

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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Case No. 2016AP002384

IN THE MATTER OF THE REFUSAL OF JARRED S.
MARTENS

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Jarred S Martens,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CLARK COUNTY CIRCUIT COURT,
THE HONORABLE JON M. COUNSELL PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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IN THE MATTER OF THE REFUSAL OF JARRED S.
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STATE OF WISCONSIN,

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did the circuit court correctly find that Martens unreasonably refused to submit to an evidentiary chemical test of his blood?

After concluding that there was probable cause to arrest Martens for operating while intoxicated (OWI), the

circuit court found that Martens unreasonably refused to submit to an evidentiary chemical test of his blood.

STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

STATEMENT OF FACTS AND OF THE CASE

On July 15, 2016, at around 11:00pm, Clark County Deputies Joshua Niemi and Matthew Prein responded to a traffic complaint of a dark in color pickup truck that was increasing and decreasing speed (23; 4 and 34). The caller reported that the truck turned off Highway O onto Popple River Road in Clark County and had a partial plate of AF. (23; 4-5) While en route to locate the truck, a second caller, Melissa Lobacz, reported that a pickup truck with a license plate that included the letters AF parked in a field on her property at N12506 County Highway O (23; 5-6). Lobacz reported that two males were passed out in the truck (23; 6). Lobacz also reported that she watched the vehicle and that nobody had gotten out or switched places (23; 7). Deputy Prien was familiar with the Lobacz address due to drug activity and because Lobacz's husband or ex-husband had previously run from law enforcement multiple times while they were trying to apprehend him at that location (23; 37 – 38). Deputy Prein had never met Lobacz's husband, but had seen booking photos of him (23; 38 – 39).

Deputies Niemi and Prein arrived at the property at approximately 11:18pm and found that the reported vehicle was still running with two males inside (23; 7 and 16). Deputy Niemi approached the passenger's side, while Deputy Prein approached the driver's side (23; 7). Both the passenger and the driver were passed out when they approached (23; 17). The driver did not respond, so Deputy Prein opened the door (23; 34-35). Deputy Prein advised that the driver, later identified as Jarred Martens, would not look at him and was staring forward while he was talking to him

(23; 35). Deputy Prein perceived Marten's non-responsiveness to be because Martens was choosing to be uncooperative (23; 35). Deputy Prein also noted an odor of intoxicants and that Martens had bloodshot and glossy eyes (23; 35). Deputy Niemi, who was making contact with the passenger, noticed that Martens appeared to have a difficult time comprehending Deputy Prein when he asked Martens for his driver's license (23; 9). Deputy Niemi also noted that Martens' speech was slurred, as well as an odor of intoxicants in the vehicle (23; 9). The passenger advised Deputy Niemi that he and Martens were coming from the bar (23; 8).

Deputy Prein then asked Martens to remove the keys from the ignition and place them on the dashboard (23; 23). Deputy Prein then placed the keys on the roof of the truck (23; 43). He then removed Martens from the vehicle and placed him into handcuffs (23; 36-37). At this time, Martens had not identified himself, was not being responsive, and had not explained why he was at that residence (23; 37). Deputy Prein was concerned for officer safety due Martens' lack of cooperation and his prior knowledge of that address (23; 37).

Deputy Niemi then took over the contact with Martens (23; 10). Sergeant Brian Rennie was present at that time, and Martens asked him if he was going to be placed under arrest for operating while under the influence (23; 9-10). Deputy Niemi then asked Martens to perform field sobriety tests (23; 10). Martens refused. (23; 10). Deputy Niemi next asked Martens to submit to a preliminary breath test (23; 10). Martens again refused (23; 10). At that time, Deputy Niemi formally placed Martens under arrest for operating while intoxicated (23; 10).

Martens was then placed in the backseat of Deputy Niemi's squad while Deputy Niemi completed the rest of the paperwork for the arrest (23; 12). As part of that process, Deputy Niemi read the Informing the Accused to Martens (23; 12). When he asked Martens if he would submit to an evidentiary chemical test of his blood, Martens did not respond (23; 14). Deputy Niemi asked again, and Martens asked him to repeat the question (23; 14). Deputy Niemi

repeated the question a third time, and Martens replied no (23; 14). Deputy Niemi then processed Martens' response as a refusal and issued the Notice of Intent to Revoke Operating Privilege (23;14; and R2).

Martens timely requested a refusal hearing which was held on December 1, 2016 (R1 and R23). After testimony by Deputies Prein and Niemi, the Honorable Jon M. Counsell found that the totality of the circumstances prior to the handcuffing supported probable cause for Martens' arrest (23; 54-60). As a result, Judge Counsell concluded that Martens unreasonably refused the test (23; 61). Martens appeals that decision arguing that there was a lack of probable cause to arrest (Defendant-Appellant's Brief, page 4).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT MARTENS UNREASONABLY REFUSED TO CONSENT TO AN EVIDENTIARY CHEMICAL TEST OF HIS BLOOD.

A. Introduction

The State believes that the circuit court correctly found that Martens unreasonably refused to submit to an evidentiary chemical test of his blood. As basis for the unreasonable refusal, the State asserts that there was probable cause to arrest Martens for operating while intoxicated.

B. Applicable legal principles and standard of review

When challenging whether an individual unreasonably refused to submit to an evidentiary chemical test of their breath, blood, or urine, pursuant to Wis. Stat. § 343.305(9)(a), the individual can contest whether the officer properly arrested him or her for operating while intoxicated. *In re Refusal of Anagnos*, 2012 WI 64, ¶ 42, 342 Wis.2d 576, 815 N.W.2d 675. A proper arrest, of course, requires that the officer had probable cause for the arrest. *See State v. Lange*,

2009 WI 49, ¶ 4, 317 Wis.2d 383, 387, 766 N.W.2d 551, 553. Probable cause to arrest for an operating while intoxicated offense “refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest 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.* at ¶ 19. It is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Id.* at ¶ 20, *citing State v. Higginbotham*, 162 Wis.2d 978, 989, 471 N.W.2d 24 (1991). Probable cause to arrest is evaluated on a case-by-case, totality of the circumstances, basis. *Id.* at ¶ 19.

Findings of fact are reviewed on a clearly erroneous standard, and the application of those facts to the determination of probable cause is a decision reviewed de novo. *County of Jefferson v. Renz*, 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999).

C. The circuit court was correct in finding that there was probable cause to arrest Martens.

The circuit court concluded that there was probable cause to place Martens under arrest for operating while intoxicated, and, consequently, that Martens unreasonably refused to submit to an evidentiary chemical test of his blood (23; 54-61).

The State maintains that the court correctly concluded that there was probable cause to arrest Martens. The circuit court's determination was based on a number of factors (23; 54-61). The court first noted that Martens was trespassing to land (23; 54). Next, the court noted that the vehicle was likely the same vehicle that had been reported as driving erratically, combined with the report that it was parked somewhere it didn't belong which happened to have a history of drug issues and someone running from law enforcement (23; 55). The court then found that when officers arrived, approximately fifteen minutes after the first call, the vehicle is running and Martens and the passenger are passed out (23; 55-56). The court specifically noted that Martens was

slumped over the center console and that officers had difficulty waking him (23; 56). The court found that Deputy Prein yelled at Martens, but he was not responding, so he opened the door (23; 57). The court then took note that in its observations over the years intoxicated people tend to fall asleep more quickly than others and that they also tend to sleep more soundly than others (23; 56-57). The court also took note that it was July, therefore not necessitating the need to keep the vehicle running for warmth (23; 57).

The court disagreed with Martens' attorney's characterization that Martens was cooperative in every way (23; 57). The court instead found that Martens would not talk at first and was simply staring forward (23; 57). The court also found that the officers noted an odor of intoxicants and that Martens had bloodshot, glossy eyes, and was non-responsive (23; 58). The court found that Martens was asked for his driver's license, didn't know where it was, started looking for it, and didn't find it at that time (23; 58). The court found that the officer then placed Martens in handcuffs, which the court determined was the point of arrest (23; 58).

The court found, based on a totality of the circumstances evaluation, that the officer had probable cause to place Martens under arrest at that point (23; 59-60). The court noted that Martens refused field sobriety tests and a preliminary breath test, but found that was unnecessary for finding probable cause for arrest (23; 60). The court then determined that the refusal was unreasonable under the circumstances (23; 61).

In *State v. Lange*, the Supreme Court of Wisconsin overturned a court of appeals decision that found that the law enforcement officer did not have probable cause to arrest for OWI. 2009 WI 49, ¶ 5. In that case, the officers observed the defendant driving "wildly dangerous" and then crash his vehicle at 3:00 in the morning. *Id.* at ¶ 9 and 24. The defendant had substantial injuries and was unconscious when the officer had contact with him. *Id.* The officer indicated she did not check for an odor of intoxicants because the scene was covered in gasoline and her primary concern at that time

was keeping the defendant and herself safe. *Id.* at ¶ 12. Ultimately, the defendant was transported to the hospital, while the defendant remained unconscious. *Id.* at ¶¶ 14, 17. The officer formally placed the defendant under arrest and a blood draw was conducted. *Id.* at ¶17.

The defense in *Lange* argued that many common indicators of intoxication were missing as there was no admission of consumption, no odor of intoxicants, no slurred speech or difficulty balancing, no known visits to the bar, no inconsistent stories, no intoxicated travel companions, no empty cans or bottles, and no suggestive field sobriety tests. *Id.* at ¶ 21. The court agreed that these indicators were not present. *Id.* at ¶ 23. However, the court found, based on the totality of the circumstances, which included the wildly dangerous driving behavior, the officer's experience, the time of night, the defendant's prior OWI, and the inability to continue an investigation because of the crash itself, that the arrest was supported. *Id.* at ¶¶ 23-34.

Justice Annette Ziegler wrote separately, in a concurring opinion, simply to clarify that field sobriety tests need not be given in order to find probable cause. *Id.* at ¶ 43. As she noted, this was previously clarified in *Washburn County v. Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243. In that case, the deputy indicated that he placed the defendant under arrest based on excessive speed, crossing the centerline during pursuit, odor of intoxicants, and the amount of alcohol the defendant admitted to consuming. *Id.* at ¶ 12. The court agreed, finding that under the circumstances of the case the deputy's knowledge at the time of the arrest 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.* at ¶ 36.

In the present matter, the circuit court's finding of probable cause to arrest should be upheld under a totality of the circumstances evaluation. Here we have evidence of erratic driving, unlawful trespass to land, a driver that is passed out and slumped over the console in less than fifteen minutes from observed driving, odor of intoxicants,

admission by the passenger that both individuals were coming from the bar, slurred speech, bloodshot and glossy eyes, and unresponsive, uncooperative behavior. Clearly this meets and exceeds the totality of the circumstances standard as laid out in *Lange* and *Smith*. Furthermore, many of the indicators of intoxication that were argued by the defense as missing in *Lange*, such as odor of intoxicants, slurred speech, and known visits to the bar, are actually present in the current matter.

Although the circuit court did not consider it, Martens also refused to participate in field sobriety tests or to provide a sample for a preliminary breath test. The circuit court did not consider these factors because Martens was already in handcuffs, which the court determined to be the point of arrest. Although the State agrees with the court that there was already enough information to lead a reasonable officer to believe that Martens was operating while intoxicated, the State does not believe there is any reason to ignore Marten's refusal to engage in field sobriety tests.

“A restraint of liberty does not ipso facto prove that an arrest has taken place.” *State v. Quartana*, 213 Wis.2d 440, 449, 570 N.W.2d 618, 622 (Ct. App. 1997), *see also State v. Goebel*, 103 Wis.2d 203, 213–14, 307 N.W.2d 915, 920 (1981). Instead, the court is to determine, using a totality of the circumstances evaluation, whether a reasonable person in the suspect's position would have considered himself or herself to be in custody based on the degree of restraint under those circumstances. *Quartana*, 213 Wis.2d at 449-450. A brief detention, that occurs in the public, is temporary, and is limited in scope, without any inference from law enforcement that he was under arrest or “that the restraint of his liberty would be accompanied by some future interference with his freedom of movement” should not be considered arrest. *Id.* at 451.

Although Martens was handcuffed when he was removed from his vehicle, there is no indication that Martens believed he was under arrest at that time. In fact, Martens asked Sergeant Rennie if he was going to be arrested for OWI, suggesting that he knew he was not under arrest at that

time. He was then asked if would participate in field sobriety exercises, showing that the officers were not unreasonably delaying the investigation. The detention occurred and remained in public. Martens was not placed in a squad vehicle, he was not transported to any other location, and he was not told that he was under arrest. As such, there is no reason to believe that a reasonable person in Martens' position would have considered himself under arrest. Therefore, Martens' refusal to participate in field sobriety and refusal to provide a sample for a preliminary breath test should be considered when evaluating probable cause to arrest.

Wisconsin courts have long held that refusal to participate in field sobriety tests or to submit to a preliminary breath test is evidence of consciousness of guilt and can be considered in determining probable cause to arrest. *See State v. Babbitt*, 188 Wis.2d 349, 525 N.W.2d 102 (Ct.App. 1994). In *Babbitt*, the trial court concluded that the officer did have probable cause to arrest, but believed that the evidence fell short without the defendant's refusal to submit to a field sobriety test. *Id.* at 356. The other facts that the court considered included a citizen's report of erratic driving, the officer's observations of the vehicle crossing the centerline three times and the dividing line once, an odor of alcohol from the vehicle, the defendant's glassy and bloodshot eyes, the defendant's slow and deliberate walking, and the defendant's uncooperative attitude and reluctance to cooperate with the officer. *Id.* at 357. The court of appeals found that these factors, even without considering the refusal to participate in field sobriety tests, were enough "to allow a reasonable officer to conclude that Babbitt was 'probably' driving while under the influence of alcohol in violation of § 346.63(1)(a), Stats." *Id.* at 357. However, the court also found that the defendant's refusal was evidence of consciousness of guilt and should be considered in the determination of probable cause. *Id.* at 359.

The State believes that indicators of intoxication in the present case easily exceed the factors that were considered to be sufficient in *Babbitt*, as well as those in *Lange* and *Smith*.

In the present case, there is a citizen's report concerning erratic driving, unlawful trespass to land, Martens is passed out and slumped over in a running vehicle, odor of intoxicants, glassy and bloodshot eyes, statements of being at the bar, and an uncooperative attitude from Martens. Further, there is also a refusal to participate in field sobriety tests or a preliminary breath test. All of these factors clearly establish probable cause that Martens was operating a motor vehicle while intoxicated.

CONCLUSION

For the foregoing reasons, this court should uphold the circuit court's finding that the defendant improperly refused to consent to a blood draw.

Dated this 5th day of May, 2017.

Respectfully submitted,

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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 produced with a proportional serif font. The length of this brief is 2,902 words.

Dated this 5th day of May, 2017.

Holly Wood Webster
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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 5th day of May, 2017.

Holly Wood Webster
Assistant District Attorney