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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN

Plaintiff-Respondent,

vs. Appeal No. 14AP000823-CR

JESSICA ANN STOFFLET,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR SAUK COUNTY, THE HONORABLE PATRICK J. TAGGART, PRESIDING

Respectfully submitted,
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ARGUMENT

I. The factual record does not support a finding of probable cause to administer a preliminary breath test.

A. The State's failure to satisfy the legal threshold.

The State's concise response brief opens with an accusation. Simply put, the State accuses Ms. Stofflet of using this forum to re-litigate the Circuit Court's findings of fact. State's Br. at 4. That criticism is mistaken and, like most of the State's carefully dashed-off arguments, ends up missing the mark entirely. Briefly restated, the State thinks that just because the Circuit Court found *some* aspects of Trooper Rau's story credible, that the rest of the record somehow becomes moot. As the State's own authority makes clear, that's not legally correct: "The question of whether a given set of facts constitute probable cause is a question of law which is reviewed de novo." State's Br. at 4, quoting *State v. Babbit*, 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). This case is all about facts—*all* the facts.

In other words, the key phrase in that sentence is "set of facts." This Court's determination of whether Ms. Stofflet's rights were violated requires a searching analysis of the *entire* record, not just those favorable excerpts identified by any one advocate. Reviewing all of the facts and circumstances, this Court must then ask whether the evidence sufficed for probable cause to administer a PBT—a decision made without any deference to the Circuit Court. *See Id.* Unfortunately for the State, the available evidence suggests otherwise.

The State's strongest evidence in this case is the alleged driving behavior—evidence that it concedes is insufficient on its own for a finding of probable cause. State's Br. at 9. Generally speaking, there is some evidence that Ms. Stofflet's driving was poor. However, going beyond general descriptors is difficult, as the record fails to disclose a coherent judicial ruling as to that driving's overall nature. That is, while the State would like this Court to wholly endorse, adopt, and therefore rule solely on behalf of Trooper Rau's testimony, a careful review of the record shows that the Circuit Court itself did not wholly "adopt" that testimony, as the State argues. State's Br. at 5.

Admittedly, the Circuit Court found that portions of Trooper Rau's testimony were generally credible. *See* 38:61. However, the Circuit Court also candidly stated when it came to specifics, that it "didn't know" and that it "wasn't established" *precisely* the egregiousness of that allegedly 'bad' driving. 38:61. In the midst of an otherwise confusing oral ruling, the Court ultimately agreed only that the driving was "erratic." 38:59. The Court *never* ruled that Ms. Stofflet's driving violated any laws and it pointed out various inherent evidentiary difficulties that precluded more precise conclusions. 38:60-61. At most, the Circuit Court found that Ms. Stofflet had crossed the fog line, 38:60; had varied her speed, 38:61, had braked hard, 38:61, and had swerved into the left lane, 38:61.

This "erratic" driving, coupled with the late hour, was the foundation upon which the Circuit Court's conclusion regarding probable cause was based. 38:59-60 (driving given "significant weight."). As the State concedes—thereby

implicitly agreeing that the Circuit Court was mistaken in its ruling—the driving behavior alone is not sufficient for probable cause to administer a PBT. State's Br. at 9.

In casting about for raw materials it might convert into an improvised legal fortification, the State next seizes on a medley of post-stop facts that it thinks are outcome-determinative. State's Br. at 7, 10. However, of those "facts" identified at least one is of no value at all: The Circuit Court gave zero deliberative weight to slurred or slow speech (probably a wise conclusion as the video reveals no such slurred or slow speech). 38:62.

Ms. Stofflet concedes that the other factors—the admission of drinking, glassy eye, and odor of intoxicants—are pieces of the record available to this Court. However, that evidence has already been proven to be extremely weak. *See for example* Defendant's Brief at 14. Moreover, while the Circuit Court also identified the time of night as a fact supporting probable cause, that fact—even when coupled with the admission that Ms. Stofflet was coming from a bar—is inherently ambiguous, as Ms. Stofflet also told the officer that she was a dancer, meaning she was a worker, and not a patron of the establishment. 31. The post-stop facts are unable to get the State over the hump.

That's because this case is not about reasonable suspicion to conduct a traffic stop. This case is not about reasonable suspicion to administer field sobriety tests or to conduct further, less-intrusive investigations. This case requires the State to prove that these facts satisfied a higher burden—probable cause for a

preliminary breath test. There are simply not enough facts to tip the scales in the State's favor.

As was argued at length in Ms. Stofflet's opening brief, the quantum of evidence *must* rise above that required for both a simple traffic stop and an extended investigation using field sobriety tests. *See Cnty. Of Jefferson v.Renz,* 231 Wis.2d 293,316, 603 N.W.2d 541 (1999); *Cnty. of Dane v. Campshure*, 204 Wis.2d 27, 32, 552 N.W.2d 876 (Ct. App. 1996). There has been no showing that the facts of this case rise above those two legal benchmarks.

That conclusion is borne out by the cases identified in Ms. Stofflet's opening brief, which are not simply "hand-picked," defense-friendly anomalies. *See* State's Br. at 6. They are meant to illustrate, and therefore to provide a rough guide to a reviewing Court, instances in which the standard for administering a PBT has, and has not, been met. Applying those cases to these facts, the officer clearly did not have probable cause to administer the PBT.

At the risk of beating a dead horse, the legal threshold must be precisely defined and understood: As *State v. Fischer* makes plain, administration of the PBT is *only* appropriate in circumstances where officers are *almost* at the threshold of probable cause to arrest, but come up short. *See State v. Fischer*, 2010 WI 6, ¶ 32, 322 Wis.2d 265, 778 N.W.2d 629. The PBT is a device meant to bridge the gap between two legal standards, reasonable suspicion and probable cause to arrest. *Id.* Here, there can be no argument that the facts of Ms. Stofflet's case fell into this 'grey zone' and therefore began to approach that required for

probable cause to arrest—as is required by law. *See State v. Felton,* 2012 WI App 114, ¶ 10, 344 Wis.2d 483,824 N.W.2d 871.

In the end, the "totality of the circumstances" analysis argued for by the State actually undermines their position. State's Br. at 8, 11. Here, there are other facts within that "totality" that cut against the State's arguments. While the Circuit Court is correct, in a general sense, that a law enforcement officer is not required to accept an individual's innocent explanations, 38:62; Ms. Stofflet's frightened disposition and report of a recent stalking attempt to a law enforcement agent who had recently been tailing her *is* a fact that matters in the overall calculus. Ms. Stofflet told police she was a "dancer." 31. The fact that one with that profession was fearful when she witnessed an unknown car tailing her, after she had left work for the night, while driving on a semi-rural road in the early hours of the morning is a part of the record. 38: 10; 31. It goes a long way toward explaining allegedly erratic driving, especially the hard braking and sudden deceleration. It therefore has a place in the overall calculus.

Putting all of the following together, the PBT was improper and should have been suppressed.

B. A preliminary breath test is an intrusive law enforcement tool and legal restrictions on its use must be respected.

The State's misunderstanding of the PBT's function, and its concomitant minimization of the PBT's intrusive characteristics, calls out for correction. The State seems convinced that field sobriety tests are somehow more intrusive than a

PBT and, for that reason, feels that skipping past their administration to a PBT is an appropriate decision. State's Br. at 10. That viewpoint is obviously mistaken under the case law exhaustively discussed and cited in Ms. Stofflet's opening brief.

A preliminary breath test *is* an intrusive law enforcement tool. Its administration is governed by multiple bodies of law, and as Ms. Stofflet argued in her opening brief, impacts multiple levels of constitutional analysis. Our legislature, in its wisdom, has decided that in order for its administration to be lawful, an officer *must* have probable cause. *See Renz,* 231 Wis.2d at 316. Ms. Stofflet is not requesting anything other than that Trooper Rau be held to these standards. In this case, the State broke the law for reasons of convenience—inclement weather. 38:11. That is simply not good enough. Suppression is therefore warranted.

Ms. Stofflet does not therefore argue that field sobriety tests must always come before a PBT—she is not asking for some kind of revolutionary re-evaluation of the PBT framework, as the State implies. However, it is a fact that field sobriety tests often *should* come before a PBT. That conclusion is logically deducible from the simple fact that field sobriety tests require a lower quantum of justificatory proof than a PBT. If the State wants to argue that field tests were not required, it needs to show why the level of proof surpassed that threshold and met the probable cause standard. Because they cannot, their argument fails.

II. Having failed to address Ms. Stofflet's other legal claims in its short response brief, the State's silence on those points should be given the weight this Court deems fit.

Ms. Stofflet's opening brief raised many issues, including some with constitutional dimensions. The State has not seen fit to respond to them. Accordingly, Ms. Stofflet respectfully requests that those arguments and assertions in the opening brief be allowed to speak for themselves, with the State's silence on those points given whatever weight this Court finds appropriate.

CONCLUSION

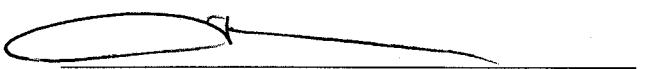
For the reasons explained here, Ms. Stofflet respectfully requests that the Circuit Court's decision be overturned and that the Motion to Suppress be granted.

CERTIFICATION OF REPLY BRIEF

I certify that this brief conforms to the rules contained in Wis. Stat. sections 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,141 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to Wis. Stat. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

Dated this 5 day of August, 2014.



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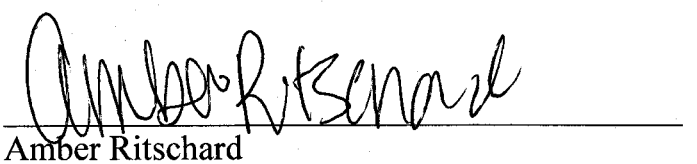
CERTIFICATION OF SERVICE

I hereby certify that on this 5th day of August, 2014, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 5 day of August, 2014.



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