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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP44-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES R. MUELLER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Marathon County Circuit Court,
the Honorable Greg Huber, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State Presented Insufficient Evidence for a Jury to Find That Mr. Mueller Was Operating a Motor Vehicle Under the Influence of Low Levels of Prescription Drugs to an Extent that Rendered Him Incapable of Driving Safely.

The state acknowledges that OWI cases involving prescription drugs present "significantly different" issues than those involving alcohol. (State's Br. At 8). Despite acknowledging those differences, the state attempts to paint alcohol and Clonazepam/Zolpidem as the same based on testimony that they are central nervous system depressants. (State's Br. at 9, 14–15).

The standard of impairment is higher in cases involving prescription drugs than in those involving alcohol. In cases involving prescription medication, the state must prove beyond a reasonable doubt that the driver was under the influence of a prescription medication "to a degree which renders him *incapable of safely driving***."** Wis. Stat. § 346.63(1)(a) (emphasis added). This standard is more demanding than the less restrictive "ability to operate is impaired" standard when alcohol is involved. WI-JI CRIM 2663, n.7; ***State v. Hubbard***, 2008 WI 92, ¶¶42, 46, 52, 313 Wis. 2d 1, 752 N.W.2d 839.

The state presented insufficient evidence for a reasonable jury to conclude that the low levels of prescription drugs in Mr. Mueller's system impaired him to a degree which rendered him incapable of safely driving. Although the trier of fact is free to choose among conflicting inferences of the evidence, it may only "*within the bounds of reason*, reject

that inference which is consistent with the innocence of the accused." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (emphasis in original). Here, there were numerous inferences of innocence, and those inferences—combined with the paucity of evidence that Mr. Mueller was impaired to the extent required under the statute—rendered the jury's verdict in this case outside the bounds of reason.

A. The officer's observations of Mr. Mueller were inconsistent with the side effects that Mr. Knutsen testified to.

In its attempt to tie Clonazepam and Zolpidem to alcohol, that state argues that "[t]he appellant points out that Mr. Mueller did not exhibit *some* of the behaviors that would be consistent" with impairment from central nervous system depressants. (State's Br. at 14). But the record demonstrates that Mr. Mueller did not exhibit *most* of the side effects that Mr. Knutsen testified to.

At trial, the court only permitted Mr. Knutsen to "describe[] in general the effects of [Clonazepam and Zolpidem] on the general population . . . and not . . . how it impacts specifically Mr. Mueller." (55:12). He testified to numerous potential side effects of each prescription drug. (55:127, 128); *see also* (Appellant's Br. at 10) (listing each potential side effect Mr. Knutsen testified to). Mr. Knutsen testified that the amounts of Clonazepam and Zolpidem in Mr. Mueller's blood were well below their respective therapeutic ranges, (55:131), and that he "couldn't render an opinion regarding [Mr. Mueller's] ability to safely drive." (55:135)

Officer Austin was the only witness who physically observed Mr. Mueller on July 16, 2016, and his observations of Mr. Mueller were largely inconsistent with the potential

side effects Mr. Knutsen testified to. *See* (Appellant's Br. at 19–20) (summarizing Officer Austin's observations of Mr. Mueller as alert, responsive, and oriented).

The state argues that Mr. Mueller exhibited clues of intoxication because he "seemed oblivious to his surroundings" and he "reacted inappropriately" when Officer Austin encountered him. (State's Br. at 15). These assertions overstate the facts of this case. Officer Austin testified that Mr. Mueller appeared "distracted" when he first approached the vehicle, as he had his head down and was writing something while waiting for the light to change. (55:70). Once Officer Austin informed Mr. Mueller that the light was green and cars were going around him, Mr. Mueller thanked the officer and attempted to drive away. (55:69). This response was appropriate, as it is reasonable to assume that Mr. Mueller took the officer's comments as a prompt to move his car. Furthermore, once Officer Austin ordered him to stop, Mr. Mueller complied immediately. (55:69, 88).

The officer's observations during field sobriety testing are emphasized by the state as evidence that Mr. Mueller was impaired. The state's argument, however, overlooks the fact that Mr. Mueller exhibited zero clues on the HGN, which, according to Officer Austin, was designed to detect impairment from depressants like alcohol. (55:74–75). Although Mr. Mueller exhibited some clues on the walk-and-turn and one-leg-stand tests, Officer Austin testified that those results were indications that an individual's blood-alcohol concentration might be above 0.08. (55:103). That evidence alone would be insufficient to meet the lower alcohol impairment standard, and it is wholly insufficient to show that he was incapable of driving safely.

B. The state mischaracterizes Mr. Mueller's argument regarding ***Wilkens.***

The state asserts that Mr. Mueller's brief "stretches the meaning of [***City of West Bend v. Wilkens***, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324] beyond recognition." (State's Br. at 11). The state misrepresents Mr. Mueller's arguments about ***Wilkens***. Mr. Mueller does not argue that the standardized field sobriety tests were inadmissible and improper for a jury to base its decision on. *See* (State's Br. at 12).

Given the state's burden in this case to prove beyond a reasonable doubt that Mr. Mueller was incapable of driving safely, it is insufficient to rely primarily on observations from two field sobriety tests as proof of said impairment—especially when there were numerous alternative explanations offered for Mr. Mueller's conduct during those tests. (Appellant's Br. at 17–18). ***Wilkens*** held that an officer's observations on field sobriety tests are "subjective evaluations" on par with "other signs of impairment." 278 Wis. 2d 634, ¶20. Those observations are certainly relevant and admissible, but they are "not litmus tests that scientifically correlate . . . numbers of 'clues' to various blood alcohol concentrations." ***Id.***

Despite the state's protestations, the distinctions between impairment due to alcohol and prescription drugs are highly relevant. In ***Wilkens***, the court listed an array of clues that might suggest alcohol impairment, such as "glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol, or driving patterns." 278 Wis. 2d 643, ¶20 (citing ***State v. Meador***, 674 So.2d 826, 831–32 (Fla. Dist. Ct. App. 1996)). These clues are substantially different from the possible clues of intoxication

due to Zolpidem or Clonazepam that Mr. Knutsen testified to. (55: 127, 128). Therefore, it was appropriate to distinguish between alcohol- and drug-specific clues of intoxication.

The evidence related to the field sobriety tests in this case were insufficient evidence that Mr. Mueller was incapable of driving safely due to prescription drug impairment. Officer Austin told the jury that: (1) The field sobriety tests he administered were developed by NHTSA to "detect whether a person might be under the influence of alcohol"; and (2) There are additional tests administered by a DRE to detect impairment from drugs. (55:103, 105, 116–17). Given the different clues that a drunk and drugged driver might exhibit, and the heightened standard for impairment for the latter, the results of Mr. Mueller's field sobriety tests and his admission to using prescription Clonazepam were insufficient to find him incapable of safely driving without more observations specific to his prescriptions' side effects.

In contrast to Mr. Mueller, the defendant in ***Wilkens*** was observed speeding, exhibited numerous clues of alcohol intoxication, and ultimately "failed" three field sobriety tests. 278 Wis. 2d 634, ¶2, 3. He was cited for, amongst other violations, operating "under the influence to an extent that he was incapable of safely driving." ***Id.***, ¶5. His case proceeded to a bench trial, and the court ultimately dismissed that citation. ***Id.,*** ¶11. While the decisions of a trial court are not binding on this court, those facts help to illustrate the heightened evidentiary standard that is applied when the state alleges that a driver was impaired to the extent that they were incapable of driving safely.

Finally, this court should not be persuaded by the state's complaint that the distinction between alcohol and drugs on field sobriety testing was not raised at trial. This

issue was raised by trial-level defense counsel, and Officer Austin testified about the difference between the tests he performed and those performed by a DRE to detect impairment due to drugs. Furthermore, a defendant is entitled to challenge the sufficiency of evidence regardless of whether or not he raised that issue at trial. ***State v. Hayes***, 2004 WI 80, ¶4, 273 Wis. 2d 1, 681 N.W.2d 203.

II. The Police Lacked Reasonable Suspicion to Subject Mr. Mueller to Field Sobriety Tests and Probable Cause to Arrest Mr. Mueller.

A. The Police unreasonably expanded the scope of the stop to conduct field sobriety tests.

The state did not prove that Officer Austin had reasonable suspicion to expand his initial traffic stop to an OWI investigation. The state argues that Officer Austin had a reasonable suspicion of "unsafe driving" because: (1) Mr. Mueller stopped his vehicle in a lane of traffic without explanation; (2) Mr. Mueller had prior OWI convictions; and (3) Mr. Mueller's admitted to taking prescription Clonazepam. (State's Br. at 20, 21). That argument, however, is in conflict with the facts adduced at the suppression hearing.

First, and most notably, the state's argument overlooks that Officer Austin had already decided to administer field sobriety tests—thereby expanding the stop to an OWI investigation—*before* he asked Mr. Mueller about prescription drugs. The state acknowledges that the officer was "already concerned there was possible intoxication" by the time he returned to his squad car to run records and call for backup. (State's Br. at 19); (53:8). While waiting for Officer Carr to arrive, Officer Austin spoke to another officer

over the phone for approximately eight minutes, during which he said he planned to administer field sobriety testing because "something feels off." (53:17, 18).

Once Officer Carr arrived, Officer Austin explained that he planned to conduct field sobriety tests. (53:19). He approached Mr. Mueller's vehicle for a second time and asked him if he had taken any "illegal drugs." (53:19–20). Mr. Mueller denied taking any drugs, and the officer asked him to exit the vehicle for testing. (53:20). Once Mr. Mueller was outside of his vehicle, Officer Austin asked about prescription drugs, and Mr. Mueller said he took prescription Clonazepam. (53:20–21). These facts show that Officer Austin had decided to conduct field sobriety tests, thereby expanding the scope of his stop, well before he knew about Clonazepam. Thus, Mr. Mueller's statement regarding Clonazepam should not factor into a reasonable suspicion analysis.

Second, there was an adequate explanation for Mr. Mueller's behavior at the initial stop. When Officer Austin approached Mr. Mueller's vehicle, he was writing on a piece of paper, and his head was down—which would be the natural position for someone writing while in the driver's seat. (53:13). When asked why he was stopped, Mr. Mueller explained that he was waiting for the light to turn green. (53:7). While speaking with the officer, Mr. Mueller did not slur his speech, appear confused, or act in any other way that might give the officer reason to conclude that he was impaired. It would be objectively reasonable for an officer to expect a traffic violation, such as inattentive driving, *see* Wis. Stat. § 346.89(1), but not criminal activity. Although Mr. Mueller did not explicitly say "I was distracted," that explanation can reasonably be inferred from his conduct.

The state correctly notes that officers are not required to rule out the possibility of innocent behavior before expanding a seizure. (State's Br. at 17) (citing ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729). It also recognizes that there is a strong public interest in prosecuting and deterring intoxicated drivers. (State's Br. at 19) (citing ***State v. Fisher***, 2010 WI 6, ¶32, 322 Wis. 2d 265, 778 N.W.2d 629). But the "touchstone of the Fourth Amendment is reasonableness," not an officer's expediency in concluding that criminal activity is afoot or deterring that activity. ***State v. Tullberg***, 2014 WI 134, ¶29, 359 Wis. 2d 421, 857 N.W.2d 120. Thus, the likelihood of an innocent explanation is inversely related to the reasonableness of the seizure: the more likely the innocent explanation, the less reasonable the suspicion of illegal activity is.

In sum, Officer Austin's decision to expand the stop was unconstitutional. There was a dearth of specific and articulable indicia to suggest that Mr. Mueller's ability to drive was impaired, let alone that he was incapable of driving safely. In fact, Mr. Mueller was responsive to inquiries, he did not appear drowsy, and there were reasonable explanations for the clues observed during field sobriety tests. These facts, discerned objectively, did not give rise to a reasonable inference of criminal activity. *See* ***Young***, 294 Wis. 2d 1, ¶21 (citing ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763). Accordingly, the state failed to prove that reasonable suspicion justified administering field sobriety tests in this case.

B. The police arrested Mr. Mueller without probable cause in violation of the Fourth Amendment.

As noted in Mr. Mueller's opening brief, the court need only address this issue if it finds that the field sobriety tests that Mr. Mueller were subjected to were lawful.

The totality of the circumstances in this case does not show that Officer Austin had probable cause to arrest Mr. Mueller. The three indicators of impairment upon which the state relies are (1) the results of Mr. Mueller's field sobriety tests, (2) Mr. Mueller's "strange driving behavior," and (3) his admission to taking prescription Clonazepam. (State's Br. at 21-22). These indicators were insufficient to support probable cause that Mr. Mueller was incapable of driving safely.

The officer's observations of Mr. Mueller in this case were not dispositive as to whether or not he was incapable of driving safely due to low levels of prescription drugs. As noted in Section I.B., field sobriety tests are not "litmus tests" for intoxication. ***Wilkens***, 278 Wis. 2d 643, ¶17. Because the test for probable cause in an objective one that requires an examination of the totality of the circumstances, ***State v. Weber***, 2016 WI 96, ¶20, 372 Wis. 2d 202, 887 N.W.2d 554, it is not improper to read the language of ***Wilkens*** to consider field sobriety test results as just one of the many factors that a court is to consider in making a probable cause determination.

The underlying facts of ***Wilkens*** again help illustrate the argument that field sobriety tests are just one of the factors a court considers in making a probable cause determination. In that case, Wilkens: (1) Was stopped for speeding; (2) Had red, glassy eyes, smelled of alcohol, slurred his speech, and admitted to consuming alcohol; (3) "[F]ailed

all three" field sobriety tests; and (4) Submitted to a PBT that suggested his BAC was above the legal limit. 278 Wis. 2d 643, ¶¶ 2, 3, 4. Wilkens sought to suppress his OWI citations, and the trial court found that probable cause existed based on the assortment of clues exhibited "*combined with his performance on the FSTs*." ***Id.***, ¶10 (emphasis added).

Unlike Wilkens, Mr. Mueller was not driving dangerously, he was alert and responsive, and the officer only observed clues of impairment on two of the three tests conducted. There was no additional conduct suggestive of intoxication that could bolster the officer's observations on the walk-and-turn and one-leg-stand tests. Although Mr. Mueller admitted to taking prescription Clonazepam, the mere consumption of a prescription drug does not necessarily impair one to the extent that they are incapable of safely driving.

The state also argues that Officer Austin merely needed probable cause to arrest Mr. Mueller for *any* type of impaired driving, and not specifically impairment due to a prescription drug. But even if that were true, the state still cannot show probable cause because Officer Austin did not suspect impairment from alcohol.

After Mr. Mueller denied drinking, and Officer Austin did not observe any perceptible indicia of impairment due to alcohol, he asked Mr. Mueller about illegal and prescription drugs. (55:19, 20). He later informed Mr. Mueller that he was arresting him for operating while intoxicated, and that Clonazepam was an intoxicant.[1] (53:22). The officer did not

[1] Notably, Clonazepam is not an intoxicant. In Wisconsin, "under the influence of an intoxicant" specifically means "that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." WI-JI CRIM 2663.

administer a preliminary breath test until *after* Mr. Mueller was placed under arrest, further evincing that there was only suspicion of impairment due to a prescription drug. Again, the standard for whether it is unlawful for a person to be driving under the influence of a prescription drug is whether the person is incapable of driving safely. Wis. Stat. § 346.63(1)(a). There was no such evidence here, and the state failed to prove that there was probable cause to arrest Mr. Mueller.

CONCLUSION

For the reasons stated above and in his opening brief, Mr. Mueller respectfully asks this court to reverse his conviction for operating under the influence of a drug and to remand the case to the circuit court to vacate his conviction. If the court finds that there was sufficient evidence to convict, Mr. Mueller respectfully asks that this court reverse the judgment of conviction and remand to the circuit court with direction to suppress all evidence derived from the unlawful extension of the stop and from Mr. Mueller's unlawful arrest.

Dated this 9th day of August, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 2,924 words.

CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of August, 2018.

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