STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2016AP000594

VILLAGE OF ASHWAUBENON,
Plaintiff- Respondent

-vs-

MARK J. BOWE,
Defendant- Appellant.

REPLY 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

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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 requested. 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 FACTS

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 Glossy eyes, Slurred Speech and a pack of Bud-Light partially covered by a blanket. Officer Sands determined that these

observations, 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)

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 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 SFSTs are a Search under the US and State Constitutions and that due to the implication and use of three 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 case Bowes 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. A search without cause.

ARGUMENT

I. UNREFUTED ARGUMENTS ARE DEEMED CONCEEDED

The Village of Ashwaubenon did not respond to Bowes assertion and argument that field sobriety tests are searches under the Fourth Amendment.

The Village simply argued our jurisprudence establishes that an officer may request a field sobriety test if the officer has reasonable suspicion to believe the driver is operating while impaired. Because the court shall decline to abandon its neutrality to develop arguments for the Village as to whether field sobriety tests constitute a search, the Court shall therefore conclude that, for purposes of this appeal, Bowes argument is conceded and find the SFSTs are a Search. See State v. Gulrud, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (court need not develop argument for parties); Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

II. THE QUANTUM OF EVIDENCE TO REQUIRE A SEARCH IS GOVERNED BY THE CONSTITUTIONAL PROTECTIONS OF THE 4th AMENDMENT

The threshold determination that SFST are "searches" within the meaning of the Fourth Amendment is conceded in this case. Having been established, the question now becomes what quantum of evidence must attach to the SFST "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 as others have done turn 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. It is important to note that the majority of the cases on this point that require only Reasonable Suspicion to conduct a SFST do so without acknowledging that SFSTs are a search. Because in this case the point is deemed conceded that the SFST are a search we must look to the case law to determine what standard of causation is mandatory in order to seize and search the defendants person.

Bowe finds *People v. Carlson*, 677 P.2d 310 (Colo. 1984) to be particularly persuasive. In *People v. Carlson*, the Colorado Supreme Court ***(interpreting this very constitutional issue)*** 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*

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[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).

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

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 and the constitutional application of law of the Supreme Court of Colorado, Bowe urges the Court to find, as a matter of first impression, that the level of suspicion in Wisconsin must be probable cause as searches of this nature and level of intrusion in other contexts require Probable Cause or even a Warrant.

Bowe submits that rationale similar to ***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 importantly, such a standard sufficiently protects the citizen's right to be from unreasonable searches and seizures, a constitutional right. The Courts appear to be silent as to what causation a warrantless "search" of this context requires.

The Courts appear to have avoided classifying SFST as a search, thus avoiding the issue of what level of causation would support a warrantless search of a person in this context. In another context a warrant or probable cause is what would typically be required to search a person and command them to perform tests for 45 minutes.

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[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-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.");

Even a Terry Stop must be supported by some independent causation that there are likely weapons and the risk of harm, and even then, the subsequent intrusion is limited to a pat down of the outer layers for weapons, must be in a public place and must not be longer than a few moments.

Bowe acknowledges the state's legitimate interest in keeping impaired drivers off the road. However, in weighing the burden SFSTs impose on the individuals' right to be free from unreasonable searches, Bowe contends that the reasonable suspicion standard is drastically insufficient.

A FST search, conducted on the roadside, can prove to be a time consuming, frightening, annoying and an embarrassing intrusion and is a search that typically takes in excess of 45 minutes. For this very reason, a quantum of evidence that is greater than reasonable suspicion is appropriate.

III. BECAUSE SFSTS ARE A DEEMED A SEARCH IN THIS CASE THE US CONSTITUTION AND WISCONSIN CONSTITUTION PROVIDES THAT THERE MUST BE A WARRANT OR PROBABLE CAUSE TO SUPPORT SUCH AN INTRUSION

I. Probable Cause is required for a Less Intrusive Search of Property Contained within an Automobile.

The fundamental guarantees of the United States and Wisconsin Constitutions which provide for "[t]he right of the people to be secure in their persons, ... against unreasonable ... seizures...." United States Constitution, amend. IV, Wis. Const. art. I, sec. 11. This court has stated that "the basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d 516 (1983); e.g., *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

We have also recognized as has the United States Supreme Court that stopping an automobile and detaining its occupants is a "seizure" which triggers fourth amendment protections. *State v. Goebel*, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

":No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile. It is settled, of course, that a stop and search of a moving automobile can be made without a warrant. That narrow exception to the warrant requirement was first established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543.

The Court in Carroll approved a portion of the Volstead Act providing for warrantless searches of automobiles when there was probable cause to believe they contained illegal alcoholic beverages. The Court recognized that a moving automobile on the open road presents a situation 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' *Id*., at 153, 45 S.Ct., at 285. Carroll has been followed in a line of subsequent cases,[1] but the Carroll doctrine does not declare a field day for the police in searching automobiles.

Automobile or no automobile, there must be probable cause for the search. As Mr. Justice White wrote for the Court in *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419: 'In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a ***minimum*** requirement for a reasonable search permitted by the Constitution.' Almeida-Sanchez v. United States, 413 U.S. 266, 269–70, 93 S. Ct. 2535, 2537–38, 37 L. Ed. 2d 596 (1973)

II. The Standard for a Search Concerning Someone's Person is a Higher Level Intrusion of Privacy than a Search of an Automobile that Requires Probable

Cause, A Warrant or qualification under an Exception to the Warrant Requirement.

"The Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized,

'***No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others,*** **unless by clear and unquestionable authority of law.'** *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). *Terry v. Ohio,* 392 U.S. 1, 9, 88 S. Ct. 1868, 1873, 20 L. Ed. 2d 889 (1968)

Article I, sec. 11 of the Wisconsin Constitution prohibits unreasonable search and seizure. **Without probable cause neither a warrant nor warrantless search would be appropriate. -**State v. Tompkins, 144 Wis. 2d 116, 122, 423 N.W.2d 823, 825 (1988)

Because the Argument that the SFST is a Search is deemed conceded the issue of whether or not a Search of this nature requires probable cause or a warrant must be addressed. Bowe in pointing to less protected rights of privacy such as the search of a motor vehicle demonstrates that Probable Cause is required under the current structure of Wisconsin Law. Automobile searches are less intrusive then a search consisting of a search of one's person, SFST.

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

What Officer Sands encountered, 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.

IV. PREFEILD SOBERITY TESTS MUST BE CONSIDERED AS PART OF THE TOTALITY OF THE CIRCUMSTANCES EVALUATION OF CAUSATION.

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 balancing used by officers 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 case of beer partially covered. The observations of Officer Sands do not amount to probable cause to conduct a warrantless search therefore, the Defendant prays this Court issue an Order overturning the Circuit Courts Ruling Denying the Defendants Motion for Suppression.

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 29th day of July, 2016.

Respectfully Submitted,

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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 2,984 words.

Dated this 29th day of July, 2016.

_____

John Miller Carroll
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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 29th day of July, 2016.

_____

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