

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

11-03-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2017AP1436 - CR
Circuit Court Case No. 2016CM596**

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROBERT L. BENTZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER
ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY,
THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

BRIEF FOR PLAINTIFF-RESPONDENT

STATE OF WISCONSIN,
Plaintiff-Respondent

BY: Sandra Jo Giernoth
Assistant District Attorney
State Bar No. 1063757

Washington County
432 East Washington Street
West Bend, Wisconsin 53095
(262) 335-4311

TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....3

STATEMENT ON PUBLICATION.....4

STATEMENT ON ORAL ARGUMENT.....4

STANDARD OF REVIEW.....4

STATEMENT OF FACTS.....5

ARGUMENT.....10

CONCLUSION.....20

FORM AND LENGTH CERTIFICATION.....21

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....21

CERTIFICATION OF MAILING.....22

TABLE OF AUTHORITIES

| Cases | Page No. |
|--|----------|
| <u>State v. Babbit</u> , 188 Wis. 2d 349, 525 N.W.2d 102..... | 19 |
| <u>State v. Blatterman</u> , 362 Wis. 2d 138, 864 N.W.2d 26..... | 18 |
| <u>State v. Colstad</u> , 260 Wis. 2d 406, 659 N.W.2d 394..... | 13 |
| <u>State v. Hampton</u> , 330 Wis. 2d 531, 793 N.W.2d 901..... | 4 |
| <u>State v. Kratochwill</u> , 346 Wis. 2d 734, 828 N.W.2d 594..... | 18 |
| <u>State v. Lange</u> , 317 Wis. 2d 383, 766 N.W.2d 551..... | 18 |
| <u>State v. Pinkard</u> , 327 Wis. 2d 346, 785 N.W.2d 592..... | 4 |
| <u>State v. Post</u> , 301 Wis. 2d 1, 9, 733 N.W.2d 634, 638..... | 14 |
| <u>State v. Stout</u> , 250 Wis. 2d 768, 641 N.W.2d 474..... | 10 |
| <u>United States v. Mendenhall</u> , 446 U.S. 554 (1980)..... | 10, 14 |
| <u>Village of Little Chute v. Rosin</u> , 353 Wis. 2d 306, 844 N.W.2d 667..... | 14 |

STATEMENT ON PUBLICATION

Plaintiff-Respondent does not request publication.

STATEMENT ON ORAL ARGUMENT

Plaintiff-Respondent does not request oral argument.

STANDARD OF REVIEW

This Court applies a two-part standard to review Defendant-Appellant's motion to suppress: this Court will uphold the trial court's findings of fact unless they are clearly erroneous but reviews *de novo* the application of law to those facts. State v. Pinkard, 2010 WI 81, ¶ 12, 327 Wis. 2d 346, 785 N.W.2d 592; State v. Hampton, 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901.

STATEMENT OF FACTS

On June 5, 2016, at about 2:17 a.m., Officer John Otte of the City of West Bend Police Department observed a vehicle, later identified as being operated by Robert L. Bentz, Defendant-Appellant, traveling from Barton Avenue onto Harrison Street. [R. 40:6-8.] Officer Otte described the Bentz vehicle as having prematurely activated its right turn signal to turn from Barton Avenue onto Harrison Street, doing so about two hundred yards from the street. [R. 40:8.] The Bentz vehicle made a slightly wide turn onto Harrison Street and traveled down the middle of the road for a brief distance. [R. 40:8.] The Bentz vehicle then turned into the first residential driveway on Harrison Street, identified as 1521 Harrison Street, and parked on the left side of the driveway and extinguished its lights. [R. 40:10.] Officer Otte testified that he ran a check on the registration plate on the vehicle, learning the vehicle was registered to Mr. Bentz at an address in Kewaskum. [R. 40:8.] Officer Otte advised he did not identify any relationship between the Bentz vehicle and the 1521 Harrison Street residence. [R. 40:10.]

Officer Otte reported that he parked his squad down the block from the residence, facing the residence, and watched the Bentz vehicle for about five minutes. [R. 40:11.] During that time Officer Otte saw no one exit or enter the vehicle. [R. 40:11.] After about five minutes, the vehicle's lights illuminated and the car backed out of the driveway and drove toward North Main Street. [R. 40:11.] Officer Otte explained that he followed the Bentz vehicle in his squad and observed it turn north onto North Main Street, that Officer Otte made the same

turn, and once his squad was behind the Bentz vehicle, the Bentz vehicle activated its left blinker, turned left onto Jefferson Street, and pulled into the first residential driveway on the north side of Jefferson Street, identified as 706 Jefferson Street. [R. 40:12-13.] The vehicle parked partially on the paved driveway and partially on the grass. [R. 40:14.] Officer Otte testified that he did not identify any relationship between the Bentz vehicle and 706 Jefferson Street residence, either. [R. 40:13.]

Officer Otte explained that he positioned his squad on the east side of North Main Street to observe the Bentz vehicle because he found it odd that the vehicle pulled into two separate residential driveways. [R. 40:13.] Officer Otte reported that he observed the vehicle for about five minutes, during which he did not see anyone enter or exit the vehicle. [R. 40:14.] After about five minutes, Officer Otte advised he left the area, unable to identify the operator of the vehicle. [R. 40:14-15, 35.] About ten minutes later, Officer Otte returned to check on the status of the Bentz vehicle by driving by 706 Jefferson Street and at that time observed Mr. Bentz sitting outside of the car leaning up against the driver's side wheel well tire. [R. 40:14-15.] The vehicle was in the exact same location as it was when Officer Otte observed it approximately fifteen minutes prior. [R. 40:43-44.]

Officer Otte testified that he parked his marked police squad on Jefferson Street, without using any emergency lights or siren, and approached Mr. Bentz on foot alone. [R. 40:15-16.] Thereafter, Officer Otte asked Mr. Bentz a series of questions, wherein Mr. Bentz provided the following responses: that he was just

chilling; that he did not want to drive anymore; that he did not reside at the residence nor did he know anyone who did; and that he wasn't coming from anywhere. [R. 40:16.] In speaking with Mr. Bentz, Officer Otte smelled the odor of intoxicants emanating from his person and observed his speech to be slurred and his eyes to be bloodshot and glossy. [R. 40:16-17.] Those observations led Officer Otte to conclude Mr. Bentz had been consuming intoxicants. [R. 40:17.]

Officer Otte posed additional questions to Mr. Bentz trying to establish a timeline as to Mr. Bentz's whereabouts and activities, and in response, Mr. Bentz stated that he parked his car at the Jefferson Street residence four hours prior. [R. 40:17.] This response caused Officer Otte to ask whether anyone else had driven the vehicle since then given Officer Otte's prior observations of the vehicle being operated on Harrison Street, which Mr. Bentz denied occurred. [R. 40:17.] Officer Otte testified he then felt the hood of Mr. Bentz's vehicle, which was warm, indicating to Officer Otte the vehicle had recently been driven. [R. 40:17-18.] Officer Otte testified that he knew the vehicle was not parked in the Harrison Street driveway four hours prior because of his personal observations. [R. 40:18.]

Officer Otte then questioned Mr. Bentz further regarding what had occurred, and this time Mr. Bentz stated that he was walking around downtown, went to Riverfest, and then walked back and just didn't want to drive. [R. 40:18.] Mr. Bentz claimed that he had been calling his son for hours and showed his cell phone to Officer Otte as proof of the calls; Officer Otte testified that when he

observed Mr. Bentz's cell phone, he saw outgoing calls to Mr. Bentz's son at 2:30 p.m. and at just before 8:00 p.m. the day prior. [R. 40:18-19.]

Officer Otte testified that after this second version of facts provided by Mr. Bentz, he confronted Mr. Bentz with the inconsistencies in his story. [R. 40:19.] In response, Mr. Bentz reported that a female was driving his car and had parked it at its current location. [R. 40:20.] Shortly after Mr. Bentz made that statement, a female exited the residence located at 706 Jefferson Street and told Officer Otte that she had been outside the residence around midnight and that Mr. Bentz's vehicle was not parked at that location, and that she did not know Mr. Bentz. [R. 40:19-20.]

Officer Otte testified that after learning this information he confronted Mr. Bentz with the female's report, and Mr. Bentz maintained that a female had operated the vehicle, that the female was now at home, and offered his cell phone to Officer Otte a second time so Officer Otte could call the female and verify the explanation. [R. 40:20-21.] Officer Otte told Mr. Bentz that before calling the female he wanted to get Mr. Bentz's story straight given the previous inconsistencies, and in response to that statement, Mr. Bentz then told Officer Otte that he had parked the car in the driveway at 706 Jefferson Street. [R. 40:21.] Officer Otte testified that he did not pursue investigating Mr. Bentz's claim that a female had driven the vehicle to its location because Mr. Bentz admitted he had driven his vehicle to that location. [R. 40:21, 46, 49, 52.]

After Mr. Bentz admitted to driving his vehicle to its location at the scene, Officer Otte questioned Mr. Bentz with regard to whether Mr. Bentz had consumed alcohol, which Mr. Bentz denied, and searched Mr. Bentz's vehicle upon receiving consent from Mr. Bentz to do so. [R. 40:21.] Mr. Bentz reported being at Regner Park for Riverfest prior to police contact, which Officer Otte testified was a festival with food and alcohol vendors that closes at ten o'clock p.m. [R. 40:21-22.]

Officer Otte testified he then requested Mr. Bentz perform standardized field sobriety tests, which Mr. Bentz refused to do after being permitted use of his cell phone to consult with an attorney. [R. 40:25, 42.] Officer Otte testified that after Mr. Bentz refused to perform field sobriety tests a second time, Officer Otte then placed Mr. Bentz under arrest. [R. 40:26.]

Officer Otte testified that he was assisted in his investigation by Officer Doleschy, who arrived in a marked squad car that approached the scene without use of overhead emergency lights or a siren. [R. 40:23.] Officer Otte testified that Officer Doleschy arrived sometime after his initial contact with Mr. Bentz, but prior to the attempts to commence standardized field sobriety tests. [R. 40:23, 28-30.] Officer Otte testified that Officer Doleschy parked his squad car in the residence's driveway for purposes of capturing Mr. Bentz's performance on standardized field sobriety tests on the squad's camera. [R. 40:23.]

ARGUMENT

I. THIS COURT SHOULD CONCLUDE THAT MR. BENTZ WAS NOT SEIZED FOR FOURTH AMENDMENT PURPOSES WHEN OFFICER OTTE FIRST APPROACHED MR. BENTZ, BUT RATHER, WAS SEIZED WHEN OFFICER OTTE ASKED MR. BENTZ TO PERFORM STANDARDIZED FIELD SOBRIETY TESTS.

Wisconsin courts have adopted the standard articulated in United States v. Mendenhall as the standard for assessing whether police contact with a citizen amounts to a seizure under the Fourth Amendment. State v. Stout, 2002 WI App 41, ¶ 20, 250 Wis. 2d 768, 784, 641 N.W.2d 474, 480.

“We conclude that a person has been “seized” within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.”

United States v. Mendenhall, 446 U.S. 544, 554–55 (1980).

Officer Otte’s initial contact with Mr. Bentz was not a product of a traffic stop or other circumstance where the subject WAS in motion and stopped. Rather, Officer Otte approached Mr. Bentz on foot while Mr. Bentz was sitting on the ground outside of a vehicle, leaning against the driver’s side tire. [R. 40:14.] There was no infringement upon Mr. Bentz’s freedom to move about because Mr. Bentz was stationary.

Similarly, Officer Otte's approach toward Mr. Bentz did not involve any show of authority or force. Officer Otte parked his squad car on the street and did not activate his emergency lights or siren. He walked on foot to approach Mr. Bentz, and he did not display or handle his firearm in any way.

At some point after Officer Otte initially approached Mr. Bentz, but before Officer Otte asked Mr. Bentz to perform standardized field sobriety tests, Officer Doleschy arrived on scene. [R. 40:23, 28-30.] When Officer Doleschy arrived on scene, his presence was more innocuous than that of Officer Otte. Like Officer Otte, Officer Doleschy's arrival lacked any show of authority or force. He too parked his squad on the road without activating emergency lights or sirens. He too approached on foot without displaying or handling his firearm. Officer Doleschy had no physical contact with Mr. Bentz and did not question Mr. Bentz.

There is no evidence that the tone or tenor of Officer Otte's questions posed to Mr. Bentz were aggressive, hostile, or threatening. The substance of the questions was limited to Mr. Bentz's whereabouts, activities, and establishing a timeline for those events.

Absent any evidence that this encounter involved display of a weapon, threatening presence of several officers, physical touching of Mr. Bentz, a tone or tenor that compelled compliance, Officer Otte's initial contact with Mr. Bentz is of the nature that Wisconsin courts find to be inoffensive and the kind that does not constitute a seizure under the Fourth Amendment. Therefore, Officer Otte's initial contact with Mr. Bentz was not a seizure as defined by the Fourth Amendment.

Mr. Bentz argues Officer Otte's initial contact with Mr. Bentz was a seizure because: (1) Officer Otte testified his subjective intent was to investigate what Officer Otte opined was a vehicle engaging in an effort to avoid police presence; (2) no reasonable person would ever feel free to leave the presence of two officers who make contact with him or her; (3) all officers were uniformed, which included standard police firearms; (4) officers arrived in two separate marked squad cars; (5) officers asked questions to "investigate" the circumstances surrounding the driving Officer Otte observed and Mr. Bentz's behavior.

There is nothing in Mendenhall, or subsequent cases that construe this type of police contact as a seizure under the Fourth Amendment. Construing the facts and circumstances present in this case as a seizure would transform nearly all police-citizen encounters into a seizure because the characteristics of this encounter are germane to all police-citizen encounters. Officers are generally required to wear a uniform that identifies them as such, which includes a firearm, and they generally operate some type of official police vehicle. It is common for an officer to request a second officer during an encounter as a general practice, and just as common for that officer to arrive in a separate squad.

Further, Mr. Bentz extrapolates that Officer Otte's reference to "investigating" transforms the contact into a seizure absent any of the required characteristics articulated in Mendenhall. That reasoning is flawed. "Investigating" is an activity officers engage in relative to all their police activities, irrespective of whether the situation is criminal in nature or not. It is

simply the exercise of asking questions and looking into circumstances. Mr. Bentz argues that anytime an officer “investigates” it is a seizure under the Fourth Amendment, but nothing in Mendenhall or its progeny supports that assertion.

Rather, this Court should conclude that Mr. Bentz was seized at the point when Officer Otte requested Mr. Bentz perform standardized field sobriety tests. Wisconsin courts recognize that an officer’s request to a citizen to perform standardized field sobriety tests is a seizure under the Fourth Amendment. See State v. Colstad, 2003 WI App 25, ¶ 19, 260 Wis. 2d 406, 659 N.W.2d 394. Officer Otte’s request constitutes a change in characteristics and scope of the initial encounter such that this juncture transforms the consensual encounter into a seizure. Officer Otte’s request clearly informed Mr. Bentz that he would be detained on scene to perform physical skills intended to determine whether he was impaired. Contemporaneous with Officer Otte’s request to Mr. Bentz to perform standardized field sobriety tests, Officer Doleschy positioned his squad in the driveway to attempt to record Mr. Bentz’s performance on standardized field sobriety tests. [R. 40:23.] These facts create a change in circumstances such that this Court should conclude Mr. Bentz was seized at the point Officer Otte requested Mr. Bentz perform standardized field sobriety tests.

The trial court erred in its conclusion that Mr. Bentz was seized at the point Officer Doleschy arrived on scene. The trial court’s conclusion is flawed because it puts too much emphasis on one fact, which is the presence of a second officer on scene. Other than Officer Doleschy being present on scene, (notably arriving

without use of any emergency lights or siren and parking his squad on the street), Officer Doleschy's presence did little to alter the tone, tenor, or content of the contact between Officer Otte and Mr. Bentz. Officer Doleschy, as only a second officer on scene, does not constitute the "several officers" criteria of Mendenhall. See Mendenhall, 446 U.S. 554 (1980). Further, Officer Doleschy's presence was innocuous in that he did not engage in questioning Mr. Bentz or have any physical contact with Mr. Bentz. Officer Doleschy's presence, while a consideration, under the facts and circumstances of the contact between Officer Otte and Mr. Bentz, does not, under the totality of the circumstances, transform the encounter into a seizure.

II. THIS COURT SHOULD CONCLUDE THAT OFFICER OTTE HAD REASONABLE SUSPICION TO DETAIN MR. BENTZ ONCE MR. BENTZ WAS SEIZED, WHICH OCCURRED WHEN OFFICER OTTE REQUESTED MR. BENTZ PERFORM STANDARDIZED FIELD SOBRIETY TESTS.

"An officer has reasonable suspicion that an individual is impaired if he or she is able to point to specific and articulable facts which, taken together with rational inferences from those facts, suggest impairment." Village of Little Chute v. Rosin, 2014 WI App 38, ¶ 18, 353 Wis. 2d 306, 844 N.W.2d 667. Reasonable suspicion is based upon the totality of the circumstances. State v. Post, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 9, 733 N.W.2d 634, 638.

The State asserts that Mr. Bentz was seized when Officer Otte requested Mr. Bentz perform standardized field sobriety tests; therefore, this Court must examine what facts Officer Otte knew at the time he requested Mr. Bentz perform

standardized field sobriety tests to determine whether those facts constitute reasonable suspicion.

At the juncture when Officer Otte made said request, he had observed the vehicle being driven in the early morning hours, evasively in his opinion, on city streets, pulling into two different residential driveways within about a twenty-minute timespan, with no one entering the vehicle and no one exiting the vehicle. Officer Otte had not identified any relationship between the vehicle and either residence as he knew the registered owner of the vehicle lived in a different jurisdiction. Officer Otte broke his observation of the vehicle at its second location for about ten minutes, but upon returning to observe the vehicle, noted it to be in the same position, this time with Mr. Bentz outside the vehicle sitting on the ground with his back leaning on the driver's side wheel well. [R. 40:14-16.] Upon making contact with Mr. Bentz, he observed Mr. Bentz emanated an odor of intoxicants, had slurred speech, and had glossy, bloodshot eyes, which Officer Otte recognized to be signs of potential impairment based upon his training and experience. [R. 40:16-17.] A citizen, who resided at the property Mr. Bentz was at, reported she had no relationship with and no contact with Mr. Bentz that night, and stated the vehicle had not been on the property at midnight. [R. 40:19-20.]

Mr. Bentz eventually admitted to driving the vehicle to its last-observed location, which by deduction occurred about twenty minutes prior. [R. 40:13-14, 43-44.] Further, Mr. Bentz admitted to being at Riverfest, which Officer Otte knew to be a festival in the area that served alcoholic beverages, but denied

consuming alcohol. Officer Otte believed Mr. Bentz had consumed alcohol because of Mr. Bentz's physical signs of consumption. [R. 40:21.]

Officer Otte personally observed Mr. Bentz's vehicle being operated on a roadway about twenty minutes prior to his contact with Mr. Bentz, and Mr. Bentz admitted he had driven the vehicle to its location at the Jefferson Street residence. Mr. Bentz exhibited signs Officer Otte recognized as consistent with consuming alcohol and potential impairment. These facts and circumstances and the reasonable inferences therefrom form the requisite reasonable suspicion to permit Officer Otte to detain Mr. Bentz for standardized field sobriety tests.

Mr. Bentz argues that Officer Otte lacked reasonable suspicion to detain Mr. Bentz for standardized field sobriety tests because he lacked "particularized" evidence that Mr. Bentz had operated the vehicle. In doing so, Mr. Bentz makes exhaustive arguments about the definition of "particularized" attempting to characterize reasonable suspicion into something it is not. Further, Mr. Bentz also argues Officer Otte lacked reasonable suspicion because Officer Otte failed to investigate one of Mr. Bentz's claims that a female was the operator of the vehicle. These arguments ignore the law and the facts of this case.

Mr. Bentz mischaracterizes the context of the questioning regarding Officer Otte's questioning of Mr. Bentz and Mr. Bentz's responses. Officer Otte testified that he was unable to identify the driver of the vehicle either time he observed the vehicle in motion. [R. 40:34-35.] That is why Officer Otte asked Mr. Bentz questions relative to who was driving. However, Officer Otte's continued

investigation resulted in reasonable suspicion that Mr. Bentz was the driver. Officer Otte was requested by defense counsel to read his report into evidence to establish the line of his questions and responses from Mr. Bentz:

“I questioned Robert about his story. I advised Robert that Riverfest ended at 2200 on 060416. Robert stated that he had been walking around. I questioned Robert that if no one was driving his vehicle – or his car how I observed the vehicle in motion on North Main Street, Harrison Street and Jefferson Street around 0217 hours. Robert then told me someone else was driving his car. Robert stated the other female that was driving his vehicle parked it in the driveway and left. I questioned where the female went. Robert stated the female went home. Robert attempted to give me his phone. I advised Robert that I wanted to get his story straight prior to speaking with the female he was saying drove his car. I inquired where the female lived. Robert would not directly answer my questions and stated that he parked the car in the driveway.”

[R. 40:52.]

The reason Officer Otte did not call the female Mr. Bentz initially claimed was the driver was because Mr. Bentz admitted that Mr. Bentz was the driver. [R. 40:21, 52.] There is no reason to call a female who Mr. Bentz admitted was not involved in any way to conduct an investigation about something Mr. Bentz admitted did not occur. The Court’s inquiry in this regard was clearly for clarification as to Officer Otte’s reasoning for not calling the female, which became obvious when Officer Otte again testified that Mr. Bentz admitted that he had parked the car in the driveway.

III. THIS COURT SHOULD CONCLUDE THAT OFFICER OTTE HAD PROBABLE CAUSE TO ARREST MR. BENTZ.

“Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. Probable cause to arrest depends on the totality of the circumstances.”

State v. Blatterman, 2015 WI 46, ¶ 69, 362 Wis. 2d 138, 185, 864 N.W.2d 26, 48 (internal citations omitted). “[A] court applies an objective standard, considering the information available to the officer and the officer's training and experience.” State v. Kratochwill, 2013 WI App 41, ¶ 10, 346 Wis. 2d 734, 828 N.W.2d 594 (citing State v. Lange, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551).

The trial court correctly concluded that the facts known to Officer Otte constituted probable cause, finding that:

“Officer Otte observed Bentz’s vehicle being driven at approximately 2:30 a.m. Bentz eventually admitted to having driving his vehicle and admitted that he had no connection to the residence or driveway he was parked in, after first giving Officer Otte several nonsensical explanations as to why his car was parked in the second driveway. Bentz had driven in an evasive manner so as to avoid being followed. Bentz had an odor of intoxicants, slurred speech, and glassy, bloodshot eyes. Bentz twice refused standardized field sobriety tests.”

[R. 40:113.]

Mr. Bentz argues that Officer Otte lacked probable cause to arrest Mr. Bentz because there was inadequate evidence Mr. Bentz drove or operated the vehicle. In making this argument, Mr. Bentz attempts to characterize his admission to driving the vehicle to its location at 706 Jefferson Street as

something other than what it is. These efforts are in vain, however, because the common-sense, reasonable interpretation of Mr. Bentz's statements is that Mr. Bentz admitted to driving the vehicle. Mr. Bentz's own admission, coupled with Officer Otte's observations of Mr. Bentz, the facts and circumstances, Officer Otte's training, education, and experience, and Mr. Bentz's refusal to perform standardized field sobriety tests¹, support probable cause for arrest.

¹"We hold only that a defendant's refusal to submit to such a test may be used as evidence of probable cause to arrest." State v. Babbitt, 188 Wis. 2d 349, 363, 525 N.W.2d 102, 107 (Ct. App. 1994).

CONCLUSION

Accordingly, because Mr. Bentz was not seized until Officer Otte requested Mr. Bentz perform standardized field sobriety tests, and because Officer Otte had reasonable suspicion to make such a request, Mr. Bentz was not illegally seized. Further, because Officer Otte had probable cause to arrest Mr. Bentz, his arrest was lawful. For the foregoing reasons, the State respectfully requests that this Court deny Mr. Bentz's appeal in all respects.

Respectfully submitted,

Dated this 2nd day of November, 2017.

Sandra Jo Giernoth
Assistant District Attorney

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,118 words.

Dated this 2nd day of November, 2017.

Sandra Jo Giernoth
Assistant District Attorney

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 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.

Dated this 2nd day of November, 2017.

Sandra Jo Giernoth
Assistant District Attorney

CERTIFICATION OF MAILING

Pursuant to Sec. 809.80(3)(b), Stats., I hereby certify that on the 3rd day of November, 2017, in the City of West Bend, Washington County, Wisconsin, I mailed in a properly enclosed postage-paid envelope the original and ten (10) copies of the enclosed addressed to the following named person at the following post office address:

Diane Fremgen
Wisconsin Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Dated this 2nd day of November, 2017.

Sandra Jo Giernoth
Assistant District Attorney
Washington County
State Bar No. 1063757