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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP000636-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

TERRY SANDERS,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Brown County Circuit Court,
the Honorable Timothy A. Hinkfuss, presiding
Trial Court Case No. 14CT1063

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ISSUE FOR REVIEW

1. Did the totality of the circumstances known to Officer Bagley give rise to probable cause to arrest Sanders for operating while intoxicated?

The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

On May 10, 2014, Officer Alicia Bagley was on duty for the De Pere Police Department, near the intersection of Cedar and Fort Howard. (79:8-9). Officer Bagley knew this area to be residential, but also knew that there is a bar in that area as well. (79:10). At approximately 2:29 a.m., Officer Bagley observed a black Cadillac enter the intersection, and stop with about three-quarters of the vehicle past the beginning of the stop line. (79:8-9, 35). Based on this observation, Officer Bagley turned to get behind the vehicle, and

noticed there was no license plate displayed. (79:8). Officer Bagley then decided to conduct a traffic stop. (79:9).

As Officer Bagley approached the vehicle, she noticed an Illinois temporary registration tag affixed to the inside corner of the car's rear windshield, which she had not been able to see while driving. (79:10-12). Officer Bagley then made contact with the driver, and immediately noted a strong odor of intoxicants coming from the vehicle. (79:14). Officer Bagley identified the driver, Sanders, by his driver's license. (79:14). Officer Bagley also noted that there was a passenger in the vehicle with Sanders at the time. (79:36). While speaking with Officer Bagley, Sanders was unable to divide his attention between getting his proof of insurance and continuing their conversation. (79:15). Based on all of her observations, Officer Bagley decided to administer standard field sobriety tests ("SFSTs") to Sanders. (79:15). Officer Bagley continued to observe an odor of intoxicants once Sanders had exited the vehicle. (79:37).

The first SFST Officer Bagley administered was the horizontal gaze nystagmus ("HGN") test. Officer Bagley explained that during

the HGN test, an officer looks for involuntary jerkiness of the eyes, which based on her training correlates to a blood alcohol concentration of .08 or higher. (79:19). Officer Bagley observed six of six possible clues when she administered the HGN test to Sanders. (79:20). Officer Bagley then administered a vertical gaze nystagmus (“VGN”) test, which indicates a high level of alcohol for the particular person being tested. (79:20). Officer Bagley did not observe VGN when she administered the test to Sanders. (79:20).

Officer Bagley next intended to administer the walk and turn test. (79:23). However, as Officer Bagley was describing the test, Sanders explained that he had been shot in the right leg. (79:18, 23). Based on that information, Officer Bagley decided not to administer the walk and turn test for Sanders’ safety. (79:23). Officer Bagley did ask Sanders to perform the one leg stand test, with his good leg. (79:24). During this test, Officer Bagley observed one of four possible clues; namely, Sanders swayed while balancing. (79:24). Officer Bagley also noted that the defendant had to be reminded to look at his foot, and his counting was off because he repeated one of the numbers

twice. (79:24). These latter observations were not standardized clues, but Officer Bagley felt they indicated impairment because Sanders was unable to divide his attention. (79:25). Officer Bagley administered each of these SFSTs consistent with her training. (79:29).

Because Sanders could not perform the walk-and-turn test, Officer Bagley also asked Sanders to complete a non-standardized field sobriety test. (79:26). Officer Bagley asked Sanders to count down from sixty-seven to fifty-two. During this test, Sanders counted extremely slowly and stopped at fifty-one, rather than fifty-two. (79:27). Relying on her training and experience, Officer Bagley decided to arrest the defendant for operating while intoxicated. (79:29). This decision was based on the totality of the circumstances known to Officer Bagley, including the pre-stop traffic violation, the time of night and location, her observations of and conversation with Sanders both inside and outside of his vehicle, and Sanders' performance on the SFSTs. (79:28-29).

After the arrest, the defendant was taken to Aurora Hospital where a blood test was administered. (3:2). The result of that blood test revealed the defendant's blood contained .090g/100 mL by weight of alcohol. (3:2).

On June 26, 2015, the defendant filed a motion to suppress, arguing that Officer Bagley lacked reasonable suspicion to conduct the traffic stop, and that she lacked probable cause to arrest the defendant for OWI.¹ (17). An evidentiary hearing was held on October 9, 2015 before the Honorable Timothy A. Hinkfuss, Brown County Circuit Court Branch VII. At the hearing, Officer Bagley testified about her extensive training and experience, including her certification as an SFST instructor and a Drug Recognition Expert. (79:5). Officer Bagley testified that at that time in her career she had stopped well over one hundred potentially impaired drivers, however, not all of them resulted in arrests because Officer Bagley was able to determine through SFSTs that the driver was not impaired. (79:5).

¹ Sanders' current appeal does not challenge the court's decision that Officer Bagley had reasonable suspicion to conduct a traffic stop on May 10, 2014.

Officer Bagley estimated the number of OWI arrests that she made was around one hundred to one hundred and fifty. (79:5).

Ultimately, the court denied Sanders' motion to suppress. First, the judge stated that there was reasonable suspicion for the stop. (79:74). Specifically, the court found that Officer Bagley's testimony was more credible than Sanders' with regard to where Sanders stopped his car at the intersection, because:

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 intersection.

(79:74). Sanders does not ask this Court to reconsider the trial court's findings of facts or conclusions of law on the issue of reasonable suspicion for the stop in the present appeal.

The court also made several findings of fact regarding the way Officer Bagley administered the SFSTs. With respect to Sanders' leg injury, the court specifically found that "the leg that was used for the field test was not the one affected by the gunshot wound," based on testimony from both Officer Bagley *and* Sanders. (79:76). The court

also found that any glare from nearby lights did not affect the HGN or VGN test results, based on Officer Bagley's credible testimony and her "great deal of training" on those specific issues. (79:78-79). Based on these findings of fact, the court held that Officer Bagley had probable cause to arrest Sanders for OWI on May 10, 2014. (79:75). The court specifically noted that Officer Bagley had observed several indicia of impairment on the SFSTs, an odor of intoxicants, and the initial traffic violation. The court also considered Sanders' performance on the non-standard tests as part of the totality of the circumstances, particularly Sanders' swaying and his inability to follow instructions. (79:75-76).²

On May 11, 2016, Sanders was found guilty of operating while intoxicated and operating with a prohibited alcohol concentration at a jury trial. (43, 44). Sanders now appeals the court's denial of his suppression motion. Specifically, Sanders argues that there was not

² The court did *not* take the testimony that Sanders was argumentative with Officer Bagley at the time of the stop into consideration when ruling on probable cause, noting that Sanders seemed to be "argumentative by nature." (79:76).

sufficient probable cause to support his arrest for operating while intoxicated.

STANDARD OF REVIEW

In reviewing an order suppressing or refusing to suppress evidence, the Wisconsin Court of Appeals will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Russ*, 2009 WI App 68, ¶ 9, 317 Wis.2d 764, 767 N.W.2d 629. Whether a police officer had probable cause to arrest is a question of constitutional fact, which this Court decides de novo, “benefitting from the analysis of the trial court.” *State v. Nieves*, 2007 WI App 189, ¶ 10, 304 Wis. 2d 182, 738 N.W.2d 125.

ARGUMENT

I. OFFICER BAGLEY HAD PROBABLE CAUSE TO ARREST SANDERS FOR OWI BASED UPON THE TOTALITY OF THE CIRCUMSTANCES.

“Every lawful warrantless arrest must be supported by probable cause.” *Nieves*, 304 Wis. 2d at ¶ 11. To determine whether probable cause existed, the Court looks at the “totality of the circumstances

within the arresting officer's knowledge at the time of the arrest," and determines if the circumstances "would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). "Probable cause is a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior,'" and questions of probable cause are assessed on a case-by-case basis. *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 392, 766 N.W.2d 551, 555 (quoting *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)). In determining whether probable cause existed, the Court "applies an objective standard, considering the information available to the officer and the officer's training and experience." *Id.* at ¶ 20.

When considering the totality of the circumstances,

[t]he building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

State v. Waldner, 206 Wis. 2d 51, 58, 556 N.W.2d 681. Evidence that leads to probable cause does not need to be sufficient to prove guilt beyond a reasonable doubt, nor does it need to prove that guilt is more probable than not. *Koch*, 175 Wis. 2d at 701.

In the context of drunk-driving related offenses, law enforcement officers may look at a variety of factors to determine whether there is probable cause to arrest. *Kennedy*, 359 Wis. 2d at 468–69. SFSTs help in the probable cause determination, but probable cause to arrest may be established even without administration of SFSTs. *State v. Felton*, 2012 WI App 114, ¶ 10, 344 Wis. 2d 483, 490-91, 824 N.W.2d 871. Similarly,

[a]lthough evidence of intoxicant usage – such as odors, an admission, or containers – ordinarily exists in drunk driving cases **and strengthens the existence of probable cause**, such evidence is not required.

Lange, 317 Wis. 2d at ¶ 37 (emphasis added). “Probable cause may be established through a showing of erratic driving and the subsequent ‘stumbling’ of the driver after getting out of the motor vehicle.” *Kennedy*, 359 Wis. 2d at 469. Additional considerations can include

the arresting officer's experience and the time of day. *Lange*, 317 Wis. 2d at ¶ 32.

Furthermore, although sometimes innocent explanations could be hypothesized as the reason for a driver's actions, "a reasonable police officer charged with enforcing the law cannot ignore the reasonable inference that they might also stem from unlawful behavior." *Waldner*, 206 Wis. 2d at 61. Officers are not required to rule out every possible innocent explanation for a suspect's behavior. *Id.* at 60.

In this case, the circuit court's findings of fact at the motion hearing were not clearly erroneous in light of all of the evidence received. The court found Officer Bagley's testimony to be more credible than Sanders', particularly because Sanders had been drinking on May 10, 2014 and Officer Bagley had not. (79:74). The court also noted that Officer Bagley had a great deal of training on administering the SFSTs, which also increased her credibility. (79:78-79).

The totality of the circumstances known to Officer Bagley at the time of the arrest clearly rises to the level of probable cause in this case. First, Officer Bagley's attention was initially drawn to Sanders when he stopped his car three-quarters of the car length over the line at an intersection controlled by a stop sign. This occurred around 2:29 AM on a Saturday. After stopping the vehicle, and making contact with the driver, Officer Bagley immediately noticed a strong odor of intoxicants. Sanders had difficulty dividing his attention between carrying on a conversation with Officer Bagley and retrieving his insurance information when asked to do so.

Officer Bagley decided to administer SFSTs, and continued to notice an odor of intoxicants after she had Sanders exit the vehicle. Officer Bagley observed six of six possible clues on the HGN test, and one of four possible standardized clues on the one leg stand test. The walk and turn test was not administered for Sanders' safety. Finally, Officer Bagley noted that Sanders had difficulty following her instructions, and also made a mistake when she asked him to count down from sixty-seven to fifty-two. Looking at this behavior as a

whole, “a reasonable police officer charged with enforcing the law cannot ignore the reasonable inference” that arises from these facts – namely, that Sanders was impaired and unsafe to operate a vehicle. *Waldner*, 206 Wis. 2d at 61.

Sanders attacks the trial court’s conclusion that probable cause existed by attempting to call into question the veracity of each of the above factors in isolation. However, this approach is misguided because case law is clear that “the building blocks of fact accumulate,” and a point may be reached where the “sum of the whole is greater than the sum of its individual parts.” *Waldner*, 206 Wis. 2d at 58. This is clearly the case here. The circuit court even noted that some of the observations – like miscounting on the non-standardized test Officer Bagley administered – were fairly minor in and of themselves, but contributed to the totality of the circumstances when looked at as a whole. (79:76).

Sanders’ argument that the poor driving behavior observed should not factor into a probable cause determination is similarly unpersuasive. That fact that individuals may commit similar driving

violations while sober during the day is irrelevant. What Officer Bagley observed at the time was suspicious enough to draw her attention to Sanders, particularly given the time of day when she observed the concerning behavior, and to initiate a traffic stop when additional violations were noticed. While Sanders' improper stop at the stop sign might itself be a fairly minor law violation, it is certainly an appropriate factor to consider when looking at the totality of the circumstances.

Sanders also attempts to undermine the indicia of impairment that Officer Bagley observed when administering the SFSTs by speculating that external factors like nearby lights could have affected the HGN test, and that Sanders' previous leg injury could have affected his performance on the one-leg-stand test. Neither of these arguments is consistent with the trial court's findings of fact. Relying on Officer Bagley's credible testimony, the court found that Sanders used his good leg to perform the one leg stand test, and that any potential light from a nearby venue did not affect the way Officer

Bagley administered the HGN test. These findings of fact are not clearly erroneous, and should be upheld by this Court.

In referring to the “mixed bag” of evidence in this case, Sanders also argues that he “passed” the one leg stand test because Officer Bagley only noted one standardized clue on that test. This position is contrary to the evidence that was received at the motion hearing. (75:45). Officer Bagley clearly testified that the SFSTs are not “pass-fail” tests, nor did she indicate that Sanders “failed” the HGN test but “passed” the one leg stand test. Instead, Officer Bagley administered the tests and observed clues that accumulated and all contributed to the totality of the circumstances giving rise to probable cause for the arrest. Whether clues are observed in one test does not undermine the results of another test, as Sanders suggests. Here, because each of the SFSTs was properly administered, Sanders’ performance and the clues Officer Bagley observed absolutely contribute to the totality of the circumstances in making a probable cause determination.

Finally, Sanders draws the Court’s attention to *County of Jefferson vs. Renz*, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998)

(overturned by *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999)). Specifically, Sanders argues that there are similarities between the cases which should lead this Court to find that probable cause to arrest did not exist in this case. However, careful examination of both cases shows distinct differences between the supposedly analogous factors that Sanders points to.

In this case, Sanders drew Officer Bagley's attention by committing a traffic violation that involved the way he was operating his vehicle – he stopped three-quarters of a car length past the line at a stop sign; in *Renz*, the initial stop was for an equipment violation – loud exhaust. *Id.* at 428. In this case, the walk and turn test was deliberately not administered for Sanders' safety based on a prior injury; whereas in *Renz* the HGN test was excluded by the trial court for evidentiary reasons. *Id.* at 430. Sanders also renews the argument that in each case, the defendant “passed” one of the SFSTs; again contrary to the evidence received at the motion hearing here. Sanders finally notes that in each case the officer observed a minor mistake on a non-standard test. However, in *Renz*, the Court expressed concerns

about this observation because the officer did not testify as to *why* the mistake could be an indicator of impairment. *Id.* at 445. Here, Officer Bagley testified that Sanders' mistakes were significant because they indicated that Sanders could not follow directions or divide his attention, both of which are required to safely operate a motor vehicle. (79:25). These important differences clearly distinguish the probable cause determination at issue in *Renz* from the totality of the circumstances here.

An officer's conclusions based on her investigative experience may be considered when determining whether probable cause exists. *State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994). Officer Bagley is an experienced officer, who is certified not only to administer SFSTs and recognize indicia of drug impairment, but also to train other officers on those issues as well. (79:5). Based on all of Officer Bagley's observations, including Sanders' driving, her interactions with him both inside and outside of the vehicle, his performance on the SFSTs as well as non-standard tests, and the time and location of the stop, the totality of the circumstances here support

Officer Bagley's determination that probable cause existed to arrest Sanders for OWI.

CONCLUSION

Officer Bagley had probable cause to arrest Sanders for operating while intoxicated based upon the totality of the circumstances. Therefore, the Court should uphold the circuit court's decision and Sanders' conviction for OWI, and deny his appeal.

Respectfully submitted this _____ day of August, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3186 words, including footnotes.

There is no appendix attached to this brief as any items that would have been included were included in the Defendant-Appellant's appendix.

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.

Dated this _____ day of August, 2017.

Signed:

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