

RECEIVED

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

12-04-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2014 AP 1991
Trial Court Case Nos. 13 TR 2492 & 2493**

CITY OF SHEBOYGAN,

Plaintiff-Respondent,

v.

NATHAN J. BECKER,

Defendant-Appellant.

**APPEAL FROM A RULING OF THE
CIRCUIT COURT FOR SHEBOYGAN COUNTY**

The Honorable Terence T. Bourke, Presiding

BRIEF OF THE PLAINTIFF-RESPONDENT

City of Sheboygan City Attorney's Office
828 Center Avenue, Suite 304
Sheboygan, WI 53081
(920) 459-3917
(920) 459-3919 (FAX)
charles.adams@sheboyganwi.gov

By: Charles C. Adams
Assistant City Attorney
State Bar No. 1021454
Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
STATEMENT ON ORAL ARGUMENT.....	3
STATEMENT ON PUBLICATION.....	3
ARGUMENT.....	4
THE ARRESTING OFFICER HAD THE REQUISITE PROBABLE CAUSE PURSUANT TO <i>STATE V. RENZ</i> TO BELIEVE THAT THE DEFENDANT VIOLATED §346.63(1), WIS. STATS.; AS A RESULT, THE OFFICER’S REQUEST THAT THE DEFENDANT SUBMIT TO A PRELIMINARY BREATH TEST WAS PROPER.....	4
CONCLUSION.....	14
FORM AND LENGTH CERTIFICATION.....	15
CERTIFICATION PURSUANT TO §809.12(f).....	16

TABLE OF AUTHORITIES

STATUTES

Wisconsin Statutes

§346.303, Wis. Stats.....	8
§346.63(1)(a), Wis. Stats.....	7
§346.63(1)(b), Wis. Stats.....	7

CASE LAW

United States Supreme Court

<i>United States v. Sokolow</i> 490 U.S. 1 (1989).....	9
---	---

Wisconsin Supreme Court

<i>County of Jefferson v. Renz</i> 231 Wis. 2d. 93, 603 N.W.2d 541 (1999).....	7, 8, 9, 11, 12
<i>State v. Fischer</i> 2010 WI 6.....	8
<i>State v. Lange</i> 2009 WI 49.....	9
<i>Washburn County v. Smith</i> 2008 WI 23.....	10

Wisconsin Court of Appeals

<i>State v. Colstad</i> 2003 WI App 205.....	12, 13
<i>State v. Felton</i> 2012 WI App 114.....	9, 13

STATEMENT ON ORAL ARGUMENT

The City of Sheboygan contends that oral argument in this case is unnecessary. The briefs will fully present the issues on appeal and fully develop the theories and legal authorities on each side. The marginal value of oral argument would not justify the expense of court time.

STATEMENT ON PUBLICATION

The City of Sheboygan suggests that publication of this case is unnecessary since it involves the application of well-settled rules of law to a common fact situation.

ARGUMENT

THE ARRESTING OFFICER HAD THE REQUISITE PROBABLE CAUSE PURSUANT TO *STATE V. RENZ* TO BELIEVE THAT THE DEFENDANT VIOLATED §346.63(1), WIS. STATS.; AS A RESULT, THE OFFICER'S REQUEST THAT THE DEFENDANT SUBMIT TO A PRELIMINARY BREATH TEST WAS PROPER.

1. Background Facts

a. Sgt. Zempel's traffic stop

Late in the evening of the 4th of July, 2013, Sgt. Kurt Zempel was in his squad car supervising second shift police officers on duty in the City of Sheboygan. At about 11:30 p.m., he heard police dispatch report an erratic driver northbound on Calumet Drive. Since he was in the area, he looked for the vehicle, finding it in the area of North 20th Street and Calumet Drive. (R38 at 4-5)

Sgt. Zempel was aware from the dispatch that there was a civilian witness who called in the erratic driver, who was following the driver, and who was willing to make a statement. (R38 at 4-5) The civilian witness, who described the make, model, color, and license plate number of the vehicle, (R38 at 6) reported that he was seeing the vehicle “crossing the center line, swerving between traffic, and driving erratically.” (R38 at 5)

Sgt. Zempel, upon locating the erratic driver, watched as the driver approached the traffic control signals at North Avenue and Calumet Drive. As the vehicle approached the intersection, it “swerved from the outside lane to the inside lane” without engaging a turn signal, “made an abrupt motion to the left, crossing

the divider,” then moved abruptly again, this time back into the outside lane of traffic. (R38 at 5) Sgt. Zempel noted at a motion hearing in this matter that traffic was unusually heavy for the time of night, as it was just shortly after the city’s famous fireworks show had finished. Traffic volume at that time was as high as the city ever experiences. (R38 at 10)

The vehicle then stopped at the red light. However, the driver kept his foot on the brake while pressing the accelerator, causing the engine to rev. (R38 at 6) As soon as the light turned green, Sgt. Zempel engaged his lights and pulled the vehicle over. He identified the driver as the defendant-appellant, Nathan Becker. (R38 at 7)

As Sgt. Zempel spoke with Becker, he noticed that Becker’s eyes were glassy and his speech was slurred. Becker had difficulty articulating his consonants. When asked to provide his driver’s license, Becker had difficulty getting it out of his wallet. It took him several attempts to slide the license out of the slot in his wallet. (R38 at 7)

Becker admitted he had been consuming alcoholic beverages that night, at first saying that he had had three or four beers. (R38 at 8) Sgt. Zempel then turned over the investigation to Officer Michael McCarthy, one of his second-shift traffic officers, so that Sgt. Zempel could continue in his supervisory role. (R38 at 9)

b. Officer McCarthy's roadside investigation

Officer McCarthy, who had heard the dispatch reports, spoke briefly to Sgt. Zempel so he could be informed about Sgt. Zempel's observations. Officer McCarthy then had Becker exit his vehicle so that he could have Becker perform field sobriety tests. (R38 at 14) As he does so, he notices the strong odor of intoxicants coming from Becker. As he had done moments before, Becker admitted to Officer McCarthy that he had been drinking, but now that he was aware that the investigation was continuing, he downgraded his admission to just two drinks. (R38 at 16)

Officer McCarthy, who is trained to use standardized field sobriety tests to determine whether a driver may be impaired, had Becker perform three tests. McCarthy is trained to look for specific clues of impairment on these tests. (R38 at 16-17) On the first—the Horizontal Gaze Nystagmus test, McCarthy noted that Becker exhibited each and every of the six clues he is trained to look for as an indication of impairment. (R38 at 19) McCarthy then had Becker perform the “Walk and Turn” test, noting three clues—stopping during the test in order to regain balance, taking an incorrect number of steps, and performing a turn contrary to instructions. These clues also were an indication that Becker was impaired. Additionally, Officer McCarthy noted that Becker needed instructions repeated before he was able to begin the test. (R38 at 20-21)

Officer McCarthy then had Becker perform a “One Leg Stand” test. Becker

performed this test acceptably and Officer McCarthy observed no clues of impairment. (R38 at 22) Officer McCarthy noted Becker's young age and apparently high level of physical fitness, stating that some people perform better on the physical tests. (R38 at 23)

Based on all he had observed, as well as the information in the dispatches and Sgt. Zempel's observations, Officer McCarthy concluded that he had sufficient probable cause to request that Becker provide a preliminary breath sample. Becker agreed to provide a sample. (R38 at 23) Eventually Becker was arrested and charged with Operating a Motor Vehicle While Intoxicated, in violation of §346.63(1)(a), Wis. Stats., and with Operating a Motor Vehicle with a Prohibited Alcohol Concentration, in violation of §346.63(1)(b), Wis. Stats.

c. Circuit court decision

Becker later filed a suppression motion alleging that Officer McCarthy lacked the requisite level of probable cause needed to request a preliminary breath sample. Sgt. Zempel and Officer McCarthy testified at a hearing on that motion. The circuit court denied the motion, finding that Officer McCarthy had the necessary level of probable cause. The circuit court cited the facts in *County of Jefferson v. Renz*, 231 Wis. 2d. 93, 603 N.W.2d 541 (1999), which is the seminal case in Wisconsin on this issue. The court noted the similarity of the facts in the present case to those in *Renz*, and denied Becker's motion. Becker was eventually convicted via a trial conducted upon stipulated facts, and then appealed.

2. *Relevant law*

As noted, the seminal case in Wisconsin on the issue of probable cause to request a preliminary breath test is *County of Jefferson v. Renz*. The case interprets §343.303, Wis. Stats., which provides that:

“If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1) The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged...”

The *Renz* court held that the statute does not require that the officer have probable cause to arrest a driver for drunk driving before giving that driver a preliminary breath test. *Renz*, 231 Wis. 2d at 295, 315–316, 603 N.W.2d at 542, 551–552. Rather, the statute’s phrase “‘probable 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.” *Id.*, 231 Wis. 2d at 316, 603 N.W.2d at 552. The court later summarized the *Renz* decision by stating that a preliminary breath test “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.

The legislature intended that the preliminary breath test function as a

preliminary screening tool, to be used by an officer during investigation of a person suspected of an OWI violation. *Renz*, 231 Wis. 2d at 312-16, 603 N.W.2d at 550-552. The legislature used the word “preliminary” for a specific reason: to denote that the PBT is “a preparation for something else.” *Id.* at 313. That something else is a probable cause to arrest, a higher standard than simply probable cause to request a preliminary breath test.

The concept of “probable cause” has various roles in the law, depending on what is at issue. See *Renz*, 231 Wis. 2d at 304–305, 308–309, 310–311, 603 N.W.2d at 546–547, 548, 549–550. “The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior.’” *State v. Lange*, 2009 WI 49, ¶20.

It is also important to note that performance on standardized field sobriety tests is not the be-all and end-all of determining probable cause to request a preliminary breath test. In *State v. Felton*, 2012 WI App 114, the court noted that the fact that a driver has successfully completed all of the properly administered field sobriety tests does not subtract from the common-sense view that the driver may have had an illegal blood alcohol level “any more than innocent behavior automatically negates either probable cause or even the lower reasonable-suspicion standard.” *Felton* at ¶10, see also *United States v. Sokolow*, 490 U.S. 1, 9–10 (1989). Indeed, the *Felton* court noted that the officer with other evidence of

impaired driving would be fully justified in asking a driver in to take a preliminary breath test without even asking him to perform any field sobriety tests because “they are not needed to establish probable cause to arrest someone for drunk driving,” and that the “probable-cause standard is lower for assessing the validity of giving a preliminary-breath test than it is for an arrest.” *Id.*, see also *Washburn County v. Smith*, 2008 WI 23, ¶33.

3. Application to the present case

The common-sense inquiry in this matter is to determine what Officer McCarthy knew that led him to give Becker a preliminary breath test. The record shows the following:

- Becker was driving erratically, swerving and abruptly changing lanes while in heavy traffic; (R38 at 5-6)
- Becker unnecessarily revved his engine while stopped at an intersection; (R38 at 6)
- Becker had glassy eyes; (R38 at 7)
- Becker’s speech was slurred and he had difficulty articulating his consonants; (R38 at 7)
- Becker had a strong odor of an alcoholic beverage coming from him; (R38 at 16)
- Becker had poor small motor coordination, as demonstrated by his

difficulty in producing his driver's license from his wallet; (R38 at 7)

- Becker admitted to consuming alcoholic beverages, first telling Sgt. Zempel that he had had three or four drinks, but later telling Officer McCarthy it was only two; (R38 at 8)
- Becker performed poorly on two standardized field sobriety tests—the Horizontal Gaze Nystagmus test and the Walk and Turn test; (R38 at 19-21)
- Becker successfully performed one field sobriety test—the One Leg Stand. (R38 at 22)

These facts are sufficient to provide Officer McCarthy sufficient basis to have probable cause to request a preliminary breath test.

4. Comparison to the facts in other reported cases

Wisconsin appellate courts have more than once applied the *Renz* standard to specific facts. When one compares the facts of this case to the facts in a number of those cases, it is clear that the circuit court's decision in this case was correct.

a. County of Jefferson v. Renz

As noted by the circuit court, one of those cases is *Renz* itself. In *Renz*, the driver was stopped for defective exhaust, not for any negative driving behavior. The driver smelled of intoxicants and admitted to having three beers earlier in the evening. He showed no slurred speech. The driver exhibited all six clues on the

Horizontal Gaze Nystagmus case, two clues on the Walk and Turn, and only one clue on the One Leg Stand, putting his foot down once during the test. He also performed two non-standard tests, correctly reciting the alphabet, and performing a finger-to-nose test properly with one hand, but touching the bridge of his nose with the other. *Renz*, 231 Wis. 2d at 296–298, 603 N.W.2d at 542–544.

The circuit court in the case at hand commented at the close similarity to the facts in *Renz*. While Becker showed no clues on the One Leg Stand, he showed one additional clue on the Walk and Turn and had the same difficulty with the Horizontal Gaze Nystagmus test. Like the driver in *Renz*, Becker admitted to drinking, smelled of intoxicants, and showed some issues with coordination. Unlike the driver in *Renz*, Becker also had slurred speech and had been observed driving erratically.

b. State v. Colstad

Several years after the *Renz* decision, the Wisconsin Court of Appeals applied the *Renz* standard to another fact situation in *State v. Colstad*, 2003 WI App 205. In that case, the driver performed “better than most” on the field sobriety tests. In fact, he exhibited no problem with balance during the One Leg Stand test and only exhibited two clues on the Walk and Turn test, stepping off an imaginary straight line and swaying. He slurred his speech only very briefly, while saying the letters L, M, N, and O, in the alphabet test. He did begin a test prematurely and neglected to include “one thousand” while counting during the One Leg Stand.

Neither of these constitutes a clue in the standardized field test regimen, but is an indicator of impairment. The driver was involved in an accident. *Id.*, ¶24-25.

While these facts are slightly different from those in *Renz* and the present case, they are of a similar concern. The driver in *Colstad* did relatively well on field sobriety tests, yet the facts were sufficient to allow the court to hold that the officer in that case had the requisite probable cause to request a preliminary breath test. *Id.*, ¶26.

c. State v. Felton

In the previously cited case of *State v. Felton*, 2012 WI App 114, the facts were even more in favor of the driver than in any of the previously cited cases. There, the driver's eyes were glassy and bloodshot, he smelled of alcohol and admitted to drinking three beers two hours before the stop. As far as driving behavior, the officer described the defendant as staying too long at one stop sign and then going through another without stopping. The officer knew that the driver in *Felton* had prior OWI convictions. The facts in the present case are far more indicative of a violation of the impaired driving than those in *Felton*.

CONCLUSION

Becker was driving in an erratic and dangerous manner. He had glassy eyes, slurred speech, and a strong odor of an alcoholic beverage coming from him. He admitted to consuming three to four alcoholic drinks prior to driving and demonstrated poor coordination, both prior to and during the field sobriety tests. Becker performed poorly on two of the three standardized field sobriety tests—the Horizontal Gaze Nystagmus test and the Walk and Turn test. When considered as a whole, considering the totality of the circumstances, these facts are sufficient to provide Officer McCarthy sufficient basis to have probable cause to request a preliminary breath test. The facts in other published appellate court decisions buttress that conclusion. Therefore, the city requests that the court deny Becker’s appeal and uphold the judgment of conviction.

Dated this 3rd day of December, 2014.

Respectfully submitted,
City of Sheboygan

By: _____

Charles C. Adams
State Bar No. 1021454
Plaintiff-Respondent’s Attorney

POST OFFICE ADDRESS

828 Center Ave., Suite 304
Sheboygan, WI 53081
(920) 459-3917
(920) 459-3919 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certifies that this brief conforms to the rules contained in Wis. Stats. §809.19 (8)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 2,459 words.

Dated this 3rd day of December, 2014

Respectfully submitted,
City of Sheboygan

By: _____
Charles C. Adams
State Bar No. 1021454
Attorney for the Plaintiff-Respondent

POST OFFICE ADDRESS

828 Center Ave., Suite 304
Sheboygan, WI 53081
(920) 459-3917
(920) 459-3919 (FAX)

CERTIFICATION PURSUANT TO §809.12(f)

I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 3rd day of December, 2014

Respectfully submitted,
City of Sheboygan

By:

Charles C. Adams
State Bar No. 1021454
Attorney for the Plaintiff-Respondent

POST OFFICE ADDRESS

828 Center Ave., Suite 304
Sheboygan, WI 53081
(920) 459-3917
(920) 459-3919 (FAX)