COURT OF APPEALS OF WISCONSIN

DISTRICT III

STATE OF WISCONSIN,

Plaintiff - Respondent,

v.

REPLY BRIEF

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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Attorneys for the Defendant, Appellant

By

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The State has argued that Officer Esler had probable cause to arrest Timothy Curtis based on the totality of the circumstance. (Brief of Respondent p.8). It cites County of Dane v. Sharpee that "in determining probable cause, the courts will look at the totality of the facts and circumstances the officer obtained at the time of arrest to determine whether probable cause exists that the defendant committed a crime." 154 Wis.2d 515, 518, 453 N.W.2d 408 (Ct.App.1990)(italics added). Mr. Curtis contends that Officer Esler failed to gather enough evidence in his brief 20-second encounter with the appellant to support probable cause prior to arrest.

The State correctly states that "factors have been laid out by the courts that officers can use to help determine whether probable cause exists," but fails to show a case where the court found probable cause with so few factors as in the present case. (Brief of Respondent p.5). In fact, each case cited by the State is distinguishable in its facts and holding from this case.

In articulating "factors," the State first cites State v. Wille, where the odor of intoxicants was used as a factor in determining probable cause for arrest. 185 Wis.2d 673,678, 518 N.W.2d 325, 327 (Ct.App.1994). The State ignores that in Wille, the arresting officer also heard the defendant make an admission of guilt prior to the arrest. Id.

The State next cites State v. Dunn which used the defendant's slurred speech combined with the odor of intoxicants as factors, but ignores that in Dunn, the defendant was also found physically inside the vehicle whereas in this case the appellant was a block away from the vehicle. 158 Wis.2d 138, 144, 462 N.W. 538, 540 (Ct.App.1990). Dunn also involved a "profane and prolonged refusal to cooperate" and an "irrational denial of the odor of intoxicants." Id. at 146, 541 (italics added).

In this case, the State has claimed Mr. Curtis was uncooperative. All Mr. Curtis did in his 20-second encounter with Officer Esler prior to arrest was deny knowing what had transpired, deny owning a truck, and refuse medical treatment. There was no profane or prolonged refusal to cooperate, nor an irrational denial of the odor of intoxicants, as there was in Dunn. In fact, Officer

Esler never even mentioned or questioned Mr. Curtis about an odor of intoxicant during his brief 20 second interview.

The State next cites State v. Lange which uses the manner in which the defendant was driving as a factor, but ignores that unlike the present case, the arresting officers in Lange personally witnessed the defendant's driving. 317 Wis. 2d 383, 389-90, 766 N.W.2d 551, 553-54 (2009). In this case, the officer relied instead on witness statements, and hastily decided the witness was right and the appellant was lying.

Also in Lange, the officer was prevented from gathering more factors to support probable cause because the defendant was unconscious after the accident. Id. Nothing prevented Officer Esler from gathering more evidence. Officer Esler eventually learned, through very little effort, Mr. Curtis' identity, and that the crashed white truck was registered to Mr. Curtis. However, prior to his arrest, Mr. Curtis was present, conscious, and available for questioning. In fact, he was being questioned by other officers before Officer Esler interceded. The vehicle in question was idle on the same city block where Mr. Curtis was being questioned.

Lastly, the State cites State v. Pfaff which uses the fact of a one-vehicle accident as a factor, ignoring that the officer in Pfaff was prevented from gathering more factors to support probable cause because the defendant was strapped to a long board receiving emergency medical attention. 269 Wis. 2d 786, 792-93, 676 N.W.2d 562, 564-65 (Ct.App.2009). Also in Pfaff, the officer was able to determine the defendant was lying about the facts surrounding the accident because she was a certified accident reconstructionist, not just relying brief citizen witness statements, as did Officer Esler in the present case.

The State notes that officers "are not required to stop seeking probable cause because common indicators are not present." (p.6). Mr. Curtis does not argue that law enforcement is required to stop seeking probable cause, he argues they are required to continue seeking probable cause until it is found, which did not happen in this case. The State also notes that Mr. Curtis "does

not get to choose how he is investigated." (p.8). Mr. Curtis does not claim a right to choose how he is investigated, only that the investigation be sufficiently thorough to find probable cause to arrest him, which in this instance would have required more substance than was gleaned during Officer Esler's 20-second interview.

The State cites State v. Griffin that "probable cause is a common-sense determination." 220 Wis.2d 371, 386, 584 N.W.2d 127 (Ct.App.1998). Common sense tells us that Officer Esler should have first identified the driver and checked the registration of the crashed vehicle before an arrest. Common sense tells us that under these circumstances, standardized field sobriety tests and a preliminary breath test were both feasible and appropriate, and would have aided Officer Esler in his investigation. In fact, Officer Esler later offered a preliminary breath test to Mr. Curtis, but only after he had already been arrested.

One would expect that an officer using common sense to use more than a 20 second discussion to investigate other obvious alternative explanations for slurred speech, red eyes, and refusal to receive medical attention, such as the trauma and shock of just having been in a car accident. At the very least, it would have "sensible" for Officer Esler to have conferred with the other officers who had been speaking to Mr. Curtis for a longer period of time before arresting him.

Moreover, Officer Esler did not feel it was worth his time to attempt the "complicated" exercise of field sobriety tests with someone who had refused simpler requests. (Brief of Respondent p.8). It is uncertain what these "simpler requests" were. In his brief 20-second interview, Officer Esler asked the appellant if he knew what happened, if he owned a truck, if he knew he was a police officer, and verified he was refusing medical treatment. Although Officer Esler did not like the responses, the appellant answered each question promptly and calmly. There was no justifiable reason not to continue his investigation and to seek sufficient evidence to support probable cause to arrest.

The State does not directly respond to the defendant's argument that Wis. Stat. §343.303 and County of Jefferson v. Renz establish that "probable cause to arrest" must be more than "probable cause to believe," and therefore must be more than appearing intoxicated in proximity to an accident. (see Brief of Appellant, p.9-10). "An argument to which no response is made may be deemed conceded for purposes of appeal." Hoffman v. Economy Preferred Ins. Co., 232 Wis.2d 53, 60, 606 N.W.2d 590, 594 (Ct.App.1999).

Conclusion

Courts rely on the general deterrent effect of the exclusionary rule to prevent abuses of power by the police. Were the Court to find probable cause existed in this case, it would grant police excessively wide discretion in making an arrest for driving while intoxicated. It would be functionally eliminating the statutory distinction between "probable cause to believe" and "probable cause to arrest," an issue conceded by the State, and would nearly eliminate the need to ever use a preliminary breath test or standardized field sobriety tests. Therefore, the Court ought to find that the circumstances of the present case did not rise to the level necessary to support probable cause to arrest the appellant.

Dated this 11th day of September, 2018

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CERTIFICATION 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 produced with proportional serif font. The length of this brief is five (5) pages and 1265 words.

Signed: /s/ Nathan M. Cockerham Electronically Signed Nate 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, 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: /s/ Nathan M. Cockerham Electronically Signed Nate M. Cockerham, State Bar No. 1067913