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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP001010

COUNTY OF COLUMBIA,
Plaintiff-Respondent,

vs.

BRITTANY N. KRUMBECK,
Defendant-Appellant.

BRIEF AND APPENDIX PLAINTIFF-RESPONDENT

ON APPEAL FROM THE JUDGMENT OF
CONVICTION ENTERED IN THE COLUMBIA
COUNTY CIRCUIT COURT,
THE HONORABLE ALAN J. WHITE PRESIDING

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BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT FOR
COLUMBIA COUNTY, THE HONORABLE
ALAN J. WHITE, PRESIDING

ISSUES PRESENTED

A. Was the stop of the defendant-appellant's vehicle, following the officer having seen it swerve back and forth for almost 7 miles on bad pavement and good pavement within its lane of travel where a lot of the corrections were quick back to the center at 3:00 a.m. on a Saturday night/Sunday morning lawful?

***Trial court*.** Yes. The trial court concluded that there was reasonable suspicion and the stop of the defendant-appellant's vehicle was lawful.

B. Was the subsequent arrest of the defendant-appellant for operating while intoxicated lawful, based on the defendant-appellant's driving behavior, bloodshot and glassy eyes, the odor of intoxicants emanating from the vehicle, the defendant-appellant's delay in responding to questions, the defendant appellant's admission to consuming alcohol, the defendant's performance on the field sobriety tests and the PBT?

***Trial court*.** The trial court found there was probable cause to arrest.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent does not request that the opinion in this appeal be published, nor does he request oral argument of the issues presented in this case, but stands ready to so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE

By citations filed in the Columbia County Circuit Court on August 20, 2012, Brittany N. Krumbeck (hereinafter the Ms. Krumbeck), was charged in case number 12 TR 6200 with operating a motor vehicle while under the influence of an intoxicant (OWI), contrary to Wis. Stat. § 346.63(1)(a), and, in case number 12 TR 6491, operating a motor vehicle while having a prohibited alcohol concentration (PAC), contrary to Wis. Stat. § 346.63(1)(b), both as first offenses.

On June 24, 2013, Ms. Krumbeck filed a Motion to Suppress – Unlawful Stop, Detention and Arrest. Following a two-part evidentiary hearing held before the Honorable Alan J. White, by means of a written decision, the Appellant's motion to suppress was denied. Following a trial on stipulated facts, the defendant was found guilty of the OWI charge, while the PAC charge was dismissed on the Court's motion. By Notice of Appeal filed May 11, 2015, the Appellant appeals the trial court's denial of her motion to suppress.

FACTS

On August 11, 2012, Deputy Timothy Schultz of the Columbia County Sheriff's Office was on duty in the Township of Leeds, Columbia County, Wisconsin (30: 4). Shortly before 3:00 a.m., he was driving southbound on Highway 51 when a vehicle pulled in front of him (30: 5). He believed it was either Friday or Saturday night (30: 5), He continued to follow the vehicle and confirmed that the registration and registered owner's driver license were valid (30: 5).

He noticed that the vehicle was fading towards the center line, swerving towards the center line and then back to the fog line (30: 5). He stated the vehicle never crossed the center line or the fog line but was just consistently kind of essentially bouncing off of the two (30: 5).

Deputy Schultz testified that they were initially in a bad area of Highway 51 where he would say poor road conditions, potholes and some pitted path of travel would make it difficult to maintain a straight line (30: 5). Deputy Schultz continued observing the vehicle until it reached a new area of Highway 51 that had been completed which he depicted as a nice, flat blacktop with no potholes

(30: 5-6). Deputy Schultz noticed that even though the surface of the road became flat and level, the driving behavior continued (30: 6). Deputy Schultz noted that he followed the vehicle with no traffic in between himself and the vehicle for approximately 6 ½ to 7 miles and that there was no bad weather (30: 6-7). Deputy Schultz believes the distance that he followed the vehicle on the newer paved portion of the highway before he stopped the vehicle to be around a mile (30: 7-8). When asked if there was any change in the driving behavior from the bad portion of the road to the good portion Deputy Schultz stated that the traveling to the center line and to the fog line continued from the bad to the good portion of the roadway (30: 8). Deputy Schultz observed the vehicle would come to the center line, correct, come back kind of to the center, and then slowly continue fading over to the fog line, and back and forth (30: 8). He stated that a lot of the corrections once at the line were quick back to center and then slowly fading back in the direction that it was correcting (30: 8). Deputy Schultz activated his emergency lights on Highway 51 just north of County Highway K (30: 8).

Schultz made contact with the driver and sole occupant, who he identified as Brittany Krumbeck (30: 9, 10). When he approached Ms. Krumbeck, Schultz noticed an odor of intoxicants coming from within the vehicle (30:10). He observed that Ms. Krumbeck's eyes were bloodshot and glassy, and there was a delay Ms. Krumbeck's responding to his questions (30:10). Deputy Schultz told Ms. Krumbeck that he had stopped her based on the driving behavior and her inability to maintain a straight path of travel (30: 10).

Deputy Schultz asked Ms. Krumbeck if she had anything to drink, she responded that she had two alcoholic drinks starting at approximately 10:00 p.m. (30: 11-12). Deputy Schultz asked Ms. Krumbeck what time she stopped drinking and she didn't provide a specific time but did state about two hours ago (30: 12). Based on Deputy Schultz's observation of Ms. Krumbeck's driving behavior, the odor of intoxicants in the vehicle, her admission to consuming intoxicants, Deputy Schultz felt she might be under the influence of intoxicants and impaired to operate a motor vehicle (30: 12). At approximately 3:00 a.m. early Sunday morning on August 11, 2012, Deputy Schultz asked Ms. Krumbeck to exit the vehicle to perform standardized field sobriety testing, including a horizontal gaze nystagmus (HGN) test, a walk-and-turn test, a one-leg-stand test and he administered a PBT (30: 12-13, 22). Deputy Schultz is trained on how to perform these tests, has passed this training and is licensed to administer the PBT (30: 13, 22).

Deputy Schultz testified that he observed six out of six possible "clues" on the HGN test – lack of smooth pursuit in each eye, distinct nystagmus at maximum deviation, and onset of nystagmus prior to reaching a 45 degree angle (30: 16-

18). A car passes where Deputy Schultz is performing the HGN test at 3:05:38 and then another car at 3:06 (31: 25, 26). Deputy Schultz testified that from his training an observation of four clues shows impairment (30: 19).

On the walk-and-turn test, according to Deputy Schultz originally, Ms. Krumbeck exhibited two out of eight possible "clues" (30: 21). Deputy Schultz testified from his training two clues on the Walk-and-Turn Test are what he looks for to show signs of impairment (30: 20). Deputy Schultz observed that Ms. Krumbeck missed heel-to-toe and she stepped off the line during this test (30: 21). On redirect, Deputy Schultz stated he instructed and demonstrated how to do the Walk-and-Turn Test to Ms. Krumbeck (31: 42). Deputy Schultz testified that Ms. Krumbeck took at least one step when completing the turn instead of a series of short steps like he demonstrated so that would also be a clue (31: 42-43).

Deputy Schultz testified that from his training two clues on the One Leg Stand Test show impairment (30: 21). When Deputy Schultz was asked how many clues Miss Krumbeck exhibited during the One Leg Stand Test he testified three clues (30: 21). Deputy Schultz testified that she swayed while balancing, she hopped or adjusted her foot and he could not recall without reviewing his report the third clue off of the top of his head (30: 21-22). The Court confirmed that two of the clues that Deputy Schultz recalled observing were swaying and hopping (30: 22).

Next, Deputy Schultz administered a preliminary breath test (PBT) to Ms. Krumbeck and then placed her under arrest for operating while intoxicated (30: 24).

ARGUMENT

I. BURDEN OF PROOF AND STANDARD OF REVIEW

THE SUPPRESSION MOTION WAS PROPERLY DENIED AS THE INVESTIGATORY STOP WAS SUPPORTED BY REASONABLE SUSPICION AND THE SUBSEQUENT ARREST WAS SUPPORTED BY PROBABLE CAUSE.

When a police officer performs a traffic stop, the individual subjected to the stop is seized. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Therefore, an automobile stop must be reasonable under the circumstances to comply with the Fourth Amendment of the United States Constitution, *id.* at 810, and article 1, § 11 of the Wisconsin Constitution. *State v. Post*, 2007 WI 60, ¶ 10 n.2, 301 Wis. 2d 1, 733 N.W.2d 634.

A traffic stop is reasonable if a law enforcement officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). In other words, the seizure is reasonable if the officer can point to specific and articulable facts that would lead the officer, in light of the officer's training and experience, to reasonably suspect that the individual committed, or was about to commit a crime. *State v. Walli*, 2011 WI App 86, ¶ 8, 334 Wis. 2d 402, 799 N.W.2d 898.

Reasonable suspicion must be more than a hunch, but the officer does not have to rule out all innocent explanations for an individual's behavior before performing an investigatory stop. *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305. When an officer encounters a situation in which an individual's behavior leads to reasonable interferences of both lawful and unlawful behavior, it is not unreasonable for the officer to perform a brief stop. *See State v. Begicevic*, 2004 WI App 57, ¶ 7, 270 Wis. 2d 675, 678 N.W.2d 293 (citing *State v. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681 (1996)). *See also State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). In fact, it is considered "the essence of good police work [] to freeze the situation until [the officer can] sort out the ambiguity." *Begicevic*, 270 Wis. 2d 675, ¶ 7.

The determination of reasonableness is a common sense test. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. *State v. Anderson*, 155 Wis.2d 77, 83-84, 454 N.W.2d 763 (1990). This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions. *Waldner*, 206 Wis.2d at 56, 556 N.W.2d 681; *Rutzinski*, 241 Wis.2d 729, ¶ 15, 623 N.W.2d 516; *State v. Guzy*, 139 Wis.2d 663, 679, 407 N.W.2d 548 (1987). The reasonableness of a stop is determined based on the totality of the facts and circumstances. *State v. Williams*, 2001 WI 21, ¶ 22, 241 Wis.2d 631, 623 N.W.2d 106; *Guzy*, 139 Wis.2d at 679, 407 N.W.2d 548.

The question of whether an officer had reasonable suspicion to perform an investigatory stop is a question of constitutional fact. *Walli*, 334 Wis. 2d 402, ¶ 10 (citing *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869). A two-step standard of review is applied to questions of constitutional fact. *Walli*, 334 Wis. 2d. 402, ¶ 10. The trial court's findings of historical fact are upheld unless clearly erroneous, and, based on the historical facts, whether a reasonable suspicion justified the stop is reviewed *de novo*. *Id.* In this review, courts employ a commonsense approach. *State v. Rutzinski*, 2001 WI 22, ¶ 15, 241 Wis. 2d 729, 623 N.W.2d 516 (citations omitted).

The Wisconsin Supreme Court held that: (1) repeated weaving by a driver within a single lane does not alone give rise to the reasonable suspicion necessary for a traffic stop; (2) a driver's actions need not by erratic, unsafe, or illegal to give rise to the reasonable suspicion necessary for a traffic stop; and (3) police officer had reasonable

suspicion that the defendant was driving while intoxicated and thus, was justified in making a traffic stop. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634.

When reviewing a circuit court's determination regarding the suppression of evidence, the findings of fact made by the circuit court are to be upheld unless they are against the great weight and clear preponderance of the evidence. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 63 (Ct. App. 1991). Whether these facts constitute probable cause to arrest is determined by considering the totality of the circumstances known to the officer at the time of the arrest. *Illinois v. Gates*, 462 U.S. 213 (1983); *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102, 104(Ct. App. 1994); *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 839, 840 (1971).

The leading traditional definition of probable cause is found in *Draper v. United States*, 358 U.S. 307, 313 (1958): In dealing with probable cause…as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men [or women], not legal technicians, act. Probable cause exists where the facts and circumstances within [the arresting officer's] knowledge and of which [he/she] had reasonably trustworthy information [are] sufficient in themselves to warrant a man [or woman] of reasonable caution in the belief that an offense has been or is being committed.

The *Draper* definition is used in Wisconsin; it was expressly adopted in *State v. Paszek*, 50 Wis.2d 619, 624-25, 184 N.W.2d 836 (1971), with the following addition: It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilty beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility.

It 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 vehicle while under the influence. *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 102 (Ct. App. 1994).

An officer does not have to administer field sobriety tests in all circumstances to confirm a suspicion of intoxication. The question of probable cause is properly assessed on a case-by-case basis. *State v. Kasian*, 207 Wis.2d 611, 558 N.W.2d 687 (Ct. App. 1996).

The *Swanson* footnote, police, prosecutors, trial courts, and the Wisconsin Court of Appeals have had to struggle with for years: Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence…Without such a test, the police officers could not evaluate whether the suspect's physical capacities were

sufficiently impaired by the consumption of intoxicants to warrant an arrest. *State v. Swanson,* 164 Wis.2d 437, 475 N.W.2d 148 (1991).

The Wisconsin Supreme Court has finally put the issue to rest in *Washburn County v. Smith*, 2008 WI 23 (2008): it states that *Swanson* did not create a general rule requiring FSTs as a prerequisite for establishing probable cause. ¶ 33 *Swanson* did not announce a general rule requiring field sobriety tests in all cases as a prerequisite for establishing probable cause to arrest a driver for operating a motor vehicle while under the influence of an intoxicant. ¶ 34 Furthermore, the *Swanson* court's statement pertained to the circumstances of that case. The question of probable cause must be assessed on a case-by-case basis.

II. REASONABLE SUSPICION TO STOP

Deputy Schultz was working on Saturday night going into Sunday morning on August 11, 2012. He observed a vehicle shortly after bar-time weaving within its lane from the center line to the fog-line continuously and a lot of times quickly correcting his weaving taking him from the fog-line back to the center line. Based on the driving behavior, the time of night and the fact that it was a weekend Deputy Schultz continued observation of the suspect vehicle. Upon Deputy Schultz's initial observations of the driver he noted that the driving he was observing was on an area of Highway 51 that had poor road conditions.

Deputy Schultz followed the vehicle for approximately six miles on the area of the road that was pitted and potholed and the erratic yet legal driving continued. After six miles or so, the road changed to a nice, flat blacktop with no potholes. Deputy Schultz continued following the vehicle to see if the erratic driving behavior was due to the bad road or maybe something else. The vehicle continued the erratic driving on the nice part of the road and was subsequently pulled over for further investigation.

The appellant's argument fails when it states that there were no other facts to support further inquiry under an objective reasonable suspicion standard that was discussed in Waldner and Post.

Deputy Schultz evaluated the totality of the circumstances that were present, that being that it was shortly after bar time, that it was the weekend on a summer night, that the erratic driving continued even after the suspect was driving on the good portion of the road. An application of case-law and common sense when coupled together support only one conclusion. This led him to the reasonable conclusion that as a community caretaker there was reason to believe that the vehicle he was following may have an impaired driver and that he needed to stop

the vehicle to ascertain whether or not the driver was okay to be driving. That is exactly what Deputy Schultz did and he was justified in making the stop.

III. PROBABLE CAUSE TO ARREST

Now with Deputy Schultz's suspicion reasonably raised as to the ability of the occupant to operate her vehicle safely, Deputy Schultz made contact with the driver and sole occupant, who he identified as Brittany Krumbeck. Upon contact, his suspicions were further heightened when Deputy Schultz noticed an odor of intoxicants coming from within the vehicle. Even further confirmation is made that he did the right thing by stopping the vehicle when he observes that Ms. Krumbeck's eyes were bloodshot and glassy which he knows from his training to be indicative of someone that may be impaired. Deputy Schultz speaks with Ms. Krumbeck and notices a delay from Ms. Krumbeck's responding to his questions which presumably could be a result of impairment from an intoxicant.

Based on these observations, Deputy Schultz asks Ms. Krumbeck the logical question if she has had anything to drink. Deputy Schultz receives further confirmation that this driver may be impaired when she responds that she has in fact been consuming alcoholic drinks starting at approximately 10:00 p.m. that evening. Deputy Schultz asked Ms. Krumbeck what time she stopped drinking and she didn't provide a specific time but did state about two hours ago. At this point Deputy Schultz relies on his training and has Ms. Krumbeck get out of the vehicle to perform field sobriety tests.

Up to this point all of Deputy Schultz's observations continue to point to the ultimate conclusion that Ms. Krumbeck is an impaired driver. Deputy Schultz has Ms. Krumbeck perform the HGN test first. Unfortunately, these tests are not performed in a vacuum. The State will concede that visual distractions in the middle of the HGN test can cause potentially inaccurate test results. That being said, Deputy Schultz testified that he observed six out of six possible clues with four possible clues being the standard minimal level of impairment. While there was a car that passed during the HGN test and another that passed 22 seconds later, Deputy Schultz was observing clues with no visual distractions for Ms. Krumbeck for the majority of the test and therefore making the results more reliable than not. Deputy Schultz does not rely on the results of the HGN test alone and arrest Ms. Krumbeck, he does what his training dictates he do and he next administers the Walk-and-Turn Test.

On the walk-and-turn test, according to Deputy Schultz originally, Ms. Krumbeck exhibited two out of eight possible clues but further testimony shows that Ms. Krumbeck actually exhibited three clues. Deputy Schultz testified that two clues are enough two show signs of impairment. He stated that Ms. Krumbeck missed

heel-to-toe and stepped off the line during the test, both clues or signs of impairment. On redirect, Deputy Schultz stated he instructed and demonstrated how to do the Walk-and-Turn Test to Ms. Krumbeck. Deputy Schultz testified that Ms. Krumbeck didn't do the turn correctly. She took at least one step when completing the turn instead of a series of short steps like he demonstrated so that would also be a clue. So now we have two field sobriety tests completed, two more indicators that Ms. Krumbeck was in fact impaired.

Next Deputy Schultz moves on to the One Leg Stand Test where he testifies that if the defendant exhibits two or more clues that would also be a showing of possible impairment. Deputy Schultz explains the test to the defendant and has her perform the test. Deputy Schultz testifies that Ms. Krumbeck exhibited three clues of impairment. Deputy Schultz does testifies that Ms. Krumbeck was swaying and she hopped during this test but couldn't remember without reviewing his report what the third clue was that she exhibited. There was a lot of discussion on whether or not Ms. Krumbeck hopped or adjusted her foot and at this point it doesn't really matter. Whether she hopped or adjusted, whether it is two or three clues, the bottom line here is that Ms. Krumbeck has demonstrated in all three of the field sobriety tests sufficient signs of impairment to establish probable cause to believe that she has been driving while impaired.

By not raising the issue, the appellant rightfully concedes that there is sufficient and substantial evidence for Deputy Schultz to administer the PBT to Ms. Krumbeck. After the administration of the PBT, Deputy Schultz arrests Ms. Krumbeck for operating while under the influence of an intoxicant.

In summation, based on the following observations Deputy Schultz had reasonable suspicion to stop Ms. Krumbeck and then he had probable cause to arrest her because:

- Deputy Schultz noted erratic driving for a sustained distance;
- It was the weekend and around 3:00 a.m. which is shortly after bar time;
- Ms. Krumbeck's driving did not improve when she went from poor road conditions to good road conditions;
- Ms. Krumbeck had an odor of intoxicants coming from her vehicle and she was alone in the vehicle;
- Ms. Krumbeck had glassy and bloodshot eyes;
- Ms. Krumbeck admitted to drinking alcoholic beverages that evening;
- Ms. Krumbeck was delayed in answering Deputy Schultz's questions;
- Ms. Krumbeck exhibited six out of six clues on the HGN test which is an indicator of impairment;

- Ms. Krumbeck exhibited three out of eight clues on the Walk-and-Turn Test which is also an indicator of impairment;
- Ms. Krumbeck exhibited two or three out of four clues on the One-Leg-Stand Test which is yet another indicator of impairment; and finally,
- Ms. Krumbeck gave a sample of her breath for Deputy Schultz and based on the totality of all the factors listed Deputy Schultz placed Ms. Krumbeck under arrest.

IV. CONCLUSION

For the above-stated reasons, the County respectfully asks this Court to affirm the trial court's denial of her Motion to Suppress – Unlawful Stop, Detention and Arrest.

Dated at Portage, Wisconsin, September 25, 2015.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 5,336 words.

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CLIFFORD C. BURDON