

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2018 AP 000951CR
Winnebago County Circuit Court Case Nos. 2017CT000846

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE J. KAIN,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT-APPELLANT'S
MOTION FOR SUPPRSSION OF EVIDENCE, IN
WINNEBAGO COUNTY, THE HONORABLE SCOTT C.
WOLDT, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT JESSE J. KAIN

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STATEMENT OF THE ISSUES

Did Officer Mulroy have the requisite level of probable cause to request a PBT and subsequently arrest Mr. Kain?

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, Jesse J. Kain (Mr. Kain) was charged in the County of Winnebago, with having operated a motor vehicle with operated a motor vehicle with a prohibited alcohol concentration while subject to an order under Wis. Stat. §343.301 contrary to Wis. Stat §346.63(1)(b). On December 6, 2017, Mr. Kain, by counsel, filed a motion for suppression of evidence challenging the officer's probable cause to request to arrest. A hearing on said motion was held on January 3, 2018, the Honorable Scott C. Woldt, Judge, Winnebago County, presiding. The Court denied said motion orally on the above date. A written order was entered on May 16, 2018. (R.33:1/App. 1).

A trial by jury was held on April 3, 2018. The jury found Mr. Kain guilty of the charge. The Court imposed a sentence including jail, revocation of license and a fine.

Mr. Kain timely filed a Notice of Intent to Pursue Post-Conviction relief on April 18, 2018, and timely filed a Notice of Appeal on May 18, 2018.

Facts in support of this appeal were adduced at the motion hearing held on January 3, 2018, and were introduced through the testimony of City of Neenah Police Officer Zach

Mulroy. Officer Mulroy testified that he was a two and one half year veteran with the Neenah Police Department. (R.39:4/ App. 2). He testified he attended the police academy and was trained in Standardized Field Sobriety testing. (R.39:5/ App. 3).

Mulroy testified that he was employed and working in his capacity as an officer on August 21, 2017. At 10:55 p.m., Officer Mulroy ran a license plate, and the registered owner had an active warrant through the City of Menasha Police Department. (R.39:6/ App. 4). Furthermore, the registered owner came back as Mr. Kain. *Id.* Prior to conducting the traffic stop, Mulroy ran Mr. Kain's driving record, and found Mr. Kain had a revoked driving status, but a valid occupational license. (R.39:7-8/ App. 5-6). Mulroy conducted a traffic stop on Mr. Kain's vehicle. Upon contacting Mr. Kain, Mulroy observed an "odor of alcohol" coming from the vehicle. (R.39:9/ App. 7). However, Mulroy acknowledged that there was a passenger in the vehicle. *Id.* Mulroy asked Mr. Kain if he had been drinking that evening, and Mr. Kain responded "no". (R.39:10/ App. 8). Mr. Kain was operating his motor vehicle within the proper hours. *Id.*

When backup arrived, the officers requested Mr. Kain exit the vehicle. At the rear of the vehicle, Mulroy told Mr. Kain about the active warrant. (R.39:11/ App. 9). Mr. Kain was unaware of the warrant, however, Mulroy placed Mr. Kain in custody. *Id.* Mulroy noticed that Mr. Kain was chewing gum, and Mulroy observed an odor of intoxicant as he handcuffed Mr. Kain. *Id.* Mr. Kain denied drinking at first, but upon additional questioning, admitted to finishing his friend's drink. (R.39:12/ App. 10). Officer Mulroy then arrested Mr. Kain on the alleged warrant, and placed him in the rear of his squad car. *Id.* Mulroy further reviewed Mr. Kain's driving record, and learned that Mr. Kain was subject to a .02 restriction. Mulroy confronted Mr. Kain with the .02 restriction information, and subsequently requested Mr. Kain to submit to a preliminary breath test (PBT). *Id.* Mr. Kain explained that he just used his IID (Ignition Interlock Device) to start his truck, he told the officer he has to blow zero alcohol concentration, and thus there is no way he could have alcohol in his system. *Id.* Mr. Kain refused to submit to a PBT. Mulroy testified that he did not recall if he looked into Mr. Kain's vehicle to determine if there was a functioning IID in the vehicle. (R.39:20/ App. 13).

Mulroy testified that he did not request Mr. Kain to perform field sobriety tests, because he did not feel that Mr. Kain was impaired. (R.39:13/ App. 11). Mulroy transported Mr. Kain to the hospital for a legal blood draw, read to him the Informing the Accused form, and requested Mr. Kain to submit a sample of his blood for chemical testing. *Id.* Mr. Kain refused chemical testing. (R.39:14/ App. 12).

On cross examination, Mulroy acknowledged he observed no signs of impairment.

The State argued that Officer Mulroy possessed specific probable cause that Mr. Kain operated a motor vehicle with a prohibited alcohol concentration (PAC) (.02). The defense disagreed arguing that there were no signs of impairment observed, and nothing suggesting .02 means absolute sobriety. (R.39:21/ App. 14). The Court found that the officers had the requisite level of probable cause to believe that Mr. Kain operated a motor vehicle with a PAC and that Mulroy had the requisite level of suspicion to request Mr. Kain submit to a PBT (R.39:22-23/ App. 15-16). An Order denying Mr. Kain's motion was filed on May 16, 2018. A jury trial found Mr. Kain guilty of the charge on April 3, 2018. Mr. Kain appeals from the judgment of conviction, and specifically from the Order of the

Court denying his motion. Mr. Kain timely filed a Notice of Appeal on May 18, 2018.

STANDARD OF REVIEW

Under Wis. Stat. §343.303, an officer must possess probable cause to believe that a motorist was operating a motor vehicle under the influence of an intoxicant to administer a PBT. In determining whether an officer had “probable cause to believe”, the Court looks at the totality of the circumstances known to the officer at the time the PBT was administered, in light of the officer’s training and experience. See *State v. Kutz*, 2003 WI App. 2005, ¶¶11-12, 267 Wis.2d 531, 671 N.W.2d 660. An appellate court will uphold a lower court’s finding of fact unless clearly erroneous, *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999) but whether those facts rise to the level of “probable cause to believe” is a question of law that is reviewed de novo. *Id.*

ARGUMENT

OFFICER MULROY DID NOT POSSESS THE REQUISITE LEVEL OF SUSPICION TO REQUEST A PBT AND DID NOT HAVE PROBABLE CAUSE TO ARREST MR. KAIN

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 with a prohibited alcohol concentration. (Here, the officer was aware that Mr. Kain was subject to a .02 alcohol standard, so prior to requesting a PBT, the officer needed probable cause to believe that Mr. Kain was operating his motor vehicle with a prohibited alcohol concentration.) See *State v. Goss*, 2011 WI 104, ¶28, 338 Wis.2d 72, 806 N.W.2d 72, 806 N.W.2d 918. “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). “Probable cause exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe...that the defendant was operating a motor vehicle” with a prohibited alcohol concentration. ” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). The standard is an objective one. See *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis.2d 531, 671 N.W.2d 660. “The question of probable cause must be assessed

on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a ‘flexible, common-sense measure of the plausibility of particular conclusions of human behavior.’” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis.2d 383, 766 N.W.2d 551.

Where a defendant is “subject to a .02 alcohol standard, the officer knows it would take very little alcohol for the driver to exceed that limit, and where the officer smells alcohol on the driver” the Court has held that there is probable cause to request a PBT. *State v. Goss*, 2011 WI 104, ¶28, 338 Wis.2d 72, 806 N.W.2d 72, 806 N.W.2d 918.

However, the facts in *Goss* are distinguishable from those herein. In *Goss*, the officer stopped Mr. Goss, for a dirty license plate and broken license plate light. *Goss* at ¶1. Goss was arrested because he was operating with a revoked license. Subsequent to the stop, the officer determined that Goss was subject to a .02 alcohol concentration requirement. While arresting Goss, the officer observed an odor of intoxicant coming from Goss, and thus requested a PBT. Goss consented and the resulting PBT showed an alcohol concentration of 0.084%. *Goss* at ¶¶3-4. Goss was not under an IID order, nor was there a functioning IID in his vehicle.

Here, Mr. Kain's vehicle was equipped a functioning ignition interlock device. In fact, Mr. Kain explained to the officer that he blew into the device minutes earlier, and the reading showed zeros. Mr. Kain further explained to the officer that had the reading shown any alcohol, that his vehicle would not have started. While Officer Mulroy could not remember if he observed the device in Mr. Kain's vehicle, there is nothing in the record that would suggest that Mr. Kain's explanation to Officer Mulroy was inaccurate.

In determining probable cause to request the PBT, and probable cause to arrest, the Court looks to the totality of the circumstances. Here, using the totality of the circumstances analysis, the fact that Mr. Kain was using a functioning ignition interlock device diminishes the officer's conclusion that Mr. Kain was probably over .02. Had Mr. Kain had any alcohol in his system, his vehicle would not have started. Because of the above, the facts herein are distinguishable from those in *Goss*, and thus Officer Mulroy did not have probable cause to request the PBT or probable cause to arrest Mr. Kain.

CONCLUSION

Because of the above, the trial court erred in denying the defendant's motion for the suppression of evidence. The Court should vacate the judgement of conviction and reverse the order denying Mr. Kain's motion.

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 17 pages. The word count is 3076.

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