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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2020AP001046-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RANDARO V. JONES,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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### **ISSUE PRESENTED**

Did the circuit court properly deny Jones's motion to suppress, which alleged that Officer Wilkiewicz did not have probable cause to arrest Jones for OWI?

Trial court answered: The trial court found that Officer Wilkiewicz did have probable cause to arrest Jones.

This Court should answer: the trial court did not err.

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

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

### **STATEMENT OF THE CASE**

Jones was arrested on March 28, 2018 for Operating a Motor Vehicle While Intoxicated (OWI) and Endangering Safety by Use of a Dangerous Weapon. (R. 31:16) This arrest was based on an investigation that occurred on March 28, 2018 at approximately 2a.m., while Officer Wilkiewicz was working in his capacity as a Milwaukee Police Officer, assigned to the tavern car. (R. 31:6) Specifically that night, Officer Wilkiewicz was observing a bar, 42nd Street Bar and Grill, located at 4200 West Burleigh Street. (R. 31:7) Officer Wilkiewicz observed a black Cadillac parked in the parking lot. (Id.) Officer Wilkiewicz saw multiple individuals get into the vehicle and drive out of the parking lot. (Id.) Officer Wilkiewicz saw the Cadillac drive westbound on Burleigh Street and then turn north onto 42nd Place, which was a block away from his location. (R. 31:8) Officer Wilkiewicz then heard a single gunshot a few minutes later. (Id.) Officer Wilkiewicz then went

in the direction he believed the gunshot came from and saw the Cadillac he observed in the bar parking lot. (Id.) Officer Wilkiewicz observed the Cadillac parked in the middle of the street and observed Jones standing next to the vehicle with the front driver's door open. (R. 31:8-10) Officer Wilkiewicz saw what he believed to be a spent shell casing next to Jones. (R. 31:11) Officer Wilkiewicz approached the vehicle and confirmed that the object he found in the street was in fact a spent shell casing. (R. 31:12-13) Officer Wilkiewicz believed that Jones was intoxicated based on smelling alcohol on Jones's breath, the open intoxicant in the vehicle, and observing the vehicle leaving a tavern. (R. 31:25)

Jones was charged in Milwaukee County Circuit Court with Endangering Safety by Use of a Dangerous Weapon on July 27, 2021. (R. 2) Jones filed a motion to suppress alleging that Officer Wilkiewicz did not have probable cause to arrest Jones for OWI (R. 9).

A motion hearing was held on March 27, 2019. (R. 31:1) Officer Wilkiewicz was called to testify at the hearing. (R. 31:5) Officer Wilkiewicz testified that on March 28, 2018 at approximately 2 a.m., he was working in his capacity as a Milwaukee Police Officer, assigned to the tavern car. (R. 31:6) Officer Wilkiewicz stated that his duties were to check the taverns to make sure that they were in compliance with all of their licenses, ordinances, and to routinely monitor the taverns to make sure nothing egregious happened. (Id.) Officer Wilkiewicz stated that he was observing a specific bar, 42nd Street Bar and Grill, located at 4200 West Burleigh Street. (R. 31:7) Officer Wilkiewicz stated that he observed a black Cadillac parked in the parking lot. (Id.) Officer Wilkiewicz stated that he saw multiple individuals get into the vehicle and drive out of the parking lot. (Id.) Officer Wilkiewicz stated that he saw the Cadillac drive westbound on Burleigh Street and then turn north onto 42nd Place, which was a block away from his location. (R. 31:8)

Officer Wilkiewicz then heard a single gunshot a few minutes later nearby. (Id.) Officer Wilkiewicz then went in the direction he believed the gunshot came from and came upon the Cadillac he observed in the bar parking lot. (Id.) Officer Wilkiewicz stated that he observed the Cadillac parked in the

middle of the street and observed Jones standing next to the vehicle with the front driver's door open. (R. 31:8-10) Officer Wilkiewicz stated that he observed an object on the ground, approximately five to six feet away from Jones and Officer Wilkiewicz believed that the object was a spent shell casing. (R. 31:11) Officer Wilkiewicz detected a scent of alcohol on Jones. (R. 31:12) Officer Wilkiewicz stated that he approached the vehicle and confirmed that the object he found in the street was in fact a spent shell casing. (R. 31:12-13) Officer Wilkiewicz stated that he looked inside the vehicle, in the center console area, within the cup holder, and there was a plastic cup with a liquid, ice, and a straw in it. (R. 31:13) Officer Wilkiewicz stated that he based on his training and experience, he believed that it could be an intoxicating beverage. (Id.) Officer Wilkiewicz stated that he smelled the liquid in the cup and it did smell like alcohol. (R. 31:14) Officer Wilkiewicz stated that he located a firearm in a pouch which was on the back of a front passenger seat. (Id.) Officer Wilkiewicz stated that after he investigated the car, he removed Jones from the back of his squad car and placed handcuffs on Jones. (R. 31:18)

The court also questioned Officer Wilkiewicz, asking him how he knew Jones was intoxicated. (R. 31:35) Officer Wilkiewicz stated that it was based on smelling alcohol on Jones's breath, the open intoxicant in the vehicle, which was located on the driver's side cup holder and observing the vehicle leaving a tavern. (Id.) Further, Officer Wilkiewicz stated that it was suspicious behavior that Jones was standing outside of the car at 2 a.m. after hearing a gunshot. (R. 31:25) At the conclusion of the hearing, the circuit court denied Jones's motion to suppress. (R. 31:31) The court found that the stop and the arrest was "completely valid". (R. 31:30) The court found that Officer Wilkiewicz's observations as he approached Jones lead to reasonable suspicion and probable cause that Jones was involved possibly in the shooting and that Officer Wilkiewicz handled the situation appropriately. (Id.)

### **STANDARD OF REVIEW**

It is a mixed question as to whether a motion to suppress evidence should be granted or not. *State v. Dumstrey*, 2015 WI App 5, ¶7, 359 Wis. 2d 624, 859 N.W.2d 138 (2014). Unless

clearly erroneous, this Court upholds the circuit court's findings of fact, and this Court reviews de novo the application of those facts to constitutional principles. *Id.*

## ARGUMENT

### **I. The Trial Court Properly Denied Jones's Motion To Suppress Because Officer Wilkiewicz Had Probable Cause To Arrest Jones For OWI or Endangering Safety By Use Of A Dangerous Weapon**

#### **A. Officer Wilkiewicz Did Have Probable Cause To Arrest Jones.**

Probable cause is a “flexible, common-sense measure of plausibility of particular conclusions about human behavior.” *State v. Kennedy*, 2014 WI 132, ¶ 22, 359 Wis. 2d 454, 856 N.W.2d 834. Additionally, probable cause must be assessed on a case-by-case basis. *In re Smith*, 2008 WI 23, ¶ 34, 308 Wis.2d 65, 746 N.W.2d 243. The weight of the evidence need not show guilt beyond a reasonable doubt or even that guilt is a likelihood. *State v. Truax*, 151 Wis. 2d 354, 359-60, 444 N.W.2d 432 (Ct. App. 1989). Rather, if the information leads a reasonable officer to believe that guilt is more than a possibility, then probable cause exists. *Id.* at 360.

An officer may consider numerous factors in order to determine probable cause to arrest an individual for a drunk-driving related offense. *Kennedy*, 2014 WI 132, ¶ 22. “Wisconsin has no requirement that police must perform field sobriety tests in order to determine whether probable cause exists that a person is operating a vehicle under the influence of alcohol.” *Id.* at ¶ 21.

The odor of intoxicants coming from a person is an indicator of alcohol intoxication. *See State v. Blatterman*, 2015 WI at ¶¶ 8, 9, 37, 38, 362 Wis. 2d at 153, 165-66 (an odor of alcohol on the defendant's person); *State v. Tullberg*, 2014 WI at ¶¶ 13, 34, 359 Wis. 2d at 431 (the defendant's breath smelled of intoxicants); *State v. Colstad*, 2003 WI App at ¶¶ 5, 20-21, 25, 260 Wis. 2d at 412, 20, 21, 23 (mild odor of intoxicants).

Further, the time of night is relevant to a probable cause determination. In *State v. Lange*, the defendant's driving occurred at approximately 3:00 A.M. on a Sunday morning. 2009 WI 49, ¶ 9, 17 Wis. 2d 383, 766 N.W.2d 551. The Court, in finding that there was probable cause to arrest the defendant for OWI, stated that the time of night is relevant. *Id.* 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. *Id.* at ¶ 32.

Here, Officer Wilkiewicz observed Jones leaving a tavern at approximately 2 a.m. and then a few minutes later, heard a single gunshot nearby. (R. 31:6-8) Officer Wilkiewicz then went in the direction he believed the gunshot came from and saw the Cadillac he observed in the bar parking lot. (R. 31:8) Officer Wilkiewicz observed the Cadillac parked in the middle of the street and observed Jones standing next to the vehicle with the front driver's door open. (R. 31:8-10) Officer Wilkiewicz found it suspicious that Jones was standing outside, at 2 a.m. in the middle of the street after hearing a gunshot. (R. 31:25) Upon making contact with Jones, Officer Wilkiewicz detected a scent of alcohol on Jones's breath. (R. 31:12;35) Officer Wilkiewicz looked in the center console area of the vehicle and located within the cup holder was a plastic cup with a liquid, ice, and a straw in it. (R. 31:13) Based on Officer Wilkiewicz's training and experience, he believed that it could be an intoxicating beverage; he smelled the liquid in the cup and it smelled like alcohol. (R. 31:14) Based on the totality of the circumstances, Officer Wilkiewicz believed Jones was intoxicated and placed him under arrest. (R. 31:35)

### **B. Anker Is Distinguishable In Facts And Law Compared To This Case.**

Jones contends his case is factually similar to *State v. Anker*, 2014 WI App 107, 357 Wis. 2d 565, 855 N.W.2d 483. The arresting officer in *Anker* had received information from eyewitnesses and police "radio traffic" that Anker was injured, had been running in-and-out of woods nearby, and likely had been involved in an unspecified accident. *Id.* at ¶¶6-7. Anker, matching the description the officer had been given, had blood on his person, and initially started to walk "a little faster" away from the officer when he first saw and made contact with

Anker. *Id.* at ¶8. On appeal from Anker's OWI conviction, the State conceded that the officer lacked probable cause to arrest Anker for OWI. *Id.* at ¶¶2, 13. The Court concluded that the officer arrested Anker and, due to the State's concession, determined the arrest lacked probable cause. *Id.* at ¶¶13, 16.

*Anker* is distinguishable in fact and issue. The arresting officer in *Anker* had fewer material facts available to him at the time of Anker's arrest than Officer Wilkiewicz did at the time of Jones's arrest. The officer in *Anker* did not observe the same indicia of intoxication that Officer Wilkiewicz did here—that is, Jones leaving a tavern at 2 a.m., suspicious behavior, an alcoholic beverage located in the center console, and an odor of an intoxicating beverage on Jones's breath. (R. 31:26) The officer in *Anker* simply testified that Anker appeared intoxicated, but did not testify as to what observations he made that would have led him to believe that Anker was intoxicated. *Anker*, 2014 WI App at ¶8. Further, the issue in *Anker* was not whether probable cause supported Anker's arrest; the critical question was whether Anker had been temporarily detained or placed under arrest. *Id.* at ¶15.

## CONCLUSION

For the reasons herein, the Court should affirm Jones's judgment of conviction and the order denying the motion to suppress.

Dated this 11<sup>th</sup> day of November, 2021.

Respectfully submitted,

JOHN CHISHOLM  
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Electronically signed by:

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**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2016.

Electronically signed by:

November 11, 2021

Jon R. Josephsen, Jr.  
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**CERTIFICATE OF EFILE/SERVICE**

I certify that in compliance with Wis. Stat § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11<sup>th</sup> day of November, 2021.

Electronically signed by:

Jon R. Josephsen, Jr.  
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