STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP001718-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

V.

ZACHARY W. SWAN,

DEFENDANT-APPELLANT.

APPEAL FROM THE JUDGMENT ENTERED IN
THE LA CROSSE COUNTY CIRCUIT COURT,
THE HONORABLE TODD W. BJERKE, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is precluded by Wis. Stat. § 809.23(1)(b)(4) as this appeal shall be decided by one judge. Oral argument is not requested.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. The circuit court properly denied Swan's motion to suppress.

A. Standard of Review.

"'Whether evidence should be suppressed is a question of constitutional fact.'" *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.* (citation omitted). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The court's application of constitutional principles to those historical facts is reviewed de novo. *Id.*

B. Officer Bowe made sufficient observations supporting a probable cause to believe Swan violated Wisconsin's absolute sobriety law before administering a preliminary breath test.

Swan asserts that the circuit court erred in denying his suppression motion (Swan's Brief-in-Chief at 9). In support, Swan advances the sole argument that at the time law enforcement requested a preliminary breath test of Swan pursuant to Wis. Stat. § 343.303, Officer Trenton Bowe made insufficient observations to support a probable cause to believe Swan had violated Wis. Stat. § 346.63(2m), also referenced as Wisconsin's absolute sobriety law (Swan's Brief-in-Chief at 9).

As Swan correctly recognizes, Wis. Stat. § 346.63(2m) prohibits individuals who have not reached the age of twenty-one years from operating a motor vehicle upon a highway with a blood alcohol concentration between 0.0 and 0.08 (Swan's Brief-in-Chief at 8). More importantly, Swan acknowledges, "[A]ny alcohol consumed would have pushed [Swan] over the legal limit" (Swan's Brief-in-Chief at 12).

Despite this extremely low lawful blood alcohol concentration threshold, Swan's central criticism of the circuit court's decision denying his suppression motion is that prior to Officer Bowe administering a preliminary breath test, Swan did not exhibit many commonly recognized signs of intoxication (Swan's Brief-in-Chief at 9-13).

In support, Swan references a myriad of appellate decisions, each examining specific observations that Wisconsin appellate courts have recognized as indicative of driver *intoxication*, such as glossy eyes, slurred speech, balance issues or an odor of intoxicants, but not necessarily indicative of mere alcohol *consumption* (Swan's Brief-in-Chief at 12-13).

In *State v. Goss*, the Wisconsin Supreme Court recognized "[t]he ordinary investigative tools employed in an investigation of an OWI case with a .08 PAC standard are of little or no use where the PAC standard is one fourth of that level because *the ordinary physical indications of intoxication are not typically present* in a person with [a .02] blood alcohol content." 2011 WI 104, ¶27, 338 Wis.2d 72, 806 N.W.2d 918 (emphasis added).

This finding in *Goss* is more so true for those such as Swan, who, having not yet reached the age of twenty-one years, are subject to an even lower blood alcohol concentration threshold than a fourth-offense drunk driver. *Compare with* Wis. Stat. § 346.01(46m) (establishing a .02 prohibited alcohol concentration for those with three or more prior impaired driving convictions).

Even a negligible .001 grams of ethanol per 100 mL of the driver's blood, an amount one-twentieth of that which would comprise a violation of the .02 prohibited alcohol concentration limit in *Goss*, would still constitute a violation of law for Swan even absent common signs of impairment. Wis. Stat. § 346.63(2m).

Consequently, while the authority Swan references may offer guidance to circuit courts around the state in determining which roadside observations may constitute signs of intoxication, such authority should not be deemed dispositive for the issue of whether a driver consumed any alcohol before getting behind the wheel of an automobile. Complete reliance on appellate authority examining clues of intoxication that one may expect from intoxicated drivers, such as glossy eyes, slurred speech, balance issues or an odor of intoxicants, is inappropriate given the fact that Swan was subject to a much lower alcohol limit. *See* Swan's Brief-in-Chief at 12.

In the instant case, Officer Bowe was confronted at 2:36 A.M. with a driver who had not reached the age of twenty-one (10:12, R-Ap. 112). *See State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis.2d 383, 76 N.W.2d 551 (recognizing police contact at "bar time" as a factor supporting an officer's suspicion of impaired driving).

When approached by Officer Bowe, Swan's speech was muffled, Swan stuttered, and Swan spoke in brief, short sentences (10:14-15, R-Ap. 114-15). *See County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (finding probable cause to administer a preliminary breath test even in the absence of a driver's slurred speech).

Officer Bowe had knowledge that this individual had driven a motor vehicle containing a half-full bottle of liquor and that Swan was aware of the bottle's presence in the vehicle, all in violation of Wis. Stat. § 346.935(2) (10:15-16, R-Ap. 115-16).

Officer Bowe noted during contact with the driver that Swan was visibly nervous, demonstrating potential consciousness of guilt (10:8, R-Ap. 108). *State v. Babbitt*, 188 Wis.2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994) (recognizing evidence of consciousness of guilt may contribute to establishing probable cause to arrest).

Swan acknowledged that he had been with another individual, Cody Soos, who law enforcement had determined was also consuming alcohol and who instructed Swan to drop him off at the location (10:14, 18, R-Ap. 114, 118).

Officer Bowe knew the driver was smoking a cigarette, a practice Officer Bowe recognized covered the odor of intoxicants, and perhaps more importantly, Officer Bowe conceded he couldn't smell "pretty much anything" that night (10:15, R-Ap. 115). The mere fact that Officer Bowe was unable to detect the odor of intoxicants over the smell of cigarette smoke should not be dipositive for this court's determination. *See Lange*, ¶ 37 ("Although evidence of intoxicant usage—such as odors, an admission, or containers—ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required").

Ultimately, the time of night, Swan's peculiar behavior, Swan's cigarette use to cover the scent of alcohol use, Swan's possession and knowledge of a half-empty bottle of liquor in the vehicle which he was driving, and Swan's admission to being with an individual who also was consuming alcohol would lead any reasonable person to believe that

Swan too had been consuming alcohol, even if merely a slight amount.

With the customary tools of alcohol detection rendered potentially useless had Swan consumed only a negligible amount of alcohol, Officer Bowe was left in a Catch-22 position: administer a preliminary breath test to confirm the presence or absence of alcohol or risk permitting an underage drinker to return his vehicle to the streets.

Taking into consideration the time of morning, Swan's nervous demeanor, Swan's cigarette use which Officer Bowe knew could cover the odor of intoxicants, Swan's knowledge of the half-full bottle of alcohol in his vehicle and within his reach, and Swan's association with an individual who was known to have been consuming alcohol, Officer Bowe elected to do the former.

While Swan wishes to fault Officer Bowe for his actions based on evidence that tended to support a contrary assumption that Swan had not been consuming alcohol, such arguments should fail. As Swan correctly notes, courts examine the totality of the circumstances to determine whether the administration of a preliminary breath test was supported by probable cause. *Goss*, ¶ 9.

That Swan wishes to highlight certain facts such as his denial of alcohol consumption, the lack of impairment indicators one would not expect from an individual who only consumed minor yet unlawful amounts of alcohol, the innocent explanations now offered by Swan for his nervous demeanor and the finding that Swan's passenger was visibly intoxicated, these facts should not lead this court to ignore the evidence that Swan had

been consuming alcohol before motor vehicle operation.

As a result, this court should properly find, as did the circuit court, that Officer Bowe had probable cause to believe Swan had been consuming alcohol and properly administered a preliminary breath test as a result.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment convicting Zachary W. Swan of operating a motor vehicle with a prohibited alcohol concentration.

Dated this 21st day of December, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,401 words.

_____

John W. Kellis
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 at La Crosse, Wisconsin, this 21st day of December, 2015.

_____

John W. Kellis
Assistant District Attorney

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 21st day of December, 2015.

_____

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on December 21, 2015, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-respondent's brief and appendix.

Dated this 21st day of December, 2015.

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John W. Kellis
Assistant District Attorney