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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Officer Bowe Lacked Probable Cause to Request a PBT from Swan and Thus the PBT Was Unlawful. All Evidence and Statements Derived from the Unlawful PBT Should Be Suppressed.

There are two main flaws in the State's reasoning: the State fails to consider the full range of circumstances relevant to determining whether the PBT was supported by probable cause, and it ascribes far too much probative value to facts that are ambiguous at best.

In arguing that the PBT was supported by probable cause, the State wholly ignores the facts that suggested Swan had *not* been drinking. *See* State's brief at 5-7; Swan's brief-in-chief at 12-13. In doing so, the State disregards the well-established totality-of-the-circumstances test for determining whether a PBT was supported by probable cause. *See State v. Goss*, 2011 WI 104, ¶9, 338 Wis. 2d 72, 806 N.W.2d 918. Careful application of that test reveals there was insufficient objective evidence that Swan had been drinking to provide probable cause for a PBT. *See* Swan's brief-in-chief at 9-13. Indeed, a closer look at the facts relied on by the State shows they have little probative value.

The State begins by noting that Officer Bowe encountered Swan around bar time (at 2:36 a.m.). State's brief at 5. While the time of night is undeniably relevant to an officer's probable cause determination, the State fails to acknowledge that an underage driver is much less likely to be coming from a bar than a driver of legal drinking age—even at bar time. Bar time simply has less salience when the driver suspected of drinking cannot lawfully drink at a bar.

The State next recites Officer Bowe's observations about Swan's speech and demeanor, stating that Swan's speech was muffled, that he stuttered and spoke in short sentences, and that he was visibly nervous. State's brief at 5-6. Considering that Swan was a 19-year-old with no criminal record at the time of this police encounter, Swan's nervous conduct and patterns of speech were only natural; they were hardly suggestive of drinking.

Similarly unpersuasive is the State's reliance on the presence of a half-empty liquor bottle in the back of Swan's car. *See* State's brief at 5. As explained in Swan's brief-in-chief at 11, the bottle in Swan's car showed only that Swan had the opportunity to consume alcohol, not that he had in fact consumed alcohol. Some evidence indicating that Swan had actually been drinking from the bottle in his car was required to elevate Officer Bowe's hunch to the level of probable cause, and no such evidence had been uncovered when the PBT was administered. On the contrary, the facts within Officer Bowe's knowledge suggested that Soos was the one who had been drinking from the bottle in Swan's car.

The State also cites the fact that Swan was with Soos as evidence supporting probable cause for the PBT. Although Swan's association with Soos may have seemed suspicious, some evidence suggesting that Swan had actually been drinking with Soos was necessary to transform Officer Bowe's suspicions into probable cause. Again, no such evidence had been uncovered when the PBT was administered.

Finally, the State emphasizes both Officer Bowe's observation that Swan was smoking a cigarette and Officer Bowe's supposed knowledge that cigarette smoke can be used to mask the odor of intoxicants. As discussed

in Swan's brief-in-chief at 10, no foundation was ever established for Officer Bowe's "knowledge" that cigarettes can serve as a masking agent. In any case, as the State seems to concede, the fact that Swan was smoking a cigarette merely diminishes the significance of the absence of the odor of alcohol on Swan's breath and person; it does not constitute affirmative evidence that Swan had been drinking. *See* State's brief at 6.

This is the entirety of the evidence that the State contends established probable cause for the PBT. Viewed in context (that is, alongside the evidence suggesting Swan had *not* been drinking), these facts fell short of providing Officer Bowe with probable cause to request a PBT from Swan. Accordingly, the PBT was unlawful and all evidence derived therefrom should be suppressed. *See Goss*, 338 Wis. 2d 72, ¶5 n.6 (because a PBT administered without probable cause violates Wis. Stat. § 343.303, its result and "all subsequently obtained evidence" should generally be suppressed).

CONCLUSION

For the reasons stated in the briefs he has filed, Zachary W. Swan respectfully urges the court to vacate the judgment of conviction and remand the case to the circuit court with instructions to suppress all evidence and statements derived from the unlawful PBT and to afford Swan the opportunity to withdraw his guilty plea.

Dated this 7th day of January, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 773 words.

CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 7th day of January, 2016.

Signed:

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