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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

04-27-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2017 AP 120
Trial Court Case No. 2016 CV 479**

CITY OF SHEBOYGAN,

Plaintiff-Respondent,

v.

JOHN W. VAN AKKEREN,

Defendant-Appellant.

**ON APPEAL FROM AN ORDER OF THE
CIRCUIT COURT FOR SHEBOYGAN COUNTY**

The Honorable L. Edward Stengel, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

City of Sheboygan City Attorney's Office
828 Center Ave., Suite 304
Sheboygan, WI 53081-4442
(920) 459-3917
(920) 459-3919 (Fax)
charles.adams@sheboyganwi.gov

By: Charles C. Adams
City Attorney
State Bar No. 1021454
Attorney for Plaintiff-Respondent

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**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue being raised on appeal. Because the appeal is before a single judge, publication is not available.

ARGUMENT

OFFICER ERICKSON LAWFULLY REQUESTED A PRELIMINARY BREATH TEST.

A. Standard of Review.

A law enforcement officer may request a driver submit to a preliminary breath test (PBT) when the officer has “probable cause to believe that the driver has been violating the OWI laws.” County of Jefferson v. Renz, 231 Wis. 2d 293, 311, 603 N.W.2d 541 (1999). “‘Probable cause to believe’ refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop . . . but less than the level of proof required to establish probable cause for arrest.” State v. Felton, 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871.

The probable cause standard is a “flexible, common-sense measure of plausibility of particular conclusions about human behavior.” State v. Felton at ¶9 citing State v. Lange, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. “Whether a police officer had probable cause to give a defendant a preliminary breath test is a legal issue that a reviewing court decides *de novo*, accepting the trial court’s findings of fact unless they are clearly erroneous.” State v. Felton, 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871.

B. Officer Erickson’s Preliminary Breath Test Request Was Supported by Probable Cause to Believe Van Akkeren Was Operating While Intoxicated.

The testimony adduced at trial established that Officer Erickson first observed Mr. Van Akkeren driving his vehicle on a city roadway at approximately

12:59 a.m. without headlights or taillights illuminated. (R.11:5/A.App.1). While following Mr. Van Akkeren's vehicle, Officer Erickson watched it straddle two westbound lanes of travel for approximately a half block. (R.11:7/A.App.3). After Officer Erickson activated his squad car emergency lights, Mr. Van Akkeren failed to immediately pull over, ultimately only pulling over after Officer Erickson "blipped" his siren a couple of times. (R.11:6-8/A.App.2-4).

In speaking with Mr. Van Akkeren, Officer Erickson noticed that his eyes were glossy and that a moderate odor of intoxicants emanated from his breath. (R.11:9/A.App.5). Mr. Van Akkeren admitted to drinking "a couple or a few beers" at his brother's house before driving. (R.11:9/A.App.5). Moreover, Mr. Van Akkeren appeared to struggle rolling up his driver side window when prompted to, instead rolling his passenger window down and back up before exiting his vehicle. (R.11:11/A.App.7). He ultimately left the driver side window down even though it was lightly raining. (R.11:11/A.App.7).

Based on his observations, Officer Erickson decided to further investigate his suspicion that Mr. Van Akkeren was operating while intoxicated. (R.11:10/A.App.6). He administered three standardized field sobriety tests; Horizontal Gaze Nystagmus (HGN), Walk and Turn, and One Leg Stand, each in accordance with his National Highway Traffic Safety Association (NHTSA) Standardized Field Sobriety Test training. (R.11:12-13/A.App.8-9).

During the course of these tests, Officer Erickson observed enough clues of intoxication, based on his training, to confirm his suspicion that Mr. Van Akkeren

was intoxicated. (R.11:13-15/A.Ap.9-11). He observed four of six standardized clues of intoxication during the HGN, two of eight standardized clues of intoxication during the Walk and Turn and two of four standardized clues of intoxication during the One Leg Stand. (R.11:13-15/A.Ap.9-11). At no point during the field sobriety testing did Mr. Van Akkeren ask any questions which would suggest he misunderstood what he was being asked to do. (R.11:15/A.App.11).

That Officer Erickson's observations of Mr. Van Akkeren were "minor in nature" as the defense argues, "does not . . . subtract from the common-sense view that [he] 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." State v. Felton at ¶10 citing United States v. Sokolow, 490 U.S. 1, 9-10, 109 S.Ct. 1581 (1989). In fact, the Wisconsin Supreme Court has held that an officer may be justified in requesting a PBT without asking a driver to perform a single field sobriety test. See Washburn County v. Smith, 2008 WI 23, ¶33, 308 Wis. 2d 65, 746 N.W.2d 243; discussing State v. Swanson, 164 Wis. 2d 437, 475 N.W.2d 148 (1991).

CONCLUSION

Mr. Van Akkeren smelled of alcohol. He admitted to drinking alcohol before driving. He was seen driving a car at 12:59 a.m. without any headlights or taillights on. He was not able to remain within his lane of travel while driving but instead straddled two lanes for half a city block. He was not able to follow the

simple instruction to roll up his window nor did he apparently feel compelled to do so on his own in order to protect the car's interior from the rain. Those factors alone could have been sufficient to establish probable cause to request a PBT but Officer Erickson continued his investigation by administering three standardized field sobriety tests according to his training. In doing so, Officer Erickson observed enough standardized clues of intoxication to conclude, based on his training, that Mr. Van Akkeren's ability to safely operate a motor vehicle was impaired by alcohol intoxication.

Based on the totality of the circumstances, Officer Erickson possessed probable cause to believe Mr. Van Akkeren was operating while intoxicated so he requested a PBT. The PBT result of .119, coupled with Officer Erickson's other observations and in light of his training and experience, provided Officer Erickson probable cause to arrest Mr. Van Akkeren for operating while intoxicated and to request a chemical test of Mr. Van Akkeren's blood. Mr. Van Akkeren refused to consent to that test. The City therefore requests this Court affirm the circuit court's findings.

Dated this 25th day of April, 2017.

Respectfully submitted,

CITY OF SHEBOYGAN
Plaintiff-Respondent

By: _____

Charles C. Adams
City Attorney
State Bar No. 1021454

828 Center Ave., Suite 304
Sheboygan, WI 53081-4442
(920) 459-3917
(920) 459-3919 (Fax)
charles.adams@sheboyganwi.gov

FORM AND LENGTH CERTIFICATION

The undersigned hereby certifies that this brief conforms to the rules contained in Wis. Stats. §809.19 (8)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 921 words.

Dated this 25th day of April, 2017.

Respectfully submitted,

CITY OF SHEBOYGAN
Plaintiff-Respondent

By: _____
Charles C. Adams
City Attorney
State Bar No. 1021454

828 Center Ave., Suite 304
Sheboygan, WI 53081-4442
(920) 459-3917
(920) 459-3919 (Fax)
charles.adams@sheboyganwi.gov

CERTIFICATION PURSUANT TO §809.12(f)

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.

I further certify that a copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this 25th day of April, 2017.

Respectfully submitted,

CITY OF SHEBOYGAN
Plaintiff-Respondent

By: _____
Charles C. Adams
City Attorney
State Bar No. 1021454

828 Center Ave., Suite 304
Sheboygan, WI 53081-4442
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charles.adams@sheboyganwi.gov