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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

COUNTY OF WINNEBAGO
Plaintiff-Respondent,

Case No. 2015 AP 585

v.

KELLI MARIE KOSMOSKY
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION
AND THE ORDER DENYING MOTION TO SUPPRESS
WINNEBAGO COUNTY CIRCUIT COURT
THE HONORABLE THOMAS GRITTON, PRESIDING

Christian A. Gossett
District Attorney
State Bar No. 1040212

Attorneys for Plaintiff-Respondent

Adam J. Levin
Assistant District Attorney
State Bar No. 1045816

Winnebago County Dist. Atty's Office
240 Algoma Boulevard, Beach Building
P O Box 2808
Oshkosh, WI 54903-2808
(920) 236-4977

Table of Contents

Statement of Issue Presented for Review	1
Statement on Oral Argument and Publication	1
Statement of the Case	1
Argument	1
Conclusion	4
Certifications	5

Statutes & Constitutional Provisions Cited

US Constitution, 4 th Amendment	2
Article I, § 11 Wisconsin Constitution	2
Wis. Stat. 809.13	1

Cases Cited

<i>State v. Kasian</i> , 207 Wis.2d 611 (Ct.App.1996)	2
<i>State v. Lang</i> , 2009 WI 49	2
<i>State v. Secrist</i> , 224 Wis.2d 201 (1999)	2
<i>State v. Willie</i> , 185 Wis.2d 673 (Ct.App.1994)	2

I. Statement of Issue Presented for Review

Whether the traffic officer had probable cause to believe Kelli Kosmosky operated her vehicle while intoxicated. The trial court ruled the traffic officer articulated probable cause to believe Ms. Kosmosky operated her vehicle while intoxicated.

II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument, as this matter involves only the application of well-settled law to the facts of the case.

III. Statement of the Case

The State believes Ms. Kosmosky's recitation of the facts of the case to be sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

The evidence available to Trooper Koehler provided probable cause to arrest for the offense of operating while intoxicated.

Under both the Fourth Amendment of the US Constitution and Article I, § 11 of the Wisconsin Constitution, probable cause must exist to justify an arrest. *State v. Secrist*, 224 Wis.2d 201, 209 (1999). The burden

is on the State to show that the officer had probable cause to arrest. *State v. Willie*, 185 Wis.2d 673, 682 (Ct.App.1994). Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *State v. Kasian*, 207 Wis.2d 611, 621 (Ct.App.1996). Such evidence need not be sufficient to prove guilt beyond a reasonable doubt “or even that guilt is more likely than not.” *State v. Babbitt*, 188 Wis.2d 349, 357 (Ct.App.1994). It is sufficient that the evidence known to the investigating officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of OWI. *State v. Lange*, 2009 WI 49, ¶38. The determination of probable cause is made on a case-by-case basis, considering the totality of the circumstances. *Kasian*, 207 Wis.2d at 621-622.

In this case, Ms. Kosmosky challenges that Trooper Koehler had probable cause to believe that she drove while intoxicated. Br. of Defendant-Appellant, P6. Trooper Koehler’s conclusion that Ms. Kosmosky was operating her vehicle while intoxicated was more than reasonable in light of the evidence Koehler observed on scene, including

Ms. Kosmosky parking over a parking stall dividing line (R30:P4), a report the defendant was passed out in the driver's seat of her car, (R30:P3), the statement of an EMT that Ms. Kosmosky admitted stopping at Kwik Trip because she was feeling the effects of alcohol while driving (R30:P5), and Ms. Kosmosky's self-reported drinking history preceding her parking the car. (R30:PP5-6).

In short, Trooper Koehler observed Ms. Kosmosky drunk. She admitted driving to the Kwik Trip. She admitted pulling over because she was impaired by alcohol. The only way she is not guilty of OWI on this evidence is if she drank AFTER parking the car, a claim she never made.

Because Trooper Koehler's arrest of Ms. Kosmosky was lawful, all evidence subsequently gathered, including the chemical test result, was lawfully obtained, and Ms. Kosmosky's motion to suppress was correctly denied.

V. Conclusion

For the reasons set forth above, Trooper Koehler's arrest of Ms. Kosmosky was lawful, and evidence gathered subsequent to the arrest is not subject to the exclusionary rule.

The trial court's denial of Ms. Kosmosky's motion to suppress should be affirmed.

Dated at Oshkosh, Wisconsin this __ day of June, 2015

By: _____
Adam J. Levin
WSBA No. 1045816
Assistant District Attorney
Winnebago County, Wisconsin
Attorney for the Respondent

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 561 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I further certify that on the date of signature I routed the enclosed briefs to our office station for first class US Mail Postage to be affixed and mailed to:

Clerk's Office (10 Copies)
Wisconsin Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Atty. Walter A. Piel, Jr. (3 Copies)
Piel Law Office
500 W Silver Spring Dr Ste K200
Milwaukee, WI 53217-5052

Dated this ____ day of June, 2015 at Oshkosh, Wisconsin by:

Adam J. Levin
Bar No. 1045816
Assistant District Attorney
Winnebago County, Wisconsin