STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2018 AP 001382
Green County Circuit Court Cases 2017 TR 001733,2017 TR 001914

COUNTY OF GREEN,

Plaintiff-Appellant,

vs.

JOEY JAY BARNES,

Defendant-Respondent.

ON APPEAL FROM THE ORDER FOR DISMISSAL ENTERED IN THE CIRCUIT COURT FOR GREEN COUNTY, THE HONORABLE THOMAS VALE, PRESIDING.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the circuit court erred by finding that Barnes had a reasonable expectation of privacy in the emergency room, contrary to State v. Thompson, 222 Wis.2d 179, 585 N.W.2d 905 (Ct.App. 1998).

II. Whether the circuit court erred in determining that Barnes was seized by law enforcement during their attempt to complete the Horizontal Gaze Nystagmus (HGN) Standardized Field Sobriety Test with Barnes.

III. Whether the circuit court applied the incorrect legal standard in finding that law enforcement did not have *'probable cause'* to request the HGN test.

IV. Whether the circuit court applied the incorrect standard for excluding consideration of law enforcement's observations during the HGN test and in determining whether they had probable cause to request a blood sample from Barnes.

V. Whether the circuit court had legal authority or basis for the remedy ordered, including dismissal of the charges.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The County does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22 (2) (b) (2017-18). Publication is not necessary.

STATEMENT OF THE CASE

Joey Jay Barnes was cited in Green County Case 17TR1733 with Operating While Intoxicated (OWI) as a 1st Offense, contrary to Wis. Stat. 346.63 (1)(a), and in 17TR1914 with Operating with Prohibited Alcohol Concentration (PAC) as a 1st Offense, contrary to Wis. Stat. 346.63(1)(b). (R.01.) Barnes filed a "Motion to Dismiss". (R.7.) An evidentiary hearing was held on February 1, 2018, at which three deputies or former deputies testified. (R. 19.) Barnes did not testify or call any witnesses. (R. 19.) Barnes and the County filed briefs. (R. 11,12,13,14.) The Court made an oral ruling granting suppression of evidence. (R. 20.) Barnes, through his Attorney Peter Kind, requested a status conference, at which he argued the cases should be dismissed, which the County opposed. (R. 21.) The Court filed a written order dismissing the cases. (R. 15) The County filed a notice of appeal. (R. 16.)

STATEMENT OF THE FACTS

On July 13, 2017, Deputy Kanable was dispatched to a motor vehicle crash at about 8:51 p.m. (R.21:5.) The crash occurred on Highway 69 between Gutzmer Road and Washington Road in the straight stretch between two curves. (R.21:13.) Barnes and another caller both called the police. (R.21:29-

30.) When Deputy Kanable arrived, Barnes's vehicle was already stopped and he was standing on his own. (R.21:10.)

Barnes told Kanable he was the driver and nobody else was there, he'd had a few drinks, probably four drinks maybe, and he was coming from Ten Pin. (R.21:7.) Deputy Kanable knew this was a bowling alley/bar on the edge of Madison.(R.21:8.) Barnes indicated that he just went around the corner and went too far and spun out, making a spinning motion with his hand. Barnes never provided any other reason for the crash besides his poor driving, and never indicated any other car, person, animal, any road condition, or any outside factor was involved. (R.21:8-9.) Barnes didn't realize the vehicle had rolled. (R.21:38.) Deputy Kanable did not observe anything on the scene to indicate any other reason for the crash. (R.21:9.) Aside from asking Barnes "Can you take a seat for me? We have got an ambulance coming." Deputy Kanable never restrained his movements, told him he was under arrest, or anything like that. (R.21:9-10.)

Deputies Kanable, Nimtz, and King were the officers present on the crash scene. (R.21:8.) Deputy Kanable conveyed the information he got from Barnes, and that he was coming from a bar, to Deputy Nimtz. (R.21:8-9.) Deputy

Nimtz made contact with Barnes at the crash scene and smelled the odor of intoxicants on him. (R.21:36.) Barnes provided consistent information to Deputy Nimtz regarding how the crash occurred. (R.21:19.) Deputy Nimtz noted he believed Barnes had slightly slurred speech. (R.21:45.) Deputy Nimtz' never got very close to Barnes during this interaction, and basically asked "hey, what happened?" while EMS was checking him out. (R.21:44.) At the scene of the crash, Nimtz never made any show of force. (R.21:20.)

Deputy Kanable found Barnes extremely cooperative and never stated or expressed anything indicating that he didn't want to be cooperative with law enforcement, medical or firefighter personnel, or anybody present on scene. (R.21:10.) Barnes was cooperative with Deputy Nimtz throughout his contact with him. (R.21:19.)

Barnes was transported from the scene by ambulance, and taken to the Monroe Emergency Room, with no law enforcement officers present and no contact from any law enforcement between when Barnes left the scene with medical personnel and Deputy Nimtz' driving to the ER separately. (R.21:20-21,26.) Deputy Kanable never responded to the Monroe Emergency Room (R.21:10.) Deputy Nimtz and Deputy King drove to the ER together. (R.21:21-22.)

At this point, Deputy Nimtz had all of the information conveyed from Deputy Kanable. (R.21:8-9.) Deputy Nimtz was aware that Barnes had engaged in suspicious activity, crashing his vehicle on a dry pavement road, and was aware that blood alcohol evidence can be destroyed over time. (R.21:48). Deputy Nimtz was aware at that time that a check of Barnes's driving record through dispatch did not reflect any prior OWI offenses, and this was a possible OWI first investigation. (R.21:45,49.)

Upon arrival to the hospital, Deputy Nimtz' walked into the ER and a nurse or receptionist told him the room number without any prompting. (R.21:22.) This reception area is open to the public inside a hospital open to the public. (R.21:75.) Beyond the reception area, there is a central area of the ER surrounded by 16 or 17 rooms that have glass doors and curtains. (R.21:107.) Deputy Nimtz' made contact with medical staff from the ambulance outside room 16 and had a brief conversation with them on Barnes's status. (R.21:32.) The large glass door was not closed and there was a drawn curtain separating this area from #16. (R.21:57,76.) There was no expression of surprise or any indication from anyone that he should not walk into that area of the ER, leave, or not be there. (R.21:24.) Deputy

Nimtz pulled back the curtain to #16 where he was directed. (R.21:25,56.) Deputy Nimtz didn't ask Barnes about entering into this area. (R.21:58.)

In Deputy Kanable's experience it is common practice for deputies to be allowed into the emergency rooms in circumstances like this, and hospital personnel allow them in. (R.21:11.) According to Deputy Kanable's experience, when there is a crash and a deputy responds to the hospital, staff typically tell them what room number the person is in and they are allowed in the room. (R.21:12.) In Deputy Nimtz' experience, this is also typical of what happens. (R.21:53.) In Deputy Nimtz' experience, he had never seen an occasion where he or any other deputies were not allowed in this area or challenged by hospital staff in any way.(R.21:77.)

Mr. Barnes was on a gurney in a gown (R.21:58) and five members of medical staff were in the room. (R.21:25.) Deputy Nimtz was present in the room for some time and no medical staff express any surprise, dismay, or unhappiness with him being there and no one asked him to leave anywhere that he had been. (R.21:27.) At one point a member of medical staff asked Deputy Nimtz to step out of the room very briefly for a procedure, which he did. (R.21:27.) They

then allowed him back into the room (R.21:28.) stating “You can come back in.” (R.25, 3 min 03 sec.)

Deputy King walked into the hospital separately and arrived in the room after Deputy Nimtz. (R.21:89.) Deputy King followed the same procedure, walking past the receptionist without objection who directed him with a room number without prompting (R.21:90.) Deputy King went to the room he was directed to and looked in the room and saw Deputy Nimtz standing in the room. (R.21:90.) No hospital staff expressed any surprise or asked Deputy King what he was doing there, told him to not be there, or asked him to leave or anything like that. (R.21:91.)

Deputy King believes he has been in this area of the hospital probably hundreds of times over nine years. (R.21:91.) This is the manner that Deputy King usually enters that area if he doesn’t have anybody in custody, the process he sees other law enforcement go through, and no one at the receptionist desk or any other hospital staff has told him not to do that or expressed surprise that he or other law enforcement were in that area of the hospital. (R.21:92.) Deputy King has never been told that there was any objection to that process by any hospital staff, personnel, or management, and no one has ever told him

anything such as he can’t do that or shouldn’t walk in like that, or anything similar. (R.21:93.) This includes walking into the rooms that they are directed to by the receptionist. (R.21:93.) Deputy King’s understanding is that it is not normal practice to explicitly ask anyone in particular at the hospital for permission to go into this area or this room, but instead they essentially just tell law enforcement what room. (R.21:104.)

Barnes did not express surprise that Deputy King was in the room and never expressed that he didn’t want him there or ask him to leave. (R.21:94.) Deputy King observed Barnes to be very cooperative throughout his contact. (R.21:94.) Barnes never expressed that he was unhappy with anything he was doing or that anyone was doing. (R.21:94.) Deputy King never made any show of force, displayed a weapon, put a hand on Barnes, put cuffs on him, told him he was under arrest, told him he couldn’t leave, or directed him anywhere at all, nor did he see any other officers do anything like that, either at the scene or at the hospital. (R.21:94-95.) Deputy King never even talked to Barnes directly, or got very close to him. (R.21:106.)

Deputy Nimtz introduced himself to Barnes and Barnes expressed no surprise, dismay, or dislike for him being

there and did not ask him to leave. (R.21:28.) Barnes was responding to Deputy Nimtz and was friendly and cooperative, and provided consistent information. (R.21:28-29.) This first interaction was reflected on video:

Nimtz: Hey, Joey, I'm Deputy Nimtz with the Green County Sheriff's Office. How you doin' today?

Barnes: I'm good.

Nimtz: Good? All right. What all happened tonight?

Barnes: Uh, I had a couple beers -like I said- and I went around that corner in between Monticello and Monroe, and took it too wide, and just spun.

Nimtz: Just spun?

Barnes: And, apparently I flipped, I don't remember doing that, but. . .

(R.25 at 3 min 32 sec.)

Barnes also interacted throughout with hospital and ambulance staff, and was cooperative, friendly and joking, including the following exchange with a phlebotomist he recognized:

Barnes: Holy shit, man, what's up dude!

Spencer: Yep, I work here.

Barnes: All right, man.

Spencer: I'm gonna take some blood from ya.

Barnes: Absolutely, you do what you gotta do, Spencer.

(R.25 at 5 minutes)

Barnes also did the Horizontal Gaze Nystagmus with Deputy Nimtz.(R.21:30.) The following exchange occurred:

Nimtz: Hey, Joey, I’m gonna check your eyes-

Barnes: Ok.

Nimtz: So what I need you to do is-can you see my finger?

Barnes: Yep.

Nimtz: I just need you to follow my finger-

Barnes: All right.

Nimtz: -with your eyes and your eyes only. Can you do that for me?

Barnes: Yep.

Nimtz: All right.

(R.25 at 9 min 32 sec.)

Deputy Nimtz was trained and at the time of the test certified to perform the Horizontal Gaze Nystagmus test, and performed it in accordance with his training (R.21:30-31.) Deputy Nimtz observed 4 out of 6 clues, which indicated to him from his training that the individual was most likely impaired. (R.21:31.) Deputy Nimtz told Deputy King he observed 4 out of 6 clues. (R.21:40.) Nimtz can be

heard detailing the four clues to King immediately after completion of the test, to which King responds “Yep.” (R.25 at 11 min.)

At no point during Deputy Nimtz’ contact with Barnes did Barnes ever ask him to leave the room or express in any way that he didn’t want Deputy Nimtz to be where he was or to do what he was doing. (R.21:37-38.) At no point did hospital staff indicate to Deputy Nimtz that they didn’t want him to be anywhere he was or object to anything he was doing where he was not entirely cooperative with their requests. (R.21:38.) At no point prior to explicitly telling Barnes he was under arrest well after the completion of the HGN test did Deputy Nimtz tell Barnes he was under arrest, that he couldn’t leave, or tell him he had to be in a particular place in any way. (R.21:40-41.)

In fact, the first time Deputy Nimtz was in the room, he believed Barnes was free to leave. (R.21:59.)

Deputy Nimtz and Deputy King left the room again and later returned and the glass door was closed and the curtain was drawn and Deputy Nimtz opened the door and curtain and entered and placed Barnes under arrest. (R.21:72-73.) Barnes’s mother was present when the deputies re-enter, and neither Barnes, his mother, nor any hospital

staff objected to their being present. (R.21:102.) Deputy Nimtz completed the OWI packet including the implied consent form, and alcohol influence report, and a blood sample was taken. (R.21:73.)

The Deputies all testified and the court admitted their body camera footage, which showed the entirety of their interactions with Barnes. Barnes did not present anything to dispute that the interactions and circumstances reflected on the Deputies' body cameras were correct and complete reflections of those events. (R.21.)

Barnes did not present any evidence or testify that the deputies in any way seized him or detained him or did anything to make him feel that he was not free to ignore their requests.(R.21.) Barnes did not present any evidence or testimony that he in any way had some property interest or control over the emergency room or that he had any actual, subjective expectation of privacy or that he in any way exhibited that expectation on this occasion. (R.21.)

The Deputies' actions at the ER are reflected in the undisputed body cam video of Deputy Nimtz (R.25), which confirmed the deputies' testimony, and their interactions with hospital personnel and Barnes, as set out above.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND THAT BARNES HAD A REASONABLE EXPECTATION OF PRIVACY IN THE EMERGENCY ROOM, CONTRARY TO *STATE V. THOMPSON*, 222 Wis.2d 179, 585 N.W.2d 905 (Ct.App. 1998).

State v. Thompson is directly on point as to this analysis. The facts of *Thompson* per the court are that:

A Madison police officer arrived at the scene shortly after the ambulance left with Thompson. One of the fire rescue personnel there told the officer a bystander said Thompson had swallowed several bags of cocaine when the car in which he was a passenger was stopped by police. The officer found out where Thompson had been taken and followed to the hospital. Hospital staff directed the officer to the emergency room where Thompson was receiving treatment. Thompson was unconscious, and still suffering from seizures. Most of Thompson's clothing had been removed and was on the floor, along with a pager and a $100 bill. The officer picked up Thompson's clothing, the pager and the $100 bill and gave them to a second officer who had come to the hospital. *State v. Thompson*, 222 Wis.2d 179, 182, 585 N.W.2d 905 (Ct. App. 1998).

Just as in the current case, officers were directed to Thompson's 'emergency room,' which room appears to be the equivalent in form and function to Barnes's emergency room.

Thompson was receiving treatment and his clothing had been removed. There is no indication that Thompson's 'emergency room' was a common area or hall or any such location that would be reasonable inferred to be more public than the emergency room here. The analysis of the reasonable expectation of privacy in the 'emergency room' in Thompson is directly on point as to any reasonable expectation of privacy in the 'emergency room' Barnes was in.

Even beyond that, in Thompson's case an officer also entered the operating room and observed the surgery. *Id.* at 182. The Court of Appeals analyzed both locations and found that "Thompson had no reasonable expectation of privacy in the hospital emergency room or operating room." *Id.* at 195.

Thompson lays out the analysis and clarifies Barnes's burden: "A search occurs when the police infringe on an expectation of privacy that society considers reasonable. Only if we first conclude that the officer's conduct infringed on Thompson's legitimate expectation of privacy, and thus constituted a search, will we then inquire whether the officer's conduct was proper under the Fourth Amendment. . . . The threshold question in this appeal, then, is whether Thompson may claim a reasonable expectation of privacy in the areas of the hospital in

which the officer collected the evidence. The burden is on Thompson, as the one claiming Fourth Amendment protection, to show that the search was illegal and that he had a reasonable expectation of privacy in the premises or property." *Id.* at 185 (internal citations omitted).

"The analysis has two prongs:

1)whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and the item seized, and

2)whether society is willing to recognize such an expectation of privacy as reasonable." *Id.* at 186.

The First Prong

Under the first prong, Thompson was unconscious and unable to exhibit a subjective expectation of privacy. In the case before the court, Barnes's position is much weaker, as Barnes was conscious and capable of exhibiting a subjective expectation of privacy and did absolutely nothing which could be construed to meet this prong. Barnes was never remotely uncooperative, unwilling to speak to or answer questions of officers. He never asked them to leave or stop doing anything they were doing, he never expressed any surprise or displeasure, or seemed in any way unhappy with their presence either at the scene or at the hospital.

There is no indication in the record of him expressing any expectation of privacy to any of the people who were walking in and out and treating him throughout this time or from the officers who were present. Barnes has absolutely failed to make any showing that would support the subjective first prong.

The Second Prong – The 6 "Dixon" factors

Under the second prong of whether society is willing to recognize such an expectation of privacy as reasonable, *Thompson* is again directly on point and provides the analysis of the 6 "Dixon" factors:

"(1) whether one has a property interest in the premises; (2) whether one was legitimately on the premises; (3) whether one has complete dominion and control and the right to exclude others; (4) whether one took precautions those seeking privacy take; (5) whether one put the property to some private use; and (6) whether the privacy claim is consistent with historical notions of privacy. See *Dixon*, 177 Wis. 2d at 469, 501 N.W.2d at 446. This list of factors is neither controlling nor exclusive. Rather, the totality of the circumstances is the controlling standard. [*State v.*]*Dixon*, 177 Wis. 2d [461]at 469, 501 N.W.2d [442]at 446." *Id.* at 186-187. (internal citations omitted.)

Thompson addresses each of the factors as it applies to the emergency room setting and made the following six findings:

1) Thompson had no property interest in the hospital or the emergency room. (*Id.* at 187)

Barnes in this case presented no evidence that he had any property interest in the hospital or the hospital emergency room he was in.

2) Thompson was legitimately on the premises of the hospital to obtain emergency treatment. (*Id*. at 187) This is the only *Dixon* factor that clearly weighed in Thompson's favor, and the Court found it insufficient. (*Id*. at 193).

This is also true for Barnes.

3) Thompson did not have dominion and control over the hospital emergency room and did not have authority or any right to exclude others from the room. (*Id.* at 191)

Neither did Barnes in the current case.

4) Thompson did not take precautions customarily taken by those seeking privacy. (*Id*. at 187)

This factor weighs more against Barnes than for Thompson as Thompson was unconscious and unable to take precautions. Barnes was conscious and made no efforts or took any precautions whatsoever to obtain privacy.

5) Thompson did not put the room to private use. (*Id.* at 187) The *Thompson* court actually found that Thompson did not put either the emergency room or the operating room to private use.

Barnes has presented no evidence that he put the emergency room in his case to private use in some way distinguishable from Thompson.

6) Historical notions of privacy are not offended when a police officer, in responding to an emergency call and with the acquiescence of hospital staff, enters the treatment area of an emergency room. (*Id*. at 192).

This is exactly the same scenario as before the court. An emergency call was made to a scene, Barnes was transported from the scene to the hospital, hospital staff acquiesce to law enforcement entry into the emergency room, the officer gathered evidence while in the emergency room. The *Thompson* court also found historical notions of privacy are not offended under the circumstances involved when the officer observed Thompson's surgical procedure, "given a patient's traditional surrender to his or her physician of the right to determine who may and may not be present during medical procedures." *Id*. at 192.

The trial court made factually inaccurate distinctions to the *Thompson* case and failed to make any relevant distinctions as to the issue of whether law enforcement was legally present. The trial court adopted defense's language of 'private examination room' with no identified distinguishing factors from the emergency room in *Thompson*. There is no support for Barnes' trial-level counsel assertion that the emergency room referenced in *Thompson*, where again, Thompson was being treated and had had his clothes removed, or the operating room, where Thompson was having items removed from his abdomen, are somehow 'non-private treatment areas' while the emergency room where Barnes was being treated and had had his clothes removed was somehow a 'private examination room.' There is similarly no support for Barnes' trial-level counsel assertion that 'a patient in a private examination room' has the right to exclude others from entering. Barnes chose not to testify or present any evidence that he expected the room to be private or that the officers would be excluded, and all of the evidence that was presented points to the exact opposite.

The trial court seems to find relevant that Deputy Nimtz agreed that he believed that "the purpose of the

curtain was to provide patient privacy." (R.21:16.) There is no support for the curtain in Barnes' case transforming his curtained area of the ER into a somehow special and different 'private examination room' any legally distinct from the emergency room involved in Thompson's case, nor the other cases addressing curtained areas of ERs.

The trial court seems to attempt to distinguish Thompson because "that was ultimately the police obtaining physical evidence as opposed to what could be considered a seizure of the person and an examination of the individual himself." (R.22:19.) Both Thompson's and Barnes' cases involved both examination of the individuals and ultimate seizure of evidence, and the trial court does not make clear how this inaccurate distinction changes the analysis of whether the officers legally entered.

The trial court next inaccurately states that in *Thompson*, "In that case there was a stop and an arrest of an individual. The defendant in this case himself was released at the time." (R.22:20.) This is incorrect. In both cases the defendant was not under arrest or otherwise seized, and was transported to the hospital by ambulance without law enforcement.

The trial court then discusses in *Thompson* that "the police in that case got information from a bystander who reported that the defendant Thompson had swallowed several bags of cocaine, so they had direct information and report that in fact there was contraband inside of Mr. Thompson." (R.22:20.) The court fails to explain how this is relevantly different from the information that the deputies in Barnes' case had that there would be evidence of his intoxication level, or how it applies to the *Thompson* analysis or *Dixon* factors.

The trail court then states that "Mr. Thompson was unconscious at the time when the police went to the hospital." (R.22:20.) The court does not address how this impacts the analysis nor the County's arguments that this reflects that Barnes' case is weaker that Thompson's. The circuit court then states "With the consent of the doctor a law enforcement officer observed the surgery. . ." (R.22:20.) The trial court seems to ignore here the facts in *Thompson* involving the officer's entry into the ER room, which is on point. As to the consent issue, the deputies here had both implied consent of the hospital staff throughout as well as explicit consent when the nurse tells Nimtz "You can come back in." There is no distinction

there. Barnes' case with regard to any need for consent from him would be much weaker, as Barnes' behavior throughout reflects implied consent from him, as well.

The trial court again seems to find a distinction in that there is "the presence of physical evidence that the police had information was swallowed" (R.22:21) versus the presence of physical evidence consisting of performance on field sobriety tests and blood containing an alcohol concentration. There is no explanation given for why this changes the analysis.

The trial court then addresses some of the *Dixon* factors, and the only apparent possibly distinguishing factor the court addresses is "Did they take precautions that someone looking for privacy would take? Interesting question. I guess if you close the curtain, close the door you are asking that the public, and there is traffic to other rooms around there, there are private citizens, there are individuals other than medical personnel in the emergency room area, but typically no, somebody else there who is not medical personnel is not expected to be in your room." (R.22:21.) The evidence does *not* reflect that Barnes closed the curtain, or closed the door (in fact there was no closed door at the relevant time frame) and the only

proposed ‘precautions that someone looking for privacy would take’ that the court identifies in this analysis is “saying close the curtain”(R.22:21) which is also inaccurate, as there is no evidence that Barnes ever did that, and Barnes did not assert that he did that. There is no evidence that Barnes took any precautions whatsoever for privacy. The court eventually acknowledges “Well, that may be true.” (R.22:22) and then discusses the court’s personal experiences and general expectations. (R.22:22.) The trial court then states that there were other considerations in *Thompson* and does not raise any relevant ways in which Barnes’ case is distinguished. (R.22:23.)

The trial court then abandons an analysis of the *Dixon* factors and the *Thompson* case for a concern that medical personnel is waiving Barnes’ right to privacy, and that it is concerning to the court that the receptionist is able to allow people into the ER. (R.22:23.) It is unclear who the trial court is proposing has control over entry if not the hospital staff designated for that purpose. The court, contrary to the case law, states that: “There has to be as a matter of law an examination of that in each case. Because he is waved by doesn’t mean there’s been a proper legal consent to give that officer permission to go into

the room." (R.22:24.) It appears that the court is injecting a new personally created requirement that hospital staff, before allowing officers into their ER must make an added legal determination of some sort or bring in some other arbiter before they can consent to entry. There is no such requirement presented in the law. Again, Barnes' circumstances do not differ from the *Thompson* case where the Supreme Court clearly found that Thompson did not have dominion and control over the hospital emergency room and did not have authority or any right to exclude others from the room. (*Thompson* at 191.)

The trial court then discusses that the deputy "assumed essentially that he could go back there, and he did. There is no question he did not ask permission to enter the room at that time." (R.22:24.) The deputy clearly had both implied and then express permission to enter.

The trial court then discusses factually irrelevant issues of whether medical personnel can allow a curious neighbor in, and medical personnel's reasoning behind their consent-"they are assuming that the police officer has some valid reason there to continue this investigation and to go in there." (R.22:25.) Again, this is irrelevant and no distinction to *Thompson*. The court then states "this was

not a surgery" (R.22:25.) which again ignores that *Thompson* also directly addresses and approves entry to the ER room.

The trial court concludes that Barnes need not exhibit an expectation of privacy, contrary to law, and states that the trial court has a problem with the law considering whether the defendant took any active steps. (R.22:25.)

Courts of other states have followed this same analysis and made the same finding. The Oregon Court of Appeals analyzed similar cases in *State v. Cromb*, 220 Or.App.315(2008) at 318-320, specifically addressing a defendant in a bed in a curtained-off area in a hospital emergency room receiving medical treatment where the curtain was closed when the officer entered the area. The *Cromb* court surveyed other similar cases, including *State v. Rheaume*, 179 Vt. 39, 889 A.2d 711 (2005) from the Vermont Supreme Court which found the defendant had no reasonable expectation of privacy in a curtained area in a hospital's emergency room, (*Cromb* at 322-324) and *Buchanan v. State*, 432 So.2d 147 (Fla.Dist.Ct.App.1983) in which the defendant was involved in an automobile accident, transported to a hospital for treatment of his injuries, placed in a curtained-off area in the emergency room, with clothing removed, and found that any expectation of privacy

would have been unreasonable. *Cromb* at 324. The court in *Cromb*, after surveying these cases, found that "The hospital emergency room in this case, even a curtained-off portion of it, is not a private place." *Cromb* at 325-326.

II. THE CIRCUIT COURT ERRED IN DETERMINING THAT BARNES WAS SEIZED BY LAW ENFORCEMENT DURING THEIR ATTEMPT TO COMPLETE THE HORIZONTAL GAZE NYSTAGMUS (HGN) STANDARDIZED FIELD SOBRIETY TEST WITH BARNES.

A court must first determine *if* and *when* a seizure occurred. Whether a person has been seized is a question of constitutional fact, and so while the trial court's findings of fact are considered, whether or when a seizure occurred is determined independently from the trial court. *State v. Young,* 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. The Seventh Circuit articulated in *Carlson v. Bukovic*, the primacy of the question of "was the person seized" in the determination of whether a Fourth Amendment seizure was reasonable: "Any Fourth Amendment inquiry necessarily begins with a determination of whether a search or seizure actually occurred. . . . If that question is answered in the affirmative, the next question is whether the seizure was unreasonable. . . . The seizure and reasonableness inquiries are distinct and should not be conflated. Furthermore, an officer's probable cause to seize is not antecedent to this two-step inquiry but rather is a subset

of the larger reasonableness inquiry of the second step." 621 F.3d. 610 at 618, (2010).

It is Barnes' burden to establish that a seizure occurred in the first place. On a motion to suppress evidence due to unlawful seizure, the defendant has the initial burden to establish that a seizure subject to Fourth Amendment protection occurred. *Gray v. State*, 243 Wis. 57, 63, 9 N.W.2d 68 (1943). Barnes has failed to meet that burden. He did not testify that he felt he was not free to choose whether or not to speak with the deputies. There is absolutely no evidence in the record to support that he was or even that he *felt* he was seized.

The trial court found that Barnes was seized when Deputy Nimtz attempted to complete the HGN test with him. (R.22:32.) The trial court found that due to the totality of the circumstances, Barnes did not feel he could refuse. (R.22:32.) The trial court said "I have a problem again with the individual who has an expectation in general under the Fourth Amendment to be free from unreasonable searches and seizures to make this determination himself that he can refuse that. The officer didn't ask can I do an examination? Can I do the HGN test? He said he exercised his authority under circumstances where I think the

defendant wouldn’t know and would assume that he had to comply. He is on his back with a neck brace on in a gown and bare feet and can he get up and walk away? Well, probably not. Maybe he can. Maybe he doesn’t want to because he wants to receive the medical treatment. There was no - - under normal circumstances if this was a stop anywhere out in a public area that defendant has a right to walk away, if he wants to refuse to answer questions, if he wants to. That was never given to him as an option.” (R.22:25-26.)

In a circumstance like this, where the person is staying in place, the question is whether a reasonable innocent person would feel free to decline; “When a person ‘has no desire to leave’ for reasons unrelated to the police presence, the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. ” *Brendlin v. Cal.*, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

Again, the critical inquiry is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he or she was not at liberty to ignore the

police presence and go about his or her business. *Florida v. Bostick*, 501 U.S. 429, 436, 111 S.Ct.2382, 2387, 115 L.Ed.2d 389,398–400 (1991).

The trial court stated "He didn't say no, go away. If it was me laying there I would have said no, go away. Mr. Kind would have. Probably a lot of people would have. If this individual is not assertive enough he is assuming that I'm stuck here." (R.22:26-27.) The trial court points to no evidence, and there appears to be no evidence in the record, that Barnes is unusually unassertive or otherwise any reason why he would not react as a "lot of people would have" if he didn't want to cooperate with the deputy.

The trial court conflates this inquiry with the issue of the hospital's consent to the officers' presence in the room, stating "Under those circumstances the hospital can't waive the defendant's right to be free from that seizure of the person." (R.22:27.) There is no evidence that the hospital interfered with this exchange in any way, and seizure requires that *law enforcement* intentionally applied a show of authority to restrain Barnes's liberty.

A Fourth Amendment seizure occurs when an officer by means of an intentionally applied show of authority restrains a person's liberty. *State v. Young*, 2006 WI 98 at

¶ 18, 294 Wis.2d at 16. “To be sure, a police uniform is a vivid reminder of the authority a police officer holds. However, it is the exercise (or apparent exercise) of that authority—not merely its existence—that may result in an encounter becoming a seizure. Thus, a confrontation with a police officer is not a seizure on the basis that the officer's authority produces an inherent pressure to cooperate. Rather, as the leading commentator on the fourth amendment has suggested, an encounter between a police officer and a civilian “is a seizure only if the officer adds to those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse.” *People v. Castigilia*, 394 Ill. App. 3d 355, 915 N.E.2d 809 at 812 (2009).

The test for the existence of a show of authority is an objective test-it is not whether the citizen perceived that he was being ordered to restrict his movements, but whether the officer’s words and actions would have conveyed that to a reasonable person. *United States v. Salazar*, 609 F.3d 1059, 1064 (10th Cir. 2010). The reasonable person test presupposes an “innocent” person. *State v. Williams*, 2002 WI 94 at ¶ 23, 255 Wis.2d 1 at 13, 646 N.W.2d 834.

Questioning by law enforcement officers alone does not effectuate a Fourth Amendment seizure of a person. *Williams*, 2002 WI at ¶¶ 22, 28, 255 Wis.2d at 12, 13. As long as the person to whom the questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particular and objective justification. *Williams*, 2002 WI at ¶ 22, 255 Wis.2d at 12-13. "[T]he curtailment of the bystander's mobility, privacy, and peace of mind is so slight that neither probable cause nor reasonable suspicion is required to justify the police action. No suspicion at all is required in such a case." *United States v. Burton*, 441 F.3d 509, 511 (7th Cir. 2006) (internal citations omitted).

In *Young*, the Court stated: *"Mendenhall* is the appropriate test for situations where the question is whether a person submitted to a police show of authority because, under all the circumstances surrounding the incident, a reasonable person would not have felt free to leave. If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure. As this court noted in *Williams*, 'most

citizens will respond to a police request,' and 'the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.'" 2006 WI at ¶ 37, 294 Wis.2d at 25 (internal citations omitted). Advising a person that he or she is free to leave is not an essential prerequisite for a consensual encounter. *United States v. Chavira*, 467 F.3d 1286, 1291 (10th Cir. 2006). The fact that the person, who is questioned and responds, is not told that he or she is free not to respond does not eliminate the consensual nature of the encounter or transform an otherwise consensual encounter into a seizure. *Williams*, 2002 WI at ¶¶ 23, 28, 255 Wis.2d at 13, 15-16; *United States v. Hill*, 199 F.3d 1143, 1149 (10th Cir. 1999). The fact that there is already a level of pressure or coercion (an inherent pressure) to stay when an officer approaches and begins to question a person does not turn a consensual encounter into a seizure. *Young*, 2006 WI at ¶ 37, 294 Wis.2d at 25. "[V]oluntary requests play a vital role in police investigatory work." *Illinois v. Lidster*, 540 U.S. 419, 425, 124 S.Ct. 885 (2004).

The trial court's incorrect analysis that there was an 'expectation of privacy' that colored the court's view of

whether the deputies were legally entitled to be present in the ER room caused the trial court to fail to analyze the interaction as a consensual encounter as the evidence supports.

In *State v. Stout*, the Court found that if the officers were legally entitled to be where they were, the presence of three officers did not constitute a seizure absent use of seizing language, physical contact, or the display of a weapon when they entered a room where the defendant was located: "Under these circumstances, we conclude that a reasonable person in Stout's position would have no reason to believe he or she was not free to leave. Assuming the officers were present under the cloak of valid consent, their initial brief encounter at the door to the apartment was nothing more than an inoffensive encounter between a citizen and police that intruded upon no constitutionally protected interest." *State v. Stout*, 2002 WI App 41, ¶ 21, 250 Wis.2d 768, 785-786, 641 N.W.2d 474.

A consensual encounter can occur inside of a place as well as in an open area as long as the officer is lawfully present in the place where the consensual encounter occurs. *Kentucky v. King*, 536 U.S. 452, 131 S.Ct. 1849, 1858 (2011). In *INS v. Delgado*, 466 U.S. 210 at 217 n. 5, 104

S.Ct. 1758 at 1763 n.5, 80 L.Ed.2d 247 (1984), the Court stated: “Contrary to respondents' assertion, it also makes no difference in this case that the encounters took place inside a factory, a location usually not accessible to the public. The INS officers were lawfully present pursuant to consent or a warrant, and other people were in the area during the INS agents' questioning. Thus, the same considerations attending contacts between the police and citizens in public places should apply to the questions presented to the individual respondents here.”

The trial court clearly conflates this analysis, saying “I don’t want anybody else in that room. The medical personnel saying go on back there is not a legal determination of how far they can go. I think standing over the individual who is laying on his back in a neck brace in a hospital gown and saying I’m going to look in your eyeballs and make a determination here is an overreach under these circumstances. I don’t think the Thompson case goes that far.” (R.22:28.) The *Thompson* case is not relevant regarding this separate seizure/consensual encounter analysis.

Recognized factors and circumstances that may constitute seizure are not present here. In *United States*

v. Mendenhall the Court articulated four factors that, depending on the facts of a particular case, can be used in determining if a Fourth Amendment seizure of a person took place: "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." 446 U.S. 544, 554-55, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

In a circumstance where the defendant is in a fixed location, the 10th Circuit identified some additional possible factors in *United States v. Hill*, in the context of determining if the defendant was seized during an encounter with a police officer on a bus, stating:

> We have identified various factors relevant to whether a reasonable person would not feel free to terminate the encounter with police: the threatening presence of several officers; the brandishing of a

> weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed place; and absence of other members of the public. We have 'steadfastly refused to view any one of these factors as dispositive.' 199 F.3d 1143, 1147-48 (10th Cir. 1999) (*internal citations omitted*).

Here, there was no threatening presence of several officers, there were two officers who engaged in no threatening behavior, and in fact Barnes was in good spirits and cooperative throughout. There was no display of weapons by law enforcement. There was no physical touching of Barnes. There was no use of aggressive language or tone of voice compelling compliance. This was a very cordial consensual interaction.

There were none of the other expressed relevant factors here, either; the officers did not engage in prolonged retention of Barnes's personal effects, they did not request that he accompany them to the station, the

characterization of the room has been exhaustively addressed, and there were numerous other members of the public present, including several members of a medical staff whose job was to care for Barnes's wellbeing and later his mother, none of whom expressed any concerns throughout the encounter.

In another case involving some similar factors, *Brown v. United States*, 983 A.2d 1023 (D.C. 2009), the Court found no seizure occurred- "Officer Hoffman stood two or three feet away from appellant, and Officer Wildey was farther away and did not interact with appellant in any way.... Although the officers were wearing police clothing, they did not make any motions toward their holstered guns, touch appellant, give any orders, or otherwise act threatening or make any "show of authority" which might have suggested that appellant was not free to leave.... None of the factors which "might indicate a seizure" listed in *Mendenhall*, are present in this case. In addition, other members of appellant's group walked away unimpeded, a fact that further indicates the encounter was not a seizure.... Such coercive circumstances were not present in this case. 983 A.2d at 1026. (internal citations omitted)."

Here, the two officers approached and acted in a similar fashion and the presence of two officers, one closer and questioning in a non-threatening fashion and the other standing back, and were not creating a seizure by that behavior.

In *State v. Jacobs*, one issue was whether the defendant was seized for Fourth Amendment purposes, after a traffic accident where a person was killed, when he was driven in a squad car to a hospital for a voluntary blood draw and when his blood was obtained at the hospital. The Court held that the defendant was not seized prior to and while his blood was obtained, including after being driven in a squad car to the hospital and then with the continued presence of law enforcement in the examination room, and found no seizure *even though Jacobs testified* and claimed he did not feel free to leave or refuse, and the Court also noted that there were times when Jacobs was left alone in the room, stating: "Such a circumstance hardly presents a seizure scenario." 2012 WI App 104, at ¶¶ 21, 22, 344 Wis.2d 142, at 156-58, 822 N.W.2d 885.

In the current case, the officers left Barnes alone in the room, and Barnes expressed cooperation, and we do not have the other factors present in *Jacobs*.

Barnes was not seized. None of the three deputies stopped Barnes on scene. Deputy Nimitz and Deputy King did not seize Barnes at the hospital. They made absolutely no show of force or restraint or intimidation. Deputy Nimtz re-identified himself and talked to Barnes. This was a consensual encounter and Barnes could have, but never did, say “please leave” or “I don’t want to talk to you” or “I don’t want to do that” or not responded at all. He had the alternative legal right, and in fact the law encourages that citizens do respond exactly the way he chose to- by happily, honestly responding and cooperating, just as he voluntarily did at the scene and continued to do throughout the interaction without any improper show of authority from law enforcement. The interaction seen on video here was in no way detention or in any way inappropriate.

The show of authority by law enforcement here was entering a place where Barnes had no legal expectation of privacy and talking to him while Barnes happily chatted away with them and everyone else present. There is not even any testimony that Barnes heard the hospital staff’s statement ‘he’s all yours for a little bit’ which is not a law enforcement show of authority, couldn’t have affected Barnes’s belief if he never even heard it, and under these

circumstances clearly did not transform this interaction into a seizure or hospital staff giving up Barnes' rights. Deputy Nimtz asked him questions, and asked him if he could follow his finger for him. The Deputies repeatedly left him entirely alone, including leaving the hospital altogether for a time. Barnes has failed to meet his burden to show that he was detained by law enforcement until he was placed under arrest.

Even if Barnes was seized at the time that Nimtz asked him to follow his finger and Barnes said "Yep," the officers had reasonable suspicion of a violation that may be civil or criminal which would be sufficient to support investigative questioning. A *Terry* stop can be performed for behavior that may constitute either a civil forfeiture or crime, and it would be supported here.

> We hold that when a person's activity can constitute either a civil forfeiture or a crime, a police officer may validly perform an investigative stop pursuant to sec. 968.24, Stats. Suspicious activity justifying an investigative stop is, by its very nature, ambiguous. Unlawful behavior may be present or it may not. The behavior may be innocent. Still, officers have the right to temporarily freeze

the situation so as to investigate further. Similarly, in a situation such as this, an officer may suspect that the person is engaged in criminal activity or the behavior may amount to no more than a forfeiture violation. Just as there is no prohibition for stopping because the behavior may end up being innocent, there is also no prohibition for stopping because the behavior may end up constituting a mere forfeiture.

[Defendant]'s argument would require police to have knowledge of criminal activity rather than mere suspicion of criminal activity before performing an investigative stop. Section 968.24, Stats., explicitly allows an investigative stop based on a reasonable suspicion. That statute is operative in this case because the police had an articulable and reasonable suspicion that he was engaged in an activity that could be criminal. That verb is all that is required here. *State v. Krier*, 165 Wis. 2d 673,678, 478 N.W.2d 63 (Ct. App. 1991). (internal citations omitted.)

In *Adams v. Williams*, the Court reiterated the *Terry* rationale and stated:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. 407 U.S. 143, 92 S.Ct. 1921 (1972).

It is clear that the ultimate test is reasonableness: "We reiterate that the fundamental focus of the Fourth Amendment, and sec. 968.24, Stats., is reasonableness. The question is whether the actions of the law enforcement officer were reasonable under the circumstances." *State v. Anderson*, 155 Wis.2d 77 at 87, 454 N.W.2d 763 (1990) (*internal citations omitted*).

The officers did not cause Barnes to be transported to the hospital. The officers legally made contact with him at the hospital in a place in which he had no expectation of privacy and one of them engaged him in very cordial

interaction, which he expressed absolutely no discomfort with, clearly having reasonable suspicion that he was operating while intoxicated. Even if the court finds that the deputies seized Barnes, their actions here were reasonable under all of the facts and circumstances.

III. THE CIRCUIT COURT APPLIED THE INCORRECT LEGAL STANDARD IN FINDING THAT LAW ENFORCEMENT DID NOT HAVE '*PROBABLE CAUSE*' TO REQUEST THE HGN TEST.

The trial court cut off argument and request for clarification and stated "There was not probable cause to make this arrest to ask for the HGN test." (R.22:35.) It is somewhat unclear if the court is making a mistake or is using the standard of probable cause for a request to do the HGN. First, probable cause is not required to request a field sobriety test. *County of Dane v. Campshure*, 204 Wis.2d 27, 32, 552 N.W.2d 876 (Ct. App. 1996). Even when seizure is conceded, an officer only needs reasonable suspicion to request such tests. *Id.* If the court intended to state that there was not probable cause for an arrest, that will be addressed in the next section.

IV. THE CIRCUIT COURT APPLIED THE INCORRECT STANDARD FOR EXCLUDING CONSIDERATION OF LAW ENFORCEMENT'S OBSERVATIONS DURING THE HGN TEST AND IN DETERMINING WHETHER THEY HAD PROBABLE CAUSE TO REQUEST A BLOOD SAMPLE FROM BARNES.

The trial court stated "[t]here was not probable cause to make this arrest to ask for the HGN test. The HGN test

was flawed. It was inconsistent. The deputy was unsure about that. Given the totality of the circumstances, the evidence at the scene of the crime and subsequent investigation. . . . there simply was insufficient evidence of the crime to make the arrest regardless of the privacy situation.(R.22:35-36.)

The trial court did *not* state that Deputy Nimtz was lying at any point during his testimony regarding the HGN. Deputy Nimtz testified that he saw four clues on the HGN which indicated that Barnes was most likely impaired. Deputy Nimtz clearly told Deputy King on camera immediately after performing the HGN that he saw four clues. Deputy Nimtz testified on direct examination that he made several mistakes in the written report, including that he observed five clues and that Barnes' mother was in the room when he first entered. (R.21:39.) He completed the report at some point up to a week after the incident. (R.21:84.) However, there is nothing in the record, and nothing in the trial court's oral ruling indicating that Nimtz did not actually see four clues on the HGN, as reflected in the video, or that anything within the officer's knowledge at the time would preclude that result from being considered in the probable cause determination.

The trial court incorrectly ignores the evidence in the officer's possession that would support probable cause and proposes 'innocent explanations,' stating "We had an individual who had an accident, and there are many reasons that people have accidents. Yes, I had some drinks. It was some time before." (R.22:29.) There is no innocent reasonable explanation for this accident in the record, beyond Barnes' own admission that he lost control of the vehicle for no good reason. Barnes told Nimtz in the video that his last drink was probably about quarter after eight. (R.25 at 5 min 50 sec.) The dispatch was about 8:51 p.m. and Barnes admitted he was coming from a bar near Madison.

The trial court incorrectly stated that "there is some inconsistency with the Deputy saying he had a couple, maybe two beers earlier in the evening and that's essentially it." (R.22:7.) This is incorrect. The Deputies were never confused that the defendant admitted to 'probably four drinks maybe' and that was not 'essentially it.' The trial court then stated "There isn't a strong indication of any other signs of intoxication at the scene." (R.22:7.) This ignores the most obvious potential indication that a person's ability to operate a vehicle might be impaired- a rollover single-vehicle crash in good weather due only to

the defendant's self-proclaimed poor driving. The trial court stated that "Deputy Nimtz was uncertain as to the clues he saw initially was inconsistent there." (R.22:30.) That is also incorrect, again Nimtz was not uncertain that he saw four clues, and immediately stated which on camera.

Ultimately, the trial court seems to find that the Deputy's uncertainty is the dispositive factor as to whether probable cause exists. "Apart from the privacy issue, which is much more complicated, I think the defendant succeeds on that motion to suppress that blood test, because the deputy himself was uncertain. He went from the accident scene and went into the room. He did this test, and it was 25 minutes or something going out to the car, thinking about it, coming back. I would ask with the repeat coming back how long do you get to continue this stop? Essentially we're extending the stop and extending the investigation under 968.24 for what amounts to several hours. We're going to come back to the hospital room there or the private examination room, and then ultimately yeah, I guess I'm going to arrest you. For that reason I think the defendant succeeds." (R.22:30.)

This analysis is incorrect on several levels. First, it reflects the court's earlier incorrect determination

that Barnes is ‘seized’ during this consensual encounter as the court then seems to believe this ‘stop’ is then extended while the defendant is repeatedly left entirely alone by law enforcement with no restrictions or instructions. Under this rubric, perhaps the defendant is still seized. Of course an ‘extending the stop’ analysis is also irrelevant to a determination of probable cause.

Second, and most importantly, this analysis takes the irrelevant subjective belief of the officer as to whether he has probable cause, and makes it dispositive. It does not matter if a veteran officer asserts with 100% certainty that he has probable cause or if, as here, a brand-new deputy in training had issues with confidence and has to spend significant amounts of time being trained by another deputy in the course of the case itself. (R.21:81.) It is black-letter law that “In determining whether probable cause exists, the court applies an objective standard, and is not bound by the officer's subjective assessment or motivation. The court is to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account. The officer's belief may be predicated in part upon hearsay information, and the

officer may rely on the collective knowledge of the officer's entire department. When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." *State v. Kutz,* 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.(internal citations omitted.)

Whether probable cause to arrest exists based on the facts of a given case is a question of law to be reviewed independently of the trial court. *State v. Truax,* 151 Wis. 2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). The HGN test can be considered, and the Deputies had probable cause to arrest Barnes. Probable cause was found when an "officer came upon the scene of a one-vehicle accident. The officer observed a damaged van next to a telephone pole. The engine of the van was running and smoking. An injured man, whom the officer recognized as Kasian, was lying next to the van. The officer observed a strong order of intoxicants about Kasian. Later, at the hospital, the officer observed that Kasian's speech was slurred." *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Even absent the HGN, probable cause is present in this case.

V. THE CIRCUIT COURT LACKED LEGAL AUTHORITY OR BASIS FOR THE REMEDY ORDERED, INCLUDING DISMISSAL OF THE CHARGES.

There is no case presented by Barnes or the trial court supporting the remedy of dismissal in this matter. Indeed, at the time of the oral ruling, the trial court appeared to have ordered suppression of evidence and not dismissal. (R.22:36.) If the trial court's rulings stand and, 1) contrary to *Thompson*, the deputies' entry in to the the ER room was a violation of Barnes' "reasonable expectation of privacy" (R.22:36), and if 2) Barnes was seized and felt he could not refuse during the exchange where he said 'Yep,' I can do that for you, and 3) if Nimtz did not have reasonable suspicion to further investigate this possible OWI offense with a single-vehicle rollover crash with no external cause except poor driving with Barnes coming from a bar drinking admittedly probably 'four beers' ending about 50 minutes before, and if 4) Nimtz did not have probable cause with all of that information as well as 4/6 clues on the HGN, then 5) the remedy is suppression of the evidence subsequent to the violation.

There is nothing supporting that the charges can be dismissed. There was no legal support given for the remedy requested by Barnes' counsel or the trial court at the 'status conference' and no argument made beyond apparently

Barnes' counsel's belief that the County's case would not be triable with the remaining evidence. (R.23:6.) The trial court's written order provides no explanation. (R.15)

CONCLUSION

Based on the above analysis, this court should reverse the trial court's apparent suppression of evidence and dismissal of the matters.

Dated this 5th day of November, 2018, at Monroe, WI.

Respectfully submitted:

_____

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CERTIFICATION OF FORM AND LENGTH

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

> Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _49__ pages.

Signed,

_____
Attorney Laura M. Kohl
State Bar Number 1053447

CERTIFICATION OF MAILING

I certify that on this 5th day of November, 2018, pursuant to sec. 809.80(3)(b) and (4), the original and nine copies of the Brief of Plaintiff-Appellant were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Defendant-Respondent via United States first-class mail in properly addressed, postage paid envelopes.

Signed,

_____
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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of sec. 809.19(12) of the Wisconsin Statutes. I further certify that this brief conforms to the rules contained in Sections 809.19(12)(f) and 809.19(13)(f) of the Wisconsin Statutes that the content of the electronic copy of the Plaintiff-Appellant's brief is identical to the content of the paper copy of the Plaintiff-Appellant's brief.

I further certify that the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated this 5th day of November, 2018.

Signed,

_____

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) of the Wisconsin Statutes and that contains, at a minimum: (1) a table of contents; (2)the findings or opinion of the circuit court; and (3)a copy of any unpublished opinion cited under 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 records 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 5th day of November, 2018.

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