STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 17AP636 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Terry Sanders,

Defendant-Appellant.

ON APPEAL FROM THE DECISION OF THE TRIAL COURT DENYING DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE TIMOTHY HINKFUSS, CIRCUIT JUDGE, PRESIDING.

BRIEF OF THE DEFENDANT - APPELLANT

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STATEMENT OF THE ISSUE(S)

I. Did the officer have requisite level of probable cause to arrest Terry Sanders?

Trial court answered: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

It is not necessary that the Court of Appeals publish this decision, nor is it necessary that oral argument be provided.

STATEMENT OF THE CASE/FACTS

On May 11, 2016, the State filed an Amended Complaint. (38:1). The first count, operating a motor vehicle while under the influence – 2nd offense, contrary to Wis. Stat. 346.63(1)(a) and 346.65(2)(am)2, carried a maximum penalty of five days incarceration, and a maximum penalty of six months incarceration. (38:1). The second count, operating a motor vehicle with a prohibited blood alcohol concentration – 2nd offense, contrary to Wis. Stat. 346.63(1)(a) and 346.65(2)(am)2, carried a maximum penalty of five days incarceration, and a maximum penalty of six months incarceration. (38:1-2).

On June 26, 2015, Sanders filed a motion to suppress evidence. (17:1; App. 101). In doing so, he argued the police lacked probable cause to arrest, and thus all evidence derived thereafter should be suppressed.[1] (17:1; App. 101). At the hearing, the officer testified to a number of observations: 1) on May 10, 2014, at 2:29 a.m., she noticed Sanders' vehicle was three quarters over the beginning of the stop line; 2) there was a bar "in that area"; 3) she followed him from Cedar Street and Fairview Street, and observed no improper driving behavior; 4) the officer could smell a strong odor of alcohol coming from inside the car – but the officer could not determine if the smell was coming from the driver or the passenger; but once Sanders stepped outside the vehicle the officer could smell "the odor of intoxicants"; 5) four or more clues of the Horizontal gaze nystagmus test (HGN) indicate impairment, and the officer determined there were six of six clues; however, she noted on cross examination, that there are other reasons besides alcohol that could explain why one could exhibit a clue during this test; 6) a Vertical gaze nystagmus (VGN) test reveals a high dose of alcohol, and the officer indicated there were no clues found; 7) a walk and turn test can indicate intoxication, but that was not conducted since the defendant indicated he had been shot in the leg and it would impair his ability to perform; 8) a one leg lift test was conducted, and the officer observed one of four clues – although she indicated she had to remind him to look at his feet and he said twenty thousand twice; 9) the officer had Sanders do a counting test, a non-standard test, and to count from sixty-seven down to fifty-two, but he stopped at fifty-one; and, 10) as a result, she

[1] Sanders also argued the officer did not have a right to conduct the traffic stop; however, that issue is not contested on appeal. (17:1; App. 101).

believed Sanders was intoxicated and she chose to arrest him.[2] (79:8, 10, 19-20, 23-27, 29-30, 35-37, 45, 47-49; App. 109, 111, 120-121, 124-128, 130-131, 136-138, 146, 148-150). After hearing said testimony, the court denied said motion. (79:77; App. 178). In doing so, it stated:

> We're back here on the record. I am recalling File 14CT1063. This is State of Wisconsin versus Terry Sanders. As I was saying, there was a motion filed by Mr. Graves asserting defendant's motion to suppress.
>
> First of all, he charged the stop did not have sufficient reasonable suspicion of a crime to justify the stop and then the evidence Mr. Graves is saying didn't support probable cause for an arrest for OWI. I am denying both aspects of the motion. So, I am denying the motion in its entirety.
>
> The reason I am, first of all - - I'll take it the way Mr. Graves set it out. I do believe there was reasonable suspicion for the stop. Number one, the trial court is a judge of credibility. Mr. Graves did say that - - or, excuse me, Mr. Sanders did say that he was drinking. The officer did not testify that she had any alcohol at all, and one has to look at the credibility. I am going to go with the person that was not drinking alcohol at all, and so I am finding that the car was three quarters of the way in the in the intersection. Where that is defined as, I don't think Mr. Sanders knew. He said he stopped by the stop sign, but I don't think he looked down specifically to look where the line was, that white line on the road.
>
> Number two, the reason why I'm finding there was reasonable suspicion is that when the officer saw the car, it did not have a plate in the usual spot. The tag was on the car, but she did not see the tag until the officer approached the car, she said two feet from the bumper of Mr. Sanders' car when it was initially observed. So, in her opinion there was a violation of the law, which to me tells me that we have a traffic stop. I do think there was reasonable suspicion for the traffic stop.
>
> With regard to the OWI, if one looks at the totality of the circumstances - - let's go through them - - first of all, we have the standard field sobriety tests in this case that were testified to a great deal on direct, cross-examination of the officer, and of Mr. Sanders. And I do believe that would be one of the factors that would go to the probable cause. Mr. Sanders did fail those field sobriety tests.
>
> Number two, the odor of - - they aren't pass-fail. I heard that enough today as well. But there were indicia of the clues. I don't know how

[2] The officer's police report was received into evidence; in said report, it indicates Sanders indicated he drank "not too much", and that Sanders "on three attempts blew into the machine in one big gust", but the breathalyzer did not provide a result, that the officer observed "Sanders level of frustration escalate", and thus she simply arrested him rather than have him try a fourth time. (20:1-6; App. 182-187).

> many times I heard that you can't pass or fail those field sobriety tests, it's just a question of the clues. So, with that I want to make sure it's clear for any appellate review.
>
> We do have the odor of intoxicants. Mr. Graves did say, make an attempt, a valiant attempt, I might add, to say we don't know whether it's from the passenger or from Mr. Sanders, but the officer said it was from Mr. Sanders. That's what the officer concluded in the final analysis. I do find that the traffic - - three quarters of the way into the intersection is an indicia of probable cause as well.
>
> The counting test. I agree with you, Mr. Graves, in the sense if one just looks at the counting test: fifty-one, fifty-two, fifty-three, okay, I mean, that's a minor violation. But when one considers everything in the totality of the circumstances, I do think that that should get locked in there.
>
> The other reason, another reason is the swaying. We did have a great deal of testimony from Mr. Sanders about his situation with regard to the gunshot wound. The officer did testify and Mr. Sanders concurred that the leg that was used for the field test was not the one affected by the gunshot wound.
>
> And when one also looks at the argumentativeness - - I think that's a word - - of Mr. Sanders, I'm not really taking that in consideration because Mr. Sanders, he doesn't like to be here. He seemed to be argumentative by nature, and I think if someone is pulled over, they don't like to be pulled over. I don't blame him. I would be as well. And the record should reflect for any appellate review that I do think Mr. Sanders was, for a lack of a better word, argumentative on the stand. I don't think he likes to be here. And like I said, who can blame him? I wouldn't like to be here either.
>
> I am also taking into consideration the fact that the lack of the following conditions - - Mr. Graves had asked the officer that and several times, and the officer finally did respond and she testified the counting backwards, and we talked about that already, and not counting correctly. We talked about that already as well.
>
> So, I do think there was probable cause for the arrest, and I do think there was reasonable suspicion for the stop so that's - - that is the decision of the Court. I am going to deny the defendant's motion to suppress.

(79:74-77; App. 175-178).

Afterwards, Sanders exercised his right to a trial. (86:1). In doing so, the State used the evidence it obtained after arrest, and it ultimately was able to prove to a jury beyond a reasonable doubt that Sanders was guilty on both counts. (86:269).

Sanders subsequently filed a notice of appeal to this Court. (64:1). The defendant appeals because case law indicates the police did not have probable cause to arrest, and therefore the trial court should have suppressed all evidence that derived from such. Ultimately, this mistake resulted in Sanders' convictions. For this reason, the case is on appeal before this Court.

STANDARD OF REVIEW

This court reviews a denial of a motion to suppress by first upholding the circuit court's findings of fact "unless they are against the great weight and clear preponderance of the evidence." *State v. Jackson,* 147 Wis.2d 824, 829, 434 N.W.2d 386 (1989). However, whether the circuit court's facts satisfy the standard of probable cause is a question of law that is reviewed *de novo*. *County of Jefferson v. Renz,* 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999).

ARGUMENT

I. THE TESTIMONY ADDUCED AT THE MOTION HEARING WAS INSUFFICIENT TO ESTABLISH THAT THE OFFICER POSSESSED THE REQUISITE LEVEL OF PROBABLE CAUSE TO ARREST SANDERS FOR AN OWI.

Case law indicates a police officer has probable cause to arrest for operating while intoxicated when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably drove while intoxicated. *State v. Koch,* 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). This is a practical test, based on 'considerations of everyday life on which reasonable and prudent [people], not legal technicians act.' *State v. Drogsvold,* 104 Wis.2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981). When called into question, the burden is on the State to show the officer had probable cause to make the arrest. *State v. Lange,* 2009 WI 49, P19, 31 Wis.2d 383, 66 N.W.2d 551 (2009).

Here, the officer had a mixed bag of information. On one hand, he had an individual who drove from Cedar Street to Fairview Street without issue, no clues after conducting the VGN test, there was no testimony that his eyes were glassy or bloodshot, there was no testimony that his speech was slurry, and there was only one clue on the one leg lift test – thus indicating Sanders was not intoxicated.

(79:20, 24, 30; App. 121-125, 131). On the other hand, the officer had evidence that: Sanders was driving at 2:29 a.m. around a bar area, that he stopped his vehicle three quarters over the beginning of the stop line; he smelled like alcohol; six of six clues on the HGN test – which indicate a .08 B.A.C.- although there are other reasons than alcohol that could explain why one could exhibit the clues on this test; and, Sanders counted from sixty-seven to fifty-one rather than sixty-seven to fifty-two. (79:8, 19, 26-27, 35-39; App. 109, 120, 127-128, 136-140).

In comparing the mixed bag, first, one should look at the State's likely strongest evidence – the six of six clues on the HGN test. The problem with this evidence, however, is that, as the officer noted, there are reasons other than alcohol that could explain why one could exhibit the six clues; thus, we are stuck with whether the six clues are as a result of alcohol, or something else. In comparing it to the other standardized field test that was conducted – the one leg stand test, only one clue was exhibited, and there was no evidence provided that one clue on that test is indicative that Sanders was intoxicated. So at best, at this point, the officer would have two inconsistent results; at worst, the officer would have evidence that the HGN clues could be explained by reasons other than alcohol since the results from the one leg stand test was indicative that Sanders was not under the influence.

As for the rest of the evidence, the officer is left with nothing more than observations of what he would likely see by day by sober folks, as well as evidence that Sanders had some alcohol. For instance, as the court noted, it was pretty "minor" the fact that Sanders counted down to fifty-one rather than fifty-two. Just as much, Sanders argues it would be easy for an officer to see sober drivers by day stopping their vehicles over the stop sign line. Last, we are left with the fact the defendant smelled like alcohol, and he was pulled over near a bar. This would suggest, at best he drank some alcohol – possibly at a bar, and at worse – he smelled like alcohol from someone – possibly at a bar or from the passenger in his own car; however, neither of these would suggest he was under the influence. Most importantly, the officer did not notice glassy and bloodshot eyes, and slurred speech. Considering the totality of the circumstances, it does not appear the officer has probable cause to arrest.

Notably, this Court may also want to consider the *County of Jefferson v. Renz* case that made its way through our State Appellate and Supreme Court. At the Appellate level, the court was faced with the issue whether probable cause to arrest is necessary before the

administration of a PBT, and if so, whether that standard was met. *County of Jefferson v. Renz,* 222 Wis.2d 424, 426-427, 588 N.W.2d 267 (Ct. App. 1998). As for the facts, the officer had the following: 1) defendant drove with a defective exhaust in the early morning hours; 2) the defendant admitted he drank three beers earlier that evening; 3) the officer smelled a strong odor of alcohol coming from the vehicle; 4) the defendant passed the alphabet test; 5) the defendant exhibited one of four clues on the one leg stand test; 6) the defendant exhibited two of eight clues on the heel to toe test; and, 7) the defendant touched the tip of his nose with his right hand (as directed) but touched the bridge of his nose with his left hand (not as directed).[3] *Id.* at 428-431. Subsequently, the officer administered a PBT, which resulted in .18 B.A.C., and the officer then arrested the defendant. *Id.* at 431.

The Appellate Court then made its ruling. In doing so, it first determined that an officer must have probable cause to arrest before he may administer a PBT. *Id.* at 442. It then turned its attention to whether there was probable cause to arrest. *Id.* at 443. In doing so, it first noted, it is not illegal to operate a motor vehicle after having consumed alcohol, and that more evidence is necessary to arrest. *Id.* at 444. It ultimately concluded, however, that there was not enough evidence to arrest before the PBT was administered, and thus it reversed the trial court's order denying the defendant's motion to suppress. *Id.* at 447-448.

The Supreme Court next heard this case. There, the Supreme Court was asked to determine whether there is a higher standard for the officer to arrest than there is to request a PBT. *Jefferson v. Renz,* 231 Wis.2d 293, P51, 603 N.W.2d 541 (1999). In ruling, it reversed the Appellate Court, and it concluded that the standard for an officer to request a Preliminary Breath Test (PBT) is "more proof that any presence of an intoxicant but less than probable cause for arrest." *Id.* at P35, 51. In doing so, though, it provided the following:

> The defendant exhibited several indicators of intoxication. His car smelled strongly of intoxicants. He admitted to drinking three beers earlier in the evening. During the one-legged stand test, he was not able to hold his foot up for thirty seconds, and he restarted his count at 10 although he stopped at 18. He appeared unsteady during the heel-to-toe test, left a space between his steps, and stepped off of the imaginary line. He was not able to touch the top of his nose with left finger during the finger-to-nose test. On the

[3] The HGN test was administered; however, it was excluded by the trial court and thus not considered for purposes on appeal. *Id.* at FN2.

> other hand, his speech was not slurred, and he was able to substantially complete all of the tests.
>
> The officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is a probable cause for an OWI arrest. We conclude that the officer had the required degree of probable cause to request the defendant to submit to a PBT.

Id. at P49-50. Considering the above, although the Supreme Court reversed the Court of Appeals in its decision regarding the probable cause standard for administering PBT, it appears the Supreme Court's decision left the Appellate Court's decision stand regarding the fact that there was not probable cause to arrest until the PBT was administered; in fact, the Supreme Court seemed to affirm the Court of Appeals decision in finding there was not probable cause to arrest when it indicated "The officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is a probable cause for an OWI arrest".[4] *Id.*

With the above in mind, it appears *Jefferson v. Renz* also supports the fact that the officer did not have probable cause to arrest Sanders. In both cases the officer initiated the traffic stop in the early morning hours. In both cases, the officer conducted a traffic stop based upon behaviors that one would observe during the day from sober people – one situation where an officer observed a defective exhaust and pulled the individual over; and, in another, the officer observed an individual stopping three quarters of his vehicle over the stop sign line, the defendant drive without issue from Cedar Street to Fairview Street, and the defendant did not have visible license plates. In both cases, the officer observed the smell of alcohol on the defendant. In both cases, one standard field sobriety test was not considered; a second standard field sobriety test exhibited enough clues to indicate the defendant was intoxicated (although in Sanders, the officer admitted the clues could have been from something other than alcohol); and on a third field sobriety test, there was no evidence that the defendant exhibited enough clues to indicate he was intoxicated. In both cases, the defendant made a minor mistake on a non-standard field test; in one case, the defendant touched the bridge of his nose, and in the other case, the defendant counted down to fifty-one rather than fifty-two. In both cases, there was no testimony regarding the officer observing bloodshot eyes,

[4] Case law indicates "a reversal of a court of appeals opinion, on other grounds, does not affect the validity of the remaining holding or holdings of that lower court opinion unless the supreme court expressly says so". *State v. Jackson,* 2011 WI App 64, P15n.3, 333 Wis.2d 665, 799 N.W.2d 461.

glassy eyes, or slurred speech. Notably, in *Renz,* the defendant additionally admitted he had drank three beers earlier that evening, while in Sanders, although the police report indicates he responded "not too much", there was no testimony regarding Sanders comment, nor did the trial court appear to consider such.

Considering the circumstances, it does not appear there was enough evidence for the officer to arrest.

CONCLUSION

Because the officer did not have the requisite level of probable cause to arrest Sanders, the trial court erred when it denied Sanders' motion to suppress evidence. Thus, the court should reverse the trial court's decision and judgment of conviction.

July 13, 2017

Signed:

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CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

July 13, 2017

Signed:

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TIMOTHY O'CONNELL

CERTIFICATE AS TO FORM AND LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3384 words.

July 13, 2017

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TIMOTHY O'CONNELL