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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CASE NO. 2020AP001046 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDARO V. JONES,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

**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**

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ARGUMENT

I. **THE STATE IS INCORRECT THAT THE FACTS IN THIS RECORD DEMONSTRATE THAT OFFICER WILKIEWICZ HAD PROBABLE CAUSE TO ARREST JONES.**

The State argues in its Response brief that Officer Wilkiewicz did have probable cause to arrest Jones for OWI. The State is incorrect as there is not probable cause to arrest Jones for OWI based on the facts in the record in the instant case.

The State cites *State v. Kennedy*, 359 Wis.2d 454 (2014), for the authority that “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 468. But this case is distinguishable from *Kennedy* because *Kennedy* involved a serious vehicle accident in which there was resulting death to the victim the defendant got in the accident with and the arresting officer observed evidence of severe erratic driving as he observed long skid marks leading into the opposite traffic lane that were from the defendant’s vehicle. *Id.* The instant matter does not involve erratic driving or a vehicle accident, and in fact the record shows that for unknown reasons the arresting officer, Officer Wilkiewicz, decided to formally arrest Jones for OWI while Jones was in the back of the squad car during the initial encounter prior to being transported to the police station by handcuffing Jones and telling Jones he is under arrest for OWI and then after Jones was placed under arrest for OWI Officer Wilkiewicz testified that he then drove Jones to the police station in order to conduct standardized field sobriety tests at the police station subsequent to the OWI arrest. (R.31:16; APP038). So this matter is distinguishable from *Kennedy* because in this matter there was no credible reason that the arresting officer could not conduct field sobriety tests prior to making the arrest for OWI as Officer Wilkiewicz could have detained Jones for OWI and transported Jones to the police station to conduct field sobriety tests at the station to determine whether or not there is evidence that Jones is impaired prior to making the formal arrest for OWI.

The State cites *State v. Lange*, 17 Wis.2d 383 (2009) as authority to count the time of night against Jones. The State cites to *Lange*: “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 397. The instant case is distinguishable from *Lange* and the same logic from *Lange* used to justify the arrest does not apply in the instant case as the Court in *Lange* used the concept of bar time on the weekend as the reasoning that it is more likely for the officer to encounter an impaired driver at this time because it is likely that people do not work on Sunday morning when the defendant in *Lange* was arrested. *Id.* The instant case occurred not on a weekend, but on a Wednesday morning, around two in the morning on Wednesday, March 28, as testified by Officer Wilkiewicz. (R.31:6; APP028).

Additionally, the State argues that odor of alcohol is evidence of impairment. Odor of alcohol may be indicative of evidence of alcohol intoxication but it is very weak evidence of alcohol intoxication and is more significantly evidence of mere alcohol consumption. What is significant about this record is that it is lacking in sufficient facts of evidence of impairment to support a finding of probable cause to arrest for OWI. Thus, Jones requests this court reverse the decision of the circuit court and find that there was not probable cause to arrest Jones.

II. THE ANKER CASE DOES SUPPORT JONES’ ARGUMENT THAT THERE WAS NOT PROBABLE CAUSE TO ARREST JONES.

The State in its Response brief distinguishes *Anker* from the instant matter by arguing the instant matter involves more facts of impairment. The instant matter does not involve any significant additional facts of impairment than *Anker*. The State argues additional factors of impairment in the instant case are Jones leaving a tavern at 2:00 a.m., suspicious behavior, an alcoholic beverage located in the center console and an odor of intoxicating beverage on Jones’ breath. (State’s Br. P. 7). These are not significant facts of impairment that can be attributed to Jones. There is no evidence of impairment

specific to Jones, i.e. erratic driving, slurred speech, admittance to consuming alcohol, admittance that the alcoholic beverage in the center console belonged to Jones and not his passenger, etc. *Anker* can lend guidance to the court in deciding this issue because both situations involve a context of an arrest by an officer on a suspect for OWI with insufficient evidence of impairment prior to the arrest for OWI.

CONCLUSION

For the aforementioned reasons, Jones asks this court to hold that the circuit court should have suppressed the evidence resulting from an unlawful arrest. He further requests that the court remand his case for proceedings consistent with this holding.

Dated at Milwaukee, Wisconsin on December 3rd, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 983 words.

Respectfully submitted this 3rd day of December, 2021.

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