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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2016AP001954 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DYLAN D. RADDER,

Defendant-Appellant.

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

APPEAL FROM A NON-FINAL ORDER DENYING THE DEFENDANT'S MOTION TO EXCLUDE EVIDENCE DERIVED FROM UNLAWFUL STOP, DETENTION AND ARREST IN CALUMET COUNTY CIRCUIT COURT
THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING
Trial Court Case No. 2016CT000061

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent believes that the written briefs presented will adequately present the relative positions of the parties, and therefore, oral argument is not requested. Publication may be appropriate because currently there are no published cases that directly address the specificity necessary to entitle a trial court defendant to an evidentiary hearing when filing a motion to suppress a traffic stop, detention and arrest.

STATEMENT OF THE CASE

The Statement of the Case and Statement of Facts included in defendant-appellant Dylan Radder's brief are sufficient to frame the issues presented for review. The State will include any additional relevant facts in the Argument section.

ARGUMENT

I. LEGAL REQUIREMENTS FOR A LAWFUL TRAFFIC STOP, ADMINISTRATION OF A PBT AND ARREST FOR OPERATING UNDER THE INFLUENCE.

A. Reasonable Suspicion Required For A Lawful Traffic Stop

The Wisconsin Supreme Court addressed the legal principles of a law enforcement stop of a motor vehicle in *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 (2009) at ¶ 11.

> ¶ 11. "The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a `seizure' of `persons' within the meaning of the Fourth Amendment." *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996). An automobile stop must not be unreasonable under the circumstances. *Gaulrapp*, 207 Wis. 2d at 605 (citing *Whren*, 517 U.S. at 810). "`A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred,' *id.*, or have grounds to reasonably suspect a violation has been or will be committed." *Gaulrapp*, 207 Wis. 2d at 605 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439, (1984); *Terry v. Ohio*, **392 U.S. 1**, (1968)).

In *State v. Popke*, at ¶ 11, the Court articulated that a stop is permissible if an officer has grounds to "reasonably suspect a violation has been or will be committed." This finding often requires the finder of fact, the trial court, to carefully review testimony and/or video of the driving to determine what occurred. In the present case, the Criminal Complaint alleges that the stop was based upon "expired registration." (Criminal Complaint, Page 2)

B. Probable Cause Requirement For PBT Request

Wisconsin Statute §343.303 statutorily allows for administration of a preliminary breath screening test (PBT) when an officer has probable cause to believe that a person has operated a motor vehicle under the influence of an intoxicant.

> **343.303 Preliminary breath screening test.** If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, the officer, prior to an 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), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63(2) or (6), 940.09(1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305(3). The general penalty provision under s. 939.61(1) does not apply to a refusal to take a preliminary breath screening test.

The Wisconsin Supreme Court in *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) addressed the meaning and application of Wisconsin Statutes §343.303. In *Renz*, at ¶ 47, the court stated in part:

> ¶ 47 … we conclude that the context, history and purpose of the statute all suggest that "probable cause to believe" 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. Under this construction, the second and third sentences function sensibly. An officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of OWI, and the PBT result will be admissible to show probable cause for an arrest, if the arrest is challenged. The context, history, and purpose of the statute strongly support this reasonable construction.

More recently in *State v. Felton*, 2012 WI App 144, 344 Wis. 2d 483, 824 N.W.2d 871, the Wisconsin Court of Appeals applied *Renz* to a factual scenario were the Felton performed well on his standardized field sobriety tests and found it proper and lawful to administer a PBT. In *Felton*, at ¶ 10, the court stated:

> ¶ 10 That Felton successfully completed all of the properly administered field-sobriety tests does not, as Felton argues, subtract from the common-sense view that Felton may have had a blood-alcohol level that violated Wis. Stat. § 346.63(1), any more than innocent behavior automatically negates either probable cause or even the lower reasonable-suspicion standard, *see United States v. Sokolow*, 490 U.S. 1, 9-10, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Indeed, Courtier would have been fully justified in asking Felton to take a preliminary-breath test without even asking him to perform any field-sobriety tests because they are not needed to establish probable cause [344 Wis. 2d 491] to arrest someone for drunk driving, *Washburn County v. Smith*, 2008 WI 23, ¶ 33, 308 Wis. 2d 65, 81, 746 N.W.2d 243, 251, and, as we have seen, the probable-cause standard is lower for assessing the validity of giving a preliminary-breath test than it is for an arrest, *see Renz*, 231 Wis. 2d at 316, 603 N.W.2d at 552. The totality of the circumstances here fully establish that Sergeant Courtier had "probable cause" under Wis. Stat. § 343.303 to ask Felton to take the preliminary-breath test. *See Fischer*, 2010 WI 6, ¶ 5, 322 Wis. 2d at 273, 778 N.W.2d at 633 (A preliminary-breath test "may be requested when an officer has a

basis to justify an investigative stop but has not established probable cause to justify an arrest.").

Renz and *Felton* clearly articulate that the "probable cause to believe" standard applicable to administration of a PBT is less than probable cause to arrest. In the current case, according to the Criminal Complaint, the defendant exhibited a "strong odor of intoxicants" and had beer, including open bottles of beer in his vehicle. (Criminal Complaint, Page 2) The Criminal Complaint further alleges that a horizontal gaze nystagmus (HGN) found six of six clues and that after the HGN test the defendant "stated he had two jack and Coke's and one shot." (Criminal Complaint, Page 2) Additionally, before administering the PBT, the officer observed two clues on the walk and turn test and one clue on the one leg stand test. (Criminal Complaint, Page 2) The State asserts that the observations noted in the Criminal Complaint establish both probable cause to arrest and exceed the lower standard of probable cause to believe required for administering a PBT.

C. PBT Result May Be Used To Establish Probable Cause To Arrest

In *Felton*, at ¶ 12, the court held that a PBT results may be admitted to establish probable cause without the proponent needing to show compliance with administrative rules. According to the Criminal Complaint, "The PBT result was a .082 BAC." (Criminal Complaint, Page 2)

It is the position of the State that the facts asserted in the Criminal Complaint, including the PBT reading, clearly establish probable cause to arrest.

II. TRIAL COURT MOTIONS MUST STATE WITH PARTICULARITY THE FACTUAL AND LEGAL GROUNDS FOR SUPPRESSION

Motions in the trial court are defined in Wisconsin Statutes §971.30. Pursuant to§971.30(2)(c) the motion must "state with particularity the grounds for the motion…" It is the position of the State that the particularity requirement should properly be applied to all trial court motions.

A. Particularity Standard For Trial Court Motions

In *State v. Nelson*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972) the court set forth the criteria for determining whether a post-conviction motion is entitle to an evidentiary motion. In *Nelson*, at 632, the court stated:

> Where, however, the motion is made after judgment and sentencing to correct a manifest injustice, it is within the discretion of the trial court whether or not to grant a hearing on the motion. Thus, where the record sufficiently refutes the allegations raised by the defendant in the motion, no hearing is required.

B. Nelson Standard Is Applicable To Pretrial Motions

In *State v. Garner*, 207 Wis. 2d 520, 558 N.W.2d 916 (Ct. App. 1996), the Wisconsin Court of Appeal applied the standard set forth in *Nelson* to a pretrial motion to suppress identification. Three years later in *State v. Velez*, 224 Wis. 2d 1, 589 Wis. 2d 9 (1999), the Wisconsin Supreme Court would apply the standard set forth in *Nelson* and applied by *Garner* to a pretrial motion to dismiss. The issue challenged in *Velez* involved an assertion that the State manipulated the system to file in adult criminal court and avoid juvenile jurisdiction. In 2010 in an unpublished persuasive authority case the Court of Appeal in *State v. Rice*, 2009

WI App 1162 (Wis. App 2010) applied *Nelson* and *Garner* to a pretrial motion to suppress evidence based upon an alleged unlawful stop, detention and arrest for operating under the influence.

The defendant has asserted that because the State has the burden at a motion to suppress that application of the *Nelson* standard as set forth in *Garner* does not apply. This proposition runs directly counter to the holding in *Velez*. In *Velez* the State could not meet its burden "unless it is affirmatively shown that the delay was not for purposes of manipulating the system to avoid juvenile court jurisdiction." *Velez*, at page 13. In applying *Nelson*, *Velez*, at pages 14 & 15, stated:

> ¶25 Some of the very reasons we require that the defendant make a prima facie showing for an evidentiary hearing following a postconviction motion are relevant with respect to a pretrial motion. First, by showing that the relief sought may be warranted, we conserve scarce judicial resources by eliminating unnecessary evidentiary hearings when there may be no disputed facts requiring resolution, or when the facts would not warrant the relief sought even if proved. See Garner, 207 Wis. 2d at 527-528, 558 N.W.2d 916. Second, where an evidentiary hearing is necessary, a full statement of the facts in dispute allows both parties to prepare and to litigate the real issues more efficiently and the evidentiary hearing will serve as more than a discovery device. See id. at 528, 558 N.W.2d 916.

In the present case, the defendant's motion pleadings make no specific allegations. For example, the defendant does not assert that his vehicle's registration was current. Nor is there any assertion that the defendant did have a PBT reading above the legal limit. The defense pleadings in the trial court simply

asserted that there was not a warrant, there was not a traffic violation and there was not sufficient reliable indicia of impairment.

In the present case, the Criminal Complaint put forth a reason for the stop. The reason for the stop was that the vehicle's registration was expired. Reasons articulated requesting field sobriety tests included a strong odor of intoxicants and observed beer in the vehicle along with knowledge that the defendant had one prior OWI. Reason for administering the PBT included additional information including the results of the field sobriety tests and admission that the defendant had consumed three alcoholic drinks. Prior to arrest the defendant was administered a PBT with a result above the legal limit. The trial court judge was able to review the complaint side by side with the defendant's pleading determined that there was no articulated reason to believe that an evidentiary hearing would dispute the facts in the complaint that clearly established probable cause to stop, detain and arrest. Based upon the holdings in *Nelson, Garner* and *Velez,* the trial court was not obligated to grant a motion hearing.

CONCLUSION

In the trial court pleadings, the defendant failed to establish a factual basis for his motion or a legal theory upon which suppression could be granted. The trial court properly allocated it resources by not engaging in an evidentiary hearing when there was no reason for the court to believe the defendant had an evidentiary or legal basis for the relief sought. For these reasons, the State respectfully

requests that this court affirm the trial court's denial of defendant's motions without an evidentiary hearing.

Respectfully submitted this 3rd day of March, 2017.

_____

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CERTIFICATION

I 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 2,291 words.

Dated this 3rd day of March, 2017.

_____

Douglass K. Jones
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CERTIFICATION 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 the requirements of 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 3rd day of March, 2017.

_____

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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.

Dated this 3rd day of March, 2017.

_____

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