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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2016AP000594

VILLAGE OF ASHWAUBENON,
Plaintiff- Respondent

-vs-

MARK BOWE,
Defendant- Appellant.

BRIEF OF DEFENDANT APPELLANT

Appeal from the Circuit Court for Brown County
The Honorable Tammy Jo Hock Presiding
Trial Court Case No. 2015-CV-1436

JOHN MILLER CARROLL LAW OFFICE

John Miller Carroll
State Bar No. 1010478
Attorney for Defendant- Appellant

ADDRESS:
226 South State Street
Appleton, WI 54911
Telephone: (920) 734 4878

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ISSUES PRESENTED FOR REVIEW

Are the Standardized Field Sobriety Tests a "search" within the meaning of the Fourth Amendment?

The Circuit Court answered: No.
The Defendant-Appellant submits: Yes.

Should the quantum of evidence to conduct a field sobriety test search be higher than reasonable suspicion?

The Circuit Court answered: No.
The Defendant-Appellant submits: Yes.

Did the officer have proper causation to conduct field sobriety tests?

The Circuit Court answered: Yes.
The Defendant-Appellant submits: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. However, publication is requested, as the issues presented for review present questions of constitutional interpretation, and the administration of a highly litigated area of the Wisconsin criminal justice system.

STATEMENT OF THE CASE

This is an appeal from a judgment, entered in Brown County Circuit Court, the Honorable Tammy Hock

presiding, in which the Defendant-Appellant, Mark Bowe's ("Bowe") , was denied. (R. 19). Following the Denial of the Defendants Motion a Stipulation was entered staying his sentencing pending appeal. (R.13)

On January 19 2015, the Village of Ashwaubenon filed a citation in the Ashwaubenon Municipal Court charging Bowe with, Operating While Intoxicated (1st Offense), contrary Wisconsin Stat. § 346.63(1)(b). (R. 5). Following the Denial of the Defendants Suppression Motion, Bowe ultimately entered into a Stipulation to Stay his Sentence Pending an Appeal in the Circuit Courts.

On or about October 9th, 2015, Bowe filed a *Notice of Appeal* in the circuit court. (R. 1). Accordingly, a motion hearing was held on February 11, 2016. (R. 19). At the February 11th, hearing, the circuit denied Bowe's motion. (R. 19:27).

Following the circuit court's ruling denying the motion, a Stipulation and Order was entered. (R. 13). Following the Stipulation, the Defendants sentence was stayed pending appeal. (R.13). This appeal follows.

STATEMENT OF THE FACTS

As indicated above, a Citation (R. 5) was filed on January 19th, 2015 (R. 5) charging Bowe with Operating While Intoxicated (1st Offense). Bowe was stopped for a failed passenger side headlight and invalid registration in the Town of Ashwaubeon by Officer Christopher Sands (Officer Sands). Upon making contact with Bowe, Officer Sands alleges to have observed a moderate odor of intoxicants coming from Bowe's vehicle. Officer Sands determined that the mere odor of intoxicants, combined with the time of night, red blood shot eyes and the presence of a partially covered case of beer in the back seat, absent other personal indicia of intoxication, were reasonable clues to determine that suggested that Bowe was intoxicated. As such, Officer Sands administered 3 pre- field sobriety tests. (R19; 6) All three Pre-Field Sobriety Tests were designed to provide officers an alternative means to a seizure and search via Standard Field Sobriety Testing in circumstances where under the totality of the circumstances the tests alleviate the cause to search (R19; 6-16). Bowe performed without issue all three Pre field sobriety tests (R19; 6-7). Specifically Officer Sands testified

> "A: What I did next is I asked to, asked the Defendant to perform some in field assessments or, or preliminary tests if you will. I first had him count from 71 to 59 backwards. He was able to perform that test with unremarkable results. I then asked him to perform the alphabet test going from J to T. He again performed that with unremarkable results. And a finger test, touching the fingertips. Again, he was able to perform that with unremarkable results." (R19; 6-7).

Following the PFSTs and Bowes flawless performance the stop of invalid registration was extended to include Standard Field Sobriety Testing and subsequently a PBT. (R 19) Bowe was ultimately arrested for Operating While intoxicated (1st Offense). (R. 5)

Also indicated above, Bowe filed a *Motion to Suppress Evidence* on October 23, 2015. (R. 9). Bowe contended that Officer Sands lacked probable cause to detain him and lacked either reasonable suspicion or probable cause to require him to perform standardized field sobriety tests. Bowe argued that the standardized field sobriety tests ("FSTs") are a "search" in the constitutional sense, as such an officer must have, at a minimum, a quantum of evidence higher than

reasonable suspicion, but lower than probable cause to require a person submit to this "search." Bowe contended that all Officer Sands possessed at the time he administered the FSTs was an unparticularized hunch that was subsequently disproven through pre-field sobriety testing that Bowe was intoxicated. (R. 19).

On February 11th, 2016, the circuit court orally denied Bowe's motion. Essentially, the circuit court held that the present factors of glossy eyes, slurred speech, and odor of intoxicants justified a finding of probable cause. (R. 19; 25-26).

However, the Circuit Court appears not to have opined on the effect of passing all Pre Field Sobriety testing on the totality of the circumstances analysis. Specifically, the Defendant contends that due to the implication and use of these Pre-Field Sobriety Tests in other cases to add to the probable cause finding justifying a search under the totality of the circumstances, that in this cases his flawless performance on these tests when considered under the totality of the circumstances alleviated the officers articulable suspicion of any illegal activity, all prior to the order to step out for Standard Field Sobriety Testing.

ARGUMENT

IV. THE STANDARDIZED FIELD SOBRIETY TESTS ARE A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT

a. Standard of Review

An appellate court is not bound by the circuit court's conclusions of law and decides the issues *de novo*. State v. *Foust*, 214 Wis.2d 568, 571-72, 570 N.W.2d 905 (Ct. App.1997).

b. Field Sobriety Tests Constitute A "Search" Within The Constitutional Sense

The Fourth Amendment to the United States Constitution declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> United States Const., Amend. IV.

The question as to whether FSTs, specifically the Horizontal Gaze Nystagmus, Walk-and-Turn and One-legged Stand tests, are a "search" within the meaning of the Fourth Amendment has never been addressed by Wisconsin courts. Therefore, an issue of first impression is presented. Fortunately, several other jurisdictions have had the

opportunity to interpret the instant issue and therefore provide guidance to the case at hand. *See e.g.*, *Berg v. Schultz*, 190 Wis.2d 170, 177, 526 N.W.2d 781 (Ct. App. 1994) ("Because this is a case of first impression, we look to other jurisdictions for guidance.").

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984). An inherent right as a human being is to control and coordinate the actions of their own body. Hence, a fundamental expectation of privacy is implicated when a person is subject to the performance of FST.

Essentially, all jurisdictions that have had the occasion to address the issue have held that FSTs constitute a "search" in the constitutional sense. In *People v. Carlson*, 677 P.2d 310 (Colo. 1984), the Colorado Supreme Court held that FST "constitutes a full 'search' in the constitutional sense of that term[.]" *Id*. at 317. *Also see e.g. United States v. Hopp*, 943 F. Supp. 1313 (D. Colo. 1996) (holding FST are searches within the meaning of the Fourth Amendment); *and also State v. Lamme*, 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), affirmed, 216 Conn. 172, 579 A.2d 484 (Conn. 1990);

State v. Little, 468 A.2d 615 (Me. 1983); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (Ariz. 1986); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544 (Haw. 1984); *Blasi v. State*, 167 Md. App. 483, 893 A.2d 1152 (Md. Ct. App. 2006).

V. THE QUANTUM OF EVIDENCE TO REQUIRE FSTs SHOULD BE HIGHER THAN REASONABLE SUSPICION

The threshold determination that FST are "searches" within the meaning of the Fourth Amendment having been established, the question now becomes what quantum of evidence attaches to the FST search in order to be constitutional. The Fourth Amendment calls for this determination. As is no surprise, no Wisconsin court has addressed the issue. Bowe turns to other jurisdictions.

At the outset, Bowe acknowledges that there is a split in authority amongst the jurisdictions having addressed the instant issue. Some courts have held the quantum of evidence required is reasonable suspicion[1], while some courts hold probable cause[2] is required.

[1] *See e.g.*, *State v. Lamme*, 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), affirmed, 216 Conn. 172, 579 A.2d 484 (Conn. 1990); *State v. Little*, 468 A.2d 615, 617-18 (Me. 1983); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 175-76 (Ariz. 1986); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544, 552-53 (Haw. 1984).

Bowe finds *People v. Carlson*, 677 P.2d 310 (Colo. 1984) to be particularly persuasive. In *People v. Carlson*, the Colorado Supreme Court held:

> We are left then with the issue of the validity of the roadside sobriety tests, a matter not considered below. A roadside sobriety test involves an examination and evaluation of a person's ability to perform a series of coordinative physical maneuvers, not normally performed in public or knowingly exposed to public viewing, for the purpose of determining whether the person under observation is intoxicated.
>
> Since these maneuvers are those which the ordinary person seeks to preserve as private, there is a constitutionally protected privacy interest in the coordinative characteristics sought by the testing process. Although some forms of governmental intrusion are so limited in scope as to be justified on a lesser quantum of evidence than probable cause, see, e.g., *Michigan v. Long*, supra; *Terry v. Ohio*, supra, a roadside sobriety test does not fall into this category.
>
> Roadside sobriety testing constitutes a full "search" in the constitutional sense of that term and therefore must be supported by probable cause. The sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect. Intrusions into privacy for the exclusive purpose of gathering evidence of criminal activity have traditionally required, at the outset of the intrusion, probable cause to believe that a crime has been committed. See *Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641, 78 L.Ed.2d 477 (1984); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).
>
> *Id*. at 316-17.

Acknowledging the persuasive value, Bowe urges the Court to find, as a matter of first impression, that the level of suspicion in Wisconsin should be probable cause, but not to

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[2] *See e.g.* *People v. Carlson*, 677 P.2d 310 (Colo. 1984); *United States v. Hopp*, 943 F. Supp. 1313 (D. Colo. 1996)

the extent of probable cause to arrest. Rather, Bowe suggests a quantum of evidence that is *more* than reasonable suspicion, but *less* than probable cause to arrest. Bowe makes this suggestion by analogically applying the rationale of decision rendered by the Wisconsin Supreme Court in ***County of Jefferson v. Renz*****,** 231 Wis.2d 293, 603 N.W.2d 541 (1999).

In ***Renz***, the Wisconsin Supreme Court was faced with interpreting the "probable cause" language as used in Wis. Stat. § 343.303. *Id*. The Renz court held that "probable cause," as that term is used in sec. 343.303, refers "to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest." ***Renz*****,** 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999).

Bowe submits that rationale of ***Renz*** should be applied here. Firstly, similar to a FST, a PBT constitutes as "search" under the federal and state constitutions.[3] Secondly, and more

[3] In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616–17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the U.S. Supreme Court held: "Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, ... implicates similar concerns about bodily integrity and, like the blood-

importantly, such a standard sufficiently protects the citizen's right to be from unreasonable searches and seizures.

Bowe acknowledges the state's legitimate interest in keeping impaired drivers off the road. However, in weighing the burden FSTs impose on the individuals' right to be free from unreasonable searches, Bowe contends that the reasonable suspicion standard is insufficient. A FST search, conducted on the roadside, can prove to be a time consuming, frightening, annoying and an embarrassing intrusion. For this very reason, a quantum of evidence that is greater than reasonable suspicion is appropriate.

VI. UNDER EITHER STANDARD, THE OFFICER LACKED THE REQUISITE QUANTUM OF EVIDENCE TO REQUEST THE FST SEARCHES BECAUSE BASED ON THE TOTALITY OF THE CIRCUMSTANCES THE OFFICER DID NOT ESTABLISH THE PROPER OBSERVATION OF OBJECTIVE FACTS THAT SUPPORT THE THEORY THAT THE DEFENDANT WAS COMMITTING AN OWI

FSTs are designed to determine if a person is operating with a blood alcohol concentration of .10 or higher. In this

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alcohol test ... considered in *Schmerber* [*v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)], should also be deemed a search. [Citations omitted.]" *Accord* *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980) ("While the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, such a search can be conducted if incident to arrest or if a police officer has probable cause to arrest.");

case, the officer did not encounter circumstances which could reasonably lead him to believe that Bowe had a blood alcohol concentration of .10 or higher, or that he was even intoxicated. According to Officer Sands, the only factors that indicated that Bowe was intoxicated were the moderate odor of alcohol, Slightly Slurred Speech, and a half covered case of beer. (R. 19; 20) Specifically, when asked why the fields were done in this case officer Sands admitted it was due to factors allegedly present prior to the decision to administer Pre-FST.

> "Q. Okay. All right, So, then at that point, based on his admission to consuming intoxicants, his speech and his eyes, despite the fact that he passed all three pre-field sobriety tests, you decided to ask him to step out of the the car to perform additional field sobriety, sobriety tests; correct?
>
> A. That's correct, yes." (R. 19; 20)

Admittedly, Officer Sands did not observe any erratic driving; Bowe was simply stopped for canceled registration. Furthermore, Officer Sands did not observe any of the typical signs of intoxication, such as; lethargic or clumsy mobility,

confusion, inability to understand or properly respond to questions, etc., until after the PFSTs were conducted. (R. 19) In fact, Officer Sands confirmed that Bowe answered his questions clearly and coherently. (R. 19; 20) Further, Sands concedes that Bowe passed all Pre Field Sobriety Testing, tests designed by their very nature to determine whether or not a full administration of Stand Field Sobriety Testing is necessary. (R. 19; 16)

What Officer Sands did encounter, was a situation where the facts indicated that Bowe had consumed some alcohol some time prior to driving. Bowe indeed admitted to consuming some amount of alcohol. (R. 19; 13). However, the mere consumption of alcohol before driving is not unlawful. Not only is this reality evinced by the plain language of the statute itself (Wis. Stat. § 346.63), but is also made clear by the pattern jury instructions: "not every person who has consumed an alcoholic beverage is 'under the influence' as that term is used here." (WIS JI-CRIMINAL 2663). Put another way, Wisconsin has not prohibited driving after consuming alcohol.

The facts of the instant case only support a conclusion that Bowe had consumed alcohol; there were no articulable

facts suggesting that he was intoxicated. To violate Wisconsin's OWI law, the prosecution must establish that the individual's ability to drive was impaired as a consequence of consuming intoxicants. *See* Wis. Stat. § 346.63 (1)(a). It is therefore necessary that an officer possess **objective** facts justifying a legitimate suspicion that the individual's ability to drive is in fact impaired as a consequence of alcohol consumption for that officer to be justified in administering FSTs – whether or not, the Court holds the FSTs to be a constitutional "search."

Finally, in this case we have evidence that was collected by way of the administration of three pre-field sobriety tests. The Defendant prays for the adoption of a standard that governs the successful completion of these tests (searches). He asserts that the pre-field sobriety tests must be considered in the totality of the circumstances considered in deciding whether or not to order full field testing. It would be absurd to think that the performance of pre field sobriety tests can add to the finding of causation but not subtract from it. In application that is what has happened. In this case the performance of the defendant on pre-field sobriety tests

effectively alleviated any suspicion Officer Sand had prior to ordering the Defendant from the vehicle.

Specifically, the only real **Objective** fact present in this case is the officer's observation of the partially covered case of beer in the back seat. The rest of the causation cited by the officer is subject to his own subjective interpretation (sight of "glossy eyes", smell of intoxicants, slightly slurred speech are all **subjective** to the thoughts or opinions of the officer and are not **objectively** the same for all people). In this case the administration of the Pre-Field Sobriety testing and the flawless completion of those tasks outweighs the **objective** observation of a causation of a case of beer partially covered. Therefore, the Defendant prays this Court issue an Order overturning the Circuit Courts Ruling Denying the Defendants Motion for Suppression.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court of Appeals reverse the circuit court's ruling denying the Defendant-Appellant's motion to suppress evidence.

Dated this 13th day of June, 2016.

Respectfully Submitted,
JOHN MILLER CARROLL
LAW OFFICE

By: _____

John Miller Carroll
State Bar #1010478
226 S. State St.
Appleton, WI 54911
(920) 734-4878

FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2, 942 words.

Dated this 13th day of June, 2016.

_____

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 13th day of June, 2016.

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John Miller Carroll
State Bar #01010478