STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2019AP243-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DAVID WILLIAM KRUMM,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, BRANCH II, THE HONORABLE EDWARD F. VLACK PRESIDING, TRIAL COURT CASE NO. 14-CT-295

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

I. WHETHER THE ARRESTING OFFICER IN THE INSTANT CASE LACKED PROBABLE CAUSE UNDER WIS. STAT. § 343.303 TO ADMINISTER A PRELIMINARY BREATH TEST TO MR. KRUMM?

Trial Court Answered: No. A sufficient factual basis existed to establish probable cause to administer a preliminary breath test. R51 at 3; D-App. at 103-105.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question regarding whether a given set of facts rises to the level of meeting a legal standard. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the law at issue herein is fully developed, and therefore, publication would do little, if anything, to enhance the relevant body of law.

STATEMENT OF THE CASE

Mr. Krumm was charged in St. Croix County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident occurring on November 29, 2014. R2.

After retaining private counsel, Mr. Krumm filed a pre-trial motion challenging whether the law enforcement officer in the instant matter had probable cause under Wis. Stat. § 343.303 to seize a preliminary sample of Mr. Krumm's breath. R12. An evidentiary hearing was held on Mr. Krumm's motion on June 15, 2015, at which the arresting officer, Sgt. Mark Volz, testified as the State's only witness. R50.

After the evidentiary hearing, supplemental briefs were filed by both parties. R15; R16. On December 18, 2015, the Circuit Court for St. Croix County, the Honorable Edward f. Vlack presiding, denied Mr. Krumm's motion on the ground that, *inter alia*, the field sobriety tests, Mr. Krumm's alleged speeding violation, along with subjective observations of an odor of intoxicants on Mr. Krumm's person, cumulatively rose to the level of establishing probable cause to administer a preliminary breath test. R51 at 4-5; D-App. at 103-105. Mr. Krumm then entered a plea of No Contest to the charge of Operating a Motor Vehicle With a Prohibited Alcohol Concentration on December 6, 2016, and was sentenced thereupon. R32; D-App. at 101-02.

STATEMENT OF FACTS

On November 29, 2014, the above-named Appellant, David Krumm, was operating his motor vehicle in the Village of North Hudson, St. Croix County, when Sgt. Mark Volz of the St. Croix County Sheriff's Office observed Mr. Krumm driving in excess of the posted speed limit. R50 at 3:5 to 4:19. Sgt. Volz caught up to Mr. Krumm's vehicle and initiated a traffic stop. R50 at 4:10-22.

After making contact with Mr. Krumm, Deputy Volz ostensibly observed that he had an odor of intoxicants about his person. R50 at 6:19-23. Based upon this observation, Deputy Volz asked Mr. Krumm whether he had consumed any intoxicating beverages that evening and Mr. Krumm replied that he had consumed three beers, finishing the same two hours prior to driving. R50 at 7:2-10. Thereafter, Sgt. Volz asked Mr. Krumm to perform field sobriety tests. R50 at 7:21-25.

The first test Sgt. Volz asked Mr. Krumm to submit to was a horizontal gaze nystagmus [hereinafter "HGN"] test.[1] R50 at 8:5-6. Mr. Krumm consented to the deputy's request. R50 at 8:11-12. Sgt. Volz testified that he observed four of six clues on the HGN test. R50 at 8:13-15.

The second test to which Mr. Krumm submitted was the walk-and-turn [hereinafter "WAT"] test. R50 at 8:20-22. Mr. Krumm displayed two clues on this test. R50 at 9:6-11.

The third test which Sgt. Volz administered to Mr. Krumm was the one-leg stand [hereinafter "OLS"] test. R50 at 9:14-24. On this test, Mr. Krumm exhibited one clue of impairment. R50 at 10:1-2.

The final field sobriety test which Sgt. Vol had Mr. Krumm perform was the alphabet [hereinafter "ABC"] test. R50 at 10: 3-8. Mr. Krumm correctly recited the alphabet, beginning with the letter "C" as requested, but allegedly ended with "W, Y, X," according to Sgt. Volz. R50 at 10:16-19.

Upon completing the field sobriety tests, Sgt. Volz was going to administer a preliminary breath test [hereinafter "PBT"] to Mr. Krumm, however, due to the inclement weather, his PBT device was too cold to properly work. R50 at 11:15-21. Because of this development, Sgt. Volz asked his cover officer, Deputy Larson, to use his PBT device and test a sample of Mr. Krumm's breath. R50 at 11:19-23. Deputy Larson was able to obtain a sample with a result of 0.147. R50 at 12:1-2.

After the PBT, Deputy Volz placed Mr. Krumm under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R50 at 12:3-8.

[1]A more thorough and detailed discussion of the field sobriety tests, and how Mr. Krumm's performance of the same impacts upon the probable cause to administer a preliminary breath test determination, is undertaken in Section I.B., *infra*.

STANDARD OF REVIEW ON APPEAL

This appeal presents a question relating to whether a particular set of facts rise to the level of providing the law enforcement officer in this matter with probable cause to administer a preliminary breath test to Mr. Krumm. As such, this Court engages in a two-step standard of review pursuant to *State v. Hajicek*, 2001 WI 3, ¶ 16, 240 Wis. 2d 349, 620 N.W.2d 781. The first step compels this Court to review the lower court's determination of historical facts for clear error. *Id*. ¶ 16. Thereafter, the question of whether those facts satisfy the standard imposed by law is a question this Court reviews *de novo. Id.*

ARGUMENT

I. SGT. VOLZ LACKED PROBABLE CAUSE TO ADMINISTER A PRELIMINARY BREATH TEST TO MR. KRUMM.

A. Statement of the Law As It Relates to the Administration of Preliminary Breath Tests.

Pursuant to Wis. Stat. § 343.303, an officer who suspects an individual of operating a motor vehicle while intoxicated may administer a PBT to that individual upon having "probable cause to believe that the person . . . has violated s. 346.63(1)." The "probable cause" referred to in § 343.303 does not rise to the level of "probable cause to arrest," but rather, has been interpreted to mean that "quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop . . . but less than the level of proof required to establish probable cause for arrest." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999); *see also State v. Fischer*, 2010 WI 6, ¶ 5, 322 Wis. 2d 265, 778 N.W.2d 629.

Albeit a hybrid level of proof between reasonable suspicion to detain and probable cause to arrest, the *Renz* standard nevertheless shares one characteristic in common with the standards between which it is implanted, namely: the test for determining its presence remains an *objective* one because, by comparison, *all* levels of

"reasonable suspicion" and "probable cause"—ranging from that for the issuance of a warrant, to the decision to arrest, to bind over at a preliminary hearing, *etc*.—involve objective assessments. *See generally, State v. Guzy*, 139 Wis. 2d 663, 407 N.W.2d 548 (1987); *State v. Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986); *State v. Knoblock*, 44 Wis. 2d 130, 170 N.W.2d 781 (1969); *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994).

The aforementioned "objective test" described in the jurisprudence relating to reasonable suspicion and probable cause further requires that the objective assessment be made under what is otherwise known as the "totality of the circumstances." *Nordness*, 128 Wis. 2d at 35 ("Probable cause exists where the *totality of the circumstances* within the arresting officer's knowledge at the time [support the decision to arrest]. . . "); *State v. Powers*, 2004 WI App 143, ¶ 7, 275 Wis. 2d 456, 685 N.W.2d 869, citing *State v. Richardson*, 156 Wis. 2d 128, 456 N.W.2d 830 (1990)(when evaluating reasonable suspicion, the totality of the circumstances must be considered).

Distilling *Renz*, *Nordness*, and *Powers* down into one, succinct statement of the law relating to the administration of the PBT to Mr. Krumm, the standard would read something akin to the following: Based upon the objective facts known to the officer at the time, did the totality of the circumstances leading up to Mr. Krumm's being asked to submit to a PBT rise to the level of establishing probable cause to administer the same? While this remains the critical question which must be addressed by this Court, there is yet one more question relating to the PBT-probable cause determination which is lurking in the shadowy edge surrounding the spectrum between reasonable suspicion and probable cause, to wit: is the hybrid *Renz* threshold one which perfectly bisects the level of proof between reasonable suspicion and probable cause, or does it lie closer to the reasonable suspicion end of things, or closer to the probable cause end? .

In order to answer the foregoing question, one need look no further than the *Renz* decision itself. Besides merely incorporating a standard between reasonable suspicion to detain and probable cause to arrest, the *Renz* court offered further, implicit guidance regarding

how this middle standard might be satisfied. Not insignificantly, the *Renz* court noted:

> The legislature entitled Wis. Stat. § 343.303 "Preliminary breath screening test," and the text of the statute also describes the test as a "preliminary breath screening test." The word "preliminary" means "prior to or preparing for the main matter, action, or business; introductory or prefatory." *The American Heritage Dictionary of the English Language*, 1429 (3d ed. 1992). Thus, when it described the test as "preliminary," the legislature clearly indicated that it intended the test to be a preparation for something else. It seems obvious that something else—the main matter—is the arrest itself.

Renz, 231 Wis. 2d at 313.

The foregoing interpretation by the court of the legislature's intent underlying the use of a PBT is that it was not a device intended to be "pulled out willy-nilly" by a law enforcement officer upon simply smelling a faint odor of intoxicants. Rather, it was a device intended to be used when the officer was "preparing for the main matter . . . [of] the arrest itself." Thus, the *Renz* court implicitly, if not expressly, made it clear that some degree of objective evidence must first be accumulated before the PBT probable cause standard will be satisfied. After all, as the *Renz* court observed, probable cause to administer the PBT requires a level of proof beyond that of a mere reasonable suspicion. *Id.* at 317. It would appear, therefore, that on a spectrum between reasonable suspicion to detain and probable cause to arrest, the objective evidence which would permit a law enforcement officer acting reasonably to believe that he or she has probable cause to administer a PBT falls closer to the probable-cause-to-arrest end of the spectrum than it does to the reasonable-suspicion-to-detain end of the spectrum.

With all of the foregoing understood, the question presented by Mr. Krumm, *i.e.*, did Sgt. Volz objectively have probable cause to administer a PBT to Mr. Krumm under the totality of the circumstances of this case, may now be answered.

B. Application of the Law to the Facts.

During the three-quarter mile pursuit Sgt. Volz initiated after he observed Mr. Krumm exceeding the posted speed limit, Sgt. Volz

did not observe Mr. Krumm swerve from, or weave within, his lane of travel, drive in an erratic manner, or violate any other traffic regulation. R50 at 23:1-18. Immediately after Sgt. Volz activated his front-facing squad lights, Mr. Krumm promptly, safely, and appropriately parked his car near the curb. R50 at 23:23-24.

Upon making contact with Mr. Krumm, Sgt. Volz asked him for his license and proof of insurance and advised Mr. Krumm that he was stopped for speeding. R50 at 6:1-8. In response, Mr. Krumm informed Sgt. Volz that he was not from the area and thus was not familiar with the speed limits. R50 at 6:10-18. Mr. Krumm had no difficulty providing Sgt. Volz with his license and Sgt. Volz did *not* observe Mr. Krumm to have "slow and delayed reaction time," or "poor finger dexterity or lack of coordination" in doing so. R50 at 25:1-18.

While speaking with Mr. Krumm, Sgt. Volz allegedly observed that his breath smelled of alcohol. R50 at 6:19-23. Based upon this observation, Sgt. Volz asked Mr. Krumm about his drinking that night. Mr. Krumm indicated that he had three beers that evening and that the last one was "a couple hours" prior to the stop. R50 at 7:2-10. Sgt. Volz did not ascertain the time frame over which the beers were consumed or the size or type of beers he drank. R50 at 26:17-23.

At no point during his encounter with Mr. Krumm did Sgt. Volz observe him to have glossy or bloodshot eyes or abnormal speech. R50 at 27:4-11. In fact, other than not knowing the name of the town he was traveling from due to his expressed unfamiliarity with the area, Sgt. Volz did not observe any other signs of intoxication during his initial encounter with Mr. Krumm. R50 at 27:12 to 28:8. Nevertheless, Sgt. Volz asked Mr. Krumm to exit his vehicle in order to perform standardized field sobriety tests.

After directing Mr. Krumm out of his vehicle, the first standardized field sobriety test Sgt. Volz administered was the horizontal gaze nystagmus test [hereinafter "HGN"], which is used to determine the presence of nystagmus in a driver's eyes. Horizontal Gaze Nystagmus is the involuntary jerking of the eyes occurring as the eyes gaze to the side. National Highway Traffic Safety

Administration, *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*, Session 7, p. 8 (Rev. 2/2018)[hereinafter "NHTSA Manual"]. While nystagmus is a natural, normal phenomenon, it becomes "readily noticeable when a person is impaired by alcohol and certain drug categories." *Id.*

Due to the highly technical characteristics of HGN, officers are trained to employ certain techniques in order to obtain valid HGN test results. According to the NHTSA Manual: "It is necessary to emphasize this validation applies only when: - The tests are administered in the prescribed, standardized manner - The standardized clues are used to assess the suspect's performance - The standardized criteria are employed to interpret that performance." *Id*. at Session 8, p. 17.

Contrary to the prescribed methodology, Sgt. Volz testified that he "started giving the HGN test and [he] observed the lack of smooth pursuit and [he] observed nystagmus at maximum deviation and [he] just . . . saw the clues [he] wanted and [he] moved on from there." R50 at 39:14-18. He did not check for the point of onset. He did not conduct the test in the proper order. He did not take nearly the amount of time necessary to achieve valid test results. He simply passed his finger in front of Mr. Krumm's eyes four times, "saw four clues and . . . moved on to the next test." R50 at 39:20-21.

As Mr. Krumm identified in his motion:

> When properly administered, the entire HGN test takes at least one minute and forty-six seconds to complete and a minimum of fourteen passes of a stimulus from side to side at a distance of between twelve and fifteen inches from the subject's face. ... Review of the squad video illustrates that Sgt. Volz's administration of the HGN test took merely eighteen seconds and consisted of only four total passes.

R15 at 5; R13 (squad video) and NHTSA Manual Session 8, pp. 27-56, and R13. The foregoing indicates that Sgt. Volz did not simply take a "minor departure" from the manner in which the NHTSA Manual *requires* the HGN test to be administered, but rather, demonstrates that Sgt. Volz utterly disregarded major components of the HGN test. This is not only contrary to NHTSA's admonishment that the test results are "**only**" valid when the standardized

instructions for administration of the test are followed, but is contrary to the common law as well. Notably, a failure to follow the NHTSA standardized procedure compromises the validity of the test results. *Village of Little Chute v. Bunnell*, 2013 WI App 1, ¶ 19, 345 Wis. 2d 399, 824 N.W.2d 929, 2012 Wisc. App. LEXIS 900 (Wisc. Ct. App. Nov. 14, 2012)(unpublished). "**If the test results are not valid, they cannot be used to support a determination of probable cause to arrest**." *Id*. (emphasis added). By extension, as described in Section I.A., *supra*, if invalid HGN test results cannot be used to support a probable cause to arrest determination, they likewise should not be used to support a probable cause to administer a PBT determination either.

After administering his unique version of an HGN test, Sgt. Volz instructed Mr. Krumm to stand in "the instructional stance," with heel touching toe and hands down at his sides while he gave instructions for the second field sobriety test, the walk-and-turn [hereinafter "WAT"] test. R50 at 44:1-23. In doing so, Mr. Krumm never broke from stance, wobbled, swayed, or otherwise exhibited poor balance or coordination. R50 at 45:1-25. After the instructions were complete, Mr. Krumm began the test at the appropriate time, (R50 at 45:22-23); took the appropriate number of steps without missing heel-to-toe, (R50 at 47: 14-16); and never raised his arms from his sides, (R50 at 47:17-18). Sgt. Volz testified that he observed Mr. Krumm "stumble" at step three and again while turning. R50 at 46:1-15; 48:17 to 49:18.

According to the NHTSA Manual, a driver must exhibit "two or more distinct clues on this test or fail[] to complete it" in order to be considered as having failed the test. NHTSA Manual, Session 8, p. 70. Moreover, "[e]ach clue may appear several times, but still only constitutes one distinct clue." *Id*. at p. 88. Based upon the NHTSA Manual, Mr. Krumm only exhibited one clue. Accordingly, Mr. Krumm *passed* the WAT test.

After administering the WAT test, Sgt. Volz administered the one-leg stand [hereinafter "OLS"] test wherein the driver is required to stand on one leg while counting out loud by thousands until he or she is told to stop, usually after thirty seconds. To "fail" this test, a driver must exhibit two or more clues of impairment. R50 at 50:6-16.

According to Sgt. Volz' own testimony, he allegedly observed but one, and only one, clue: a "balance issue" at count eight and count twenty-three or twenty-four. R50 at 49:22 to 52:25. Based upon the NHTSA Manual, Mr. Krumm successfully completed this test as well.

Despite Mr. Krumm passing both the WAT and OLS tests, Sgt. Volz nevertheless asked Mr. Krumm to recite the alphabet from C to X. But for transposing the letters "W" and "Y," Mr. Krumm completed this test without issue. R50 at 56:9-13. After the alphabet test, Sgt. Volz requested that Mr. Krumm submit to a PBT.

It is Mr. Krumm's position that when the totality of his performance on the field sobriety tests is taken together with other objective factors present at the time of his detention, there was no probable cause to administer a PBT.

The starting point for Mr. Krumm's analysis begins with the obvious. That is, he *passed* three of four field sobriety tests—the WAT, the OLS, and the Alphabet test—and the one test he is alleged to have failed, the HGN, was so poorly administered, that it has no value whatever in the probable cause determination. After all, what value are field sobriety tests really supposed to have if a person can pass 75% of the same and still be deemed to have a cloud of suspicion hanging over their head? The tests are supposed to discern who is likely to be impaired from who is not because it is *not* illegal in Wisconsin to consume intoxicants and operate a motor vehicle. What is illegal is to consume sufficient intoxicants so as to become impaired. If the only tool law enforcement officers have to make a probable cause determination is disregarded or ignored when the outcome of the individual tests are not what the officer wanted or expected them to be, then the tests themselves should be dispensed with and law enforcement officers should simply proceed directly from the moment a person is pulled over to full-blown, formal custody.

Fortunately for the citizens of this State, the suspect individual is protected by the rigors of Wis. Stat. § 343.303 and the Federal and State Constitutions. In the instant case, Mr. Krumm's passing grade on the WAT, OLS, and Alphabet tests should so call into question

whether probable cause to administer a PBT exists in this case that even if the HGN test had been perfectly administered and Mr. Krumm failed the same, there still would not objectively exist probable cause under the totality of the circumstances.

Beyond the foregoing, the "value" of many of Sgt. Volz' other observations of alleged impairment, even when taken together, is *de minimus* or actually *counterintuitive* to evidence of impairment. To cite a few examples, this Court should consider that the alleged "bad" driving in the instant case—speeding—is potentially proof of Mr. Krumm's *lack* of impairment. Operating a vehicle at a speed in excess of the maximum safe speed posted for a highway requires a person to exercise *greater* control over the vehicle given the shortened reaction times at higher rates of speed. Impairment would be indicated by a *lessening* of one's ability to control the motor vehicle, not demonstrable proof of a person's ability to safely operate a vehicle with shorter reaction times.

Similarly, nowhere within the four corners of this case is there any component allegation that Mr. Krumm's mentation was impaired. To the contrary, the record throughout demonstrates that Mr. Krumm engaged in intelligent conversation with Sgt. Volz, followed directions given to him, responded appropriately to questions put to him, *et al*.. This case lacks any evidence of impairment of Mr. Krumm's mentation. It is well known that alcohol does not discriminate, *i.e.*, it not only affects *physical* coordination, but it affects a person's ability to think clearly *as well*. When there is an absence of any effect on a person's mentation, such evidence *contraindicates* impairment by alcohol.

These factors, or more correctly, the *absence* of any negative inferences from these factors, were not weighed as part of Sgt. Volz' decision in the field to administer a PBT because if they had been, Sgt. Volz would have realized that on balance, the objective totality of the circumstances in this matter did not rise to the level of satisfying the standard set forth in Wis. Stat. § 343.303.

CONCLUSION

Because the *Renz* court intended probable cause determinations under § 343.303 to objectively consider the totality of the circumstances surrounding a suspect's detention, and further, since the totality of the circumstances in the instant case do not rise to the level of objectively establishing the requisite probable cause to administer a preliminary breath test, Mr. Krumm respectfully requests that this Court reverse the decision of the circuit court denying Mr. Krumm's motion to suppress the preliminary breath test, and remand the case with further directions that thereupon the circuit court re-evaluate whether probable cause to arrest Mr. Krumm for allegedly operating a motor vehicle while intoxicated existed under the facts herein.

Dated this 16th day of April, 2019.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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CERTIFICATION

I hereby 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. The text is 13-point type and the length of the brief is 3.921 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) 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 and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 16, 2019. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 16th day of April, 2019.

MELOWSKI & ASSOCIATES, LLC

_____

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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APPENDIX

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