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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

11-09-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2018AP1428

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Michael R. Pace,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR KENOSHA COUNTY, THE
HONORABLE MARY WAGNER, PRESIDING
CIRCUIT COURT CASE NO. 2016TR016201

BRIEF OF PLAINTIFF-RESPONDENT

SUBMITTED BY:

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STATE OF WISCONSIN
COURT OF APPEALS
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STATE OF WISCONSIN,

Petitioner-Respondent,

v.

Michael Pace,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR KENOSHA COUNTY, THE
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CIRCUIT COURT CASE NO. 2016TR016201

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE

1. Did Wisconsin State Patrol have sufficient probable cause to arrest the defendant for Operating While Intoxicated?

Trial Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Kenosha County District Attorney's Office is not requesting oral argument or publication as the issue before the court can be resolved through the application of existing law to the facts of this case.

STATEMENT OF THE FACTS

A refusal hearing was held on July 18, 2018 in which Wisconsin State Trooper Michael Lawson testified that on the evening of December 25, 2016 he observed the defendant's vehicle pass his squad, which was traveling at 70 MPH, at a higher rate of speed. **(Refusal R:5.1-3)**. Trooper Lawson witnessed the defendant's vehicle deviate from its lane by crossing into the next lane by one to two feet. **(R:5.9-10)**. Trooper Lawson then conducted a traffic stop. The State introduced a video of the lane deviation.

Trooper Lawson testified he initially approached the defendant's vehicle on the passenger side of the vehicle, requesting the defendant exit his vehicle. **(R:10.17-23)**. Once outside the vehicle, Trooper Lawson observed the defendant exhibited red, bloodshot eyes, and a strong odor of intoxicants. **(R:8.12-18)**. Trooper Lawson requested the defendant perform Field Sobriety tests, which the defendant did not pass. **(R:8.21-22)**. Trooper Lawson then read the defendant the Informing the Accused and asked the defendant to submit to a breath test, which he refused. **(R:7.3-7)**.

The Court found that Trooper Lawson possessed the requisite level of suspicion to stop, investigate, and request the defendant to submit to a chemical test of his blood. **(R:13.3-16)**. The Court signed an Order finding the

refusal improper on July 24, 2018. The defendant filed a Notice of Appeal on July 27, 2018.

ARGUMENT

I. Standard of Review

The Court of Appeals upholds the circuit court's findings of fact unless they are clearly erroneous or contrary to the great weight and clear preponderance of the evidence. ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997; *State v. Allen*, 226 Wis. 2d 66, 70, 593 N.W. 2d 504 (Ct. App. 1999)). Whether the facts satisfy the constitutional requirement of reasonableness is a question of law and should be reviewed de novo. ***Id.*** The appellate court values a trial court's decision on the question. ***Scheunemann v. City of West Bend***, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

"The determination of whether a witness is qualified to testify as an expert under [Wis.Stat. §] 907.02 is a matter within the discretion of the circuit court." ***Green v. Smith & Nephew AHP, INC.***, 2001 WI 109, ¶89, 245 Wis. 2d 772, 833, 629 N.W.2d 727, 756 (citing *Glassey v. Continental Ins. Co.*, 176 Wis. 2d 587, 608, 500 N.W.2d 295, 304 (1993)). The Wisconsin Supreme Court noted that on review, the court will sustain the circuit court's discretionary determination so long as the circuit court examined the facts of record,

applied a proper legal standard and, using a rational process, reached a reasonable conclusion. *Id.*

II. The Trooper Had Probable Cause to Arrest the Defendant for Operating While Intoxicated Offense.

Where there is no unlawful conduct, a stop may be justified based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct indicate that criminal activity is afoot. *See State v. Waldner*, 206 Wis.2d 51, 57, 556 N.W.2d 681, 684-85 (1996).

Whether an officer had reasonable suspicion is an objective test and the suspicion must be "grounded in specific, articulable facts and reasonable inferences from those facts....". *Id.* at 56, 556 N.W.2d at 684 (citation omitted). The focus is on the totality of the circumstances, not individual facts standing alone. *See Id.* at 58, 556 N.W.2d at 685. There are specific articulable facts that demonstrate that the defendant either was driving while intoxicated or was violating a traffic law. Trooper Lawson specified at the refusal hearing that he has training to detect impaired drivers. **(R:4.14-16)**. He further testified that he observed a Maserati traveling at a high rate of speed, passing his squad car, which was traveling 70 MPH. **(R:4,5.17-25, 1-3)**. Further, Trooper Lawson observed the Maserati deviate from its lane of traffic into its

neighboring lane. (R:5.3-12). This alone constitutes specific articulable facts that a traffic law was being violated.

The issues to be addressed at a refusal hearing are limited to first "Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol," and second "whether the person was lawfully placed under arrest for violation of s. 346.63(1) or a local ordinance in conformity therewith or s. 346.63(2), 940.09 or 940.25.". **State v. Nordness**, 128 Wis.2d 15, 25, 381 N.W.2d 300 (1986). The evidentiary scope of a revocation hearing has been deemed to be very narrow. **Id.** at 35. The state must only present evidence sufficient to establish an officer's probable cause to believe the person was operating a motor vehicle while under the influence of an intoxicant. **Section 343.305(3)(b) 5.a., Wis. Stats.** There is nothing more that is required. Due to the implied consent statute limiting the revocation hearing to a determination of probable cause rather than a determination of probable cause to a reasonable certainty, the trial court is not to weigh the evidence between the parties. The trial court is to ascertain the plausibility of a police officer's account. **Id.** at 36; *See, e.g., Vigil v. State*, 76 Wis.2d 133, 144, 250 N.W.2d 378 (1977).

Wis. Stat. 343.305, also known as the implied consent law, states that any person who drives or operates a motor vehicle upon the public highways of this state is deemed to have given his consent for chemical testing when requested to do so by a law enforcement officer. *Id* at 24. The court recognized that states have a compelling interest in keeping their highways safe for public use. The Supreme Court also recognized this interest by commenting on the bloodshed caused by drunk drivers. *See, e.g., South Dakota v. Neville*, 459 U.S. 553, 558, 103 S.Ct. 916, 919, 74 L.Ed.2d 748 (1983). "This state interest is served by the purpose of the implied consent law, which is to obtain the blood alcohol content in order to obtain evidence to prosecute drunk drivers". *State v. Brooks*, 113 Wis.2d 347, 355, 335 N.W.2d 354 (1983); *State v. Pawlow*, 98 Wis.2d 703, 298 N.W.2d 220 (Ct.App.1980). "The state's interest of keeping the highways safe is best served when those who drive while intoxicated are prosecuted and others are thereby deterred from driving while intoxicated". *Id.* at 32.

Under the totality of the circumstances test, Trooper Lawson had reasonable suspicion to conduct a traffic stop of the defendant, thereby investigating further, obtaining probable cause for an Operating While Intoxicated arrest. Trooper Lawson specified that the defendant was driving at a

high rate of speed, deviated from his lane, exhibited red bloodshot eyes, had a strong odor of intoxicants, and failed all the Field Sobriety tests. (R:5,8.1-6, 17-18). These specific articulable facts demonstrate that the defendant was violating a traffic law. Considering the totality of the circumstances, an objective officer would have reasonable suspicion to detain the defendant.

[S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

State v. Anderson, 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990). This was the totality of the information available to Trooper Lawson. Officers are allowed to arrest individuals based on probable cause to believe that they committed a crime. **Wis. Stat. 968.07(1)(d)**.

"[T]he term "probable cause," according to its usual acceptance, means less than evidence which would justify condemnation. " **Zalaski v. City of Hartford** 723 F.3d 382, 392; (quoting *Locke v. United States*, 11 U.S. 339, 7 Cranch 339, 348, 3 L.Ed. 364 (1813) (Marshall, C.J.)).

The Wisconsin Supreme Court held in **State v. Paszek**:

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.

50 Wis. 2d 619, 624-25, 184 N.W.2d 836, 839-40 (1971) (citations omitted). Probable cause exists where under the totality of the circumstances of 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. 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).

A trial court is in the best position to decide the weight and relevancy of testimony and an appellate court must give substantial deference to the trial court's better ability to assess the evidence. **In re Deannia D.**, 288 Wis. 2d 485, 494, 709 N.W.2d 879 (Ct. App. 2005). (citations omitted). Here, the only witness at the evidentiary hearing

presented by the State was Trooper Lawson, who testified he had training in detecting impaired drivers. (R:4.14-16). The trial court's ruling accepts Trooper Lawson's observations of the defendant as fact. The trial court found that, "[T]here's probable cause to have suspicion, number one, to stop the car for speeding and lane deviation; and then as that investigation proceeded, the reason to investigate further for intoxication." (R:13.3-7).

After the defendant did not pass the Standard Field Sobriety Tests, Trooper Lawson then had sufficient *probable cause* to place the defendant under arrest for Operating While Intoxicated. "Arguable probable cause [to arrest] exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Zalaski v. City of Hartford*, 723 F.3d 382, 390 (2d Cir.2013). (internal quotation marks omitted). There were multiple indicia of operating while intoxicated present based on the high rate of speed, lane deviation, red, bloodshot eyes, a strong odor of intoxicants, as well as failing the Field Sobriety tests. All of these establish probable cause for Trooper Lawson to arrest. Probable cause to arrest an individual for operating a motor vehicle while intoxicated:

[R]efers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.

State v. Lange, 317 Wis.2d 383, 391-92, 766 N.W.2d 551,555.

This Court upheld a circuit court's finding of probable cause to arrest for operating a motor vehicle while intoxicated when a defendant was not seen driving the motor vehicle after a crash and admission by the driver at the hospital of, "I have to quit doing this." **State v Wille**, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994). This Court held under the totality of the circumstances test that law enforcement *did* have probable cause to arrest. **Id.** at 684. Unlike in **State v Wille**, Trooper Lawson did see the defendant driving. Additionally, Trooper Lawson was able to document the excessive speed by the defendant, as well as the lane deviation prior to making the traffic stop.

Similarly, in **In re Smith**, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, as the defense cited, the court found that probable cause did exist for the arrest, despite the lack of slurred speech, blood shot eyes, difficulty swaying, or other signs of intoxication. **Id.** at 74. The deputy testified at the refusal hearing to the high rate of speed and crossing of the highway's double yellow centerline twice by Smith. **Id.** at

72. After approaching the vehicle, the Deputy detected an odor of intoxicants coming from Smith, which Smith admitted to drinking intoxicants. *Id.*

Likewise in the present matter, there is driving at a high rate of speed, lane deviation and odor of intoxicants from the driver. Yet unlike *In re Smith*, there are indicia of intoxication in the current case. Trooper Lawson testified at the refusal hearing that upon having closer contact with the defendant he detected the defendant "to exhibit red, bloodshot eyes, and a strong odor of intoxicants". (R:8.12-18). Additionally, in the present matter, which was lacking in *In re Smith*, Trooper Lawson testified that Field Sobriety Tests were conducted and failed by the defendant. (R:8.21-22).

Trooper Lawson had sufficient probable cause to arrest the defendant for Operating While Intoxicated based on the totality of the circumstances known to him at the time and believing, as a reasonable officer, that a crime had been committed. "Probable cause exists if at the time of the arrest, the facts and circumstances within the officer's knowledge ... are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Thayer v. Chiczewski*, 705 F.3d

237, 246 (7th Cir.2012) (citations and quotations omitted). Probable cause "requires only that a probability or substantial chance of criminal activity exists; it does not require the existence of criminal activity to be more likely true than not true." *Id.* (citations and quotations omitted). "Probable cause is a fluid concept that relies on the common-sense judgment of the officers based on the totality of the circumstances." *Id.* at 246-47 (citations and quotations omitted). Making a determination on probable cause requires the court to step into the shoes of a reasonable person in the officer's position. *Id.* at 247. "This is an objective inquiry; [the court does] not consider the subjective motivations of the officer." *Id.* Measuring Trooper Lawson's conduct on an objective standard and considering the totality of the circumstances at the time of the arrest, a reasonable officer could conclude that there was probable cause to believe the defendant was driving while under the influence of an intoxicant.

CONCLUSION

For the stated reasons, it is respectfully requested that the decision of the Circuit Court be upheld as the arrest of the defendant was supported by sufficient probable cause.

Dated at Kenosha, Wisconsin, this 7th day of November,
2018.

Respectfully submitted,

By: _____

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained within Section 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

Dated this 7th day of November, 2018.

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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 7th day of November, 2018.

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