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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

12-13-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2019 AP 001966-CR
Green County Circuit Court Case 2019 CM 000006

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

CATHERINE CUSKEY LARGE,

Defendant-Respondent.

ON APPEAL FROM THE ORDER FOR SUPPRESSION OF EVIDENCE AND
DISMISSAL ENTERED IN THE CIRCUIT COURT FOR GREEN COUNTY,
THE HONORABLE JAMES BEER, PRESIDING.

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

- I. Whether the circuit court erred by finding that the officer did not have probable cause to believe that the defendant was operating with a prohibited alcohol concentration over .02, and thus incorrectly suppressed the blood test result.
- II. Whether the circuit court had legal authority or basis for ordering dismissal of the charges.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22 (2) (b) (2017-18). Publication is not necessary.

STATEMENT OF THE CASE

Catherine Cuskey Large was charged in Green County Case 19CM006 with five misdemeanor criminal counts including Operating with Prohibited Alcohol Concentration (PAC) as a 3rd Offense, contrary to Wis. Stat. 346.63(1)(b); Operating While Revoked (OAR), contrary to Wis. Stat. 343.44(1)(b); Failure to Install Ignition Interlock Device (IID), contrary to Wis. Stat. 347.413(1); and two counts of Misdemeanor Bail Jumping, contrary to Wis. Stat. 946.49(1)(a). (R. 04.) Large filed a Motion to Suppress. (R. 16.) An evidentiary hearing was held on July 3, 2019, at which the arresting officer, Lieutenant Sturdevant, testified. (R. 31.) Large and the State filed briefs, largely focused on the issue of the appropriate remedy to be applied for an unlawful application of a preliminary breath test (PBT). (R. 21,22,23,24.) The Court made an oral ruling finding that without the PBT result the officer could not have known that Large's alcohol level was over .02 and that he did not have a basis for arrest (although not explicitly using the words, presumably finding no probable cause), and suppressed all evidence that "follows from the PBT." (R. 32.) The Court also ordered the entire criminal case 19 CM06 be dismissed, which also included the

criminal OAR, IID, and two Bail Jumping charges. (R. 32,25.) The court stated it was *sua sponte* "outright" dismissing the case because there was "no basis for arrest." (R.32:5). The State filed a notice of appeal. (R. 26.)

STATEMENT OF THE FACTS

On November 12, 2018, Lieutenant Jeff Sturdevant stopped a vehicle operated by Catherine Large for an equipment violation. (R.31:4.) One of the first things Large told Sturdevant was "I'm in trouble." (R.31:5.) She advised him she didn't have a driver's license and that she had been drinking. (R.31:5.) She had been drinking while driving and Sturdevant observed intoxicants in the vehicle including a closed 12-pack, an open 12-pack, and an open can in the center console. (R.31:5.) She said she had run out of intoxicants and went to a gas station to pick up some more, and she was on her way home. (R.31:5.) She told Sturdevant she had three beers. (R.31:6.) He could smell a slight odor of intoxicants on her, and her eyes were red. (R.31:6.) Sturdevant ran her driver's license and confirmed that she was revoked, that she did not have a valid occupational license, and that she needed an IID. (R.31:7.) Sturdevant then re-approached her vehicle and confirmed

that she did not have an IID in the vehicle. (R.31:7.) Sturdevant determined with dispatch that she had two prior convictions and that her revocation was OWI-alcohol related. (R.31:8.) Sturdevant then completed the Horizontal Gaze Nystagmus test with her, but did not see signs of impairment, and stopped Standardized Field Sobriety Testing at that time. (R.31:8-9.) Sturdevant then asked her to do a Preliminary Breath Test (PBT). ((R.31:9.) The State acknowledged that given that he was unaware that she was under a .02 restriction at that time, he did not have a basis for administering the PBT. (R.31:32-33.) He was unaware at the time that everyone who is under an ignition interlock order is at a .02 standard. (R.31:13.) Sturdevant then proceeded as he normally would have whether or not he had administered the PBT, returning to his squad car. (R.31:9-10.) Given the other criminal violations that Sturdevant was aware of, Sturdevant would have had to return to his vehicle and issue citations, and Large would not have been allowed to drive from the scene. (R.31:12.) Citations for a stop are issued by Sturdevant when the investigation is complete. (R.31:16.) When he returned to his squad car, dispatch advised Sturdevant that Large was under a restriction of prohibited alcohol concentration of

.02. (R.31:10.) Once Sturdevant found out that Large was under a .02 restriction, he believed she was over a .02 based on his other information, not considering the PBT result. (R.31:12.) She was arrested, her blood was drawn, the result was over .02, and she was charged with Operating with a Prohibited Alcohol Concentration as a 3rd offense, as well as Operating After Revocation, Failure to Install an Ignition Interlock Device, and two counts of Misdemeanor Bail Jumping for violating bond conditions relating to entering establishments selling intoxicants and operating without a valid driver's license. (R.04.)

ARGUMENT

- I. THE CIRCUIT COURT ERRED BY FINDING THAT THE OFFICER DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT WAS OPERATING WITH A PROHIBITED ALCOHOL CONCENTRATION OVER .02, AND THUS INCORRECTLY SUPPRESSED THE BLOOD TEST RESULT.

Whether probable cause to arrest exists based on the facts of a given case is a question of law to be reviewed independently of the trial court. *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

Probable cause for arrest exists when "the totality of the circumstances within the arresting officer's knowledge

would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Kutz*, 2003 WI App 205, ¶ 11, 267 Wis.2d 531, 671 N.W.2d 660. The standard requires "more than a possibility or suspicion that [the] defendant committed an offense, but the evidence need not reach the level ... that guilt is more likely than not." *State v. Mitchell*, 167 Wis.2d 672, 681-82, 482 N.W.2d 364 (1992). The probable cause requirement "deals with probabilities" and must be sufficient "to lead a reasonable officer to believe that guilt is more than a possibility." *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985). The test for probable cause is a practical test based on considerations of everyday life on which reasonable and prudent men act. *State v. Drogsvold*, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981). This standard is case-specific: "[t]he quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case." *State v. Paszek*, 50 Wis.2d 619, 625, 184 N.W.2d 836 (1971) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). "When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is

entitled to rely on the reasonable inference justifying arrest." *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.(internal citations omitted.) Police may properly consider prior convictions in a probable cause determination. *State v. Goss*, 2011 WI 104, ¶ 24, 338 Wis.2d 72, 806 N.W.2d 918 (evaluating probable cause to request a preliminary breath test); *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis.2d 383, 766 N.W.2d 551 (evaluating probable cause to arrest).

The Wisconsin Supreme Court has found probable cause to administer a PBT when the officer had nothing more than an odor of intoxicants when he knew the driver was at a .02 prohibited alcohol concentration.

"In this case, both the smell of alcohol on Goss and the officer's knowledge that Goss could drink only a very small amount before exceeding the legal limit that applied to him make the conclusion that Goss was likely in violation of the statute highly plausible....

To hold otherwise would hamstring the ability of law enforcement to investigate a suspected violation of the .02 PAC statute."

Goss, 2011 WI 104, ¶ 26-27, 338 Wis.2d 72, 806 N.W.2d 918. The Wisconsin Supreme Court recognized that “[t]he ordinary investigative tools employed in an investigation of an OWI case with a .08 PAC standard are of little or no use where the PAC standard is one fourth of that level because the ordinary physical indications of intoxication are not typically present in a person with that level of blood alcohol content.” *Goss*, 338 Wis. 2d 72, ¶ 27.

The limited facts needed for probable cause not only for a PBT but to arrest for a .02 violation has also been acknowledged by the Wisconsin Supreme Court. In *State v. Blatterman*, the defendant’s driving record, which showed three prior OWI convictions that lowered his PAC threshold to 0.02%, repeated failure to follow the officers’ orders and dispatch information that defendant was possibly intoxicated combined with the odor of alcohol and watery eyes established probable cause to arrest for a 0.02% PAC violation. 2015 WI 46, ¶ 37-38, 362 Wis. 2d 138, 864 N.W.2d 26.

Justice Ziegler’s concurrence in *Blatterman* is illustrative of the problems that would result from the trial court’s apparent requirement for a numerical PBT result before probable cause could be found:

"What if a law enforcement officer had asked a suspected offender - known to be a repeat operating-while-intoxicated ("OWI") offender, subject to a.02% PAC legal limit and smelling of intoxicants - to submit to a PBT, and the PBT was refused? Would the suspect be free to leave? Are officers on scene always required to obtain a PBT from a suspected.02% PAC offender? If a PBT is refused, is that, coupled with odor, enough for probable cause? What if the officer does not have a PBT device? Are officers without the lawful ability to pursue whether such chronic offenders are committing the crime of operating with a.02% PAC or above? What exactly is required to establish probable cause for the stand-alone crime, operating in violation of a.02% PAC limit?"

Id. ¶ 62 (Ziegler, J., concurring).

Justice Ziegler ultimately concluded that "[u]nder a natural extension of *Goss*, an officer has probable cause to arrest a driver who smells of alcohol and is subject to a PAC legal limit of.02%, even if the driver does not exhibit strange behavior like Blatterman did." *Id.* ¶ 76 (Ziegler, J., concurring). While not binding on this Court, Justice Ziegler's concurrence answers the problem that officers

face given the few investigatory tools available to screen for low yet unlawful blood alcohol concentrations.

Probable cause of a .02 violation has been repeatedly found, without requiring that the officer have some specific numerical test result. In *State v. Howes*, the officer was aware that Howes had a 0.02 PAC threshold, and the Wisconsin Supreme Court agreed this was "highly relevant in determining that the deputy had probable cause to arrest Howes." *Howes*, 2017 WI 18, ¶32, 373 Wis. 2d 468, 893 N.W.2d 812. The Court stated that with an 0.02 threshold, the following was sufficient:

"Moreover, three people told the deputy that Howes smelled of intoxicants: (1) an individual at the scene of the accident; (2) one of the EMTs who rode in the ambulance with Howes; and (3) a nurse at the hospital.

Taken together with the vehicle accident, these facts were sufficient to provide the deputy with probable cause to arrest Howes for operating a vehicle with a prohibited alcohol concentration.

We note that probable cause in this case developed over a period of time. At the accident scene, one bystander mentioned that Howes may have

smelled of intoxicants. While on his way to the hospital, the deputy learned that Howes' PAC threshold had been lowered to 0.02 percent because of his prior convictions for OWI/PAC. Then, at the hospital, the deputy spoke with EMT personnel, one of whom said that Howes smelled of intoxicants and later he spoke with a nurse who also said that Howes smelled of intoxicants.

At that point, the deputy reasonably believed that he had probable cause to conclude that Howes had operated his motorcycle with a prohibited alcohol concentration of 0.02 percent. He then placed Howes under arrest. We agree that the deputy had probable cause to believe that Howes had violated *Wis. Stat.* § 346.63(1)(b) under the provisions of *Wis. Stat.* § 340.01(46m)(c)."

State v. Howes, 2017 WI 18, ¶¶33 -34373 *Wis. 2d* 468, 893 N.W.2d 812.

Again, the odor of intoxicants, and a motorcycle crash with a deer, was sufficient for probable cause to arrest for a 0.02 violation, without any need for a PBT or other test that would provide a numerical result.

Finally, unpublished cases have also recognized this low threshold for probable cause to arrest on a .02 PAC,

the small amount of consumption needed to provide probable cause of having exceeded it, and that reasonable inferences are sufficient and appropriate under these circumstances to determine a violation without the need for a numerical test. The reasoning in *State v. Holt* and *State v. Popp*, cited below for persuasive value only, is illustrative of the analysis:

"We are not persuaded by Holt's argument that the officer could not have probable cause for the arrest absent any specific details as to when Holt drank or how much he had to drink. As Holt concedes, .02 is a low threshold and very little alcohol consumption is required to exceed that amount. See *State v. Goss*, 2011 WI 104, ¶¶2, 26, 28, 338 Wis. 2d 72, 806 N.W.2d 918. Thus, even if the "slight" odor of intoxicants supported only the reasonable inference that Holt had drunk little or not recently, that inference would still support probable cause to believe that Holt's BAC was over .02. While the officer could have inferred that any alcohol that Holt had consumed had already metabolized, the officer was not required to make that inference, particularly in light of the

other facts set forth above. See [*State v.*]Anderson, 155 Wis. 2d [77] at 84.”

State v. Holt, 2018 WI App 39, ¶16 , 382 Wis.2d 832, 917 N.W.2d 234.

“[A] reasonable police officer would suspect that Popp may be operating with a blood alcohol concentration level greater than .02 where, as here, her driving was erratic and she admitted that she had consumed a glass of wine within the last one to three hours.

[I]t is common knowledge that it takes “only a very small amount” of alcohol to exceed a .02 PAC.” See *State v. Goss*, 2011 WI 104, ¶¶ 17, 18, 26, 338 Wis.2d 72, 806 N.W.2d 918.

State v. Popp, 2016 WI App 67, ¶ 19, ¶ 15, 371 Wis.2d 566, 884 N.W.2d 536.

Here, Sturdevant clearly had probable cause to arrest Large as soon as he received the information of her .02 PAC restriction. He had much more information than was deemed probable cause in *Goss* or *Howes*, including not just an odor of intoxicants, but also red eyes, and that the defendant was driving while under an OWI-related revocation, and that she was driving without her required IID, and that she had

two prior OWI convictions, and also that she had just picked up more beer, and that she had an open intoxicant in the vehicle, and above all her own admission that she had 3 beers, which, if accurate, would put even a very large man over a .02 limit. There is no requirement that the officer make inferences that it was, for some reason, all already metabolized.

Large's admission to drinking three beers is much more indicative of having a blood alcohol contraction above .02 than the odor of alcohol on a person. It is possible that a person who smells of alcohol has not consumed enough alcohol to have a blood alcohol concentration above .02. It is even possible that the person has not consumed any alcohol, but smells of alcohol for another reason, such as alcohol being spilled on the person. But there can be no serious doubt that drinking three beers is enough to have a blood alcohol concentration above .02. As the supreme court stated in *Goss*, a person can drink "only a very small amount" of alcohol before exceeding the .02 limit. *Goss*, 338 Wis. 2d 72, ¶ 26. In *Goss*, the supreme court held that the smell of alcohol on a driver made a conclusion that the driver was above the .02 limit "highly plausible." *Id.*

Here, Large's admission to drinking three beers made it virtually certain that she was above the .02 limit.

The trial court's concern that Sturdevant could not know she was over .02 without a PBT result is misplaced. The trial court believed that without a numerical result, an officer would have just a "guess." But the cases above make clear that the question is if there was probable cause to believe she would be above .02, and that can be found in circumstances outside a PBT result. The information lawfully collected by Sturdevant establishes probable cause for an arrest for a .02 violation, without the need for a PBT result.

II. THE CIRCUIT COURT LACKED LEGAL AUTHORITY OR BASIS FOR ORDERING DISMISSAL OF THE CHARGES.

"Among the sources from which courts receive their powers are the statutes and their own 'inherent judicial authority.'" *W.W.W. v. M.C.S.*, 185 Wis.2d 468, 483, 518 N.W.2d 285 (Ct.App.1994). Whether a trial court acted within these powers is a question of law which is reviewed *de novo*. See *id.*

There is no statutory basis for the court's authority to dismiss. Only four statutes pertain to a court's

dismissal without prejudice, secs. 968.03, 970.03(9) and (10), 970.04, and 971.01(2), Stats. *State v. Clark*, 162 Wis.2d 406, 409, 469 N.W.2d 871 (Ct.App.1991).

"Section 968.03, Stats., allows dismissal of the complaint if the judge finds no "probable cause to believe that an offense has been committed or that the accused has committed it." Section 970.03, Stats., allows for dismissal at the preliminary examination if there is no "probable cause to believe that a crime has been committed by the defendant," sec. 970.03(9), or in the case of multiple counts, a count is not supported by probable cause, sec. 970.03(10). Section 970.04, Stats., implicitly allows for a dismissal at a second examination for the same reasons as a preliminary examination, see sec. 970.03(10), Stats. Section 971.01(2), Stats., mandates dismissal for failure to file the information within the prescribed time limit."

State v. Clark, 162 Wis.2d 406, fn 2, 469 N.W.2d 871 (Ct.App.1991).

Wis. Stat. § 967.055(2) authorizes the court to supervise prosecutorial motions to dismiss or amend OWI-related offenses, which has been found not to violate

separation of powers. *State v. Dums*, 149 Wis.2d 314, 322, 440 N.W.2d 814 (Ct.App.1989). *Dums* illustrates that the power to dismiss charges for operating while intoxicated is shared between the prosecutor, who first has the power to seek a dismissal, and the court, which has the power to approve or reject the request. A trial court is not authorized by Wis. Stat. § 967.055(2) to usurp the prosecutor's discretion, and to do so is a violation of separation of powers.

There is also no inherent authority to dismiss under these circumstances. A court's inherent powers extend only so far as necessary to enable that court to function properly. *State v. Braunsdorf*, 98 Wis.2d 569, 580, 297 N.W.2d 808 (1980). In *Braunsdorf*, the Wisconsin Supreme Court concluded that courts have no inherent authority to dismiss a criminal case with prejudice prior to the attachment of jeopardy, except where the defendant's right to a speedy trial is implicated. *Id.* at 570, 297 N.W.2d 808. This was extended to dismissals without prejudice in *State v. Clark*, 162 Wis.2d 406, 409, 469 N.W.2d 871 (Ct.App.1991). "The authority to seek dismissal, with or without prejudice, except in cases of statutory or constitutional authorization, rests in the discretion of

the prosecutor." *Id.* at 410. "The trial court then has the discretion to grant or deny the state's motion." *Id.*

There is no case or legal authority presented by Large or the trial court supporting the remedy of dismissal in this matter. Indeed, the court appears to have decided *sua sponte* to "outright" dismiss the entire 19CM6 criminal case, and refused to provide any further clarification or justification beyond stating, "You have no basis for an arrest." (R.32:5.) The court did not explain how the court's position on that results in dismissal. It is also clear that the officer had probable cause for the remaining four criminal charges (OAR, IID, and two counts of Bail Jumping) prior to any complained-of activity. It is also clear that the officer had all of the above indications of alcohol consumption and operation prior to the complained-of PBT request. If the trial court's ruling stands, the remedy is suppression of the evidence subsequent to a violation.

There is nothing supporting that the charges can be dismissed. There was no legal support for the remedy of dismissal ordered *sua sponte* by the trial court beyond that the court believes there would be no basis for the arrest. The court appears to acknowledge that non-criminal tickets

may still be supported; but the entire criminal case was dismissed, even though for four of the five criminal charges, the suppressed evidence would not even impact the strength of the charges. There was probable cause to arrest for all four of those charges, and there certainly was sufficient evidence to continue to trial despite the court's suppression ruling. There was no rationale presented either via statutory grant of power or argument from inherent authority that supports the dismissal.

CONCLUSION

Based on the above analysis, this court should reverse both the trial court's suppression of evidence for lack of probable cause and dismissal of the case.

Dated this 12th day of December, 2019, at Monroe, WI.

Respectfully submitted:

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch;
double spaced; 1.5 margin on left side and 1
inch margins on the other 3 sides. The
length of this brief is 18 pages.

Signed,

Attorney Laura M. Kohl
State Bar Number 1053447

CERTIFICATION OF MAILING

I certify that on this 12th day of December, 2019, pursuant to sec. 809.80(3)(b) and (4), the original and nine copies of the Brief of Plaintiff-Appellant were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Defendant-Respondent via United States first-class mail in properly addressed, postage paid envelopes.

Signed,

Attorney Laura M. Kohl
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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of sec. 809.19(12) of the Wisconsin Statutes. I further certify that this brief conforms to the rules contained in Sections 809.19(12)(f) and 809.19(13)(f) of the Wisconsin Statutes that the content of the electronic copy of the Plaintiff-Appellant's brief is identical to the content of the paper copy of the Plaintiff-Appellant's brief.

I further certify that the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated this 12th day of December, 2019.

Signed,

Attorney Laura M. Kohl
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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) of the Wisconsin Statutes and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under 809.23(3)(a) or (b); 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the records 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.

Dated this 12th day of December, 2019.

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