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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT 2

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Village of Fredonia,  
*Plaintiff-Respondent,*

*v.*

Appeal No. 15-AP-298

Bruce A. Gossett,  
*Defendant-Appellant.*

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*ON APPEAL FROM A DECISION AND JUDGMENT  
ENTERED BY THE OZAUKEE COUNTY CIRCUIT COURT  
THE HONORABLE PAUL V. MALLOY, PRESIDING*

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**PLAINTIFF-RESPONDENT'S BRIEF**

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## **STATEMENT OF THE ISSUES**

Did Deputy Marshal Erickson have the requisite quantum of proof necessary to request a preliminary breath test sample from Gossett?

The circuit court answered: Yes.

## **STATEMENTS ON ORAL ARGUMENT AND PUBLICATION**

This appeal will be decided by one judge pursuant to Wis. Stat. § 752.31(3); therefore, the opinion should not be published. Wis. Stat. § 809.23(1)(b). Oral argument is not requested as the briefs will fully present the issue to be decided.

## **STATEMENT OF THE CASE**

On March 8, 2013, Deputy Marshal Christopher Erickson of the Village of Fredonia Marshal's Office cited Gossett for operating a motor vehicle while under the influence of an intoxicant, contrary to Village of Fredonia Code of Ordinances § 10-1-1(a) adopting Wis. Stat. § 346.63(1)(a). (R. 17.) When the Wisconsin State Laboratory of Hygiene returned its analysis of Gossett's blood, Erickson cited Gossett for operating a motor vehicle with a prohibited alcohol concentration, contrary to Village of Fredonia Code of Ordinances § 10-1-1(a) adopting Wis. Stat. § 346.63(1)(b). (R. 18.)

Gossett, by counsel, entered not guilty pleas in the municipal court, and filed a motion to suppress evidence deriving from the stop and arrest. (R. 1, 2.) The motion was heard and denied by the municipal court. (R. 14.) The parties stipulated as to what the trial testimony would be, and the municipal court found the defendant guilty on the basis of the stipulated testimony. (R. 16:1.)

Gossett appealed the OWI and PAC convictions to the circuit court, asking for a *de novo* jury trial. (R. 19.) The circuit court reheard and denied Gossett's motion to suppress evidence. (R. 28, 41.) Gossett then chose to forego the jury trial and instead agreed to a court trial on the basis of a stipulation as to what the trial testimony would be. (R. 29, 42.) The circuit court found Gossett guilty on the basis of the stipulated testimony and imposed a sentence. (R. 31, 43.)

Gossett appeals from the circuit court's order denying his motion to suppress, and from the resulting conviction.

## **STATEMENT OF THE FACTS**

At about 3:15 p.m. on March 8, 2013, a citizen called 911 to report a possible impaired driver northbound on State Highway 57 in Ozaukee County, headed toward the Village of Fredonia. (R. 29:3.) The citizen reported that the vehicle—a semi tractor-trailer—was swerving all over the road. (R. 29:3-5, 41:6-7.) The dispatcher indicated that the citizen had identified himself and was willing to give a written statement. (R. 41:11-12.)

Village of Fredonia Deputy Marshal Christopher Erickson was in the marshal's office when the dispatcher sent out the broadcast. (R. 41:5-6.) Erickson immediately got in his squad car and headed eastbound towards State Highway 57, where from a distance he saw a northbound semi matching the given description. (R. 41:7-8.) A few moments later, Erickson turned northbound onto State Highway 57 where he regained sight of the semi. (R. 41:8-9.)

Erickson saw the semi drift twice across the dividing line between the two lanes of northbound traffic. (R.41:10.) He also noted that the semi was traveling about 45 miles per hour in an area where the speed limit was 55. (*Id.*) Based on Erickson's observations as well as the citizen complaint, Erickson—who had already been operating with his red & blue emergency lights and sirens—pulled behind the semi, which pulled over after about three tenths of a mile. (R. 41:11.)

After the semi pulled over, Erickson approached the cab of the semi and asked the driver, Gossett, to step out and speak with Erickson in front of the semi's hood<sup>1</sup>. (R.41:12.) Erickson noted that Gossett was chewing gum, and that Gossett had to steady himself against the semi's hood while walking towards Erickson. (*Id.*)

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<sup>1</sup> In addition to the motion hearing transcript and the police report—which was considered by the circuit court as part of a set of stipulated testimony—Erickson's "lapel cam" video is part of the record, which documents Erickson's interactions with Gossett throughout the traffic stop. (R. 29:12.)

Erickson informed Gossett of the citizen complaint and asked Gossett whether he had been drinking; Gossett denied drinking. (R.41:12.) Erickson handed his preliminary breath test (“PBT”) device to Ozaukee County Deputy Sheriff David Maglio, who had since arrived as backup. (R.41:13.) Erickson asked Gossett to provide a breath sample into the PBT device; Gossett complied. (*Id.*) Erickson asked Maglio to not tell Erickson the result, but only whether the result was positive or negative. (*Id.*) When the PBT device had finished analyzing the breath sample, Maglio looked at the PBT device and asked Gossett, “Are you sure you haven’t been drinking?” (R.41:13-14). Although Erickson did not see the PBT result at that point, Erickson inferred from Maglio’s question that the PBT result contradicted Gossett’s assertion that Gossett had not been drinking. (R.41:14.)

Accordingly, Erickson proceeded to have Gossett perform standardized field sobriety tests. (*Id.*) Gossett’s performance on these tests showed indications of impairment, including nystagmus, difficulty balancing, and red, glassy eyes. (R. 29:5-6.) Erickson then asked Maglio what the result of the PBT was. (R. 29:6.) Maglio then told Erickson the result was a 0.19%. (*Id.*)

Erickson placed Gossett under arrest on suspicion of operating a motor vehicle while under the influence of an intoxicant, and took Gossett to the Aurora Medical Center-Grafton. (R. 29:6.) Erickson read the “Informing the Accused” form to Gossett; Gossett

consented to a blood draw. (R. 29:6, 29:8.) Erickson mailed the blood sample to the Wisconsin State Laboratory of Hygiene for analysis; the laboratory reported a blood alcohol concentration of 0.250 grams per 100 milliliters. (R. 29:11.)

Erickson advised Gossett of his *Miranda* rights, which Gossett waived in writing. (R. 29:10.) In post-arrest questioning, Gossett admitted to drinking whiskey at a rest stop in Illinois earlier in the day. (*Id.*)

## ARGUMENT

### **I. The PBT request was proper because Deputy Marshal Erickson had “reason to believe” Gossett had been drinking**

Because Gossett was operating a commercial motor vehicle, and because Deputy Marshal Erickson had reason to believe Gossett had been drinking, Erickson was entitled to request a preliminary breath test sample from Gossett.

Whether an officer had probable cause to request a preliminary breath test sample is a legal issue that this Court is to decide *de novo*, accepting the trial court’s fact finding unless clearly erroneous. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

The legal standard for requesting a preliminary breath test is set forth by Wis. Stat. § 343.303:

If a law enforcement officer has **probable cause** to believe that the person is violating or has violated



s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample for his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.

*Id.* (emphasis added.) Section 346.63(7) prohibits driving, operating, or being on duty time with respect to a commercial motor vehicle while having an alcohol concentration above 0.0 or within 4 hours of having consumed or having been under the influence of an intoxicating beverage. Wis. Stat. § 346.63(7)(a).

The distinction between the threshold necessary to request a PBT from commercial vs. non-commercial drivers was directly addressed in *Renz*, which is the seminal case governing when officers may request a driver to submit to a PBT. The most commonly-known holding of *Renz* is that police must have probable cause to request a PBT, which the *Renz* court defined as

a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the ‘reason to believe’ that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for an arrest.

*Id.* at ¶ 51. However, this holding is limited to non-commercial drivers. As the *Renz* court noted:

With regard to commercial drivers, an officer may request a PBT upon the detection of “any presence” of an intoxicant or if the officer has “reason to believe” that the driver is operating a motor vehicle while intoxicated. § 343.303. Thus, the legislature authorizes police officers to request a commercial driver to submit to a PBT with a minimum of suspicion.

*Id.* at ¶ 34. Thus, as the state Supreme Court clarified recently, if “either the ‘any presence’ or the ‘reason to believe’ standard is satisfied, the officer may request a PBT breath sample from a commercial driver.” *State v. Goss*, 2011 WI 104 ¶ 12, 338 Wis. 2d 72 ¶ 12, 806 N.W.2d 918 ¶ 12.

Deputy Marshal Erickson had “reason to believe” that Gossett was operating a commercial motor vehicle<sup>2</sup> with an alcohol concentration greater than 0.0. First, Erickson had an identified citizen caller, willing to make a statement, who was so concerned about the semi’s inability to maintain its lane of travel that the citizen called 911 to report the poor driving, and who later provided a written statement documenting the citizen’s observation that the semi “almost side swiped other vehicles” such that the citizen

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<sup>2</sup> Gossett has never challenged or disputed the classification of the vehicle he was driving as a commercial motor vehicle. The “lapel cam” video clearly shows the vehicle in question to be a conventional “18 wheeler” semi tractor-trailer. (R. 29:12.)

“thought for sure there was going to be an accident.” (R. 29:3.)

Second, Erickson himself saw the semi drift twice between the two lanes of northbound State Highway 57. (R. 41:10, 29:5.) Third, Erickson noted that the semi was traveling 10 miles an hour below the posted speed limit of 45 miles per hour. (*Id.*) Fourth, Erickson noted that Gossett had to steady or brace himself on semi’s hood, after Erickson asked Gossett to step out of the cab. (R. 41:12, 29:5.)

The totality of these circumstances provided Erickson with reasonable suspicion that Gossett was operating either while under the influence of an intoxicant or, at a minimum, above the absolute sobriety standard to which commercial drivers are held while on duty. Because Erickson had such reasonable suspicion, he necessarily had the “minimum of suspicion,” that is, a “reason to believe” Gossett had been drinking. *Renz, supra*, at ¶ 34.

Gossett appears to argue that because it was windy that day, and because wind can adversely affect large-profile vehicles such as semis, Erickson needed *more* “reason to believe” that Gossett was drinking to outweigh the possibility that the semi’s poor driving was simply caused by the weather. (A. Br. at 7.) However, it is well-settled that an officer need not rule out the possibility of innocent behavior as part of the reasonable suspicion analysis. *State v. Colstad*, 2003 WI App 25 ¶ 8, 260 Wis. 2d 406 ¶ 8, 659 N.W.2d 394 ¶ 8. In other words, the reasonable suspicion analysis is not weighted;

an officer need not have a greater “amount” of reasonable suspicion as the possibility of innocent behavior becomes more plausible.

Because the totality of the circumstances gave Erickson “reason to believe” Gossett had been drinking, the PBT request was proper. Therefore, this Court should affirm the decision and judgment of the circuit court.

## **II. Even if this Court were to find that the PBT request was improper, the arrest was valid on independent grounds**

Because Deputy Marshal Erickson had a valid basis to arrest Gossett independent of the PBT result, suppression of all evidence subsequent to the administration of the PBT is not the proper remedy.

Because the circuit court found that Erickson’s administration of the PBT was proper, the issue of whether the arrest was valid even if the PBT result were to be suppressed was not discussed in the circuit court. Of course, if this Court finds that the PBT was properly administered, then this Court need not discuss this issue, as this Court need only address those issues that are dispositive. *See Gross v. Hoffman*, 227 Wis. 2d 296, 300, 277 N.W. 663 (1938). Nevertheless, the Village, as the respondent, may advance any argument that would sustain the circuit court’s ruling. *State v. Darcy N.K.*, 218 Wis. 2d 640, 641, 581 N.W.2d 567 (Ct. App. 1998).

Whether a set of facts constitutes probable cause is a legal question which this Court is to review *de novo*. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The standard for probable cause in this context is well-settled: whether “the totality of the circumstances would lead a reasonable police officer to believe...that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Lange*, 2009 WI 49 ¶ 19, 317 Wis. 2d 383 ¶ 19, 766 N.W.2d 551 ¶ 19. The Court is to apply an objective standard, considering “the information available to the officer and the officer’s training and experience.” *Id.* at ¶ 20.

Gossett appears to argue that the post-PBT field sobriety tests constitute an improper continued detention. (A. Br. at 4-5.) An officer may lawfully extend a traffic stop if, during the stop, the officer

...becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense **separate and distinct from the acts that prompted the officer’s intervention in the first place.**

*Colstad, supra*, at ¶ 19, *quoting State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999) (emphasis added.)

Here, Erickson’s request that Gossett perform field sobriety tests was **not** separate and distinct from the reason for the initial traffic stop; the entire reason for the stop was to investigate the 911 call regarding the semi’s poor driving, which was bolstered by

Erickson's own observations of the semi's driving. Erickson further observed Gossett steady himself on the cab of the semi when walking towards Erickson. Especially given the absolute sobriety standard to which commercial drivers are held, it was reasonable for Erickson to ask Gossett to perform field sobriety tests given the totality of these circumstances. Here, any error in administering the PBT early in the process was vitiated by the officer's subsequent observations of Gossett's poor performance on the field sobriety tests, including nystagmus and difficulty balancing and walking. These observations, combined with Erickson's and the citizen's observations of Gossett's driving, gave Erickson probable cause to arrest Gossett even absent the PBT result.

Even if this Court holds that the PBT result should be suppressed, this Court should not suppress the evidence of the subsequent field sobriety tests, because they were properly performed. Because the totality of the circumstances even without the PBT result presented Erickson with probable cause to arrest Gossett, this Court should affirm the judgment of conviction.

## **CONCLUSION**

Deputy Marshal Erickson's observations of Gossett's poor driving and Gossett's physical abilities, combined with the report of the identified 911 caller, gave Erickson reason to believe Gossett was operating a commercial motor vehicle with alcohol in his system.

Accordingly, Erickson was justified in requesting a PBT sample from Gossett. Even if this Court were to hold that there was an insufficient basis to request a PBT at the time, Erickson was still entitled to ask Gossett to perform field sobriety tests, and Gossett's poor performance on these tests, combined with the other observations, gave Erickson probable cause to arrest Gossett independent of the PBT.

Therefore, this Court should affirm the decision and judgment of the circuit court.

Respectfully submitted June 10, 2015.

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**FORM AND LENGTH CERTIFICATION**

**Wis. Stat. § 809.19(8)(d)**

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b)-(c) for a brief produced with a proportional serif font. The length of this brief is 2,490 words.

**ELECTRONIC BRIEF CERTIFICATION**

**Wis. Stat. § 809.19(12)(f)**

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.

Dated June 10, 2014.

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