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

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal No. 2017AP000724
Circuit Court Case No. 2015CT64

SARAH A. SCHMIDT
Defendant-Appellant

BRIEF OF PLAINTIFF-RESPONDENT

On appeal from a Judgement of Conviction entered on February 17, 2016
Circuit Court for Fond du Lac County
Honorable Dale L. English Presiding

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STATEMENT OF THE ISSUES

Did the Trial Court error when concluding that Fond du Lac County Sheriff's Deputy Paul Metzger had the requisite level of probable cause to arrest Ms. Schmidt for operating under the influence of an intoxicant?

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Respondent agrees with Appellant that the resulting decision is not eligible for publication, and that oral arguments are not necessary.

STATEMENT OF THE CASE/FACTS

The facts of this case are not in dispute. Appellant's brief accurately summarizes the relevant facts considered by the Trail Court at an evidentiary motion hearing on February 23, 2016.

STANDARD OF REVIEW

Historical facts found by a circuit court during a motion to suppress are to be upheld unless clearly erroneous. *State v. Pinkard*, 2010 WI 81, ¶ 12, 327 Wis.2d 346, 785 N.W.2d 592. However the application of constitutional principles to those facts are reviewed independently as a question of law. *Id.* Therefore, a question as to the existence of probable cause for arrest in accordance with the U.S. Constitution's Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution are questions for a reviewing court's independent review. *State v. Kramer*, 2009 WI 14, ¶ 16, 315 Wis.2d 414, 759 N.W.2d 598.

ARGUMENT

The Trial Court did not erred when it concluded that neither the U.S. Constitution's Fourth Amendment nor Article I, Section 11 of the Wisconsin Constitution was violated by Dep. Metzger's arrest of Ms. Schmidt, and likewise did not error when it denied defendant's motion to suppress.

The U.S. Constitution's Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution protect person's from unreasonable searches and

seizures, however, law enforcement officers are allowed to conduct warrantless arrests when there is reasonable grounds for that officer to believe that the defendant probably committed or was committing a crime. *State v. Secrist*, 224 Wis.2d 201, at 212, 589 N.W.2d 387. Specifically, for operating while intoxicated cases, “probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest 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.” *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551.

Appellant’s brief primarily argues that Dep. Metzger lacked probable cause to arrest because he did not witness “impaired driving” (Appellant’s Br. 9.) prior to his stop of Ms. Schmidt and that after the stop his observations “did not provide Deputy Metzger with sufficient additional indicia amounting to probable cause to arrest”. (Id.). Respondent, disagrees with both arguments.

Firstly, Respondent disagrees with Appellant’s assertion that Dep. Metzger did not observe “impaired driving”. Dep. Metzger testified that Ms. Schmidt’s speed was “fluctuating”. (R.2:16). He testified that she was driving 5 miles over the speed limit. (R.3:17-20), and that the vehicle was “weaving back and forth within its lane of traffic going towards the centerline and, again, going towards the fog line. Continuing this back and forth manner several times.” (R.5;7-12).

Secondly, Respondent asserts that the post-stop observations provided Dep. Metzger sufficient indicia amounting to probable cause to arrest Ms. Schmidt. He testified that he noticed “her eyes were very red and glossy” and that he noticed a “strong odor of intoxicants on her breath”. (R.6:22-24). She admitted to Dep. Metzger that “she had a couple of beers”. (R.7:25). The Horizontal Gaze Nystagmus test was conducted and Dep. Metzger noticed six out of six clues. (R.23:8-9). She refused to provide a breath sample for a PBT test. (R.23:23). Additionally, the stop occurred at about 2:26 am. (R.9:7). This time of day was described by Dep. Metzger as “the time of day where there are a higher percentage of people that are operating under the influence of an intoxicant.”

The Trial Court analyzed each of those factors when it denied the Defendant’s motion. Although not all of the Trial Court’s analysis is included in the appellate record, a summary of the reasons the Court felt “more than satisfied” suffering probable cause for arrest existed is included:

“...his observations of her driving behavior, his observations of her, her admission of drinking, her performance on the HGN test and her refusal to provide a PBT. I think there’s most certainly enough there to arrest her for operating while intoxicated.” (R. 24:1-9).

Appellant’s brief does not allege that any of these facts is clearly erroneous, leaving whether or not these facts were appropriately applied to constitutional principles as the only remaining issue for review.

Appellant's brief argues that because there are factual differences between the observations observed by Dep. Metzger and the observations made by the arresting officer(s) in *State v. Lang*, 2009 WI 49, 317 Wis.2d 383, 766 N.W.2d 551 and *In re Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, that Dep. Metzger did not have probable cause to arrest. Respondent disagrees.

Although driving behavior played a significant role in the probable cause analysis in *Lange*, it does not stand for the proposition that bad driving is a requirement for a probable cause determination¹. A more accurate description of the *Lange* proposition is that "the question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances." *Lange*, ¶20. A careful analysis of the totality of the circumstances was conducted by the Trial Court as summarized in the Court's conclusion quoted above.

In this case, Dep. Metzger may not have noticed the exact same observation noticed by the *Lange* officers, however, Dep. Metzger articulated several observations which the Trial Court "assessed on a case-by-case basis, looking at the totality of the circumstances." *Id.* After hearing testimony which included fluctuating speed (R. 2:14), swerving within her lane (R. 5:7-12), red and glossy eyes (R. 6:22), strong odor of intoxicants (R. 6:24), admission to drinking (R. 7:25), six of six clues on the Horizontal Gaze Nystagmus Test (R. R. 23:8-9), a PBT refusal (R. 23:23), and a suspicious time of night (R. 9:7), the Trial Court concluded probable cause sufficient to arrest existed. This conclusion was

¹ Respondent does not concede that Ms. Schmidt did not exhibit bad driving as the record indicates that Dep. Metzger's observation that she was swerving within her lane was one of the factors considered by the Trial Court. (R.34:4).

consistent with the U.S. Constitution's Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

The Trial Court did not error when it found that Dep. Metzger had probable cause to arrest Ms. Schmidt. The Court of Appeals should uphold the Trial Court's finding.

Respectfully submitted this 15th Day of August, 2017.

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CERTIFICATION TO FORM AND LENGTH

I hereby certify that this brief confirms to the rule contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional and serif font. The length of this brief's body is 7 pages and 1,812 words.

Dated: August 15, 2017

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CERTIFICATION OF ELECTRONIC COPY

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: August 15, 2017

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CERTIFICATION OF MAILING

I hereby certify that on the date below, I mailed 10 copies of this brief
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Dated: August 15, 2017

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