COURT OF APPEALS OF WISCONSIN

DISTRICT III

State of Wisconsin,

Plaintiff - Respondent,

v.

Brief of Appellant

Timothy Edward Curtis,

Defendant - Appellant,

Appeal No. 2018-AP-920

Circuit Case No. 2017-CT-20

Appeal of the decision of the

Honorable Kelly J. Thimm,

Douglas County Circuit Court Judge

Submitted by:

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STANDARD OF REVIEW

Whether there was probable cause to arrest is a question of law that is reviewed by the Court of Appeals, independently of the circuit court. State v. Kasian, 207 Wis.2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). An appellate court is not bound by the trial court's findings, and decides the matter *de novo*. City of Muskego v. Godec, 167 Wis.2d 536, 545, 482 N.W.2d 79 (1992). As to findings of fact made by the trial court, those findings shall not be set aside on appeal unless clearly erroneous. Wis. Stat § 805.17(2). To be set aside, the evidence of a contrary finding than that of the trial court must constitute the great weight and clear preponderance of the evidence. Cogswell v. Robertshaw Controls Co., 87 Wis.2d 243, 249, 274 N.W.2d 647 (1979).

STATEMENT OF THE ISSUES

1. Was the arrest of Mr. Curtis supported by probable cause at the time of the arrest by Officer Esler?

The circuit court determined **YES**.

STATEMENT AS TO NECESSITY FOR ORAL ARGUMENT

Undersigned counsel believes that briefing by the parties will not adequately and appropriately develop the theories and legal

authorities cited herein, and this appeal involves mixed questions of law and fact, and therefore respectfully submits that this matter is appropriate for Oral Argument.

STATEMENT AS TO NECESSITY FOR PUBLICATION

Undersigned counsel believes that publication may be appropriate in this matter, as the challenges made by Appellant would further clarify or modify existing law.

STATEMENT OF THE CASE

On February 13, 2017, a Criminal Complaint was filed in Douglas County Circuit Court charging the defendant with four misdemeanors, including Operating While Intoxicated – as a second offense. (R.1). On March 16, 2017, an Amended Criminal Complaint, which added the charge of Operating With a Prohibited Alcohol Concentration as a second offense, was filed. (R.2).

On January 16, 2018, the defendant filed a Motion to Suppress evidence, and a hearing on that motion was held on February 21, 2018. (R.4 and R.21). The court denied the Motion, ruling from the bench, on February 21, 2018. (R.21 at P.48, L.23-24).

Thereafter, Mr. Curtis entered a plea of no contest to Count 1 of the Amended Criminal Complaint, Operating While Intoxicated – as a second offense on April 13, 2018. (R.9) He was sentenced to 60 days in the county jail. (R.14) This appeal followed. (R.16)

STATEMENT OF FACTS

On February 12, 2017, Officer Bradley Esler responded to a report of a hit and run crash in the City of Superior, WI, reported by a citizen witness. (R. 20 p. 6-7). Officer Esler spoke with two

witnesses to the incident. (R. 20 p. 9). One witness to the incident observed a gray truck hit a parked car and then a tree before coming to rest on the snowbank. (R. 20 p. 9). A second witness, who never observed the truck in motion, saw a man step out of the vehicle after coming to rest on the snowbank. (R. 20 p. 9). Officer Esler then made radio contact with Sergeant Poskozim who informed him that he was with the suspected driver of the gray truck, within the vicinity of the crash. (R. 20 p. 8).

Officer Esler then confronted Mr. Curtis, and in the short span of his contact with him, Esler observed Mr. Curtis' eyes to be red, his speech slurred, and detected an odor of an intoxicant. (R. 20 p. 11). At this point, conducting no further investigation, and making no further inquiry, Officer Esler arrested Mr. Curtis for operating a motor vehicle while intoxicated. (R. 20 p. 13). Mr. Curtis was then escorted to the hospital for a blood draw. (R. 20 p. 13).

At the time of the arrest, Officer Esler did not know the defendant's name; that the vehicle was registered to Mr. Curtis; where the vehicle had come from, whether it had come from a bar or not; there was no admission from Mr. Curtis that he had been drinking, what he had been drinking, how long he had been drinking, or how many drinks he had. (R. 20 p. 15-22). (R. 20 p. 30-31). Officer Esler did not perform any standardized field sobriety testing on the defendant. (R. 20 p. 34-35). Officer Esler did not administer a Preliminary Breath Test on Mr. Curtis. (R.20 p. 35). Besides the brief exchange leading up to the arrest of the defendant, Officer Esler did not have any other contact with the defendant. (R. 20 p. 36).

ARGUMENT

The arrest of defendant was not supported by probable cause, therefore any evidence obtained as a result of that arrest is inadmissible against defendant.

The Fourth Amendment to the United States Constitution protects the people "against unreasonable searches and seizures," and enforces this protection by requiring probable cause before an arrest. U.S. Const. Amend IV. The State has the burden of showing that a police officer had probable cause to arrest an individual. State v. Wille, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994).

Probable cause is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior. State v. Higginbotham, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). In determining whether there is probable cause, the Court applies an objective standard, considering the information available to the officer at the time of arrest, and the officer's training and experience. State v. Kutz, 2003 Wi. App. 205, ¶ 12, 267 Wis. 2d 531, 671 N.W.2d 66. *See Id.*

The totality of the circumstances in the present case do not support probable cause to arrest Mr. Curtis, and the State failed to prove otherwise. At the time of arrest, after a very abbreviated investigation, a reasonable officer using common-sense would have seen that, under these circumstances, there were alternative explanations for Mr. Curtis's behavior, and would have used standardized methods of determining probable cause, rather than rushing to an arrest.

Although the courts have provided no definitive list of what may serve as the basis for finding probable cause, a review of their rulings shows common, reoccurring themes. In most cases involving driving while intoxicated, the officers recognized on the defendant the smell of

intoxicating beverages, bloodshot eyes, slurred speech, and/or poor balance. But Courts have never held that these alone are sufficient to establish probable cause.

For example, in Renz, Goss, and Felton, in addition to the above-mentioned indicators, the defendants also failed Standardized Field Sobriety tests (SFSTs) before being arrested. County of Jefferson v. Renz, 231 Wis.2d 293, 296-97, 603 N.W.2d 541, 543 (1999); State v. Goss, 338 Wis.2d 72, 75, 806 N.W.2d 918, 919 (2011); State v. Felton, 344 Wis.2d 483, 486-87, 824 N.W.2d 871, 872-73 (Ct. App. 2012). In Goss and Howes, the arresting officers had knowledge of the defendant's record of drunk driving prior to arresting them. Goss at 75; State v. Howes, 373 Wis.2d 468, 481, 893 N.W.2d 812, 818 (2017). In Lange, Felton, and Babbitt, the officers personally witnessed the defendant driving erratically. State v. Lange, 317 Wis.2d 383, 766 N.W. 2d 551 (2009); Felton at 487; State v. Babbitt, 188 Wis.2d 349, 357, 525 N.W.2d 102, 103-04 (Ct.App.1994). In Felton and Tullberg, the defendants were subject to a lengthy interview by the arresting officer wherein they admitted to drinking before they were arrested. Felton at 103; State v. Tullberg, 359 Wis.2d 421, 430-31, 857 N.W.2d 120, 125 (2014). Additionally, in Wille the defendant stated his consciousness of guilt, in Kennedy the defendant admitted to being the driver of the crashed vehicle, and in Kasian the defendant was found in immediate proximity to the crashed vehicle. State v. Wille, 185 Wis.2d 673, 678, 518 N.W. 325, 327 (Ct. App. 1994); State v. Kennedy, 359 Wis.2d 454, 462, 856 N.W.2d 834, 838 (2014); State v. Kasian, 207 Wis.2d 611, 622, 558 N.W.2d 687, 691 (Ct. App. 1996).

None of these factors are found in the present case. No objective facts were gathered by Officer Esler prior to his arrest of the defendant. Rather, it appears that Officer Esler relied only on his brief subjective

survey of the defendant before he was arrested. Before Mr. Curtis was arrested, the arresting officer had no knowledge of his driving record, did not personally witness his driving, did not spend more than twenty seconds personally observing him, and did not take the time to gain the collective knowledge of the other officers. Mr. Curtis had not admitted to drinking or to being the driver, and he was not in immediate proximity to the crashed vehicle. Never has the Court found probable cause given so little evidence known before the arrest.

Mr. Curtis was also not given any SFST. Concededly, the requirement laid out in Swanson that an SFST be administered before probable cause may be found has been overruled, and Mr. Curtis acknowledges that "Wisconsin has no requirement that police must perform field sobriety tests in order to determine whether probable cause exists that a person is operating a vehicle under the influence of alcohol." Kennedy at 468; *see also* State v. Swanson, 164 Wis.2d at 453-54, 475 N.W.2d 148 n. 6 and Wille at 684. However, Wis. Stat. § 343.303 is governing law, and it provides an officer with an avenue for establishing probable cause when the justification for such is, or ought to be, in doubt. §343.303 allows an officer who has "probable cause to believe" a crime or violation has occurred involving driving while intoxicated to request the person submit to a preliminary breath screening test (PBT), and a positive result can establish probable cause to arrest.

§343.303 was discussed extensively in County of Jefferson v. Renz. The court distinguished between the lower standard of "probable cause to believe" and the higher standard of "probable cause to arrest." The court acknowledged that, however minimal, the officer needs some probable cause to request a PBT. It is difficult to imagine anything more "minimal" than simply appearing intoxicated near an accident. Therefore, since

"probable cause to arrest" is greater than "probably cause to believe," then "probable cause to arrest" must be more than simply appearing intoxicated near an accident. To suggest otherwise would be to hold § 343.303 functionally meaningless, because an officer would always have probable cause to arrest on the mere appearance of intoxication, near an accident.

In the present case, the Circuit Court reasoned that the combination of slurred speech, odor, red eyes, the crashed vehicle, the blood on his person, and the two witnesses to the crash were enough to support probable cause to arrest. (R.20 Pg. 47-48). In so doing, the Circuit Court failed to recognize that all of those factors, aside from the odor, were easily explained by the trauma of the car accident Mr. Curtis was presumed to have just experienced. That leaves only the smell of alcohol as the single strong indicator of intoxication, and as shown above, that alone cannot support probable cause to arrest. Even the Circuit Court acknowledged that "if there's just odor of intoxicants, do you have enough? No." (R.20 Pg. 47).

The Circuit Court also looked to the fact that Mr. Curtis offered his credit card in response to a request for identification. (R.20 Pg. 48). Not only are confusion and mistakes common after a head trauma, but the Circuit Court erred in considering this mistake because Officer Eller's body cam footage clearly shows he only learned of the mistake after the arrest was made and therefore could not have been a factor to finding probable cause.

There was certainly reasonable suspicion, even "probable cause to believe," sufficient to request a PBT or SFST, and had those tests been performed there might have been "probable cause to arrest." But without those tests, and absent any of the other factors used by courts to find

probable cause, probable cause to arrest simply cannot be found in this case.

Moreover, in nearly every case where Standardized Field Sobriety Tests and/or a Preliminary Breath Tests were not administered, and it was found that probable cause supported an arrest, there was some difficulty that prevented administering Standardized Field Sobriety Tests and/or a Preliminary Breath Test. *E.g., see* Wille 185 Wis.2d 673, 677 (where the deputy was dealing with a fatal car accident) and Kennedy 359 Wis.2d 454, 463(where the officer was dealing with an angry crowd and feared for the defendant's safety). No such circumstances existed in this case. Officer Esler simply did not perform either of them. In fact, after Mr. Curtis was arrested, Officer Gothner asks Officer Esler "do you need a PBT?" Officer Esler responds by saying "yeah, if you want to administer that, that would be fine." (R.8 04:15-04:30).

For a case whose facts most closely approximate those of the present case, we refer the court to State v. Anker, 357 Wis.2d 565 (Ct. App. 2014). In Anker, a conservation warden heard over the radio about a car accident and an injured person heading into the woods. The warden drove to the location and waited until the injured person, Anker, was seen exiting the woods. Just as in the present case, Anker appeared intoxicated, near the location of the accident, matching the description given by a witness, bleeding from the head, and was initially less than cooperative, so the warden quickly placed him under arrest and waited for police officers to arrive.

As in the present case, the circuit court denied Anker's motion to suppress, and as it should be in the present case, the Court of Appeals reversed the judgment. In Anker, the State knew that probable cause did not support Anker's arrest, and instead argued that Anker was only merely

detained, consistent with a Terry stop. *See* Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed 889 (1969). When the Court determined Anker was under arrest, and not merely temporarily detained, and because the State failed to contest the asserted lack of probable cause, the Court reversed the circuit court, and found that probable cause did not support his arrest.

Under the exclusionary rule, evidence obtained in violation of the 4th Amendment is generally inadmissible in court proceedings. Mapp v. Ohio, 367 U.S. 643, 655, 81, S. Ct. 1864, 6 L. Ed. 2d 1081 (1961). The exclusionary rule operates as a judicially created remedy designed to safeguard against violations of the 4th Amendment through the rule's general deterrent effect. Arizona v. Evans, 514 U.S. 1, 10, 115, S. Ct. 1185, 131 L. Ed. 34 (1995). Wisconsin has adopted the exclusionary rule and applied it to exclude evidence obtained in violation of the Wisconsin Constitution as well. State v. Scull, 361 Wis. 2d 288, 300, 862 N.W.2d 562 (2015).

CONCLUSION

For the foregoing reasons, the circuit court erred in its decision, and accordingly its decision should be reversed. Judgment of conviction of plaintiff-appellant Timothy Curtis should be vacated, and the motion to suppress should be granted, and the case should be remanded to the Circuit Court for further consideration.

Dated this 23rd day of July, 2018

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(b) and (c)

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 monospaced font. The length of this brief is 13 pages and 2,489 words.

Signed: _____ Nathan M. Cockerham, State Bar No. 1067913

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 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.

Signed: _____ Nathan M. Cockerham, State Bar No. 1067913