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COURT OF APPEALS
DISTRICT II

07-18-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

APPEAL NO. 2019AP000167 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT J. FARUZZI,

Defendant-Respondent.

REPLY 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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INTRODUCTION

The State respectfully asks this court to reverse the trial court's order granting the defendant's motion to suppress evidence from Faruzzi's traffic stop on May 19, 2018.

ARGUMENT

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

Faruzzi's brief focuses on the circuit court's determination that Faruzzi substantially passed all field sobriety tests, therefore there was no probable cause to place Faruzzi under arrest. This argument, however, ignores a general principal courts are to apply in these types of cases; a police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably drove while intoxicated. *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300, 308 (1986). "Wisconsin has no requirement that police must perform field sobriety tests in order to determine whether probable cause exists that a person is operating a vehicle under the influence of alcohol." *State v. Kennedy*, 2014 WI 132, ¶ 21, 359 Wis. 2d 454, 468, 856

N.W.2d 834, 841 (citations omitted). "That [a defendant] successfully completed all of the properly administered field-sobriety tests does not...subtract from the common-sense view that [a defendant] may have had a blood-alcohol level that violated Wis. Stat. § 346.63(1), any more than innocent behavior automatically negates either probable cause or even the lower reasonable-suspicion standard, see *United States v. Sokolow*, 490 U.S. 1, 9-10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)." *State v. Felton*, 2012 WI App 114, ¶ 10, 344 Wis. 2d 483, 490-91, 824 N.W.2d 871, 874-75.

While it is true that the circuit court found that Faruzzi performed relatively well on the field sobriety tests, Faruzzi did exhibit signs of intoxication, not only on the field tests themselves but during the totality of the stop that added to the incriminating factors against Faruzzi. Faruzzi exhibited two out of six clues on the HGN, two out of eight clues on the walk and turn which the officer indicated impairment, and failed to listen to directions and was argumentative on the finger dexterity test before refusing to continue. Prior to the tests, officers had information from an identified citizen informant that Faruzzi was intoxicated, Faruzzi was observed traveling 40 miles per hour in a posted 25 mile per hour zone demonstrating poor judgment, and a beer

bottle fell from the front passenger compartment of Faruzzi's truck at the time of the stop. 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 tests and failed to listen to directions. Finally, Faruzzi refused to give a preliminary breath test.

In a case such as this, where there are conflicting signs as to whether Faruzzi is operating a motor vehicle while intoxicated (OMVWI), the PBT can take on a significant role in determining whether or not an individual is placed under arrest. The Wisconsin Supreme Court has stated that the purpose of the PBT is "to help determine whether there are grounds for arrest." *County of Jefferson v. Renz*, 231 Wis.2d 293, 304, 603 N.W.2d 541 (1999). Faruzzi, however, refused the PBT giving the officer probable cause to arrest Faruzzi for operating a motor vehicle while intoxicated.

Faruzzi's argument that his refusal to perform the PBT should not be considered consciousness of guilt under the circumstances of this case is unavailing. In *Babbitt*, the Court allowed refusal evidence of precisely the type at issue here, the refusal to submit to field sobriety tests:

We conclude that just as the refusal to take an Intoxilyzer test is indicative of consciousness of guilt so too is the refusal to perform a field sobriety test. The purpose of the field sobriety test is to make a preliminary determination of whether the defendant is intoxicated. The most plausible reason for a defendant to refuse such a test is the fear that taking the test will expose the defendant's guilt. Thus, because the defendant's refusal to submit to a field sobriety test is some evidence of consciousness of guilt, this evidence should be admissible for the purpose of establishing probable cause to arrest.

Babbitt, 188 Wis.2d at 359-60, 525 N.W.2d 102. *Babbitt* made clear that suspects "have no ... right to refuse to perform a field sobriety test." *Id.* at 361, 525 N.W.2d 102. See also *State v. Repenshek*, 2004 WI App 229, 277 Wis.2d 780, 691 N.W.2d 369 (the court declined to suppress the refusal to submit to a PBT for purposes of determining reasonable suspicion to support a subsequent blood draw.) *Id.* at ¶26.

Moreover, the *Babbitt* Court reasoned, "a person who performs the field sobriety test should not be placed in a worse position by virtue of his or her compliance with an officer's request than a defendant who refuses to cooperate with the police." *Id.* at 360, 525 N.W.2d 102. Although the result of a PBT is not admissible at a trial to prove OMVWI, the result of a PBT is admissible at a proceeding to determine whether there was probable cause for an OMVWI arrest. Wis. Stat. 343.303 ("The result of the preliminary breath screening test shall not be admissible in any action

or proceeding except to show probable cause for an arrest, if the arrest is challenged..."). Had Faruzzi submitted to a PBT its result would have been admissible to establish probable cause at the hearing on Faruzzi's suppression motion. Thus, Faruzzi's refusal to take the PBT indicated consciousness of guilt, and this Court is entitled to consider it in assessing probable cause.

Finally, Faruzzi's reliance on *In re Refusal of Hopper*, 2014 WI App 1, 352 Wis.2d 245, 841 N.W.2d 580 (unpublished citable opinion) to support his position that the officers in this case lacked probable cause to place him under arrest is misplaced.

In *Hopper*, the refusal hearing was held contemporaneously with a jury trial on the charges of OWI and operating left of center. *Id.* at ¶2. The following facts were introduced to support probable cause for the arrest pertaining to the refusal: 1) in the late afternoon a citizen called 911 to report that Hopper was driving recklessly "passing a bunch of cars"; 2) Hopper smelled of intoxicants; 3) Hopper admitted to drinking two beers; 3) Hopper exhibited one clue on the walk and turn test; and 4) Hopper failed to stop at "V" during the alphabet test as the officer instructed, which the officer did not view as impairment. *Id.* at ¶4-7. "Significantly, the deputy

testified that he did not recall observing any problems with Hopper's balance or coordination and that, during the entire forty minutes he personally observed Hopper, he observed no problems with Hopper's speech and 'didn't observe [Hopper] do anything out of the ordinary." *Id.* at ¶11. Hopper also performed the one-leg stand test and did not exhibit any clues. *Id.* Based on this evidence, the Appellate Court "agreed with trial court's conclusion that the deputy did not have probable cause to believe Hopper had operated his motor vehicle while under the influence of alcohol." *Id.* at ¶11.

Here, Faruzzi's exhibited much more indicia of intoxication than Hopper. Officers made the following observations of Faruzzi: (1) an identified complainant called 911 and reported that Faruzzi was intoxicated; (2) Faruzzi was speeding traveling fifteen miles per hour over the posted speed limit; (3) a beer bottle fell from the passenger compartment of Faruzzi's truck; (4) Faruzzi an odor of alcohol on his breath; (5) Faruzzi had glassy, bloodshot eyes; (6) Faruzzi was uncooperative and argued with officers about taking field sobriety tests; (7) Faruzzi failed to listen to directions and refused to continue performing the finger dexterity test; (8) Faruzzi exhibited two clues on the HGN; (9) Faruzzi exhibited two

clues on the walk and turn test indicating impairment; and (10) Faruzzi refused to give a PBT. Unlike Hopper, based on the evidence a reasonable police officer could have believed that Faruzzi "probably committed" the offense of drunk driving. *Babbitt*, 188 Wis.2d at 357, 525 N.W.2d 102.

Even so, however, no court has fashioned such a hard and fast probable cause standard. In fact, the Appellate Court has rejected an analysis that rigidly determines probable cause based upon similar or near-similar facts in prior cases. For instance, in *State v. Mata*, 230 Wis.2d 567, 602 N.W.2d 158 (Ct. App. 1999), the State and the defense cited to competing cases, each with factual scenarios supportive of their competing positions on the probable cause question. *Id.* at 570-72, 602 N.W.2d 158. The court saw no need to engage in such factual comparisons because "the question of probable cause turns on the facts of the particular case" and "the totality of the circumstances." *Id.* at 572, 602 N.W.2d 158.

Based on the totality of the circumstances presented in this case, Officer Ryan had probable cause to arrest Faruzzi for drunk driving.

CONCLUSION

Accordingly, for the reasons set forth above, as well as the reasons stated in the State's initial brief to this

Court, the State respectfully requests that this Court reverse the circuit court's order granting Faruzzi's motion to suppress evidence and to remand the case for further proceedings.

Dated this ____ day of July, 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