STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Court of Appeals Case No. 2019AP000167-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT J. FARUZZI,

Defendant-Respondent.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

On Appeal from the Circuit Court for Walworth County, the Honorable Kristine E. Drettwan, Presiding

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ISSUE PRESENTED

Whether the circuit court correctly held that the officers lacked probable cause to arrest Faruzzi for OWI when he passed all three field sobriety tests?

After an evidentiary hearing and reviewing the officer's body camera footage, the circuit court determined that there was insufficient evidence to establish probable cause that Faruzzi was impaired. Therefore, the circuit court granted Faruzzi's motion to suppress evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Faruzzi does not request oral argument or publication because the case involves only the application of settled law.

STATEMENT OF THE CASE

The State appeals the circuit court's decision granting Faruzzi's motion to suppress evidence. The State is asking the Court to find that the circuit court erred when it found that the arresting officer lacked probable cause to arrest Faruzzi for OWI.

The Stop to Conduct a Welfare Check

At 8:30 p.m. on May 19, 2018, Fontana Officer Ryan stopped Faruzzi's vehicle for a welfare check. R.22:19-20. A caller had claimed that two people were fighting at a Town of Linn boat pier, had left the pier in a truck, and that the driver "might have been" intoxicated. R.27:7-8. The caller provided his name, but the record contains no evidence that Officer Ryan ever learned any facts upon which the caller relied. R.22, R.23, R.27.

The caller gave mixed information about the vehicle make and model, but said it was a dark pickup truck, lifted from standard height, possibly towing a boat, and heading toward Fontana on Lakeshore Drive. R.27:8-12. Eventually the caller said the truck was a black GMC. R.27:11.

Officer Ryan testified at that time of year it is common to see pickup trucks towing boats in that area. R.22:10. Another officer confirmed that many of those pickup trucks towing boats in that area are raised. R.23:51.

Ryan observed Faruzzi's raised black GMC pickup truck towing a boat on Lakeshore Drive and decided to conduct a traffic stop. R.27:12-13. Ryan visually estimated the vehicle's speed to be about 15 miles per hour over the speed limit, R.27:13, but he made the stop only to conduct a welfare check. R.22:19-20.

The stop turned up no grounds for concern about the welfare of Faruzzi or his female passenger. Faruzzi denied any incident. R.27:15. Another officer spoke to the female passenger and had no concerns for her welfare. R.23:53-55. However, Ryan decided to detain Faruzzi for field sobriety tests because Faruzzi had bloodshot and glassy eyes. R.23:19-20.

The OWI Investigation

This was Ryan's second year in law enforcement. R.27:5, 21. He had two prior OWI arrests. R.22:5-6. He didn't know if those arrests led to convictions. R.22:6. His last training or certification in field sobriety testing was during his time at the police academy. R.22:6 and R.27:5-6. He has not attended any

other training in OWI investigation or field sobriety testing since then. R.22:6-7.

Ryan saw Faruzzi speeding but said Faruzzi did not weave or exhibit other indicia of impairment. R.22:13-14. Faruzzi pulled the truck and trailer over immediately and without any indicia of impairment. R.22:15-18.

Faruzzi's speech was not slurred. R.22:31. He produced his license, responded to questions, and obeyed Ryan's instructions. R.22:19-22. Ryan did not observe an odor of intoxicants during his initial contact with Faruzzi. R.27:15. Ryan first smelled the odor after he had Faruzzi exit, but Ryan said the odor was "light." R.27:16. Ryan testified that Faruzzi's eyes were bloodshot and glassy, R.27:14, which the night of the incident he described as "a little" bloodshot and glassy. R.23:22.

Ryan decided to conduct field sobriety tests. R.23:19. Based on his observations, he planned to release Faruzzi if he passed the field sobriety tests. R.23:20.

Ryan went back to his squad to prepare a ticket for an insurance violation so that Faruzzi could leave if he passed field sobriety testing. R.23:20. He took about 20 minutes to prepare the ticket. R.23:20. He still had not checked the female passenger's welfare, but Officer Vogt arrived and did so 10-15 minutes later. R.23:21-22. When Vogt asked the passenger to exit an empty beer bottle fell into the street from her door. R.27:16.

Ryan proceeded to administer field sobriety tests. He was trained to follow the standardized field sobriety testing manual produced by the National Highway Traffic Safety Administration.

R.22:8. He admitted he hasn't looked at the manual since 2013. R.22:14.

Ryan testified that he arrested Faruzzi because he failed "the standard field sobriety test criteria," R.27:21, but during cross-examination Ryan conceded that he made errors that impact the results. He initially testified he observed four clues of impairment on the Horizontal Gaze Nystagmus ("HGN") test, R.27:18, and his training tells him four clues is the threshold to indicate impairment, R.27:18. But during cross-examination he admitted he administered the test contrary to his training in a manner that the field sobriety testing manual forbids because it can produce false positives. R.22:44-45. Thus, Ryan admitted there were just two clues. R.22:44-45.

In addition, Ryan was uncertain about a critical clue he counted during the walk-and-turn test. At least two clues must be present to indicate impairment. R.27:20. Ryan first testified he saw two clues: Faruzzi missed heel-to-toe and made an improper turn. R.27:20. But later he admitted that he didn't know if there was more than one inch between Faruzzi's heel and toe, he could only say it was "maybe an inch or two." R.23:13-14. He admitted that information is important since the field sobriety manual states that one inch or less is not a clue of impairment. R.23:13-14. Ryan said he couldn't tell the circuit court if Faruzzi exceeded that. R.23:13-14.

Faruzzi was not given the one-leg stand test due to an injury, R.23:17, so another officer administered a finger dexterity test, R.23:32. That officer, Sergeant Goetsch, described the test as follows:

> [W]e simply ask them to bring their fingers down each one to their thumb and count it out loud and they go backwards with

> that. So it would be like this – one, two, three, four, four, three, two, one and continue that test.
> R. 23:32.

Goetsch said he could not recall seeing Faruzzi make an error in finger dexterity. R23:37-38, which is what the test is designed to measure. R.23:37. Faruzzi completed one full sequence of one to four and four to one correctly, did a second sequence of one to four correctly. R.23:37-38. Faruzzi did a second sequence of four to one but Goetsch couldn't recall if he did it correctly. R.23:38. Faruzzi was argumentative about the test, but Goetsch admitted that he became upset and argumentative with Faruzzi as well. R.23:38. Faruzzi stopped after going through the full sequence twice. R.23:33. Faruzzi declined to consent to a PBT after taking the three field sobriety tests. R.27:21.

Officer Vogt said had little memory of Faruzzi's demeanor other than it was "nothing too combative or anything like that." R.23:48. Officer Ryan said that Faruzzi was argumentative about the walk-and-turn test but complied with instructions. R.27:19.

During the entire encounter, Faruzzi had no slurred speech, no balance issues, and he walked without exhibiting indicia of impairment. R.22:31, R.23:10.

Ryan said he based his decision to arrest that night on the field sobriety test results. R.27:21. The decision was Ryan's, and he made it without input from Sergeant Goetsch. R.23:40.

Aside from the witness testimony, the circuit court was also provided with DVD recordings of the incident from Officer Ryan's body camera and squad camera. R.27:2. The State provided these

videos, and Faruzzi agreed the court could consider them. R.27:2. The videos are not in the record.

Circuit Court Ruling

The circuit court found that, considering the totality of the circumstances, there was not probable cause to believe that Faruzzi was impaired by alcohol. R.23:71-75. That was based on several factual findings. First, the court reviewed the body camera footage of the incident and found that the defendant did not appear impaired, had no balance issues, had no problems walking, and no problems getting out of his raised truck. R.23:72-75. Faruzzi had no slurred speech and only a light odor of intoxicants. R.23:72. He did have bloodshot and glassy eyes. R.23:72. The defendant sped but did not drive dangerously. R.23:71-72. There were two clues on HGN, and this doesn't indicate impairment. R.23:73. The officer claimed two clues on the walk-and-turn but couldn't say Faruzzi had more than one inch between heel and toe. R.23:73-74. Based on the video, the court found no problem with how Faruzzi performed the finger dexterity test. R.23:74.

The circuit court thus granted Faruzzi's motion to suppress. R.19. The State now appeals from the order granting that motion.

STANDARD OF REVIEW

In reviewing a circuit court's decision to suppress evidence, an appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous, and will independently apply constitutional principles to those facts. *State v. Sanders*, 2007 WI App 174, ¶ 9, 304 Wis. 2d 159, 737 N.W.2d 44.

ARGUMENT

I. The circuit court was correct when it held that the evidence was insufficient to establish probable cause that Faruzzi committed an OWI.

When a driver passes all field sobriety tests, a reasonable police officer would believe the driver is impaired only if the other indicia of impairment is compelling. Faruzzi passed all three field sobriety tests, and the other indicia of impairment was weak. Therefore, the Court should affirm the circuit court order.

A person is under the influence when the "ability to safely control the vehicle is impaired by the consumption of alcohol." WIS JI—Criminal 2663A. The State had the burden to show that the arresting officer had probable cause believe Faruzzi was impaired. *See State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551. Probable cause to arrest for OWI refers to that quantum of evidence within the arresting officer's knowledge that would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* Whether probable cause existed will be evaluated based on the totality of the circumstances. *Id.*, ¶ 20.

Here the most significant circumstance is that Faruzzi passed all three field sobriety tests. He exhibited two clues on the HGN test, whereas the threshold to indicate impairment is four clues. R. 23:70. And while Ryan first believed he found two clues on the walk-and-turn test, R. 27:20, he later admitted to not knowing if the gap between Faruzzi's heel and toe was more than one inch, and he admitted that a gap of one inch or less between heel and toe is not a clue, R. 23:13-14. Thus, there were less than

the two clues needed to indicate impairment. In addition, Faruzzi completed two full sequences of the finger dexterity test without error. R. 23:37-38. Based on the video, the circuit court found there was no problem with Faruzzi's performance on that test. R.23:74-75. In sum, the field sobriety tests did not indicate impairment.

When a driver passes all field sobriety tests, it is unreasonable to believe they are impaired when the other indicia of impairment is weak. Field sobriety tests are usually the best indication of whether a person has crossed the threshold of impairment to warrant an arrest for drunk driving. *See State v. Swanson*, 164 Wis. 2d 437, 453-54 n. 6, 475 N.W.2d 148 (1991) (stating that in the circumstances of that case, field sobriety tests were necessary to evaluate whether the driver was sufficiently impaired to warrant an arrest), *overruled on other grounds*, *State v. Sykes*, 2005 WI 48, ¶ 27, 279 Wis. 2d 742, 695 N.W.2d 277. A suspect's performance on field sobriety tests usually dictates whether further detention is justified. *See Swanson*, 164 Wis. 2d at 452 (holding that administering field sobriety tests does not constitute an arrest because a reasonable person would believe they would be free to leave if they pass the test); *State v. Quartana*, 213 Wis. 2d 440, 451, 570 N.W.2d 618 (Ct. App. 1997) ("Quartana had to realize that if he passed the field sobriety test, any restraint of his liberty would be lifted and he would be free to go.").

Officer Ryan did not observe strong indicia of impairment. He admitted this when he said he planned to release Faruzzi if Faruzzi passed the field sobriety tests. R.23:20. Faruzzi had no issues with balance or walking. R.23:72. He did not slur his speech. R.23:72. His driving was not dangerous or indicative of impairment. R.23:71-72. The empty beer bottle came from the

passenger not Faruzzi. R.23:71. The odor of intoxicants was light. R.23:72. The only physical clue was Faruzzi's bloodshot and glassy eyes. The caller's statement that the driver "might" be intoxicated was equivocal. And as the circuit court noted it was not accompanied by articulable facts to support the statement. R.23:72.

In addition, the video supports the circuit court's ruling. The circuit court judged the totality of the circumstances by relying in part on video of the encounter provided by the State. The video is not in the record. Therefore, the Court should assume that it supports the circuit court finding. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993)(holding that when the appellate record is incomplete in connection with an issue raised by the appellant, the Court will assume the missing material supports the circuit court's ruling).

In contrast, the State's claim of circuit court error relies on four cases with overwhelming evidence of impairment, none of which involve a defendant passing field sobriety tests.[1] These cases are so dissimilar that they provide no useful comparison. Each case involves some reason officers could not perform field sobriety tests and overwhelming indicia of impairment. *See Lange*, 2009 WI 49, ¶¶ 24-34 (finding probable cause for arrest because the driver engaged in "the sort of wildly dangerous driving that suggests the absence of a sober decision maker," caused a one-car accident, the incident occurred near bar closing time, the officer knew the driver had a prior OWI conviction, and

[1] *See* Brief of the Plaintiff-Appellant at 16-18 (citing *State v. Babbit*, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994); *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994); *State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996); *State v. Lange*, 2009 WI 49, ¶¶ 23-24, 317 Wis. 2d 383, 766 N.W.2d 551.

field sobriety testing was impossible due to the driver's injuries); *Wille*, 185 Wis. 2d at 677-79 and 683-84 (finding probable cause when driver inexplicably hit a parked car, emitted strong odor of intoxicants, showed consciousness of guilty by admitting "I have got to quit doing this," and could not perform field sobriety tests because of ongoing medical treatment); *Babbitt*, 188 Wis. 2d at (finding probable cause when citizen reported erratic driving, officer observed driver cross centerline three times and dividing line once within a quarter-mile stretch, the incident occurred near bar-closing time, the driver emitted an odor of intoxicants, had bloodshot eyes, displayed such poor balance as to require using the car to steady herself, was uncooperative, and refused to perform field sobriety tests); *Kasian*, 207 Wis. 2d at 621-22 (finding probable cause because driver was in an unexplained one-car accident, was injured, emitted a strong odor of intoxicants, and had slurred speech).

Faruzzi passing all field sobriety tests combined with the weak evidence of impairment more closely resembles the circumstances the Court found insufficient to establish probable cause in *In re Refusal of Hopper*, No. 2012AP1719, unpublished slip op. (Wis. Ct. App. Nov. 27, 2013)(App. 1). Like Faruzzi, in that case the defendant passed field sobriety tests with less than the threshold number of clues. *Id.*, ¶ 10. Like Faruzzi, that defendant did not slur his speech and had no balance issues. *Id.*, ¶ 5. However, there was some indicia of intoxication. Police were told a caller reported the defendant as a "reckless driver," the defendant emitted the odor of intoxicants, lied to the officer about drinking, later admitted consuming two drinks, and failed to stop at "V" during the alphabet test as the officer instructed. *Id.*, ¶ 4-5.

That case presents more significant indicia of impairment. Unlike Faruzzi, police had reason to believe that defendant

engaged in dangerous driving, that defendant lied about drinking, and he later admitted to drinking. Both defendants emitted an odor of alcohol, but in Faruzzi's case the arresting officer said the odor was light. Faruzzi had bloodshot and glassy eyes, but in totality the *Hopper* defendant's dangerous driving, lie, and admitted drinking constitutes stronger indicia of impairment.

With such weak indicia of impairment, the refusal to consent to the PBT does not establish probable cause. Faruzzi's driving, appearance, and physical performance did not indicate impairment.

And even if refusing a PBT can support consciousness of guilt, it is less suggestive than the *Hopper* defendant lying to police by denying drinking. What valid reason is there to lie to police about drinking? In contrast, there are valid reasons to refuse to consent to a PBT since a PBT is a search. *See Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160, 2173, 195 L.Ed.2d 560 (2016) (stating that blood draws and breath tests are searches). The existence of the Fourth Amendment presupposes the validity of withholding consent to warrantless searches and insisting that authorities conform to the constitutional norms of reasonable suspicion or probable cause. Thus, if withholding consent to a PBT supports probable cause at all, it is certainly less suggestive than lying about drinking.

In sum, the circuit court was correct when it said these facts support reasonable suspicion but not probable cause. Therefore, the Court should affirm the circuit court order granting the motion to suppress.

CONCLUSION

For the reasons stated above, the Court should affirm the circuit court order granting Faruzzi's motion to suppress.

Dated this 24th day of June, 2019.

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and that it is proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,879 words.

Dated this 24th day of June, 2019.

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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, which complies with the requirements of Rule 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed on or after 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 24th day of June, 2019

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