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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2019AP243-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID WILLIAM KRUMM,

Defendant-Appellant.

ON APPEAL A JUDGEMENT 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

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUE

Did the arresting officer have probable cause under Wis. Stat. § 343.303 to administer a Preliminary Breath Test to Mr. Krumm?

The trial court answered “yes”; there was a sufficient factual basis existed to establish probable cause to administer a preliminary breath test. (R51 at 3).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties’ briefs will adequately address the issue presented, and oral argument will not significantly assist the Court in deciding this appeal.

The State does not take a position on publication of this Court’s decision and opinion.

STATEMENT OF THE CASE

As plaintiff-respondent, the State exercises its discretion to not present a statement of the case. *See* Wis. Stat. § 809.19(3)(a)2. The State cites to relevant facts in the Argument section below.

STANDARD OF REVIEW

This appeal presents a question of probable cause to administer a preliminary breath test to Mr. Krumm based on the facts. An Appellate Court upholds the Circuit Court’s findings of fact unless the findings are clearly erroneous. *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541, 552 (1999) (citing *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830 (1990)). An Appellate Court reviews de novo whether the facts satisfy the probable cause standard. *Id.*

ARGUMENT

I. PURSUANT TO *COUNTY OF JEFFERSON V. RENZ*, THERE WAS PROBABLE CAUSE TO ADMINISTER A PRELIMINARY BREATH TEST TO MR. KRUMM.

It is routine for an officer to utilize the Preliminary Breath Test (hereafter “PBT”) as a tool to determine if the officer should make an arrest for Operating a Motor Vehicle While Intoxicated (hereinafter “OWI”). *County of Jefferson v. Renz*, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999). Wisconsin Statute section 343.303 permits an officer who suspects an individual of OWI to administer a PBT if the officer has “probable cause to believe that the individual...has violated s. 364.63(1).” *Id.* at 300-01. In this case, Mr. Krumm showed multiple signs of impairment, however, he substantially completed the field sobriety tests. The PBT in this case, just as it did in *Renz*, proved a useful tool for Sgt. Volz to confirm his belief that Mr. Krumm was impaired.

A. Sergeant Volz observed numerous signs of impairment, which amounted to probable cause to believe Mr. Krumm had driven impaired.

Based on the evidence presented at the motion hearing, Sgt. Volz had probable cause to administer the PBT. In the original hearing on the Motion to Suppress, Sgt. Volz testified that he conducted a traffic stop on Mr. Krumm’s vehicle because Mr. Krumm was driving forty-six miles per hour in a twenty-five mile per hour zone (R50 at 4:3-25, 5:1-7). The traffic stop occurred around 2:40 a.m. (R50 at 2:24-25). Upon making contact with Mr. Krumm, Sgt. Volz could smell a strong odor of intoxicants coming from Mr. Krumm (R50 at 6:22-25, 7:1). Mr. Krumm admitted to Sgt. Volz that he had been drinking, having consumed three beers, with the last being about two hours prior. (R50 at 7:2-10). Sergeant Volz testified that Mr. Krumm appeared to be confused about where he was coming from and where he was going. (R50 at 27:15-16).

Sergeant Volz administered field sobriety tests, starting with the horizontal gaze nystagmus test (hereinafter “HGN”). (R50 at 8:5-6). Sergeant Volz testified that he observed lack of smooth pursuit and nystagmus at maximum deviation in both eyes, which he was trained meant the individual likely had a blood alcohol concentration over 0.1. (R50 at 8:13-19).

During the walk and turn test, Mr. Krumm briefly stumbled during his first pass, stumbled when he turned, but did not make any mistakes on his return. (R50 at 9:8-11). Mr. Krumm next performed the one leg stand test, and Sergeant Volz observed Mr. Krumm sway at count 8 and again at count 23 or 24. (R50 at 10:1-2).

Lastly, Sergeant Volz had Mr. Krumm recite the alphabet. (R50 at 10:3-5). On this test, Mr. Krumm incorrectly stated the order of the letters to be “W, Y, X.” (R50 at 10:16-19). Following the field sobriety tests, Sergeant Volz asked Mr. Krumm how long ago his last drink was, and this time after being asked, Mr. Krumm responded that it was about one hour prior. (R50 at 11:15-17). Sergeant Volz then asked another officer to administer a PBT. (R50 at 11:19-25). The PBT result was .147 and Sgt. Volz placed Mr. Krumm under arrest for OWI 2nd (R50 at 12:1-8).

An officer may request a PBT when the officer has a basis to justify an investigative stop but has not yet established probable cause to justify an arrest. *State v. Felton*, 2012 WI App 114, ¶ 8, 344 Wis.2d 483, 824 N.W.2d 871 (citing *State v. Fischer*, 2010 WI 6, ¶ 5, 322 Wis. 2d 265, 778 N.W.2d 629)). “An officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of OWI.” *Renz*, 231 Wis. 2d at 316. The proper standard is “probable cause to believe.” *Id.*

In *Renz*, the Wisconsin Supreme Court found that an officer had probable cause to administer a PBT. *Id.* at 317. The defendant in that case was stopped at around 2:00 a.m. for a loud exhaust. *Id.* at 296. The officer noted a strong odor of intoxicants and the defendant admitted to consuming three beers. *Id.* However, the defendant’s speech was not slurred and he “was able to substantially complete all of the tests.” *Id.* at 317. The Court held that “[t]he officer was faced with exactly the sort of situation in which a PBT proves extremely useful in

determining whether there is probable cause for an OWI arrest.” *Id.*

The factors present in this case almost mirror the factors in *Renz*. In both cases, the stops were around bar time, the officers noted a strong odor of alcohol, and defendants admitted to drinking three beers. Unlike in *Renz*, in this case, there was bad driving, with Mr. Krumm speeding forty-six miles per hour in a twenty-five mile per hour zone. Mr. Krumm also appeared confused about where he was and changed his story regarding his drinking timeline. Like in *Renz*, Mr. Krum did not have slurred speech and he substantially completed the field sobriety tests.

Individually, some of the factors present in this case may have innocent explanations, but officers may properly use evidence with innocent explanations for a probable cause determination. See, e.g. *State v. Tullberg*, 2014 WI 134, ¶¶34-35, 359 Wis. 2d 421, 439-41, 857 N.W.2d 120, 129-30. Considering the totality of the circumstances, Sgt. Volz was faced with a similar situation as in *Renz*, where the PBT proved a useful tool for making his arrest decision. Pursuant to *Renz*, Sgt. Volz had probable cause to administer the PBT.

B. Field sobriety tests, including the HGN test, are observational tools that can be used to aid an officer in deciding whether to arrest for OWI, whether or not they are administered as prescribed in the NHTSA manual.

Field sobriety tests are tools to aid an officer in making an arrest decision. However, Mr. Krumm argues that the HGN test was not administered in the manner set forth in the NHTSA manual, and the test, therefore, cannot be considered for a probable cause analysis. The State acknowledges that the HGN test was not administered as prescribed by the NHTSA manual. However, the HGN evidence is nonetheless probative.

In, *City of W. Bend v. Wilkens*, 2005 WI App 36, ¶ 1, 278 Wis. 2d 643, 645, 693 N.W.2d 324, 325, the defendant argued that the officer’s “FSTs were unreliable and his observations of and conclusions he drew from Wilkens’ performance on the tests should be excluded from the probable cause analysis.” *Id.* ¶ 12. The court disagreed and noted that

FSTs “are merely observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication.” *Id.* ¶ 1. The Court held that issues with the procedure the officer used in administering the field sobriety tests “go to the weight of the evidence, not its admissibility.” *Id.*

Even without the HGN evidence, given all the other factors, Sgt. Volz had probable cause to request the PBT. However, pursuant to *Wilkins*, the results of the HGN test, although not administered as prescribed by the NHTSA manual, may be considered for a probable cause determination.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the circuit court’s decision that the officer had sufficient probable cause to request a PBT.

Dated this 19th day of July, 2019.

Respectfully submitted,

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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) 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 1,417 words.

Dated this 19th day of July, 2019.

Signed:

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

The electronic filing website is currently offline due to the power outages in Madison. I hereby certify that I will submit an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) on Monday 7/22/19, or if not online by then, as soon as I become aware the system is back online. I further certify that the electronic brief will be 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 this 19th day of July, 2019.

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CERTIFICATE OF MAILING

I certify that this brief was deposited into 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 July 19, 2019.

I further certify that on July 19, 2019, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 19th day of July, 2019.

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