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.

REPLY BRIEF OF THE DEFENDANT - APPELLANT

TIMOTHY T. O'CONNELL
Attorney
State Bar No. 1063957

O'Connell Law Office
403 S. Jefferson St.
Green Bay, WI 54301
920-360-1811

Attorney for Defendant-Appellant

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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.

In the State's response brief, the State indicates it believes the officer possessed probable cause to arrest – considering the totality of the circumstances, and it rebuts a number of points Sanders previously raised in his initial brief. Brief of Plaintiff-Respondent at 11-18. The

scope of the argument in the Defendant's Reply Brief is limited to responding to said arguments. No further legal arguments will be addressed because Sanders believes the arguments from the Brief of the Defendant-Appellant have sufficiently addressed all other matters to the extent that the Court can find the testimony adduced at the motion hearing was insufficient to establish the officer possessed the requisite level of probable cause to arrest Sanders.[1]

First, the State argues the officer had probable cause to arrest – considering the totality of the circumstances. Brief of Plaintiff-Respondent at 12. In making this argument, it first highlighted the evidence the officer indicated at the motion hearing that she observed: Sanders' vehicle stopped three quarters of a car length over the stop linen at 2:29 A.M.; there was an odor of intoxicants coming from Sanders; Sanders had difficulty dividing his attention between carrying on a conversation with the officer and retrieving his insurance information; Sanders exhibited six of six clues on the HGN test; Sanders exhibited one of four clues on the one leg stand test; and, Sanders made a mistake in counting down from sixty-seven to fifty two. Brief of Plaintiff-Respondent at 12. Then, the State attacks Sanders argument in arguing that Sanders inappropriately considered the veracity of the factors in isolation rather than as a whole. Brief of Plaintiff-Respondent at 12-13.

In reply, Sanders did consider all of the information as a whole in showing the officer did not have probable cause. In doing so, Sanders discussed the inconsistent results the officer received among the two administered SFST, and then Sanders discussed the fact the rest of the information was evidence an officer would "likely see by day by sober" drivers. Brief of Defendant-Appellant at 6. After showing this, Sanders was able to show there was not sufficient evidence for the officer to arrest Sanders. Before moving on, however, Sanders believes it is necessary to address the State's own fallacy in making this argument.

As noted above, the State provided support for why the officer would have probable cause, and then it argued Sanders did not consider the whole record. Brief of Plaintiff-Respondent at 12-13.

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[1] In Sanders' brief, he indicated the defendant in *Jefferson v. Renz* exhibited enough clues on the heel to toe test to indicate intoxication. Brief of Defendant-Appellant at 7-8. Although the State did not object to this fact, Sanders noticed said fact was not cited to such, and thus is citing to such now. *Jefferson v. Renz,* 222 WIs.2d 424, 429, 588 N.W.2d 267 (Ct. App. 1998); (20:25; App. 200).

The problem with this argument is that it is the State that is not considering the whole record in making its argument. The State appears to leave out the officer was also aware: Sanders drove from Cedar Street to Fairview Street without issue; there were no clues on the VGN test; there was no testimony that Sanders' eyes were glassy or bloodshot; there was no testimony that Sanders' 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). Had the State considered the whole record on appeal, the State likely would conclude the officer did not have probable cause.

Next, the State argues Sanders' argument that stopping over the stop line should not be considered. Brief of Plaintiff-Respondent at 13-14. In reply, it appears the State misinterpreted Sanders argument. Sanders was not arguing the stop cannot be considered; instead, it should be considered for what it is worth. Defendant – Appellant at 6. Notably, the officer also saw Sanders drive from Cedar Street to Fairview Street without issue, and the fact that the three quarter stop over the stop line is conduct the officer would likely see by day by a sober driver. Brief of Defendant-Appellant at 6.

Subsequently, the State argues Sanders inappropriately attempted to "undermine the indicia of impairment that Officer Bagley observed when administering the Standard Field Sobriety Tests (SFSTs) by speculating the external facts 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." Brief of Plaintiff-Respondent at 14. In reply, Sanders may have raised these issues at the motion hearing, but Sanders is not arguing such on appeal.

The State also seems to take issue that Sanders claims he "passed" the one leg stand test since the officer only observed one standardized clue. Brief of Plaintiff-Respondent at 15. Further, the State argues that one standardized clue does not undermine the results of "another test", but rather contributes to the "totality of the circumstances giving rise to probable cause for the arrest". Brief of Plaintiff-Respondent at 15. In reply, Sanders did not use the words "passed" but rather cited the following: "the results from the one leg stand test was indicative that Sanders was not under the influence." Brief of Defendant-Appellant at 6. This would be consistent with the State's own words at the motion hearing:

> She also testified that on the one-leg stand she only observed one standardized clue. Based on my familiarity with standardized field sobriety tests and what officers are trained to look for, its my understanding that two out of the four clues on that test indicate impairment.

(79:70; App. 171). Notably, it appears the State's previous assertion of its understanding was correct. The manual the officer basis her knowledge on the topic to determine intoxication also indicates the officer should be looking for two or more clues. (79:28; 20:27; App. 127; 202). Considering such, one clue is on said test is indicative of an individual not intoxicated.

Finally, the State attempts to distinguish *County of Jefferson v. Renz* from this case. In doing so, it first indicates *County of Jefferson v. Renz* was in regards to an officer pulling over an individual for an equipment violation, and here it was for Sanders stopping three quarters of his vehicle over the stop line. Brief of Plaintiff-Respondent at 16. In reply, Sanders agrees with the reason for the stop in *County of Jefferson v. Renz,* but it appears the reason for the traffic stop in Sanders was not simply because Sanders stopped his vehicle three quarters over the stop line. Here, the officer notice Sanders vehicle stop at the stop line, she then followed the vehicle from Cedar Street to Fairview Street without any issue, and then noticed Sanders did not have his license plate properly displayed. (79:35-36; App. 136-137). After seeing there was no plate displayed, the officer decided to conduct the traffic stop. (79:35-36; App. 136-137). Considering this, and as noted in Sanders' brief, in both cases, the officer conducted the traffic stop based upon conduct one would observe during the day from sober drivers.

Next, the State argues in *County of Jefferson v. Renz* the court excluded the results of a SFST test, but here the officer did not administer a test for Sanders safety. Brief of Plaintiff-Respondent at 16. In reply, the State does not explain why this difference matters, and this Court has indicated it need not address an inadequately briefed and undeveloped argument. *State v. Pettit,* 171 Wis.2d 627, 646-647, 492 N.W.2d 633 (Ct. App. 1992). In both situations, one SFST was not used, and should not be considered an aggravating or mitigating factor in determining whether the officer had probable cause to arrest.

Third, the State indicates Sanders improperly argues in his brief that he "passed" one of the SFSTs. Brief of Plaintiff-

Respondent at 16. First, as a preliminary matter, as Sanders previously indicated, he was not saying he "passed", but rather that there were not enough clues on that test to indicate intoxication. Second, and more importantly, in both cases, the officer observed one of four clues on the one legged stand test. *County of Jefferson v. Renz,* 222 Wis.2d 424 at 429. Thus, there does not seem to be a distinction between the cases on this issue, and the State does not indicate any difference.

Fourth, the State argues in *County of Jefferson v. Renz*, the court discounted the minor mistake on the SFST by the defendant because the officer did not testify why the mistake could be an indicator of intoxicant, whereas here, the officer testified Sanders' mistakes were significant because they indicated he could not follow directions or divide his attention. Brief of Plaintiff-Respondent at 16-17. In reply, the mistake Sanders assumes the State is referring to is regarding counting to fifty-one rather than fifty-two. This appears to be a fairly minor mistake. On the other hand, though, using the State's same line of reasoning, the results of the HGN test should be discounted. As noted in Sanders' brief, the officer in this case indicated the clues on the HGN test could have also resulted from something other than alcohol; thus, we are left with the officer failing to provide insight as to the significance as to the clues from the HGN test. Brief of Appellant-Defendant at 6; (70:48-49; 149-150). Notably, it is the State's burden to show probable cause, and we are left to wonder what else would cause clues on the HGN test, and whether they were present in this case. *State v. Lange,* 2009 WI 49, P19, 31 Wis.2d 383, 66 N.W.2d 551 (2009). Thus, using that same reasoning, the HGN test should be discounted and we are left with even a weaker set of facts for probable cause than that in *County of Jefferson v. Renz.*

Finally, the State argues the officer's conclusions based on her investigative experience may be considered when determining whether probable cause exists. Brief of Plaintiff-Respondent at 17. In response, Sanders agrees an officer's conclusions based on experience may be considered, but ultimately it is the Court's role to determine whether the facts reached probable cause. Here, as previously discussed, considering the totality of the circumstances, it does not appear the evidence shows probable cause 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.

August 28, 2017

Signed:

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TIMOTHY T. O'CONNELL
Attorney
State Bar No. 1063957

O'Connell Law Office
403 S. Jefferson St.
Green Bay, WI 54301
920-360-1811
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

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 1758 words.

Date: August 28, 2017

Signature:_____

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. 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. 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.

Date: August 28, 2017

Signature:_____