

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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Appellate Case No. 2014AP001991

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CITY OF SHEBOYGAN,

Plaintiff-Respondent,

v.

NATHAN J. BECKER,

Defendant-Appellant.

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BRIEF AND APPENDIX OF DEFENDANT-  
APPELLANT

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Appealed from a Judgment of Conviction Entered  
in the Circuit Court for Sheboygan County, the  
Honorable Terence T. Bourke Presiding  
Trial Court Case Nos. 13 TR 2492/2493

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## STATEMENT OF THE ISSUES

- I. WHETHER THE ARRESTING OFFICER HAD PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT OPERATED A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT OR WITH A PROHIBITED ALCOHOL CONCENTRATION AT THE TIME HE REQUESTED THAT THE DEFENDANT SUBMIT TO A PRELIMINARY BREATH TEST

Trial Court Answered: Yes.

## STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

## STATEMENT ON PUBLICATION

The Defendant-Appellant believes publication of this case is also unnecessary. Pursuant to Rule

809.23(a)(b), stats., this case involves the application of well-settled rules of law to a common fact situation.

#### STATEMENT OF FACTS AND CASE

On July 4, 2013 at approximately 11:30 p.m., Sheboygan Police Department Sergeant Kurt Zempel a report of a vehicle driving erratically. (R38 at 4, Appendix at 104). Sergeant Zempel, after following the vehicle for several blocks, observed the vehicle partially cross the lane divider before correcting itself and stopping fully at a red light. (R38 at 5-6, Appendix at 105-106). Sergeant Zempel initiated and traffic stop. (R38 at 6, Appendix at 106). The driver of the vehicle, later identified as Nathan J. Becker (hereinafter “Becker”) responded appropriately by immediately pulling over. (R38 at 11, Appendix at 111).

Sergeant Zempel reportedly observed that Becker had glassy eyes and slurred speech, but did not note an odor of intoxicants. (R38 at 7-8, Appendix at 107-108). Sergeant Zempel stated that Becker fumbled when removing his license a sleeve in his wallet. (R38 at 12, Appendix at 112). Becker admitted to consuming three to four beers. (R38 at 8, Appendix at 108). At that point, Sheboygan Police Department Officer Michael McCarthy arrived and took over the investigation. (R38 at 14, Appendix at 114).

Officer McCarthy asked Becker to exit his vehicle and to perform several field sobriety tests. Id. Officer Becker reportedly observed a strong odor of intoxicants and upon questioning of “how much he had to drink”, Becker allegedly stated that he had drank “two”. (R38 at 16, Appendix at 116). Officer

McCarthy did not observe Becker slurring his speech. (R38 at 24, Appendix at 124).

As Officer Officer McCarthy conducted the Horizontal Gaze Nystagmus test, heavy traffic passed on the road. (R38 at 25, Appendix at 125).

When asked whether he used separate passes to check for equal tracking, Officer McCarthy stated, “Yeah. I don’t like to break it down. I just—it’s all one. Just do the first two and then – so it’s all just one part of the test.” (R38 at 26, Appendix at 126).

Defense counsel requested clarification as to whether Officer McCarthy administered 14 passes, and Officer McCarthy responded, “It would be 12, 14, 16. Wouldn’t it?” Officer McCarthy was unfamiliar with resting nystagmus and end point nystagmus. (R38 at 27, Appendix at 127). Becker had no difficulty remaining motionless, with his hands at his side. (R38 at 28, Appendix at 128).

During the instructional period for the Walk and Turn test, Becker correctly remained in the instructional stance and did not prematurely begin (R38 at 29, Appendix at 129). While performing the test, Becker remained on the imaginary line, never stumbled, staggered or raised his arms for balance, and never failed to make heel-to-toe contact. Id.

Next, Officer McCarthy administered the One Leg Stand. (R38 at 32, Appendix at 132). Becker satisfactorily passed the test, by keeping his foot raised at the appropriate height for 30 seconds, and not exhibiting any balance issues. (R38 at 33, Appendix at 133). Although Becker performed the test correctly, Officer McCarthy stated that it would not change his opinion. (R38 at 23, Appendix at 123).

When asked why he bothered to administer the test if it would not impact his opinion, Officer McCarthy stated, “It’s part of the standardized field sobriety



tests.” (R38 at 33, Appendix at 133). Officer McCarthy agreed that he is supposed to gather information from all three tests, and if Becker had failed the third test, it would have strengthened his belief that Becker was impaired. (R38 at 34, Appendix at 134). Officer McCarthy finally stated that he was going to arrest Becker regardless of how he did on the One Leg Stand and only administered it because it is a part of the standardized field tests. Id.

Officer McCarthy requested that the defendant take a PBT, which came back with a reading of .129. Ultimately, Officer McCarthy arrested Becker for Operating a Motor Vehicle While Intoxicated.

Prior to trial, Becker filed a suppression motion based upon a lack of probable cause to administer the Preliminary Breath Test and arrest

Becker. The Honorable Judge Bourke denied the motion. (R38 at 40, Appendix at 140). Becker was ultimately found guilty of Operating a Motor Vehicle While Impaired. (R37). This appeal follows.

## ARGUMENT

- I. THE ARRESTING OFFICER LACKED PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT OPERATED A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT OR WITH A PROHIBITED ALCOHOL CONCENTRATION AT THE TIME HE REQUESTED THAT THE DEFENDANT SUBMIT TO A PRELIMINARY BREATH TEST

This Court will defer to the trial court's factual determinations unless they are clearly erroneous, and will review de novo whether those facts are sufficient to create reasonable suspicion based on the totality of the facts and circumstances. *State v. Post*, 301 Wis. 2d 1, 733 N.W.2d 634 (2007).

The Fourth Amendment to the United States

Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 343.303 of the Wisconsin Statutes requires that a law enforcement officer have probable cause to believe that a person is violating, in relevant part, section 346.63 (1) or (2m) before requesting that the person submit to a preliminary breath test. See 343.303, Wis Stats. "Probable cause to believe" refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the "reason to believe" that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest.

County of Jefferson v. Renz, 231 Wis.2d 293, ¶ 47 (1999).

The issue of probable cause to arrest is based in the Fourth Amendment to the United States Constitution, as well as Article I, section 11 of the Wisconsin Constitution. State v. Paszek, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971); See also State v. Richardson, 156 Wis. 2d 128, 137, 456 N.W.2d 830, 833 (1990).

Probable cause for an arrest without a warrant requires more than an officer's subjective good-faith belief or mere suspicion. See Hill v. California, 401 U.S. 797 (1971); State v. DiMaggio, 49 Wis. 2d 565, 182 N.W.2d 466 (1971). The Wisconsin Supreme Court defines probable cause generally as:

that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. Probable cause exists where the totality of the

circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe, in this case, that the defendant was operating a motor vehicle while under the influence of an intoxicant.

State v. Nordness, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). When an arrest is made without a warrant, the burden is on the State to show the existence of probable cause. See *Vale v. Louisiana*, 399 U.S. 30 (1970).

Under the facts and circumstances known to Sergeant Zempel and Officer McCarthy at time they made their arrest decision, they did not possess sufficient probable cause to arrest the defendant. Sergeant Zempel did not establish that Becker violated any law. There was no testimony that a turn signal was mandatory because it would have impacted another driving in having to apply brakes or change their course of direction. In his dealings with Becker, Officer McCarthy observed no slurred

speech. Becker made no admissions to being impaired, although he admitted to drinking two beverages, with no further information as to what they were.

Officer McCarthy's administration of the Horizontal Gaze Nystagmus test was incorrect, thereby compromising its validity. Officer McCarthy had no understanding that resting nystagmus is something that must be allotted for prior to administering the test. He was also unfamiliar with end point nystagmus, something that naturally occurs in sober adults. The administration of the Horizontal Gaze Nystagmus requires that an officer must distinguish normal end point nystagmus from that caused by alcohol.

The Walk and Turn calls for a common sense approach as to what an officer, and ultimately, a jury may observe and identify as impairment. In this

case, there is a great deal of evidence that Becker performed the test in a manner consistent with being able to control his physical performance. It is unusual to see someone exert such a high level of control during this test and not engage in behaviors consistent with impairment.

Officer McCarthy very clearly refused to consider the fact that Becker performed the One Leg Stand Test satisfactorily. This test is used for gathering more information and officers are meant to weigh a defendant's performance on this test. The fact that Officer McCarthy failed to contemplate Becker's satisfactory performance in terms of administering a PBT goes towards his bias against Becker.

In this case, Becker violated no law to require a traffic stop. Officer McCarthy observed no slurred speech, administered the Horizontal Gaze

Nystagmus test incorrectly, saw minimal clues on the Walk and Turn and refused to consider Becker's satisfactory performance prior to administering the PBT. If any one of the standardized field sobriety test elements is changed, the validity is compromised.



## CONCLUSION

For the foregoing reasons, Becker respectfully asserts that the trial court abused its discretion in denying his motion to issue an order suppressing for use as evidence any and all statements made by the him, the chemical test of his breath, and any other observations made by the arresting officer of him subsequent to the unlawful arrest.

Therefore, Becker requests that this Court reverse the trial court's decision and remand the case for further proceedings consistent with this Court's opinion.

Dated this 3rd day of November, 2014.

Respectfully submitted,

KIRK OBEAR AND ASSOCIATES

By:

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CERTIFICATION AS TO FORM AND LENGTH

I hereby 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. The text is 13 point type and the length of the brief is 2387 words.

Dated this 3rd day of November, 2014.

Respectfully submitted,

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CERTIFICATION AS TO CONTENTS OF  
APPENDIX

I hereby certify that filed with this brief, either as a separate document or as 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 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 or 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.

Dated this 3rdday of November, 2014.

Respectfully submitted,

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## ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

Dated this 3rd day of November, 2014.

Respectfully submitted,

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## CERTIFICATE OF MAILING

I hereby certify that this brief and appendix was mailed to the Clerk, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin, on November 3, 2014.

Dated this 3rd day of November, 2014.

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