to request a preliminary breath test ("PBT"). Therefore, that test result cannot be used in determining whether there was probable cause to arrest. His convictions should

therefore be reversed. Wong Sun v. United States, 371 U.S. 471, 484–85 (1963).

A. Standard of review.

Whether undisputed facts constitute probable cause is a question of law that appellate courts review without deference to the trial court. State v. Drogsvold, 104 Wis.2d 247, 262, 311 N.W.2d 243, 250 (Ct. App. 1981). In determining whether probable cause exists, reviewing courts look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time . . . would lead a reasonable police officer to believe . . . that the defendant was operating a motor vehicle while under the influence of an intoxicant." State v. Babbitt, 188 Wis.2d 349, 357, 525 N.W.2d 102 (1994) (citing State v. Nordness, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986)).

B. Trooper Holtz lacked the degree of probable cause necessary to request a PBT.

The administration of the PBT in this case was unlawful, as Trooper Holtz was not in possession of facts establishing the requisite probable cause required before a PBT may be administered under Wis. Stat. § 343.303. Thus, all derivative evidence should have been suppressed and Mr. Thomas's convictions should now be reversed. Wong Sun, 371 U.S. at 484–85.

In order to request a PBT, the police officer must have "probable cause to believe" the person has committed one of several offenses specified by statute. Wis. Stat. § 343.303. This includes probable cause to believe the person has violated Wisconsin's operating while intoxicated law. "Probable cause to believe" in this context has been interpreted to mean "a level of proof greater than the reasonable suspicion necessary to justify an investigative stop but less than that required to establish probable cause for arrest." Cnty. of Jefferson v. Renz, 231 Wis. 2d 293, 314, 603 N.W.2d 541 (1999).

In this case, Trooper Holtz testified he requested Mr. Thomas submit to a PBT without first asking Mr. Thomas to do the complete battery of Standardized Field Sobriety Tests. The only test that he administered was the HGN. Based on the way Wisconsin courts apply the test to determine whether the probable cause standard articulated in Renz has been met, the State cannot prevail on the issue.

For example, in State v. Colstad, the Court found the officer had the requisite probable cause to request a PBT. 2003 WI App 25, ¶¶ 23–25, 250 Wis. 2d 406, 659 N.W.2d 394. In that case, the defendant struck a child with his truck, killing the child. Id. at ¶ 2. The officer observed the odor of intoxicants, and Colstad admitted

having two beers earlier. Id. at ¶ 5. Colstad's performance on tests that evaluated his ability to complete divided attention tasks was also lacking. Id. at ¶ 25. During the one-leg stand, he counted improperly. Id. On the walk and turn, he twice failed to walk heel-to-toe in a straight line. Id. Colstad's speech was also slurred during the alphabet test, which was administered as an alternative test. Id.

In State v. Begicevic, the Court of Appeals also concluded the officer had probable cause to justify his request for a PBT. 270 Wis. 2d 675, 685, 678 N.W.2d 293 (Ct. App. 2004). The officer first made contact with Begicevic because his car was positioned beyond the painted stop line in the middle of the intersection. Begicevic, 270 Wis.2d at 681. His vehicle was too far into the intersection to trigger the turn light, but Begicevic did not move his vehicle; instead, he just waited for the light to change for approximately ten minutes. Id. Upon making contact with Begicevic, the officer observed that he was confused, smelled strongly of alcohol, and had bloodshot and glassy eyes. Id. at 683. Begicevic did not perform the one-leg stand because of a previous leg injury. Id. However, he did perform the walk-and-turn, although he began the test early on three separate occasions and failed to complete it properly when he finally did perform it. Id. Begicevic was unable to perform the nystagmus test

because he failed to follow instructions. Id. at 684. Given his inability to perform two of the three standard field sobriety tests, the officer also asked Begicevic to perform the finger-to-nose test, which he was unable to complete, despite three attempts. Id.

Although Colstad and Begicevic are cases where probable cause was found by the courts, they are helpful in determining how many indicators of intoxication were noted before probable cause could be found. There are many less indicia in the instant case.

Here, Trooper Holtz observed Mr. Thomas cross into the left lane where his squad was. He noted, however, that this occurred in an area where one would need to move over in order to turn left. It was apparent from the video that Mr. Thomas had not seen Trooper Holtz's squad and was unaware that he had done anything improper. However, in all other respects Mr. Thomas appeared engaged and fully cognizant of his surroundings. He was able to follow the conversation and respond to Trooper Holtz's questions without difficulty. Trooper Holtz did note the odor of intoxicants, but that is consistent with Mr. Thomas's statement that he had consumed alcohol. As mentioned above, it is well established that the mere consumption of alcohol is not indicative of impairment. See Wis. J.I.--Criminal 2663 (2004).

Trooper Holtz initially claimed the results of the HGN were indicative of impairment, but later admitted the test was only designed to show a percentage chance that a person had a particular blood alcohol content (BAC). (The fact that a particular BAC is distinct from impairment is evinced by the bifurcated way in which these cases are typically charged.) The trooper could have administered divided attention tests, which may have spoken more directly to the possibility of impairment, but he decided not to. His reason for not administering the remaining field sobriety tests was that Mr. Thomas indicated he had low blood pressure, which might affect his balance "a little bit." Mr. Thomas clarified that he was not feeling the impact of low blood pressure at that time, but still Trooper Holtz did not ask him to do further tests. He also did not ask Mr. Thomas to perform any alternative tests that would not require walking or balance. Instead, the trooper simply rushed ahead with a PBT even though he did not yet have the probable cause needed to justify that test. The lack of results from the standardized divided attention tests or any alternative tests, which are commonly administered on those that cannot complete divided attention tests, are what distinguishes this case from Colstad or Begicevic. Instead of diligently trying to determine whether Mr. Thomas was impaired

through field sobriety testing, Trooper Holtz short circuited the process by impermissibly jumping ahead to the PBT.

CONCLUSION

Mr. Thomas's OWI and PAC convictions should be reversed for two reasons. First, Trooper Holtz conducted a traffic stop that was neither justified at its inception nor properly limited in scope. Second, Mr. Thomas's arrest was unsupported by probable cause. Therefore, Appellant respectfully asks this Court for entry of an order reversing the circuit court decision denying his motion to suppress. If the suppression motion had been granted in the lower court, the remaining evidence would be insufficient to find Appellant guilty of either OWI or PAC.

Dated at Madison, Wisconsin, September 15, 2014.

Respectfully submitted,

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

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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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) 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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