

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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APPEAL NO. 2016-AP-001720
WAUKESHA CIRCUIT COURT NO. 16-CV-000725

CITY OF WAUKESHA

Plaintiff-Respondent,

vs.

DEREK R. PIKE

Defendant-Appellant

BRIEF OF RESPONDENT CITY OF WAUKESHA

**APPEAL OF A VERDICT OF GUILTY IN THE
WAUKESHA COUNTY CIRCUIT COURT
MICHAEL P. MAXWELL, CIRCUIT COURT JUDGE**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	1
STATEMENT OF THE ISSUE.....	2
STATEMENT ON ORAL ARGUMENT	2
STATEMENT ON PUBLICATION	2
STANDARD OF REVIEW	3
STATEMENT OF FACTS AND OF THE CASE	3
ARGUMENT	6
Officer Fisher Possessed Sufficient Reasonable Suspicion of Impaired Driving to Request Pike to Perform Field Sobriety Tests	6
CERTIFICATION	11
APPENDIX CERTIFICATION.....	11

TABLE OF AUTHORITIES

Cases

<u>County of Jefferson v. Renz</u> , 231 Wis. 2d 293, 603 N.W.2d 541 ¶ 36 (1999)	7
<u>Dane County v. Sharpee</u> , 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990)	9
<u>Farrell v. John Deere Co.</u> , 151 Wis.2d 45, 62, 443 N.W.2d 50, 55 (Ct. App. 1989)	3
<u>State v. Colstad</u> , 260 Wis. 2d 406, 659 N.W.2d 394 ¶ 19 (Ct. App. 2003)	6
<u>State v. Glover</u> , 332 Wis. 2d 807, 798 N.W.2d 321 (Ct. App. 2011)	7, 8
<u>State v. Lange</u> , 317 Wis. 2d 383, 766 N.W.2d 551, ¶ 20 (2009)	8
<u>State v. Poelliger</u> , 153 Wis.2d 493, 506-507, 451 N.W.2d 752, 757 (1990)	3
<u>State v. Repenshek</u> , 277 Wis. 2d 780, 691 N.W.2d 369, ¶ 30 (Ct. App. 2004)	9
<u>State v. Waldner</u> , 206 Wis.2d 51, 59, 556 N.W.2d 681, 685 (1996)	8

Statutes

Wis. Stat. § 809.19(8)(b) and (c)	11
Wis. Stat. §343.305(10)	5
Wis. Stat. §752.31(2)	2

Wis. Stat. §800.14(4)	5
Wis. Stat. §809.19(12)	11
Wis. Stat. §809.23(1)(b)4.....	2
Wis. Stat. 968.24.....	6

STATEMENT OF THE ISSUE

Could the arresting officer in this case ask the Defendant to perform Field Sobriety Tests when the officer knew the Defendant had been drinking alcohol, was coming from a bar, smelled of intoxicants, and the traffic stop occurred at 1:07 in the morning?

Trial Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT

Plaintiff-Respondent City of Waukesha (hereinafter “City”) respectfully submits that oral argument would not serve to develop the arguments of the parties further and is not merited in this case.

STATEMENT ON PUBLICATION

This matter is decided by one court of appeals judge pursuant to Wis. Stat. §752.31(2) and therefore under Wis. Stat. §809.23(1)(b)4. should not be published. Additionally, the issue involves no more than the application of well-settled rules of law to a recurring fact situation.

STANDARD OF REVIEW

Whether a Fourth Amendment violation has occurred is a constitutional question of law and is therefore reviewed de novo. Farrell v. John Deere Co., 151 Wis.2d 45, 62, 443 N.W.2d 50, 55 (Ct. App. 1989). However, where more than one reasonable inference may be drawn from a set of circumstances, an appellate court is required to accept the inference drawn by the trier of fact, unless the evidence on which the inference is based is incredible as a matter of law. State v. Poelliger, 153 Wis.2d 493, 506-507, 451 N.W.2d 752, 757 (1990).

STATEMENT OF FACTS AND OF THE CASE

On February 14, 2014, at 1:07 a.m., City of Waukesha Police Officer Bradley Fisher executed a traffic stop of a motor vehicle being driven on a Waukesha city street without a front license plate. (Record 35 at pages 7-8; Respondent's Appendix at pages 1-2.) Officer Fisher approached the vehicle and identified its sole occupant via Wisconsin driver's license as the Defendant-Appellant, Derek Pike (hereinafter "Defendant" or "Pike"). (R. 35 at 9; R-App at 3.)

Upon making contact with Pike, Officer Fisher informed him of the reason for the stop and asked Pike where he was coming from. Pike said he was coming from Rooters nightclub, a nearby bar. Pike admitted he had been consuming intoxicants, specifically two 12-ounce beers, while at Rooters. During this conversation, the officer could smell an odor of intoxicants on Pike's breath. (R. 35 at 9; R-

App at 3.) Based on these observations, Officer Fisher asked Pike to exit the vehicle so that he could administer Field Sobriety Tests to determine whether Pike's ability to safely operate a motor vehicle was impaired. (R. 35 at 10; R-App at 4.)

Officer Fisher conducted the Horizontal Gaze Nystagmus test and observed a lack of smooth pursuit in both eyes; jerkiness at maximum deviation in both eyes; and nystagmus prior to moving his stimulus 45 degrees in both eyes, which according to the officer were all signs of impairment. (R. 36 at 11-13). Officer Fisher also had the defendant perform the walk-and-turn test by walking heel-to-toe for 9 steps keeping his arms at his side, turn, and walk 9 steps back, while counting each step out loud. (R. 36 at 13-14.) Pike did not step heel-to-toe during the first 9 steps and also stepped off the line, both clues of intoxication. Officer Fisher then had Pike complete the one-leg-stand test and instructed Pike to lift either leg six inches off the ground, keep his arms at his sides, and count to 30. (R. 36 at 16.) Pike placed his foot down on 3 occasions and lifted his arms from his sides, all of which indicated impairment according to the officer. (R. 26 at 17.)

Although Pike performed other verbal exercises correctly, since he failed the first 3 tests, Officer Fisher asked him to provide a preliminary breath test. Pike refused. (R. 36 at 9-10.) Officer Fisher then placed Pike under arrest for Operating a Motor Vehicle while Under the Influence of an Intoxicant. (R. 36 at 20.) Officer Fisher read Pike the Informing the Accused form in its entirety and asked Pike if he would submit to an evidentiary chemical test of his blood.

Pike refused. (R. 36 at 22-23.) Officer Fisher then filled out and gave Pike the required notice of intent to revoke his operating privilege due to his refusal to submit to the test. (R. 36 at 25.)

Pike pled Not Guilty to the Operating Under the Influence charge and filed a timely challenge to the Improper Refusal charge in accordance with Wis. Stat. §343.305(10). (R. 4; R. 3.) The Waukesha Municipal Court conducted a hearing regarding the Refusal and a trial on the Operating Under the Influence charge and concluded that Pike had improperly Refused to submit to an evidentiary chemical test, but was Not Guilty of Operating Under the Influence. (R. 36 at 35-36.)

Pike appealed the finding of Guilty of Improper Refusal to the Waukesha County Circuit Court and requested a review of the record pursuant to Wis. Stat. §800.14(4). (R. 24.) The parties submitted briefs on the subject of this appeal, namely whether Officer Fisher could require Pike to perform Field Sobriety Tests. (R. 25; R. 26; R.27.) The Circuit Court concluded Officer Fisher possessed sufficient reasonable suspicion to suspect Pike was driving while intoxicated and therefore could require Pike to perform the tests. (R. 30 at 6; R-App at 5.) The Court also concluded the officer possessed sufficient probable cause for Pike's arrest and therefore there was "more than a sufficient basis to request a chemical test for intoxicants" and held that Pike's Refusal was not reasonable. (R. 30 at 8; R-App at 11.) This appeal followed.

ARGUMENT

Officer Fisher Possessed Sufficient Reasonable Suspicion of Impaired Driving to Request Pike to Perform Field Sobriety Tests

Pike's sole contention on appeal is that when Officer Fisher asked him to step out of his car and perform Field Sobriety Tests, the officer lacked sufficient reasonable suspicion that Pike had operated his motor vehicle while impaired and therefore all evidence obtained from that point forward was collected in violation of the Fourth Amendment. (Appellant's Brief at page 10.) Pike asserts that the only evidence the officer possessed when he asked Pike to perform Field Sobriety Tests was that Pike emitted an odor of intoxicants and admitted he had consumed alcohol. (Appellant's Br. at 9.)

Pike omits additional facts that were available to Officer Fisher when he asked Pike to perform Field Sobriety Tests. In addition to the odor of intoxicants and Pike's admission he had consumed alcohol, the time of the stop was 1:07 a.m., close to bar time. Pike also admitted he was coming from a bar, Rooters nightclub.

If an officer becomes aware of additional evidence giving rise to an articulable suspicion that the subject has committed or is committing an offense that is separate and distinct from the acts prompting the officer's initial investigation, the officer may investigate the separate offense. State v. Colstad, 260 Wis. 2d 406, 659 N.W.2d 394 ¶ 19 (Ct. App. 2003).

First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime, Wis. Stat. 968.24, or reasonably suspects that a

person is violating the non-criminal traffic laws. After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests.

County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541 ¶ 36 (1999) (internal citations omitted).

The evidence of impaired driving in this case exceeds the information that was considered sufficient in County of Jefferson v. Renz. In Renz, the officer pulled the defendant over for a loud muffler at 2:00 a.m. The officer smelled intoxicants and asked the defendant to step out of the car. The officer asked if the defendant had been drinking and the defendant indicated he had; the officer then required the defendant to perform Field Sobriety Tests. Id. at ¶¶ 3-5. The instant case involves the same pieces of information and the additional fact that Pike admitted he had just been at a bar.

The evidence available to Officer Fisher is also similar to the scenario addressed in the unpublished case State v. Glover, 332 Wis. 2d 807, 798 N.W.2d 321 (Ct. App. 2011) (unpublished); (R-App. at 12). In Glover, the defendant was stopped for speeding at 1:19 a.m. The officer detected a “slight odor of intoxicants emanating from the cab area.” Id. at ¶ 2 (R-App at 12). The defendant informed the officer he was coming from the Cottonwood Bar. The officer asked the defendant if he had been drinking and the defendant acknowledged that he had; the officer couldn’t recall whether he

asked how many drinks the defendant consumed. Id. at ¶ 3; R-App at 12.

Glover challenged whether the officer possessed sufficient reasonable suspicion to require Field Sobriety Tests. Id. at ¶ 16; R-App at 14. The Court concluded the officer had sufficient reasonable suspicion:

Contrary to Glover’s assertion, the slight odor of intoxicants coming from the vehicle was not the only factor that contributed to the officer’s suspicion that Glover might be impaired in his ability to drive. Glover admitted to drinking and had left a bar. The time of night, 1:19 a.m., around ‘bar time,’ is also a factor that contributes to the reasonable suspicion that Glover was operating his vehicle while under the influence of alcohol.

Glover, 332 Wis. 2d 807, 798 N.W.2d 321 at ¶ 18 (citing State v. Lange, 317 Wis. 2d 383, 766 N.W.2d 551, ¶ 20 (2009) (time of night of traffic stop is relevant factor in probable cause determinations); R-App. at 14.

“The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape.” State v. Waldner, 206 Wis.2d 51, 59, 556 N.W.2d 681, 685 (1996). In this case, after learning that Pike had been drinking alcohol at a bar prior to driving, smelled of intoxicants, and noting the time was 1:07 a.m., Officer Fisher would have almost been negligent to permit Pike to drive away without investigating further into whether Pike’s ability to drive was impaired.

Pike does not challenge whether the officer could ask him where he was coming from or if he’d been drinking. Pike also does

not challenge whether the Officer possessed probable cause to arrest for Operating Under the Influence once Field Sobriety Tests were performed and Pike refused to submit to a preliminary breath test. Since the officer observed Pike fail all the non-verbal Field Sobriety Tests and may consider Pike's refusal to take the preliminary breath test as evidence of consciousness of guilt, State v. Repenshek, 277 Wis. 2d 780, 691 N.W.2d 369, ¶ 30 (Ct. App. 2004), these facts coupled with the other facts known to the officer clearly establishes that the officer had knowledge of facts and circumstances "sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense." Dane County v. Sharpee, 154 Wis. 2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

Officer Fischer possessed reasonable suspicion to conduct the traffic stop, and then acquired sufficient reasonable suspicion Pike had been driving under the influence of an intoxicant to ask him to perform Field Sobriety Tests. The odor of intoxicants, time of the stop at 1:07 a.m., and Pike's admissions that he had consumed alcohol and was coming from a bar exceed or are equal to the information considered sufficient under prior decisions. After the Field Sobriety Tests were conducted and Pike refused the preliminary breath test, the officer possessed probable cause to arrest Pike for Operating a Motor Vehicle Under the Influence. Consequently, the Improper Refusal finding made by both the municipal court and the circuit court in this case should be upheld.

Dated this _____ day of January, 2017.

Respectfully submitted,
CITY OF WAUKESHA

By: _____
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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 and appendix produced with a proportional serif font. The length of this brief is 2,571 words.

I also hereby certify that the text of the electronic copy of this brief, filed pursuant to Wis. Stat. §809.19(12), is identical to the text of the paper copy of the brief.

Dated this ____ day of January, 2017.

Miles W.B. Eastman
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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 s. 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.

I further certify that the content of the electronic copy of the appendix, filed pursuant to Wis. Stat. §809.19(13), is identical to the content of the paper copy of the appendix.

Dated this ____ day of January, 2017.

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