

**FILED**  
**09-29-2021**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

---

CASE NO. 2020AP001046 - CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDARA V. JONES,

Defendant-Appellant.

---

DEFENDANT-APPELLANT'S BRIEF  
AND APPENDIX

---

**APPEAL FROM THE ORDER DENYING MOTION TO  
SUPPRESS BASED ON UNLAWFUL ARREST ENTERED ON  
MAY 15, 2020 AND THE JUDGMENT OF CONVICTION  
ENTERED ON MARCH 24, 2020, THE HON. DANIELLE L.  
SHELTON, PRESIDING, IN THE MILWAUKEE COUNTY  
CIRCUIT COURT IN CASE 2018CM002606**

---

John T. Bayer  
Attorney for Defendant-Appellant  
State Bar No. 1073928

Bayer Law Offices  
735 North Water Street, Suite 720  
Milwaukee, Wisconsin 53202  
Phone: (414) 434-4211  
Fax: (414) 210-5272  
Email: jtbayerlaw@gmail.com

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES .....	ii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	iii
STATEMENT OF THE CASE .....	iii
ARGUMENT.....	1
I.    THE WARRANTLESS ARREST OF JONES WAS NOT BASED UPON PROBABLE CAUSE AND THUS THE EVIDENCE IT PRODUCED SHOULD HAVE BEEN SUPPRESSED .....	1
A. Standard of Review .....	1
B. The Facts Within Officer Wilkiewicz's Knowledge at the Time of Jones' Arrest do not Amount to Probable Cause to Arrest Jones for OWI .....	1
C. This Court Should Suppress the Evidence .....	4
CONCLUSION .....	4
FORM AND LENGTH CERTIFICATION .....	6
APPENDIX CERTIFICATION .....	7

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>County of Jefferson v. Renz</i> , 231 Wis.2d 293, 603 N.W.2d 541 (1999).....	1
<i>Illinois v. Krull</i> , 480 U.S. 340, 107 S.Ct. 1160 (1987).....	4
<i>Nix v. Williams</i> , 467 U.S. 431, 104 S.Ct 2501 (1984).....	4
<i>State v. Anker</i> , 357 Wis.2d 565 (2014) ) .....	3
<i>State v. Felix</i> , 339 Wis.2d 670, 811 N.W.2d 775 (2012) .....	4
<i>State v. Knapp</i> , 285 Wis.2d 86, 700 N.W.2d 899 (2005).....	4
<i>State v. Lange</i> , 317 Wis.2d 383, 766 N.W.2d 551 (2009).....	1
<i>State v. Secrist</i> , 224 Wis.2d 201, 589 N.W.2d 387 (2001).....	1
<i>United States v. Calandra</i> , 414 U.S. 338, 94 S.Ct. 613 (1974).....	4
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407 (1963).....	4

## STATEMENT OF THE ISSUES

1. Whether the police had probable cause to arrest the defendant Randaro V. Jones for operating his motor vehicle under the influence of an intoxicant?

The circuit court answered yes.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Jones does not believe that oral argument will assist the Court in considering the issues presented in this appeal; the facts are not complex and can be sufficiently argued in brief format.

Jones does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well settled rules of law and controlling precedent, with no call to question or qualify said precedent. Additionally, Jones herein appeals from a misdemeanor conviction. He has not moved for a three-judge panel, and the case will most likely be decided by one judge. Thus, this case is likely not appropriate for publication and no such request is being made.

### **STATEMENT OF THE CASE**

This case is about whether the defendant Randaro V. Jones' rights under the Wisconsin and US constitutions which require police to have probable cause to arrest a person without a warrant were violated when Jones was arrested for Operating While Under the Influence of an Intoxicant. The circuit court denied Jones' motion to suppress evidence based upon unlawful arrest. (R.23:1; APP019). Jones contends herein that the circuit court's findings were erroneous. The following facts are relevant to the Court's understanding of the issue presented herein.

On March 28, 2018, Jones was arrested for OWI First Offense by Officer Andrew Wilkiewicz of the Milwaukee Police Department. (R.31:19; APP041). Officer Wilkiewicz was monitoring the 42<sup>nd</sup> Street Bar and Grill in Milwaukee, WI when he observed a black Cadillac Escalade exit the bar parking lot with distinct tail lights. (R.31:7-8; APP029-APP030). Officer Wilkiewicz heard a gunshot moments later and upon traveling to the



source of the gunshot noise the officer observed the Cadillac with the distinct taillights parked in the middle of the street with the front drivers door open and an individual whom he identified as Jones standing outside the vehicle. *Id.* There were no other people walking on this street and only a few parked cars were on this street at this time. *Id.* There was a passenger in the passenger seat of Jones' vehicle. (R.31:25; APP047). Officer Wilkiewicz detained Jones by activating his squad lights upon which Jones put his hands up. (R.31:10; APP032). Officer Wilkiewicz observed a spent shell casing next to Jones approximately five to six feet away. (R.31:11; APP033). Officer Wilkiewicz conducted a pat down search of Jones and placed him in his squad car and observed an odor of alcohol on Jones. (R.31:12; APP034). Officer Wilkiewicz next confirmed what was on the ground next to Jones was indeed a spent shell casing and also observed in the center console a cup with liquid in it and ice and a straw that appeared to be a watered down cocktail which smelled like alcohol. (R.31:13; APP035). Officer Wilkiewicz located a glock firearm with an extended magazine in the pouch of the back of the front passenger seat. (R.31:14; APP036). Officer Wilkiewicz then asked Jones out of the squad car and handcuffed Jones and advised Jones that he is under arrest for suspicion of operating while intoxicated. (R.31:19; APP041). Officer Wilkiewicz also had Jones' vehicle towed. *Id.*

Jones was subsequently charged with Endangering Safety by Use of Dangerous Weapon (Under the Influence of an Intoxicant) in the Milwaukee County Circuit Court. (R.2:1; APP001). He filed a motion to suppress blood test evidence based upon unlawful arrest. (R.9:1; APP003). The motion was heard by the Milwaukee County Circuit Court, Branch 12, Judge David L. Borowski presiding, on March 27, 2019. (R.78:1; APP086). The circuit court denied Jones' motion to suppress evidence based upon unlawful arrest. (R.31:31; APP053). The court based its decision on the rationale that there was

enough facts in the totality of the circumstances to justify the arrest. *Id.*

Jones entered a plea of no contest to Endangering Safety by Use of Dangerous Weapon (Under the Influence of an Intoxicant) on January 21, 2020. The court sentenced Jones to 2 days of jail and \$894.00 fine and costs. (R. 22:1; APP021). Jones appeals from the court's adverse ruling on his motion to suppress evidence based upon unlawful arrest. Jones argues herein that the blood test results should be suppressed because his arrest for OWI First Offense was not based upon probable cause.

## ARGUMENT

### **I. THE WARRANTLESS ARREST OF JONES WAS NOT BASED UPON PROBABLE CAUSE AND THUS THE EVIDENCE IT PRODUCED SHOULD HAVE BEEN SUPPRESSED**

#### **A. Standard of Review**

An arrest by police without a warrant requires probable cause to be considered lawful. *State v. Lange*, 317 Wis.2d 383, 766 N.W.2d 551 (2009). Probable cause to arrest a person for operating a motor vehicle while intoxicated refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* The burden is upon the State to prove that there was probable cause. *Id.* On review this court will uphold the trial court's findings of fact unless they are clearly erroneous. *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541, 316 (1999). Whether those facts satisfy the standard of probable cause is a question of law that this court reviews de novo. *Id.*

#### **B. The Facts Within Officer Wilkiewicz's Knowledge at the Time of Jones' Arrest Do Not Amount to Probable Cause to Arrest Jones for OWI**

Whether probable cause to arrest exists in a particular case must be judged by the facts of that case. *State v. Secrist*, 224 Wis.2d 201, 212, 589 N.W.2d 387, 212 (2001). There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof of beyond a reasonable doubt or even that guilt is more likely than not. *Id.*

In the instant case, the circuit court should not have concluded that there are enough facts in the



totality of circumstances to hold that there was probable cause to arrest Jones for OWI First Offense or for Endangering Safety By Use of a Dangerous Weapon (Under the Influence of an Intoxicant) on March 28, 2018. Officer Wilkiewicz lacked a sufficient factual basis of evidence of impairment to form probable cause to arrest for OWI or ESBDO at the time that Officer Wilkiewicz placed Jones under arrest. Officer Wilkiewicz was monitoring the 42<sup>nd</sup> Street Bar and Grill in Milwaukee, WI when he observed a black Cadillac Escalade exit the bar parking lot with distinct tail lights. (R.31:7-8; APP029-APP030). Officer Wilkiewicz heard a gunshot moments later and upon traveling to the source of the gunshot noise the officer observed what he believed to be the same Cadillac he observed leaving the bar with the distinct taillights parked in the middle of a street with the front drivers door open and an individual whom he identified as Jones standing outside the vehicle. *Id.* There were no other people walking on this street and only a few parked cars were on this street at this time. *Id.* There was a passenger in the passenger seat of Jones' vehicle. (R.31:25; APP047). Officer Wilkiewicz detained Jones by activating his squad lights upon which Jones put his hands up. (R.31:10; APP032). Officer Wilkiewicz observed a spent shell casing next to Jones approximately five to six feet away. (R.31:11; APP033). Officer Wilkiewicz conducted a pat down search of Jones and placed him in his squad car and observed an odor of alcohol on Jones. (R.31:12; APP034). Officer Wilkiewicz next confirmed what was on the ground next to Jones was indeed a spent shell casing and also observed in the center console a cup with liquid in it and ice and a straw that appeared to be a watered down cocktail which smelled like alcohol. (R.31:13; APP035). Officer Wilkiewicz located a glock firearm with an extended magazine in the pouch of the back of the front passenger seat. (R.31:14; APP036). Officer Wilkiewicz then asked Jones out of the squad car and handcuffed Jones and advised Jones that he is under arrest for suspicion of



operating while intoxicated. (R.31:19; APP041).  
Officer Wilkiewicz also had Jones' vehicle towed. *Id.*

These facts in the totality of circumstances do not equate to probable cause to arrest for OWI or ESBDU. What is significant about this case is that Officer Wilkiewicz specifically advised Jones that Jones was being placed under arrest for suspicion of OWI at the time Jones was arrested and that additionally Jones was handcuffed at this time and Jones' car was towed at this time. *Id.* This circumstance is similar to the facts presented in *State v. Anker*, 357 Wis.2d 565 (2014), where the court was presented with a situation where an officer was looking for a possible suspect of an OWI causing injury that was fleeing on foot after an accident and the officer spotted the defendant coming out of the woods, and under these facts the State did not even argue that probable cause to arrest for OWI was present. *State v. Anker*, 357 Wis.2d 565, 571-572 (2014). The issue in *Anker* was whether the officer had merely detained this defendant or had in fact arrested the defendant without probable cause, and the court stated: "Here the circuit court determined Anker (the defendant) was arrested during the initial moments of his encounter with Horne. That conclusion is unassailably correct. Anker was ordered to stop, told he was under arrest, forcibly handcuffed, and taken to Horne's vehicle to be given over to investigating authorities. There was no ambiguity in the situation, a reasonable person in those circumstances would consider himself or herself to be under arrest. The arrest was unreasonable in the absence of probable cause." *Id.* at 576. The situation presented in this case, as mentioned above, has even less facts supporting probable cause, as there is no evidence of impairment. Prior to arresting Jones for OWI, Officer Wilkiewicz did not attempt to administer one field sobriety test, did not ask the defendant whether he had been drinking alcohol, did not observe slurred speech or the defendant swerving his vehicle out of his lane. Officer Wilkiewicz never confirmed with Jones that the cup of liquid and ice found in Jones' vehicle belonged to Jones or whether it belonged to Jones'

passenger. In the totality of the circumstances there was not sufficient evidence for a reasonable police officer to believe Jones was impaired at the time Jones was placed under arrest for OWI. Therefore, evidence following this unlawful arrest must be suppressed.

### **C. This Court Should Suppress the Evidence**

This court should order that the evidence in this matter that was generated from the unlawful arrest should be suppressed, which includes but is not limited to the blood test results.

The exclusionary rule provides for the suppression of evidence that “is in some sense the product of the illegal government activity.” *State v. Knapp*, 2005 WI 127, ¶ 22, 285 Wis.2d 86, 700 N.W.2d 899 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)). “The primary purpose of the exclusionary rule ‘is to deter future unlawful police conduct.’” *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)). It is a judicially created rule that is not absolute, but rather requires the balancing of the rule’s remedial objectives with the ‘substantial social costs exacted by the exclusionary rule.’” *Id.* ¶¶ 22-23 (quoting *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)). This rule extends to both tangible and intangible evidence that is the fruit of the poisonous tree, or, in other words, evidence obtain “by exploitation of” the illegal government activity. *Id.*, ¶ 24 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

*State v. Felix*, 339 Wis.2d 670, 811 N.W.2d 775, 690 (2012). Accordingly, because the arrest in this matter was unlawful, the blood test and all evidence which resulted directly from the unlawful arrest should be suppressed.

### **CONCLUSION**

For the aforementioned reasons, Jones asks this court to hold that the circuit court should have suppressed the evidence resulting from unlawful arrest. He further

requests that the court remand his case for proceedings consistent with this holding.

Dated this 29<sup>th</sup> day of September, 2021.

Electronically Signed By:

John Bayer  
State Bar No. 1073928  
Bayer Law Offices  
735 N. Water Street, Suite 720  
Milwaukee, Wisconsin 53202  
Tel: (414) 434-4211  
Fax: (414) 210-5272  
Email: jtbayerlaw@gmail.com

### FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b)(bm) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **2,346** words.

Dated this 29<sup>th</sup> day of September, 2021.

Electronically Signed By:

John Bayer  
State Bar No. 1073928



### APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with § 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 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 trial 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, this 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 record included in the appendix are reproduced using one or more initial or other appropriate pseudonym or designation 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 29<sup>th</sup> day of September, 2021.

Electronically Signed By:

John Bayer  
State Bar No. 1073928