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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

In the matter of the refusal of Kirk L. Griese:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KIRK L. GRISE,

Defendant-Appellant,

District 4

Appeal No. 2015AP000180

Circuit Court Case No. 2014TR7899

DEFENDANT-APPELLANT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DODGE COUNTY, WISCONSIN, THE HONORABLE JOHN R. STORCK PRESIDING, CASE NO. 2014TR7899

Respectfully submitted,

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STATEMENT OF ISSUES

1. Did Deputy Weinfurter have probable cause to arrest Griese, thereby triggering the implied consent law?

Answered by Trial Court: Yes

STATEMENT ON ORAL ARGUMENT

Appellant's counsel believes oral argument would be helpful to the appellate court to the extent that the appellate court has questions that go beyond the current submissions, or to address the importance of the temporal element in OWI cases in general and probable cause determinations in particular. Appellant recommends and requests oral argument for the purpose of clarifying any issues the reviewing Court may have questions about, particularly the importance of the "while" element in the determination of probable cause in an OWI case.

STATEMENT ON PUBLICATION

Appellant believes that the issue this case brings into sharp relief differs from most reported cases, and that therefore publication would be helpful to the bench and bar, as well as law enforcement, to provide guidance to all under the circumstances where an officer is investigating an OWI and does not know the time of driving, but does know that the defendant consumed alcohol after driving.

STATEMENT OF THE CASE

This appeal arises out of an alleged implied consent violation (§343.305(9)(a), Wis. Stats). The defendant was arrested for OWI outside Beaver Dam, in Dodge County, Wisconsin, and refused to consent to a blood test when requested. Proper notice of intent to revoke was given, and a refusal hearing request was filed.

A refusal hearing was held on December 18, 2014, at which Deputy Robbie Weinfurter testified. The Court ruled that the officer had probable cause to believe that the defendant, Kirk Griese, had been operating while intoxicated, and that therefore his refusal to submit to the blood draw was a violation of the implied consent law, §343.305(9)(a), Wis. Stats.

An appeal was timely filed seeking review and reversal of the Circuit Court decision.

STATEMENT OF FACTS

The police officer in this case, Deputy Robbie Weinfurter, according to his testimony at the refusal hearing, appears to have known the following facts at the time of the defendant Kirk Griese's arrest.

Deputy Weinfurter was informed by dispatch that a cycle had tipped over at Highway 151 and County Road C, in Dodge County, Wisconsin, and that the operator of the cycle had driven up a driveway to the Hill Tavern. (R.14;5:7-8;7:6-11) The officer was dispatched around 6:18 p.m., drove to the tavern, and arrested the defendant at approximately 6:49 p.m. (R.14;4:19-24; 8:22-24). The

time between the dispatcher calling the officer and the officer arresting Griese was approximately 31 minutes. (R.14;9:1-3)

Arriving on the scene, Deputy Weinfurter spoke briefly with Deputy Severson, who had arrived on the scene before him. (R.14;10:12-15) Deputy Severson advised Deputy Weinfurter that Griese was the operator of the motorcycle. (R.14;10:19)

Deputy Weinfurter next interviewed Griese, who provided him with information that tipping his motorcycle was not an uncommon occurrence for him, nor a concern that should have caused the police to have been at the tavern talking to him because it wasn't a big deal to him. (R.14;11:10-14) The damage to the motorcycle, as observed by Deputy Weinfurter, was consistent with a motorcycle which had been tipped and scraped along the side of the road. (R.14;12:5-7). The tipping and scraping occurred when Griese attempted to make a left turn. (R.14;12:24-25) The Hill Tavern is located on the southwest corner of the intersection of Hwy. 151, a divided highway, and County Road C. (R.14;13:2-4)

The deputy indicates that upon talking to Griese he noticed a strong odor of intoxicating beverage, that Griese had bloodshot watery eyes, and that he was swaying. (R.14;13:16-19). Griese denied being injured in any way and did not appear to be injured. (R.14;13:20-25) Deputy Weinfurter indicated that based on the swaying, the watery eyes, and odor of alcohol, he was suspecting at that point that Griese was under the influence of an intoxicant. (R.14;14:1-4).

According to Weinfurter's testimony, Griese indicated that he had nothing to drink at the bar, that anything he had to drink came before arriving at the bar, but did not indicate how much he had to drink or when that might have been, nor the location of the drinking. (R.14;14:20-15:1) The officer agreed that the information Griese gave him regarding not drinking at the tavern was incorrect according to Deputy Severson's investigation. (R.14;22:13-17) The officer admitted he did not know, at the time of the arrest how long before the driving any such drinking may have occurred. (R.14;22:24-23:2) The officer admitted that Griese had not said where or how much he had to drink at any time prior to reaching the tavern. (R.14;22:18-20) Neither did Griese indicate when he would have had anything to drink earlier in the day. (R.14;22:21-23)

The officer represented that everything that was in his police report was contained in the factual recitation in the criminal complaint. (R.14;25:12-15) The officer, upon review of the report and the complaint, admitted that his conversation with Griese regarding Griese saying that he did not have anything to drink at the bar, or that he had something to drink earlier, is not recorded in his report. (R.14;26:10-19)

Griese refused to take any field tests and also refused to take a PBT. (R.14;15:9-21). The officer learned nothing about Griese's prior driving record until after the arrest. (R.14;17:1-2;27:4-7) The officer indicated his decision to arrest was based on his observations of Griese and the reported driving behavior. (R.14;17:20-21)

The officer testified that he was not sure when the reporting witness, Mr. Johnston, had called dispatch in relation to the time of the crash. (R.14;20:3-12) Dispatch did not tell the officer what the time of Johnston's call was. (R.14;20:13-17) After indicating that the 9-1-1 display would show the time of a 9-1-1 call, the officer admitted that he did not look at that to note the time of the call. (R.14;21:4-10) The officer indicated he was responding to the scene out of concern that someone might be injured. (R.14;21:10-12) But, Mr. Johnston's concerns for the operator of the cycle were not expressed until he made his statement (R.14;30:11-20), which Weinfurter did not have at the time he responded to the dispatch. (R.14;19:7-21) The officer admitted he did not, prior to the arrest, make even a mental note of what the time of the call might have been (R.14;22:2-8)

Regarding the tipping of his motorcycle, Griese made a statement that the traffic was coming up so quickly that he felt he had to make the turn quick. (R.14;23:6-15) The officer understood this to mean that the speed of the turn was faster than the speed that would have been necessary to keep the bike in an upright position when executing the turn. (R.14;23:21-24)

The officer indicated he did not go out to look at the actual scene of the tipping. (R.14;24:1-3) Thus, the officer did not know if there was gravel or smooth pavement or what the road conditions were (such as gravel) that would have affected the turn and caused the tipping. (R.14;24:4-7)

As far as the turn that Griese made, the officer describes it as essentially a perpendicular or right angle, turn, to go from 151 onto the county road that leads to the driveway to the tavern. (R.14;29:2-7) The officer's understanding of where the tipping occurred would have been the median on Highway 151, not in any particular lane of travel. (R.14;29:8-11)

On redirect, the officer testified that Deputy Severson had spoken to a bartender who indicated that Griese ordered a Bacardi and Coke and drank approximately one inch out of it. (R.14;27:16-23) There was no testimony, and apparently no inquiry, as to how many bartenders were working, whether this was the only bartender that served Griese, or how long Griese had been in the bar prior to the officer's arrival.

The prosecutor attempted to establish the simultaneity of the 9-1-1 call with the tipping incident. However, the officer clearly testified that the information he relied on when forming his opinion regarding the timing of the 9-1-1 call was the statement of Mr. Johnston. (R.14;28:1-8) The officer did not have that statement at the time of the arrest. (R.14;19:16-21) On recross, the officer admitted any belief that he had about the timing of the 9-1-1 call was not based on anything relayed to him by dispatch. (R.14;29:16-30:10), and that the officer's testimony regarding Mr. Johnston's concerns for the safety of the motorcycle operator were gleaned from Johnston's statement, which was taken later, after the arrest. (R.14;30:11-20)

ARGUMENT

A. Whether the Deputy had Probable Cause is an Issue this Court Reviews Without Deference to the Trial Court.

The issue to be addressed at an implied consent revocation hearing, or refusal hearing, as relevant to this appeal, is

> "Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol . . . to a degree which renders him or her incapable of safely driving . . . and whether the person was lawfully placed under arrest for violation of s. 346.63(1) or a local ordinance in conformity therewith. . ."

State v. Nordness, 128 Wis. 2d. 15, 25-26, 381 N.W.2d 300 (1986) (citing prior statute).

In order for the defendant to be found to have violated the implied consent law, and thereby have his driving privilege revoked, the state must "present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle **while** under the influence of an intoxicant." (emphasis added) *Id.* at 35. Probable cause is "not easily reducible to a stringent, mechanical definition . . ." *Id.* (citations omitted). Probable cause is "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *Id.* (citations omitted). "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." (emphasis added) *Id.* (citations omitted).

While it is true that "a defendant's refusal to submit to a field sobriety test may be used as evidence of probable cause", *State v. Babbitt,* 188 Wis. 2d. 349, 363, 525 N.W.2d 102 (Ct. App. 1994), that fact alone does not constitute probable cause.

In determining the reasonableness of an officer's determination of probable cause, determining what constitutes reasonableness is a common sense test. *State v. Waldner*, 206 Wis. 2d. 51, 56, 556 N.W.2d. 681 (1996). The court should give weight to the specific reasonable inferences the officer is entitled to draw. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Section 968.24 of the Wisconsin Statutes is the statutory expression of the constitutional requirements set forth in the *Terry* opinion. *State v. Waldner*, 206 Wis. 2d. at 55.

The probable cause to arrest is what triggers the officer's ability to, first, arrest the defendant and second, request that he give a blood sample. The question is, did the officer have probable cause to arrest the defendant? *State v.* Wille, 185 Wis. 2d, at 682, 518 N.W.2d 325 (Ct. App. 1994) and §343.305(9)5.a.

Probable cause to arrest is commonly defined as:

> Proof that would lead a reasonable police officer to believe that a person probably committed a crime. (citation omitted)

County of Jefferson v. Renz, 231 Wis. 2d, 293, 302, 603 N.W.2d 541(Ct. App. 1999).

The test is a non-technical, common sense one, in which courts consider the totality of the circumstances known to the police at the time. *Dane County v. Sharpee*, 154 Wis. 2d, 515, 518, 453 N.W.2d. 508 (Ct. App. 1990).

"Whether undisputed facts constitute probable cause is a question of law that we review without deference to the trial court." (citation omitted) *State v. Babbitt* 188 Wis. 2d. at 356.

B. What the Officer Knew at the Time of Arrest was Limited, and There is Insufficient Evidence to Find That There Was Probable Cause to Believe that Griese was Operating While Intoxicated.

At the refusal hearing, the officer testified to many things, in response to the prosecutor's questioning, that he learned later, after the time of arrest. (R.14;17:2; 19:9-21; 26:10-19; 27:4-7; 29:16-30:10; 30:11-20) None of those "facts" may be relied upon, by either the officer or this Court, to establish probable cause for the arrest.

What the officer did know at the time of arrest was that he had personally observed an odor of intoxicants, bloodshot eyes, and swaying. (R.14;13:16-19) The officer had no field tests or PBT to rely upon because Griese refused both, telling the officer this should not be a concern because the tipping of his motorcycle was no big deal. (R.14;15:9-21; 11:10-14) The officer knew that Griese had driven to the bar, and knew that he had tipped his motorcycle executing the right angle turn, at the median, before riding the motorcycle and driving across the other half of the divided highway, up the county road (a brief distance, as far

as the bar's driveway) and then up the driveway to the bar. (R.14;7:9-11 and 29:2-11)

With respect to Griese's drinking, the officer claimed he knew that Griese said he had been drinking prior to arriving at the bar but was unable to locate any reference to that in his report. Weinfurter did know that Griese had been drinking since arriving at the bar. (R.14;14:21-15:1 and 18:21-25)

The above is what the officer knew at the time of arrest that could constitute probable cause to arrest. Griese contends that the officer did not have probable cause to believe that he was intoxicated **while** driving.

What the officer did not know, and what Deputy Severson did not inquire into inside the bar, is also important and also constitutes the "totality of the circumstances" that must be taken into account by this reviewing Court, as well as the police officer, in determining probable cause to arrest.

The officer did not know how much Griese had to drink, either prior to driving the motorcycle or after. While Deputy Severson reported to Deputy Weinfurter that Griese had consumed part of one drink while in the bar, according to one bartender, there was no inquiry or no information as to how many bartenders were working, how many had served Griese, or how long Griese had been at the bar. The record reveals that Deputy Severson apparently talked to one bartender who served Griese one drink. There is no information to indicate whether Deputy Severson inquired as to whether there were other bartenders working, whether other drinks had been served, or, most importantly given the

other facts of this case, how long Griese had been in the bar. Deputy Weinfurter did not. (R.14;19:4-6)

The officer did not know when Griese had finished driving the motorcycle. The trial court made the finding that "it's clearly a reasonable inference for a deputy who's had experience for ten years to believe that a 9-1-1 call of an accident of somebody tipping over and doing that thing that it's being made at or immediately after the incident occurred." (R.14;38:24-39:4) This finding lies at the heart of the court's determination of probable cause.

With respect to the above inference that the Court found reasonable for the officer to draw, the officer's own testimony does not support that specific inference. The officer specifically testified that he was not sure when the 9-1-1 call was made by Johnston. (R.14;20:3-12) He did not know, and was not told by the dispatcher when the 9-1-1 call was made. (R.14;20:14-17). He did not look at the time of the call on his display in his squad car, although he testified that it would have been available to him had he looked. (R.14;21:8-19; 22:2-8). Most importantly, he had no information as to how long Johnston waited before placing the 9-1-1 call.

The officer's belief that the 9-1-1 call was simultaneous with the tipping was not based on any reasonable inference drawn by the officer based on his training and experience, as found by the trial court, but rather was based upon the statement of the witness. (R.14;28:1-8) The statement of the witness was something that was taken after the arrest. (R.14;19:7-21). Thus, at the time of the

arrest, the officer had drawn no inference, reasonable or otherwise, and had no facts at his disposal from which to draw a reasonable inference, as to when the 9-1-1 call, and when the tipping, occurred.

Further, the witness was not at the scene when the officer arrived. The witness kept on driving. Thus, the witness apparently did not consider the tipping to be a serious enough accident which would require him to stop and render assistance, or remain to explain what had happened to the police. The officer responding to the scene claimed he was responding simply out of a concern for Griese's well being. (R.14;21:10-12) But again, Johnston's concerns for the operator of the cycle were not expressed until he made his statement (R.14;30:11-20), which Weinfurter did not have at the time of his responding to the dispatch. (R.14;19:7-21). In any event, once it was established, that Griese was not injured (which should have been the first inquiry if in fact this was the reason for the officer responding), with Griese coming out of the bar to speak to the officer, that should have been the end of the inquiry, because there was no reason to proceed further at that time.

There was no "bad" or erratic driving that was suspicious of intoxicated driving. Rather, the "tipping", according to the information the officer had, was not serious enough to do the rider of the motorcycle any damage, or to do damage to the motorcycle beyond a few scrapes. (R.14;12:5-7) The officer did not observe nor was he aware of, any bad driving prior to the attempted 90 degree corner, at speed, under circumstances where Griese said the traffic was going fast

and he was feeling pressured, which resulted in the tipping. (R.14;23:13-15; 21-24) Neither did the officer examine the pavement to see if there was gravel or anything else along the median area where the tipping occurred. (R.14;24:1-7) Thus, the tipping itself is not suspicious and is not indicative of anything related to operating while intoxicated. It was, as Griese informed the officer, not uncommon for him to "put the motorcycle down." (R.14;11:10-14)

The officer conceded that any conclusion he drew with regard to the timing of the 9-1-1 call was, ultimately, an assumption, given the fact that Mr. Johnston's statement had not yet been taken. (R.14;29:16-30:1). A reasonable reading of his testimony would lead to the conclusion that the officer was, somewhat, "filling in the blanks" in his probable cause with information that he came by later. This is not permissible.

Another instance of this "filling in the blanks" comes when the officer talks about Griese's "admission" to drinking earlier. According to the officer's police report, as fully contained in the complaint, there was no such admission. The officer, upon review of the report/complaint, appears surprised in the record when he admits that there is no mention of Griese's "admission" in the report/complaint. (R.14;26:18-19) The officer had believed, upon testifying to this previously, that this "admission" of Griese's was in his report. (R.14;25:9-11). The officer was simply mistaken.

What this Court, and the officer, is left with is an odor of intoxicants, bloodshot eyes, and some swaying from an individual who had **at least** one drink,

or part of one drink, at a tavern, over some undetermined period of time after driving. He exhibited no "bad" or suspicious driving when he was driving the motorcycle (whenever that was). The officer only approached Griese out of a concern for his safety due to a 9-1-1 call made at an undetermined time. Upon being approached the driver of the motorcycle indicated that he was not hurt and told the officer it was nothing to be concerned about, because it was no big deal. (R.14;11:10-14; 13:21-25)

The Supreme Court has stated that:

> After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating a vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances.

County of Jefferson v. Renz, 231 Wis. 2d, 293, 310, 603 N.W.2d. 541 (Ct. App. 1998).

Now, defendant does not argue that the police officer needs to arrest at the earliest possible time in the investigation. Facts to support probable cause may be known to the officer and yet the officer seeks additional evidence by asking for more tests or a PBT. It is also clear in the caselaw that the refusal to take field tests or a PBT may be considered as evidence of probable cause. *State v. Babbitt*,188 Wis. 2d at 356. However, neither *Babbitt*, nor any other decision, states that the refusal to take a PBT, or the refusal to do a field test, constitutes

probable cause in and of itself. And as the *Renz* decision suggests, one reason to request field tests is because an officer does not yet have enough evidence to establish probable cause. *State v. Swanson*, 164 Wis. 2d 437, 453-54, n.6, 475 N.W.2d 148 (1991), and *State v. Seibel*, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991). The appellate decisions consistently remind us that "the totality of the circumstances" is what governs a probable cause finding.

In this case, the most important fact to consider is that no matter how much "probable cause" relating to intoxication the deputy did in fact establish once he confronted Griese, there is a glaring lack of connection between Griese's physical state of intoxication at the time the officer confronted him (which had, obviously and uncontestedly, been augmented by his drinking at the bar following his ride on the motorcycle) and the time of driving. Nothing was known about what Griese had to drink earlier, or when he had to drink it. Not enough inquiry was made to determine the full extent of Griese's drinking after driving. Thus, Griese's state of intoxication at the time the officer confronted him is close to being irrelevant due to the lack of information in the record regarding the time of driving.

Simply put, not enough investigation was done to determine whether Griese was intoxicated **while** driving or not. This is almost not even a question of probable cause, rather, it may be a question of whether there is any proof in the record at all that Griese was intoxicated **while** driving.

With regard to the "reasonable inference" found by the trial court, the officer's testimony focused on his experience with 9-1-1 dispatch calls being made

promptly after a 9-1-1 call is received (R.14;29:21-30:20) This does nothing to establish how much of a delay there was on the part of Mr. Johnston (who may have been tailgating Griese and who may have been the vehicle Griese felt pressured by). There may have been a substantial delay.

Deputy Severson did not ask anyone in the bar how long Griese had been there. As far as the record shows, he only spoke to one bartender. There is no evidence that there was only one bartender in the bar, or if other employees served Griese alcohol.

There was no attempt at flight by Griese. He tipped the bike, he righted it, he drove to the bar, and he commenced drinking. What the officer did not know, and what this record does not reveal, constitutes as much or more evidence of whether or not there was probable cause to arrest here than what the officer did know. These holes in the evidence are part of the totality of the circumstances of this case.

In the end, Deputy Weinfurter had little more probable cause to interrogate, much less arrest, Griese than he did any other person in the bar that afternoon, had he stopped and simply randomly picked one off of a barstool. The tipping, which is the officer's reason for responding to the scene in the first place, was not in any way indicative of intoxicated driving. It occurred in an area of unknown pavement quality, at a higher speed than the rider wanted to be going when executing a 90 degree turn, which was executed, by the driver's own statement to the officer, to get out of the traffic he found troubling. The totality of these circumstances do not

demonstrate that Griese was operating **while** intoxicated, at least not to the recognized standard of probable cause.

C. There is a Dearth of Authority on the "While" Element

The essential elements of this particular crime (or in the case of a first offense, which this is not, forfeiture), in their simplest terms, are: A) Driving, B) While, C) Intoxicated. One can turn them around and they make just as much sense: A) Intoxicated, B) While, C) Driving. Either way, the intoxication and the driving must be temporally connected. Most of the reported cases deal with situations where the police officer observed the defendant driving, and then stopped the defendant. In most cases, there is no issue with respect to the "while" element, because the condition in which the officer finds the defendant immediately upon stopping him is, obviously, the same condition the defendant was in while they were driving only moments, sometimes seconds, before. Sometimes an accident scene is investigated where the driver was at the accident scene, accompanied by other witnesses. The witnesses invariably establish the time of driving.

Of the cases cited in this brief, including *Nordness, Sharpee, Renz, Wille* and *Babbitt*, in none of those cases was there an issue regarding the "while" element, or when the defendant was driving in relation to his or her intoxication.

There is one case, which is cited here for persuasive purposes only, in which a defendant did attempt somewhat to raise a timing issue, which this Court might find helpful to analyze in the light of the issues in this case. In *State v.*

Kissack, 323 Wis. 2d, 278, 2009 WL 49 31 389 (Wis. App.), an officer responded to a squealing tire complaint and heard an individual running through the woods near a damaged vehicle in a wooded area. *Id.* at ¶¶10, 11. A witness to the driving event admitted to being a passenger in the vehicle, and further admitted that he and the defendant, Kissack, had been drinking during the course of the evening, that Kissack had dropped him off at his house, and that then Kissack started driving down the street "doing doughnuts and crashing into things." *Id at* ¶12. Kissack (because it was, of course, Kissack who was running through the woods and being pursued by the other officer) was eventually caught when he stopped running, and was brought back to the cul-de-sac where the damaged car, and the other officer, were. *Id at* ¶ ¶ 14-15

On appeal, Kissack, chiefly argued the case on the grounds of what the arresting officer knew personally as compared to what he knew through his partner. The Court of Appeals determined that there was no difference, and that the police can rely on each other's knowledge and do not have to personally interview every witness themselves. *Id* at ¶19.

In a secondary argument, dealt with toward the end of the opinion, the Court of Appeals indicates that Kissack made an argument that the police could not clearly relate the time of operation to the time of intoxication. *Id* at ¶31. The court cited the precise time of the report of tires squealing being around 2:40 a.m.. *Id* at ¶32. The passenger/witness had identified Kissack as the driver at that time, doing doughnuts and crashing into things. *Id.*

Those two paragraphs, ¶¶31, 32 of the opinion, are the extent of the analysis of the "while" issue in the *Kissack* case and, not surprisingly, the finding went against the defendant. Most important to the analysis of this case, however, is the fact that the *Kissack* officer and court had a definite time, 2:40 a.m., to connect the driving that was taking place at that time with the intoxication that the officer observed once he apprehended *Kissack.* Thus, *Kissack* differs from the instant case in that, first, the officers had a definite time of driving to relate to, through the witness, and related to the 2:40 a.m. report of squealing tires. In the instant case, as was clearly established by Deputy Weinfurter's testimony, there is **no** evidence in the record as to **when** the 9-1-1 call was made in relation to the driving. While it may be reasonable to believe the dispatch call to the officer was made shortly after the 9-1-1 call came in, there is no way to know how long Mr. Johnston waited before making that call. There is no evidence in the record to support any finding on that issue, nor did the officer have any knowledge of that timing when he made the arrest. The belief he testified to came about after taking Johnston's statement, after the arrest. (R.14;28:1-8, 19:7-21)

Second, there was no drinking by *Kissack* after his "doughnut and bumper car" routine was over. He did not go into a bar and start drinking. He was too busy running through the woods trying to evade capture. Thus, the state of intoxication in which the officer found *Kissack* was obviously the same as it was at 2:40 when he was crashing into things and squealing his tires.

Finally, in *Kissack* we have observable bad driving which is suspiciously consistent with intoxicated driving. Kissack was doing doughnuts and crashing into the items encircling the cul-de-sac (including five "crashes" and some type of wire hanging down from utility poles, in addition to the vehicle itself being damaged, *Id* at ¶10), whereas in the instant case Griese tipped his cycle making a high speed, 90 degree turn, did what one can reasonably conclude was some sort of controlled slide so that the only damage to either he or the cycle were some scrapes to the cycle, righted the cycle, and proceeded directly to the bar. Without knowledge of the roadway or any evidence of any bad driving prior to this, the reasonable and common sense conclusion to draw from it is that Griese, consistent with the evidence in this case, felt pressured by the traffic, tried to execute a right angle turn at a speed which was somewhat too fast, because he did not want to slow down and get hit by the problematic traffic, was in fact going too fast and did a controlled slide in which the side of the motorcycle was scraped, got up and went along his way. Quite an athletic feat, actually. He did not try to flee from the police and, most importantly, it is unknown in this record when any of this occurred.

CONCLUSION

One of the things that is concerning in this case is the lack of investigation by the police officers as to the time of the driving. The arresting officer seems to have assumed that there was a temporal connection between the driving and intoxication without ever having taken the time to establish the facts. Deputy

Severson, when he was in the bar, could have asked not only whether more than one bartender may have served Griese, but how long Griese had been in the bar. That would have given the record some indication of Griese's time of last operating, as well as time spent drinking. Severson chose not to make those inquiries.

Similarly, Deputy Weinfurter could have inquired of Griese, and could have interviewed the people in the bar himself, or could have attempted to contact Johnston by cell phone, to determine the time of Griese's last operation. Weinfurter chose not to do so.

Since Deputy Severson is the only officer that actually went into the bar, it is also concerning that he spoke to only one bartender about one drink, and never finished the investigation to determine if that was the only drink that Griese had ordered or consumed. Since that information could only be helpful to Griese, in terms of connecting the intoxication to the driving, it is not surprising that the officer did not do a full inquiry. It is also not acceptable. With a perfectly reasonable opportunity to ascertain the full facts prior to making an arrest decision, Deputy Severson chose to ask one bartender about one drink. Deputy Severson chose not to ask how long Griese had been in the bar, or when he arrived. Thus, the police chose not to establish a time of driving, and chose not to inquire as to how much Griese had to drink at the bar once they had established that he had been drinking at the bar following his operation of the motorcycle.

Deputy Weinfurter, upon being advised by Deputy Severson that Griese had been drinking at the bar, never followed up with Griese to ask him why he was denying it. Never asked him when he arrived at the bar, or how much he had to drink at the bar after he determined Griese's initial denial of drinking at the bar was not true. Perhaps Griese misunderstood the officer's question. We will never know, because the officer never asked the obvious, relevant, follow-up questions to complete his investigation.

The police officers, at least in this case, did not follow up their investigation with obvious, relevant questions that would have clarified both the time of the driving and Griese's alcohol consumption after he stopped driving. It is apparent that once Deputy Severson found out that Griese was drinking in the bar he stopped investigating and he went with his minimal, least harmful to the prosecution, information to Deputy Weinfurter and told him only that.

The decision in *State v. Swanson* stands out among Wisconsin Appellate decisions in actually taking a stance and a position that probable cause was not present under the circumstances present in that case. One of the problems the Court had in the *Swanson* case was that on the minimal evidence before it at the time, the *Swanson* Court concluded that without further field testing, there could not have been probable cause to arrest.

It is just as important now, as it was then, at least occasionally, for the appellate courts in Wisconsin to take a position and indicate where the line for probable cause to arrest exists. The importance of this case is that it brings into

sharp relief the temporal element of our operating while intoxicated law, and that the W in OWI must actually be present before someone can be arrested for it. At least, there must be probable cause that the W is present.

In the instant case the "while" element has no evidence to support it in the record. The time between dispatch of the deputy and arrest was approximately 31 minutes. That much is in the record. The time between the tipping incident and the dispatch call is unknown in the record, and there is no reasonable inference to be drawn one way or another on these facts with regard to the timing of the 9-1-1 call. Mr. Johnston did not remain at the scene or do anything else to give an indication, in the record, as to the time of either his call or the tipping incident.

Griese, for his part, did not flee the scene, and thus did not act in a manner indicative of consciousness of guilt. He told the officer he wasn't hurt and wondered what the big deal was because he tips his bike during the riding season frequently. Even though he denied it initially to the police officer, and in the absence of follow-up questions regarding it, Griese himself obviously knew he had been drinking in the bar and therefore had a good reason not to want to take a blood test or a PBT, not to mention doing the field tests. It is reasonable to find that Griese knew he had been drinking in the bar and knew that evidence of his intoxication would be used against him, and therefore the consciousness of guilt that would otherwise be indicated by his refusals is lessened, or even abrogated, in this case, because Griese (who denied drinking at the bar) had apparently not figured out that drinking in the bar made him less guilty, not more.

All of the above, though important, is not as important as the lack of a temporal connection between Griese's apparent state of intoxication, such as it was when observed by Deputy Weinfurter, and the time of his driving. This case comes down to the importance of the W in OWI.

Was Griese operating? Yes he was. That was not contested at the refusal hearing. Was Griese intoxicated? For purposes of this analysis it must be conceded that this reviewing Court, as did the circuit court, will probably find sufficient evidence of Griese's intoxication from the officer's recital of his observations, combined with the refusal to do field tests or allow a PBT to be administered, that there was probable cause to believe Griese was intoxicated. This concession is mitigated somewhat by the fact that the officer indicated that the driving of Griese was part of his decision to arrest, and it must again be noted, at least in passing, that there is nothing inherently suspicious about Griese's tipping incident on the motorcycle given the information that the officer had at the time of arrest. Griese determined that the traffic would not allow him to slow sufficiently to make the turn, and therefore attempted to execute a quicker turn than he ordinarily would have at that intersection. Rather than risk a collision with another vehicle Griese went into what must have been a somewhat controlled slide to result only in some scraping to his cycle. If anything, the reasonable conclusion to draw from that athletic endeavor was that Griese could not have been too intoxicated at that time or the accident would have been much worse.

There are not, however, any facts in evidence to allow this court to find that the officer had probable cause, at the time of the arrest, with respect to the "while" element. Under the totality of the circumstances, given that Griese had at least a part of one drink while at the bar after driving, and given the fact that the officers failed to inquire sufficiently to determine the parameters and extent of Griese's drinking at the bar after being told that he was drinking at the bar, the totality of the circumstances indicates that we don't know how much Griese had to drink at the bar after he was driving, and we don't know when he was driving. This makes the state of intoxication after exiting the bar and speaking with Deputy Weinfurter essentially irrelevant. His state of intoxication at that point is not reasonably related to his state of intoxication, or sobriety, at the time of driving. The case doesn't get there simply because the temporal connection is not established anywhere in the record.

For the above reasons, and without a W being present in this case, from a probable cause standpoint, the State is left only with OI and the decision of the circuit court should and must be reversed in order to preserve the law and ensure that citizens are not arrested unless probable cause to believe all of the elements of OWI are present prior to arresting any individual for the crime of operating while intoxicated.

Defendant asks this reviewing Court to reverse the trial court and order that the refusal be dismissed.

Dated this 9th day of April, 2015.

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