STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018 AP 1388-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL R. MCGINNIS,

Defendant-Respondent.

DEFENDANT-RESPONDENT'S BRIEF

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On appeal from the Circuit Court
of Eau Claire County, Hon. William M. Gabler, Sr.,
Circuit Judge, presiding.

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ISSUE FOR REVIEW

1. Did a police officer have probable cause to arrest the defendant before he entered defendant's residence?

The Trial Court Answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE[1]

Bell "had information" from dispatch that a "hit and run" "had just occurred in the parking lot of the Happy Hollow Tavern." The "suspect's" vehicle was identified as "a yellow Jeep Wrangler" and "was leaving the area…." (23:5). Dispatch also provided Bell with a plate number. (23:5).

Bell ran the plate and learned the registered owner was Michael McGinnis. (23:7). Bell then obtained McGinnis's address and his driving record. (23:7). The address was a "few blocks" from the Happy Hollow Tavern. McGinnis's record showed six previous convictions for OWI. McGinnis would therefore have a .02 restriction for blood alcohol and any subsequent offense would be a felony. (23:7). Bell went directly to the residential address he obtained from the record search. Bell directed another officer to the Happy Hollow Tavern to gather information there. (23:8).

Bell arrived at an apartment building with a door directly accessing the parking lot. (23:8-9). He "observed" a "yellow Jeep in front of the registered owner's apartment door." (23:8-9). Bell stood outside the apartment for several seconds. He could hear music "and somebody moving inside the residence." He then knocked on the door and waited about 30 seconds. There was no answer. He knocked a second time and a man opened the door. (23:9). He did not see any one else "[a]s far as [he] could see inside the room." (23:10). He asked the person who answered the

1 The Statement of the Case and the Statement of Facts are combined.

door whether he was the registered owner of the Jeep. The person responded he was not. Bell next asked if he had been at the Happy Hollow. The person responded he was not and added "there would be no evidence" he was at the Happy Hollow. (23:10, 12). Bell asked the man for identification. He refused to provide it. (23:12). Bell "advised" the man "he needed to identify himself because he was being detained pending the investigation in this matter." (23:12). Bell then told the man to step out of the residence. The man "declined" to do so and began shutting the door. (23:13). At that point, Bell "stepped into the door to prevent it from being shut." (23:12-13). The State concedes this was the moment of entry. (23:32).

While Bell was talking to the man, he noted his "eyes were glassy and bloodshot" and that "his speech was slurred and very slow…." (23:10-11).

ARGUMENT

I. THE POLICE OFFICER DID NOT HAVE PROBABLE CAUSE TO ARREST AT THE TIME HE ENTERED MCGINNIS'S APARTMENT AND THEREFORE ALL DERIVATIVE EVIDENCE MUST BE SUPRESSED.

1. Legal Standards

A. Suppression Standards

McGinnis agrees with the State that *State v. Felix*, 2012 WI 36, 339 Wis.2d 670, 811 N.W.2d 775 governs in this case.[2] If Officer Bell had probable cause to arrest McGinnis at the moment of entry, then the evidence subsequently obtained outside the residence is admissible. *Felix*, at ¶¶40, 49. If not, then all derivative evidence after entry must be suppressed.

2 The State appeals based solely on whether Bell had probable cause to arrest at the time of the entry. (State's Brief, p. 1, 7, 8)

B. Probable cause to arrest

Probable cause to arrest exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that *the defendant probably* committed a crime." *State v. Kutz*, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 544-545, 671 N.W.2d 660. See also *State v. Drogsvold*, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (1981) (police must have probable cause to believe "that the person arrested had committed or was committing an offense.") The available evidence must be sufficient to lead a reasonable officer to believe a defendant's involvement in a crime is "more than a possibility,…." *Kutz,* at ¶11. Probable cause for arrest "serves as a safeguard to protect citizens from rash and unreasonable interference with their privacy and from unfounded charges of crime." *Hills v. State*, 93 Wis. 2d 139, 144, 286 N.W.2d 356 (1980).

In reviewing an order granting or denying a motion to suppress evidence, the trial court's findings of fact will be upheld unless they are clearly erroneous. *Kutz,* at ¶13. Whether the evidence satisfies the standard of probable cause is a question of law reviewed de novo. *Id*.

Probable cause to arrest should not be confused with probable cause to request a PBT. Probable cause to request a PBT is greater than reasonable suspicion but less than the level of proof required to establish probable cause for arrest. *State v. Begicevic*, 2004 WI App 57, ¶8, 270 Wis.2d 675, 678 N.W.2d 293.

Reasonable suspicion requires significantly less than probable cause to arrest. *Begicevic*, at ¶8. A police officer may temporarily detain a person when the officer has reasonable suspicion, grounded in specific articulable facts, that an individual is violating the law. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623; *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569 The principal function of an

investigative stop is to resolve ambiguity when a reasonable inference of unlawful conduct can be objectively discerned but the existence of other innocent inferences may also be drawn. *State v. Waldner*, 206 Wis.2d 51, 60, 556 N.W.2d 681 (1996). See e.g. *State v. Swanson*, 164 Wis.2d 437, 453-54 n.6, 475 N.W.2d 148 (1991) (unexplained erratic driving, the odor of intoxicants, and the approximate time of the incident (about the time that bars close in Wisconsin) "form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.") Reasonable suspicion must be individualized. See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (reasonable suspicion analysis is focused on whether a particular person has violated the law).

2. Officer Bell did not have probable cause to arrest McGinnis for a PAC violation prior to entry.

The question on appeal is whether Officer Bell had probable cause to arrest Michael McGinnis for a PAC violation *prior* to the moment he made entry into McGinnis's apartment. (23:31-32). The State does not claim the alleged "hit and run" provides grounds for the arrest. (23:30). In this case, a PAC violation pursuant to Wis. Stat. § 346.63(1)(b) has two elements: 1) McGinnis was operating a motor vehicle; and, 2) McGinnis had a BAC exceeding .02 while he was operating a motor vehicle, See e.g. *State v. Lange*, 2009 WI 49, ¶19, 317 Wis.2d 383, 766 N.W.2d 551. The burden of proof is on the State to show the officer had probable cause to arrest. *Id.*

The State's sole argument is that Bell had probable cause to arrest McGinnis based on "the information available to Officer Bell before McGinnis attempted to close the door." Therefore, any evidence subsequently obtained outside the residence should not have been suppressed. (State's Brief, p. 8). The State previously conceded that once Bell's foot crossed the threshold into the house, he made entry. (23:32). In short, McGinnis and the State

agree: 1) that Bell made entry when his foot crossed the door's threshold; and 2) probable cause must be based exclusively on what Bell knew[3] before entry was made. Anything Bell learned after he entered McGinnis's residence is irrelevant. The question, then, is what Bell knew *prior* to his entry and whether that reaches the threshold of probable cause to arrest McGinnis for driving with a PAC of .02 or more.

Bell lacked probable cause to arrest for at least three alternative reasons. First, Bell did not have probable cause to believe McGinnis was the driver of the yellow Jeep leaving the Happy Hollow parking lot. Second, Bell did not have probable cause to believe the man he was speaking to at the apartment door was McGinnis. Third, Bell did not have probable cause to believe McGinnis was operating the Jeep with a PAC or .02 or more. Each of these will be addressed in turn.

A. Bell did not have probable cause to arrest McGinnis because he did not have probable cause to believe McGinnis was the driver of the yellow Jeep.

Probable cause to arrest requires a police officer to reasonably believe ***the defendant*** *probably* committed a crime. *Kutz*, at ¶11. The mere fact McGinnis was the registered owner of the yellow jeep does not establish probable cause to believe he was the driver of the vehicle.

The dispatch Bell received did not identify the driver of the yellow Jeep leaving the Happy Hollow.[4] It did not provide a name,

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3 McGinnis assumes that what Bell knew at the time of entry is consistent with what the record shows was the collective knowledge of the police department.

4 Bell did not find out a witness had verified McGinnis's presence at the Happy Hollow until Officer Peterson joined him at the apartment, long after he made entry to the residence. (23:11). The precise time Peterson found out is not in the record. Bell testified Peterson found out "at some point" during his investigation at the Happy Hollow. (23:11). In short, the

a description—age, male or female, black or white, type of clothing, distinguishing characteristics—or anything else that could have been used to help identify the driver. The only identifying information Bell had was the color and make of the vehicle and a plate number. Bell assumed McGinnis was the driver based solely on the fact that he was the registered owner and the car was parked near what was, presumably, the address McGinnis had provided the DOT.

A police officer may presume a registered owner is the driver *for the purpose of a traffic stop*. See *State v. Newer*, 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 923. Despite the fact that cars registered to one person are often driven by another, this presumption is based on a "sufficient probability" to meet reasonable suspicion standards under Fourth Amendment. *Newer*, at ¶7. *Newer,* however, did not address probable cause to arrest. Nor did it address this presumption in the context of an empty, parked vehicle.

At best, the registration information may lend support to probable cause, but is insufficient standing alone. In *Hills*, for example, the suspects leaving the scene of a robbery were described as two black males driving a light brown automobile with a specific license plate number. About 40 minutes later the police found the vehicle parked on the street. *Id*., at 143. They set up surveillance. While they were waiting, they learned the car was registered to a man named James Earl Hills. Within an hour they saw a black male enter the car. The police approached and told him to step back. They asked him what he was doing and who he was. *Id*. The defendant identified himself as Robert James Hills and stated that the car belonged to his brother, James Earl Hills. The defendant also stated he was retrieving his coat from the car. The officers noted he was not wearing a coat at that time. *Id*., at 144. Hills was arrested.

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record does not show police had knowledge—collectively or otherwise—that McGinnis was at the Happy Hollow prior to Bell's entry.

The Court agreed there was probable cause to arrest. While the car's registration in the family name "lent" support to the belief Hills was one of the men involved in the robbery, the more important factor was the "substantial dominion and control over the same automobile in which the robbers had fled less than two hours earlier. Not only was defendant the only one to approach the car during the hour it was under police surveillance, but it was also apparent he had recently used or ridden in it from the fact that on a December afternoon he was coatless and was entering the car to retrieve his coat from the back seat." *Id*., at 147.

In contrast, Bell had no description of the driver or McGinnis. More importantly, Bell had no evidence of *recent* domination and control over the vehicle by the unidentified man answering the door to McGinnis's residence.

B. Alternatively, Bell did not have probable cause to arrest McGinnis because he did not have probable cause to believe the man who answered the door was McGinnis.

Even if Bell had probable cause to believe McGinnis was the driver, he did not have probable cause to believe the man at the door *was* McGinnis. He was not acquainted with McGinnis nor did he have a description of McGinnis or the driver. Indeed, Bell asked the man at the door to identify himself and when he failed to do so, told the man he "needed" to identify himself. (23:12). McGinnis not only refused to identify himself, he refused to produce his driver's license, denied the Jeep was his, denied he was at the Happy Hollow, and denied he was involved in a hit and run. (23:10, 12).

The State also implies that Bell had reason to believe McGinnis was alone in his apartment. (State's Brief, p. 9). Bell did not see anyone else, but with McGinnis standing in front of him and his vantage point admittedly limited to the outside

doorway entrance, there was no way Bell could have reasonably drawn any conclusions. (23:10). Bell knew nothing of McGinnis's living situation. He did not know who lived there; he did not know who was on the apartment lease; he did not know the size and layout of the apartment; and he never asked McGinnis if anyone else was home. Bell acknowledged hearing activity inside the apartment before he knocked. *Id*. Bell, therefore, had no basis for assuming McGinnis was alone in the apartment.

The bottom line is that Bell could only *suspect* the man he was talking to was McGinnis. He had reasonable suspicion at best. Bell was confronted with an ambiguous situation that required clarification. Probable cause, on the other hand, requires a higher level of certainty. *Begicevic*, at ¶8. With no means to identify the man at the door as McGinnis, Bell did not have probable cause to arrest McGinnis when he entered the apartment.

C. Alternatively, Bell did not have probable cause to arrest McGinnis because he did not have probable cause to believe McGinnis was operating the yellow Jeep with a PAC of .02 or more.

Bell had no evidence the Jeep's driver had consumed alcohol prior to driving and therefore did not have probable cause to believe the driver of the Jeep was operating with a prohibited PAC level.

Bell had no information the driver was drinking in the Happy Hollow Tavern. He had no information concerning the alleged "hit and run."[5] He did not report seeing any visible damage to the Jeep when he found it in the apartment parking lot. As the circuit court pointed out, the lack of information from the tavern prevented any assessment of whether the driver was likely

5 See footnote 4, *supra*.

intoxicated. (24:19-20). With no information from the Happy Hollow and no visible damage to the Jeep, Bell had no basis from which he could reasonably infer the driver was impaired. He could only speculate.

The only other relevant information would have been Bell's observations that McGinnis had glassy eyes and slurred speech. Bell's observations are problematic for at least two reasons.

First, the inculpatory value of Bell's observations is dependent on how close in time they were to the vehicle's operation. Bell did not know when the Jeep was operated because he did not know how much time had elapsed since the Jeep left the Happy Hollow Tavern. While Bell was allegedly told the hit and run had "just occurred" (Bell's words) (23:5), the word "just" is far from precise. As the circuit court pointed out, it could have been "ten minutes, 15 minutes, 30 minutes, 45 minutes, who knows?" (23:40). The circuit court specifically found McGinnis was home "some unknown period of time." (23:39). It was at least long enough that McGinnis could have been drinking at home. *Id*. Not knowing when the Jeep was operated, Bell's observations of McGinnis at most amounted to reasonable suspicion. The inculpatory impact was unknown without further investigation.

Second, Bell did not report any odor of intoxicants coming from McGinnis despite speaking to McGinnis in very close proximity. Had McGinnis been drinking only minutes before, as the State contends (23:39), the scent of alcohol would have been prominent and noted by a police officer trained in OWI enforcement. McGinnis cannot find a single reported case where "glassy eyes" and slurred speech" were not accompanied by a "strong odo r of intoxicants."

The State's evidence is too ambiguous to support the reasonable inferences necessary for probable cause. The identity of the driver was unknown; the time of operation was unknown;

and the identity of the person at the door was unknown. Bell did not have probable cause to believe McGinnis operated a vehicle with a PAC of .02 or more.

The circuit court's conclusion that the State failed to prove probable cause is correct, and "benefitting" from the circuit court's analysis, this Court should affirm.

CONCLUSION

This Court should affirm the circuit court's Order suppressing evidence.

Respectfully submitted this 3rd day of December, 2018.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

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This brief contains 3946 words.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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.

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Dated this 3rd day of December, 2018.

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I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on this 3rd day of December, 2018. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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