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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

Appellate Case No. 2016AP2384

IN THE MATTER OF THE REFUSAL OF JARRED S. MARTENS:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JARRED S. MARTENS,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

**Appealed from a Judgment of Conviction Entered in the Circuit Court for
Clark County, the Honorable Jon M. Counsell Presiding
Trial Court Case No. 16 TR 1759**

Respectfully Submitted:

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STATEMENT OF THE ISSUE

I. WHETHER THERE WAS PROBABLE CAUSE TO ARREST MARTENS?

Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT ON PUBLICATION

Defendant-Appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT OF FACTS AND CASE

On July 15, 2016, around 11:00 PM, Deputy Joshua Niemi and Deputy Matthew John Prein of the Clark County Sheriff's Office were dispatched to the area just south of Popple River Road on Highway O for a complaint about a pickup truck increasing and decreasing speed. (R. 23, pp. 4, 33-34.) The caller stated the pickup was dark in color and provided a partial license plate number of A and F. (R. 23, p. 5.) The caller then indicated that the pickup turned off Highway O onto Popple River Road. (R. 23, p. 5.)

While en route, Deputy Niemi received another complaint from the resident of N12506 County Highway O reporting that she was outside having a campfire and that a pickup truck had pulled into her driveway and parked in her field. (R. 23, pp. 5-7.) This resident gave the full license plate and stated there were two male occupants inside sleeping and that nobody had gotten out of the vehicle. (R. 23, p. 6-7.)

At approximately 11:18 PM, the deputies arrived on scene and observed two male individuals asleep inside a vehicle which was running and still parked in the field. (R. 23, pp. 7-8, 17, 34.) Deputy Niemi approached the passenger side door and Deputy Prein approached the driver. (R. 23, pp. 7, 34.) Deputy Prein yelled at Martens who was in the driver's seat. (R. 23, p. 40.) When Martens did not wake up, Deputy Prein opened the door. (R. 23, pp. 35, 40.) Deputy Prein could not recall if Martens was awake when he opened the door. (R. 23, p. 41.) Deputy Niemi could not recall if he opened the passenger side door or if the passenger opened the door. (R. 23, pp. 17-18.) Upon opening the door, Deputy Prein told Martens to get up. (R. 23, p. 40.)

Martens would not talk to Deputy Prein at first and was staring forward. (R. 23, p. 35.) Deputy Prein then asked

Martens for his driver's license. (R. 23, pp. 36, 41.) Martens looked for a few seconds and went into the glove box console for his driver's license but was unable to find his identification. (R. 23, pp. 22, 36, 41.) Martens was not uncooperative at this time, but did seem kind of "out of it." (R. 23, p. 41.) Martens verbally identified himself at Deputy Prein's request. (R. 23, pp. 23, 42.) Ultimately, Deputy Prein obtained Martens' driver's license but did not recall when he obtained the driver's license. (R. 23, p. 36.)

While Deputy Prein maintained that Martens never really turned and talked to him, Deputy Niemi testified that Martens stared at Deputy Prein and answered questions after being requested to find his driver's license. (R. 23, pp. 23-29, 35.) Both deputies alleged the odor of intoxicants coming from the vehicle. (R. 23, pp. 9, 35.) Deputy Prein further alleges that he observed that Martens had bloodshot and glossy eyes. (R. 23, p. 35.) Deputy Niemi also alleges that Martens' speech was slurred. (R. 23, p. 9.)

Deputy Prein then either removed the keys or asked Martens to remove the keys of the truck from the ignition and put them on the dashboard. (R. 23, pp. 23, 43.) Either way, Deputy Prein reached in, grabbed the keys from somewhere and placed them on the roof of the truck. (R. 23, p. 43.) Within a few seconds of this, Deputy Prein took Martens by the forearm out of the vehicle. (R. 23, pp. 27, 43.) Immediately thereafter, Deputy Prein handcuffed Martens behind his back. (R. 23, pp. 27-28, 43.) From the point that the Deputies approached the truck to the handcuffing of Martens was "approximately" or "maybe" less than two minutes. (R. 23, pp. 28, 44.) Neither Martens nor the passenger were uncooperative in any way. (R. 23, pp. 21, 30.)

After being read the Informing the Accused form, Martens allegedly refused the evidentiary chemical test and a

Notice of Intent to Revoke Operating Privilege was issued. (R. 2; R. 23, pp. 13-14, 30-31.) Thereafter, Martens timely requested a refusal hearing. (R. 1.) The refusal hearing was held on December 1, 2016, before the Honorable Jon M. Counsell where Deputy Niemi and Prein both testified. (R. 23.)

At the conclusion of taking evidence, the defense argued that the deputies lacked probable cause to arrest Martens. After hearing arguments, Judge Counsell convicted Martens of Unlawfully Refusing a Chemical Test and imposed the mandatory penalties. (R. 23, pp. 47-63.) Martens raises the same issue now on appeal.

ARGUMENT

The circuit court erred in finding that Deputy Prein had probable cause to arrest Martens. Whether probable cause to arrest exists in a given case is a question of law that this Court determines independently of the circuit court. *County of Washburn v. Smith (In re Refusal of Smith)*, 2008 WI 23, ¶ 16, 308 Wis. 2d 65, 746 N.W.2d 243.

“In the context of a refusal hearing following an arrest for operating a motor vehicle while intoxicated, ‘probable cause’ refers generally to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.*, ¶ 16. The prosecution bears the burden of presenting “evidence sufficient to establish the officer’s probable cause to believe the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.* “A circuit court may not revoke a defendant’s operating privileges based on the defendant’s refusal to submit to chemical testing unless the defendant’s arrest was based on probable cause.” *Id.* at ¶ 14, *citing* Wis. Stat. § 343.305(9)(a)5.a.

In 1991, the Wisconsin Supreme Court noted that “[u]nexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.” *State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991) (abrogated in part for other reasons by *State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277 (2005)).

In 2008, the Wisconsin Supreme Court again addressed the issue of probable cause relating to drunk

driving investigations in *Smith*, 2008 WI 23. There, the Deputy observed the Smith's vehicle traveling 21 miles per hour in excess of the speed limit. *Id.*, ¶ 8. Upon activating the emergency lights, Smith had "a delayed response" in pulling over and continued traveling approximately three-tenths of a mile. *Id.*, ¶ 9. The Deputy also observed Smith's vehicle cross the highway's double-yellow centerline twice before Smith pulled over. *Id.* The Deputy then detected the odor on Smith's breath and Smith admitted to consuming "a couple of beers" at Grandma Link's Restaurant and Bar. *Id.*, ¶ 10. Later in the conversation, Smith also told the Deputy that he would be lying if he said he had just a couple beers and stated that he had consumed more than two beers between 4:00 PM and just prior to being stopped at 2:40 a.m.. *Id.*, ¶ 11. The Court held the Deputy had probable cause to arrest under these circumstances.

More recently, the Wisconsin Supreme Court addressed the issue in *State v. Kennedy*, 2014 WI 132, 359 Wis. 2d 454, 856 N.W.2d 834. There, Kennedy struck the victim as she crossed the street while driving a Chevy Impala shortly after midnight. *Id.*, ¶ 7. The initial officer on scene observed the Impala facing westbound in the eastbound lane with the severely injured victim pinned underneath the passenger side of the vehicle and skid marks approximately one block long leading to the vehicle. *Id.* Kennedy admitted that he was the driver and the officer observed that Kennedy's eyes were glassy and bloodshot, he was swaying back and forth, his speech was slow and slurred, and a strong odor of alcohol was on his breath. *Id.*, ¶¶ 8-9. Due to a crowd gathering, the officer asked Kennedy to sit in a squad car. *Id.*, ¶ 10. Kennedy initially refused but then relented. *Id.* While the parties debated when the arrest occurred, the Court assumed, without deciding, that Kennedy was under arrest when placed in the squad car and held that there was probable

cause to arrest him for a drunk-driving related violation under the totality of the circumstances. *Id.*, ¶¶ 20, 24.

The note in *Swanson* has never been overturned. Rather, it has simply been made clear that field sobriety tests are not required in every case. It remains, however, that field sobriety tests are still important and that unexplained erratic driving, the odor of intoxicants and the time of the incident are insufficient to form probable cause to arrest. From *Kennedy*, *Smith* and the Court of Appeals cases cited therein, it appears that a serious accident or considerable traffic violations observed by an officer is a significant factor in whether field sobriety tests can be disregarded. In the present case, there was no accident, the deputies did not observe any traffic violations, and the initial caller's observations of varying speeds do not rise to the level of a traffic violation. It is also unknown if the initial caller wished to remain anonymous further reducing the reliability of the tipped information. It also remains unclear from the testimony at the motion hearing exactly where Martens' vehicle was even located. All that was testified to was that the vehicle pulled off the road, into a driveway leading to a field, which is a logical place to pull over if one was tired. Thus, any inappropriate driving behavior in the present case is minimal.

In *Swanson*, *Smith* and *Kennedy*, the odor of intoxicants came directly from the defendants. Here, the odor came from a vehicle where another passenger was located. Thus, this fact is likewise of minimal evidentiary value. Moreover, unlike in *Smith*, we do not have different stories of alcohol consumption. In fact, the deputies did not even ask Martens about his alcohol consumption. Consequently, there is no direct evidence that Martens had even consumed alcohol.

While one of the two deputies, in particular the deputy who was not speaking with Martens, testified that he observed slurred speech, this is also minimal as it can be attributed to an individual being awoken by an officer entering his vehicle and commanding him to “get up.” The same goes for bloodshot and glossy eyes. Such observations would likely be observed in an individual waking up and are less of an indicator of intoxication than was observed in *Kennedy*. Moreover, prior to the arrest there was no observation of swaying or any balance issue before Martens was dragged forcefully from his vehicle by his forearm. Thus, the observations in *Kennedy* indicated impairment much more than in the present case.

Furthermore, Martens was cooperative, answered questions, looked for his driver’s license at Deputy Prein’s request, verbally identified himself, and at some point was able to produce his driver’s license although it is not clear if this occurred after the arrest. While Martens may have seemed “out of it” after being awoken as many would, he demonstrated no problems with his mentation, coordination or balance prior to being removed from his vehicle.

While there may have been a suspicion of intoxication, there is no direct evidence that Martens was even consuming alcohol, let alone impaired. Without more, Deputy Prein did not have enough to reach in the vehicle, take the keys, grab Martens by the forearm, physically pull Martens from the vehicle, and then immediately handcuff Martens behind his back.

CONCLUSION

WHEREFOR, for the reasons discussed above, the defendant respectfully requests this Court reverse the decision of the circuit court.

Dated this ____ day of March, 2017.

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

By: _____
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APPENDIX

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,032 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

A copy of this certificate is included in the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of March, 2016.

Respectfully submitted,

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