

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2015AP000585
Winnebago County Circuit Court Case Nos.
2014 TR 0007212

COUNTY OF WINNEBAGO,

Plaintiff-Respondent,

v.

KELLI MARIE KOSMOSKY,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE ORDER DENYING THE
DEFENDANT'S MOTION FOR SUPPRESSION OF
EVIDENCE IN THE CIRCUIT COURT FOR
WINNEBAGO COUNTY, THE HONORABLE THOMAS
J. GRITTON, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT KELLI MARIE KOSMOSKY

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STATEMENT OF THE ISSUES

Did the State establish that Trooper Phil Koehler had the requisite level of suspicion to conclude that Ms. Kosmosky operated her motor vehicle while impaired where the state failed to introduce evidence as to the time operation?

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, Kelli M. Kosmosky (Ms. Kosmosky) was charged in Winnebago County, Wisconsin with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on June 8, 2014. On July 17, 2014, Ms. Kosmosky, by counsel entered a written plea of not guilty to both charges, and filed a motion for suppression of evidence due to an unlawful stop and arrest.

A hearing on Ms. Kosmosky's motion was held on October 7, 2014, the Honorable Thomas J. Gritton, presiding. On that same date, the court denied the defendant's motion. A written order to that effect was signed on March 3, 2015. (R.23/A.App. 1). A trial to the court was held on December 23, 2014 where the court found Ms. Kosmosky guilty of both charges. Judgment on the verdict was entered on that same date.

Ms. Kosmosky timely filed a Notice of Appeal on March 19, 2015.

The pertinent facts to this appeal were adduced at the motion hearing held on October 7, 2014 and received through the testimony of Wisconsin State Trooper Phil Koehler. Trooper

Koehler testified that he had been employed as a Wisconsin State Trooper for three years. (R.30:3/ A.App. 2). He testified that he was working on June 8, 2014 at approximately 8:27 p.m. when he received a call of an unconscious female seated in the driver's seat of a vehicle parked in the Kwik Trip parking lot located in the Town of Winchester. When Trooper Koehler arrived, the vehicle was off. However, he claims that he overheard EMTs say the vehicle was running when they arrived. (R.30:4/ A.App. 3).

When Trooper Koehler arrived on the scene, he said he spoke with one of the EMTs who had a conversation with Ms. Kosmosky. The EMT advised that Ms. Kosmosky told her that she stopped because she was feeling the effects of alcohol. (R.30:5/ A.App. 4). When Trooper Koehler made contact with Ms. Kosmosky, he observed her to be a little lethargic, with glassy bloodshot eyes and slurred speech. He also could detect an odor of intoxicant from Ms. Kosmosky as well as her vehicle.

Id.

In a conversation with Ms. Kosmosky, Ms. Kosmosky admitted she had been drinking earlier in the day at the Bridge Bar, had one or two tap beers, and had gone for a ride on a motorcycle. (R.30:6/ A.App. 5). Ms. Kosmosky was then

dropped off at her car and she had gotten back in her vehicle and drove home. (R.30:6/ A.App. 5). Ms. Kosmosky did not tell Trooper Koehler that she was feeling the effects of alcohol but Trooper Koehler indicated that he heard that from the EMT. *Id.*

On cross examination, Trooper Koehler indicated that he first made contact with Ms. Kosmosky at 8:51 p.m. Trooper Koehler admitted that he asked Ms. Kosmosky to perform field sobriety tests upon arrival. (R.30:8/ A.App. 6). Koehler's testimony was that after asking Ms. Kosmosky to perform field sobriety tests, he observed the odor of intoxicant coming from her vehicle. (R.30:9/ A.App. 7). Furthermore, Koehler admitted that he observed no problems with Ms. Kosmosky's motor coordination as she sat in the vehicle. (R.30:10/ A.App. 8).

Koehler admitted he could not remember the name of the EMT to whom he had spoken. *Id.* Further, no one observed the vehicle drive up to the location (R.30:11/ A.App. 9), and prior to having Ms. Kosmosky exit the vehicle for field sobriety tests, he did not determine the time in which the vehicle was driven to the location. (R.30:12/ A.App. 10).

Defense counsel argued that the evidence adduced by the State was insufficient to establish that Ms. Kosmosky was

impaired at the time of operation inasmuch as the State failed to put forth sufficient evidence showing the time of operation. (R.30:12/ A.App. 10). The State argued that the evidence supported the detention and the arrest. (R.30:13/ A.App. 11). The Court questioned that fact that there was no time of driving and how that played into argument. (R.30:13/ A.App. 11). However, in the end found that the evidence supported the initial contact and the continued detention and denied Ms. Kosmosky's motion. (R.30:13/ A.App. 11). The court stated that the issue as to the time of driving was one for trial. (R.30:14/ A.App. 12). A trial to the court was held on December 23, 2014, where the court found Ms. Kosmosky guilty of both counts.

Ms. Kosmosky timely filed a Notice of Appeal on March 16, 2015.

STANDARD OF REVIEW

When reviewing a motion to suppress, the appellate court accepts the circuit court's finding of fact unless they are clearly erroneous. However, the application of concepts and principles to those facts is a question of law which is reviewed de novo. *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis.2d 641, 740 N.W.2d 404.

ARGUMENT

BECAUSE THE STATE FAILED TO ESTABLISH THE TIME OF OPERATION, THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE THAT MS. KOSMOSKY OPERATED HER MOTOR VEHICLE WHILE IMPAIRED

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 ...that the defendant was 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). Probable cause requires that at the moment of arrest, an officer knew of facts and circumstances that were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985). A reasonable police officer need only believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). Wis. Stat. §346.63(3)(b) defines operating a motor vehicle as the physical manipulation of the controls of a motor vehicle necessary to put the vehicle in motion. The State must adduce sufficient evidence to show that the evidence known to the arresting

officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of operating a motor vehicle while impaired. *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551. Probable cause is determined on a case by case basis using the totality of the circumstances. *State v. Kasian*, 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996)

WI JI-Criminal 2668, sets forth the elements of operating a motor vehicle while intoxicated. The first element is that the defendant operated a motor vehicle on a highway. The second element is at the time of the operation the defendant was impaired. To establish probable cause to arrest, not only must the State show that Ms. Kosmosky was impaired, but also that Ms. Kosmosky was probably impaired at the time of driving. The sole argument on appeal is whether the State established sufficient evidence that Ms. Kosmosky was probably guilty of being impaired at the time of operation. While Ms. Kosmosky did not challenge the fact of impairment at the time Trooper Koehler arrived, the crux of her argument was that the State failed to put forth sufficient evidence that she was impaired at the moment of operation.

Here, the State failed to adduce evidence at the motion hearing regarding when Ms. Kosmosky operated the motor vehicle. Based on the motion hearing record, we do not know when she drove from the Bridge Bar or when she arrived at the Kwik Trip gas station. Because of this, the evidence was insufficient to establish that Ms. Kosmosky was probably guilty of being impaired at the moment of operation. Thus, the detention of Ms. Kosmosky violated her right to be free from unreasonable searches and seizures under both the 14th Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

Because the evidence was insufficient to establish the time of operation, the trial court erred in denying Ms. Kosmosky's motion for suppression of evidence. 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 17 pages. The word count is 2820.

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