

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2014AP1852-CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs-

JOSEPH J. VANMETER,
Defendant-Appellant.

**APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN EAU CLAIRE
COUNTY CIRCUIT COURT, THE HONORABLE PAUL LENZ, PRESIDING
BRIEF AND APPENDIX OF DEFENDANT-APPELLANT**

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TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

ARGUMENT 2

THE TRIAL COURT IMPROPERLY DENIED THE DEFENDANT-APPELLANT'S
MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE FOR ARREST AND
FOR LACK OF REASONABLE SUSPICION TO CONDUCT FIELD SOBRIETY
TESTS

A. Relevant Facts 2-3

B. Applicable Law and Standard of Review 3-6

CONCLUSION 6

CASES CITED

	Page
Ballard v State, 955 P.2d 931 (1998)	5
Bramble v State, 982 P.2d 464 (1999)	5
County of Jefferson v Renz, 231 Wis.2d 293, 603 N.W.2d 541 (1999)	3
Hulse v DOJ, Motor Vehicle Div., 961 P.2d 75 (1998)	5
People v McKown, 924 N.E.2d 941 (2010)	5
State v Colstad, 260 Wis.2d 406, 659 N.W.2d 394 (2003)	4
State v Dahood, 814 A.2d 159 (2002)	5
State v Lange, 317 Wis.2d 383, 766 N.W.2d 551 (2009)	3
State v Lasworth, 2002-NMCA-029	5
State v Meader, 674 So.2d 826 (Fla. Ct. App. 1996)	5
State v Taylor, 694 A.2d 907 (1997)	5
U.S. v Horn, 158 F.Supp.2d 530 (2002)	5
White v Miller, 724 S.E.2d 768 (2012)	5

STATUTES CITED

Wis. Stat. Sec. 343.303	3
Wis. Stat. Sec. 907.02(1)	5

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant requests neither oral argument nor publication.

ARGUMENT

THE TRIAL COURT IMPROPERLY DENIED THE DEFENDANT-APPELLANT'S MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE FOR ARREST, FOR LACK OF REASONABLE SUSPICION TO CONDUCT FIELD SOBRIETY TESTS AND FOR EXCLUSION OF RESULTS OF HORIZONTAL GAZE NYSTAGMUS TEST

A. Relevant Facts

September 30, 2011, Eau Claire Police dispatch received a call that someone was slowly driving a van up and down a street. (44:6) Officer Jaquish observed a van operated by Joseph VanMeter. (44:6) Mr. VanMeter stopped in the road next to Officer Jaquish's squad car, driver's window to driver's window. (44:7) They spoke through their open windows. (44:7) Mr. VanMeter told Officer Jaquish that he was looking for his ex-wife's residence. (44:8) He asked Officer Jaquish to put on his lights to aid his ex-wife in finding him. (44:9) Officer Jaquish activated his lights but Mr. VanMeter's ex-wife telephoned Mr. VanMeter that she could not see any squad car lights. (44:9) Officer Jaquish exited his squad car and stood next to Mr. VanMeter's car window. (44:9) Officer Jaquish detected an odor of intoxicants on Mr. VanMeter's breath. (44:10, 11) Mr. VanMeter admitted he consumed alcohol. (44:11, 21) However, Officer Jaquish admitted he did not observe slurred speech or bloodshot and glassy eyes. (44:20) According to Officer Jaquish, Mr. VanMeter had no problem understanding him. (44:21) Officer Jaquish found Mr. VanMeter had a suspended driver license and two convictions for operating while intoxicated. (44:10-11)

During a horizontal gaze nystagmus test Officer Jaquish noted lack of smooth pursuit with nystagmus onset prior to 45 degrees in both eyes. (44:13-14) According to Officer Jaquish, Mr. VanMeter began the walk and turn test too soon and made an improper turn. (44:17, 22) Mr. VanMeter walked a straight line, turned, and again walked in a straight line, each way with the required nine steps and without swaying. (44:22) Office Jaquish stated Mr. VanMeter placed his leg down during the one-leg stand test when he reached a count of 24 or 25 of the required count of 30. (44:18) Officer Jaquish stated he was looking at his watch during that test but did not note in his report how long Mr. VanMeter actually kept his leg raised. (44:23) Mr. VanMeter did not sway or use his arms to balance during the one-leg stand test. (44:23) Officer Jaquish requested a preliminary breath test and it measured .150. (44:19)

In Case No. 11CM1147 the Eau Claire County District Attorney charged Mr. VanMeter with operating while intoxicated third offense and disorderly conduct. March 12, 2012, Hon. Paul Lenz denied Mr. VanMeter's motion to suppress the field sobriety tests and to dismiss for lack of probable cause for arrest. January 2, 2014, a jury convicted Mr. VanMeter of both charges. Hon. Paul Lenz withheld sentence and placed Mr. VanMeter on two years of probation. As conditions of probation he ordered 60 days of jail, 24-month driver license revocation, 18-month ignition interlock, \$766.00 fine, court costs and alcohol assessment and driver safety plan.

B. Applicable Law and Standard of Review

For a warrantless arrest to be lawful, it must be based on probable cause. State v Lange, 317 Wis.2d 383, 766 N.W.2d 551 (2009). Probable cause exists for operating while intoxicated if, under the totality of the circumstances within the officer's knowledge at the time of arrest, those circumstances would lead a reasonable officer to believe the defendant was probably operating while intoxicated. The burden of proof is upon the prosecution to show probable cause to arrest. In order to give a preliminary breath test, the officer must have probable

cause to believe the defendant was operating while intoxicated. Sec. 343.303, Stats. Probable cause is 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, 603 N.W.2d 541 (1999). Something more than the mere presence of an intoxicant is required before an officer may request a preliminary breath test. Id. at 309-310.

Officer Jaquish did not see any illegal or unsafe driving. Mr. VanMeter engaged in a coherent conversation with the officer. His eyes were not bloodshot or glassy. Mr. VanMeter was able to walk nine steps in each direction in a straight line. He stood on one leg for a long time without swaying or losing his balance. Therefore, there was no probable cause to believe Mr. VanMeter was driving under the influence of an intoxicant. The preliminary breath test should be suppressed.

Moreover, the evidence should be suppressed because Officer Jaquish had no reasonable suspicion to request field sobriety tests. The standard for determining the legality of holding someone for field sobriety tests is the same as the standard for a traffic stop. State v Colstad, 260 Wis.2d 406, 659 N.W.2d 394 (2003). An officer must become “aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense” independent of those that prompted the initial stop. Id.

Officer Jaquish smelled the odor of intoxicants on Mr. VanMeter and discovered he did not have a valid driver license. Officer Jaquish extended the stop and requested Mr. VanMeter perform field sobriety tests. However, Officer Jaquish did not have reasonable suspicion to request field sobriety tests as he saw no unsafe driving, no red eyes, no impaired ability to communicate, no impaired balance, no unusual movements, no open intoxicants, i.e., nothing to indicate Mr. VanMeter was driving while intoxicated.

The results of the horizontal gaze nystagmus (HGN) test should be excluded. The HGN test is not sufficiently reliable to justify continued detention and testing by a police officer. The HGN is, by its very nature, necessarily

subjective and no record can exist to confirm or deny the tester's opinion.

In U.S. v Horn, 158 F.Supp.2d 530 (2002), the Court held HGN tests are admissible as circumstantial evidence of alcohol consumption but found it, or other field sobriety tests, alone or in combination, have limited reliability. That court limited the use of HGN tests to opinion based on observation, not evidence based on scientific, specialized, or technical knowledge. See also: State v Lasworth, 2002-NMCA-029; State v Meader, 674 So.2d 826 (Fla. Ct. App. 1996).

Although the holding in Horn cannot be deemed the majority rule, the holding is consistent with what some other courts have held when faced with similar challenges involving the purposes for which HGN testimony is permissible and reliable. See: State v Taylor, 694 A.2d 907 (1997) (HGN cannot be used to quantify a particular BAC); Hulse v DOJ, Motor Vehicle Div., 961 P.2d 75 (1998) (HGN test results admissible to correlate alcohol consumption with nystagmus); Bramble v State, 982 P.2d 464 (1999) (without proper foundation HGN testimony limited to observations made by officer); State v Dahood, 814 A.2d 159 (2002) (HGN results are admissible a circumstantial evidence of intoxication but HGN cannot be used to establish BAC). See also: White v Miller, 724 S.E.2d 768 (2012); People v McKown, 924 N.E.2d 941 (2010); Ballard v State, 955 P.2d 931 (1998).

Pursuant to sec. 907.02(1), Stats.:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts in the case.”

In this case, Officer Jaquish testified he was trained in administration of the HGN test. (44:5) He testified as to the clues for intoxication he looks for in giving

the HGN test. (44:13) Officer Jaquish stated Mr. VanMeter failed the HGN test. (44:14-15) However, there was no testimony that the officer administered the HGN test in substantial compliance with training manual procedure; only conclusory statements that he did it right. Thus, his testimony on the HGN test should have been excluded.

CONCLUSION

For the above reasons, Mr. VanMeter moves this Court to vacate his judgment conviction and remand his case to the circuit court for further proceedings.

Dated this Seventh Day of May, 2015

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CERTIFICATION AS TO FORMAT AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of

minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,173 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of sec. 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date. A copy of this certificate has been served with all paper copies of this brief filed with the court and served on all opposing parties.

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APPENDIX

INDEX TO APPENDIX

Transcript of March 22, 2012, Motion Hearing

Page 1-31

CERTIFICATION AS TO APPENDIX

I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with sec. 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings of opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written ruling or decisions, showing the circuit court's reasoning regarding those issues. I 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 the final decision of the administrative agency. I certify that if the record is required by law to be confidential, the portions of the record including the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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