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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2014AP2625-CR

ZACHARY F. GEYER,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION, DECISION
DENYING SUPPRESSION MOTION, AND DECISION
DENYING MOTION FOR RECONSIDERATION, ENTERED IN
THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE
PATRICK TAGGART, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

- I.** DID DEPUTY UMINSKI HAVE PROBABLE CAUSE TO ARREST GEYER FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED, DESPITE NEVER ADMINISTERING FIELD SOBRIETY TESTS OR A PRELIMINARY BREATH TEST, AND DESPITE NO EVIDENCE AS TO THE CAUSE OF THE CRASH?

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

In all likelihood, this opinion will not merit publication because the issues are fact-specific, and the case is governed by existing precedent. Further, since this is a misdemeanor case, it will be a one-judge opinion and therefore not subject to publication.

STATEMENT OF THE CASE

On November 15, 2012, Sauk County Deputy Vertein responded to a call regarding a single car accident in the area of State Highway 58 and County Road F (12: 4, 7). Dispatch advised that a vehicle had struck a guard rail, and was subsequently towed by another vehicle into a parking lot for Cut and Run Tree Service, just off State Highway 58 (12: 4, 6-7). Without examining the accident scene, Deputy Vertein responded directly to the parking lot of Cut and Run Tree Service (12: 7). The Deputy did not have information about what caused the accident when he responded to Cut and Run (12: 15).

Deputy Vertein first made contact with Dale Geitz, who had towed the vehicle belonging to Geyer (12: 8-9). Vertein also spoke with Geyer, who confirmed he was uninjured from the accident (12: 10). When asked why he had the vehicle towed rather than contacting law enforcement immediately, Geyer informed Deputy Vertein he didn't know he needed to report the accident, and wanted to remove the vehicle from the roadway immediately to prevent any further accidents (12: 8-9). Deputy Vertein spoke with Geyer, Geitz, and Geyer's wife for approximately 10 to 15 minutes (12: 22).

In speaking with Geyer, Deputy Vertein noted that Geyer exhibited "lethargic" speech and mannerisms (12: 9). Vertein testified that he detected an odor of intoxicants from Geyer, but noted he omitted any such reference in his incident report (12: 18-19). Deputy Vertein did not observe Geyer to have slurred speech (12: 18). Further, although he was in good position to view Geyer's eyes, he specifically did not observe Geyer to have glassy or bloodshot eyes (12: 22-23).

Deputy Vertein asked Geyer if he consumed any alcohol that evening, and Geyer stated that he'd had one beer (12: 17). Geyer informed Deputy Vertein that he was wearing his seatbelt when the accident occurred (12: 12). When Deputy Vertein asked Geyer how the accident occurred, Geyer politely declined to answer any more questions without first speaking with an attorney (12: 11, 18). Deputy Vertein gave Geyer the opportunity to attempt to contact an attorney via Geyer's cell phone (12: 22).

Shortly thereafter, Sauk County Deputy Uminski arrived at the scene, and was briefed by Deputy Vertein (12: 22). Deputy Uminski spoke briefly with Geyer's wife and Mr. Geitz, who indicated the accident had occurred at approximately 9:40 pm (12: 37-38).

Deputy Uminski approached Geyer and instructed him to get off the phone (12: 23, 51-52). Deputy Uminski asked Geyer a series of questions, including what time the crash occurred, where he was coming from, and how much he had to drink (12: 38, 52-53). To each question, Geyer politely declined to answer the questions without an attorney present (12: 53). Deputy Uminski told Geyer he did not have the right to speak to an attorney at that point (12: 53). Geyer continued to refuse to answer without an attorney present, and gave this same answer to each of Deputy Uminski's questions (12: 39).

In speaking with Geyer, Deputy Uminski smelled a strong odor of intoxicants, but acknowledged he could not "accurately tell what [Geyer's] alcohol concentration [was] based upon odor" (12: 54). Deputy Uminski also observed that Geyer's eyes were glassy and bloodshot, but could not provide any specifics concerning the degree (slightly, moderately, very) that Geyer's eyes were bloodshot and/or glossy (12: 54-56). When Geyer continued his refusal to speak without an attorney present, Deputy Uminski placed Geyer under arrest (12: 53).

Although Deputy Vertein eventually viewed the accident scene, he did not do so before Geyer was arrested, and conceded he had no information on how the accident occurred at the time of arrest (12: 27). Neither Deputy

Uminski nor Deputy Verstein ever asked Geyer to perform standardized field sobriety tests (“SFST”) or take a preliminary breath test (“PBT”) (12: 24).

A blood test was performed, and a chemical analysis revealed Geyer had a blood alcohol level of 0.138 (2: 2). The defense filed a motion to suppress, arguing the arrest was performed without probable cause (8: 1-5).

After an evidentiary hearing, the parties submitted briefs, and the trial court issued a written order denying the motion to suppress (16: 1-5). The court found probable cause to arrest existed under the totality of the circumstances based on the following: (1) Geyer’s vehicle struck a guardrail on a highway; (2) the vehicle was towed to a nearby parking lot without law enforcement notification; (3) Deputy Verstein observed that Geyer appeared lethargic and slow in movements; (4) Geyer dropped his driver’s license on the ground and was slow in picking it up; (5) both Deputy Verstein and Deputy Uminski testified that they detected an odor of intoxicants from Geyer; (6) Geyer admitted to consuming one beer; (7) Geyer refused to answer Deputy Verstein’s questions about the cause of the accident; (8) Deputy Uminski observed that Geyer had glassy, bloodshot eyes, and (9) when questioned by Deputy Uminski, Geyer again refused to answer questions without consulting with an attorney (16: 4-5).

The defense filed a motion to reconsider, arguing the court erred in considering Geyer’s invocation of his constitutional right to remain silent when assessing whether probable cause existed for arrest (18: 1-4). The court denied the motion for reconsideration in a written decision (19: 1-2). Without addressing whether Geyer’s invocation of his right to remain silent could properly be considered in assessing probable cause, the court asserted the remaining factors cited in its original decision denying suppression supported probable cause (19: 1-2). Accordingly, the court denied the motion for reconsideration (19: 2).

Geyer subsequently entered a no contest plea to operating with a prohibited alcohol concentration 2nd offense, contrary to Wis. Stat. sec. 346.63(1)(b), and was sentenced

consistent with local OWI guidelines (28: 2-4, 8). Geyer appeals from the judgment of conviction, the decision denying suppression, and the decision denying the motion for reconsideration.

ARGUMENT

I. DEPUTY UMINSKI DID NOT HAVE PROBABLE CAUSE TO ARREST GEYER FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED

A. Summary of Arguments and Standard of Review

The decision to arrest Geyer for operating while intoxicated was made without administering or even requesting standardized field sobriety tests or obtaining a preliminary breath test result, and despite the fact that Geyer was not injured or otherwise unable to perform the tests. It was also made without evidence regarding the cause of the accident, and no witnesses to why the accident occurred. Geyer asserts that the facts known to the officers at the time he was arrested were insufficient to establish probable cause to arrest for operating while intoxicated.

Whether undisputed facts constitute probable cause is a question of law that appellate courts review without deference to the circuit court. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). To determine whether probable cause existed, the court “must look to the totality of the circumstances to determine whether the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.* (internal quotation omitted).

B. The Evidence Was Insufficient To Support A Finding of Probable Cause To Arrest

Driving after drinking is not, in and of itself, unlawful. Not only does this reality exist in the pattern jury instruction -

“not every person who has consumed an alcoholic beverage is ‘under the influence’ as that term is used here,” WIS JI-CRIMINAL, no. 2663 - it is clear in the terminology of the statute itself. Wisconsin has not prohibited driving after consuming intoxicants. Thus for probable cause to arrest, there should be evidence linking the consumption of alcohol to either being over the legal blood alcohol limit, or to actual impairment.

The defendant acknowledges that standardized field sobriety tests are not required to establish probable cause in every case. *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). However, Wisconsin courts have long recognized that SFSTs are the best indication of whether a person has crossed the threshold of impairment to warrant an arrest for drunk driving. *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277.

In this case, officers met with Geyer sometime after his vehicle struck a guardrail on State Highway 58. The officers possessed little to no information about how or why the accident occurred. By the time officers arrived, Geyer’s vehicle had been towed from the roadway to avoid causing any additional accidents. Neither officer had personally observed Geyer driving, or were there any witness accounts of Geyer’s driving. Neither Deputy Vertein or Deputy Uminski responded to the scene of the accident before Geyer’s arrest, so neither officer was in position to dispute the need for such action.

In speaking with Geyer, Deputy Uminski observed a strong odor of intoxicants and glassy, bloodshot eyes. However, Deputy Vertein, who spoke with Geyer for a longer period than Deputy Uminski (12: 24-25), did not observe Geyer to have bloodshot or glassy eyes (12: 22-23), and neglected to mention detecting an odor of alcohol in his incident report, though he testified he observed such an odor (12: 18-19).

Geyer had also told Deputy Vertein that he’d consumed one alcoholic beverage. Deputy Vertein observed that Geyer appeared “somewhat lethargic” in his statements

and movements, but that when he answered questions, the answers were appropriate and not confusing (12: 21). Further, neither officer requested Geyer perform standardized field sobriety tests to determine whether Geyer was actually impaired by intoxicants, despite the fact that Geyer wasn't injured from the accident or otherwise unable to perform the tests. Finally, neither officer requested Geyer perform a PBT.

Ultimately, this factual record is insufficient to sustain a finding of probable cause to arrest. Indicia of alcohol consumption are not enough, as there must be evidence linking alcohol consumption to impaired driving. Field sobriety tests and/or preliminary breath tests are generally used to bridge the evidentiary gap, as they can help establish that the defendant's ability to control a vehicle is compromised.

Several cases have found that such tests are not necessary to establish probable cause when an accident has occurred. *See, e.g., Wille*, 185 Wis. 2d. at 683; *State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996); and *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551. However, accidents can have many causes unrelated to alcohol. The *Lange* court recognized that not all suspicious cases involving accidents will automatically result in finding of probable cause to arrest for OWI. *Id.*, 2009 WI 49, ¶39.

In each of those cases, unlike Geyer's case, the officers personally investigated the scene of the accident prior to arrest. *See Wille*, 185 Wis. 2d. at 677-78; *Kasian*, 207 Wis. 2d at 622; *see also Lange*, 2009 WI 49, ¶¶27, 29 ("There was no other traffic; the roadway was dry and free of debris. Thus traffic and road conditions do not explain the defendant's driving"). Therefore, in each of those cases, the officers possessed evidence necessary to determine how and why the crash occurred.

In two of those cases, unlike Geyer's case, witnesses observed the accident occurring, and attributed the accident to the defendant's erratic driving. *See Wille, id.* at 677 (witness and victim of accident informed police that defendant struck their parked car from behind, knocking them into the ditch);

Lange, id. at ¶¶24-28 (two officers observed the defendant’s “wildly dangerous” driving, crossing the center line multiple times, driving 80 mph in a 30 mph zone in the wrong lane of traffic, and crashing into a utility pole). No such evidence was available against Geyer.

In all three of those cases, no SFSTs were performed in part because the defendants were injured and subsequently hospitalized following the accidents. *See Wille, id.* at 678 (defendant hospitalized with a facial laceration); *Kasian, id.* at 622 (defendant found injured, lying next to damaged vehicle, and taken to hospital); *Lange, id.*, ¶¶14-17, 34 (defendant found “unconscious, bloody, and lying amid a gasoline-soaked crash scene” before being taken to hospital, where he was still unconscious at time of arrest). By contrast, Geyer was not injured, and was not physically unable to perform SFSTs.

Ultimately, no Wisconsin case has upheld a finding of probable cause for an OWI arrest under such circumstances, where (1) neither an officer or another witness observed the defendant driving erratically, (2) the officers did not view the actual crash scene to investigate its circumstances before the arrest, and (3) no SFSTs or PBT were administered or even requested despite the defendant’s ability to perform such tests.

The circuit court’s decision denying suppression and its decision on the motion for reconsideration cited several factors in support, but they really boil down to indicia of alcohol consumption (odor of intoxicants, glassy/bloodshot eyes, slow speech, admission of consuming one beer) and an unexplained, uninvestigated crash (16: 4-5; 19: 1-2).¹ Without any evidence about the cause of the crash, any witness statements attributing the accident to reckless or erratic driving by Geyer, and no evidence of SFSTs or PBT

¹ Geyer’s refusals to answer questions from the deputies without an attorney present constituted an unequivocal assertion of his constitutional right to remain silent. *See Babbitt*, 188 Wis. 2d at 360. Since the trial court’s decision on reconsideration properly excluded Geyer’s refusal to answer questions from its probable cause analysis (19: 1-2), the appellant does not address the inclusion of those factors in the court’s original decision denying suppression.

results showing actual impairment, a necessary link in the probable cause analysis is missing. The trial court erred in its decisions denying suppression.

CONCLUSION

For the reasons discussed above, the defendant respectfully requests that this court reverse the judgment, reverse the orders denying the motion to suppress, and remand to the circuit court for further proceedings.

Respectfully submitted 2/11/15:



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,260 words.

Dated 2/11/15:



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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed 2/11/15:



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