STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

IN THE MATTER OF THE REFUSAL OF MICHAEL E. HALE:

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018 AP 000812
Circuit Court Case No. 17-TR-11598

vs.

Michael E. Hale,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED ON APRIL 16, 2018 IN THE CIRCUIT COURT FOR SAUK COUNTY, BRANCH I, THE HONORABLE MICHAEL P. SCRENOCK PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF THE FACTS

On December 9, 2017 at approximately 2:21 p.m., Officer Josh Hoege of the Reedsburg Police Department was dispatched to a citizen complaint of a driver at Kwik Trip. (21:4-5.) The complaint concerned both driving behavior and an apparent injury to the driver's head, and it was relayed as an impaired driver. (21:4.) The caller indicated that the driver was "out of it." (21:24.) Officer Hoege searched for the vehicle at Kwik Trip and was not able to find it, but located the vehicle parked in a no parking zone in front of Viking grocery. (21:5-6.) Yellow paint indicated the no parking zone (21:6) and a sign denoted that it was a fire lane (21:14). The vehicle was running, and Officer Hoege confirmed the vehicle's registration with dispatch. (21:6.) Michael Hale was in the driver's seat of this vehicle, a truck. (21:7.) Hale was slumped over and had injuries to his left hand and forehead. (21:7.) Officer Hoege did not activate the emergency lights on his squad car, but instead approached the vehicle and knocked on the window. (21:15.) Hale took his vehicle keys out of the ignition and dropped them on the floor to his right side, which Officer Hoege felt was unusual. (21:8.) When asked about where the blood or the bump on his head came from, Hale did not have an answer. (21:8.)

Officer Hoege noticed an odor of intoxicants coming from Hale's breath. (21:8-9.) Officer Hoege asked Hale if he had anything to drink, and Hale said he had not. (21:9.) Hale's eyes were red and glassy, and Hale's speech was slurred. (21:9.) Officer Hoege knew Hale from prior contacts (21:6) and his speech on this date was markedly different than normal (21:9-10). Officer Hoege asked Hale to step out of the vehicle. (21:9.)

Officer Hoege noticed Hale's movements were slow and delayed, as compared to his normal behavior. (21:9.) Officer Hoege asked Hale to perform a preliminary breath test (hereinafter "PBT") (21:23), and then Officer Hoege asked Hale to perform field sobriety tests (21:23). Hale said he would not perform either the PBT or field sobriety tests. (21:10.) Officer Hoege placed Hale under arrest and searched the truck incident to arrest. (21:10-11.) Inside the truck, Officer Hoege found a tumbler in the center console that smelled of alcohol, and found an open bottle of whiskey or brandy. (21:11.)

Officer Hoege read Hale the Informing the Accused form and Hale refused an evidentiary chemical test of his blood. (21:12.) Hale timely requested a hearing under Wis. Stat. § 343.305(9)(a)5 (hereinafter "refusal hearing") and the hearing was held on April 16, 2018.[1]

[1] The State would note that Hale was charged criminally arising out of the same conduct in Sauk County case 18CT34. Discovery was sent to defense counsel (the same representing at the refusal hearing and on this appeal) on 1/26/18. Defense counsel was aware of the facts well before evidence was taken at the refusal hearing.

ARGUMENT

Michael Hale, Defendant-Appellant, challenges the circuit court's finding that he improperly refused testing, on the basis that the officer lacked "probable cause to believe" necessary to request a preliminary breath test and thus lacked probable cause to arrest. The State maintains that Hale waived his challenge to the officer's PBT request and there is ample probable cause for arrest.

WIS. STAT. § 343.305(9)(a)5 outlines the issues subject to the refusal hearing to be limited to, in relevant part:

a) Whether the officer had probable cause to believe the person was operating a motor vehicle while under the influence of alcohol ("OWI") and whether the person was lawfully placed under arrest for a violation of the OWI statutes.
b) Whether the officer read the information contained in WIS. STAT. § 343.305(4).
c) Whether the person refused to permit the test.

Subsections (b) and (c) are not at issue in this appeal. *In re Anagnos*, 2012 WI 64, ¶ 42, 341 Wis. 2d 576, 815 N.W.2d 675, held that the "lawfully placed under arrest" language of sub (a) meant that "the circuit court may entertain an argument that the arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion." Hale makes that argument now, by way of attacking the officer's PBT request.

This case hinges on the distinction between a refusal hearing under WIS. STAT. § 343.305(9)(a)5 and a hearing on a motion to suppress evidence due to a constitutional (or statutory, in the case of the PBT) violation. Certainly, *Anagnos* made clear a defendant can challenge the constitutionality of the stop that

ultimately led to the refusal. But *Anagnos* does not stand for the proposition that a refusal hearing is automatically and simultaneously a suppression hearing. In fact, the defendant in *Anagnos* specifically requested, and the prosecutor consented to proceed with, a suppression hearing as it related to the legality of the traffic stop. *See Anagnos Def-Respondent Br.* 3 (2012 WL 1121340).

Here, Hale's counsel made no mention of a challenge to the constitutionality of the stop (the request to have Hale exit the vehicle) or the request for the PBT prior to taking testimony at the refusal hearing. He makes those arguments now (the PBT argument being more fully developed in his brief). In so doing, Hale asks the State to anticipate all possible suppression motions and solicit evidence meeting its burden on those motions prior to Hale having to give any notice. This is not the law. It is further unreasonable because, had Hale given notice of his intent to make these challenges, testimony tailored to those narrow issues (the citizen complaint and the PBT request) would have been solicited in more detail from the witness.[2]

This case presents constitutional questions that are mixed questions of law and fact, to which a two-step standard of review is applied. *See e.g., State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The

[2] Specifically, that citizen complainant was identified by dispatch and later filled out a written statement. Further, that the officer's subjective intent on requesting the PBT was due to an investigation into Obstructing an Officer (*see* WIS. STAT. § 946.41(2)(a)and Wis. J.I.-Criminal 1766A), which is not governed by Wis. Stat. § 343.303.

application of those facts to constitutional principles is reviewed independently. *Id.*

I. Hale Forfeited His Right to Challenge the Preliminary Breath Test as a Basis for Suppressing Evidence.

Hale attempts to appeal from the judgment of conviction and the decision of the trial court finding that Hale refused to permit chemical testing in violation of WIS. STAT. § 343.305(9). In his appeal, Hale asserts that "Officer Hoege did not have the requisite level of suspicion to request that Mr. Hale perform a preliminary breath test." However, the defendant forfeited this claim by not adequately raising it in his filings. "To avoid [forfeiture], a party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling." *State v. Eugene W.*, 2002 WI App 54, ¶ 13, 251 Wis. 2d 259, 641 N.W.2d 467 (citation omitted). "[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." *Townsend v. Massey*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155. The court of appeals has rejected the "proposition that [it] must address the merits of new legal arguments made on appeal so long as the arguments somehow relate to an issue that was raised before the circuit court." *Id.* ¶ 27.

Under those principles, Hale forfeited appellate review of his claim. He was required to do more than mention, at the hearing, that he believed there was

no probable cause for the PBT. At the conclusion of the hearing, defense counsel stated:

> I think the issue here is - - is the issue that deals with probable cause, but I think that issue also encompasses reasonable suspicion to stop, which then would also encompass reasonable suspicion to detain. I would also argue that it would encompass reasonable - - or the requisite level of probable cause under 343.303 to request a preliminary breath test.

(21:25–26.) That is the extent of Hale's argument at the trial level on this issue of appeal.

That type of passing comment is insufficient to alert the circuit court of the need for fact finding and a decision on that issue. In fact the circuit court deliberately limited its ruling and only found that "at the time of refusal, which occurred back at the police department, Officer Hoege did have probable cause to believe that Mr. Hale was driving or operating a motor vehicle while under the influence of alcohol to a degree which renders him incapable of safely driving." (21:28.) The circuit court made no findings of fact related to probable cause for the PBT and the circuit court did not decide that issue.

The defendant did not raise that claim with sufficient prominence in the circuit court. Accordingly, that claim is forfeited on appeal and addressing it "would seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party." *See Townsend v. Massey*, 2011 WI App 160, ¶ 26; *see also State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d

653, 761 N.W.2d 612 ("The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal.").

Hale may counter this forfeiture argument with the same reliance on *In re Anagnos*, 2012 WI 64, that he proffers in his brief. Specifically, that at a refusal hearing, a court may consider "whether the officer had the requisite level of suspicion to extend the traffic stop for field sobriety testing and PBT testing." (Def. Br. 7.) Stated differently, *Anagnos*, 2012 WI 64, held that a driver subject to a refusal hearing may challenge the lawfulness of the arrest, which can include a suppression argument, and thus allows Hale to bring a motion challenging the PBT request under WIS. STAT. § 343.303 and *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). However, defendant's reliance on *Anagnos* is misplaced because the facts of *Anagnos* are markedly different from the facts of the current case.

In that case, Anagnos retained counsel and requested a hearing on the revocation notice. During the hearing, *defense counsel stipulated* that once Deputy Frami stopped the vehicle and observed Anagnos, he had probable cause to believe Anagnos was driving while under the influence of alcohol. *Defense counsel also stipulated* that Deputy Frami properly read the Informing the Accused form to Anagnos, and that Anagnos refused to take the chemical test. *The only issue challenged by defense counsel was the constitutionality of the stop*.

Id. ¶ 8 (emphasis added). No such stipulation of issues occurred in the current case.

Furthermore, in reaching its holding the *Anagnos* Court explicitly recognized that the defendant unambiguously raised the issue of whether the defendant "was lawfully placed under arrest" with the trial court. *Id*. ¶ 19. Accordingly, the *Anagnos* Court decidedly limited its holding to that previously raised issue. *Id.* ¶ 42. In reaching its conclusion, the *Anagnos* Court distinguished its holding from two prior cases: *State v. Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986) and *In re Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. When describing the two cases the *Anagnos* Court stated that : "[i]n both cases . . . the court focused on the portion of the refusal hearing statute *that was directly implicated by the arguments advanced in each case*." *Anagnos*, 2012 WI 64, ¶ 39 (emphasis added).

Finally, courts that have made determinations about the lawfulness of a stop based on *Anagnos*, limit its application to cases that have a supported procedural history. *See, e.g.*, *In re Refusal of Adams*, 2014 WI App 24, ¶ 9, 352 Wis. 2d 756, 843 N.W.2d 711 (unpublished) ("The circuit court conducted an evidentiary hearing at which the parties stipulated that the sole issue before the court was whether the police had reasonable suspicion to stop Adams."); *In re Hartman*, 2012 WI App 118, ¶ 7, 344 Wis. 2d 518, 822 N.W.2d 736 (unpublished) ("At the [refusal] hearing, Hartman did not contest that the deputy had probable cause to arrest him . . .[or] he refused to take the chemical test. Instead, Hartman

challenged whether the deputy had reasonable suspicion to stop him based on the report the deputy received from dispatch."); and *In re Tomaw*, 2014 WI App 45, ¶ 7, 353 Wis. 2d 554, 846 N.W.2d 34 (unpublished) ("At the [refusal] hearing, Tomaw argued that his license should not be revoked due to his refusal because the sergeant lacked reasonable suspicion to administer the field sobriety tests and, as a result, Tomaw was not lawfully placed under arrest.").

Because there was no signal to the court or the State that Hale intended to challenge the administration of the PBT, a full and fair evidentiary hearing on that issue was not held. Hale should not now be able to argue an issue not litigated at the trial level. Allowing him to do so is tantamount to appeal by ambush.

II. Based on the Evidence Solicited at the Hearing, Officer Hoege Could Legally Administer the PBT and, Thus, Hale's Refusal and All Subsequent Evidence Should Be Considered in the Probable Cause Analysis.

WIS. STAT. § 343.303 establishes that if a law enforcement officer has "probable cause to believe" a person has violated an OWI statute, the officer may request the person to submit to a PBT. "[P]robable cause to believe refers to 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) (internal quotation marks omitted).

When Officer Hoege requested a PBT from Hale, he had the following information:

- The time was 2:21 p.m., which, while not bar time, is a dangerous hour for an impaired driver to be out on the road.
- A concerned citizen called about a possibly injured and possibly impaired driver, who was "out of it."
- The citizen gave a specific location and directed law enforcement to a specific vehicle. While the latter is not explicit from the transcript, it is certainly implied because Officer Hoege knew what vehicle to look for at Kwik Trip.
- Officer Hoege found a vehicle matching the description, near the location described.
- The vehicle was parked in a no-parking fire lane, which was clearly marked.
- The vehicle was running, which adds to the inference that the driver just arrived from Kwik Trip next door.
- Officer Hoege knew the driver, Michael Hale.
- Hale was slumped over.
- Officer Hoege saw injuries on Hale, for which Hale could give no explanation.
- Hale rolled down the window and then oddly took his keys out of the ignition and tossed them on the floor of the passenger side.

- Officer Hoege smelled the odor of intoxicants inside the vehicle and from Hale's mouth as he spoke.
- Hale's eyes were red and glassy.
- Hale's speech was slurred, which Officer Hoege knew to be different from Hale's normal speech.
- Hale's movements were slow and delayed as compared to normal.

At this point, Officer Hoege had ample evidence, arising beyond reasonable suspicion and squarely into the "probable cause to believe" standard contemplated by WIS. STAT. § 343.303 and *Renz*, 231 Wis.2d 293. "The officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." *Renz*, 231 Wis. 2d at 317.

Hale contends that the PBT request was unlawful, in part, because the citizen complaint was an anonymous tip. Again, for the same reasons stated above, Hale's failure to signal a suppression motion as it related to citizen complainant was insufficient to alert the circuit court of the need for fact finding and a decision on that issue. Thus that argument should be deemed forfeited.

Had testimony been solicited from the officer on this issue, he would have explained that the caller was identified by dispatch as Eric and Eric ultimately gave a statement to the officer. Defense counsel, in his cross examination of the officer, conceded that a written statement was ultimately filled out by the citizen complainant. (21:17.) Obviously a citizen complainant who can be identified (or

exposes themselves to identification), such that they later fill out a written statement is not the same as an unidentifiable anonymous tipster.

Assuming *arguendo* that Hale has not forfeited this argument and the tip need be analyzed based on this record, the informant's information was sufficiently reliable under either the anonymous tipster analysis or the citizen complainant analysis in order to be considered in Officer Hoege's "probable cause to believe" analysis.

Whether a tip provides reasonable suspicion requires the court to 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. An "inversely proportional" relationship exists between these two factors. *Id.* In other words, "if 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." *Id.* ¶ 32 (quoting *Alabama v. White*, 496 U.S. 325, 332 (1990)) (footnotes omitted). Conversely, "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." *Id.*

Here, Officer Hoege was able to corroborate the information relayed to dispatch by the citizen. Namely, the person in this vehicle was "out of it" and apparently injured. Officer Hoege found that vehicle and confirmed those observations of the citizen.

Furthermore, the State contends the information relayed form dispatch was not from an "anonymous" source; instead the State asserts that a "citizen informant" provided the tip. "[A] citizen informant is someone who happens upon a crime or suspicious activity and reports it to police." *State v. Kolk*, 2006 WI App 261, ¶ 12, 298 Wis. 2d 99, 726 N.W.2d 337. The tipster was a citizen informant because he provided enough information that he could be subsequently identified. "[W]hen a caller provides his or her name, the tip is not anonymous; it is a tip from a citizen informant." *State v. Powers*, 2004 WI App 143, ¶ 9, 275 Wis. 2d 456, 685 N.W.2d 869.

Under the collective knowledge doctrine, "[t]he police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department." *State v. Mabra*, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974). This same reasoning "applies to cases involving investigatory stops based on reasonable suspicion." *State v. Rissley*, 2012 WI App 112, ¶ 19, 344 Wis. 2d 422, 824 N.W.2d 853. Therefore, based on the collective knowledge doctrine, Officer Hoege "knew" that an identified citizen informant provided the tip that led to the seizure of Hale.

For all these reasons, Officer Hoege had sufficient evidence arising to the level of "probable cause to believe" in order to request a PBT from Hale. Thus, Hale's refusal to submit to a PBT and all subsequent evidence can be considered in Officer Hoege's probable cause for arrest analysis.

III. Hale's Refusal Cures Any Defect to the Request for the PBT Because There Is No "Result" and Probable Cause Existed Anyway Absent the PBT Refusal.

The statute that governs the PBT is silent on refusals to provide a PBT. WIS. STAT. § 343.303 states that "[t]he *result* of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested [for an OWI offense]." (Emphasis added.) Here, there is no result, as Hale refused. Thus, the PBT result did not factor into Officer Hoege's decision because there was no test at all. The refusal to perform the PBT could be considered by the officer in his arrest analysis as evidence of consciousness of guilt. *See State v. Mallick*, 210 Wis. 2d 427, 565 N.W.2d 245 (1997).

Even assuming *arguendo* that the PBT refusal must be excluded from Officer Hoege's arrest analysis, his subsequent investigation (namely, the request for standardized field sobriety tests) need not be suppressed. Had Officer Hoege's inquiry hinged solely on the PBT refusal, then subsequent investigation might be fruit of the poisonous tree. But at the moment Officer Hoege requested the PBT, he had ample evidence, at least arising to reasonable suspicion of OWI, even without the PBT refusal. Thus, his request of Hale to perform field sobriety tests and Hale's refusal should be considered regardless of the legality of the PBT request. With the refusal to perform the field sobriety tests (again, evidence of consciousness of guilt, *see State v. Mallick*, 210 Wis. 2d 427), Officer Hoege had probable cause to arrest Hale.

IV. The PBT Was Legally Administered in the Context of an Obstructing an Officer Investigation.

While Hale's failure to signal a suppression challenge to the PBT request led to the State not soliciting Officer Hoege's subjective intent regarding the PBT (*see supra* note 2), the PBT request should still be considered legally administered as an investigation into Obstructing an Officer. WIS. STAT. § 946.41(2)(a), in part, criminalizes one for "knowingly giving false information to [an] officer." *See also* Wis. J.I.-Criminal 1766A. When asked if he had been drinking, Hale told Officer Hoege that he had not. Considering Hale's slurred speech, his red and glassy eyes, and the odor of intoxicants coming from his breath, Officer Hoege would have been justified in being skeptical and wanting to investigate whether Hale was lying.

WIS. STAT. § 343.303 governs PBT administered in OWI investigations, but it does not preclude an officer from using the tool in other cases. *See State v. Doerr*, 229 Wis. 2d 616, 599 N.W.2d 897 (Ct. App. 1999). When Hale lied to Officer Hoege about drinking nothing, Officer Hoege had enough other evidence (eyes, speech, and odor) to investigate whether Hale was Obstructing an Officer.[3] Thus, the PBT was legally administered.

[3] Had Hale said "a couple" or "a few," then the State could not rely on this argument because a PBT cannot quantify exactly how many drinks a person has had. However, by registering any result on the PBT, the PBT can tell the officer whether or not a person is lying about having zero drinks.

V. Based on the Evidence Solicited at the Hearing, There is Ample Evidence of Probable Cause for Arrest for an OWI Violation and Ample Evidence that Hale was Lawfully Arrested.

Given all the evidence known to Officer Hoege at the moment of the PBT request, outlined in section II *supra*, the PBT refusal, and the field sobriety test refusal, Officer Hoege had probable cause to arrest Hale for an OWI violation. Even if the Court were to disregard the citizen complainant, the PBT refusal, and the field sobriety test refusal, Officer Hoege still had ample evidence that Hale was driving a motor vehicle impaired.

CONCLUSION

For all the foregoing reasons, the State respectfully requests the trial court's decision be affirmed.

Respectfully submitted this 17th day of September, 2018.

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,829 words.

Signed:

_____
Michael X. Albrecht
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of §809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

_____
Michael X. Albrecht
State Bar No. 1085008

APPENDIX

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