STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2019AP000200-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
JEFFREY I. QUITKO,
Defendant-Appellant.

On Notice of Appeal to Review the Judgment of Conviction and the Order Denying Motion to Suppress in the Circuit Court for Kewaunee County, the Honorable David L. Weber presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ANA L. BABCOCK
State Bar No. 1063719
Attorney for Defendant-Appellant

BABCOCK LAW, LLC
130 E. Walnut Street, St. 602
P.O. Box 22441
Green Bay, WI 54305
(920) 884-6565
ababcock@babcocklaw.org

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STATEMENT OF ISSUES

I. WHETHER LAW ENFORCEMENT UNREASONABLY EXPANDED THE SCOPE OF THE INITIAL SEIZURE WITHOUT REASONABLE SUSPICION?

The circuit court did not answer this question. The circuit court concluded that probable cause existed to request a preliminary breath test and found that no additional probable cause was gained from the field sobriety tests; thus, it did not reach this issue.

II. WHETHER LAW ENFORCEMENT HAD PROBABLE CAUSE TO REQUEST THAT QUITKO SUBMIT TO A PRELIMINARY BREATH TEST?

The circuit court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Rule 809.22 as Quitko's arguments are substantial and do not fall under the class of clearly frivolous upon which oral argument may be denied under Rule 809.22(2)(a). This case is appropriate for publication under Rule 809.23 as it applies an established rule of law to a factual situation that is significantly different from that in published opinions.

STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Jeffrey I. Quitko, asks that this Court reverse the circuit court's decision denying his motion to suppress the evidence obtained when law enforcement expanded the scope of a traffic stop without reasonable suspicion and when law enforcement had Quitko submit to a preliminary breath test without probable cause.

On February 13, 2017 at 5:05 p.m., Deputy Salentine performed a traffic stop of Quitko's vehicle because he was traveling seventy-eight miles per hour in a sixty-five miles per hour zone. R. 65:10. Deputy Salentine discussed with Quitko the reason for the stop, and he collected Quitko's driver's license and proof of insurance *Id.* at 11. During this initial interaction, Deputy Salentine did not have any reason to believe that Quitko was operating while intoxicated. *Id.* at 11, 26. Deputy Salentine then returned to his patrol car, made contact with dispatch, and learned that Quitko had seven prior convictions for operating while intoxicated (hereinafter "OWI"), which meant he was not allowed to operate a motor vehicle with a blood alcohol content (hereinafter "BAC") over .02. *Id.* at 11.

Deputy Salentine then reapproached Quitko's vehicle claiming that he needed to obtain his phone number. *Id.* at 12. During this second interaction, Deputy Salentine noticed a slight odor of an intoxicant emanating from the vehicle. *Id.* However, Deputy Salentine was not sure whether the odor was coming from Quitko or from the garbage inside the vehicle. *Id.* at 34, 37. In addition, Deputy Salentine had no training or experience to equate a slight odor of

intoxicants to a specific blood alcohol level. *Id.* at 46. Quitko denied consuming alcohol. *Id.* at 12.

Subsequently, Deputy Salentine advised dispatch that he would be expanding the scope of the stop to investigate a possible operating while intoxicated. *Id.* at 13. Deputy Salentine asked Quitko to perform field sobriety tests but admitted that he had not observed any signs of impairment at that point.[1] *Id.* at 36-37. The results of the field sobriety testing confirmed that Quitko was not impaired. *Id.* at 43-44. Despite these results, Deputy Salentine conducted a preliminary breath test (hereinafter "PBT") on Quitko, which revealed a blood alcohol content of .112. *Id.* at 18-19, 44. Deputy Salentine then placed Quitko under arrest. *Id.* at 19.

On April 11, 2017, the State filed a criminal complaint charging Quitko with one count of operating while intoxicated, in violation of § 346.63(1)(a), and operating with a prohibited alcohol concentration, in violation of § 346.63(1)(b). R. 4. Quitko subsequently filed a motion to suppress, asserting that law enforcement lacked reasonable suspicion to initiate field sobriety testing and lacked probable cause to administer a preliminary breath test.[2] R. 36.

The circuit court denied the motion. R. 66:14. The court first concluded that there was probable cause to request the PBT because Quitko was speeding, because Deputy Salentine noticed a slight odor of alcohol, and because Quitko was subject to a

[1] Prior to requesting field sobriety testing, Deputy Salentine asked if Quitko was willing to submit to a PBT to "check" if he was being honest that he had not been drinking. R. 65:35-36. The deputy did not perform the PBT at that point. *Id.* at 50.
[2] Quitko also asserted other grounds that he does not maintain on appeal.

.02 prohibited alcohol concentration (hereinafter "PAC"). R. 66:11. With respect to the field sobriety testing, the court found that the results of the testing did not add additional probable cause, and thus that it need not address this issue. *Id.* at 12.

Following the denial of his suppression motion, Quitko pled no contest to operating with a prohibited alcohol concentration, in violation of § 346.63(1)(b), and was sentenced to a prison term of eight years, with four years initial confinement and four years extended supervision. R. 54. This appeal follows.[3]

ARGUMENT

I. LAW ENFORCEMENT UNREASONABLY EXPANDED THE SCOPE OF THE INITIAL SEIZURE WITHOUT REASONABLE SUSPICION

A. Standard of Review

In reviewing a denial of a motion to suppress, this Court will uphold the circuit court's factual findings unless clearly erroneous. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). However, "[w]hether the facts satisfy the constitutional requirement of reasonableness is a question of law, which we review de novo." *Id.*

B. Legal Principles

Our federal and state constitutions protect defendants from unreasonable seizures. *State v.*

[3] The order denying the motion to suppress may be reviewed on appeal despite Quitko's no contest plea. Wis. Stat. § 971.31(10).

Arias, 2008 WI 84, ¶ 25, 311 Wis. 2d 358, 752 N.W.2d 748; U.S. Const. amend. IV; Wis. Const. art. I, § 11. A traffic stop constitutes a seizure for constitutional purposes. *Arias*, 311 Wis. 2d 358, ¶ 29. To determine whether a traffic seizure is constitutional, our courts apply a two-part analysis. *Id.* First, the court determines whether the seizure was justified at its inception. *Id.*, ¶ 30. Next, the court evaluates whether the officer's actions were "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Quitko does not challenge the initial stop of the vehicle; thus, the focus of the inquiry is on the second prong.

In evaluating the second prong, the court is to determine whether the detention lasted longer than was necessary to effectuate the purpose of the stop. *Id.*, ¶ 32. During a lawful seizure, an officer may broaden the scope of investigation beyond the initial purpose of the stop if "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 initial stop. *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). "Reasonable suspicion" is "suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or hunch . . . will not suffice.'" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (internal citation omitted).

C. Application

As an initial matter, Quitko asserts that the point at which the stop was extended beyond the speeding violation was when Deputy Salentine learned that Quitko had seven prior OWI convictions. *See* R 65:11. After his initial interaction with Quitko, Deputy Salentine returned to his vehicle and learned that Quitko had seven prior OWI convictions. *Id.* Up to that point, Deputy Salentine did not notice any odor of intoxicants and had no reason to believe that Quitko committed an alcohol-related offense. *See id.* at 11, 26. Instead of completing the paperwork related to the speeding violation, Deputy Salentine extended the stop by reapproaching Quitko to obtain his telephone number. *Id.* at 12. Quitko submits that this reason was pretextual and that the deputy's true intent was to "check" whether Quitko committed an alcohol-related offense now that Deputy Salentine was aware of Quitko's prior history. *Id.* at 11-12, 35.

The reason Deputy Salentine offered for returning to the vehicle–to obtain Quitko's phone number–was pretextual because one's phone number is not required for completing the mission of the stop: the speeding citation. While the law requires officers to obtain and record a great deal of information[4] in issuing a traffic citation, it notably does not require the phone number of the alleged violator. *See* Wis.

[4] The law requires the officer to include the following information on the citation form: "the name, address, birth date, operator's license number of the alleged violator if known, the license number of the vehicle, the offense alleged, the time and place of the offense, the section of the statute or ordinance violated, the amount of deposit or bail for the offense, [and] a designation of the offense . . . ." Wis. Stat. § 345.11(2).

Stat. § 345.11(2).[5] While an officer's subjective motivation for extending a stop is not per se unreasonable, the reason offered must nonetheless be objectively reasonable. *See State v. Houghton*, 2015 WI 79, ¶¶ 25-29, 364 Wis. 2d 234, 868 N.W.2d 143.

Here, it was objectively unreasonable for Deputy Salentine to extend the stop to obtain Quitko's phone number, as this information was not required to complete the mission of the stop. *See* Wis. Stat. § 345.11(2);*Rodriguez v. United States*, 575 U.S. ____, 135 S. Ct. 1609, 1614 (2015)(An officer's lawful authority to seize a defendant "ends when tasks tied to the traffic infraction are—*or reasonably should have been*—completed.")(emphasis added). Because Deputy Salentine unreasonably extended the mission of the stop by approaching Quitko's vehicle a second time, the evidence obtained as a result must be suppressed. *State v. Smith*, 119 Wis. 2d 361, 365-66, 351 N.W.2d 752 (Ct. App. 1984)(evidence obtained as a result of an unlawful seizure must be suppressed).

Even if the stop was lawfully extended to obtain Quitko's phone number, at which point Deputy Salentine gained information of a slight odor of intoxicants emanating from the vehicle, he still lacked reasonable suspicion to extend the stop to conduct field sobriety testing. R. 65:12. To conduct field sobriety testing, law enforcement must have reasonable suspicion that one is *impaired*. *See State v. Colstad*, 2003 WI App 25, ¶¶ 20-21, 260 Wis. 2d 406, 659 N.W.2d 394. Indeed, the purpose of field sobriety testing is to check for "clues" of impairment. R. 65:42-

[5] All references will be to the 2017-18 version of the Wisconsin Statutes, unless otherwise noted.

44. The mild odor of alcohol alone is not sufficient to extend a stop to conduct field sobriety testing. *See Colstad*, 260 Wis. 2d 406, ¶¶ 20-21. Instead, where an officer detects an odor of alcohol, there must be additional facts to suspect that one is impaired to extend a stop to conduct field sobriety testing. *See id.*, ¶¶ 5, 20 (odor of intoxicants on driver, admission to drinking, and striking a child with his vehicle sufficient reasonable suspicion); *State v. Swanson*, 164 Wis. 2d 437, 453, n. 6, 475 N.W.2d 148 (1991) (overruled on other grounds) (odor of alcohol from driver, unexplained erratic driving around bar closing time form reasonable suspicion). As a result, the slight odor of alcohol in this case was insufficient to establish reasonable suspicion that Quitko was impaired. Indeed, Deputy Salentine testified that he had no concerns that Quitko was impaired. R. 65:36. Without reasonable suspicion to believe that Quitko was impaired, Deputy Salentine unlawfully extended the scope of the traffic stop to conduct field sobriety testing. *Id.*; *Colstad*, 260 Wis. 2d 406, ¶¶ 20-21.

In any event, as the circuit court found, Deputy Salentine did not gain any additional probable cause during the field sobriety tests.[6] R. 66:12. The more critical question is thus whether Deputy Salentine had probable cause to request that Quitko submit to a PBT.

[6] The circuit court did not make a legal conclusion on the issue of the field sobriety tests because it found that the results of these tests did not reveal any additional probable cause, and thus it addressed only whether there was probable cause to request the PBT. R. 66:12.

II. LAW ENFORCEMENT LACKED PROBABLE CAUSE TO REQUEST THAT QUITKO SUBMIT TO A PRELIMINARY BREATH TEST

A. Standard of review

In reviewing a denial of a motion to suppress, this Court will uphold the circuit court's factual findings unless clearly erroneous. *Young*, 212 Wis. 2d at 424. However, "[w]hether the facts satisfy the constitutional requirement of reasonableness is a question of law, which we review de novo." *Id.*

B. Legal principles

Law enforcement may request that an individual submit to a PBT if the officer has probable cause to believe the individual has operated a motor vehicle while under the influence of an intoxicant or with a prohibited alcohol concentration. Wis. Stats. §§ 343.303, 346.63(1).[7] Our supreme court has interpreted the term "probable cause to believe" to mean something less than probable cause to arrest and something more than the mere presence of alcohol. *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 309-10, 603 N.W.2d 541 (1991).

When an individual is subject to .02 PAC, our supreme court concluded that sufficient "probable cause exists to request a PBT breath sample when the driver is known to be subject to a .02 PAC standard, the officer knows it would take very little alcohol for the driver to exceed that limit, and the officer smells alcohol on the driver." *State v. Goss*, 2011 WI 104, ¶ 28, 338 Wis. 2d 72, 806 N.W.2d 918. *Goss* established

[7] Wis. Stat. § 343.303 provides additional grounds to request a PBT not applicable in this case.

a notably low threshold for establishing probable cause to administer a PBT in the context of a .02 PAC. *See id.* *Goss* represents the bare minimum of facts necessary to establish probable cause, as no case has since concluded that evidence less than that present in *Goss* is sufficient to establish probable cause.

C. Application

In this case, there were even fewer facts supporting probable cause than in *Goss*. At the time Deputy Salentine requested the PBT, he had identified only an unparticularized slight odor of intoxicants emanating from the vehicle and had knowledge that Quitko was subject to a .02 PAC. R. 66:8,11. The circuit court concluded that these facts established sufficient probable cause under *Goss.*[8] *Id.* at 8. However, unlike in *Goss*, Deputy Salentine could not attribute the odor of alcohol to the *driver*, and the deputy lacked the knowledge of how a slight odor of intoxicants correlates to a specific BAC. R. 65:34, 37, 46; *Goss*, 338 Wis. 2d 72, ¶ 28.

In *Goss*, the odor of intoxicants was linked directly to the defendant: "as he placed Goss in the back of the squad car, he 'smelled an odor of intoxicants *coming from his person*.'" *Goss*, 338 Wis. 2d 72, ¶ 17 (emphasis added). Indeed, where the odor of an intoxicant is used to support probable cause, it must be "linked to a specific person." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999); *State v. Meye*, No. 2010AP336-CR, ¶ 9, unpublished slip. op. (WI App July 14, 2010)(stating "[w]here the odor

[8] The circuit court also concluded that the fact that Quitko was speeding contributed to probable cause. R. 66:11. Quitko will discuss below why this fact added nothing to probable cause.

cannot be linked to one person in particular, it is not within the officer's knowledge that the evidence is connected to the *defendant*."). In this case, Deputy Salentine did not attribute the slight intoxicating odor to Quitko himself; indeed, he suggested it could be from the garbage inside the vehicle. R 65:34, 37.

In addition, the *Goss* court gave specific and repeated attention to the officer's specialized "knowledge that even a small amount of alcohol could put a suspect over a .02 PAC standard[.]" *Goss*, 338 Wis. 2d 72, ¶¶ 17, 23, 26, 28. In this case, Deputy Salentine, who had limited experience[9] investigating alcohol-related driving offenses, admitted he was unaware of how a slight odor of intoxicants equates to a certain BAC. R. 65:46. This Court should not expand the holding of *Goss* to further lower the bare minimum bar set in that case. The results of the PBT taken without probable cause, and all evidence subsequently obtained, must be suppressed. *Goss*, 338 Wis. 2d 72, ¶ 5, n. 6.

D. The Circuit Court's Decision

The court denied Quitko's motion, concluding that there was probable cause to request the PBT because Quitko was speeding, because Deputy Salentine noticed a slight odor of alcohol ("at least at some point"), and because Quitko was subject to a .02 PAC. R. 66:8, 11.

As to the odor of alcohol, the circuit court explained that it was reasonable for the deputy to infer that the odor was coming from Quitko because he was

[9] Deputy Salentine had performed about "a dozen" OWI related traffic stops. R 65:9.

the only occupant of the vehicle, acknowledging the distinction in *Goss*, where the officer directly linked the odor to the defendant's breath after placing him under arrest in his squad car. *Id.* at 9; *Goss*, 338 Wis. 2d 72, ¶ 17. However, under *Secrist* and *Meye*, this unparticularized odor, without specific evidence linking it to the defendant, is insufficient to support probable cause. *Secrist*, 224 Wis. 2d at 212; *State v. Meye*, No. 2010AP336-CR, ¶ 9, unpublished slip. op. (WI App July 14, 2010)

As to the deputy's ability to correlate the slight odor of alcohol to a specific BAC, the court believed that "common sense" dictates that any scent of alcohol on one's breath leads to probable cause that one's BAC exceeds .02. R. 66:10. This "common sense" approach is logical in situations where one is subject to an absolute sobriety limit, but does not apply to the technical interpretations of varying levels of blood alcohol concentration, whether that be .02, .08, or higher. In *Goss*, the court repeatedly emphasized the officer's specialized knowledge as to how much alcohol correlates to a .02 BAC as critical to its holding. *Goss*, 338 Wis. 2d 72, ¶¶ 17, 23, 26, 28. Where an officer admits he lacks this knowledge, the court cannot impute such knowledge in the name of "common sense."

Finally, the circuit court's reliance on the fact that Quitko was speeding is misplaced. R. 66:11. Speeding has been found to contribute to probable cause only when coupled with other acts of poor or suspicious driving evidencing impairment. *See e.g.*, *State v. Lange*, 2009 WI 49, ¶ 24, 317 Wis. 2d 383, 766 N.W.2d 49 (defendant drove 80 miles per hour in a 30-miles-per-zone, crossed the center line multiple times,

and drove on the wrong side of the road); *Washburn Cnty. v. Smith*, 2008 WI 23, ¶ 12, 308 Wis. 2d 65, 746 N.W.2d 243 (defendant was speeding excessively and crossed the centerline while being pursued); *State v. Rocha-Mayo*, 2014 WI 57, ¶ 35, 355 Wis. 2d 85, 848 N.W.2d 832 (defendant drove recklessly and at a high rate of speed). Simply traveling above the posted speed limit, a common occurrence among many–if not most–drivers is not indicative of intoxication. Thus, the fact that Quitko drove over the speed limit, without any other facts to suggest impairment, does not contribute to probable cause.

The unparticularized slight odor of an intoxicant and a reduced PAC, without specialized knowledge to correlate the amount of alcohol to a specific BAC, provided insufficient probable cause to request a PBT. The results of the PBT, and all subsequently obtained evidence, must be suppressed. *Goss*, 338 Wis. 2d 72, ¶ 5, n. 6.

CONCLUSION

For the reasons outlined above, Quitko requests that this Court reverse the circuit court's decision denying his motion to suppress.

Dated this 24th day of April, 2019

Signed:

_____

Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in 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 of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,140 words.

Dated this 24th day of April, 2019

Signed:

_____

Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant

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I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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Dated this 24th day of April, 2019

Signed:

_____

Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant

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I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 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 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.

Dated this 24th day of April, 2019

Signed:

_____

Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant

APPENDIX

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