

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appellate Case No. 2014AP001991

CITY OF SHEBOYGAN,

Plaintiff-Respondent,

v.

NATHAN J. BECKER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-
APPELLANT

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

Respectfully Submitted:

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ARGUMENT

Becker respectfully reaffirms the arguments presented in its brief-in-chief, and replies below to the arguments made in the Respondent's brief.

- 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

The Respondent greatly overstates the clues observed in determining whether Officer McCarthy had probable cause to administer a preliminary breath test. The Respondent states that "Becker's speech was slurred and he had difficulty articulating his consonants", which was based on Sgt. Zempel's testimony. Respondent's br. at 10. However, Officer McCarthy spent the most time interacting with

Becker. It was Officer McCarthy that administered that took over the investigation, administered the field sobriety tests, and ultimately decided to give Becker the preliminary breath test. Officer McCarthy did not any slurred speech. If in fact Becker was having issues with his speech, it is extremely unlikely that the issue would have been cured in the few minutes that passed while Officer McCarthy arrived on scene.

The Respondent's claim that Becker performed poorly on the Horizontal Gaze Nystagmus test and that his performance is an indicator of impairment also falls short. Officer McCarthy administered the test incorrectly and had no understanding of resting or end point nystagmus. The instructions require that Officer McCarthy distinguish normal end point nystagmus from that caused by alcohol. If the Horizontal Gaze Nystagmus test is administered

improperly, as it was in this case, the validity is compromised. Therefore, any suggestion that the results should be considered in determining whether probable cause exists is wrong.

Additionally, the Respondent exaggerated the claim that Becker performed the Walk and Turn test poorly. 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.

The fact that the One Leg Stand was performed successfully should have weighed into Officer McCarthy's determination as to whether probable cause existed to administer the preliminary breath test. In stead, he very clearly refused to consider that fact.

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.

The facts in this case are not more egregious than those discussed by the Respondent. In Felton, the defendant stayed a stop sign for an unusually long time, then stopped appropriately at the next set of lights, only to drive straight through a third stop sign, at approximately twenty miles per hour, without slowing down in the slightest. State v. Felton, 2012 WI App 114, ¶2. The officer observed that the defendant's eyes were bloodshot and glassy

could detect a “strong odor of intoxicants” coming from the defendant. Id at ¶3. The defendant also admitted to drinking three beers and the officer was aware of the defendant’s three prior drunk-driving convictions. Id at ¶9. All of these observations, viewed in the totality of the circumstances, weighed in favor of a finding of probable cause.

In *County of Washburn v. Smith*, another case cited by the Respondent, the defendant was traveling at 76 miles per hour in a 55 mile per hour speed limit zone, had a “delayed response” in pulling over, and crossed the centerline twice before pulling over. 2008 WI 23, ¶8,9. Prior to arresting the defendant, the Deputy detected an odor of alcohol on the defendant’s breath, and the defendant admitted to drinking from 4:00 PM to shortly before he was pulled over at 2:40 AM. In that case, field sobriety tests were not administered, and the court held that

probable cause existed. The facts in this case are not nearly as egregious.

CONCLUSION

For the foregoing reasons, Becker respectfully reasserts 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 19th day of December, 2014.

Respectfully submitted,

KIRK OBEAR AND ASSOCIATES

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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 1069 words.

Dated this 19th day of December, 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 19th day of December, 2014.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that this reply brief was mailed to the Clerk, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin, on December 19, 2014.

Dated this 19th day of December, 2014.

Respectfully submitted,

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