STATE OF WISCONSIN :COURT OF APPEALS DISTRICT I

In Re the Matter of the Refusal of James M. Gregg:

CITY OF WEST ALLIS,

Plaintiff-Respondent,

v.

Appeal No. 18-AP-1326

JAMES M. GREGG,

Defendant-Appellant. Milwaukee County Circuit Court Case Number 17-TR-26646

ON NOTICE OF APPEAL TO REVIEW A REFUSAL FINDING AND ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEAN MARIE KIES PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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CORRECTED STATEMENT OF THE ISSUES PRESENTED

1. Did the arresting officer have probable cause to arrest Mr. Gregg, rendering unreasonable his subsequent refusal to submit to an evidentiary chemical test?

    Circuit Court's answer: Yes.

In its brief, the City correctly observes the embarrassing error in Mr. Gregg's initial brief. As the remainder of Mr. Gregg's brief makes clear, the circuit court actually held that Officer Kaye's arrest of Mr. Gregg was supported by probable cause, rendering unreasonable his subsequent refusal to submit to an evidentiary chemical test.

ARGUMENT

The City argues that Mr. Gregg obscures "the distinction between a probable cause hearing and a refusal hearing requiring a showing of 'probable cause to believe.'" (City's Br. 3). The City asserts that Mr. Gregg's initial brief "conflates the two different burdens from two different types of proceedings and thereby confuses the issues and correct requirements at a refusal hearing." (Id.)

While the City correctly observes that Mr. Gregg's initial brief does not acknowledge such a distinction, in its brief the City errs in the other direction. Pursuant to Wis. Stat. § 343.305(9)(a)5, the issues at a refusal hearing are limited to those listed in the three subsections that

immediately follow in the statute. The first such subsection is unreasonably long and unwieldy:

> Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a controlled substance analog or any combination of alcohol, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders the person incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of safely driving, having a restricted controlled substance in his or her blood, or having a prohibited alcohol concentration or, if the person was driving or operating a commercial motor vehicle, an alcohol concentration of 0.04 or more and whether the person was lawfully placed under arrest for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09(1) or 940.25.

Wis. Stat. § 343.305(9)(a)5.a. This 154-word passage is often shortened or summarized in opinions and briefs. *See*, *e.g.*, *State v. Wille*, 185 Wis. 2d 673, 679, 518 N.W.2d 325, 327 (Ct. App. 1994) ("whether the officer had probable cause to believe that the person was driving under the influence of alcohol"); *State v. Nordness*, 128 Wis. 2d 15, 26, 381 N.W.2d 300, 304-05 (1986) ("whether the arresting officer had probable cause to believe the defendant was driving a motor vehicle while under the influence of alcohol."); (City's Br. 2) ("Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol . . ."); (Mr. Gregg's Br. 3) ("'[w]hether the officer had probable cause to believe the person was

driving or operating a motor vehicle while under the influence of alcohol.").

In *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675, the Supreme Court of Wisconsin acknowledged that it too had previously "used shorthand to summarize the issues that are enumerated in the refusal hearing statute." ¶ 38. The result of this common shortening is the omission of the phrase "whether the person was lawfully placed under arrest" for violation of an OWI-related statute. *See id*., ¶ 39. In *Anagnos*, the Supreme Court of Wisconsin clarified that the issues that can be raised at a refusal hearing include "whether the person was lawfully placed under arrest." ¶ 40.

And what makes an arrest lawful? Probable cause, of course. *See State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387, 392 (1999). "Probable cause is the sine qua non of a lawful arrest." *State v. Drogsvold*, 104 Wis. 2d 247, 254, 311 N.W.2d 243, 246 (Ct. App. 1981). Probable cause is an "absolute requirement" that is "derived from the [F]ourth [A]mendment." *Id*. In *Drogsvold*, this Court reversed a trial court order suppressing the defendant's statements in a criminal case on the grounds that they were tainted by an unlawful arrest. *Id*. at 250, 311 N.W.2d at 245. This Court's formulation of what constitutes probable cause in that situation was later cited by this Court in *Village*

of Elkhart Lake v. Borzyskowski, 123 Wis. 2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985), the same decision on which the City later urges this Court to rely, and which the City emphasizes dealt with a refusal hearing (City's Br. 6-7).[1]

In short, the distinction to which the City devotes most of its brief, even if relevant in the past, has been effectively eliminated in this context by the Supreme Court of Wisconsin in *Anagnos*. The issue in the present case is whether Officer Kaye's arrest of Mr. Gregg for Operating While Intoxicated was supported by probable cause to believe that he had operated a motor vehicle while under the influence of an intoxicant, the same issue considered at a suppression hearing where probable cause to arrest is at issue. *See Borzykowski*, 123 Wis. 2d at 189, 366 N.W.2d at 508.

The City also asserts that Mr. Gregg's reliance on *Village of Cross Plains v. Haanstad*, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, is misplaced. (City's Br. 5). This is so, the City argues, "because the Court in *Haanstad* was reviewing Ms. Haanstad's operation of a motor vehicle

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[1] The City notes that "the refusal hearing is not a forum for the 'trial court to weigh the evidence between the parties.'" (City's Br. 4). This is correct, of course. The forum for the trial court to weigh the evidence between the parties was the trial held at the City of West Allis Municipal Court, where Mr. Gregg was found not guilty of Operating While Intoxicated. (R1).

in the context of a court trial rather than in the context of a refusal hearing." (City's Br. 5). But *Haanstad* is the Supreme Court of Wisconsin's most significant decision regarding the definition of "operate" this century. The lens through which the court in *Haanstad* considered the statutory definition of "operate" was different from that of the present case, but the City does not explain why the definition of "operate" under Wis. Stat. § 346.63(3)(b) would change depending on whether the proceeding in question is a bench trial or a refusal hearing.

Notably, the City does not address, let alone contest, Mr. Gregg's argument in his initial brief that this Court should interpret the definition of "operate" in Wis. Stat. § 346.63(3)(b) to exclude the *deactivation* of any controls necessary to put a motor vehicle into motion. In fact, the City does not cite the statutory definition of "operate" at all.

The City then cites *Borzyskowski* for the premise that "a reasonable officer would have probable cause to believe the person in the driver's seat of a running car was operating a motor vehicle by leaving that vehicle running or restraining its movement, both constituting 'operation' of a motor vehicle." (City's Br. 7). But that portion of *Borzyskowski* relied on *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), for that premise, and the

Supreme Court of Wisconsin explicitly repudiated that interpretation of *Proegler* as taking its language out of context in *Haanstad*. *See Haanstad*, ¶¶ 17-18.

Even so, the City's comparison of *Borzyskowski* and the present case is unconvincing. The City identifies "two primary differences" between the factual scenario in *Borzyskowski* and that of the present case: that "the vehicle was still running at the time the officer in *Borzyskowski* made contact," and "that Mr. Borzyskowski had open intoxicants on the car and with him." (City's Br. 10). Tellingly, the City ignores more important differences:

- Because there is no indication that the arresting officer in *Borzyskowski* was dispatched to the location of the vehicle, or that the vehicle was the subject of any citizen complaints, the officer likely came upon the motor vehicle during regular patrol. 123 Wis. 2d at 187, 366 N.W.2d at 507. The arresting officer in the present case knew from the citizen caller that the vehicle in question had been parked "for quite some time." (25.22-23).
- The vehicle in *Borzyskowski* was "parked along the roadway in a place not designated for parking." 123 Wis. 2d at 187, 366 N.W.2d at 507. There is no indication whatsoever in the present case that the vehicle in question was not legally parked.
- The arresting officer in *Borzyskowski* observed one individual in the vehicle. The arresting officer in the present case observed two individuals in the vehicle, and could not recall asking either individual whether the vehicle had been operated. (28.9-24).

The City argues that "this Court should follow the rational in *Borzykowski* [sic] regarding what constitutes operation of a motor vehicle through the context of a refusal hearing" (City's Br. 11), a rationale that, as discussed above, was explicitly rejected by the Supreme Court of Wisconsin in *Haanstad*. In *Borzyskowski*, this Court held that "[i]t was reasonable for Officer Spakowicz to believe that Borzyskowski was physically manipulating the controls either by leaving the engine running or by restraining its movement. Both of these actions constitute 'operation' as it is defined in the statute and in *Proegler*." 123 Wis. 2d at 189, 366 N.W.2d at 508. There is nothing unclear about the Supreme Court of Wisconsin's explicit repudiation of that rationale in *Haanstad*. *See Haanstad*, ¶¶ 17-18.

CONCLUSION

Officer Kaye clearly possessed probable cause to believe that Mr. Gregg was sitting while intoxicated, *see Haanstad*, ¶ 21, but that is not a crime in Wisconsin. *See* Wis. Stat. § 51.45(1); *State ex. rel. Jacobus v. State*, 208 Wis. 2d 39, 49-51, 559 N.W.2d 900, 903-04 (1997). If Officer Kaye had conducted additional investigation regarding whether Mr. Gregg had done anything more in the vehicle than sit, perhaps the fruits of that investigation would have provided probable cause to believe that Mr. Gregg had committed an arrestable offense.

But Officer Kaye instead conducted absolutely no investigation whatsoever into whether Mr. Gregg had operated the vehicle at all, let alone while intoxicated. Lacking probable cause to believe that Mr. Gregg had operated a motor vehicle while intoxicated, Officer Kaye's arrest of Mr. Gregg was improper, and the circuit court's refusal finding must be reversed.

Dated this 25th day of March, 2019.

Respectfully submitted,

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CERTIFICATION OF FORM, LENGTH, MAILING, AND ELECTRONIC COPY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,186 words.

Pursuant to Wis. Stat. § (Rule) 809.80(3)(b), I further certify that I have delivered to a 3rd-party commercial carrier 10 copies of this reply brief for filing with the clerk within 3 calendar days and 3 copies of this reply brief for service on Plaintiff-Respondent City of West Allis.

I further certify that I have submitted an electronic copy of this reply brief, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 25th day of March, 2019.

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