

RECEIVED

08-06-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**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**

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & ASSOCIATES, LLC

Matthew M. Murray
State Bar No. 1070827

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
matt@melowskilaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY TO STATE’S ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

Wisconsin Court of Appeals

County of Jefferson v. Renz, 231 Wis. 2d 293, 602 N.W.2d 541
(1999).....5, 8

State v. Fischer, 2010 WI 6, 322 Wis. 2d 365, 778 N.W.2d
629.....6

Wisconsin Statutes

Wis. Stat. § 343.303.....8

Other

NHTSA, DWI Detection and Standardized Field Sobriety
Testing (SFST) Manual.....2

REPLY TO STATE'S ARGUMENT

A close examination of the State's Brief in the instant case reveals that the State wishes to "have its cake and eat it too." In other words, the State proffers on the one hand that "Mr. Krumm showed multiple signs of impairment," but then it goes on to concede that "he substantially completed the field sobriety tests." State's Brief at 2. It is as though the State seeks to create a Dantean Limbo in which it can prevail on any factual basis *regardless* of which direction the scales of justice seemingly tip.

The first example of the tension inherent in the State's argument is Mr. Krumm's performance on the field sobriety tests. Instead of examining the field sobriety tests from the perspective of the *clues* officers are trained to look for, the State breaks down each individual test "deviation" into something akin to a clue all on its own. For example, the State describes Mr. Krumm as "sway[ing] at count 8 and again at count 23 or 24" during the one-leg stand test. State's Brief at 3. Examining the one-leg stand with this degree of hypersensitivity might lead one to erroneously conclude that Mr. Krumm exhibited *three* clues when he swayed at the foregoing times. *This is not how the test was **designed, studied, and intended** to be interpreted.*

Over the course of the last several decades, NHTSA¹ has developed, published, and frequently revised what has become the "gold standard" in field sobriety training for law enforcement officers, namely the *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*. This manual is not only the preeminent and seminal source for all

¹National Highway Traffic Safety Administration.

things related to field sobriety testing, but there is not an organized law enforcement agency in the country which does not, in some form or another, rely upon it for training its officers in the detection and investigation of impaired driving cases.

The manual itself principally arises out of the work done in three laboratory and field studies from 1977, 1981, and 1983, and then later reaffirmed in three “validation studies” done in 1995, 1997, and 1998. *See* NHTSA, *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*, Session VIII, pp. 5-12 (Rev. 10/2015)[hereinafter “NHTSA Manual”]. The studies underlying the development of the standardized battery of field sobriety tests note that there will be variability among individuals with respect to the difficulty they may have performing the standardized field tests, however, at some point—as scientifically determined by the test developers—the exhibition of certain clues crosses the line from merely being a statistical aberration to being statistically significant. *See, e.g.*, NHTSA Manual, Session VIII, pp. 55 & 65.

The State’s position is, however, that all of the foregoing work which went into the development of these tests can be disregarded by law enforcement officers because field sobriety tests are merely “observational tools.” State’s Brief at 4. Apparently, the State believes that when it comes to using “observational tools” to determine whether one will seize a sample of a person’s breath, no constitutional or statutory rigor is required.

This leads directly into the second major problem with the State’s position, to wit: adopting the State’s approach to the question presented herein does not simply “create a slippery

slope,” it sends a tsunami of mud sliding downhill. The State conceded in its Brief that the officer’s administration of the horizontal gaze nystagmus test in this case was deficient. State’s Brief at 4. Despite acknowledging this deficiency, the State still characterizes the test as “probative.” *Id.* Since the effect of alcohol on gaze nystagmus is not part of the common stock of knowledge, there must be some nexus which links it from the realm of the scientifically obscure to the realm of the useful sobriety tool. If there is not, then Mr. Krumm can reasonably ask the State: “Of what probity is the test?” The answer to this question is “none” in the absence of any studies linking the two. Nevertheless, this is precisely what the State is attempting to do by arguing that even the most deficiently administered test is still probative of impairment. Really? How does the State know that? Upon what studies does it rely? Which combination of properly observed factors can be mixed with which combination of improperly administered test elements and still yield a result with probity? Under what environmental conditions will the State’s conclusions regarding probity hold true?

If it is not plainly evident by now, it should be: to allow for a slippery slope to support the probity of a misadministered field sobriety test is a dangerous game when one considers that balanced at the other end of that scale are the Fourth Amendment rights of the accused citizens.

The third and final major flaw with the State’s argument is that it ignores and overlooks the *actual facts* of the instant case by misdirecting the Court’s attention with blue smoke and mirrors. The whole point of undertaking three separate studies to scientifically develop field sobriety tests, and then undertake another three validation studies to confirm the findings of the first three studies, was to lend credibility to what could—up to

that point—be characterized as a “voodoo” science. When one examines Mr. Krumm’s performance on the field sobriety tests in the instant case against the scientifically developed standard, the only conclusion which can reasonably be drawn is that there was no probable cause to administer a preliminary breath test to him.

On November 29, 2014, after detaining Mr. Krumm for allegedly speeding, 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. 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. It should be noted, however, that the State conceded in its brief that the HGN test was misadministered. State’s Brief at 4. As such, Mr. Krumm posits that this Court should disregard the HGN test was assessing whether probable cause to arrest him existed under the facts of this case.

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.

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.

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 23:23-24:16.

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.

While he gave instructions for the second field sobriety test, the walk-and-turn [hereinafter “WAT”] test, Mr. Krumm never broke from stance, wobbled, swayed, or otherwise exhibited poor balance or coordination. R50 at 44:4-45:21. 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; 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, at VIII-21. Moreover, “[e]ach clue may appear several times, but still only constitutes one distinct clue.” *Id.* at VIII-28. 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.

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 5th day of August, 2019.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By: _____
Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant

CERTIFICATIONS

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 2,272 words.

Further, 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.

Finally, I certify that this brief or 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 August 5, 2019. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this 5th day of August, 2019

Respectfully submitted,

MELOWSKI & ASSOCIATES, LLC

Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant