STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 14-AP-823-CR
Circuit Court Case No. 13-CT-371

vs.

JESSICA ANN STOFFLET

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF SAUK COUNTY,
SAUK COUNTY CASE NO. 12-CT-284,
THE HONORABLE PATRICK TAGGART, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

ARGUMENT

I. The Trial Court's Findings of Fact, That Stofflet's Driving Was "Erratic" and the Officer's Testimony was Credible, Are Not Clearly Erroneous.

Stofflet, Defendant-Appellant, challenges her conviction on the basis that Trooper Rau lacked the "probable cause to believe" she was violating the OWI laws required by WIS. STAT. § 343.303 when he asked her to submit to a preliminary breath test ("PBT"). When evaluating a circuit court's decision regarding a suppression motion, the circuit court's findings of historical fact are reviewed under the clearly erroneous standard. State v. Roberts, 196 Wis.2d 445, 452, 538 N.W.2d 825 (Ct.App.1995). The question of whether a given set of facts constitute probable cause is a question of law which is reviewed de novo. State v. Babbitt, 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct.App.1994).

Though the Defense brief indicates that the facts are "undisputed" (Def. Br. at 9), it at the same time attempts to undercut the court's findings of fact by impeaching the officer (Def. Br. at 13 ("who failed to record…")) and pointing out "glaring issues" with the evidence (Def. Br. at 14). It is therefore worth first evaluating whether the trial court's findings of facts are clearly erroneous.

The trial court, Honorable Judge Guy. D. Reynolds presiding, heard testimony from Trooper Andrew Rau of the Wisconsin State Patrol and reviewed a portion of his squad video at the December 6, 2013 evidentiary hearing. The trial court

found that, based upon Rau's testimony and the squad video, that the Defendant's driving was "erratic". (38:59.) The court noted the time of day, which was early morning after "bar time". (38:61.) The court pointed to various instances of bad driving outlined in the officer's testimony and in the squad video. (38:60-61.) The court further determined that the squad video did not impeach the officer's testimony and instead credited the officer as essentially being in a better position to view the conduct than the squad video could depict. (38:61.)

A cursory review of the transcript and the squad video indicates that the trial court's findings of fact are not clearly erroneous. Squad videos are not perfect recordings of events and when presented with an imperfect and incomplete reproduction of the stop, the trial court must weigh the credibility of any witnesses when arriving at its decision. In this case, only one witness testified, Trooper Rau, and the trial court chose to adopt his testimony as the factual basis for the decision to deny Stofflet's motion to suppress. Nothing in the record demonstrates that the trial court's findings were clear error.

II. When the Trial Court's Findings of Fact are Applied to the Controlling Law, Trooper Rau Did Have "Probable Cause to Believe" Stofflet Was Violating an OWI law and Could Request She Provide a PBT.

WIS. STAT. § 343.303 establishes that if a law enforcement officer has "probable cause to believe" a person has violated an Operating While Intoxicated statute, the officer may request the person to submit to a PBT. "[P]robable cause to believe refers to a quantum of proof greater than the reasonable suspicion

necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest." County of Jefferson v. Renz, 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999) (internal quotation marks omitted). The PBT "may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest." State v. Fischer, 2010 WI 6, ¶ 5, 322 Wis.2d 265, 778 N.W.2d 629.

Defendant references in her brief a variety of details that were not present during the stop. It is true that there was no accident, and further that the Defendant did not vomit in front of the officer nor slump over the steering wheel upon stopping the vehicle. However, the absence of hand-picked, obviously egregious facts do not negate the observations the trooper made at the time of the traffic stop. What is ultimately most important for the Court to consider is what the officer *did* see, not everything in the world that he did not.

Above all, the trooper saw bad driving. This included erratic maneuvers such as:

- The Defendant swerved over the white fog line and onto the shoulder. (38:7.)
- The Defendant deviated within her lane. (38:7.)
- The Defendant crossed over the white dotted line separating the lanes at least 3 times, but did not change lanes. (38:7.)
- The Defendant varied speeds by slowing down and then speeding up. (38:7.)

- The Defendant swerved over to the left lane and braked hard, slowing to 35 mph in a 65 mph interstate zone. (38:7.)

The trooper then made specific observations when he approached the Defendant's driver's side window:

- A moderate odor of intoxicants coming from the vehicle (38:10), of which the Defendant was the sole occupant.[1]
- The Defendant's speech was slow and slurred.[2] (38:10.)
- The Defendant admitted to drinking "a couple" that evening. (38:10.)
- The Defendant said she was coming from a bar. (38:10-11.)
- The Defendant had a bloodshot and glassy right eye.[3] (38:11.)

All of these observations being made in the early morning hours of approximately 4:30 a.m.. (38:7.)

And while the Defendant immediately provided conveniently innocent explanations for her driving behavior, the odor and how long ago she drank, the trooper was under no obligation to believe those explanations. State v. Nieves, 2007 WI App 189, ¶ 14, 304 Wis.2d 182, 738 N.W.2d 125 ("[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause.").[4] If he had to believe the

[1] It does not appear it was expressly stated in the testimony that the Defendant was the sole occupant of the car. However the squad video that was received as Exhibit 1 shows that there were no other occupants other than the Defendant.
[2] However, the court did not give "much weight" to this. (38:62.)
[3] The Defendant later said she is blind in her left eye. (38:15.)
[4] While this case deals with probable cause to arrest, it seems equally applicable to a "probable cause to believe" analysis.

Defendant, then anyone with a well-prepared story would be unassailable and immune from further investigation. However, "[l]aw enforcement officers are permitted to formulate certain commonsense conclusions about human behavior and to consider the evidence as understood by those versed in the field of law enforcement." Id. Trooper Rau did just that.

The Defendant's argument is predicated on a basic, tacit assumption: a PBT must necessarily come after field sobriety tests. It is true that field sobriety tests are ideal to have prior to a PBT. It is also true that if the trooper had the "probable cause to believe" to ask for a PBT, he certainly had the reasonable suspicion to ask the Defendant to perform field sobriety tests. But nothing in Renz or any other Wisconsin case dictates a particular procedure that an officer investigating an OWI must follow. Furthermore, the varied nature of OWI offenses suggests that there is no one, best cookie-cutter approach to investigating them – they are rarely "ideal". That is precisely why Wisconsin courts have routinely rejected bright line rules in favor of totality of a circumstances analyses. See e.g., State v. Post, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634.

Oftentimes officers stop vehicles for nothing more than equipment violations such as a broken tail lamp. Upon these type of stops, the officer can have no reasonable suspicion of OWI until he makes contact with the driver at their window. His justification for stopping the vehicle is based on probable cause of an equipment violation, so he cannot simply require the driver to immediately perform field sobriety tests without articulating more. The officer must point to

new observations in order to develop reasonable suspicion of OWI and extend the stop for field sobriety. State v. Colstad, 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394. The reason for the stop, the equipment violation, has nothing to do with OWI.

Here, however, when Trooper Rau stopped the Defendant's vehicle, he had reasonable suspicion of OWI from the beginning. Given the erratic driving and the time of night, the initial observations that justified the stop are very much like those in Post, 2007 WI 60. Unlike Post, the driving behaviors in this case probably constituted several traffic violations.[5] But even in Post, where there were no specific traffic infractions, but certainly suspicious driving conduct, the bad driving arose to the level of reasonable suspicion *of OWI*. Once Trooper Rau had a few moments to speak with the Defendant, his reasonable suspicion was elevated – not quite to probable cause for arrest, but certainly to the "probable cause to believe" an OWI had been committed.

The State's argument is not the strawman contained in the Defendant's brief. The State certainly makes no argument that poor driving alone, viewed in a vacuum, arises to the level of "probable cause to believe" in this case. Nor does the State contend that the physical observations of the Defendant, on their own, justify a PBT. Each alone would arise to reasonable suspicion, but not "probable cause to believe." However, the bad driving, combined with the physical

[5] For example, such Impeding Traffic by Slow Speed or Unsafe Lane Deviation. WIS. STAT. § 346.59(1); 346.13(1) .

observations of the Defendant, her admissions, and the time of night all elevate the officer's category of inquiry from reasonable suspicion to "probable cause to believe."

The irony of this case is most painfully apparent in the reason the officer gave PBT. Meant as a courtesy to the Defendant to keep her out of the rain,[6] it is now being pointed to as a violation of the Defendant's rights. Quickly submitting to a PBT under the circumstances certainly seems less intrusive than standing out in the rain to perform physical tasks. But ultimately, the trooper's subjective intent does not matter. Whren v. U.S., 517 U.S. 806, 813, 116 S.Ct. 1769 (1996). What matters is whether there was an objectively reasonable basis for requesting a PBT.

A significant number of OWI investigations have absolutely no bad driving conduct, so the justification for the stop is something wholly unrelated to OWI. It makes sense in those cases, that an officer would need to investigate beyond simple personal contact clues ascertained from looking at the Defendant through a driver's side window. But in this case, before the trooper ever spoke to the Defendant he had reasonable suspicion of OWI. Her driving conduct was erratic, and frankly dangerous, on a 65 mph interstate highway. After the trooper spent a few moments with the Defendant, he had a red flag that even the most naïve of law enforcement officers could not miss – he had probable cause to believe she

[6] "[H]e was hoping for an excuse to stay out of the rain" (Def. Br. at 15) is a particularly hollow argument when the squad video shows the officer standing out in the rain.

had committed an OWI. For all the above reasons, the PBT that he then administered was lawfully given and the Defendant's motion to dismiss was rightly denied.

CONCLUSION

Nothing in the record indicates that the trial court's findings of fact were clearly erroneous. When those facts are applied to the relevant law, Trooper Rau observed enough concerning behavior under the totality of the circumstances to warrant requesting a PBT from the Defendant. The "erratic" driving, the Defendant's admissions, and the trooper's observations of her, led Trooper Rau to have "probable cause to believe" the Defendant was Operating While Under the Influence of an Intoxicant. Therefore the trial court's decision must be affirmed.

Respectfully submitted this 24th day of July, 2014

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,830 words.

Signed:

_____
Michael X. Albrecht

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of §809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

_____
Michael X. Albrecht