

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017 AP 001886 CR
Waukesha County Circuit Court Case Nos. 2016CT001508

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE M. DATKA,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT-APPELLANT
MOTION FOR SUPPRSSION OF EVIDENCE, IN
WAUKESHA COUNTY, THE HONORABLE LEE S.
DREYFUS, JR, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT JACQUELINE M. DAKTA

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STATEMENT OF THE ISSUES

Did Waukesha County Sheriff Deputy Daniel Coats have the requisite level of probable cause to request that Ms. Datka perform and preliminary breath test?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Jacqueline M. Datka (Ms. Datka) was charged in the County of Waukesha, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a) and with having operated a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat §346.63(1)(b) both as first offenses with a passenger under the age of 16 years old in the vehicle. On December 7, 2016, Ms. Datka, by counsel, filed a motion for suppression of evidence challenging the officer's probable cause to request a preliminary breath test. A hearing on said motion was held on March 3, 2017, the Honorable Lee S. Dreyfus, Jr., presiding. The court denied said motion, and a written order was entered on March 3, 2017. (R. 14:1/ App. 1). On August 8, 2017, Ms. Datka entered a guilty plea to count one of the criminal complaint, operating a motor vehicle while under the influence of an intoxicant first with a minor passenger in the vehicle. The court imposed a sentence including jail, revocation of license and a fine.

On August 18, 2017, Ms. Datka timely filed a Notice of Intent to Pursue Post Conviction Relief, and on September 22, 2017 timely filed a Notice of Appeal.

Facts in support of this appeal were adduced at the motion hearing held on March 3, 2017, and were introduced through the testimony of Waukesha County Sheriff Deputy Kyle Steger and Deputy Daniel Coats. Steger testified that on September 19, 2016 at 5:32 p.m., he received a dispatch call of a reckless driver in the Village of Sussex. (R.34:5-6/ App. 2-3). The caller complained that the vehicle squealed its tires, varied speed and had a difficult time maintaining its lane. (R.34:6/ App. 3). A license plate was provided, and the vehicle was located parked, taking up two parking spots in front of Marcileno's Pizza. (R.34:7,9/ App. 4,6).

Deputy Steger arrived on the scene first, and as the vehicle was backing up, he parked his squad behind the vehicle. (R.34:7/ App. 4). The vehicle stopped and Steger made contact with the driver, subsequently identified as Ms. Datka. *Id.* At the motion hearing, Steger testified that during that initial contact he observed Ms. Datka to have slow speech, glossy eyes, and slow movements. (R.34:8/ App. 5). However, when Deputy Coats arrived, Steger specifically told Coats that he observed no immediate signs of intoxication. (R.34:13/ App. 7). Steger did not reveal this until cross examination, and during the State's redirect attempted to explain the statement away by saying that

when he said no immediate signs of intoxication, he meant no odor of alcohol was observed. (R.34:14/ App. 8). Steger's story on redirect was that he "believed that she was impaired by prescription medication, not necessarily alcohol..." *Id.*

Deputy Coats arrived as Steger was approaching the vehicle. (R.34:17/ App. 10). Coats was the officer who continued the investigation and performed the field sobriety testing. Coats also testified about receiving the initial complaint, and as he was in the area on another call, he responded. (R.34:16/ App. 9). Coats spoke with Steger shortly thereafter. Coats testified that Steger told him that Steger observed "no immediate odor of intoxicant or anything like that..." In contrast to Steger's statement on redirect that he thought Ms. Datka was impaired by medication, Coats testified on direct examination that Steger told him that Steger "wasn't quite sure what the issue was..." (R.34:18/ App. 11).

Coats spoke with the complaining witness regarding the incident. (R.34:19/ App. 12). Coats testified upon initial contact he observed Ms. Datka to have slow speech. However, Coats would not characterize the speech as slurred. (R.34:41/ App. 25). Other than the slow speech, Coats acknowledged that upon initial contact, he did not note any "other obvious signs of

intoxication.” *Id.* Coats did state that Ms. Datka appeared to have difficulty getting out of the vehicle and walking. (R.34:21-22/ App. 13-14). Once outside the vehicle Coats observed the odor of intoxicant, and Ms. Datka admitted to consuming one 24 ounce alcoholic beverage.

Coats performed several field sobriety tests. The first test was the Horizontal Gaze Nystagmus test (HGN). Coats indicated that the HGN test is the most accurate of all the tests, agreeing that eyes don’t lie (R.34:36/ App.21), and stating that the HGN consists of six possible clues for which exhibiting four or more clues would be an indicator that someone was above .08. *Id.* Coats agreed that Ms. Datka exhibited only two of the possible six clues. (R.34:38-39/ App. 22-23).

Next, Coats testified he explained and demonstrated the walk and turn test. However, Coats did not testify as to what specific instruction he gave to Ms. Datka. (R.34:27/ App. 16). During the walk and turn exercise, Coats testified that Ms. Datka immediately started the test (before Coats said go), had her foot cocked in the instruction position, but did not step out of the instruction stance, walked normally as opposed to heel to toe, raised her arms for balance and walked in an “L” shaped pattern. (R.34:26-28/ App. 15-17).

On the one leg stand test, Coats asked Ms. Datka to raise her foot off the ground for thirty seconds. The only clue that Coats observed, was that Ms. Datka put her foot down at fourteen one thousand. On cross examination, Coats acknowledged that the one leg stand test consists of four clues. Furthermore, he admitted that based on his training exhibiting 2 or more clues on that test would be an indicator that a subject is over .08. (R.34:38/ App. 22). He further conceded that Ms. Datka exhibited only one clue on that test. (R.34:39/ App. 23).

Ms. Datka performed the alphabet test, without “observable problems.” (R.34:32,40/ App. 24) Coats asked Ms. Datka to perform a counting test and she was instructed to count from 61-47 (R.34:31/ App. 18). Rather than stopping at 47, Coats testified that Ms. Datka counted to zero.

The final field sobriety test performed was the Romberg test. On that test Coats looks to see how a subject estimates thirty seconds, and whether the subject has difficulty with balance. (R.34:33/ App. 20). Here, Ms. Datka stopped the test at seventeen seconds *Id.* Coats made no other observations during that test. *Id.*, including nothing about Ms. Datka’s balance that led him to suspect she was impaired.

Coats had Ms. Datka submit to a preliminary breath test (PBT) which showed a result of .193

The State argued that the above evidence supported the officer's request for a PBT. (R.34:42-48/ App. 26-32). Defense counsel argued, among other things that based on the fact adduced at the motion hearing, Coats did not have the requisite level of probable cause to request Ms. Datka to perform a PBT. (R.34:48-49/ App. 32-33). The Court found that the deputies had the requisite level of probable cause to request Ms. Dakta perform a PBT and arrest her. (R.34:48-61/ App. 32-45). An Order denying Ms. Datka's motion was filed on March 3, 2017. Ms. Datka entered a guilty plea to the charge on August 8, 2017. Ms. Datka timely filed a Notice of Appeal on September 22, 2017.

STANDARD OF REVIEW

Under Wis. Stat. §343.303, an officer must possess probable cause to believe that a motorist was operating a motor vehicle under the influence of an intoxicant to administer a PBT. In determining whether an officer had “probable cause to believe”, the Court looks at the totality of the circumstances known to the officer at the time the PBT was administered, in light of the officer’s training and experience. See *State v. Kutz*, 2003 WI App. 2005, ¶¶11-12, 267 Wis.2d 531, 671 N.W.2d 660. An appellate court will uphold a lower court’s finding of fact unless clearly erroneous, *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999) but whether those facts rise to the level of “probable cause to believe” is a question of law that is reviewed de novo. *Id.*

ARGUMENT

DEPUTY COATS DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO REQUEST THAT MS. DATKA PERFORM A PRELIMINARY BREATH TEST AND WITHOUT THE PRELIMINARY BREATH TEST RESULT DID NOT HAVE PROBABLE CAUSE TO ARREST MS. DATKA

At a motion for suppression of evidence, the Court must weigh the evidence for and against suppression, and choose between conflicting versions of the facts determining the

credibility of each witness. *State v. Wille*, 185 Wis.2d 673, 681 518 N.W.2d 325 (Ct. App. 1994). In weighing the testimony of the deputies, it is apparent that the officers did not possess the requisite level of “probable cause to believe” under Wis. Stat. §343.303, permitting them to request Ms. Datka perform a PBT test. Furthermore, without the result of the preliminary breath test, Deputy Coats did not possess probable cause to arrest Ms. Datka.

Under Wis. Stat. §343.303 an officer is permitted to request that an individual submit to a preliminary breath test when he possesses “probable cause to believe” that the person is operating a motor vehicle while impaired. “Probable cause to believe” refers to a quantum of evidence that is greater than the level of reasonable suspicion required to justify a stop, but less than probable cause to arrest. *State v Begicevic*, 2004 WI App 57, 270 Wis.2d 675, 678 N.W.2d 293, *State v. Colstad*, 2003 WI App 25, 260 Wis.2d 406, 659 N.W.2d 394 citing to *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999). “Probable cause exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe...that the defendant was operating a motor vehicle while under the

influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). The standard is an objective one. See *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis.2d 531, 671 N.W.2d 660. “The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a ‘flexible, common-sense measure of the plausibility of particular conclusions of human behavior.’” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis.2d 383, 766 N.W.2d 551.

In *Begicevic*, the court found that the arresting officer possessed the requisite level of suspicion to request Begicevic to perform a PBT. The officer stopped Begicevic because his vehicle was “stopped, on an angle, in the left-turn lane but in the middle of the intersection beyond the stop line painted on the roadway.” After stopping the vehicle the officer observed Begicevic to appear confused with bloodshot and glassy eyes, and noticed a strong odor of intoxicant. *Begicevic* at ¶9. The officer had Begicevic exit the vehicle for field sobriety tests. Begicevic could not perform the one leg stand test due to a leg injury, failed to following instruction so did not perform the HGN test, improperly performed the heel to toe test, and unsuccessfully, on three attempts, performed the finger count

test. *Id.* The officer then asked Begicevic to perform the PBT and eventually arrested him.

Unlike *Begicevic*, here, Ms. Datka successfully completed three of the field sobriety tests. Ms. Datka performed the HGN test first. Coats acknowledged that this is the most accurate test. The threshold for impairment on the HGN test is four clues. Exhibiting four of the six clues suggests probable impairment. Ms. Datka exhibited only two clues.

On the one leg stand test, Coats testified that he was looking for four potential indicators of impairment. (hopping, swaying, raising arms up and putting her foot down). The threshold for impairment on the one leg stand test is two or more clues. That is, exhibiting two or more clues suggests probable impairment. Once again, Ms. Datka exhibited only one clue.

Coats asked Ms. Datka to perform the alphabet test. Ms. Datka recited the alphabet without difficulty. She also showed minor errors on the counting test (counting all the way down to one rather than stopping at 47) and the Romberg balance test (exhibiting no balance problems, but stopping the test at seventeen seconds rather than thirty). On the walk and turn test, Ms. Datka took the proper number of steps, but did not walk in the manner in which the officer demonstrated.

Further, in *Begicevic*, the traffic stop occurred early in the morning, *Id.* at ¶4, as opposed to here, the traffic stop occurred in the middle of the afternoon. *Lange*, at ¶17 (bar time is a factor supporting an officer's suspicion of impairment). Moreover, despite Deputy Steger's testimony at the motion hearing that Ms. Datka's speech and reactions were slow, and her eyes were glossy, Steger advised Deputy Coats on the day of the arrest that he observed no immediate signs of intoxication, and was "not quite sure what the issue was." R.34:21/ App. 13. Equally important is the fact that Coats testified that upon his initial contact with Ms. Datka, he thought her speech was slower than usual, but he agreed that it was not slurred. R.34:41/ App. 25. Coats further testified that but for the slow speech, there were no other obvious signs of intoxication upon his initial contact with Ms. Datka (R.34:41/ App. 25). Additionally, neither officer observed an odor of intoxicant until Ms. Datka exited the vehicle. Once Ms. Datka exited the vehicle Coats testified that he observed only a light odor. (R.34:41/ App. 25).

The facts herein are significantly less than those in *Begicevic*. Ms. Datka was contacted by officers in the middle of the afternoon, exhibited no immediate signs of impairment upon initial contact, only a slight odor of intoxicant when she exited

the vehicle and successfully completed three of the field sobriety tests. Under a totality of the circumstances analysis and when weighing the evidence herein, it is clear that the officer did not possess the requisite level of suspicion to request Ms. Datka to perform a PBT.

CONCLUSION

Because of the above, the trial court erred in finding that the deputies had the requisite level of suspicion to request Ms. Datka to perform a PBT. Furthermore, without the PBT, the deputies did not have the higher level of probable cause to arrest Ms. Datka. The Court should vacate the judgement of conviction and reverse the order denying Ms. Datka's motion.

Dated this 11th day of December, 2017.

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 21 pages. The word count is 3800.

Dated this 11th day of December, 2017.

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**CERTIFICATION 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 s. 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 11th day of December, 2017.

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APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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.

Dated this 11th day of December, 2017.

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APPENDIX