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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

05-07-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

APPEAL NO. 2019AP000167 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT J. FARUZZI,

Defendant-Respondent.

BRIEF OF PLAINTIFF-APPELLANT

ON APPEAL FROM THE DECISION OF
THE HONORABLE KRISTINE E. DRETTWAN, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH III

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STATEMENT OF THE ISSUES

Was there probable cause to place Faruzzi under arrest for operating a motor vehicle while intoxicated?

The trial court determined that there was no probable cause for the arrest.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state believes that the briefs of the parties will set forth well-established legal authority governing the issues presented. Resolution of the issues in this case requires only application of these established legal principles to the particular facts of this case. The state therefore requests neither oral argument nor publication.

STATEMENT OF THE CASE

Underlying charge.

By complaint filed June 8, 2018 and amended criminal complaint filed July 23, 2018, Defendant-Respondent, hereinafter Faruzzi, was charged with one count of operating a motor vehicle while intoxicated - third offense contrary to Wis. Stat. §346.63(1)(a), 346.65(2)(am)3, and 346.65(2)(g), and one count of operating a motor vehicle with a prohibited alcohol content - third offense, contrary to Wis. Stat. §346.63(1)(b), 346.65(2)(am)3, and 346.65(2)(g). (R1, R8). The violation date for this offense is May 19, 2018. (R1).

Suppression ruling.

In relevant part, by pretrial motion, Faruzzi sought to suppress all evidence derived from his illegal arrest. (R11). An evidentiary hearing was conducted on September 4, 2018 and December 5, 2018. (R22, R23, R27). At the conclusion of the hearing on December 5, 2018, the court made an oral ruling (R23). For the reasons set forth on the record of a hearing on December 5, 2018 Judge Kristine E. Drettwan granted the motion to suppress (R23:67-77; Appendix 1). A formal order to this effect was filed on December 10, 2018 (R19).

By notice of appeal filed January 17, 2019, the State now appeals from the pretrial suppression ruling (R20).

**STATEMENT OF FACTS RELEVANT
TO THE SUPPRESSION HEARING**

At the suppression hearing the State called three witnesses to testify, Village of Fontana Police Officer Gregory Ryan, (R23:7-28; Appendix 3:1-23); Village of Fontana Sergeant Derrick Goetsch; and Town of Linn Police Officer Ross Vogt. Following is a summary of the officers' testimony, and the trial court's oral ruling granting Faruzzi's motion to suppress the evidence resulting from an arrest without probable cause.

Officer Ryan's Testimony:

Officer Ryan, a police officer with the Village of Fontana Police Department with two years of law enforcement

experience, testified that he is trained to investigate operating while intoxicated offenses and is certified to administered field sobriety tests (R27:5-6, 16; R22:5-9). On May 19, 2018, at approximately 8:30 p.m., Officer Ryan testified that he was on duty and advised by dispatch of an attempt-to-locate a possible drunk driver who was heading westbound into the Village of Fontana on South Lakeshore Drive (R27:5). The identified complainant reported to 911 that the two individuals in the truck had been fighting and the complainant believed that the driver was intoxicated (R27:8-9). The complainant further provided a description of the truck to dispatch (R27:8-9).

Shortly after receiving this information, Officer Ryan located a vehicle matching the description given by dispatch, heading westbound on South Lakeshore Drive traveling at a high rate of speed (R27:12). Officer Ryan testified that the vehicle's speed was checked with radar, which although was not locked in, indicated the vehicle was traveling 40 mile per hour in a posted 25 mile per hour speed zone (R27:12-13; R23:27). Officer Ryan conducted a traffic stop of the vehicle on Fontana Boulevard and Reed Street in the Village of Fontana, Walworth County, Wisconsin (R27:13). Officer Ryan approached the driver, who was identified by Illinois driver's license as Faruzzi (R27:13-14). There was also a

female passenger in the truck (R27:14). Faruzzi was driving a jacked up truck that was over Officer Ryan's head, preventing Officer Ryan from seeing inside the truck or smelling any odor of intoxicants (R27:14-15; R22:19-20, 30; R23:23). While speaking with Faruzzi, who remained seated inside his truck, Officer Ryan observed that Faruzzi had glassy, bloodshot eyes (R27:14; R22:22).

After Officer Ryan returned to his squad car, Sergeant Vogt from the Linn Police Department arrived to assist (R27:15). While Officer Ryan remained in his squad writing a citation for no valid motor vehicle insurance, Sergeant Vogt approached the passenger (R27:15-16). As the passenger exited the truck to speak with Sergeant Vogt a beer bottle fell from the truck and broke along the curb line (R27:16). Sergeant Vogt advised Officer Ryan of the beer bottle (R27:16).

When Officer Ryan finished writing his citation, Officer Ryan again approached Faruzzi and had Faruzzi exit his truck (R27:16). After Faruzzi exited his vehicle, Officer Ryan could now detect a light odor of intoxicants emanating from Faruzzi's breath (R27:16; R22:30-31). Officer Ryan then asked Faruzzi to perform field sobriety tests and Faruzzi complied (R27:16).

First, Officer Ryan had Faruzzi perform the horizontal gaze nystagmus (HGN) test (R27:17). During this test, Officer

Ryan observed a total of four of six clues, which Officer Ryan knew to indicate impairment (R27:18). On cross-examination, however, Officer Ryan testified that while looking for nystagmus at maximum deviation, he had Faruzzi hold his eye in that position for three seconds. Officer Ryan acknowledged that the National Highway Traffic Safety Administration (NHTSA) manual states that the eye should be held at maximum deviation for a minimum of four seconds to determine if nystagmus is present. As a result, Officer Ryan agreed that the test was improperly performed and that the results were unreliable (R22:43-45).

Next, Faruzzi performed the walk and turn test. After explaining and demonstrating the test, Faruzzi indicated that he understood Officer Ryan's instructions (R27:19). Although Faruzzi's demeanor was initially calm, Officer Ryan testified Faruzzi became argumentative, but eventually agreed to do the test (R27:19). Before beginning the test, Faruzzi stepped out of place while Officer Ryan was giving Faruzzi instructions (R23:11). During the walk and turn, Officer Ryan observed that on the first nine steps Faruzzi left a one to two inch space between steps three and four, and failed to properly execute the turn, pivoting instead of taking small steps as instructed (R27:20; R23:13-14, 16). On his way back, Faruzzi again left a one to two inch space on step five (R23:14).

Officer Ryan observed a total of two of eight clues, which Officer Ryan knew to indicate impairment (R27:19-20).

Because Faruzzi stated he was unable for medical reasons to perform the one leg stand test, Sergeant Goetsch had Faruzzi complete a finger dexterity test (R27:20). After completing that test, Officer Ryan asked Faruzzi to submit to a preliminary breath test (PBT), which Faruzzi refused (R27:21).

Based on his observations, Officer Ryan formed the opinion that Faruzzi was under the influence of an intoxicant and placed him under arrest (R27:21).

Sergeant Goetsch's Testimony:

Sergeant Goetsch stated that he is a police sergeant for the Village of Fontana Police Department, and has been a law enforcement officer for twelve and a half years (R23:28). Sergeant Goetsch further stated that he was trained and certified to administer field sobriety tests, and has made over two hundred and seventy arrests for OWI. (R23:29). On the night of May 19, 2018 at approximately 8:38 p.m. Sergeant Goetsch was on duty when he received an attempt to locate a vehicle for a welfare check. The identified complainant, who gave a description of the suspect vehicle, stated that the occupants of the vehicle were fighting and intoxicated (R23:29-30). After Officer Ryan conducted a stop of the

suspect vehicle, Sergeant Goetsch responded to the scene (R23:30). Upon arrival at the scene, Sergeant Goetsch observed that Officer Ryan and Officer Vogt were standing outside with Faruzzi, who was performing field sobriety tests (R23:31). Sergeant Goetsch heard Faruzzi yelling, being loud and talking over Officer Ryan. Sergeant Goetsch heard Faruzzi yelling about not being able to perform a sobriety test, so Sergeant Goetsch offered to conduct the finger dexterity test instead (R23:32). Faruzzi continued to be argumentative and as Sergeant Goetsch was explaining the test, Faruzzi quickly did the test two times and just stopped before Sergeant Goetsch was able to complete the instructions and tell Faruzzi to begin (R23:33, 37). Sergeant Goetsch instructed Faruzzi to do the test until he was told to stop, but Faruzzi declined to continue (R23:37). While Sergeant Goetsch was speaking with Faruzzi, Sergeant Goetsch detected a strong odor of intoxicants and observed that Faruzzi's eyes were red, bloodshot and glassy (R23:33, 38). Sergeant Goetsch also observed a broken beer bottle on the curb, which Officer Vogt stated fell from Faruzzi's truck (R23:34, 40-41).

Officer Vogt's Testimony:

Officer Vogt, a police officer with the Town of Linn Police Department, testified that he has five and a half years law enforcement experience (R23:42-43). On the night of May

19, 2018 at approximately 8:30 p.m. Officer Vogt was on duty when he was dispatched to the Linn Pier. An identified caller had reported that there was a couple pulling their boat from the pier who were arguing and appeared to be intoxicated (R23:43-44). Officer Vogt responded to the pier, but the suspect vehicle had already left that location (R23:44). A short time later, Officer Vogt was informed that Fontana Police had located the suspect vehicle and had conducted a traffic stop (R23:44). Officer Vogt responded to the scene of the traffic stop and observed Officer Ryan's squad positioned behind the vehicle and two occupants were still inside the suspect vehicle (R23:44). Officer Vogt approached the passenger side of the suspect vehicle and made contact with a female passenger (R23:46). Officer Vogt asked the female passenger to exit the vehicle and she agreed. As she was exiting the vehicle, Officer Vogt observed a beer bottle roll out from the floorboard of the truck and break on the pavement outside the truck (R23:46). Officer Vogt informed Officer Ryan of his observations and stood by while Officer Ryan conducted field sobriety test on the driver, Faruzzi (R23:47). Sergeant Goetsch subsequently arrived on scene (R23:47). Officer Vogt further stated that he detected an odor of intoxicants on Faruzzi after he exited the truck (R23:47).

THE TRIAL COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Based upon the evidence adduced at the suppression hearing, the trial court found that there was no probable cause to arrest Faruzzi for operating a motor vehicle while intoxicated. Specifically, the court stated:

And when I look at the facts here, what do we have? A bottle fell out of the passenger side. There's no indication there was any alcohol in it but apparently it was a beer bottle. Okay. That gives you the right to look at it. What else do we have? There's no bad driving here, other than a speeding, 40 in a 25. And most people at one time or another had sped and it's not necessarily an indication of bad, meaning poor, meaning dangerous driving. You shouldn't be doing 40 in a 25 in a residential area; that's why there's a citation for it, but it's not like he put that truck in the ditch, like he was swerving making unsafe turns, anything like that. I have no indication of that.

Officer Ryan's testimony was that the defendant's speech was not slurred. And I know that we have the caller making the assertion that he thought the couple was intoxicated. But other than that assertion there are no facts by which the Court can consider that opinion. He - Ryan testified the defendant had glassy and bloodshot eyes and that once he got out of the truck he smelled a light odor of intoxicants. And I think that's important to note, he said it was a light odor. He stated that defendant did not have a problem getting out of that jacked-up truck, did not have a problem walking to the back. I watched the video. I do note that the defendant was argumentative - not the best attitude to have with officers who were investigating you, let's be honest.

(R23:71-72). The Court continued,

[A]nd then we come to the field sobriety tests. I think Officer Ryan was being incredibly honest with this Court...When he did the HGN, although at the time he noted four out of six clues, that's what he noted at the time. During the testimony he admitted that he did not administer the HGN correctly and that he knew then he admitted you can't use all of those clues, I agree with that. So there were only two of six clues on that HGN that this Court can consider...So the HGN does not show impairment.

On the walk and turn he exhibited two of eight clues for missing a couple of the heel to toes, but even so, the officer can't say by how far and recognizes that under NHTSA an inch is acceptable, and then for not doing the turn correctly. I watched it on the video. And the officer admits the he never lost his balance. He did not use his arms to retain balance or anything. And I didn't see any balance problems on the video. I was not assessing it for clues, I was just watching. And then - so he got two clues out of eight. And although that is indicative of impairment, I have to look at everything under the totality of the circumstances here including the way that he did perform the rest of the test. He didn't do the one leg because of the medical issue. The officer rightly so did not force him to do that. And then Sergeant Goetsch had him do the finger dexterity test which is not a standardized test. And, quite frankly, the defendant and Sergeant Goetsch started arguing about that which, quite frankly, I can't blame the sergeant for giving it back to you, because you were giving it to him...But I watched you do the finger dexterity and I didn't see a problem with it the way you did it. It's not a field test really anyway but it didn't cause me any concern. And the officer really didn't...evaluate you on that, because he was concerned that you weren't really listening to him, which is a legitimate concern. So is there - did they possibly have an OWI that night? Yes. Did they have reasonable suspicion for an OWI after the facts I've just recited? Yes. But I don't

believe under our Constitution and under case law as defined in Wisconsin under the totality of the circumstances that they had probable cause to arrest you for OWI. I don't - if they had - if there was a possibility, yes, absolutely, but it didn't rise to the level of probable cause.

(R23:72-75), Appendix 3.

ARGUMENT

I. OFFICER RYAN HAD PROBABLE CAUSE TO PLACE FARUZZI UNDER ARREST FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED.

A. STANDARD OF REVIEW

When a suppression motion is reviewed, the circuit court's finding of fact will be sustained unless they are clearly erroneous. *State v. Roberts*, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, the Appellate Court will independently examine the totality of the circumstances at the time of the complained of conduct to determine whether the officer's acts were reasonable. *Id.*

In determining whether probable cause to arrest exists, a court must look to the totality of the circumstances to determine whether the arresting officer's knowledge at the time of the arrest would lead a reasonable 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, 381 N.W.2d 300, 308 (1986). Evidence need not reach the level of proof beyond a reasonable doubt, or even that guilt

is more likely than not. *Id.* It is sufficient that a reasonable officer could conclude, based upon information in the officer's possession, that the defendant probably committed the offense. *State v. Babbit*, 188 Wis.2d 349, 357, 525 N.W.2d 102, 104 (Ct. App. 1994). Probable cause to arrest is to be judged by the factual and practical considerations of everyday life, not how legal technicians act. *State v. Truax*, 151 Wis.2d 354, 444 N.W.2d 432, 435 (Ct. App. 1989). Probable cause is to be assessed on a case by case basis where field sobriety test may or may not be necessary to establish probable cause. *State v. Kasian*, 207 Wis.2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996). An investigative officer's conclusions based upon his investigative experience may be considered. *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325, 329 (Ct. App. 1994), citing *State v. DeSchmidt*, 155 Wis.2d 119, 454 N.W.2d 780, 787 (1990), *cert. dismissed*, 498 U.S. 1043 (1991).

B. OFFICER RYAN HAD PROBABLE CAUSE TO ARREST

In the present case, the arresting officer had probable cause to arrest Faruzzi for operating while under the influence of an intoxicant. Prior to conducting the stop on Faruzzi's vehicle, Officer Ryan had received information from an identified citizen witness that Faruzzi was driving while intoxicated. Officer Ryan observed Faruzzi driving 40 miles

per hour in a posted 25 mile per hour speed zone. Officer Ryan conducted a traffic stop on the vehicle and identified the driver of the vehicle as Faruzzi. Officer Ryan immediately observed that Faruzzi had glassy, bloodshot eyes. A beer bottle fell out of Faruzzi's vehicle, and once Faruzzi was removed from his lifted truck, Officer Ryan could smell the odor of intoxicants on Faruzzi's breath. Faruzzi was also cooperative with officers until he was asked to submit to standardized field sobriety tests, at which time Faruzzi became argumentative with officers, did not follow directions and had a very poor attitude.

Faruzzi first performed the HGN test. Officer Ryan observed a lack of smooth pursuit in both eyes and a distinct jerkiness or nystagmus at maximum deviation in both eyes. Although the Court determined it could not rely on two of the four clues observed by Officer Ryan because Ryan failed to follow the standard procedure; Faruzzi still exhibited signs of intoxication on this test.

Faruzzi also performed the walk and turn test. On this test, Faruzzi stepped out of position during the instructional phase of the test and was argumentative about doing the test. During the test, Faruzzi missed heel to toe on three steps and conducted an improper turn by pivoting in

one motion rather than taking a series of small steps as instructed. Faruzzi failed this test displaying two clues.

Faruzzi was unable to perform the one-leg stand test because of medical issues, but refused to listen to directions when given the opportunity to complete the finger dexterity test. Faruzzi began the test before instructed and refused to continue the test when the officer requested him to do so.

Finally, Faruzzi refused to take a preliminary breath test. *See Babbit*, 188 Wis.2d at 359-60, 525 N.W.2d at 105. (defendant's refusal to perform a field sobriety test may be used as evidence of probable cause to arrest for OWI).

Based on these facts, there is more than sufficient evidence to meet the probable cause to arrest standard. When considering all the potential signs of impairment observed by Officer Ryan in conjunction with one another, a reasonable officer would believe that it was probable that Faruzzi was operating a motor vehicle while under the influence.

Under the probable cause standards set down in cases such as *Babbit*, *Wille*, *Kasian*, and *Lange* it seems clear that there was indeed probable cause to arrest in the present case. *See State v. Babbit*, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994)(an officer had probable cause to arrest when a suspect drove erratically, smelled of intoxicants, walked slowly and deliberately and was uncooperative); *State v. Wille*, 185

Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994)(an officer had probable cause to arrest a suspect who hit the rear end of a car parked along the highway, smelled of intoxicants, and stated "he had to quit doing this"); and *State v. Kasian*, 207 Wis.2d 611, 558 N.W.2d 687 (Ct. App. 1996)(an officer had probable cause to arrest a suspect who was involved in a one car accident, had slurred speech and an odor of an intoxicant emitting from his persons).

In *State v. Lange*, 2009 WI 49, ¶ 23-34, 317 Wis.2d 383, 766 N.W.2d 551, the supreme court also held that officers had probable cause to arrest after observing the defendant's "wildly dangerous driving" which resulted in a one-vehicle accident, during the time of night when bars in the area normally close, and after learning that the defendant had a prior conviction of operating a vehicle while under the influence of an intoxicant. In *Lange*, the court determined that the standard for probable cause to arrest had been satisfied despite the fact that "the defendant did not admit alcohol consumption [t]here were no odors of intoxicants, no slurred speech or difficulty balancing, no known visits to a bar, no inconsistent stories or explanations, no intoxicated traveling companions, no empty cans or bottles, and no suggestive field sobriety tests." *Id.* at ¶ 21. Instead the standard for measuring probable cause in OWI cases is the

familiar, fact-based "totality of the circumstances" test for probable cause, which is assessed on a case-by-case basis. *Id.* at ¶ 37.

Was there more than a mere possibility that Faruzzi was driving while under the influence of an intoxicant? Of course. First, an identified citizen informant was concerned enough to call dispatch and report that Faruzzi and his passenger were involved in a fight and were intoxicated. Officer Ryan observed Faruzzi traveling 40 mph in a posted 25 mph speed zone. While many nonintoxicated persons also speed, an intoxicated person is less likely to be aware of the rules of the road and more likely to violate those rules. Faruzzi also had an odor of intoxicants emitting from his breath, and bloodshot glassy eyes. Faruzzi was uncooperative, argued with officers about taking field sobriety test and failed to listen to directions. During the field sobriety tests Faruzzi also exhibited a lack of smooth pursuit in both of his eyes. Faruzzi also failed to satisfactorily complete the walk-and-turn test and failed to follow directions properly before performing the finger dexterity test and then refused to continue. Faruzzi further refused to give a preliminary breath test. From a reasonable police officer's perspective, these observations reasonably indicate impairment. The relevant inquiry is whether the facts would lead a reasonable

police officer to believe that a violation had occurred or was occurring. See *Johnson v. State*, 75 Wis.2d 344, 348-49, 249 N.W.2d 593, 595-96 (1977). This evidence, viewed under the totality of the circumstance and under the case law cited previously, clearly shows Faruzzi had probably committed the offense of driving while under the influence of an intoxicant.

Based on the totality of the circumstances, it would have been reasonable for Officer Ryan to arrest Faruzzi for OWI.

CONCLUSION

For all the above stated reasons, the state respectfully requests that this court reverse the trial court's order suppressing the evidence from Faruzzi's traffic stop on May 19, 2018.

Dated this ____ day of May, 2019.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

_____ Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is _____ pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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: _____

Signed,

Attorney