

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

RECEIVED

10-15-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2018AP 001428
Kenosha County Circuit Court Case Nos. 2016TR016201**

In the Matter of the Refusal of Michal R. Pace:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. PACE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MR. PACE REFUSED
CHEMICAL TESTING, IN KENOSHA COUNTY, THE
HONORABLE MARY KAY WAGNER, JUDGE,
PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT MICHAEL R. PACE**

**By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997**

**Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)**

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	iii
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.....	iii
STATEMENT OF THE CASE/FACTS.....	1
STANDARD OF REVIEW.....	4
ARGUMENT	4
THE STATE FAILED TO ADDUCE SUFFICIENT EVIDENCE AT THE REFUSAL HEARING ESTABLISHING PROBABLE CAUSE TO BELIEVE THAT MR. PACE OPERATED A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT.....	4
CONCLUSION	9
FORM AND LENGTH CERTIFICATION	10
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	11
APPENDIX CERTIFICATION	12
APPENDIX.....	14
Order	App.1
Excerpts from Refusal Hearing 07/18/2018	App.2

TABLE OF AUTHORITIES

Page No.

CASES

Wisconsin Supreme Court

<i>In re Smith</i> , 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243.	8-11
<i>State v. Blatterman</i> , 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26.	8
<i>State v. Sykes</i> , 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277.	8
<i>State v. Fry</i> , 131 Wis.2d 153, 388 N.W.2d 565 (1986)..	8
<i>State v. Lange</i> , 2009 WI 49, 317 Wis.2d 383, 766 N.W.2d 551.	9,10
<i>State v. Nordness</i> , 128 Wis.2d 15, 381 N.W.2d 300 (1986).	8

Wisconsin Court of Appeals

<i>County of Dane v. Sharpee</i> , 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).	9
<i>State v. Kasian</i> , 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996)	9
<i>Village of Elkhart Lake v. Borzyskowski</i> , 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985).	9

Wisconsin Constitution

Article I, Section 11.	8
--------------------------------	---

United States Constitution

Fourth Amendment.	8
---------------------------	---

STATEMENT OF THE ISSUES

Did Wisconsin State Patrol Trooper Michael Lawson have the requisite level of probable cause to arrest Mr. Pace for operating a motor vehicle while under the influence of an intoxicant?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Michael R. Pace (Mr. Pace) was charged in the Kenosha County, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a), with operated a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat §346.63(1)(b) and with refusing to submit to a chemical test in violation of Wis. Stat. §343.305(9) on December 25, 2016. Mr. Pace, by counsel, timely filed a request for a refusal hearing on January 3, 2017. A Refusal Hearing was held on July 18, 2018, the Honorable Mary Kay Wagner, presiding. On said date, the Court found that Mr. Pace unlawfully refused chemical testing, finding that Trooper Lawson had the requisite level of probable cause to believe that Mr. Pace was operating a motor vehicle while under the influence of an intoxicant. A written order was entered on July 24, 2018. (R21:1/ App. 1).

On July 27, 2018, the defendant timely filed a Notice of Appeal.

Pertinent facts in support of this appeal were adduced at the Refusal Hearing held on July 18, 2018 and were introduced through the testimony of Wisconsin State Trooper Michael Lawson. Trooper Lawson testified that on Christmas Day of

2016 at approximately 4:38 p.m., he observed Mr. Pace's vehicle pass his squad at a high rate of speed. (R26:5/ App. 2). Lawson could not testify as to the speed Mr. Pace's vehicle traveled, but testified he observed the vehicle deviate from its lane. Lawson said the vehicle deviated one to two feet from lane one into lane two. (R26:5/ App. 2). Based on the above, Lawson conducted a traffic. Lawson acknowledged that it was raining at the time of the stop. (R26:9/ App. 5). The State introduced into evidence a video showing the alleged driving behavior.

The initial contact with Mr. Pace revealed no signs of intoxication. (R26:6/ App. 3). Trooper Lawson indicated he initially approached on the passenger side of the vehicle. However, Trooper Lawson requested Mr. Pace to exit the vehicle. Once outside the vehicle, Lawson observed Mr. Pace to exhibit red, bloodshot eyes, and a strong odor of intoxicant. (R26:8/ App. 4). Lawson testified that Mr. Pace performed field sobriety tests, and did not pass those tests. (R26:8/ App. 4). But for this conclusion, the State put forth no evidence as to which specific field sobriety tests were performed or what specifically suggested Mr. Pace might be impaired. The State offered no evidence regarding Lawson's training, or the specific indicators

of impairment Lawson looked for on each test. Further, the record is silent as to what specific indicators Mr. Pace exhibited.

The State argued the evidence produced was sufficient to establish probable cause to arrest Mr. Pace. (R26:11-12/ App. 6-7). The defense countered stating the evidence adduced did not justify the continued detention, nor the arrest. (R26:12-13/App. 7-8). The Court found Trooper Lawson possessed the requisite level of suspicion to stop, investigate and request Mr. Pace to submit to a chemical test of his blood, and the refusal was improper. (R26:13/ App. 8).

The Court signed an Order finding the refusal improper on July 24, 2018. Mr. Pace timely filed a Notice of Appeal on July 27, 2018.

STANDARD OF REVIEW

When reviewing the circuit court's finding of a refusal, appellate court will uphold the lower courts finding of facts unless they are clearly erroneous, but independently reviews application of those facts to constitutional principles, as questions of law. See *State v. Blatterman*, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26, *In re Smith*, 2008 WI 23, ¶16, bri308 Wis.2d 65, 746 N.W.2d 243.

ARGUMENT

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, protect individuals against unreasonable seizures. “A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment...” *State v. Sykes*, 2005 WI 48, ¶14, 279 Wis.2d 742, 695 N.W.2d 277 citing to *State v. Fry*, 131 Wis.2d 153, 169, 388 N.W.2d 565 (1986). In the context of a refusal hearing, probable cause “exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ...that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986) see also *In re*

Smith, 2008 WI 23, ¶15, 308 Wis.2d 65, 746 N.W.2d 243. Probable cause requires that at the moment of arrest, an officer knew of facts and circumstances that were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985). A reasonable police officer need only believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The State has the burden to show the evidence known to the arresting officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of operating a motor vehicle while impaired. *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551, see also *In re Smith*, 2008 WI 23 at ¶15. Probable cause is determined on a case by case basis using the totality of the circumstances. *State v. Kasian*, 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996)

Here, the record is devoid of any testimony concerning Mr. Pace's specific performance on field sobriety tests. From the record, we do not know what Trooper Lawson requested Mr. Pace do, or how Mr. Pace did it. This writer acknowledges field sobriety testing is not a prerequisite for probable cause to arrest.

see *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551, see also *In re Smith*, 2008 WI 23 at ¶1. In *Lange*, the court found “wildly dangerous” driving alone might suggest “the absence of a sober driver.” *Lange* at ¶24. However, here, more was necessary for Trooper Lawson to arrest Mr. Pace. Mr. Pace’s case is easily distinguishable from *Lange* and *In re Smith*. In *Lange* the driver “crossed the center line multiple times, venturing far into the wrong side of a four-lane road. The defendant also did not merely speed; he increased his speed to over eighty miles per hour in a thirty miles per hour zone...the defendant did not simply fail to maintain proper control of his vehicle; he drove his vehicle off the road and through a utility pole.” *Id.* The driving behavior of Lange played a significant role in the court’s probable cause determination.

Likewise, in *In re Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, even though several indicia of intoxication were not present, the court found that probable cause existed for the arrest. *Id.* at §17. The *Smith* court considered the driving behavior along with the time of night (around bar time) in finding probable cause. The *Smith* court found, “at the time of the arrest, the Deputy knew that the defendant had been driving well in excess of the speed limit late at night on a two-lane

highway; that the defendant delayed pulling over after the deputy activated his emergency lights; [and] that the defendant had twice driven across the centerline before pulling over...” *In re Smith* at ¶36 The driving behavior coupled with the time of night suggested impairment.

Unlike the factual scenarios in *In re Smith* and *Lange*, the driving here was not so “wildly dangerous” to suggest Mr. Pace was an impaired driver. Trooper Lawson did not establish the speed at which Mr. Pace’s vehicle was operating, and the deviations observed in the video while technically a violation were minor in nature compared to those described in *In re Smith* and *Lange*. Thus, unlike *In re Smith* and *Lange*, the driving here alone did not support probable cause to arrest Mr. Pace.

Finally, the issue becomes whether the additional observations testified to by Trooper Lawson, established the requisite level of suspicion to detain and subsequently arrest Mr. Pace. Because the State put forth no specific evidence of Mr. Pace’s performance on the field sobriety tests, Mr. Pace’s case is akin to both *Lange* and *In re Smith* inasmuch as none of the cases had the results of field sobriety testing. Here, as in both of the cases *supra*, it is like no field sobriety tests were performed, the State adduced no specific observations regarding the testing.

The question is whether the other evidence adduced at the Refusal Hearing justified the decision to detain and arrest Mr. Pace. It did not.

Trooper Lawson conceded, upon his initial approach, he observed no signs of intoxication. (6). In fact, there is no testimony Lawson even suspected impairment, the record is silent as to whether Lawson even asked Mr. Pace if he had consumed alcohol. Clearly, upon the initial approach, Lawson observed no odor of intoxicants, slurred speech, bloodshot eyes or motor coordination difficulty.

Despite the above, Lawson requested Mr. Pace to exit for field sobriety testing. The record is silent as to whether Mr. Pace exhibited any balance problems while exiting. However, once outside the vehicle Lawson observed an odor of intoxicant and red bloodshot eyes. These observations, without more, do not rise to the level of probable cause to arrest Mr. Pace for impaired driving. Said observations would not have led a reasonable officer to believe that Mr. Pace probably operated his motor vehicle while impaired.

CONCLUSION

Because of the above, the trial court erred in finding that Trooper Lawson had probable cause to arrest Mr. Pace. The Court should reverse the order and vacate the refusal.

Dated this 15th day of October, 2018.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 18 pages. The word count is 3139.

Dated this 15th day of October, 2018.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of October, 2018.

Respectfully submitted,

Piel Law Office

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of October, 2018.

Respectfully submitted,

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX