STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2019AP001082-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

MICHAEL A. DOTSON,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from the Judgment of Conviction Entered in
Brown County Circuit Court,
the Honorable William M. Atkinson, presiding
Trial Court Case No. 17CT661

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ISSUE FOR REVIEW

Whether the law enforcement officer had sufficient reasonable suspicion to administer standardized field sobriety tests to Dotson?

The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

Michael A. Dotson was charged with Operating a Motor Vehicle While Under the Influence of an Intoxicant-Second Offense and Operating a Motor Vehicle With a Prohibited Alcohol Concentration-Second Offense in violation of Wis. Stat. §§ 346.63(1)(a) & 346.63(1)(b)[1], for an incident that occurred on Sunday, February 12, 2017. (R2).

[1] All statutes are current unless otherwise cited.

Dotson filed a motion to suppress on October 2, 2017, seeking suppression of statements Dotson made to Officer Robby Hock after being taken into custody on a warrant and alleging that without those statements Officer Hock lacked probable cause to arrest Dotson. (R14).

Brown County Circuit Court Judge Thomas J. Walsh presided over a motion hearing on November 30, 2017. (R59). Officer Robby Hock of the Green Bay Police Department, who had approximately 11 years' experience in law enforcement, was the only witness at this motion hearing. (R59: 5).

Officer Hock testified that at approximately 1:21 a.m. on Sunday, February 12, 2017, he initiated a traffic stop on a vehicle that had a temporary license plate, because when he ran the temporary plate number through his squad car's computer it came back as not associated with any vehicle. (R59: 8, 10). Hock testified that not only was this vehicle traveling in a well-known bar district in Green Bay, but he had observed the same vehicle earlier in the night parked in front of a drinking establishment called Slammer's Bar. (R59: 8-9).

When Hock approached the driver's side door of Dotson's vehicle he noted that Dotson only rolled his window down about six inches and Dotson was smoking a cigarette. (R59: 11). Hock noted this was unusual, as drivers in this situation normally roll their windows down all the way for him. (R59: 11). Hock testified that while this might means the person doesn't like police, in his law enforcement experience this usually means they are trying to conceal something in the vehicle or cover up the odor of intoxicants or marijuana. (R59: 12). Hock also stated that encountering a driver who is smoking is not unusual, but smoking a cigarette is a common tactic used by someone who has been drinking and driving to cover up the odor of intoxicants coming from their breath. (R59: 12).

After obtaining Dotson's driver's license and running him through his squad's computer, Hock learned there was a warrant for Dotson's arrest out of another county. (R59: 14).

Hock stated he re-approached Dotson and asked him to step out of the vehicle, but Dotson did not comply with this request. (R59: 15). Hock said he then ordered Dotson out of the vehicle, and Dotson still

did not immediately comply. (R59: 15). Hock then told Dotson that he was under arrest for a warrant and told him to step out of the vehicle, but Dotson responded by rolling up his window instead. (R59: 15). Hock stated he was about to use his window punch to smash out Dotson's window when Dotson finally stepped out of the vehicle. (R59:15).

When Dotson exited his vehicle and Hock placed him under arrest, putting him in handcuffs and patting him down, Hock then smelled the odor of intoxicants emitting from Dotson's person for the first time. (R59: 16). Hock stated that up to that point, he thought Dotson was possibly an intoxicated driver but felt he did not yet have enough information. (R59: 13).

Hock then asked Dotson if he had been drinking that night, and Dotson admitted that he had been. (R59: 17). This admission was subsequently suppressed by the trial court. (R60: 8).

However, Officer Hock had testified that no matter what Dotson's answer to that question had been, Hock was going to administer standardized field sobriety tests (hereinafter SFSTs). (R59:

17-18, 19, 25). Hock testified that he while the odor of intoxicants was the primary factor in determining that there was reasonable suspicion to administer the SFSTs, he was also basing this decision on other factors: the time of day that he encountered Dotson (1:21 a.m.), the fact that this was a bar district, and the way he felt Dotson was originally trying to conceal the odor of intoxicants by smoking a cigarette and only opening his window a few inches. (R59: 36-37).

Hock transported Dotson to the sally port of a nearby hospital, where he administered the SFSTs to Dotson. (R59: 18-19). After Dotson had performed the SFSTs, Hock continued the OWI investigation and asked Dotson submit to a preliminary breath test, which returned a reading of 0.14%. (R59: 33-34, 39). Hock then placed Dotson under arrest for operating while intoxicated and escorted Dotson into the hospital for the blood draw. (R59: 39).

Although the trial court suppressed Dotson's admissions of drinking, it ruled that Officer Hock still had enough reasonable suspicion to investigate Dotson for OWI without the admissions. (R60: 8). The trial court enumerated the various factors that supported Hock's

suspicion being reasonable and, therefore, were the basis of its decision to deny remainder of Dotson's motion to suppress:

1) That this encounter occurred in the early morning hours—specifically at 1:21 a.m. (R60: 4, 8).

2) That the traffic stop occurred in an area of the city with several bars. (R60: 4, 8).

3) That Officer Hock had observed Dotson's vehicle earlier in the night parked at a different drinking establishment. (R60: 4, 8).

4) That Dotson was smoking a cigarette, which the officer knew was often a method used by suspects to disguise the odor of intoxicants or marijuana. (R60: 3-4, 8).

5) That when Hock approached the driver's window Dotson only rolled the window down a small amount, which Hock indicated was not normal for most traffic stops and might have been due to Dotson not wanting him to smell the odor of intoxicants. (R60: 3-4, 8).

6) The difficulty Hock encountered when asking Dotson to exit his vehicle. (R60: 5).

7) That once Dotson finally exited the vehicle Hock could now smell the odor of intoxicants coming from Dotson. (R60: 5, 7, 8).

The trial court also noted that the testimony of Officer Hock was consistent with the video in this case, and said it could tell that Hock

first smelled the intoxicants on Dotson as Hock was placing Dotson into custody for the outstanding warrant, based on Hock's reaction and how it was that point when Hock asked Dotson whether he had been drinking. (R60: 5). For these reasons, the trial court denied the remainder of Dotson's motion to suppress. (R60: 8).

Dotson subsequently entered a no contest plea to, and was convicted of, count 1-operating a motor vehicle while intoxicated-second offense on April 13, 2018; count 2-operating with a prohibited alcohol concentration-second offense was dismissed. (R63: 3, 4). Dotson was sentenced to 10 days jail, 12 months revocation of his operating privileges, and 12 months ignition interlock device.[2] (R63: 7).

STANDARD OF REVIEW

A motion to suppress evidence presents a question of constitutional fact to which the reviewing court applies a two-step

[2] Brown County Circuit Court Judge Thomas J. Walsh presided over the motion hearing on November 30, 2018, and issued the Court's decision regarding Dotson's motion on January 29, 2018. The case was later reassigned to Brown County Circuit Court Judge William M. Atkinson as part of a judicial rotation and Atkinson presided over Dotson's plea and sentencing hearing on April 13, 2018.

standard of review. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. "We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles." *Id.*

ARGUMENT

THE LAW ENFORCEMENT OFFICER HAD SUFFICIENT REASONABLE SUSPICION TO ADMINISTER STANDARDIZED FIELD SOBRIETY TESTS TO DOTSON.

There is no dispute here that Officer Hock had reason to stop the vehicle Dotson was driving. As Officer Hock testified, the vehicle had a temporary license plate on it but when he ran the number through his squad's computer it showed that the temporary plate was not associated with any vehicle. Hock therefore stopped the vehicle as it appeared to be in violation of vehicle registration laws. But this is just the first step in the process of an OWI investigation. See *County of Jefferson v. Renz*, 231 Wis.2d 293, ¶ 36, 603 N.W.2d 541 (1999).

In *Renz*, the Wisconsin Supreme Court grappled with what quantum of probable cause was needed to administer a preliminary

breath test (PBT) in an OWI investigation. The Supreme Court ultimately determined that the level of "probable cause" needed to administer a PBT to a suspected drunk driver was lower than the probable cause needed to arrest the suspect, but greater than the level of reasonable suspicion needed to initiate an investigative stop, and greater than the "reason to believe" necessary to request a commercial driver to submit to a PBT. *Id.* at ¶ 51.

In arriving at its decision the Wisconsin Supreme Court discussed the process of OWI investigations and where the various quanta of proof needed for each step fit with each other:

> First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime, …, or reasonably suspects that a person is violating the non-criminal traffic laws. After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. *If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest.* The legislature has authorized the use of the PBT to assist an officer in such circumstances. If the person stopped is a

> commercial driver, the officer may request a PBT upon the detection of "any presence" of an intoxicant or if the officer has "reason to believe" the driver has been operating the vehicle while intoxicated. For non-commercial drivers, the officer may request a PBT if there is "probable cause to believe" that the person has been violating the OWI laws. If the driver consents to the PBT, the result can assist the officer in determining whether there is probable cause for the arrest. If under the facts there are reasonable grounds to believe that the person has violated the OWI laws, the officer may arrest the driver under Wis. Stat. § 345.22 or Wis. Stat. § 968.07(1)(d). Finally, to bind the defendant over after a hearing, the authorities will need to show probable cause that is greater than that required for the arrest, but less than the guilt beyond a reasonable doubt that must be proven before conviction.

Id. at ¶ 36 (citations and footnotes omitted) (emphasis added). The Wisconsin Supreme Court makes it clear here that SFSTs are tools for law enforcement to collect evidence justifying additional investigation of a possible OWI.

Dotson completely ignores the Wisconsin Supreme Court's discussion of the degrees of probable cause from the *Renz* case, and instead argues that a much higher level of probable cause is needed for a law enforcement officer to administer SFSTs—essentially asserting that the reasonable suspicion to administer SFSTs is akin to the

probable cause needed to *arrest* an individual for OWI. However *Renz* makes it clear that the reasonable suspicion to administer SFSTs is much lower than that: the amount of reasonable suspicion needed to administer SFSTs is just above the level of reasonable suspicion, but lower than the amount of probable cause needed to administer a PBT. *Id.*

Dotson quotes the definition of operating under the influence set forth by the standard criminal jury instructions to assert that, "[b]efore conducting field sobriety tests, an officer must have reasonable suspicion that the 'person has consumed a *sufficient amount of alcohol* to cause the person to be less able to exercise the clear judgment and steady hand necessary to control a motor vehicle.'" (Dotson's brief, pp. 12-13, quoting WIS JI-CRIMINAL 2663). However, an arresting officer will rarely have knowledge of the driver's ability "to exercise the clear judgment and steady hand necessary to control a motor vehicle" until *after* the driver has performed the SFSTs.

The SFSTs are simply tools to assist the officer in assessing the level of impairment. That is precisely what the *Renz* court

acknowledges when it says, "If [the officer's] observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests." *Renz*, 231 Wis.2d 293, ¶ 36.

If the higher level of reasonable suspicion embraced by Dotson was actually required in order to administer SFSTs, the *Renz* court certainly would not have said, "The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances." *Id.*

Officer Hock articulated several factors that supported his decision to have Dotson perform the SFSTs, and stated that while the primary factor may have been the odor of intoxicants, that was not the sole factor. (See, R59: 36-37). Hock stated that the time of the night—1:21 a.m.[3], the fact that this happened in a known bar district[4], and the

[3] Suspicion is reasonably "heightened by the officer's experience that he is more likely to encounter impaired drivers at 1:15 in the morning." *In re Refusal of Anagnos*, 2012 WI 64, ¶ 58, 341 Wis. 2d 576, 815 N.W.2d 675.

[4] See, *State v. Young*, 212 Wis. 2d 417, 426-427, 569 N.W.2d 84 (Ct. App. 1997).

way it appeared Dotson was trying to cover up the odor of intoxicants (by smoking and only opening his window a few inches) all led him to believe that Dotson may have been drinking, and once Dotson stepped out of his vehicle and Hock could smell the odor of intoxicants this suspicion was confirmed. (R59: 36-37).

Dotson argues that any of these factors noted by Hock *prior* to detecting the odor of intoxicants should *not* be included in this court's analysis of the evidence, because prior to Hock smelling the odor of intoxicants "it was just a hunch." (Dotson's brief, pp. 14-15). However, that is simply not how it works. Instead, the court is supposed to look at the *totality* of the circumstances. See, *State v. Waldner*, 206 Wis.2d 51, 58, 556 N.W.2d 681 (1996).

> Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. *The building blocks of fact accumulate.* And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

Id. (emphasis added). Dotson does not get to leave certain factors out of the equation because that particular factor, standing on its own, does

not establish a reasonable suspicion. Nor does a particular factor get left out of the analysis because it might be a perfectly legal behavior or may have an innocent explanation. *Id.* at 59-61.

Each of the factors mentioned by Officer Hock is a building block that accumulates, and once the smaller blocks are combined with the biggest block of all, *i.e.*, the odor of intoxicants, they together give rise to a reasonable suspicion that something unlawful is afoot.

Dotson's argument that there must be also be some bad or unusual driving, in addition to a "mere" odor of intoxicants, to support a reasonable suspicion to administer SFSTs quite simply ignores the degrees of reasonable suspicion/probable cause set forth by our state's Supreme Court in *Renz*. In support of his myopic argument Dotson relies on a single unpublished Court of Appeals decision—*County of Sauk v. Leon*, 2010AP001593, unpublished (Ct. App. Nov. 24, 2010).

However, a comparison of Dotson's case to the *Leon* case shows that Dotson's case is much more than a *Leon*-like "odor of intoxicants" case. As enumerated by the trial court in its oral ruling, there were a number of factors that combined in Dotson's case that provided Officer

Hock the reasonable suspicion necessary to proceed to the next level of investigation and administer the SFSTs:

1) The time of day—specifically at 1:21 a.m.[5]

2) The fact that Dotson was stopped in an area of the city known as a bar district.

3) The fact that Officer Hock had observed Dotson's vehicle parked at a different bar earlier in the night.

4) That Dotson was smoking a cigarette, which Officer Hock articulated was a method often used by suspects to disguise the odor of intoxicants or marijuana, based on his experience.[6]

5) That Dotson only rolled the window down a small distance, which Hock indicated was not normal and, based on his experience, could be attributable to Dotson not wanting him to smell the odor of intoxicants.

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[5] The fact that this incident occurred on a Saturday night/Sunday morning also supports the trial court's conclusion. See, *State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 766 N.W.2d 551 ("It is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning."). This is also consistent with Officer Hock's testimony that he was working an OWI Task Force detail at the time of this stop (R59: 7), and the fact that OWI Task Force details are scheduled for weekend nights or other times where a there is a higher possibility of intoxicated drivers.

[6] The fact that Officer Hock was an experienced officer, having worked in law enforcement for a total of 11 years at the time of this incident, including his work on the different OWI Task Force details in Brown County, can also be a factor for the court to consider in evaluating the totality of circumstances. (R59: 5, 7). See, *Lange*, 2009 WI 49, ¶ 30 (where an officer's nearly 8 years of law enforcement experience was considered as a factor in Wisconsin Supreme Court's assessment of the totality of the circumstances in an OWI arrest).

6) The fact there was difficulty getting Dotson to exit his vehicle.[7]

7) The odor of intoxicants coming from Dotson once he finally exited the vehicle.

(R60: 4-5, 7-8). Taken together, these factors give a much different scenario than the limited evidence of drinking and driving, *i.e.*, the mere odor of intoxicants, in the *Leon* decision, and it becomes clear that the trial court's finding that reasonable suspicion was present was correct.

CONCLUSION

Officer Hock had sufficient reasonable suspicion to have Michael Dotson perform the standardized field sobriety tests before continuing his OWI investigation by giving Dotson a preliminary breath test, and then arresting Dotson for operating while intoxicated. For that reason the State respectfully requests that this court uphold the circuit court's Judgement of Conviction.

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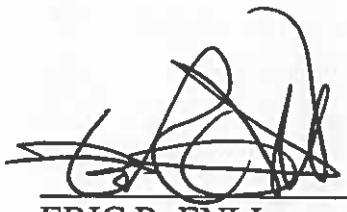
[7] Dotson argues that his 35-second delay in exiting his vehicle, after being asked to step out because there was a warrant for his arrest, was due to Dotson wanting to make arrangements for someone to get his vehicle. (Dotson's brief, pp. 15-16). However, the officer does not have to eliminate all innocent explanations for an individual's behavior. *Waldner*, 206 Wis.2d 51, at 61.

Respectfully submitted this 26th day of November, 2019.



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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: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text , 12 point for footnotes leading of minimum 2 points and maximum 60 characters per line of body of text. The length of the brief is 2964 words, including footnotes.

CERTIFICATION AS TO APPENDIX

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 Rule 809.19(2)(a) and that contains, at minimum: (1) a table of contents; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 one or more initials or other appropriate pseudonym or designation instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

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I hereby certify that:

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.

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 2nd day of December, 2019.

Signed:

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PLAINTIFF-RESPONDENT'S APPENDIX

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