RECEIVED
10-12-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

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

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES

Wisconsin Supreme Court

Wisconsin Court of Appeals

Wisconsin Statutes

ARGUMENT

The State's first argument is dispensed with easily. The State claims the defense waived the first issue regarding whether Officer Hoege had the requisite level of probable cause to request the PBT under Wis.Stat. §343.303. The State compares a refusal hearing to a suppression motion or a challenge to the constitutionality of a stop. The State's reliance is misplaced. A refusal is a special proceeding, not a suppression motion, or a challenge to the constitutionality of an officer's actions. see Wis. Stat. §801.01. Under Wis. Stat. §343.305(9), there are three issues at a refusal hearing. The issue at contention here is "whether the officer had probable cause to believe that the person was driving or operating a motor vehicle while under the influence of an intoxicant… and whether the person was lawfully placed under arrest for a violation of Wis. Stat. §346.63(1)."

Under ***Anagnos*** the Court stated "The language of the statute provides that a defendant may also contest whether he was lawfully placed under arrest. As part of this inquiry, the circuit court may entertain an argument that the arrest was unlawful because the traffic stop that proceeded it was not

justified by probable cause or reasonable suspicion." ***In re Refusal of Anagnos,*** 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675. It follows that a Court can entertain an argument that the arrest was unlawful because the officer did not have the requisite level of suspicion to request a PBT, and without the PBT did not have probable cause to believe that the defendant was operating his motor vehicle while impaired. The burden of establishing this issue is upon the plaintiff. The law requires only that the defense timely submit a request for a refusal hearing. Mr. Hale did that here. The issues that can be raised are provided by statute, the defense is not required to provide notice as to which of the three issues is being raised. But for a stipulation to an issue, the law requires the State to prove each.

Furthermore, the defendant clearly argued that based on the evidence adduced, and pointing to ***Rutzinski,*** and Wis. Stat. §343.303, the officer did not have the requisite level of suspicion to request Mr. Hale submit to a PBT. At that moment, the State could have made an objection to the defense's argument, but they did not. They could have requested to reopen the testimony so they could supplement their evidence, but they did not. To suggest that the defense waived this argument is ridiculous. The State is required to establish each

issue under Wis. Stat. §343.305(9). This includes justification for the initial stop or detention up through and including the requisite probable cause under §343.305(9)5.a. The continuum of probable cause also encompasses the requisite level of probable cause to request a PBT, thus it would follow that the State must establish this fact also. The defense specifically argued the officer did not have the requisite level of probable cause to proceed to the PBT. Contrary to the State's contention, this argument was raised, and was not waived.

Additionally, the State attempts to supplement what it believes would have been the evidence on appeal. The State claims that "had testimony been solicited from the officer on this issue, he would have explained that the caller was identified by dispatch as Eric…" Brief of Plaintiff-Respondent, page 15. The State did not elicit testimony. The scope of review by an appellate court is limited to the record on appeal. ***Sills v. Walworth Cty. Land Mgmt. Comm.,*** 2002 WI App 111, ¶36, 254 Wis.2d 538, 648 N.W.2d 878. The State put forth no evidence consistent with that which is referred to in their brief. The scope of review must be confined to the record on appeal.

Based on the evidence in this record, the caller can only be considered anonymous, thus some corroboration is required. The initial call did not suggest alcohol impairment or erratic driving. The caller reported the driver as off, while the officer interpreted that as impaired, he specifically said the caller said "off". (R.21:16/ Rep. App. 1). Thus, the State's claim that the report was the driver was impaired is not accurate, the report was simply Officer Hoege's interpretation of what he heard. Also, the State suggests that the time of day in some way is an indicia of intoxication. Driving around bar time might have significance in terms of potential impairment, the further away from bar time the driving occurred the less significant in terms of potential impairment. See ***State v. Post,*** 2007 WI 60, ¶36, 301 Wis.2d 1, 733 N.W.2d 634. Here, the observations occurred at 2:21 in the afternoon. Contrary, to the State's contention, the relationship of the hour of the day to potential impairment is insignificant, and should not be considered an additional indicia of impairment.

Furthermore, the fact Officer Hoege knew Mr. Hale or that Mr. Hale had injuries on his face adds little to a determination as to whether Mr. Hale might be impaired. However, the injury could have been the cause of Mr. Hale's

slurred speech, glassy eyes and slow movements. Despite the alleged call, and Hoege's observations of Mr. Hale's injuries, Hoege did not call an ambulance to check on Mr. Hale's injuries. (R.21:19/ Rep. App. 3). Further, Hoege testified that Mr. Hale responded normally to his knock on the window, and he observed no problem with Mr. Hale's motor coordination as he sat in the vehicle. (R.21:17/ Rep. App. 2) and (R.21:22/ Rep. App. 4). Without even requesting Mr. Hale to attempt field sobriety tests, once Officer Hoege had Mr. Hale outside the vehicle, he requested a PBT test. (R.21:23/ Rep. App. 5). Mr. Hale declines the request. Contrary to the State's contention, Officer Hoege did not possess the requisite level of suspicion to request said test. This issue is adequately addressed in the Defendant's Brief in chief.

However, the State also contends that the officer could have requested the PBT in the context of an obstructing investigation. The problem with this argument, is that the issue at the refusal hearing is not whether the officer has probable cause to arrest, but whether the officer had sufficient evidence to believe that the driver was operating a motor vehicle while impaired, and whether the person was arrested for a violation of Wis. Stat. §346.63(1). Whether the officer is investigating a

potential obstructing charge is not relevant to whether the evidence is sufficient to meet the issues under Wis. Stat. §343.305(9).

For the reasons stated herein, and for those asserted in the Brief of Defendant-Appellant, Officer Hoege did not possess sufficient suspicion to request Mr. Hale submit to PBT test, and without the refusal to perform the PBT, Officer Hoege did not possess the requisite level of probable cause to arrest Mr. Hale.

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 12th day of October, 2018.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

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 14 pages. The word count is 2190.

Dated this 12th day of October, 2018.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

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 12th day of October, 2018.

Respectfully submitted,

Piel Law Office

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

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 12th day of October, 2018.

Respectfully submitted,

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX

`