

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III**

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**Appeal No. 2015AP000462
Shawano County Circuit Court Case No. 2014TR004200**

**IN THE MATTER OF THE REFUSAL OF KORY V.
AMBROZIAK**

COUNTY OF SHAWANO,

Plaintiff-Respondent,

v.

KORY V. AMBROZIAK,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGMENT OF CONVICTION
BEFORE THE HONORABLE JAMES R. HABECK,
JUDGE SHAWANO COUNTY CIRCUIT COURT**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT KORY V. AMBROZIAK**

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STATEMENT OF THE ISSUES

Did the additional information obtained by Deputy Rogers after the traffic stop provide sufficient additional suspicion to continue the detention of Mr. Ambroziak for field sobriety testing?

Answer: The trial court answered yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Kory V. Ambroziak (Mr. Ambroziak) was charged with operating a motor vehicle while under the influence of an intoxicant, a violation of Wis. Stat. §346.63(1)(a) and refusing to submit to a chemical test a violation of Wis. Stat. §343.305(9) stemming from an offense allegedly occurring on August 30, 2014. Mr. Ambroziak timely filed a request for a refusal hearing in writing on September 8, 2014. A refusal hearing was held in the Shawano County Circuit Court on December 19, 2014, the Honorable James R. Habeck, Judge, presiding. The trial court found that Mr. Ambroziak refused to submit to chemical testing in violation of Wis. Stat. §343.305(9). A Judgement of Conviction was filed on December 19, 2014. (R.5:1).

Mr. Ambroziak, by counsel timely filed a Notice of Appeal on March 2, 2014.

The appeal herein stems from the trial court finding that Mr. Ambroziak improperly refused to submit to a chemical test under Wis. Stat. §343.305(9). The facts that are pertinent to this appeal were received through the testimony of Deputy Rogers at the refusal hearing on December 19, 2014.

Deputy Rogers testified that he was employed as a Shawano County Sheriff's Deputy on August 30, 2014 and was on duty at 12:32 a.m. (R.21:3-4/ A.App. 1-2). Rogers testified that on that date at about that time, he was the third vehicle stopped at an intersection in Eland, Shawano County. (R.21:4/ A.App. 1). Rogers testified that he observed the first vehicle spin its tires causing the tires to smoke and debris to fly. *Id.* Rogers explained that there was a second vehicle between his squad and the first vehicle. The first vehicle turned right, traveled 150-200 feet and Deputy Rogers stopped it (R.21:5/ A.App. 3) within eight to ten seconds. (R.21:16/ A.App. 10). Rogers testified that he identified the driver as Mr. Ambroziak. (R.21:5/ A.App. 3).

When Rogers made contact at the vehicle, he observed that there were three people in the vehicle and observed a strong odor of intoxicant coming from the vehicle. (R.21:6/ A.App. 4). Mr. Ambroziak unilaterally exited the vehicle, and Deputy Rogers told him multiple times to get back in the vehicle. (R.21:7/ A.App. 5). Eventually Mr. Ambroziak returned to his vehicle. *Id.*

Deputy Rogers testified that he observed the odor of intoxicant while Mr. Ambroziak was inside the vehicle, and

based on that observation he thought Mr. Ambroziak was impaired. (R.21:7/ A.App. 5).

Deputy Rogers testified he then asked Mr. Ambroziak to perform field sobriety tests, and Mr. Ambroziak refused. *Id.* Mr. Ambroziak refused field sobriety testing because he was on probation and was not supposed to be drinking and knew he would be going to jail anyway. (R.21:8/ A.App. 6). Based on the response to the request for field sobriety test, Deputy Rogers asked Mr. Ambroziak why he was drinking if he was on probation. Ambroziak stated he was celebrating his 21st birthday. Rogers asked him how much he had been drinking and he said a lot. *Id.* Rogers said Mr. Ambroziak was able to stand on his own, and at some point during the contact observed Mr. Ambroziak to have slurred speech and bloodshot eyes. However, when asked to articulate the factors that Deputy Rogers used to formulate his arrest decision, he said Mr. Ambroziak admitted to drinking, the driving behavior and “I felt he was intoxicated.” (R.21:9/ A.App. 7).

After transporting Mr. Ambroziak to the Shawano County Jail, Deputy Rogers read Mr. Ambroziak the Informing the Accused Form and Mr. Ambroziak refused to permit chemical testing. (R.21:10-11/ A.App. 8-9). Mr. Ambroziak

provided no medical or other reason for refusing testing. (R.21:11/ A.App. 9).

An oral ruling was issued by the court on December 19, 2014 finding that Mr. Ambroziak refused to permit chemical testing. (R.21:19/ A.App. 12). The court found that Deputy Rogers observed a “slight stagger, smelled a strong odor of intoxicant, noticed bloodshot eyes.” In referring to the observations, the court stated “so not as many things as usual under the circumstances, but certainly reasons to ask for a standardized field sobriety test.” (R.21:18/ A.App. 11). A judgement of conviction was entered on December 19, 2014. The defendant timely filed a Notice of Appeal of the Judgment of Conviction on March 2, 2015.

STANDARD OF REVIEW

In determining whether there is sufficient suspicion to continue a detention, an appellate court accepts the circuit court’s factual determinations unless clearly erroneous, but application of those facts to constitutional principles is a question of law that is reviewed de novo. *State v. Secrist*, 224 Wis.2d 201, 207-208, 589 N.W.2d 387 (1999).

ARGUMENT

THE ADDITIONAL SUSPICIOUS FACTORS OBSERVED BY DEPUTY DAVID ROGERS AFTER THE TRAFFIC STOP DID NOT RISE TO THE REQUISTE LEVEL OF SUSPICION TO CONTINUE THE DETENTION OF MR. AMBROZIAK FOR FIELD SOBRIETY TESTING

The issues at a refusal hearing under Wis. Stat. §343.305(9) are limited to (a) whether the officer had probable cause to believe that the defendant was operating or driving a motor vehicle while under the influence of an intoxicant, (b) whether the officer complied with the provisions of Wis. Stat. §343.305(4), and (c) whether the defendant refused to submit to chemical testing. In the instant case, the first issue is the only contested issue.

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996), *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under Fourth Amendment jurisprudence. *Id.* at 810. If an officer has probable cause to believe a traffic violation has

occurred, an officer may conduct a traffic stop. *State v. Gaulrapp*, 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). An investigative detention must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394.

Initially, the Court must determine if the initial stop of Mr. Ambroziak's vehicle was justified. If so, the court must determine whether during the stop, Deputy Rogers became aware of additional "suspicious factors or additional information that would give rise to, an objective, articulable suspicion that criminal activity is afoot..." *State v. Malone*, 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (citing *State v. Betow*, 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)) "If, during a valid traffic 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 or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun." *Id.* at 94-95.

“The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *State v. Young*, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997). To meet this test, the officer must show specific and articulable facts, which taken together with rationale inferences from those facts, reasonably warrant the officer’s continued intrusion. *Terry v. Ohio*, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968).

Deputy Rogers testified that he initially stopped Mr. Ambroziak’s vehicle for spinning his tires and throwing up debris.

In determining whether the continued detention and request to perform field sobriety tests was proper, it is necessary that Deputy Rogers articulate additional suspicious factors that are sufficient to give rise to an articulable suspicion that Mr. Ambroziak was operating his vehicle while impaired.

“There is probable cause to arrest ‘when the totality of the circumstances within the officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime’” *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis.2d 742, 695 N.W.2d 277. The

objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.” *Id.* at ¶18. 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.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). “Only evidence which speaks to the facts and circumstances available to the officer at the time of arrest is relevant to a determination of probable cause in a revocation hearing.” *Id.* at footnote 6.

Here, Deputy Rogers testified that he observed Mr. Ambroziak’s tires spin and emit smoke from a stop. He stopped the vehicle and talked with Mr. Ambroziak. (R.21:6/ A.App. 4). When asked to articulate his observations of Mr. Ambroziak when they spoke, Rogers said he observed “just a strong odor of intoxicant.” *Id.* Rogers testified that based on his observations he believed that Mr. Ambroziak was impaired. (R.21:7/ A.App. 5). At that point he asked Mr. Ambroziak if he would perform field sobriety tests. Mr. Ambroziak refused to perform the tests, explaining to the deputy that he was on probation and would be going to jail for violating probation anyway. Deputy Rogers then inquired as to why Mr. Ambroziak was drinking if he was on probation. Mr. Ambroziak said because it was his 21st

birthday. (R.21:8/ A.App. 6). Mr. Ambroziak said he had consumed a lot. *Id.* What is clear is that Mr. Ambroziak's admission to drinking and celebrating his 21st birthday occurred after Deputy Rogers had asked, and Mr. Ambroziak refused, field sobriety testing. Moreover, while Deputy Rogers stated he observed slurred speech and bloodshot eyes, the record is unclear if those observations were made before or after the request for field sobriety tests.

Deputy Rogers stopped Mr. Ambroziak for spinning his tires and kicking up debris. After stopping Mr. Ambroziak, Rogers observed Mr. Ambroziak to exhibit a strong odor of intoxicant. Based on this odor, Rogers continued the detention of Mr. Ambroziak by requesting that Mr. Ambroziak perform field sobriety tests. The odor of intoxicant by itself simply suggests that Mr. Ambroziak had consumed alcohol. This observation was an insufficient additional factor to extend the stop for field sobriety testing.

Because the information gained by Deputy Rogers after the stop was insufficient to extend the stop by asking Mr. Ambroziak to perform field sobriety tests, the continued detention of Mr. Ambroziak was unreasonable and violated both

the Fourth Amendment of the United States Constitution and
Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

Because Deputy Rogers continued detention of Mr. Ambroziak was unreasonable, the trial court erred when it found the officer had the appropriate level of suspicion to request field sobriety tests and that the refusal was improper. The court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 26th day of May, 2015.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 19 pages. The word count is 3483.

Dated this 26th day of May, 2015.

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**CERTIFICATION 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.

Dated this 26th day of May, 2015

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of May, 2015.

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APPENDIX