

STATE OF WISCONSIN
COURT OF APPEALS OF WISCONSIN
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 18 AP 1167

COUNTY OF DUNN,

Plaintiff-Respondent,

Vs.

CASHE L. NEWVILLE,

Defendant-Appellant.

Plaintiff-Respondent's Brief

Appealed from the Circuit Court of Dunn
County, Wisconsin

Honorable Rod W. Smeltzer, Branch II,
presiding

Dunn County Case #17TR1318

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STATEMENT OF THE CASE

On February 17, 2017, around 10:40 P.M., Defendant-Appellant Cashe Newville (hereinafter "Newville") was driving westbound on Highway 12 in Dunn County, Wisconsin. (R. 42:4-5, 17). Deputy Brandon Scott of the Dunn County Sheriff's Office was on routine patrol travelling eastbound on Highway 12. (R.42: 3-4). Deputy Scott measured the speed of Newville's vehicle as the vehicles were approaching each other at 47 mph in a 55 mph zone by use of radar. After the vehicles passed by each other Deputy Scott observed that Newville's rear registration lamp was out. (R. 42:17-18). Scott turned his vehicle around and began to follow Newville's vehicle. At that point Deputy Scott observed Newville's vehicle's speed varied between 40 and 47 mph which raised Deputy Scott's suspicion. (R. 42:5, 5). Newville's vehicle turned on to 690th Avenue. Deputy Scott observed Newville's

vehicle operating over the center of the roadway multiple times. (R. 42:5-6, 23).

Deputy Scott initiated a traffic stop. Deputy Scott spoke to Newville and asked him about his slower than normal speed. Newville stated that Deputy Scott's headlights were bothering him. Scott determined that Newville had not been taking the most direct route to his home which was where he was heading. (R.42:6-7, 22). Deputy Scott asked Newville about the vehicle not being registered. Newville stated that the person who had sold him the vehicle was not the actual owner of the vehicle. (R. 42:8, 16). Deputy Scott asked Newville to exit the vehicle. As he did so Deputy Scott observed a torch lighter in the driver's side compartment. (R. 42:8, 2). Deputy Scott was aware that torch lighters are an item which is commonly used in the use of methamphetamine. Deputy Scott asked Newville about prior drug use. Newville stated that he was reporting to jail that

Sunday on a charge of possession of a methamphetamine pipe. (R. 42:8, 13).

Newville stated that he had last used methamphetamine two months prior. (R. 42:8, 18). Deputy Scott then had Newville perform field sobriety tests. First, Deputy Scott asked the defendant to stick out his tongue. Deputy Scott observed that he had a yellow film on the back of his tongue. Based on Deputy Scott's training and experience this is a possible indication of methamphetamine use. (R. 42:9, 8). Although Deputy Scott was not a drug recognition evaluator, he was familiar with the Romberg test. During this test Deputy Scott asked Newville to tilt his head back, close his eyes, and indicate once he had estimated when 30 seconds has passed. On his first attempt Newville estimated 30 seconds in 3 seconds. Deputy Scott asked him to explain how he had done that and Newville stated that he counted to ten really fast. Deputy Scott clarified the instructions and had Newville attempt the

test again. On his second attempt Newville estimated 30 seconds in six seconds. (R. 42:10-11, 18). Newville then passed the HGN test. Deputy Scott then had Newville perform the walk and turn test. During that test Deputy Scott noticed four clues. Newville started the test before the instructions were finished, despite being advised not to, he could not keep his balance while listening to the instructions, he used his arms for balance and he took too many steps. (R. 42:12-13, 12). Newville passed the one-leg stand test. Newville failed to recite the alphabet correctly. (R.42:13, 18). Newville was asked to count the numbers 54 backwards to 36. He did not successfully complete that test (R.42:14, 4). Deputy Scott testified that he has observed people under the influence of alcohol or controlled substances numerous times during the course of his duties and that he had an opinion that the defendant was under the influence. (R.42:14, 12).

Newville provided a PBT sample which showed that he had not consumed alcohol. Deputy Scott asked Newville again when he had last used methamphetamine and if he took a blood test what the results would show. Newville then changed his story and stated that he had smoked methamphetamine a week prior and admitted that it would show up in his blood. (R.42:15, 2). Newville was then advised that the blood test would not be positive based on use which was a week prior. Newville then again changed his story about when he had last used to five days prior and again admitted that his blood test would be positive for methamphetamine. (R.42:15, 11). Deputy Scott then placed Newville under arrest.

ARGUMENT

- I. NEWVILLE DID NOT FORFEIT HIS RIGHT TO APPEAL THE CIRCUIT COURT'S DENIAL OF HIS MOTION TO SUPPRESS BY ENTERING A PLEA OF NO CONTEST TO THE CITATION**

The Respondent agrees with the Appellant that he has not forfeited his

right to appeal and agrees with the arguments made in his brief. It would have been a waste of judicial resources in this case to proceed to trial simply to preserve the suppression issue for appeal.

II. THE CIRCUIT COURT CORRECTLY DENIED APPEALLANT'S MOTION TO SUPPRESS EVIDENCE OF HIS BLOOD TEST FROM USE AT TRIAL.

A. Standard of Review.

The Appellate Court applies a two-step standard of review when reviewing a motion to suppress evidence. See *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. First, the circuit court's findings of fact are upheld unless clearly erroneous. Next, the circuit court's application of constitutional principles is reviewed de novo.

B. The Police Officer had reasonable suspicion to investigate impaired driving at the time he stopped the vehicle.

Deputy Scott had several reasons for stopping Newville's vehicle. The vehicle was traveling slower than the speed limit

which can be an indicator of impaired driving. The Deputy measured the defendant's vehicle's speed by radar at 47 as the vehicle approached, and noted that the defendant's speed varied between 40 and 47 after Deputy Scott began to follow the vehicle. The vehicle's license plate lamp was burned out. The vehicle crossed the center of the roadway multiple times. Not only did these traffic violations justify stopping the vehicle, they raised a reasonable suspicion that Newville was operating under the influence. The observations that the defendant had been traveling left of center and slower than the posted speed limit raised a reasonable suspicion that the defendant had been operating under the influence. In *State v. Popke* 317 Wis.2d 118, 765 N.W.2d 569 (2009) the Supreme Court upheld a traffic stop as reasonable where the defendant had crossed the center of the road and then swerved back to his lane but over overcompensated and

nearly struck the curb. The Supreme Court ruled that the defendant's operating left of center not only gave the police officer probable cause to believe a traffic code violation had occurred, namely operating left of center, but also reasonable suspicion to believe that the defendant was operating a motor vehicle while intoxicated. This was also true in our case. When Deputy Scott stopped Newville's vehicle he had reasonable suspicion that Newville had been operating while impaired. Therefore, it was not necessary to have additional facts to expand the scope of the traffic stop. When Deputy Scott observed the torch lighter he suspected that it may be an item used in methamphetamine use. He also learned that Newville had not been traveling the most direct route home. At that point Deputy Scott began to suspect that the impairment that he had witnessed might be due to methamphetamine. It was reasonable for Deputy Scott to inquire about drug use.

Newville stated that the last time he had used drugs was two months prior. (R. 42:8, 18). While use two months prior would not cause impairment on the day of this incident, the defendant's admission to having previously used methamphetamine was additional evidence which supported probable cause. Because controlled substances are addictive persons who have been a user are more likely to still be a person who is actively using. That admission combined with the presence of the torch lighter bolstered Deputy Scott's suspicion of drug use and justified continuing the investigation.

**1. THE APPEARANCE OF THE TONGUE IS NOT A
SUBJECT OF FOURTH AMENDMENT
PROTECTION.**

There is no reasonable expectation of privacy in the appearance of a person's tongue. Courts have consistently held that no one can reasonably expect that his or her physical characteristics will remain a secret. In *State v. Wilks*, 121 Wis.2d 93,

358 N.W.2d 273 (1984) the Wisconsin Supreme Court held that a person who is in custody may be compelled to participate in a lineup. Citing *Katz v. United States* 389 U.S. at 351, 88S.Ct., at 511 the Court stated:

"The Fourth Amendment provides no protection for what a person knowingly exposes to the public, even in his own home or office...The physical characteristics of a person's voice, its tone and manner, ...are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id.* At 14, 93 S. Ct. at 771. *Wilks* 121 Wis.2d at 104, 358 N.W.2d at 279.

In *State v. Gonzalez*, 359 Wis.2d 1, 856 N.W.2d 580 (2014) the Wisconsin Supreme Court upheld a compelled exposure of the defendant's teeth to the jury over the objection of defense counsel. In *Gonzalez* the defendant had platinum teeth. A witness testified that the person who assaulted him had platinum teeth. During the testimony of that witness the court ordered in front of the jury that the defendant "display his

teeth". On appeal the Supreme Court denied a challenge to this evidence which claimed that it violated the right against self-incrimination. The Supreme Court found that there was no violation, as the appearance of one's teeth is physical evidence and does not have a testimonial aspect. As such, a defendant may be ordered by the court to display his teeth to the jury. The court stated that there is no prohibition to compelled exhibition of physical characteristics. The Supreme Court in footnote twelve cited to State v. Babbitt 188 Wis.2d 349, 525 N.W.2d 102 (Ct. of Appeals 1994). In Gonzalez the court stated:

"...his teeth are not different from other non-testimonial physical evidence, such as tattoos, scars, muscular arms, teeth and results of an in-court test of defendant's eyes...Gonzalez 359 Wis.2d at 587.

In Babbitt the Court of Appeals held that evidence of physical acts during field sobriety tests was not testimonial. The Court of Appeals thus held that Babbitt's

refusal to submit to field sobriety tests can be used against him when determining whether probable cause to arrest exists. The Court also found that field sobriety tests are not testimonial in nature and not protected by the Fifth Amendment. Babbitt 188 Wis.2d at 361. In our case, Deputy Scott requested that the defendant stick out his tongue and the defendant did so. This is no different than requesting the defendant perform other field sobriety tests such as the HGN test. Requesting a person to stick out their tongue is no more intrusive than requesting them to move their eyes back and forth so that the officer can look for nystagmus. There is also no expectation of privacy in the appearance of one's eyes or tongue and therefore no Fourth Amendment violation.

C. The Police Officer did have Probable Cause to Conduct a Preliminary Breath Test.

Deputy Scott had ample evidence to request a PBT. The defendant's driving left

of center multiple times, his driving at a slower speed, his choice to travel home by an indirect route, the presence of the torch lighter, the defendant's admission to prior methamphetamine use, the yellow film on his tongue, his failure of the Romberg test, his failure of the walk and turn test, his failure of the alphabet test, and his failure of the counting test provided sufficient probable cause. Deputy Scott is not a drug recognition expert, however he has observed persons under the influence of intoxicants including controlled substances in the course of his duties numerous times and in his opinion Newville was impaired. Newville's counsel wants to completely discount a number of the tests because they are not standardized or because Deputy Scott is not a drug recognition examiner. In *City of West Bend v. Wilkens* 278 Wis.2d 643, 693 N.W.2d 324 (Ct. of Appeals 2005), the court stated that field sobriety tests (FSTs) are not "scientific tests." They are merely

observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication, the perception of which is necessarily subjective. Moreover, it is not beyond the ken of the average person to understand such indicia and to form an opinion about whether an individual is intoxicated. Wilkens 278 Wis.2d at 645. Further, the court rejected the proposition that following the standardized procedures that NHTSA recommends leads to scientifically valid determinations. The court stated that the mere fact that the NHTSA studies attempted to quantify the reliability of FSTs in predicting unlawful blood alcohol contents does not convert all of the observations of a person's performance into scientific evidence. A police officer's observations of FST performance should be placed in the same category as other commonly understood signs of impairment. Ordinary individuals are readily familiar with the manifestations

of impairment. The Romberg test is one commonly used by a DRE. Newville's counsel wants to discount it completely because Deputy Scott had no qualifications to administer it properly. Asking a person to close their eyes and estimate the passing of thirty seconds is not a complicated test to administer. The defendant's performance on that test was so woeful that it's evidentiary value as to impairment is readily apparent. Similarly, being unable to recite the alphabet or count backwards between two numbers is evidence of impairment, despite the fact that they are not the standardized tests. These are commonly used tools used by officers to gauge impairment. In our case, Deputy Scott had made numerous observations which taken together provided probable cause to request the PBT.

D. The Police Officer did have Probable Cause to Arrest.

In addition to the evidence that Deputy Scott had to request a PBT, he obtained

additional statements from Newville prior to arresting him. Newville gave two additional dates that he had last used methamphetamine. The fact that Newville changed his story about when he had last used was evidence of consciousness of guilt. He would have no need to lie about when he had last used unless he had used recently. Further, Newville twice admitted that a blood test would show positive for methamphetamine. Those admissions taken together with all the other evidence provided probable cause to arrest for both operating with a detectible amount of restricted controlled substance and operating under the influence of drugs.

CONCLUSION

For the foregoing reasons, the arrest of Newville was lawful and his appeal should be denied.

Dated this 27th day of November, 2018.

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ELECTRONIC CERTIFICATION

Pursuant to Wis. Stats. 809.19(12f), I
hereby certify that the text of the electronic
copy of the brief is identical to the text of
the paper copy of the brief.

Dated this 17th day of December, 2018.

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CERTIFICATION

I certify that this brief conforms to the rules contained in s.809.19(8) (b)&(c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; 2 inch margin on left and right side and 1 inch margins on the other 2 sides. The length of this brief is 21 pages.

Dated this 17th day of December, 2018.

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