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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP000866

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

BRADLY E. AMMANN

Defendant-Appellant

ON APPEAL FROM AN ORDER DENYING
SUPPRESSION AND A JUDGMENT OF CONVICTION
ENTERED IN THE GREEN COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. VALE PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT,
BRADLY E. AMMANN

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ISSUES PRESENTED

Issue #1: Did the arresting officer have reasonable suspicion to extend the traffic stop and perform field sobriety tests where: (a) Bradley Ammann was initially stopped for speeding (16-19 mph); (b) Mr. Ammann admitted he had consumed only one drink; and (c) the arresting officer, who conducted his traffic investigation at the passenger window, noticed the odor of alcohol, but testified it was likely coming from the passenger, Mr. Ammann's wife, who had had more to drink?

The trial court concluded that the officer had reasonable suspicion to extend the traffic stop and perform field sobriety tests.

Issue #2: Did the trial court use the correct legal standard and properly explain its decision when it determined the arresting officer could request Mr. Ammann take a preliminary breath test (PBT)?

In its oral decision, the trial court used the "reasonable suspicion" standard vice the "probable cause to believe" standard in determining the arresting officer could request the PBT. There was evidence presented indicating the field sobriety tests (FSTs) were not properly and reliably administered by the arresting officer. The court did not adequately explain how much evidentiary weight, if any, it gave to the FSTs.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Bradly Ammann requests neither oral argument nor publication, because the briefs will adequately address the issues, and because the case can be decided on well settled law.

STATEMENT OF THE CASE

Bradly Ammann was initially pulled over for speeding. Subsequently, the traffic stop was extended by an OWI investigation, FSTs and a PBT. Mr. Ammann was arrested for operating a motor vehicle with prohibited alcohol concentration (4th) and charged with: count one operating a motor vehicle while intoxicated (4th), contrary to Wis. Stat. § 346.63(1)(a); and count two, operating with a prohibited alcohol concentration of 0.060 (4th), contrary to Wis. Stat. § 346.63(1)(b). (3:2)

Mr. Ammann filed a motion to suppress evidence alleging: (a) the arresting officer did not have reasonable suspicion to extend the traffic stop or conduct FSTs; and (b) the arresting officer did not have probable cause to believe Mr. Ammann was operating while intoxicated or operating with a prohibited alcohol concentration prior to administering the PBT. (14:5) Mr. Ammann requested the trial court suppress all evidence obtained by the arresting officer after the traffic stop was impermissibly extended. (14:5-6; 49:57¹)

¹ The record forwarded to the court of appeals includes some condensed transcripts, i.e. four pages of transcript per page. In this brief, the first number of a citation to a transcript references the actual forwarded record number of the document. The second number references the page number listed on the actual transcript.

A hearing was held on Mr. Ammann's suppression motion on April 21, 2016. (49:1) The trial court denied Mr. Ammann's motion to suppress in an oral ruling on May 25, 2016. (50:1, 9) The trial court also denied Mr. Ammann's subsequent motion for reconsideration on December 19, 2016. (51:22)

As part of a plea agreement, Mr. Ammann then entered a plea of no contest to count one, operating a motor vehicle while intoxicated (4th). Count two, operating with a prohibited alcohol concentration, was dismissed with prejudice. (51:26, 36) The trial court granted Mr. Ammann's request to stay execution of judgment and informed Mr. Ammann he had 20 days to seek an appeal. (51:30-31)

Mr. Ammann filed an appeal (2017AP000255) which was dismissed by the Court of Appeals because the trial court had not yet entered the final judgment of conviction. (45:1-2) The trial court sentenced Mr. Ammann on April 28, 2017, and then stayed the sentence pending the results of this appeal. (40:1-2; 52:1-9) Mr. Ammann then filed this appeal.

STATEMENT OF FACTS

The traffic stop and investigation.

State Trooper Jeffrey Hill testified that he was on duty in an unmarked Wisconsin State Patrol car on Saturday, September 5, 2015. (49:2-3) At around 5:00 p.m., Trooper Hill was in a rural area about eight miles east of Monroe, on Highway 11 near Ullom Road. (Id.) Trooper Hill was heading east towards Monroe on Highway 11, when he "clocked" a vehicle traveling at 74 miles per hour in a 55 miles-per-hour speed zone. (49:3, 6) Trooper Hill turned his

squad around and conducted a traffic stop of the vehicle. (49:8)

Trooper Hill testified he was a state trooper for 31 years and had successfully completed the initial training and numerous refresher courses in determining the possible indications of impairment. (49:12-14) He also testified he was taught using the National Highway Transportation Safety Administration (“NHTSA”) manuals and he testified that follows the NHTSA manual exactly. (49:22) Trooper Hill testified that, at the time of the traffic stop, he was up to date on his OWI enforcement training. (Id.)

The weather at the time of the traffic stop was clear and sunny. (See 54) Trooper Hill described it as “a nice day.” (49:24) The traffic stop did not occur during bar closing time or near any bars. (Id.) Trooper Hill testified the vehicle pulled over quickly and he did not observe any driving irregularities, vigilance or judgment issues. (49:25-26) Trooper Hill confirmed that exceeding the posted speed limit is not listed as an indicator of impairment in the NHTSA manual. (49:25) Trooper Hill also testified that he did not observe any indicators of impairment up to the point at which he made personal contact with the occupants of the vehicle. (49:24-26)

Trooper Hill approached the vehicle and noticed two people in the vehicle. (49:10) Mr. Amman was in the driver’s seat and his wife was in the front passenger seat. (Id.) Trooper Hill made contact at the passenger window and identified himself. (49:11) He told Mr. Ammann that he had been stopped for speeding and asked for his driver’s license and registration. (49:11, 30) Trooper Hill asked where they

were going and Mr. Ammann told Trooper Hill they were returning home to let their dogs out. (Id.)

During his traffic investigation, Trooper Hill did not notice any common indicators of impairment such as fumbling fingers, slurred speech, bloodshot eyes, unusual actions or abusive language. (49:27) Mr. Ammann was courteous and cooperative throughout the entire traffic stop. (See 53)

While at the passenger window, Trooper Hill did notice an odor of intoxicants. (49:11) He asked the occupants of the vehicle if they had been drinking. (Id.) Mr. Ammann told Trooper Hill that he only had one drink all day. (49:11; 54:17:05:03) Mr. Ammann's wife admitted she had been drinking and had more to drink than he did. (49:11,29) Trooper Hill testified that, given his position at the passenger window, the odor of intoxicant he had noticed was likely coming from Mr. Ammann's wife. (49:29)

Trooper Hill testified that, based on his 31 years of law enforcement experience, consumption of one drink would not impair a person to the degree where it safely affects their driving. (49:28) Trooper Hill also testified that, during his investigative questioning at the passenger window, he had no reason to believe Mr. Ammann was not telling the truth when he told him he only had one drink. (Id.)

After Trooper Hill completed a thorough investigation of the traffic stop while at the passenger window, he told Mr. Ammann:

Well, you are going to get a ticket for your speed. 74 is way too fast. 55 is the limit. You will have a court date, and you can appear and contest it or you will be given an

envelope and you can mail the money in whichever you want to do with that, but you have to watch your speed closer. (49:30-31; 54:17:06:50)

Trooper Hill testified that the traffic investigation was complete at that point and the only thing left to do was to write the speeding ticket. (49:31) Normally, Trooper Hill would have immediately returned to his squad to write the ticket. (Id.) However, in this case, Trooper Hill decided to extend the stop by proceeding to the driver's side window to investigate a possible OWI. (Id.)

Trooper Hill testified there was no reason for him to go the driver's side window or have the driver exit the vehicle related to the traffic stop or speeding violation at that point. (49:32) Trooper Hill testified he extended the stop in order to determine if any odor of intoxicants was coming from the driver and to conduct field sobriety tests (FSTs). (Id.)

During the evidentiary hearing, the Court specifically asked Trooper Hill if there were any other reasons or any evidence that he believed existed, besides the odor of intoxicants likely coming from the passenger and Mr. Ammann admission of consuming one drink, that would have indicated Mr. Ammann might have been operating under the influence. (49:55-56) Trooper Hill replied "No". (49:56) Although Trooper Hill stopped and cited Mr. Amman for speeding, he never testified that he believed, under the circumstances of this particular stop, the speeding was unusual enough to be an indicator of impairment. (See 49)

The OWI investigation.

Trooper Hill began his OWI investigation by having Mr. Ammann exit his vehicle and stand in front of his squad.

(49:12) Trooper Hill then proceeded to his vehicle to reposition it in order to capture the FSTs on his in-squad video recording system. (49:12, 33) After Trooper Hill repositioned his vehicle, he testified that he returned to Mr. Ammann where he noticed an odor of intoxicants coming from him. (49:12) Trooper Hill again asked him how much he had to drink. Mr. Ammann reconfirmed he had only one drink, but stated it may have been a stiff one or a double. (49:14)

Trooper Hill did not testify that Mr. Amman had any problems with normal walking, normal balance or normal motor coordination. (*See* 49)

The first test administered to Mr. Ammann was the “alphabet test”. (49:35-36) Trooper Hill admitted that the “alphabet test” is a non-standardized test. (49:37) Even though Mr. Ammann successfully completed the test the first time, Trooper Hill administered the test a second time, stating “I always ask people to do it twice, if they do it correctly the first time...” (49:15) Although Mr. Ammann did make a mistake on the second iteration of the test, Trooper Hill testified that he had no training on which he could reliably link the results of Mr. Ammann’s two alphabet tests to any level of impairment. (49:36)

Trooper Hill testified that he then administered the NHTSA standardized field sobriety tests, i.e. the horizontal gaze nystagmus, the walk and turn and the one leg stand. (49:34) Trooper Hill testified the NHTSA manual provides specific instructions for each test which must be followed or the test is compromised. (49:34-35) Additionally, Trooper Hill testified that all three tests must be performed as a

battery and if any of the test elements is changed, the validity of the test is compromised. (Id.)

Trooper Hill first administered the horizontal gaze nystagmus (HGN) test. (49:15) Trooper Hill testified he observed two clues during smooth pursuit, two clues at maximum deviation and zero clues for the onset of nystagmus prior to 45 degrees for a total of four out of a possible six clues. (49:15, 41) Trooper Hill testified that four clues on the HGN test was an indication that the person is intoxicated. (49:18)

However, Trooper Hill also testified that the results of HGN test can be compromised by optic kinetic nystagmus which is produced by rapidly moving traffic within the subject field of view while the HGN test is being administered. (49:38) Officer Hill testified the NHTSA manual tells officers to have the subject face away from traffic to remove this issue. (49:38-39) Trooper Hill could not recall if he had Mr. Ammann face away from traffic, but believed he was facing directly west. (49:39)

Trooper Hill's in-squad video shows Trooper Hill did not have Mr. Ammann facing away from the traffic. (54:17:10:14) Additionally, the video shows numerous rapidly moving vehicles passing within Mr. Ammann's field of view throughout the period of the test. (54:17:10:14-17:11:50) Thus the validity of the HGN test was compromised.

Furthermore, Trooper Hill testified the smooth pursuit portion of the HGN test requires him to move his pen out from the center of the head in two seconds and back in two seconds for each eye and should take eight seconds. (49:41)

He testified the test must be performed twice (total of 16 seconds) and is to be conducted continuously and smoothly. (49:41, 46)

The in-squad video shows Officer Hill moved his pen far too quickly on the first smooth pursuit test, completing it in four vice eight seconds. (54:17:10:18-17:10:22) On the second smooth pursuit test, Trooper Hill interrupts the test and never completes a smooth and continuous second smooth pursuit test. (54:17:10:22-17:10:36) Since the smooth pursuit test was not administered correctly, the results are compromised.

Trooper Hill then administered the walk and turn (WAT) test. (49:16) Trooper Hill testified that he observed Mr. Ammann miss the heel to toe by more than two inches once, and then counted nine, but took ten steps. (Id.) However, upon reviewing the video, Trooper Hill admitted that during his demonstration of the test, his own counting was not in direct sync with his steps. (49:49)

The in-squad video shows Trooper Hill took a step before beginning his count, and Mr. Ammann counted his steps exactly as Trooper Hill demonstrated. (54:17:12:30-17:13:20) Furthermore, Trooper Hill admitted the in-squad video did not show Mr. Ammann missing any heel to toe steps. (49:49, 54:17:13:02-17:13:20) Finally, although Trooper Hill initially testified he observed two out of possible eight “clues”, he failed to provide any testimony linking the observed “clues” to any level of impairment. (49:16)

The final test administered was the one leg stand (OLS) test. (Id.) Trooper Hill did not observe any clues on

the OLS test and admitted Mr. Ammann “did okay on that.”
(Id.)

Trooper Hill then had Mr. Ammann take a PBT which came back with a reading of 0.068. (Id.) At that point, Trooper Hill decided not arrest Mr. Ammann for any alcohol related offense and only issue a citation for speeding. (49:17) In the process of preparing the speeding citation in his squad, Trooper Hill discovered Mr. Ammann was subject to a 0.02 alcohol concentration restriction due to prior offenses. (49:20) Trooper Hill subsequently arrested Mr. Ammann for operating with a prohibited alcohol concentration. (49:20-21)

The evidentiary hearing.

An evidentiary hearing was held on April 21, 2016. After the hearing, both sides submitted post-hearing briefs to the circuit court. The trial court denied Mr. Ammann’s suppression motion via an oral ruling on May 25, 2016. (50:9)

This appeal follows.

ARGUMENT

I. Introduction.

Trooper Hill's testimony and in-squad video showed that there was probable cause to pull Mr. Ammann over for driving over the speed limit, which is prohibited by law. Thus, the seizure was valid at its inception. However, the scope of the seizure was unconstitutional. The State failed to prove that reasonable suspicion existed to justify extending the traffic stop and conducting a separate OWI investigation.

Here, there were insufficient facts to lead a reasonable police officer to believe that Mr. Ammann had consumed a sufficient amount of alcohol to cause him to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle. *State v. Resch*, 2011 WI App 75, ¶ 16, 334 Wis. 2d 147, 799 N.W.2d 929. Therefore, all of the evidence obtained by Trooper Hill after he repositioned his squad to capture the FSTs should have been suppressed.

Had the trial court properly granted suppression, Mr. Ammann would not have entered a plea to the charge. As such, Mr. Ammann respectfully asks this Court to reverse the trial court and remand with directions to suppress the evidence and allow Mr. Amman to withdraw his plea.

II. Standard of Review

The right to be secure against unreasonable seizures is protected by the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution. The question of whether police conduct

violated the Fourth Amendment is a question of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶ 23, 236 Wis. 2d 48, 613 N.W.2d 72.

A question of constitutional fact is reviewed under a two-step standard of review. *State v. Hajicek*, 2001 WI 3, ¶ 15, 240 Wis. 2d 349, 620 N.W.2d 781. The trial court's findings of historical fact are reviewed under the clearly-erroneous standard, while the court's determination of constitutional facts are reviewed de novo. *Id.*

III. There was no reasonable suspicion to extend the traffic stop and detain Mr. Ammann for field sobriety tests.

A. Trooper Hill measurably extended the original traffic stop when he had Mr. Ammann exit his vehicle and then repositioned his own cruiser to capture in-squad video of the FSTs.

Our United States Supreme Court has repeatedly emphasized that a traffic stop becomes unconstitutional when it is measurably extended by investigation into an unrelated offense without reasonable suspicion:

We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. *Id.*, at 407, 125 S.Ct. 834.

Rodriguez v. United States, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015).

A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. See *Brendlin*, 551 U.S., at 258, 127 S.Ct. 2400. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

Arizona v. Johnson, 555 U.S. 323, 333, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694 (2009)(emphasis added).

An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But contrary to Justice ALITO's suggestion, *post*, at 1625, n. 2, he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.

Rodriguez v. United States, 135 S. Ct. 1609, 1614–15, 191 L. Ed. 2d 492 (2015).

The scope of the traffic stop and detention must be carefully tailored to its underlying justification. *Rodriguez* at 1614. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. *Id.* Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. *Id.* In determining the reasonable duration of a stop, it is appropriate to examine whether the police diligently pursued the investigation. *Id.* Thus, in this case, the relevant question becomes, did Officer Hill act diligently in pursuing the underlying traffic stop, or did his actions related to the OWI investigation “measurably extend” the duration of the stop?

In this case, Trooper Hill extended the original traffic stop into a separate and distinct OWI investigation when he had Mr. Ammann exit his vehicle and then repositioned his own cruiser to capture in-squad video of the FSTs. These actions measurably extended the original traffic stop. There was no need to have Mr. Ammann exit his vehicle or for Trooper Hill to reposition his vehicle related to any part of the original traffic stop for speeding. Trooper Hill admitted the only reason he approached the driver side of the vehicle, asked Defendant to exit the vehicle, and repositioned his squad was to conduct field sobriety testing and continue his OWI investigation.

B. Trooper Hill did not have a reasonable suspicion Mr. Ammann was operating while intoxicated at the point where he extended the original traffic stop.

The standard for determining the legality of extending a traffic stop into an OWI investigation is based on the same reasonable suspicion standard as the initial stop. *State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394 (2003) If, during a valid traffic stop, a law enforcement officer “becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses” independent from those that prompted the initial stop, “the stop may be extended and a new investigation begun.” *Colstad*, 260 Wis.2d 406, ¶ 19, 659 N.W.2d 394. An inchoate and unparticularized suspicion or “hunch” will not suffice. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681, 684 (1996).

In this case, at the point at which Trooper Hill had Mr. Ammann exit his vehicle and then repositioned his own cruiser to capture in-squad video of the FSTs, he had nothing more than a “hunch” or “unparticularized suspicion” that Mr. Ammann had been operating while intoxicated.

i. Evidence of Mr. Ammann exceeding the posted speed limit was not relevant to show he was operating while intoxicated.

The State argued the fact that Mr. Ammann was exceeding the posted speed limit was evidence of impairment and should be included under the totality of circumstances standard. (16:4) However, the State failed to make any showing at the evidentiary hearing which suggests evidence of common speeding is relevant to the issue of impairment.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Wis. Stat. § 904.01. Evidence which is not relevant is not admissible. Wis. Stat. § 904.02. The State, having the burden of production and proof, did not provide any evidence showing that a person who is speeding is more likely to be operating while intoxicated than a person not speeding. Presumably, the “totality of circumstances” standard is not intended to be an open invitation to consider evidence which has not been shown to be relevant.

The evidence presented at the evidentiary hearing suggests the opposite conclusion, i.e. that common speeding is not relevant or probative as to intoxication. Trooper Hill, based on his 31 years of experience, did not believe, nor did

he testify that Mr. Ammann's speeding was a vigilance issue or an indicator of impairment in this case. (49:24-26) After reviewing the evidence Trooper Hill observed during his traffic investigation, i.e. the odor of alcohol likely coming from the passenger and Mr. Amman's admission of consuming one drink, the trial court specifically asked Trooper Hill "Were there any other reasons or any other evidence that you believe existed that would have told you at that point that he might have been impaired or operating under the influence?" (49:56) Trooper Hill responded "No." (Id.) Trooper Hill did not testify there was anything unsafe, suspicious or even noteworthy about Mr. Ammann's speeding ticket.

Furthermore, Trooper Hill confirmed that the NHSTA manual, which contains a myriad of well-researched clues of impairment, does not list simply exceeding the speed limit as an indicator of impairment². Presumably, speeding is not listed because NHSTA research has shows it is not a relevant or reliable indicator of impairment.

Even if exceeding the posted speed limit were a relative indicator as to impairment, its probative value would be minimal. Anyone who regularly drives is aware that people regularly and intentionally exceed the speed limit. In this case, there is no evidence of actual physical impairment at the time Trooper Hill extended the stop. There does not appear to be any published cases where a court found reasonable suspicion of OWI wherein the only evidence, arguably, of actual physical impairment was exceeding the posted speed limit.

² The NHTSA manual does list the following speed related behaviors as clues of impairment: 1) Accelerating or decelerating rapidly for no reason; 2) Varying speed, alternating between speeding up and slowing down; and 3) Driving at a speed that is 10 miles per hour or more under the speed limit. (19:14)

ii. The odor of intoxicants noticed by Trooper Hill at the passenger window could not be attributed to the driver.

In *State v. Secrist*, 224 Wis. 2d 201, 217, 589 N.W.2d 387, 394 (1999), our Wisconsin Supreme Court determined that odor evidence is relevant when the odor is unmistakable and linked to a specific person. “Case law requires that those indicators of drunk driving used by law enforcement must be linked to the operator of the vehicle.” *State v. Meye*, 2010 WI App 120, ¶ 9, 329 Wis. 2d 272, 789 N.W.2d 755. (unpublished)

Generally speaking, odor of alcohol can be probative to show alcohol consumption, but has very limited probative value in showing impairment. In this case, it is not particularly useful for either purpose. Trooper Hill admitted the odor of intoxicants he observed while at the passenger window was likely coming from the passenger and not the driver. Accordingly, he could not attribute the odor of intoxicants to the driver. It was not until after Trooper Hill had extended the stop that he was able to attribute any odor of intoxicants to Mr. Ammann.

iii. Mr. Ammann’s admission that he had consumed one drink does not reasonably suggest impairment.

While conducting his traffic investigation at the passenger window, Trooper Hill asked Mr. Ammann how much he had to drink. (49:30) Mr. Ammann did not give an ambiguous or uncertain answer such as “a couple,” “a few,” “several,” etc. Mr. Ammann told the trooper he had one

drink. (Id.) Officer Hill testified he did not have any reason not to believe Mr. Ammann's statement. (49:28) Trooper Hill testified that, based on his 31 years of law enforcement experience, consumption of one drink would not impair a person to the degree where it affects their safe driving. (49:28)

Mr. Ammann's statement regarding the one drink possibly being a "stiff one" or a "double" was made after Trooper Hill had already extended the traffic stop into an OWI investigation by having Mr. Ammann exit his vehicle and then moving his own squad to record the FSTs. Accordingly, this statement should not be considered in determining whether Trooper had reasonable suspicion Mr. Amman was operating while intoxicated at the time the traffic stop was extended into an OWI investigation.

Thus, at the time the initial traffic was extended into an OWI investigation, Trooper Hill had: 1) observed Mr. Ammann exceeding the posted speed limit, but did not consider the speeding to be a driving vigilance or impairment issue; 2) observed an odor of alcohol from the passenger window which he could not attribute to the driver and acknowledged was likely coming from the passenger who had more to drink; and 3) heard Mr. Ammann's statement that he had one drink all day, a statement which Trooper Hill testified he had no reason to believe was not truthful.

Wis. Stat. § 346.63(1)(a) does not prohibit operating a motor vehicle after having consumed alcohol, but prohibits driving under the influence of an intoxicant "which renders him or her incapable of safely driving." In this case, an objective law enforcement officer could not reasonably suspect Mr. Ammann was under the influence of an

intoxicant which rendered him incapable of safely driving, based on Trooper Hill's observations. Trooper Hill extended the stop into an OWI investigation based on a hunch. This is constitutionally impermissible and all of the evidence obtained as a result of the illegal seizure must be suppressed.

IV. The trial court erroneously exercised its discretion when it did not use the correct legal standard and did not properly explain its decision when it determined Trooper Hill had sufficient evidence to request Mr. Ammann take a preliminary breath test.

A law enforcement officer may give a PBT to a driver if the officer has probable cause to believe the driver is operating while under the influence of an intoxicant. Wis. Stat. § 343.303. This "probable cause to believe" is a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigatory stop, but less than the level of proof needed to establish probable cause for an arrest. *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541, 552 (1999).

A circuit court erroneously exercises its discretion when it fails to examine relevant facts, applies the wrong legal standard, or when the circuit court fails to use a demonstrated rational process to reach a reasonable conclusion. *State v. Schmidt*, 2016 WI App 45, ¶ 70, 370 Wis. 2d 139, 176, 884 N.W.2d 510, 528, *review denied*, 2016 WI 98, ¶ 70, 372 Wis. 2d 279, 891 N.W.2d 410.

In this case, Mr. Ammann's suppression motion alleged that Trooper Hill did not have "probable cause to believe" he was operating while intoxicated when he

administered the PBT test. (14:5) In its oral decision denying Mr. Ammann's suppression motion, the trial court utilized the wrong legal standard merely stating "...because of the clues that were given during the field sobriety test I think that gave [Trooper Hill] *reasonable suspicion* that he could ask for the PBT." (50:9)(emphasis added) The trial court did not explain which facts were relevant nor did it explain the process or reasoning used to arrive at its conclusion.

In addition to using the wrong legal standard, the trial court made no relevant factual findings other than "...because of the clues that were given during the field sobriety test...". We have no idea which test the trial court is referring to and we have no way of knowing if the trial court believed the clue(s) from this test were a "quantum of proof that is greater than the reasonable suspicion necessary to justify an investigatory stop."

If Trooper Hill's testimony and administration of the FSTs had been unchallenged, perhaps this Court could call it harmless error and step in and make a finding based on the record. However, Trooper Hill's testimony and administration of all of the FSTs were challenged. There was evidence showing the FSTs were not administered correctly or reliably and therefore compromised.

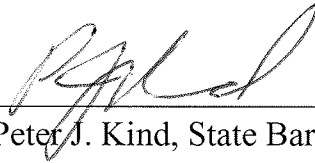
The trial court, as the finder of fact, had to make certain reliability, credibility and factual determinations. The trial court's use of the singular "test" versus "tests" in its oral ruling suggests it may not have excluded some of the tests administered by Trooper Hill as compromised, not credible or irrelevant. The trial court did not explain which facts it found relevant, did not use the correct legal standard, and did not

rationaly explain the process it used to reach its conclusion.
This is an erroneous exercise of its discretion.

CONCLUSION

For the foregoing reasons, Mr. Ammann respectfully asks this Court to reverse the trial court and remand with directions to suppress the evidence and allow Mr. Amman to withdraw his plea.

Submitted this 19th day of September, 2017.



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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 6180 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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.

Dated this 19th day of September, 2017.



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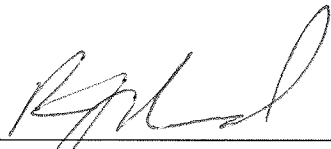
CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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TABLE OF APPENDICES

Appendix A.....	Judgment of Conviction
Appendix B.....	Excerpts from Transcript of May 25, 2016 Trial Court Oral Decision Denying Mr. Ammann's Suppression Motion
Appendix C.....	Unpublished Cases Cited as Persuasive Authority