

RECEIVED

STATE OF WISCONSIN

COURT OF APPEALS

03-16-2015 DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

**Appeal No. 2014 AP 2625-CR
Circuit Court Case No. 12-CT-711**

vs.

ZACHARY F. GEYER,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

**Michael X. Albrecht
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1085008**

TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION	4
STATEMENT OF THE FACTS	4
ARGUMENT	6
I. Deputy Uminski Did Have Probable Cause to Arrest Geyer for Operating While Under the Influence of an Intoxicant..	6
II. The Court Should Consider the Timing of Geyer's Uncooperativeness, Which Only Strengthens Deputy Uminski's Probable Cause..	10
CONCLUSION	11
CERTIFICATION	13
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	13

TABLE OF AUTHORITIES

	<u>Page</u>
<u>State v. Anderson</u> , 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990).....	9
<u>State v. Babbitt</u> , 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).....	6, 7, 9
<u>State v. Fencil</u> , 109 Wis.2d 224, 325 N.W.2d 703 (1982).....	10
<u>State v. Kasian</u> , 207 Wis.2d 611, 558 N.W.2d 687 (Ct. App. 1996).....	8
<u>State v. Lange</u> , 2009 WI 49, ¶ 19, 317 Wis.2d 383, 766 N.W.2d 551.	7, 8
<u>State v. Paszek</u> , 50 Wis.2d 619, 624, 184 N.W.2d 836 (1971).....	7
<u>Washburn County v. Smith</u> , 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243).....	8
<u>State v. Wille</u> , 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994).....	8
WIS JI-CRIMINAL, no. 2663.....	9

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF THE FACTS

On November 15, 2012 at approximately 10:25 p.m. Deputy William Vertein of the Sauk County Sheriff's Department was dispatched to a traffic accident where a vehicle had struck a guardrail on State Hwy 58 and County Hwy F. (12:4.) Deputy Vertein was a 7-year veteran of the sheriff's department with approximately 50-100 prior OWI arrests. (12:2, 3.) While en route, dispatch updated him that a white Suburban type vehicle was towing a silver colored vehicle and sparks were coming out from underneath on State Hwy 58. (12:6.) Deputy Vertein was again updated that the vehicles had pulled into the Cut and Run Tree Service parking lot in the Village of LaValle. (12:6-7.)

Deputy Vertein arrived at this parking lot shortly thereafter, and found three vehicles and three people: Zachary Geyer, Zachary's wife Lisa Geyer, and Dale Geitz. (12:7.) Mr. Geitz advised the deputy that he towed a vehicle down Hwy 58 and that Zachary hit a guardrail near County Hwy F. (12:8.) Deputy Vertein observed the silver Camry was damaged extensively on the front passenger side and down the length of the passenger side, which was consistent with hitting a guardrail. (12:8-9, 27.)

Deputy Vertein asked Zachary why he had not contacted the sheriff's department about the accident and Zachary said he did not know he needed to and

wanted to get the vehicle off the roadway so no one else would be involved in an accident. (12:9.) Zachary appeared to be lethargic and slow to answer questions. (12:9.) Zachary dropped his ID and appeared to be in slow motion when he picked it up, which appeared to Deputy Vertein to be caused by difficulty with hand-eye coordination. (12:9-10.) Deputy Vertein also smelled an odor of intoxicants coming from Zachary's breath. (12:19.) When asked if he was wearing a seatbelt at the time he struck the guardrail, Zachary advised that he was wearing a seatbelt. (12:10.) When asked if he had been consuming alcohol that day, Zachary stated he had one beer. (12:11.) Zachary also advised that he had been coming from the City of Mauston and did have insurance on his vehicle. (12:12.) When asked what caused the accident, Zachary initially stated he did not know what Deputy Vertein meant. (12:11.) When the question was reworded, Zachary said he was not going to answer any more questions without his lawyer present. (12:11.) By way of explanation, Zachary said he had a bad experience with police in the past and said he wanted to consult with a lawyer before answering those questions. (12:18.)

Deputy Joseph Uminski from the Sauk County Sheriff's Department arrived on scene and was briefed by Deputy Vertein. (12:32.) Deputy Uminski was a 12-year veteran of the sheriff's department with approximately 350-400 OWI arrests. (12:28, 29.) Deputy Uminski noted that it was a clear night, not foggy, and road conditions were dry. (12:42.) Deputy Uminski observed that the silver car's tire was almost at a 90-degree angle to the vehicle, which was

consistent with striking a guardrail, and that there was metal and the rim itself dragging on the ground, which was consistent with the sparks that were reported to dispatch. (12:32.) Deputy Uminski spoke to Zachary's wife, who advised she received a phone call from Zachary about being involved in a crash at about 9:45 p.m.. (12:37.) Deputy Uminski then spoke to Dale Geitz, who advised that Zachary called him at about 9:40 p.m. and said that he was in a crash and his car would not move. (12:37-38.) Deputy Uminski observed that Zachary had glassy and bloodshot eyes, a strong odor of intoxicants coming from his breath, and that his mannerisms were "standoffish". (12:40.) To all questions that Deputy Uminski asked, Zachary responded that he would answer them once he had a lawyer. (12:53.) Deputy Uminski then arrested Zachary. (12:53.)

ARGUMENT

Zachary Geyer, Defendant-Appellant, challenges his conviction on the basis that Deputy Uminski lacked probable cause to arrest Zachary for Operating While Under the Influence of an Intoxicant (OWI). Whether undisputed facts constitute probable cause is a question of law that appellate courts review without deference to the trial court. State v. Babbitt, 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

I. Deputy Uminski Did Have Probable Cause to Arrest Geyer for Operating While Under the Influence of an Intoxicant.

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable law enforcement officer to believe that the suspect probably committed

a crime. State v. Paszek, 50 Wis.2d 619, 624, 184 N.W.2d 836 (1971). In the context of OWI, a reviewing court must look at 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. Babbitt, 188 Wis.2d at 356. Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." State v. Lange, 2009 WI 49, ¶ 19, 317 Wis.2d 383, 766 N.W.2d 551. Probable cause does not require proof beyond a reasonable doubt, or even that guilt is more likely than not. Babbitt, 188 Wis.2d at 357. "It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility." Paszek, 50 Wis.2d at 625. In determining whether there is probable cause, the Court applies an objective standard, considering the information available to the officer and the officer's training and experience. Lange, 2009 WI 49, ¶ 20.

Here, Deputy Uminski had ample evidence that Geyer had committed an OWI offense:

- At roughly 9:40 p.m., Geyer crashed into a stationary object, a guardrail, that resulted in severe damage to his vehicle on a clear night with dry road conditions.
- Rather than reporting the accident to law enforcement as he was required by law, Geyer took the extraordinary steps to conceal the

evidence by having the vehicle towed by a friend and Geyer personally left the scene of the crash.

- Geyer appeared to be slow and lethargic.
- Geyer dropped his ID and appeared to be in slow motion when he picked it up.
- Geyer had a strong odor of intoxicants coming from his breath.
- Geyer had bloodshot and glassy eyes.
- Geyer admitted to drinking alcohol.

Although the deputies' investigation was ultimately stymied by Geyer's sudden unwillingness to discuss the particulars of the crash, given the information known to the officers up to that point and what these things meant in their experience, Geyer's guilt was more than just a possibility.

It is well established that Field Sobriety Tests (FSTs) and Preliminary Breath Tests (PBTs) are not prerequisites to probable cause for OWI. See Lange, 2009 WI 49; State v. Wille, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994); Washburn County v. Smith, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243; and State v. Kasian, 207 Wis.2d 611, 558 N.W.2d 687 (Ct. App. 1996). Geyer attempts to distinguish precedent from the case at bar by pointing out that the deputies here were not at the scene of the accident and the suspect here was not physically incapacitated. The State concedes that probable cause would be infinitely more obvious had the deputies asked Geyer to perform FSTs or a PBT, as these are non-testimonial in nature and his specific refusal (or refusal to answer)

could contribute to evidence of probable cause. See e.g., Babbit, 188 Wis.2d 349. But the case law is clear that there are no bright-line rules – probable cause is to be determined on a case-by-case basis. Under the specific circumstances of this case, those two additional requests would only have strengthened what was already probable cause. After all, the deputies were not at the scene of the accident due to Geyer’s own actions of attempting to flee and conceal the evidence.

The crash and subsequent removal of Geyer’s vehicle looms large in the deputies’ probable cause rubric. Geyer attempted to explain this away from a public safety standpoint and claimed he did not know he needed to report an accident to law enforcement. But if the facts support a reasonable inference of unlawful conduct, the officer is entitled to draw that inference “notwithstanding the existence of other innocent inferences that could be drawn.” See State v. Anderson, 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990). Consciousness of guilt is a perfectly reasonable inference for the deputies to draw from Geyer’s removal of the vehicle from the scene.

It is absolutely true that “not every person who has consumed an alcoholic beverage is ‘under the influence’” as stated in WIS JI-CRIMINAL, no. 2663. But every juror who sits for an OWI trial also hears the rest of that instruction: “What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.” WIS JI-CRIMINAL, no. 2663 (emphasis added). Geyer’s lethargy, admission to drinking, dropping and slowly

picking up his ID, bloodshot/glassy eyes, and strong odor of intoxicants all would have led a reasonable officer to conclude that Geyer was less able to control a motor vehicle, specifically because he had just crashed his car into a stationary object and tried to secrete it away from the scene.

II. The Court Should Consider the Timing of Geyer's Uncooperativeness, Which Only Strengthens Deputy Uminski's Probable Cause.

It is well established that the Fifth Amendment right to silence applies to pre-custodial statements to law enforcement officers. See State v. Fencil, 109 Wis.2d 224, 325 N.W.2d 703 (1982). However, the facts of this case are unique and undersigned counsel is aware of no case, Wisconsin or Federal, that deals with the timing of the invocation of right to silence pre-custody as it pertains to probable cause. Here, Geyer freely spoke to Deputy Verlein up until the point the deputy asked what caused the accident, to which he first responded that he did not understand. After a rephrasing of the question, Geyer said repeatedly throughout the contact with deputies that he would answer questions once he had a lawyer. (12:53.) Geyer went on to explain that he had a prior bad experience with police.

Assuming *arguendo* that this request for counsel constitutes an invocation of right to silence, the timing of Geyer sudden unwillingness to answer questions is something that an officer under the circumstances simply could not ignore – and this timing is only brought about by Geyer's own decision to speak to the deputies in the first place. Had Geyer immediately refused to speak with police, there would be no question that his silence could not be used to establish probable

cause. Or had Geyer cut off questioning when asked about his car insurance, there would be no relevant inference to draw. But because Geyer at first choose to speak and then only choose to stop speaking when the deputy began asking about the reason for the crash (and by implication, his impairment), Geyer's choice to then cut off questioning until a lawyer was present (to which he was not entitled pre-custody) is evidence of consciousness of guilt.

Ultimately this is just an additional factor that strengthens Deputy Uminski's probable cause for arrest. The trial court recognized that probable cause was established even without this factor. However, Geyer's decision to speak, not Geyer's silence, is what makes the timing of his uncooperativeness suspicious and therefore relevant to probable cause.

CONCLUSION

Given what Deputies Vertein and Uminski knew about the crash and their personal contact with Geyer, they were faced with the question of whether it was more than a mere possibility that Geyer was "less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle" due to the consumption of alcohol. A reasonable officer under the circumstances would certainly have concluded that there was probable cause to arrest Geyer for operating under the influence of an intoxicant. For all of the forgoing reasons, the trial court's decision must be affirmed.

Respectfully submitted this 11th day of March, 2015.

Michael X. Albrecht
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1085008

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,018 words.

Signed:

Michael X. Albrecht

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of §809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

Michael X. Albrecht