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DISTRICT II**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2017 AP 001886 CR
Waukesha County Circuit Court Case No. 2016CT1508**

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
SUPPRESSION OF EVIDENCE, IN WAUKESHA COUNTY,
THE HONORABLE LEE S. DREYFUS, JR., PRESIDING**

**THE BRIEF AND APPENDIX OF THE PLAINTIFF-
RESPONDENT, STATE OF WISCONSIN**

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STATEMENT OF THE ISSUES

Did the trial court err in denying the Defendant-Appellant Jacqueline M. Datka's motion for suppression of evidence from an unlawful arrest?

BRIEF ANSWER

No, the trial court properly denied the motion finding that based upon the officers' observations and the totality of the circumstances, there was sufficient probable cause to request a PBT and arrest the defendant.

**STATEMENT AS TO ORAL ARGUMENT AND
PUBLICATION**

This appeal falls within *Wis. Stat. Sec. 752.31(2)*, thus, the resulting decision is not eligible for publication. Moreover, the issue in this appeal may be resolved through the application of well-established law, therefore, oral argument will not be necessary

STATEMENT OF THE CASE AND FACTS

I. Procedural status of the case.

The Appellant, Jacqueline M. Datka (Ms. Datka) was charged in Waukesha County, for 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 sixteen years old in the vehicle. On December 7, 2016, the Appellant filed a motion to suppress evidence, challenging the officer's probable cause to request a preliminary breath test (PBT). Subsequently, the Honorable Lee S. Dreyfus presided over the motion hearing on March 3, 2017. The court denied the Appellant's motion, and a written order was entered on March 3, 2017. (*Def's. App. 1.*).

On August 8, 2017, the Appellant plead guilty to count one of the criminal complaint, operating a motor vehicle while under the influence of an intoxicant first offense, with a minor passenger in the

vehicle. Consequently, the court imposed a sentence, which included jail, driver's license revocation, and a fine.

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

II. Statement of the facts.

On October¹ 19, 2016, at 5:32 p.m., Waukesha County Sheriff's Deputy Steger and Deputy Coats, received a dispatch call of a reckless driver in the Village of Sussex. (*App.5-6*). The citizen witness complained that the vehicle was squealing its tires, having trouble maintaining its lane, as well as varying speeds. (*App. 6*). A description of the vehicle and the license plate was provided, and ultimately, Deputy Steger was able to locate the vehicle parked in front Marcileno's Pizza. *Id.*

As Deputy Steger entered the parking lot, the vehicle began to back out of the parking space. (*App. 7*). Consequently, Deputy

¹ On direct examination, based upon the questioning by the prosecutor, Deputy Steger erroneously testified this incident occurred on September 19 rather than October 19. (*App. 5*). This error was corrected during the direct examination of Deputy Coats. (*App. 16*).

Steger parked behind the vehicle and approached the driver's side. *Id.* Deputy Steger made contact with the driver of the vehicle, who was identified as Ms. Datka. *Id.* Immediately after making contact, Officer Steger observed that Ms. Datka's speech was slow, her eyes were glossy, and her movements were unusually slow when performing simple tasks, such as retrieving her identification. (*App.* 8). Furthermore, Deputy Steger observed that Ms. Datka's vehicle was parked partially between two spaces. (*App.* 9). However, during this encounter with Ms. Datka, Deputy Steger did not observe an odor of alcohol emitting from the vehicle. (*App.* 14). Nevertheless, at this point, based on his training and experience, Deputy Steger began to form the opinion that Ms. Datka was impaired by something. (*App.* 10).

Shortly thereafter, Deputy Coats arrived on scene and met with Deputy Steger. (*App.* 17). Deputy Coats was informed that there was no immediate odor of intoxicants, but instead, was possibly a medication issue. (*App.* 18). After meeting with Deputy Steger, Deputy Coats met with Jennifer Collins (Ms. Collins) who was the citizen caller. (*App.* 19). Ms. Collins informed him that

while she was dropping her children off at the park, a vehicle almost struck her. *Id.* She then watched the vehicle enter a grassy area while trying to leave the parking lot; however, soon after, corrected itself. *Id.* Ms. Collins then began following the vehicle and observed numerous traffic infractions. *Id.* She stated the vehicle would stop well before stops signs, then quickly accelerate through the stop signs. (*App.* 19-20). Further, Ms. Collins stated that the vehicle screeched its tires numerous time, crossed the center line, and almost struck a parked vehicle. (*App.* 20).

After meeting with Ms. Collins, Deputy Coats approached Ms. Datka's vehicle. *Id.* Upon initially making contact with Ms. Datka, Deputy Coats observed that her shirt appeared to be wet and her speech was slower than normal. (*App.* 21). Ms. Datka was then asked to step out of the vehicle. *Id.* As Ms. Datka was exiting the vehicle, she had difficulty getting out and had to use the driver's side door for balance. *Id.* Ms. Datka was then asked to walk toward the back of the vehicle, and while she was doing so, Deputy Coats observed Ms. Datka having difficulty walking. (*App.* 22).

Deputy Coats then questioned Ms. Datka about her driving, and ultimately, Ms. Datka admitted to drinking one 24-ounce can of red Zapalayo. *Id.* Furthermore, while talking with Ms. Datka, Deputy Coats detected an odor of intoxicants coming from her breath. *Id.* At this point, Deputy Coats asked Ms. Datka if she would conduct standardized field sobriety tests, and Ms. Datka agreed. (*App.* 23).

The first test that Deputy Coats conducted was the Horizontal gaze nystagmus test. (*App.* 24). During the test, Ms. Datka had difficulty following directions, and would move her head with Deputy Coats's finger, instead of just moving her eyes as she was instructed. *Id.* Deputy Coats checked for equal tracking and the lack of smooth pursuit, both of which were present. *Id.*

Next, Deputy Coats conducted the walk and turn test. (*App.* 25). Deputy Coats then set Ms. Datka up in the instructional position and advised her not to move, while he further explained and demonstrated the test. *Id.* However, even after Deputy Coats's instructions, Ms. Datka immediately began walking. (*App.* 26). Deputy Coats once again had to place Ms. Datka in the instructional

position. *Id.* During this time, Deputy Coats observed Ms. Datka having difficulty standing. *Id.* Additionally, once the test began, Deputy Coats observed Ms. Datka make no attempt to walk heel to toe, and also use her arms for balance. *Id.* When Ms. Datka reached the ninth step, instead of turning around and walking the same line, she turned forty-five degrees and walked nine more steps. (*App.* 26-27). Deputy Coats described the pattern of walking as that of an “L” shape. *Id.*

Next, Deputy Coats administered the one-leg stand test. (*App.* 28). During this test Ms. Datka put her foot down at fourteen one-thousand, and was only able to reach nineteen one-thousand, before the test period of thirty seconds was up. (*App.* 29-31).

Next, Deputy Coats requested that Ms. Datka count down from sixty-two to forty-seven. (*App.* 31). Instead of stopping at the instructed number, Ms. Datka counted all the way down to zero. *Id.* Next, Ms. Datka performed the alphabet test, but exhibited no issues. (*App.* 32).

Finally, Deputy Coats conducted the Romberg test. *Id.* The Romberg test consists of the subject standing with their feet together,

arms at their side, eyes closed and their head titled back. *Id.* During this time, the subject is instructed to estimate the passage of thirty seconds in their head. *Id.* Once they reach thirty, they are instructed to open their eyes, look down, and say done. *Id.* During the test, Ms. Datka believed that thirty seconds had passed after actually, only seventeen seconds. (*App.* 33).

At this point, Deputy Coats formed the opinion that Ms. Datka was impaired based on his training and experience, as well as the observations he made during this encounter. *Id.* Consequently, Deputy Coats asked Deputy Steger to retrieve his preliminary breath test (PBT) from his squad. *Id.* Deputy Steger then administered the PBT to Ms. Datka, the results of which were a .193. *Id.*

These facts were adduced at the motion hearing held on March 3, 2017, and were introduced through the testimony of Waukesha County Sheriff Deputies Steger and Coats. Moreover, the Honorable Lee S. Dreyfus Jr., relied on these very facts, when he denied Ms. Datka's motion to suppress. (*App.* 61). More specifically, the Honorable Lee S. Dreyfus Jr., stated, that given all of the observations by Deputy Steger and Coats (Ms. Datka's wet shirt; her

difficulty getting out of the vehicle and walking; her acknowledgement of consuming alcohol; the information Ms. Collins provided; and Ms. Datka's spotty performance on all of the field sobriety tests) there was sufficient probable cause to effectuate an arrest of Ms. Datka. (*App.* 59-60).

STANDARD OF REVIEW

Two probable cause determinations are at issue in this case. First is whether Deputy Steger and Coats had probable cause to administer the PBT. Second is whether Deputy Steger and Coats had probable cause to arrest Ms. Datka.

An appellate court reviews a trial court's probable cause determination in two parts. First, the court upholds the trial court's findings of fact unless they are clearly erroneous. *State v. Goss*, 338 Wis. 2d 72, 806 N.W.2d 918 (2011) (citing *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999)). Second, an appellate court reviews "[w]hether those facts satisfy the statutory standard of probable cause," *de novo*. *Id.*

ARGUMENT

I. EVEN BEFORE ADMINISTERING THE PRELIMINARY BREATH TEST, DEPUTY STEGER AND COATS HAD SUFFICIENT PROBABLE CAUSE TO ARREST MS. DATKA AFTER FIELD SOBRIETY TESTS, BASED ON THE TOTALITY OF THE CIRCUMSTANCES.

The Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution, protect “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” U.S. Const. amend. IV; Wis. Const. art. I, § 11. The Wisconsin Supreme Court has generally conformed its “interpretation of Article I, Section 11 and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment.” *See State v. Rutzinski*, 241 Wis. 2d 729, 623 N.W.2d 516 (2001).

A warrantless arrest is not lawful except when supported by probable cause. *State v. Lange*, 317 Wis. 2d 383, 391, 766 N.W.2d 551, 555 (2009). Probable cause for operating while under the influence of an intoxicant refers to the quantum of evidence within the officer’s knowledge at the time of the arrest, that would lead a reasonable officer to believe that the defendant was operating a

motor vehicle while under the influence of intoxicants. *Id.* Further, the question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. *Id.* Moreover, probable cause is a flexible and common sense measure of the plausibility of particular conclusions about human behavior. *Id.* In determining whether there is probable cause, a court applies an objective standard, considering the information available to the officers, as well as the officers' training and experience. *Id. at 393.* Although, probable cause must amount to more than a possibility or suspicion that the defendant committed an offense, the evidence required to establish probable cause need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *Id. at 398-399.*

While evidence of intoxicant usage—such as odors, an admission or containers—ordinarily exists in operating while intoxicated cases and strengthens the existence of probable cause, such evidence is not required. *Id. at 398.* In *Lange*, there were no odors, slurred speech, balance problems, admissions of consumption. Instead, the court considered the totality of the circumstances, which included five

factors. *Id. at 393*. Those five factors were (1) the “wildly dangerous” driving observed by the officers, (2) the officers’ experience, (3) the time of night, (4) the defendant’s prior conviction for operating while intoxicated, and (5) the defendant’s collision with the utility pole, which cut off the officer’s ability for further investigation. *Id. at 395-397*. Ultimately, the Court concluded that there was sufficient evidence to find probable cause to arrest the defendant for operating while intoxicated. *Id. at 399*. Thus, ordinary evidence of intoxication are not required to establish probable cause to arrest. *See Id.*

In the case at issue, a review of the record indicates that under the totality of the circumstances and based on all of the facts available to Deputy Steger and Coats, a reasonable officer would believe that Ms. Datka was driving while under the influence of an intoxicant. Additionally, here, unlike in *Lange*, Deputy Steger and Coats observed all the ordinary signs of intoxication, which only strengthen the existence of probable cause.

Deputy Steger, who first made contact with Ms. Datka, initially observed her vehicle parked between two parking spaces.

(*App.* 9). Further, immediately upon making contact, Deputy Steger observed Ms. Datka's eyes were glossy, her speech was slowed, and she was unusually slow when performing simple tasks, such as retrieving her identification. (*App.* 8). Even though Deputy Steger did not detect an odor of intoxicants coming from Ms. Datka during this encounter, he was still able to form the opinion that she was intoxicated by something. (*App.* 10, 14).

Moreover, Ms. Collins, the citizen caller, informed Deputy Coats that Ms. Datka's vehicle almost struck her, entered a grassy area of a parking lot, and committed numerous traffic infractions, such as stopping well before a stop sign and then quickly accelerating through it. (*App.* 19-20). Additionally, Ms. Collins informed Deputy Coats that Ms. Datka's vehicle almost struck a parked vehicle. (*App.* 20).

Additionally, upon initially making contact with Ms. Datka, Deputy Coats observed her shirt appeared wet, her speech was slower than normal, and she had difficulty exiting the vehicle and walking. (*App.* 21-22). Further, Deputy Coats detected an odor of intoxicants coming from Ms. Datka. Ultimately, after being

questioned by Deputy Coats, Ms. Datka even went so far as admitting to consuming alcohol prior to driving. (*App.* 22).

Ms. Datka asserts that she successfully completed the standardized field sobriety tests, but that is simply not the case. (*Def's. Br.* 12). On the horizontal gaze nystagmus test, Ms. Datka had difficulty following directions, and exhibited equal tracking as well as the lack of smooth pursuit. (*App.* 24). Further, on the walk and turn test, Ms. Datka had difficulty standing in the instructional position, started the test early, made no attempt to walk heel to toe and used her arms for balance the entire time. (*App.* 26). Additionally, Ms. Datka walked in an "L" like shape instead of completing the test as instructed. (*App.* 27). Moreover, on the one-leg stand test, Ms. Datka lowered her foot early. (*App.* 29-31). Futher, Ms. Datka did not follow Deputy Coats's instructions to count down from sixty-two to forty-seven. (*App.* 31). Instead, she counted all the way down to zero. *Id.* Finally, on the Romberg test, Ms. Datka believed that thirty seconds had passed after only seventeen seconds had actually passed. (*App.* 33). Given all of the information that Deputy Coats had at this time, he reasonably

formed the opinion that Ms. Datka was intoxicated, even before the PBT had been administered.

Thus, the quantum of evidence within Deputy Steger's and Coats's knowledge, was significantly more than the officer's knowledge in *Lange*. Deputy Steger and Coats observed an abundant amount of evidence that would lead any reasonable officer to believe the Ms. Datka was operating a motor vehicle while under the influence of intoxicants. Therefore, under a totality of the circumstances analysis, it is clear that even before administering the PBT, Deputy Steger and Coats possessed an ample amount of evidence, which was sufficient to establish probable cause to arrest Ms. Datka for operating while intoxicated.

II. EVEN IF DEPUTY STEGER AND COATS DID NOT POSSESS THE REQUISITE PROBABLE CAUSE TO ARREST MS. DATKA AFTER STANDARDIZED FIELD SOBRIETY TESTS, THEY DID POSSESS SUFFICIENT PROBABLE CAUSE TO REQUEST A PRELIMINARY BREATH TEST, THE RESULTS OF WHICH, THEN GAVE THE DEPUTIES THE NECESSARY PROBABLE CAUSE TO ARREST MS. DATKA.

Whether an officer properly requests a PBT is governed by *Wis. Stat. § 343.303*, which provides, in relevant part, that:

“If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63 (7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.”

A probable cause determination is made, "looking at the totality of the circumstances," and is a, "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Goss*, 338 Wis. 2d 72, 806 N.W.2d 918 (2011) (quoting *State v. Lange*, 317 Wis. 2d 383, 766 N.W.2d 551 (2009)). Probable cause to request a breath sample for a PBT requires "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, . . . but less than the level of proof required to establish probable cause for arrest." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

The legislature provided the PBT as a screening tool to assist officers in determining whether there is probable cause to arrest impaired drivers. *State v. Begicevic*, 270 Wis. 2d 675, 678 N.W.2d. 293 (Ct. App. 2004) (Citing *Renz*, 231 Wis. 2d at 310). In *Begicevic*, the officer conducted a traffic stop on the defendant, because his vehicle was stopped at an angle, in the middle of an intersection. *Begicevic*, 270 Wis. 2d. at 683. Upon making contact, the officer observed the defendant's eyes were bloodshot and glossy, as well as an odor of intoxicants. *Id.* Based on her observations, the officer then requested that the defendant perform standardized field sobriety tests. *Id.* The defendant did not perform the one-leg stand test due to an injury, however, on the heel to toe test, the defendant failed to follow directions by beginning the test early, and improperly performed the test. *Id.* at 683-684. Moreover, the horizontal gaze nystagmus test could not be completed because the defendant kept moving his head and did not properly following the pen with his eyes. *Id.* at 684. Based on all of her observations, the officer asked the defendant to submit to a PBT. *Id.* Ultimately, the court concluded that the officer's use of the PBT was supported by

probable cause and was consistent with its intended purpose of being a screening tool. *Id.* at 685.

Similar to the officer in *Begicevic*, both Deputy Steger and Deputy Coats observed immediate signs of intoxication. Deputy Steger observed Ms. Datka's eyes were glossy, her speech was slowed, and she was unusually slow performing simple tasks. (*App.* 8). Deputy Steger further observed that Ms. Datka's vehicle was parked between two parking spaces. (*App.* 9).

Likewise, upon initially making contact with Ms. Datka, Deputy Coats observed her speech was slower than normal, her shirt appeared wet, and she had difficulty exiting the vehicle and walking. (*App.* 21-22). Additionally, while questioning Ms. Datka, Deputy Coats detected an odor of intoxicants. (*App.* 22). Furthermore, Ms. Datka admitted to Deputy Coats that she consumed alcohol prior to driving. *Id.*

Additionally, just like the defendant in *Begicevic*, Ms. Datka failed to properly follow directions, and improperly conducted several of the field sobriety tests. More specifically, on the horizontal gaze nystagmus test, Ms. Datka exhibited the lack of

smooth pursuit as well as had difficulty following Deputy Coats's instruction of not moving her head. (*App.* 24). On the walk and turn test, Ms. Datka had difficulty standing in the instructional position, and once again failed to follow directions by beginning the test early. (*App.* 26). Moreover, Ms. Datka improperly conducted the walk and turn test by failing to walk heel to toe, using her hands for balance, and walking in an "L" shape. (*App.* 26-27). Likewise, Ms. Datka put her foot down early on the one-leg stand test. (*App.* 26-28). On the counting test, Ms. Datka again, failed to properly follow Deputy Coats's instructions of only counting down from sixty-two to forty-seven. (*App.* 31). Ms. Datka, instead, counted all the way down to zero. *Id.* Finally, on the Romberg test, Ms. Datka improperly estimated that thirty seconds had passed, after only seventeen seconds. (*App.* 33).

In contrast, unlike the officer in *Begicevic*, Deputy Coats also had information from Ms. Collins, the citizen caller, who observed Ms. Datka's erratic driving. Ms. Collins informed Deputy Coats that Ms. Datka's vehicle committed numerous traffic infractions,

including crossing the center line, and almost striking her as well as a parked vehicle. (*App.* 19-20).

Thus, under a totality of the circumstance analysis, Deputy Steger and Deputy Coats's use of the PBT, is clearly supported by probable cause. Furthermore, their use of the PBT was consistent with its intended purpose of being a screening tool for officers to use when investigating impaired drivers. Therefore, even if Deputy Steger and Coats did not possess the necessary probable cause to arrest Ms. Datka before the PBT, the results of her PBT, which came back as .193, gave the deputies the necessary probable cause to arrest Ms. Datka.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment, convicting Jacqueline M. Datka of operating a motor vehicle while under the influence of an intoxicant and further, affirm the order denying Ms. Datka's motion.

Dated this 24th day of January, 2018

Respectfully submitted,

/s/
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,288 words.

Dated this 24th day of January, 2018

Respectfully submitted,

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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 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of January, 2018

Respectfully submitted,

/s/

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. §809.80(4) that, on the 24th day of January, 2018, I mailed 10 copies of the Brief and Appendix of Plaintiff-Respondent, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, 110 East Main Street, Suite 215, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Dated this 24th day of January, 2018

Respectfully submitted,

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APPENDIX