

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4**

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**Appeal No. 2018 AP 000812
Sauk County Circuit Court Case Nos.
2017TR00011598**

In the Matter of the Refusal of Michael E. Hale,

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL E. HALE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT THE DEFENDANT-
APPELLANT REFUSED TO PERMIT CHEMICAL
TESTING IN VIOLATION OF WIS. STAT. §343.305(9) IN
THE CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE MICHAEL P. SCROENOCK, JUDGE,
PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT MICHAEL E. HALE**

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	iv
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.....	iv
STATEMENT OF THE CASE/FACTS.....	1
STANDARD OF REVIEW.....	5
ARGUMENT	6
OFFICER HOEGE DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO REQUEST THAT MR. HALE PERFORM A PRELIMINARY BREATH TEST AND DID NOT HAVE PROBABLE CAUSE TO ARREST MR. HALE.....	6
CONCLUSION	15
FORM AND LENGTH CERTIFICATION	16
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	17
APPENDIX CERTIFICATION	18
APPENDIX.....	20
Excerpts from Refusal Hrg.- 04/16/2018..	A.App.1

TABLE OF AUTHORITIES

Page No.

CASES

United States Supreme Court

<i>Alabama v. White</i> , 496 U.S. 325, 328, 110 S.Ct.2412 (1990)	8
---	---

Wisconsin Supreme Court

<i>County of Jefferson v. Renz</i> , 231 Wis.2d 293, 603 N.W.2d 541 (1999).	6
<i>County of Grant v. Vogt</i> , 2014 WI 76, 356 Wis.2d 343, 850 N.W.2d 253.	10
<i>State v. Anagnos</i> , 2012 WI 64, ¶42, 341 Wis.2d 576, 815 N.W.2d 675.	5,7
<i>State v. Felton</i> , 2012 WI App 114, 344 Wis.2d 483, 824 N.W.2d 871.	12
<i>State v. Goss</i> , 2011 WI 104, 338 Wis.2d 72, 806 N.W.2d 916.	6
<i>State v. Miller</i> , 2012 WI 61, ¶31, 341 Wis.2d 307, 815 N.W.2d 349.	8
<i>State v. Patton</i> , 2006 WI App 235, ¶10, 297 Wis.2d 415, 724 N.W.2d 347.	6,8
<i>State v. Rutzinski</i> , 2001 WI 22, ¶17, 241 Wis.2d 729, 738, 623 N.W.2d 516.	7,9-10
<i>Washburn County v. Smith</i> , 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243..	7

Wisconsin Court of Appeals

<i>State v Begicevic</i> , 2004 WI App 57, 270 Wis.2d 675, 678 N.W.2d 293.	6
<i>State v. Colstad</i> , 2003 WI App 25, 260 Wis.2d 406, 659 N.W.2d 394.	6

Wisconsin Statutes

Wis. Stat. §343.303.	6
Wis. Stat. §343.305(9).	1,5-7

STATEMENT OF THE ISSUES

Did Officer Hoege have the requisite level of suspicion to request a preliminary breath test (PBT) and subsequently arrest Mr. Hale when he refused to perform the PBT 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, Michael E. Hale (Mr. Hale) was charged in the Sauk County, Wisconsin, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a) and with having refused chemical testing contrary to Wis. Stat §343.305(9) and (10) on December 9, 2017. The defendant timely filed a Request for Refusal Hearing on December 18, 2017. A refusal hearing was held on April 16, 2018, the Honorable Michael P. Scroenock, Judge, Sauk County Circuit Court, presiding. The Court found the defendant unlawfully refused chemical testing. (R. 21:27-28/ App.). The Court entered a Dispositional Order/ Judgment on April 16, 2018, and a conviction status report on May 1, 2018. (R.15:1). The defendant timely filed an appeal of the refusal allegation by Notice of Appeal on April 26, 2018. The appeal herein stems from the Court's finding that Mr. Hale refused chemical testing, specifically, the Court's finding that Officer Hoege possessed the requisite level of suspicion to detain and arrest Mr. Hale.

Facts in support of this appeal were adduced at the refusal hearing held on April 16, 2018 and were introduced through the testimony of City of Reedsburg Officer Josh Hoege. Hoege

testified that he was employed with the City of Reedsburg Police Department on December 9, 2017. (R.21:4/ App. 1). On that date at 2:21 p.m., he was dispatched by a caller concerned for a vehicle in Kwik Trip. (R.21:5/ App. 2). The record is silent as to whether the caller was a known caller or anonymous. On direct examination, Hoege testified that it came across as an impaired driver, as something was wrong and the driver had a head injury. However, on cross-examination, Hoege acknowledged that the citizen report did not state that the driver was impaired, but only that the driver seemed off. (R.21:16/ App. 3). On redirect examination, Hoege testified that the caller actually said the driver seemed out of it. (R.21:25/ App. 18). Furthermore, Hoege admitted that prior to contacting Mr. Hale he had no report concerning the manner in which Mr. Hale was operating his motor vehicle. (R.21:17/ App. 12). Furthermore, Hoege admitted that prior to his contact with Mr. Hale, he made no attempt to look at Kwik Trip surveillance footage to determine if Mr. Hale had difficulty driving. (R.21:18/ App. 13). Upon arriving at the Kwik Trip, Hoege could not locate the suspect vehicle. (R.21:5/ App. 2). Officer Hoege then checked the businesses behind Kwik Trip in an attempt to locate the vehicle. (R.21:6/ App. 3).

Initially, he could not locate the vehicle, however, after searching nearby businesses, Officer Hoege located the vehicle parked (R.21:15/ App. 10) and running in front of the Deli entrance of Viking Grocery. *Id.* Mr. Hale's vehicle was located within about ten minutes from the initial call. (R.21:13/ App. 9). In confirming the registration Officer Hoege realized that he knew the vehicle owner as a long-time business owner in the City of Reedsburg. (R.21:6/ App. 3). On direct examination Hoege testified that he checked the inside of the vehicle, and observed Mr. Hale "kind of slumped over." (R.21:7/ App. 4). However, during cross examination, Hoege testified, that Mr. Hale had his head down when the officer arrived, and that once Hoege knocked on the window, Mr. Hale response seemed normal. (R.21:17/ App. 12). Hoege was dressed in full police uniform. (R.21:18/ App. 13). Hoege also observed an injury on Hale's left hand and a bump on his forehead. (R.21:7/ App. 4). In response to Hoege knocking on the window Mr. Hale rolled the window down. (R.21:8/ App. 5).

According to Hoege, Mr. Hale took the keys out of the ignition and dropped them on the floor. (R.21:8/ App. 5). Hoege found this to be unusual. *Id.* Hoege questioned Mr. Hale about his injuries, but Mr. Hale did not provide any explanation. *Id.*

Additionally, Hoege observed an odor of intoxicant on Mr. Hale's breath and emitting from the vehicle. (R.21:9/ App. 6). However, Hoege testified that from the odor of intoxicant alone, he could not discern what, when or how much alcohol was consumed. (R.21:19-20/ App. 14-15). Mr. Hale denied consuming alcohol. Additionally, Hoege testified that Mr. Hale exhibited glassy or red eyes, but he did not know what caused his eyes to be glassy or bloodshot (Mr. Hale clearly had a head injury). (R.21:20/App. 14). Based on the above, Hoege requested Mr. Hale to exit the vehicle for field sobriety testing. Hoege testified he observed Mr. Hale's speech to be slurred, and his speech sounded more slurred than it did on other occasions when the officer had contact with Mr. Hale. (R.21:10/ App. 7). However, Hoege observed no problems with Mr. Hale's motor coordination as he sat in the vehicle. (R.21:22/ App. 16).

According to Hoege, upon exiting the vehicle, he observed Mr. Hale to have slow and delayed movements. (R.21:10/ App. 7). Once outside the vehicle, Officer Hoege first asked Mr. Hale to perform a preliminary breath test (PBT). (R.21:23/ App. 17). After Hale refused the preliminary breath test, Officer Hoege requested Mr. Hale perform field sobriety tests. *Id.* Mr. Hale declined the request. (R.21:10/ App. 7).

Hoege then arrested Mr. Hale. Hoege read the Informing the Accused form, and Mr. Hale refused to submit to chemical testing. (R.21:12/ App. 8).

The State argued that Officer Hoege possessed the requisite level of suspicion to arrest and request Mr. Hale submit to chemical testing. (R.21:25/ App. 18). Defense counsel argued that the State did not establish the requisite level of probable cause to request the PBT test, and that Hoege did not have probable cause to arrest. (R.21:26/ App. 19). The Court found the defendant refused chemical testing and that Officer Hoege possessed the requisite probable cause to arrest. (R.21:27-28/ App. 20-21). A Conviction Status Report was filed on May 1, 2019. Mr. Hale timely filed a Notice of Appeal on April 26, 2018.

STANDARD OF REVIEW

In reviewing an trial court's decision concerning a violation of Wis. Stat. §343.305(9), an appellate court will uphold a lower court's finding of fact unless clearly erroneous, but the court "reviews the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court..." *In re Refusal of Anagnos*, 2012 WI 64, ¶21, 341 Wis.2d 576, 815 N.W.2d 675.

ARGUMENT

OFFICER HOEGE DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO REQUEST THAT MR. HALE PERFORM A PRELIMINARY BREATH TEST AND DID NOT HAVE PROBABLE CAUSE TO ARREST MR. HALE

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). The Court considers the totality of the circumstances in determining whether probable cause existed for a PBT. *State v. Goss*, 2011 WI 104, ¶25, 338 Wis.2d 72, 806 N.W.2d 916.

Pursuant to Wis. Stat. §343.305(9)(a) one of the issues at a refusal hearing is whether the driver was lawfully placed under arrest for an OWI violation. “In the context of a refusal hearing...’probable cause’ refers generally to that quantum of evidence that would lead a reasonable law enforcement officer

to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Washburn County v. Smith*, 2008 WI 23, ¶15, 308 Wis.2d 65, 746 N.W.2d 243. “The burden is upon the State to present sufficient evidence to establish the officer’s probable cause to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.* Pursuant to *In re Anagnos*, 2012 WI 64, ¶42, 341 Wis.2d 576, 815 N.W.2d 675, the probable cause inquiry under Wis. Stat. §343.305(9)(a), can include whether the traffic stop that preceded an arrest was lawful. Logic dictates that it can also include whether the officer had the requisite level of suspicion to extend the traffic stop for field sobriety testing and PBT testing.

Here, Officer Hoege’s initial contact with Mr. Hale was based solely on the report of the caller.

"In some circumstances, information contained in an informant's tip may justify an investigative stop." *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis.2d 729, 738, 623 N.W.2d 516. In determining whether a tip is sufficient, the police must consider its reliability and content. *State v. Patton*, 2006 WI App 235, ¶10, 297 Wis.2d 415, 724 N.W.2d 347 citing to *Rutzinski* at ¶¶17-18. "In assessing the reliability of a tip, due

weight must be given to: (1) the informant's veracity and (2) the informant's basis of knowledge." *Id.* at ¶18. The Court looks at the totality of the circumstances in determining whether a tip rises to the level of reasonable suspicion. Reliability, veracity and basis of knowledge are all highly relevant factors in determining the value of a tip. *Alabama v. White*, 496 U.S. 325, 328, 110 S.Ct.2412 (1990).

In determining the veracity and reliability of an informant, it is critical to determine whether the informant is known or anonymous. "When the tipster is anonymous, the police must corroborate the information through independent investigation." *Patton* at ¶10. In determining whether a tip provides reasonable suspicion, a court must consider (1)"the quality of the information, which depends upon the reliability of the source" and (2) the "quantity or content of the information." *State v. Miller*, 2012 WI 61, ¶31, 341 Wis.2d 307, 815 N.W.2d 349. *Miller* recognized the "inversely proportional" relationship that exists between these factors, *Id.* as set forth in *Alabama v. White*, 496 U.S. 325, 332 (1990):

[I]f an informant is more reliable, there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information to conduct an investigatory stop. On the other hand, if an informant has limited reliability- for example, an entirely anonymous

informant- the tip must contain more significant details or future predictions along with police corroboration. The relevant question is whether the tip contained “sufficient indicia of reliability”

In some circumstances, if the tip alleges an imminent threat to public safety, “it may be reasonable for an officer in such a situation to conclude that the potential for danger caused by a delay in immediate action justifies stopping the suspect without any further observations.” *Rutzinski* at ¶26.

Based on the evidence in this record, the caller can only be considered anonymous. There is no testimony that the caller was known. Thus, in the probable cause analysis the tip should not be afforded the same level of reliability as if were a known informant. Police must corroborate some of the details of the call. The initial call was that a driver at the Kwik Trip gas station seemed out of it. When Officer Hoege arrived, the vehicle that was the subject of the call was not there. The record is silent as to whether the tipster indicated that the vehicle drove away from Kwik Trip and the direction of travel of the vehicle. In fact, it took the officer 10 minutes to actually find the vehicle. The caller did not make any specific report of witnessing the driving of the vehicle, and specifically did not report the direction the vehicle would be traveling. (Making personal

observations of the suspect's contemporaneous actions enhances the reliability of a tip. *Rutzinski* at ¶33.) Likewise, this record did not establish that the witness "exposed him- or herself to being identified." *Rutzinski* at ¶32 (Exposing oneself to being identified enhances the reliability of a tip. *Id.*). Because the caller was anonymous, the tip lacks the inherent reliability of tips from a known informant.

Granted, simply knocking on the window, is not a seizure. See *County of Grant v. Vogt*, 2014 WI 76, 356 Wis.2d 343, 850 N.W.2d 253. Thus, Mr. Hale does not challenge the initial contact with the officer at his driver's side window.

However, here Officer Hoege, after the initial contact, and based upon his observations of Mr. Hale in the vehicle (speech, eyes and odor), requests Mr. Hale to immediately perform a PBT test. ((R.21:23/ App. 17). Mr. Hale declines the request. At this point, Officer Hoege did not possess the requisite level of suspicion to request said test. The observations made by Officer Hoeger were insufficient to justify the PBT request. While an officer is not required to rule out innocent explanations for behavior (slurred speech, blood shot and glassy eyes according to Hoege's testimony) here, according to the officer, Mr. Hale had an injury to his head. Clearly a head

injury could cause slurred speech and bloodshot glassy eyes. Further, the officer specifically testified that while he observed an odor of intoxicant, he could not specifically tell from the odor alone that Mr. Hale was impaired, nor could he even tell what, when or how much alcohol Mr. Hale consumed. (R.21:20/ App. 15). Likewise, the fact that Hoege observed Mr. Hale to have bloodshot and glassy eyes is not necessarily determinative of impairment.

At the point of his contact with Mr. Hale, Officer Hoege had not witnessed any deviant driving. Mr. Hale's response to Hoege's knock on the window was normal, and his movements in the vehicle seemed normal. The anonymous tipster obviously did not see Mr. Hale pull away from Kwik Trip, because they did not provide any contemporaneous report of the vehicle's direction of travel.

To request a PBT, the officer needs more suspicion than that which is required to initiate the initial detention. The initial contact was based on the anonymous tip, however, the initial detention was based on the observations of Mr. Hale's eyes, speech and the odor of intoxicant. The officer needed additional suspicion to request Mr. Hale exit the vehicle and submit to a preliminary breath test. However, field sobriety testing is not a

prerequisite to a request for a PBT. See *State v. Felton*, 2012 WI App 114, 344 Wis.2d 483, 824 N.W.2d 871 (even if the defendant passes the field sobriety tests, the totality of the observations might still warrant a request for a PBT). In *Felton*, the defendant passed the field sobriety tests. Despite this, the court found the other evidence was sufficient to justify the request for the PBT. *Felton* at ¶10. However, the observations made by the officer in *Felton* were significantly greater than those herein. In addition to observing glassy bloodshot eyes and the odor of intoxicant (similar to Mr. Hale’s case), in *Felton*, the defendant admitted consuming three beers, the officer witnessed deviant driving (stopping too long at one stop light and “blowing another”), and the officer knew prior to requesting the PBT that *Felton* had other drunk-driving convictions on his record. *Felton* at ¶9. Here, the officer witnessed no deviant driving (while there is an anonymous tip its reliability is low). Moreover, the “tipster” did not report deviant driving, Mr. Hale did not admit to consuming alcohol, and the record is silent as to whether Officer Hoege had any knowledge of Mr. Hale’s driving record prior to requesting the PBT. Based on the above, Officer Hoege did not possess sufficient suspicion to request Mr. Hale submit to PBT test.

Officer Hoege's decision to arrest Mr. Hale was based in part on Mr. Hale's refusal to perform the PBT. Hoege testified the refusal to perform the PBT coupled with the other observations prompted him to place Mr. Hale under arrest. (R.21:10/App.7). Clearly, Hoege considered the refusal to perform the PBT consciousness of guilt. If an officer does not have the requisite level of suspicion to request a PBT, the PBT cannot be considered in the arrest analysis. Similarly, the refusal to submit to a PBT should not be considered in the arrest analysis where the officer is unjustified in making the request. Without the consciousness of guilt indicia, Officer Hoege did not possess the requisite level of probable cause to arrest Mr. Hale. The trial court failed to address the issue of the PBT. The court made the following findings of fact:

(1) Officer Hoege received a report concerning a driver that appeared to be out of it

(2), Hoege found Mr. Hale's truck stopped and running in a fire lane

(3) Mr. Hale was seated in the truck, slumped over, but responded appropriately when Hoege knocked on the window

(4) Hoege observed Mr. Hale to exhibit red and glassy eyes, slurred speech and an odor of intoxicant.

(5) Hoege had injuries to his forehead and hands

(6) Hoege had prior contacts with Mr. Hale in the community.

(7) Mr. Hale was not normal with respect to his response time or movements. (R.21:27/ App. 20).

Based on these factual findings and using a totality of the circumstances analysis, the court found that Officer Hoege had the requisite level of probable cause to arrest Mr. Hale. However, while the above facts might have justified detaining Mr. Hale for field sobriety testing, without more, they did not rise to the level of probable cause to arrest. The trial court erred in finding that the above facts constituted probable cause to arrest.

CONCLUSION

Because Officer Hale did not have the requisite level of suspicion to request the PBT, and because the remaining evidence is not sufficient to support probable cause to arrest, the Court should reverse the order and vacate the refusal.

Dated this 6th day of August, 2018.

Respectfully Submitted

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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 22 pages. The word count is 4608.

Dated this 6th day of August, 2018.

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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 6th day of August, 2018.

Respectfully submitted,

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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 6th day of August, 2018.

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APPENDIX