

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

02-02-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 16 AP 420 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANGELO M REYNOLDS,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH #5, THE HONORABLE NICHOLAS J. MCNAMARA, PRESIDING

Patrick D. Winter
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1089795

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES iii

STATEMENT ON PUBLICATION AND ORAL ARGUMENT iii

STATEMENT OF THE CASE iii

ARGUMENT 1

I. THE CIRCUIT COURT PROPERLY DENIED REYNOLD'S MOTION BECAUSE AT THE TIME OF THE PRELIMINARY BREATH TEST, DEPUTY SCHIRO HAD PRPOBABLE CAUSE TO BELIEVE REYNOLDS HAD OPERATED WHILE INTOXICATED IN VIOLATION OF WIS. STAT. 364.63

CONCLUSION 8

CERTIFICATION 10

CERTIFICATE OF COMPLIANCE. 11

APPENDIX

TABLE OF CONTENTS. i

State v. Tadych,
2010 WI App 33, 323 Wis.2d 824,
781 N.W.2d 551. A1

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<i>Cnty. of Jefferson v. Renz</i> , 231 Wis.2d 293, 603 N.W.2d 541 (1999)	3,4,6,7
<i>State v. Richardson</i> , 156 Wis.2d 128, 456 N.W.2d 830 (1990)	1
<i>State v. Setagord</i> , 211 Wis.2d 397, 565 N.W.2d 506 (1997)	1
<i>State v. Tadych</i> , 2010 WI App 33, 323 Wis.2d 824, 781 N.W.2d 551.	4,5,6,7

STATUTES CITED

Wis. Stat. § 343.303	passim
Wis. Stat. § 343.305(3).	3
Wis. Stat. § 346.63(1)(a).	1,2,3,8
Wis. Stat. § 752.31(2)	iii
Wis. Stat. § 809.19(3)(a)(2)	iii
Wis. Stat. § 809.23(3)(b).	5

STATEMENT OF THE ISSUES

At the time of the preliminary breath test, did Deputy Schiro have probable cause to believe Reynolds had operated while intoxicated in violation of Wis. Stat. § 364.63?

The trial court answered YES.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Because this is an appeal permitted by Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. The issues in this appeal may be resolved through the application of established law, and written briefs will adequately address the arguments, so oral argument will not be necessary.

STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. See Wis. Stat. § 809.19(3)(a)(2).¹ Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2015-16 edition.

Appellant, Angelo Reynolds, was charged with operating a motor vehicle while intoxicated and with a prohibited alcohol concentration, both as third offenses, contrary to Wis. Stat. §§ 346.63(1)(a) and (1)(b), respectively. (R. 4:1-11.) On August 31, 2014, Deputy Schiro was dispatched to UW Hospital regarding a motorcycle accident that occurred in the township of Vermont. (*Id.*) Deputy Schiro identified Reynolds as the driver of the motorcycle. (*Id.*) At 9:55 p.m., Deputy Schiro observed that Reynolds was in a cervical collar with visible injuries to his right leg. (R. 47:19-21,37.) Reynolds stated that he had crashed his motorcycle at approximately 7:30 p.m. that day. (R. 47:16.)

Deputy Schiro testified that when speaking with Reynolds, he could smell alcohol on Reynolds' breath. (R. 47:17.) Reynolds told Deputy Schiro that he drank four beers that evening, prior to his motorcycle accident. (R. 47:28.) Deputy Schiro also testified that he observed Angelo Reynolds' eyes to be bloodshot, and Reynolds was "loud and boisterous." (R. 47:17.) Deputy Schiro then performed both standardized and non-standardized field sobriety tests upon Reynolds. (R. 47:18-27.) During the tests, Reynolds exhibited indicators of impairment on each

of the four tests he performed. (R. 47:21-27.) After completing the standardized and non-standardized field sobriety tests, Deputy Schiro requested that Reynolds provide a breath sample for a preliminary breath test. (R. 47:30.)

On March 6, 2015, Reynolds appeared for a motion hearing in Dane County Circuit Court before the Honorable Nicholas J. McNamara. (R. 47:1.) The issue presented was whether, based upon the totality of the circumstances, the State proved that Deputy Schiro had probable cause under Wis. Stat. § 343.303 to request and administer the PBT to Reynolds. (R. 17:1.) After hearing oral testimony relating to Reynolds' motion to suppress the result of the PBT, the trial court denied Reynold's motion.

ARGUMENT

This Court should affirm the lower court's order denying the motion to suppress filed by Reynolds because at the time of the preliminary breath test, Deputy Schiro had sufficient probable cause to believe, based upon the totality of the circumstances, that Reynolds had operated while intoxicated in violation of Wis. Stat. § 364.63.

Furthermore, Deputy Schiro had probable cause to arrest Reynolds irrespective of the implementation of the preliminary breath test.

When reviewing the denial of a motion to suppress evidence, the reviewing Court shall uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830 (1990). Whether those facts satisfy the statutory standard of probable cause is a question of law this Court reviews *de novo*. *State v. Setagord*, 211 Wis.2d 397, 405-06, 565 N.W.2d 506 (1997).

I. THE CIRCUIT COURT PROPERLY DENIED REYNOLD'S MOTION BECAUSE AT THE TIME OF THE PRELIMINARY BREATH TEST, DEPUTY SCHIRO HAD PROBABLE CAUSE TO BELIEVE REYNOLDS HAD OPERATED WHILE INTOXICATED IN VIOLATION OF WIS. STAT. § 346.63

The lower court properly denied a motion to suppress evidence on whether Deputy Schiro lawfully requested and administered a PBT to Reynolds. Deputy Schiro was investigating a crash where Reynolds was the operator of the vehicle, and during that investigation Deputy Schiro smelled intoxicants on Reynolds' breath, heard Reynolds admit that he had drunk multiple beers before the crash, and observed Reynolds exhibit clues of impairment on each of the four field sobriety tests he performed. (R. 47:16-30.) At this point, Deputy Schiro had probable cause to believe Reynolds had operated while intoxicated, and his subsequent request that Reynolds provide a PBT is an example of an appropriate time and use for a preliminary breath test.

Wis. Stat. § 343.303, governs the use of a PBT as part of an OWI investigation. The relevant portion of that statute provides:

If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) . . . the officer, prior to arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1) . . . and whether or not to require or request chemical tests as authorized under s. 343.305(3).

Wis. Stat. § 343.303.

The use of the term "probable cause to believe" has been clarified by the Wisconsin Supreme Court. See *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999). In *Renz*, the Court concluded that the legislature intended the term "probable cause to believe," as used in the first sentence of Wis. Stat. § 343.303, to refer to a quantum of proof that is greater than the level of reasonable suspicion necessary to justify an investigative stop, and also greater than the "reason to believe," such as the smell of alcohol alone, necessary to request a PBT from a commercial driver, but less than the requisite level of proof to establish probable cause for arrest. *Id.* at 317.

The law enforcement officer in *Renz* stopped *Renz's* vehicle for defective exhaust, *Renz's* vehicle smelled of

intoxicants, Renz admitted to drinking three beers earlier that evening, and Renz exhibited clues of impairment in four out of five of the field sobriety tests he performed. *Id.* at 296, 297. Renz was able to substantially complete all field sobriety tests while exhibiting no signs of slurred speech during his interaction with the officer. *Id.* at 317. The officer then asked Renz to submit to a PBT, the results of which were later challenged on grounds of lack of probable cause. *Id.* at 299.

In response to the defendant's argument, the Court addressed the purpose of the PBT, which is "to help determine whether there are grounds for arrest." *Id.* at 304. The Court further explained that "[t]he officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest," and held that the officer had the required degree of probable cause to request the defendant to submit to a PBT. *Id.* at 317.

Similarly, the Court of Appeals, District II, in *State v. Tadych*, concluded that a rollover accident and odor of intoxicants coupled with Tadych's admission that he had consumed alcohol but "stopped drinking" three hours prior to the accident "were sufficient to provide an officer with

not only reasonable suspicion to believe that Tadych may have committed a crime, but also a quantum of proof greater than that.² *State v. Tadych*, 2010 WI App 33, ¶ 12, 323 Wis.2d 824, 781 N.W.2d 551 (2010). The Court went on to note that “any doubt fostered by the lack of speech impairment and the officer’s inability to request field sobriety testing was properly resolved by the administration of the PBT. *Id.* at ¶12.

In *Tadych*, the law enforcement officer was dispatched to a rollover accident and learned that Tadych had already been transported to the hospital. *Id.* at ¶3. The officer located Tadych at the hospital, identified that Tadych was the driver of the rolled vehicle, and noted a “slight odor of intoxicant” on Tadych’s breath. *Id.* at ¶4. Tadych said he left the roadway to avoid a deer. *Id.* During the exchange, Tadych also stated that he had been drinking, but he had stopped three hours before the time of the crash. *Id.* The officer did not request field sobriety tests due to the medical treatment Tadych was receiving but he asked that Tadych take a PBT, the results of which were later challenged on grounds of lack of probable cause. *Id.*

²Per Wis. Stat. §809.23(3)(b), an unpublished opinion issued on or after July 1, 2009 may be cited for its persuasive value.

On appeal, Tadych pointed out that the officer failed to notice any speech impairment, bloodshot eyes, incoherence, did not perform any field sobriety test, and lacked any knowledge as to how much alcohol he had consumed. *Id.* at ¶9. Tadych contended that when compared to *Renz*, the facts of his case fell short, but the Court of Appeals disagreed and upheld the lower court's ruling. *Id.*

The facts in this present case display more clues, or indicators of alcohol consumption and impairment than the facts heard by the Supreme Court in *Renz*, and the Court of Appeals in *State v. Tadych*. *See Id.* at ¶12. Deputy Schiro knew that Reynolds was operating a motor vehicle and was involved in a serious crash around 7:30 p.m., the crash causing injury which necessitated Reynolds be taken to the hospital. (R. 47:13-17.) Deputy Schiro observed that Reynolds had bloodshot eyes, and was being "loud and boisterous." (R. 47:17). Deputy Schiro noted that he could smell intoxicants on the breath of Reynolds, and that Reynolds admitted that he had drank four beers prior to the crash. (R. 47:17,28.) Deputy Schiro administered four field sobriety tests to Reynolds, and Deputy Schiro observed that Reynolds exhibited clues of impairment on each test he performed. (R. 47:21-28.) Whereas in *Tadych*,

the officer knew only that Tadych was involved in a rollover accident, that Tadych had an odor of intoxicants on his breath, and that Tadych had admitted to drinking. See *Tadych*, WI App 33, ¶12.

The quantum of evidence in the present case was likely sufficient to warrant an arrest, but surely sufficient to warrant further investigation. It would have been irresponsible for Deputy Schiro to ignore the indicators of impairment he observed, and fail to make an arrest or conduct further investigation. Deputy Schiro testified that he felt that he had enough evidence to arrest Reynolds for OWI before administering the PBT, but chose to ask Reynolds to perform the PBT before the arrest. (R. 47:30.) This shows that Deputy Schiro correctly used the PBT for its intended purpose, as intended by the legislature in Wis. Stat. § 343.303 and interpreted by the Wisconsin Supreme Court in *Renz*, that being to help the officer conclude that he or she has grounds for a proper arrest. See *Renz*, at 304.

CONCLUSION

This Court should affirm the lower court's order denying the motion to suppress filed by Reynolds. Deputy Schiro carefully investigated a crash that resulted in injury serious enough to warrant medical treatment. Deputy Schiro observed multiple physical indicators of impairment and alcohol consumption during his contact with Reynolds, which when viewed alongside the fact that Reynolds crashed his vehicle and admitted that he had drunk four beers before driving, gave him probable cause to believe, based upon the totality of the circumstances, that Reynolds had operated while intoxicated. Before making an arrest, Deputy Schiro offered Reynolds a chance to take the PBT. The PBT result helped Deputy Schiro conclude that he had sufficient evidence to arrest Reynolds for a violation of Wis. Stat. § 346.63(1)(a).

The State therefore respectfully requests that this Court affirm the circuit court's denial of Reynolds' motion to suppress.

Patrick D. Winter
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1089795

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 9 pages.

Dated: _____.

Signed,

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 this 2nd day of February, 2017.

Patrick D. Winter
Assistant District Attorney
Dane County, Wisconsin

TABLE OF CONTENTS

	<u>PAGE</u>
<i>State v. Tadych</i> , 2010 WI App 33, 323 Wis.2d 824, 781 N.W.2d 551.	A-1