

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP000120
Sheboygan County Circuit Court Case Nos.
2016CV000479

CITY OF SHEBOYGAN,

Plaintiff-Respondent,

v.

JOHN W. VAN AKKEREN,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE ORDER OF THE TRIAL
COURT FINDING THAT THE DEFENDANT-
APPELLANT REFUSED TO PERMIT CHEMICAL
TESTING IN VIOLATION OF WIS. STAT. §343.305(9)
AND FINDING THE DEFENDANT-APPELLANT
GUILTY OF OWI IN THE CIRCUIT COURT FOR
SHEBOYGAN COUNTY, THE HONORABLE L.
EDWARD STENGEL, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT JOHN VAN AKKEREN**

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STATEMENT OF THE ISSUES

Did City of Sheboygan Police Officer Robert Erickson have the requisite level of suspicion, under Wis. Stat. §343.303 to request Mr. Van Akkeren perform a preliminary breath test (PBT) and subsequently arrest him after performing the test?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, John Van Akkeren (Mr. Van Akkeren) was charged in the City of Sheboygan Municipal Court, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a) and with having refused chemical testing contrary to Wis. Stat. §343.305(9) and (10) on November 26, 2015. The defendant timely filed a Request for Refusal Hearing on December 2, 2015. A refusal hearing and court trial was held in municipal court on July 13, 2016. On August 10, 2016, the court issued a written order finding Mr. Van Akkeren unlawfully refused chemical testing, and further found him guilty of operating a motor vehicle while under the influence of an intoxicant.

On August 26, 2016, Mr. Van Akkeren, by counsel, timely filed an appeal to the circuit court pursuant to Wis. Stat. §800.14 appealing both the guilty verdict and refusal determination. A trial to the court and a refusal hearing was held in Circuit Court on November 10, 2016, the Honorable L. Edward Stengel, Judge, presiding. The Court found the defendant refused chemical testing and found the defendant guilty of operating a motor vehicle while under the influence of an intoxicant. A written Order was entered on December 12,

2016. (R.12:1-2). The defendant timely filed an appeal of the refusal allegation and OWI conviction filing a Notice of Appeal on January 20, 2017. The appeal herein stems from the Court's finding that Officer Erickson had the requisite level of probable cause to request that Mr. Van Akkeren perform a preliminary breath test.

Facts in support of this appeal were adduced at the court trial/ refusal hearing held on November 10, 2016 and were introduced through the testimony of Officer Robert Erickson, an almost nine year veteran of the City of Sheboygan. Officer Erickson testified that on Thanksgiving Day, November 25, 2015, at approximately 12:59 a.m. he received a communication from another officer a vehicle was driving westbound on Erie Avenue near North 14th Street without headlights on. (R.11:5/ A.App. 1). Erickson was in the area and observed the vehicle. (R.11:6/ A.App. 2). Erickson confirmed that the vehicle was driving without headlights illuminated, and while attempting to stop it, observed the vehicle travel with driver side tires in innermost westbound lane and passenger side tires in outermost westbound lane for approximately one half block. (R.11:7/ A.App. 3). Erickson testified that he "blipped" his siren a

couple times due to the fact that the vehicle did not immediately pull over. (R.11:8/ A.App. 4). The vehicle eventually stopped.

Mr. Van Akkeren was identified through a Massachusetts driver's license. Upon initial contact Erickson observed Mr. Van Akkeren to have glossy eyes and observed a "moderate" odor of intoxicant coming from the vehicle. (R.11:9/ A.App. 5). Mr. Van Akkeren said he was coming from his brother's house after Thanksgiving, and admitted to consuming a few beers. However, Mr. Van Akkeren's speech was normal and there were no problems with his motor coordination. (R.11:17/ A.App. 13). Erickson acknowledged that the odor that he observed did not indicate impairment, but only indicated that Mr. Van Akkeren had consumed alcohol. (R.11:18/ A.App. 14).

Erickson requested Mr. Van Akkeren perform standardized field sobriety tests. (R.11:10/ A.App. 6). Mr. Van Akkeren complied. It had started to lightly rain, but Erickson testified that he was not concerned that the rain would affect the tests. (R.11:10/ A.App. 6). Because of the rain, Erickson told Mr. Van Akkeren that he could roll his window up. According to Officer Erickson, rather than roll the driver's side window up, Mr. Van Akkeren rolled the passenger side window down. (R.11:11/ A.App. 7). Mr. Van Akkeren commented that the

vehicle was a rental then rolled up the passenger window, but he did not roll up the driver's side window. *Id.* Mr. Van Akkeren then exited the vehicle for the field sobriety test.

The parties stipulated that Officer Erickson was trained to perform field sobriety tests, and that he performed them according to his training. (R.11:12/ A.App. 8). Erickson testified that he performed the Horizontal Gaze Nystagmus test, and observed four of a possible six clues. (R.11:13/ A.App. 9). Erickson testified that his observations confirmed his suspicions that Mr. Van Akkeren might be impaired.

The second field sobriety test performed was the walk and turn test. Erickson testified that there are eight clues on that test and two are indicative of impairment (R.11:14/ A.App. 10). Erickson testified that Mr. Van Akkeren raised his arms on this test, and made an improper turn. *Id.* Rather than turning taking small choppy steps, Mr. Van Akkeren turned in one continuous motion. (R.11:20/ A.App. 16). On cross examination, Erickson testified that Mr. Van Akkeren's arms were at a "45-degree angle from his body" during the walk and turn test. However, Mr. Van Akkeren correctly took all the steps in a straight line, in a heel to toe manner, and without stopping. Furthermore, Erickson testified that Mr. Erickson started the test when he was

told to start, and adequately maintain the instruction stance at the start of the test. (R.11:19/ A.App. 15).

Erickson concluded the field sobriety test with the one leg stand. Of the four potential clues on the one leg stand Mr. Van Akkeren exhibited 2. (R.11:14/ A.App. 10). He raised his arms more than six inches from his sides and swayed slightly. (R.11:15/ A.App. 11). However, Erickson conceded that Mr. Van Akkeren kept his foot raised six inches off the ground for thirty seconds, without hopping, and only swaying slightly. (R.11:20/ A.App. 16).

Erickson testified that based on his performance on the field sobriety tests, he requested Mr. Van Akkeren to perform a PBT. The result was a .119. (R.11:15/ A.App. 11).

Erickson then placed Mr. Van Akkeren under arrest for OWI. The parties stipulated that Mr. Van Akkeren was read the Informing the Accused, and refused testing. (R.11:16/ A.App. 12).

Defense counsel argued that the minor clues on the field sobriety tests coupled with the other observations did not establish the requisite level of probable cause to request a PBT test. (R.11:21-22/ A.App. 17-18). The City argued that the evidence was sufficient to support the request for a PBT. *Id.*

The Court found that the evidence adduced was sufficient for the officer to request that Mr. Van Akkeren perform a PBT. (R.11:22-24/ A.App. 18-20). Furthermore, the Court found the refusal improper and found Mr. Van Akkeren guilty of operating a motor vehicle while under the influence of an intoxicant, Wis. Stat. §346.63(1)(a). An Order was signed on December 12, 2016. Mr. Van Akkeren timely filed a Notice of Appeal on January 20, 2017.

STANDARD OF REVIEW

Under Wis. Stat. §343.303, an officer must possess probable cause to believe that a motorist was operating a motor vehicle under the influence of an intoxicant to administer a PBT. In determining whether an officer had “probable cause to believe”, the court looks at the totality of the circumstances known to the officer at the time the PBT was administered, in light of the officer’s training and experience. See *State v. Kutz*, 2003 WI App. 2005, ¶¶11-12, 267 Wis.2d 531, 671 N.W.2d 660. An appellate court will uphold a lower court’s finding of fact unless clearly erroneous, *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999) but whether those facts rise to the level of “probable cause to believe” is a question of law that is reviewed de novo. *Id.*

ARGUMENT

OFFICER ROBERT ERICKSON DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO REQUEST PRELIMINARY BREATH TEST AND WITHOUT THE PRELIMINARY BREATH TEST RESULT DID NOT HAVE PROBABLE CAUSE TO ARREST MR. VAN AKKEREN

Under Wis.Stat. §343.303 an officer is permitted to request that an individual submit to a preliminary breath test when he possesses “probable cause to believe” that the person is operating a motor vehicle while impaired. “Probable cause to believe” refers to a quantum of evidence that is greater than the level of reasonable suspicion required to justify a stop, but less than probable cause to arrest. *State v Begicevic*, 2004 WI App 57, 270 Wis.2d 675, 678 N.W.2d 293, *State v. Colstad*, 2003 WI App 25, 260 Wis.2d 406, 659 N.W.2d 394 citing to *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999). The court considers the totality of the circumstances in determining whether probable cause existed for a PBT. *State v. Goss*, 2011 WI 104, ¶25, 338 Wis.2d 72, 806 N.W.2d 916. However, the court is not bound by the officer’s subjective assessment regarding impairment, but rather must apply “an objective standard” in considering whether probable cause exists. *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis.2d 531,

671 N.W.2d 660. That is, would a reasonable officer in Officer Erickson's position have the requisite level of "probable cause to believe" that Mr. Van Akkeren was operating his motor vehicle while impaired, thus justifying the PBT request.

Pursuant to Wis. Stat. §343.305(9)(a) one of the issues at a refusal hearing is whether the driver was lawfully placed under arrest for an OWI violation. "In the context of a refusal hearing... '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." *Washburn County v. Smith*, 2008 WI 23, ¶15, 308 Wis.2d 65, 746 N.W.2d 243. "The burden is upon the state to present sufficient evidence to establish the officer's probable cause to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." *Id.* Under *State v. Anagnos*, 2012 WI 64, ¶42, 341 Wis.2d 576, 815 N.W.2d 675, the probable cause inquiry under Wis. Stat. §343.305(9)(a), can include whether the traffic stop that preceded an arrest was lawful. Logic dictates that it can also include whether the officer had the requisite level of suspicion to extend the traffic stop for field sobriety and PBT testing. Mr. Van Akkeren does not challenge

the stop. The sole issue is whether Officer Erickson had the requisite level of suspicion to request Mr. Van Akkeren submit to a PBT.

The evidence adduced at the refusal hearing in this case did not rise to the level of “probable cause to believe” necessary to request Mr. Van Akkeren submit to a PBT. Furthermore without the PBT evidence, Officer Erickson did not have the requisite level of suspicion to arrest Mr. Van Akkeren.

After stopping Mr. Van Akkeren, Officer Erickson observed minimal indicators that suggested that Mr. Van Akkeren might be impaired. Initially, Erickson observed Mr. Van Akkeren to exhibit an odor of intoxicant and have glossy eyes, but Mr. Van Akkeren’s speech appeared normal. Also, during the initial conversation Mr. Van Akkeren admitted consuming a few beers. However, Officer Erickson admitted that the odor is not indicative of impairment. (R.11:18/ A.App. 14). Based on these observations, Officer Erickson then continued the detention and requested Mr. Van Akkeren to perform field sobriety tests. “If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate

and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun." *State v. Malone*, 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (citing *State v. Betow*, 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)).

Erickson conceded that he observed no difficulty with Mr. Van Akkeren's motor coordination or balance as he exited the vehicle. Furthermore, the "clues" on the field sobriety were minor in nature. On the one leg stand test, Mr. Van Akkeren kept his foot six inches off the ground for the duration of the thirty seconds, he did not hop, and only swayed slightly. (R.11:15/ A.App. 11). What he did wrong was raised his arms more than six inches from his side. Additionally, on the walk and turn test, Mr. Van Akkeren took the appropriate number of steps, walked all steps in a straight line, and walked each step heel to toe without stopping. Once again, what he did wrong was again raise his arms more than six inches from his side (about at a 45 degree angle from his body as walked.) (R.11:19/ A.App. 15), and turned in one continuous motion rather than by taking small step. There was no problem with Mr. Van Akkeren's balance on the walk and turn test and only a slight

sway on the one leg stand test. The court acknowledged that on each test only the “minimum number of clues” were observed.

Comparatively, the potential indicators of intoxication on the field sobriety tests in Mr. Van Akkeren’s case are clearly less significant than those exhibited by the defendant in *Renz*. In *Renz*, the defendant exhibited clear balance and motor coordination problems during the field sobriety tests. Renz could only keep his foot off the ground for eighteen seconds during the one leg stand test, did not walk heel to toe and could not walk on a straight line on the walk and turn test *Renz* at ¶¶8-9, missed his nose on the finger to nose test, and exhibited all six clues on the horizontal gaze nystagmus test. *Id.* at ¶11. Mr. Van Akkeren’s performed the field sobriety tests significantly better than did Mr. Renz. Mr. Van Akkeren kept his foot six inches off the ground for thirty seconds, walked a straight heel to toe line and only showed four of six clues on the horizontal gaze nystagmus test. Other than holding his arms at a 45 degree angle during the tests and a slight sway during the one leg stand test, Mr. Van Akkeren, unlike Renz, showed virtually no difficulty with balance or motor coordination during the tests.

Employing an “objective standard,” Mr. Van Akkeren performance on the field sobriety test did not suggest that he was

impaired. Because of the above, Officer Erickson did not have the requisite level of “probable cause to believe” to request Mr. Van Akkeren submit to a PBT. Without the PBT evidence, the remaining evidence adduced at the refusal hearing did not rise to quantum of evidence necessary for the probable cause to arrest under Wis. Stat. §343.305(9)(a).

CONCLUSION

Because of the above, the court erred in finding that Officer Erickson had the requisite level of probable cause to request the PBT, and erred in finding that Mr. Van Akkeren unlawfully refused chemical testing. The Court should reverse the order and vacate the refusal.

Dated this 27th day of March, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 20 pages. The word count is 3938

Dated this 27th day of March, 2017.

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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 with the requirements of s. 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 27th day of March, 2017.

Respectfully submitted,

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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: (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 this appeal is taken from a circuit court order or a 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 27th day of March, 2017.

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APPENDIX