

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

RECEIVED

12-17-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2018 AP 001956
Green Lake County Circuit Court Case Nos. 2018TR000129

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FAITH A. PARAFINIUK,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MS. PARAFINIUK REFUSED
CHEMICAL TESTING, IN GREEN LAKE COUNTY, THE
HONORABLE MARK T. SLATE, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT FAITH A. PARAFINIUK

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..... | iv |
| STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION..... | iv |
| STATEMENT OF THE CASE/FACTS..... | 1 |
| STANDARD OF REVIEW..... | 8 |
| ARGUMENT | 8 |
| I. OFFICER DOWNS LACKED REASONABLE SUSPICION TO STOP MS. PARAFINIUK’S VEHICLE..... | 11 |
| II. OFFICER DOWNS DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO CONTINUE TO DETAIN MS. PARAFINIUK FOR FIELD SOBRIETY TESTING..... | 12 |
| CONCLUSION | 15 |
| FORM AND LENGTH CERTIFICATION | 16 |
| CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)..... | 17 |
| APPENDIX CERTIFICATION | 18 |
| APPENDIX..... | 20 |
| Order | App.1 |
| Excerpts from Refusal Hearing 09/14/2018 | App.2 |

TABLE OF AUTHORITIES

Page No.

CASES

UNITED STATES SUPREME COURT

Terry v. Ohio, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L.d.2d 889 (1968) 13

Whren v. United States, 517 U.S. 806 (1996). 14

Wisconsin Supreme Court

In re Refusal of Anagnos, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675. 8

In re Smith, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243. 8,10

State v. Blatterman, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26. 8

State v. Fry, 131 Wis.2d 153, 388 N.W.2d 565 (1986) 10

State v. Lange, 2009 WI 49, 317 Wis.2d 383, 766 N.W.2d 551. 10

State v. Malone, 2004 WI 108, 274 Wis.2d 540, 683 N.W.2d 1. 12

State v. Nordness, 128 Wis.2d 15, 381 N.W.2d 300 (1986). 10

State v. Post, 2007 WI 60, 301 Wis.2d 1, 733N.W.2d 634. 9

State v. Sykes, 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277. 9

Wisconsin Court of Appeals

| | |
|---|----|
| <i>County of Dane v. Sharpee</i> , 154 Wis.2d 515, 453 N.W.2d 508 (Ct. App. 1990). | 10 |
| <i>State v. Colstad</i> , 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. | 9 |
| <i>State v. Gaulrapp</i> , 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). | 9 |
| <i>State v. Kasian</i> , 207 Wis.2d 611, 558 N.W.2d 687 (Ct.App. 1996). | 11 |
| <i>State v. Betow</i> , 226 Wis.2d 90, 593 N.W.2d 499 (Ct.App. 1999). | 12 |
| <i>Village of Elkhart Lake v. Borzyskowski</i> , 123 Wis.2d 185, 366 N.W. 2d 506 (Ct. App 1985). | 10 |

Wisconsin Constitution

| | |
|--------------------------------|---|
| Article I, Section 11. | 9 |
|--------------------------------|---|

United States Constitution

| | |
|---------------------------|---|
| Fourth Amendment. | 9 |
|---------------------------|---|

Wisconsin Statutes

| | |
|---|-----|
| Wis. Stat. §346.63(1)(a) and (am) | 1 |
| Wis. Stat. §343.305(9). | 1,8 |
| Wis. Stat. §346.18(4). | 11 |

STATEMENT OF THE ISSUES

Did City of Princeton Police Officer Christopher Downs have the requisite level of suspicion cause to stop Ms. Parafiniuk and subsequently possessed additional suspicion to continue to detain Ms. Parafiniuk for operating a motor vehicle while impaired?

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

Ms. Parafiniuk, defendant-appellant, (Ms. Parafiniuk) was charged in the City of Princeton, Green Lake County, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a), and with having operated a motor vehicle with a restricted controlled substance contrary to Wis. Stat §346.63(1)(am) and with refusing to submit to a chemical test in violation of Wis. Stat. §343.305(9) on February 14, 2018. Ms. Parafiniuk, by counsel, timely filed a request for a refusal hearing on February 22, 2018. A Refusal Hearing was held on September 14, 2018, the Honorable Mark T. Slate, presiding. On said date, the Court found that the refusal allegation “appropriate”, and found the officer had the requisite level of probable cause to stop Ms. Parafiniuk and to believe Ms. Parafiniuk operated a motor vehicle while under the influence of an intoxicant. A written order was entered on September 28, 2018. (R:9:1/ App. 1).

On October 1, 2018, the defendant timely filed a Notice of Appeal.

The following facts, in support of this appeal were adduced at the Refusal Hearing held on September 14, 2018 and were introduced through the testimony of City of Princeton

Police Officer Christopher Downs. Officer Downs testified he was employed as a police officer for the City of Princeton on February 14, 2018. On that date, at approximately 6:00 p.m., he was patrolling the area of State Highway 23 near Old Green Lake Road. (R.20:4/ App. 2).

Downs testified he was traveling eastbound on Highway 23. (R.20:17/ App. 12). Officer Downs made a turn from Highway 23, onto Old Green Lake Road. (R.20:18/ App. 13). On direct examination, Downs testified Parafiniuk's vehicle turned in front of him and then quickly pulled into the parking lot of a nearby gas station. (R.20:5/ App. 3). Downs indicated he had to apply his brakes to avoid a collision. (R.20:6/ App. 4). Ms. Parafiniuk's vehicle turned onto Old Green Lake Road, from an access point of a parking lot that "pretty much butts right up to Old Green Lake Road." *Id.* Defense counsel asked Downs if he was completely onto Old Green Lake Road when Ms. Parafiniuk made her turn. (R.20:17/ App. 12). Downs testified that as he completed his turn from Highway 23 onto Old Green Lake Road, Ms. Parafiniuk's vehicle "was there". (R.20:18/ App. 13). Downs suggested that it was possible that as he was turning onto Old Green Lake Road, Ms. Parafiniuk could have been simultaneously turning onto Old Green Lake

Road. However, he could not be sure without viewing his squad camera video footage. (R.20:18-19/ App. 13-14).

The vehicle stopped at one of the gas pumps, where Downs conducted the traffic stop. (R.20:6/ App. 4).

Downs identified the driver as Ms. Parafiniuk, and had recognized her from prior contacts with her at a gas station where Ms. Parafiniuk was previously employed. While speaking to Ms. Parafiniuk, Downs stated he observed her expressions to be exaggerated, and observed her to be talking very quickly. (R.20:7/ App. 5). Downs noted this behavior was inconsistent with his prior encounters with Ms. Parafiniuk. *Id.* However, Downs testified on cross examination that Ms. Parafiniuk did not exhibit slurred speech, but observed her speech to be accelerated. (R.20:21/ App. 15). Furthermore, Downs did not observe Parafiniuk to exhibit bloodshot eyes while she was sitting in the vehicle, and made the observation only after Ms. Parafiniuk exited the vehicle during the field sobriety tests. (R.20:21/ App. 15).

Downs also testified he recalled nothing about Ms. Parafiniuk's motor coordination when producing her driver's license suggesting impaired movements. (R.20:22/ App. 16). Downs testified Ms. Parafiniuk's movements were exaggerated

compared to what he had observed on prior contacts, but agreed that when he saw her on other occasions, the contact was under less stressful situations. (R.20:23/ App. 17).

Downs then ran Ms. Parafiniuk's information through dispatch, and eventually requested her to exit the vehicle. Once outside the vehicle, Downs noticed Ms. Parafiniuk's pupils to be "slightly larger, a little bit dilated." (R.20:7/ App. 5). Also, when Parafiniuk exited, Downs observed her to have bloodshot eyes. (R.20:8/ App. 6). Ms. Parafiniuk also seemed to have "abnormal" body movement, compared to what Downs had observed during previous contacts. *Id.*

Downs then requested Ms. Parafiniuk to perform field sobriety tests. Ms. Parafiniuk initially performed the horizontal gaze nystagmus test (HGN). Officer Downs observed no "clues" of impairment on that test. (R.20:9/ App. 7). The result of the HGN indicated Ms. Parafiniuk was not impaired by alcohol or "certain drugs." (R.20:25/ App. 18). Next, Downs had Ms. Parafiniuk perform the walk and turn test. During this test Downs observed six clues- including Ms. Parafiniuk stepped out of the instruction stance, missed heel to toe, stepped off line, stopped walking, raised her arms, and turned improperly. (R.20:11/ App. 8). During cross examination, defense counsel

inquired into the specifics of what Ms. Parafiniuk did incorrectly on the walk and turn test. (R.20:27/ App. 20). Downs could not testify as to how many times Ms. Parafiniuk missed heel to toe or raised her arms. He did not recall how many times she stepped off line or by how many inches. Nor could he remember how big of a gap she exhibited when she missed heel to toe. (R.20:27/ App. 20).

The next test perform was the one legged stand test. During that test, Downs observed three clues – Ms. Parafiniuk raised her arms from her side, placed her foot on the ground and swayed. (R.20:13/ App. 9). Downs could not remember how many times Ms. Parafiniuk raised her arms, or how far away from her side that her arms were raised. (R.20:28/ App. 21). Officer Downs testified the walk and turn and one legged stand test could suggest possible impairment from drugs or alcohol. (R.20:26-27/ App. 19-20).

Downs then performed the lack of convergence test, and observed a button-hook type of movement in Ms. Parafiniuk's left eye. (R.20:13/ App. 9). Downs testified this can indicate impairment. *Id.*

A Romberg balance test was performed next. Ms. Parafiniuk was asked to tilt her head back and close her eyes and

open her eyes when she thought 30 seconds passed. (R.20:14/ App. 10). Ms. Parafiniuk estimated 30 seconds passed when actually only 25 seconds passed. (R.20:14/ App. 10). Downs indicated during the Romberg test, he observed Ms. Parafiniuk to exhibit eyelid tremors which he stated could indicate impairment. *Id.* However, on cross examination, Downs admitted the criteria on the Romberg balance test is plus or minus 5 seconds, and that Ms. Parafiniuk's results fell within the normal range. (R.20:30/ App. 22). Downs agreed Ms. Parafiniuk performed the Romberg test correctly. *Id.*

The final test performed by Downs was the preliminary breath test, which showed no alcohol. (R.20:15/ App. 11).

Subsequently, Downs arrested Ms. Parafiniuk. He read to her the Informing the Accused form and requested that she submit to chemical testing. Ms. Parafiniuk said she was not willing to give a blood test, so Downs marked her as a refusal. Eventually, Downs obtained a search warrant for the blood test. (R.20:17/ App. 12).

The State argued the traffic stop was proper, and the evidence produced was sufficient to establish probable cause to arrest Ms. Parafiniuk. (R.20:33-34/ App. 23-24). The defense argued the officer did not have the requisite level of suspicion to

arrest Ms. Parafiniuk. (R.20:33-34/ App. 23-24) The defense argued the officer did not have the requisite level of suspicion to perform the traffic stop arguing that both vehicles turned simultaneously (R.20:34/ App. 24). and Downs did not have probable cause to arrest Ms. Parafiniuk. (R.20:34-35/ App. 24-25).

The Court found the stop to be appropriate stating Ms. Parafiniuk failed to yield to Officer Downs' vehicle. Furthermore, based on Downs' observations after the stop, the Court found Downs had the requisite level of suspicion to extend the traffic stop, and based on her performance on the field sobriety tests, had probable cause to arrest Ms. Parafiniuk. (R.20:35-36/ App. 25-26). Finally, the Court found Ms. Parafiniuk unlawfully refused chemical testing. (R.20:36/ App. 26).

The Court signed an Order finding the refusal improper on September 28, 2018. Ms. Parafiniuk timely filed a Notice of Appeal on October 1, 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

Pursuant to Wis. Stat. §343.305(9) the issues at a refusal hearing are limited to (a) whether the officer had probable cause to believe that the defendant was operating or driving a motor vehicle while under the influence of an intoxicant, (b) whether the officer complied with the provisions of Wis. Stat. §343.305(4), and (c) whether the defendant refused to submit to chemical testing. In the instant case, the first issue- probable cause, is the only contested issue. The probable cause determination under Wis.Stat. §343.305(9) encompasses reasonable suspicion for the traffic stop and for the continued detention. see *In re Refusal of Anagnos*, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675.

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996), *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under Fourth Amendment jurisprudence. *Id.* at 810. If an officer has probable cause to believe a traffic violation has occurred, an officer may conduct a traffic stop. *State v. Gaulrapp*, 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). An investigative detention must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394.

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).

I. OFFICER DOWNS LACKED REASONABLE SUSPICION TO STOP MS. PARAFINIUK'S VEHICLE

The rules of right-of-way require that a vehicle entering a highway from a non-highway access must yield the right-of-way to all vehicles approaching *on the highway which the operator is entering*. Wis. Stat. §346.18(4). (emphasis added).

In this case, Ms. Parafiniuk was turning from the school parking area onto Old Green Lake Road. Officer Downs was traveling on State Highway 23. Per the statute, Ms. Parafiniuk was required to yield to all vehicles on Old Green Lake Road. Downs testified that as he turned from Highway 23 to Old Green Lake Road, Ms. Parafiniuk's vehicle was there. Downs testified this occurred as he was completing his turn from Highway 23 to Old Green Lake Road. (R.20:17-18/ App. 12-13). The testimony revealed Ms. Parafiniuk was on Old Green Lake Road when Officer Downs completed his turn from Highway 23. As indicated above, Downs' testimony is that as he completed his turn she was there. Ms. Parafiniuk was not required to yield to traffic on Highway 23 inasmuch as the access that she turned out

of abutted Old Green Lake Road. She had a duty only to yield to vehicles approaching on Old Green Lake Road. Because Downs was on Highway 23, when Ms. Parafiniuk turned onto Old Green Lake Road she had no obligation to yield to him. Because of this, there was no traffic violation justifying the stop.

II. OFFICER DOWNS DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO CONTINUE TO DETAIN MS. PARAFINIUK FOR FIELD SOBRIETY TESTING

If the court finds the stop valid, the court must determine whether during the stop, Officer Downs became aware of sufficient additional “suspicious factors or additional information that would give rise to, an objective, articulable suspicion that criminal activity is afoot...” *State v. Malone*, 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (citing *State v. Betow*, 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)) “If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s intervention in the first place, the stop may be extended and a new investigation begun.” *Id.* at 94-95.

To meet this test, the officer must show additional specific and articulable facts, which taken together with rationale inferences from those facts, reasonably warrant the officer's continued intrusion. *Terry v. Ohio*, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968). To extend the stop, the officer must base that decision on something more than "an officer's inchoate and unparticularized suspicion or hunch." *Id.*

Even if the court finds the stop valid, Officer Downs did not observe sufficient additional suspicious factors justifying an extension of the stop for field sobriety tests. Based on his own testimony, he continued the detention and requested Ms. Parafiniuk to exit the vehicle to perform field sobriety tests, solely because Ms. Parafiniuk appeared to be talking very quickly, and her expressions were different than those observed by this officer in the past. (R.20:7/ App. 5).

Officer Downs observed no odor of alcohol or illegal substances, such as THC. Further, he did not observe any evidence in the vehicle consistent with drug use. He did not question Ms. Parafiniuk about use of controlled substances or alcohol. Thus, there was no admission of drug use. The stop occurred in the middle of the afternoon, not bar time. While her speech was quick it was not slurred. But for what the officer

characterized as “talking quickly”, the officer made no observations as Ms. Parafiniuk sat in the vehicle suggesting impairment.

An officer needs more than an inchoate and unparticularized hunch to continue a detention. Officer Downs needed additional suspicion which would have led a reasonable police officer to suspect that Ms. Parafiniuk was operating her vehicle while under the influence of a controlled substance. A totality of the circumstances analysis is used. Employing a totality of the circumstances analysis, and based on the argument above it is apparent the continued detention is not justified. Officer Downs had nothing more than an inchoate and unparticularized hunch that Ms. Parafiniuk might be operating her vehicle impaired.

CONCLUSION

Because of the above, the trial court erred in finding the stop and continued detention were justified. The Court should reverse the order and vacate the refusal.

Dated this 17th day of December, 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 23 pages. The word count is 4728.

Dated this 17th day of December, 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 17th day of December, 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 17th day of December, 2018.

Respectfully submitted,

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

APPENDIX