COURT OF APPEALS OF WISCONSIN
DISTRICT 2
APPEAL No. 2020AP001416

VILLAGE OF GRAFTON,
Plaintiff-Respondent,
v.
ELIZABETH A. WESELA,
Defendant-Appellant.

Appeal From A Judgment Of Conviction
In The Circuit Court For Ozaukee County
2020CV000048
Honorable Sandy A. Williams

APPELLANT'S BRIEF and APPENDIX

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Should the circuit court have suppressed evidence that Elizabeth was operating with a PAC because the officer who conducted the initial stop thereafter lacked reasonable suspicion to extend the stop; lacked reasonable suspicion to administer Field Sobriety Tests (FSTs), and then lacked probable cause to administer a PBT, thereby, under the totality of the circumstances, lacked probable cause to arrest Elizabeth for PAC and OWI.

The circuit court denied Elizabeth's motion; thereafter the court conducted a trial on stipulated facts, to preserve the issue for appellate review.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome the opportunity to participate in Oral Argument. As to publication, one could argue that Wisconsin case law inadequately discusses how to assess the probative value of FSTs administered contrary to standard NHTSA protocol, as was conceded herein. Thus publication, or perhaps an authored 3-judge panel opinion, is warranted.

STATEMENT OF THE CASE

On Thursday, June 27, 2019, shortly after midnight, Grafton Police Officer James Menger observed a motor vehicle that had just left the Summerfest lot in Grafton, and although he did not observe any moving violations, he ran the plate and discovered that the drivers license of the sole registered owner, Patricia Wesela, had expired 6 days earlier. Officer Menger initiated a traffic stop (the legality of which is not in dispute), and quickly observed that the driver was not Patricia - it was her daughter, Elizabeth. At his command, Elizabeth produced her facially valid license (which clarified that she was over 21) and insurance cards. It is not contested that at this initial encounter, Officer Menger detected "a little bit" of the odor of alcohol emanating from the interior of the vehicle.

Officer Menger returned to his squad with Elizabeth's drivers license, and 'ran' her license (learning she was not subject to a reduced PAC for prior alcohol related convictions), but despite detecting the "little bit" of the odor of alcohol, and despite knowing Elizabeth was not subject to a reduced PAC, and despite not having observed any moving violations or driving indicating potential impairment, Officer Menger decided, with backup, to conduct FSTs.

After conducting FSTs - the probative value of which are challenged in this appeal - Officer Menger proceeded to conduct a PBT (without probable cause, it is asserted), which produced a result of .12, which (if valid) provided the probable cause to arrest Elizabeth and issue citations for Operating Under the Influence (6; App. 104), and Operating W/PAC (1st) (7; App. 103).

After motions and a municipal court trial (1-7), Elizabeth Wesela took her defense to allegations of impaired driving, 1st Offenses, to the Ozaukee County Circuit Court. (1). Elizabeth

(named so as to be distinguished from her mother, Patricia, who had the 6-day expired license that generated the stop)(infra), sought to suppress the evidence of impaired driving (13-16, 18); the Village of Grafton, the Plaintiff in the proceedings, opposed suppression (17). On July 15, 2020, in the Circuit Court, the Hon. Sandy A. Williams, presiding, a motion hearing was held. After receiving the testimony of Officer Menger, and reviewing (in part) the squad cam and body cam videos (20), the court denied Elizabeth's motions. (35; decision at p. 40-43; App. 105).

On July 28, 2020, the circuit court conducted a trial on stipulated facts (36). However, as detailed herein below, Elizabeth did not stipulate to all the facts - that some of the facts in reports produced for trial were inconsistent with Officer Menger's testimony at the July 15, 2020, motion hearing, or were inconsistent with what was observed and heard by the court on the squad and body cam videos at the motion hearing. (36:3-7). After the presentation of evidence, and argument, the circuit court determined that the Village had met its burden of proof, and found Elizabeth guilty of both citations. After the verdicts were recorded in the court record, Elizabeth filed a timely Notice of Appeal, on August 19, 2020 (23).

STATEMENT OF FACTS

After motions and a municipal court trial (1-7), Elizabeth Wesela took her defense to allegations of impaired driving, 1st Offense, to the Ozaukee County Circuit Court. (1). Elizabeth (named so as to be distinguished from her mother, Patricia, who had the 6-day expired license that generated the stop)(infra), sought to suppress the evidence of impaired driving (13-16, 18); the Village of Grafton, the Plaintiff in the proceedings, opposed suppression (17). On July 15, 2020, in the Circuit Court, the Hon. Sandy A. Williams, presiding, a motion hearing was held. First, the court clarified that Elizabeth, as she had advised, was not contesting "the initiation" of the stop.[1] (35:4).

The sole witness, called by the Village, was Grafton Police Officer James Menger, who explained he had two years experience as a Grafton Police Officer (hired in July 2018); that he had obtained a degree in criminal justice from UW-Oshkosh; and that he had completed the 720-hour police academy program at Fox Valley Technical College, in Appleton, in 2016; that prior to being hired by Grafton PD, he worked one year for the UW-Oshkosh Police Department. On June 27, 2019, he was a certified police officer in Wisconsin. (35:4-5).

When asked, on direct, whether he had received training

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[1] Litigation of the circuit court phase of this case was on hold pending the US Supreme Court decision in *Kansas v. Glover,* 140 S.Ct. 1183 (2020), decided April 6, 2020 (Common sense inference that the owner of a vehicle was likely the vehicle's driver). The Supreme Court, aside from the lone dissent by Justice Sotomayor, found that Glover had been legally stopped, reversing the Kansas Supreme Court's ruling to the contrary. So Wesela abandoned that argument, although she will rely, *infra,* on the *Glover* court's reaffirmation that "[A] mere 'hunch' does not create reasonable suspicion." 140 S.Ct. 1183, 1187.

specifically in "detecting possible impaired drivers," Officer Menger replied that during police academy training, "we went through training on OWI's through the certified state instructors." Officer Menger asserted that prior to June 27, 2019, he had conducted "approximately 12" OWI arrests or investigations. (35:5).

Just after midnight on June 30, 2019, Grafton Police Officer James Menger was patrolling the area around the Target® parking lot designated as a Summerfest pickup/drop-off area (35:6); the logic is that Summerfest attendees might be intoxicated and shouldn't drive away in the vehicles they had parked in the lot. It isn't clear from his motion hearing testimony whether Officer Menger observed any drunk driving as vehicle operators were leaving that lot that night, but apparently with nothing better to do he decided to run the plates of a Toyota Prius driving in the area apparently westbound from the lot. What came back was that the sole registered owner, Patricia Wesela, a 56-year-old, resident of Slinger, did not have a valid drivers license - it had expired 6 days earlier. (35:6; 20, Menger body cam, 1:22:11 am).

Officer Menger tailed the Prius for a few blocks, still headed westbound, then activated his squad's blue and reds, and the Prius uneventfully pulled over. As Officer Menger would concede, he did not observe any moving violations - the sole reason for the stop was the expired license of the registered owner (35-6). But within moments of speaking with the driver, as captured on Officer Menger's body cam, and as he stated at the motion hearing (35:8) he understood that the driver was the registered owner's daughter, Elizabeth. Elizabeth Wesela, without difficulty (again, as seen on the body cam) produced her facially valid driver's license (which Officer acknowledged as such), and an insurance card (20, Menger body cam, through 1:23:34 am). By 1:24:50, on his body cam video, Officer Menger confirms that Elizabeth has no alcohol related convictions that would reduce her allowed BAC (20, Menger body cam).

Officer Menger sensed what he described, clearly heard on his body cam video, "a little bit" of the odor of alcohol, and although he waivered, in his testimony and reports, whether the odor was personal to Elizabeth or just emanating from the vehicle, he asked her whether she had been drinking, and she explained she had earlier in the day, and lastly, an hour prior to leaving Summerfest. Specifically, at the motion hearing, in direct examination, Officer Menger stated, "I smelt the odor of intoxicants coming from inside the vehicle... (35:8).

When asked to provide all of the observations he relied upon in deciding to proceed with conducting field sobriety tests, Officer Menger stated, as he had just before, "the odor of intoxicants coming from inside the vehicle." Then, he added, I saw somewhat bloodshot eyes. And other than that, that was it." (35:8). He threw in that the fact that Elizabeth had admitted to drinking factored into his consideration (35:8).

Still in the course of the direct examination of Officer Menger, the Village attorney, after establishing that Officer Menger's in-squad and "body-worn" camera, and microphone, recorded his interaction with Elizabeth during the course of the stop (35:9), played a segment of the body-worn camera, "just from that initial contact." (35:9). Our prosecutor stated that this would be Exhibit 1, and the video to be played begins with the letters QJA; that the time listed at the beginning is 1:27:07 am. (35:9-10; 20; see App 102). The prosecutor played the video, however, he stopped the video, as he stated, at 1:23:27 am (35:10). Officer Menger agreed that the video accurately captured "the initial conversation you had with the driver." (35:10). When he got back to his squad car (after this "initial" conversation) he ran Elizabeth's license status, and then called for a second squad to assist running the FST (35:10).

When asked what happened after the second officer (Officer

Volkert (35:20)), arrived, Officer Menger responded,

> I spoke with him (Officer Volkert), told him what I had based on the fact that she had told me she was drinking. I don't remember the rest of the context of what I advised him, but I told him we were gonna (sic) run the driver through field sobriety tests and then we made - - recontacted with the car (35:10).

Officer Menger stated that in response to questions put to Elizabeth *after* removing her from her car, she told him that she had been downtown in Milwaukee at Camp Bar, where she had approximately four White Claws, and then while at Summerfest she had two to three beers, and that she had stopped drinking at approximately 11 pm (35:11).

Officer Menger testified that he then told Elizabeth that he was going to conduct the field sobriety tests, but that prior to doing the tests, he had received FST training, at his academy, in 2016, and that prior to June 27, 2019, he had conducted field sobriety tests approximately 12 times (35:11-12).

Officer Menger testified that he observed four clues in conducting the HGN test, and that four clues were indicative of potential impairment (35:12-13). Then, Officer Menger testified that he explained the procedure of the walk and turn test to Elizabeth - he did not, in direct, disclose that he demonstrated the test's required turn off the sidewalk (as can clearly be seen on Officer Volkert's body cam, infra); Officer Menger stated that he observed three of eight 'clues' on Elizabeth's walk and turn, and that three clues on the walk and turn were indicative of potential impairment (35:13-14). Importantly, Officer Menger testified that one of the three clues was Elizabeth's improper turn after the first set of nine heel to toe touches (35:14)(as shown, *infra,* the demonstration of the turn was inaccurate).

Officer Menger then conceded that he did not see any clues on the one leg stand test (35:14). Officer Menger then explained that he conducted two "nonstandard" field sobriety tests, "the alphabet test" and "the numbers test," and she (Elizabeth) had "no issues" with either test (35:14). Never the less, based on the HGN and walk and turn tests, he believed Elizabeth to be impaired and had her submit to a preliminary breath test (35:14-15). The result was ".12" and he therefore placed Elizabeth under arrest for operating while under the influence of an intoxicant (35:15).

The Village then played Officer Menger's body cam video, which "capture your interactions with the defendant from your next contact through the field sobriety tests." The video was played from 1:28:41 am to 1:40:14 am (35:15; 20; App 102). That is where the Village concluded with Officer Menger.

Cross examination revealed more. First, Officer Menger agreed that while at his academy, he became familiar with the protocol of the standard field sobriety tests as published by the National Highway Traffic Safety Administration (35:17). But when asked why, with Elizabeth, he administered two nonstandard tests, he stated that they were used "just to gauge the possible level of intoxication just to see if they get tripped up. But it's not utilized to make the decision to make the arrest for OWI." (35:17). Officer Menger asserted that although he had the minimum number of clues indicating potential intoxication, Elizabeth's "no issues" with the nonstandard tests did not "diminish or counter" the standardized tests (35:17-18). Officer Menger did not offer any explanation why Elizabeth's not being "tripped up" would not change his belief that even with the minimum number of clues (and that's ignoring the lapse in protocol in administering the standard tests, see, infra), she was potentially impaired.

Officer Menger agreed that the original reason for his stop

concluded within moments of walking up to the car, when he realized that Patricia was not the driver (35:18). Elizabeth handed Officer Menger her license 'correctly' (35:19). In other words, he agreed, Elizabeth had no difficulty handing him her license; Elizabeth had no trouble understanding his questions to her; Officer Menger didn't have to ask Elizabeth to repeat any of her answers; he agreed that she "easily" retrieved her registration - in fact two pieces of paper from the glove compartment on the passenger side of the car, and that she was able to determine that they (the two pieces of paper) were from two different years; that she was able to hand him, almost immediately, the registration paper from the correct year (35:19-20).[2]

Then, Officer Menger was provided with the opportunity to bolster the credibility of his later-reported observations of bloodshot eyes, but he declined:

> Q. You had some repartee with her about her dad puts all these pieces of paper, but is it fair to say at that point you're not getting any clues of impairment other than, as you said in you direct exam - - I want to make sure - - I thought I had this - - odor coming from inside the vehicle. Correct?
> A. Correct. (35:20)

Officer Menger agreed that based on the video (that had been played during his direct examination), he explained to Officer Volkert that he detected "a little bit of booze." (35:20). After clarification of where counsel wanted the video to start, the video was then restarted at 1:27:32 am (35:22; 20). Officer Menger, after viewing the video, agreed that when Officer Volkert walked up to

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[2] Indeed, at the court trial held on July 28, 2020, the court stated that, "If only clips of her talking were shown to the jury, I think they would have a hard time determining if she was under the influence" (36:17).

Officer Menger's squad, Officer Menger used the phrase, "little bit." (35:23). Officer Menger agreed that based on the video recording the interaction between the two officers, Officer Menger did not tell Officer Volkert that he saw bloodshot eyes (35:23).

Then, Officer Menger was asked whether he agreed that the video was "good enough" to demonstrate for the trier of fact, and anyone else, that Elizabeth's eyes were bloodshot when he first walked up to her vehicle, and then when he walked up to her vehicle a second time; specifically, "Is your video good enough to show that?" To which Officer Menger responded, "I guess. Yes." (35:23). Immediately, Officer Menger was asked, "Are you claiming then - - are you saying that the video demonstrated that Ms. Wesela had bloodshot eyes? But he answered, "In my report I said somewhat bloodshot eyes." (35:23).

Officer Menger was then asked about his understanding of the acceptable way to run the HGN test, based on NHTSA protocol (which he had previously agreed he had studied). He responded that his pen should be positioned from 12 to 14 inches from the nose of the subject (35:24). However, when asked if he could relate the accepted NHTSA protocol for positioning the pen vertically in front of the subject's nose or eyes, he stated, "I do not recall that from the NHTSA manual." (35:24).[3]

Officer Menger agreed that according to his experience and training, the pen should be held slightly above the subject's eyes

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[3] It was clear from Officer Menger's demeanor that he wished he didn't have to answer this question, because immediately upon Officer Menger providing this answer, the Court interjected:

THE COURT: Try to keep your voice up because with the mask it's soft and the reporter has to get everything down. (35:24).

(35:25). When asked if the video demonstrated that his pen was "much higher" he responded, "I believe that it was at her eyes." (35:25). However, Officer Volkert's body cam video, played for Officer Menger, and the trier of fact, and positioned at a different angle, shows the pen several inches above what NHTSA protocol permits for a valid test (20, Volkert body cam, 1:31:30, see also, at 1:32:50 am).

Officer Menger agreed that he did not see the onset of nystagmus prior to 45 degrees, but stated that he did not recall anything in his training that the NGN test that provides the most information about possible intoxication is the onset of nystagmus prior to 45 degrees (35:27).

Questions turned to the walk and turn test. Officer Menger was asked what he was referring to when he could be heard (and seen) during his demonstrating that test, "kind of a bad spot." (35:27; 20, Menger body cam, 1:34:22am; Volkert body cam, 1:34:20 am). He responded,

> Based on looking at the video (20), the elevation of the yard that I was walking (meaning, as asserted above, off the sidewalk, as can be seen in the video) and performing the turn on, it was a little bit of a steep incline, but from my recollection I showed the proper turn when I did that. That's what I meant by this is a bad spot for showing - - doing the turn myself. (35:28; 20)

Officer Menger stated that he reviewed his body cam video four or five days prior to his testimony, and that reviewing the video helped him remember things or whatever he had forgotten in all the months since he made the stop of Elizabeth (35:28). He was aware that Officer Volkert also had a body cam audio/video running recording the same events, but he had not reviewed it (35:28). But he agreed that viewing Officer Volkert's body cam video, which "is from a slightly different angle," might help Officer Menger refresh

his recollection as to what he actually instructed Elizabeth, visually, to do in doing the walk and turn test. (35:29.

The body cam video taken on June 27, 2019, beginning at 1:27:50, identified as that of Officer Volkert, was played (35:30; 20). During the playing of that body cam video, counsel interrupted with a question:

> MR. WASSERMAN: I just want to pause this for a moment. ... So you just want to check because you have a hunch that she might be intoxicated, correct?
> A. [Menger] Yes. (35:30-31)

The question was asked because in both Officer Menger's and Officer Volkert's body cam videos, Officer Menger can clearly be heard to explain to Officer Menger:

> I could smell it a little bit; she doesn't seem to be overly intoxicated, but I just want to make sure.

(20, Menger body cam, 1:28:24 am; Volkert body cam, 1:28:24 am)

The question is asked, also, because Officer Menger approaches the Prius, and as can be seen and clearly heard, says:

> Elizabeth, do you mind stepping out of the vehicle for me, just wanna make sure you're good to drive, I just smelled a little bit of booze ... I just wanna make sure you're good.

(20, Menger body cam, 1:28:50 am; Volkert body cam, 1:28:50).

Cross examination sought to clarify the effect of, "all the flashing strobe lights coming from both Officer Menger and Officer Volkert's squad cars (35:31). Officer Menger conceded that the flashing lights can be seen reflected on the house (behind Elizabeth

and Officer Menger, 20, most clearly in Volkert body cam at all times Volkert is facing Elizabeth and Officer Menger). Officer Menger agreed that the lights could be seen flashing on him and Elizabeth (35:31). Then he agreed that the protocol is that the subject should face away from "those kinds of lights" instead of having them in the subject's face, but he didn't do that, and that nothing prevented him from facing Elizabeth away from the flashing blue and red squad lights (35:32).

Cross examination returned to the height of the pen held in front of Elizabeth during the HGN testing. Officer Menger was asked, during viewing of Officer Volkert's body cam video (at a different angle from his own), whether he agreed that his pen was several inches above Elizabeth's eyes, and he responded that he agreed, "that it's above her eyes." (35:33).

Cross then returned to a question, based on Officer Menger observing the Volkert body cam video, concerning the video showing that Officer Menger was "up on the grass" while attempting to demonstrate how to make the turn component of the walk and turn (35:34). Officer Menger conceded that his turn instructions were incomplete (35:34). He agreed that walking up the embankment looked, for him, awkward. And then he agreed that he did not convey to Elizabeth the proper way to do the turn after the first steps (35:34).

Counsel for the Village attempted rehabilitation, asking Officer Menger where the odor of intoxicants was emanating from after Elizabeth was removed from her vehicle, to which her replied, "Her breath." (35:35). The counsel asked Officer Menger to provide the facts that led him to believe Elizabeth was potentially impaired before administering the field sobriety tests, to which Officer Menger replied, "the admission she had been drinking while at Summerfest. And the somewhat bloodshot eyes that I observed

when I made contact with her at the - - on the initial approach to the vehicle. And the odor of intoxicants emanating from her breath (35:35).

On re-cross examination Officer Menger agreed that in his re-direct examination answers he was not seeking to back away from his previous testimony, "that the odor was a little bit." (35:36).

After hearing arguments (35:36-40), the court ruled:

> THE COURT: All right, thank you. Well, let me start off by saying that it's, I guess, been posed to this Court then to make a credibility determination because defenses one argument is, you know, he's not really credible because he didn't relay that he saw bloodshot eyes to the second officer when he was giving some of the reasons why he was going forward with field sobriety tests. The Court had the opportunity to observe the witness. And based on the Court's observations and based on the testimony of the officer, I don't question his credibility in any way. I don't doubt that he saw slightly bloodshot eyes. And the reason I can say that so confidently is because on certain parts he could have, I guess, testified differently. For example, even though they aren't the standard field sobriety tests, the alphabet and the counting, he said she did fine. But we had the opportunity to listen to her doing the counting one. And he could have said, nope, she didn't because she had to ask what number she was supposed to count to, she had stopped during the course of that. So that to me shows that the officer really had nothing to hide. He said she did okay on the counting where he could have made a big issue of it that she didn't. So I think that plays into why I find the officer's testimony credible. And I agree with Attorney Woodward, really when he's talking to the other officer, he's just summarizing it. He's not giving all of the details of his observations. And I think one other thing is, I heard it very clear, the officer, when talking to Volkert said, smelled it a little bit but she doesn't seem overly intoxicated. He had already gotten an impression that she was intoxicated. Maybe not, I think it was Attorney Woodward's phrase, a fall down drunk, but the officer had the suspicions. And based on that, he has every reason to act on

> them.
>
> Now, could there be other explanations for maybe her performance on let's say the walk and turn. One explanation is she wasn't clearly given the directions or she was confused because of the way the officers demonstrated it. But at this stage of the game what the Court has to look at is; what did the officer do and observe, and does that form the reasonable suspicion that she was operating under the influence of an intoxicant? So you have the idea that she not only admitted to drinking, but she listed several drinks; four something-claw -- obviously I don't drink that, but four White Claws, but it's an intoxicant, then two or three beers and clarified that the last one was an hour before she left the concert at Summerfest. Again, that she began her night of drinking around six and an hour before she was stopped, so anywhere from, I guess, 12:30 or maybe even midnight, so you have that.
>
> You have the somewhat bloodshot eyes, the odor, then when he does do the field sobriety tests, it might be minimal, but he observed the minimal amounts that, from his training, indicate that the person could be impaired. Now, had she gotten on the HGN only one clue versus the four out of the eight that he observed, as well as only one clue on the walk and turn, I think your arguments would be a whole lot stronger. But in both of those, she demonstrated that there's impairment possible because of the different clues. So he was justified in asking for the preliminary breath test. And clearly that resulted in the .12 which, I think, solidified his observations that she could have been intoxicated and the arrest was proper.
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> So based on that, the Court will deny defense's request to dismiss or suppress any evidence.

(35:40-43)(App. 105).

Additional facts, with citation to the record, may be provided in support of the arguments made herein.

Summary of the Arguments

Both Officer Menger's body cam video, and Officer Volkert's body cam videos are remarkably clear. The cams clearly show that Elizabeth's speech wasn't garbled or slurred; she appropriately responded to Officer Menger's inquiries (didn't fumble around trying to retrieve her license or papers); her eyes were clear (not bloodshot). The assertion that Elizabeth's eyes were bloodshot was not credible; it was clearly erroneous to so find. Because there was no moving violation to observe, because Elizabeth had a valid DL and insurance cards, that indicated she was over 21-years old, and because the "little bit" of the odor of alcohol emanating from the vehicle was not attributed to her breath, the seizure should have ended before Officer Menger retreated to his squad with Elizabeth's license in hand.

But, with nothing but the "little bit" of the odor of alcohol to support reasonable suspicion that Elizabeth was driving impaired, or with a prohibited BAC, Officer Menger retreated to his squad with Elizabeth's license in hand, propped the license on the dash computer, and ran the DL. Was he seeking to discover whether Elizabeth had a prior alcohol conviction that would limit her allowed BAC to .02, a fact that would make it somewhat more probable that the "little bit" of the odor of alcohol should be investigated further? While he never said that was his purpose, assuming it was his license status search consumed only seconds, as can clearly be seen on the body cam video, and obviously came back negative for any prior alcohol related driving convictions. What Officer Menger knew at the moment he learned that Elizabeth was not subject to a reduced BAC would not support further detaining her to check things out.

Instead of terminating the encounter upon learning that Elizabeth had no alcohol level reducing violations, he had her sit in

her vehicle for several minutes while he waited for backup. When Officer Volkert arrived, Officer Menger exited his squad, and stated to Officer Volkert, as recorded on the body cam of both officers:

> I could smell it a little bit; she doesn't seem to be overly intoxicated, but I just want to make sure.

Officer Menger approached the Prius, and as can be seen and clearly heard, says:

> Elizabeth, do you mind stepping out of the vehicle for me, just wanna make sure you're good to drive, I just smelled a little bit of booze ... I just wanna make sure you're good.

And Elizabeth, as seen on both body cams, got out of the car (without any indications of impairment of her ability to do so), and walked up to the sidewalk as instructed (without any indication of any impairment of her ability to do so). Office Menger initiated and conducted the three validated field sobriety tests, and for good measure threw in two non-standard but apparently commonly used tests, at least among Grafton PD officers, an alphabet recital and a counting exercise; Elizabeth had "no issues" with either.

And as seen on the video, Officer Menger failed to follow his training protocol in conducting the Nystagmus test - the position of the pen he moved around to Elizabeth's left, and right, was held too high, as Officer Menger observed, and the court observed, while watching the video in court during cross examination (20, Menger body cam, 1:31:03; Volkert body cam, 1:31:03).

Officer Menger didn't properly explain the walk and turn test, and he failed to properly demonstrate the turn component of the walk and turn test; as seen on Officer Volkert's body cam video, Officer Menger stumbled while demonstrating the turn component because he was on a grassy incline.

Ignoring all the stop points where this seizure should have terminated, Officer Menger then administered the PBT, then formally arrested Elizabeth, who was conveyed to the Grafton PD, and subjected to a department Intoximeter procedure. A municipal court trial on the issued citations followed, then the circuit court proceedings, consisting of the motion hearing, and a court trial on stipulated facts. This appeal followed.

Elizabeth argues herein that in the first instance, Officer Menger did not have reasonable suspicion to extend the stop after objectively determining that Elizabeth was of legal drinking age, and had a valid drivers license.[4] In other words, the 'little bit' odor of alcohol (regardless of whether it emanated from Elizabeth's person or from the interior of the vehicle) did not supply sufficient reason to retain Elizabeth's license and thereby extend the seizure; retreating to his squad with her license was no longer an "ordinary inquiry."*State v. Smith,* 2018 WI 2, ¶2.

ARGUMENTS

The Circuit Court Clearly Erred in Finding Critical Facts in Denying Elizabeth Wesela's Suppression Motion.

Standard of Review

The review of an order granting or denying a suppression motion presents a question of constitutional fact. *State v. Johnson,* 2013 WI App 140, ¶6. This court reviews the trial court's findings of

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4 The resolution of this issue may have to await the Supreme Court's decision in *State v. Vanbeek,* 2019AP447-CR, on Certification granted September 16, 2020; oral argument February 23, 2021.

fact and upholds them unless they are clearly erroneous; whether those facts (those upheld?) constitute reasonable suspicion is then reviewed de novo. *Id.; State v. Summer,* 2008 WI 94, ¶17.

Additionally, in *State v. Walli,* 2011 WI App 86, ¶17, this court held, "when evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording."

Nevertheless, if the circuit court fails to provide sufficient findings, or in other words the circuit court's findings are clearly erroneous, then this court will independently review the record to determine whether the facts (those not clearly erroneous) as found support the court's 4th Amendment and case law analysis. *See State v. Hunt,* 2003 WI 81, ¶4. To the extent that the circuit court did not expressly make a finding necessary to support its legal conclusion, this court can assume that the circuit court made that finding in a way that supported its decision - with the limit that assumed factual findings are subject to the same "clearly erroneous" analysis. *See State v. Echols,* 175 Wis. 2d 653, 672-73, 499 N.W.2d 631 (1993).

The Circuit Court's Critical Findings Were Clearly Erroneous.

This decision ignores the Officer's admission that the sum of the information and observations he possessed when he approached Elizabeth's vehicle the second time was, just *a hunch* that she might be operating her vehicle in violation of the law. Ignoring Officer Menger's concession was a critical error, as reasonable suspicion "must be based on more than an officer's inchoate and unparticularized suspicion or hunch." *State v. Post,* 2007 WI 60, ¶10 (quoting *Terry v. Ohio,* 392 U.S. 1, 27 (1968); *Kansas v. Glover,* 140 S.Ct. 1183, 1187 (2020).

The decision ignores the officer's admission that he failed to follow testing protocol in conducting the HGN field test. The decision ignores the officer's mistake in demonstrating the walk and turn test, inexplicably concluding that in essence, it was up to Elizabeth to sort out the visual information and correctly perform the test.

The motion hearing court found the officer credible because he could have made a big deal about Elizabeth asking, after counting accurately to 41 and asking if the officer had wanted her to continue. The court stated that Officer Menger could have made a big issue of her stopping the count, but he didn't. So he's credible in everything else. How could Officer Menger made a big issue of the answers given in non-standard, unvalidated test? What about stopping the count to ask if he wants her to continue is a 'big issue' in the first place?[5] Did the court mean Officer Menger was credible in later writing that he observed bloodshot eyes because he lied about her passing the counting test?

Parenthetically, the Village attorney didn't ask Officer Menger if he could have made a big issue out of Elizabeth stopping the count, or even if there was any issue with Elizabeth stopping the count. What the court's logic reduces to is, since Officer Menger failed to correctly analyze Elizabeth's performance in the counting exercise, he's credible in everything else. That's illogical and therefore the equivalent of clearly erroneous. It is not a rational

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[5] Officer Menger's body cam video (20: 1:38:30) reveals that Elizabeth was asked to count from 21 to 43; she counted from 21 to 41, then asked, "did you say 41?,", and when he responded "43" she said, "Okay, 42, 43." Asking how far to proceed didn't cause her to forget where she had left off, thus she realized her mistake, and corrected it, which supported Officer Menger's concession that she had "no issues" with the counting test. *See City of West Bend v. Wilkens,* 2005 WI App 36, 10.

inference, *see Terry v. Ohio,* 392 U.S. 1, 27 (1968), that the failure to be more incredible (failure to make a big issue where none exists) can be the basis for a finding of credibility in all other aspects of the witnesses' testimony.

The finding that the court didn't doubt that Officer Menger saw bloodshot eyes ignores the Officer's testimony to the contrary. The court found that Officer Menger's failure to relate to Officer Volkert that he saw bloodshot eyes didn't compromise his credibility - but the court didn't say why that deficiency was unimportant. Moreover, the motion court ignored that after Officer Menger administered the PBT, his explanation of why he was arresting Elizabeth omitted, as he had previously, any reference to bloodshot eyes. Officer Menger's use of the word, "eyes" in his explanation to Elizabeth referred to the HGN test, not to bloodshot eyes. (20, Menger and Volkert body cam videos, at 1:40:00). Moreover, the court's finding that Officer Menger saw bloodshot eyes ignores that Officer Menger's body cam video, as Officer Menger conceded, doesn't show bloodshot eyes, or for that matter, slurred speech. It is significant to assessing the credibility determinations of the court, that as with the notation of bloodshot eyes solely in a report, so too, was the notation of slurred speech.[6] One doesn't objectively hear slurred speech from Elizabeth in any of the cams, and the court didn't make an reference to slurred speech in its findings. Logically, if there's one based solely on a report, there's both.

Thus, in finding that Officer Menger was credible when he reported bloodshot eyes, under the totality of the circumstances, the

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[6] At the Motion Hearing (35) there was no testimony that Elizabeth's speech was slurred, thus it seems to Elizabeth that the Village has abandoned that potential building block of reasonable suspicion.

court clearly erred. *Lessor v. Wangelin,* 221 Wis. 2d 659, 665-66, 586 N.W.2d 1 (Ct. App. 1998). Whether there is reasonable suspicion is based on the totality of the facts known to the officer at the time of the stop. *State v. Waldner,* 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Objectively (what can be seen and heard on the body cam), there was no indication either slurred speech or bloodshot eyes at the time of the stop, nor 19 minutes later when Officer Menger was explaining to Elizabeth why he was placing her under arrest.

Officer Menger presented what amounts to two facially credible but contradictory version of events, however the court relied on only one version, disregarding Officer Menger's concessions that all he had was a hunch (which should have terminated the seizure prior to administration of the FST), disregarding his concession that his HGN test was non-standard, disregarding his clearly misdirecting instructions on the walk and turn. The court took the position that the misdirections on the walk and turn were just another explanation for Elizabeth's performance - but for the tests to be valid they have to be properly explained and where applicable (as in the walk and turn) properly demonstrated. See, National Highway Transportation Safety Administration, DWI Detection and Standardized Field Sobriety Testing, Instructor's Manual. Session 8, page 70. (February 2018).

Additionally, to find credible the version of Officer Menger's observations that support reasonable suspicion to proceed with Field Sobriety Tests, the court had to ignore what it saw and heard when the squad and body cam videos were played, and Officer Menger's responses to the questions put to him in response to being asked to comment as the video played. If the circuit court's factual findings were equivalent to guidelines loss calculations, which are reviewed, like credibility determinations, for clear error, one could say the judge's credibility determinations were "not only inaccurate, but outside the realm of permissible computations." *See United States v.*

Collins, 949 F.3d 1049, 1053 (7th Cir. 2020).

What are the facts found by the circuit court that are not clearly erroneous? Elizabeth agrees that Officer Menger legally pulled her over because he had no reason to believe that Patricia was not the driver. Elizabeth's driving did not give rise to any suspicion that she was impaired. Elizabeth, in response to Officer Menger's questions and directions, retrieved her license and insurance certificate without creating any suspicion that she was impaired. The remarkably clear video shows that Elizabeth's speech was not slurred (although it is somewhat Valley Girl inflected), and her eyes were not, at all, bloodshot. The license she produced was facially valid, and indicated that Elizabeth was of legal drinking age. Elizabeth agrees that the "little bit" of the odor of alcohol emanated from the interior of the vehicle.

Officer Menger, with Elizabeth's license in hand, returned to his squad car and 'ran' her license, as seen in his body cam video. Thus, under the totality of the circumstances, Elizabeth was now 'seized.' *State v. Luebeck,* 2006 WI App 87, ¶16, 292 Wis. 2d 748, 715 N.W.2d 639. The video's time display reflects that Officer Menger returned to his squad at 1:23:13 am (20); that his call for assistance (another officer) was made at 1:24:19 am, (20), thus Officer Menger was aware by the time he called for assistance that Elizabeth was not subject to a reduced PAC. Thus, as a matter of constitutional fact, any reasonable suspicion that Elizabeth was driving with a PAC dissipated when Officer Menger 'cleared' Elizabeth's license. *State v. Popke,* 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569.

Officer Menger's comments to Officer Volkert upon his arrival at 1:26:15 am (20), and to Elizabeth when requesting she exit her vehicle at 1:26:35 am (little bit of booze), are clearly heard and seen in Officer Menger's body cam video (20).

Officer Menger's positioning of his pen during the administration of the HGN test deviated from standard NHTSA protocol. Directing Elizabeth to face the red and blue flashing lights of two squad cars deviated from standard NHTSA protocol. Officer Menger's instructions to Elizabeth concerning the walk and turn test were incomplete and thus deviated from standard NHTSA protocol; his demonstration of how to make the turn after the first set of steps, done on a grassy incline which caused him to stumble, deviated from standard NHTSA protocol. Therefore, the clues obtained from the HGN and WAT field sobriety tests were not obtained reliably, and are not probative of potential impairment. Elizabeth's responses, verbal and visual, were not independent of the impaired instructions and procedures.

The Stop of Elizabeth's Vehicle Became Unlawful When She Produced a Valid Drivers License Indicating She Was of Legal Drinking Age.

In other words, Elizabeth asserts, in practical terms, that Officer Menger lacked reasonable suspicion to subject her to FSTs. Whether Officer Menger did, is a question of law this court reviews *de novo. State v*. *Goss*, 2011 WI 104, ¶9, 338 Wis. 2d 72, 806 N.W.2d 918

Elizabeth does not assert that Officer Menger lacked reasonable suspicion to pull her car over to determine whether Patricia was the driver. *State v. Smith,* 2018 WI 2, ¶13; *County of Jefferson v. Renz,* 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). Even on a 6-day expired license. Thus Elizabeth will defer providing additional argument concerning whether the 4th Amendment or cases reviewing a traffic stop are dispositive.

But as seen on the body cam videos, and as conceded in the motion hearing testimony, Officer Menger quickly learned that Elizabeth was the driver, and he had not observed any moving violations that would otherwise make the stop and seizure legal. This traffic stop, initiated lawfully, became unlawful because it was prolonged beyond the time reasonably required to effectuate the purpose of the stop. *State v. Hogan,* 2015 WI 76, ¶35, 364 Wis. 2d 167, 868 N.W.2d 124. Taking Elizabeth's license to his squad to run it for no articulated reason is not reasonable suspicion of impaired driving. *Id.* Was the reason to check to see if Elizabeth had any prior alcohol related convictions that would lower her allowed BAC such that it would support further investigation based on the little bit of order emanating from the vehicle? The plaintiff never asked that question of Officer Menger; even so Officer Menger had every opportunity to articulate why he continued the seizure beyond the point of the first encounter at the vehicle. But he offered nothing.

If, as he conceded, that after running Elizabeth's license, all he had was a hunch that she was potentially intoxicated, what did he have before running her license? Really, common sense tells us: nothing. *State v. Post,* 2007 WI 60, ¶¶10, 13, 301 Wis.2d 1, 733 N.W.2d 634; *Kansas v. Glover,* 140 S.Ct. 1183, 1187 (2020).

Not everyone driving after drinking is "under the influence." See Wis JI - Criminal 2663. You can't drive with a PAC, which for Elizabeth at any stage of this unlawful seizure, was 0.08, or you can't drive under the influence of an intoxicant "to a degree with renders him or her incapable of safely driving." Wis. Stat. §§ 340.01(46m); 346.63(1)(a)(b). And nothing that Officer Menger knew after obtaining Elizabeth's license during the initial stop would have allowed him to reasonably suspect Elizabeth was driving with a PAC or had consumed enough alcohol to impair her ability to drive. *State v. Gentry,* No. 2012AP59-CR, unpb slip op. ¶6 (WI App May 24, 2012)(App. 121). The court's conclusion that Officer Menger

reasonably suspected Elizabeth of consuming alcohol is insufficient by itself to provide reasonable suspicion to detain Elizabeth to undergo FSTs.

The totality of circumstances did not rise to a level of reasonable suspicion that Elizabeth was operating with a PAC - and the evidence is clear that Officer Menger did not observe any moving violations. The little bit of the odor of alcohol emanating from the vehicle doesn't even rise to the level of "slight." Thus, Officer Menger lacked a reasonable suspicion, at the initial stop, to suspect that Elizabeth had consumed enough alcohol to impair her ability to drive. *State v. Quitko,* No. 2019AP200-CR, unpb slip op. ¶21 (WI App May 12, 2020)(citing to *State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999))(16).

Even if there was a reason to find the later recitation of slightly bloodshot eyes credible, which as pointed out in the body cam video is not credible, there are simply not enough, when combined with the "little bit" of alcohol, building blocks here to give rise to a reasonable suspicion that FSTs should be conducted. In the final analysis, here there were virtually no indicia of actual impairment. *County of Sauk v. Leon,* No. 2010AP1593, unpb slip op. ¶28 (WI App Nov. 24, 2010)(App. 109).

Officer Menger provided no testimony that he was trained or sufficiently experienced (only 12 OWI stops) concerning how much alcohol a person would have to consume before exceeding a 0.08 BAC. Officer Menger provided no testimony that his training and experience would allow him to infer a person's specific BAC from any level of odor.

Thus, Officer Menger's "just want to check" Elizabeth utterly fails as reasonable suspicion to administer FSTs. Indeed, if prior convictions for alcohol related PAC are relevant, then the absence of

any, as herein, should have indicated to this officer that the seizure should have terminated, at the latest, upon discovering that Elizabeth was not subject to a reduced PAC, and that the "little bit" of the odor of alcohol from the vehicle was far too little information to lawfully subject her to FSTs.

Moreover, as in *Leon, supra,* absent in this case are any articulable facts that Elizabeth had consumed enough alcohol to cause her to be unable to exercise the judgement and control necessary to handle and control her Prius. See WI JI - Criminal 2663. Officer Menger's squad cam video (20), and his testimony were clear that he observed no indications of impaired driving. Elizabeth's affect, responses, and clear speech, given the time of day, were in fact just the opposite of indications of impairment affecting her ability to drive. No doubt the Village will argue on appeal that Elizabeth being stopped near a Summerfest parking lot will add to Officer Menger's suspicions, but he didn't stop her for anything having to do with impaired or unsafe driving. The lack of otherwise 'bad' driving makes what ever suspicion Officer Menger had much weaker. *Leon*, No. 2010AP1593, ¶20.

Given the totality of the circumstances, as soon as Officer Menger determined Elizabeth was in possession of a valid DL, and at the latest when he learned she was not subject to a reduced PAC, the seizure should have terminated. *State v. Floyd,* 2017 WI 78, ¶22, 377 Wis. 2d 394, 898 N.W.2d 560.

> Lacking sufficient cause to arrest Elizabeth for PAC or OWI without a PBT, the failure to first conduct valid FSTs deprived Officer Menger of probable cause to arrest Elizabeth for any alcohol related offense.

Elizabeth asserts that assuming Officer Menger had sufficient suspicion to subject her to FST's, the failure to properly conduct the tests deprived Officer Menger of probable cause to administer a preliminary breath test. See Wis. Stat. 343.303.[7] The statute's criteria for probable cause for initiating a PBT is not subject to a common sense analysis. *Quitko, supra,* at ¶¶22-23.

There isn't a lot of guidance in how courts should consider FSTs that are not performed according to protocol. Elizabeth doesn't argue that FSTs are inadmissible even if not conducted with 100% compliance to NHTSA training and protocol manuals - that argument was stifled in *City of West Bend v. Wilkens,* 2005 WI App 36, but it should be noted that *Wilkens* is a pre-Daubert case! And *Wilkens* also stands for the proposition that the officers observations, independent of the reliability (again, this is pre-Daubert), of the defendant are admissible. 2005 WI App 36, ¶19.

But FSTs administered outside of NHTSA standardized procedures are not nothing. The Wilkens court acknowledged that, "when an officer deviates from the standardized procedures, NHTSA considers the result "invalid."" 2005 WI App 36, ¶18. And that is precisely what occurred herein. First, remember that the

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343.303 Preliminary breath screening test. If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6), 940.09 (1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305 (3).

observed clues were the bare minimum necessary to indicate potential impairment, and there were no clues with the OLS and the two non-standard tests were performed without issues.

Despite acknowledging that allowing or requiring Elizabeth to face the two squad cars flashing red and blue lights was non-standard, Officer Menger offered no real explanation as to why that was done, and offered no assertion that despite that flaw, the clues he received were validly observed. And despite his begrudging acknowledgment that the height of the position of the pen he held in front of Elizabeth was non-standard, Officer Menger offered no explanation concerning why that occurred, and no explanation or assertion that despite that deviation, the clues he claims to have received were valid.

Officer Menger's deviations from standard procedures in the walk and turn (incorrectly, or perhaps just clumsily so concerning the turn) are more than enough to invalidate the clue he claimed he observed with Elizabeth's turn after the first run of steps, and his concession that his walk and turn verbal instructions were non-standard are sufficiently off the mark to invalidate all of the walk and turn clues he observed. Again, as with the answers concerning the HGN test, Officer Menger offered no real explanation as to why he deviated from the standard procedures, and he offered no assertion that despite the deviations, his observed clues in the walk and turn were valid.

Wilkens tells us that even the non-standard administration of FSTs may still be probative of impairment. *See State v. Krumm,* No. 2019AP243-CR, unpb slip op. ¶16, May 5, 2020 (App. 127). But the problem herein is the circuit court's failure to assess the witness' credibility in his observations, instead placing the blame for the observed clues on Elizabeth's failure to sort out the valid from the invalid instructions.

Thus, the deviations from NHTSA protocol were substantial, and sufficiently so to find that the observations reported by Officer Menger were unreliable in assessing whether Elizabeth was potentially impaired or had been driving with a PAC. Therefore, Officer Menger administered the PBT without the required probable cause, and the seizure which had occurred prior to the administration of the FSTs was now clearly an egregious deviation from the original mission of the stop, *Rodriguez v. United States,* 575 U.S. 348, 354 (2015), when Officer Menger administered the PBT. The PBT was clearly illegally administered and Elizabeth's seizure was unlawfully extended. *Id.*

To clarify, Elizabeth did not move the circuit court to suppress the PBT result; it is not admissible to prove her BAC. See Wis. Stat. §343.303. The argument is that without the PBT result (because there was not probable cause to perform the test because of the deficiencies in administering the FSTs, and the Village did not claim or assert that the FST 'clues' were unnecessary to establish probable cause to administer the PBT), the seizure was unconstitutional (unreasonable) under *Rodriguez, supra.*

The Issues Raised Herein Were Not Waived at the Court Trial upon Stipulated Facts.

On July 28, 2020, a trial on stipulated facts was conducted in the circuit court (36:1-23). But Elizabeth clarified that she was not stipulating to some facts that the Village had produced just for the trial. First, to clarify, the only exhibit introduced at the May 15, 2020, motion hearing was the CD that contained only the videos (19, 20). Counsel addressed the court, and proffered that Document 27, filed the day prior to the court trial, the Stipulated Facts For Purposes of Trial, was in part inconsistent with the testimony and body cam videos entered at the Motion hearing (36:3-6).

Specifically, counsel argued that Exhibit B (Circuit court No. 27:4; appeal record 22:4), Alcohol/Drug Influence Report, completed by Officer Menger at 2:46 am, on June 27, 2019, claimed that Elizabeth's speech was "slurred" (36:3) and that the report claimed that the odor of alcohol was "strong" (36:4). Counsel asserted that at the motion hearing Officer Menger, both in his testimony and on the body cam video, stated the odor of alcohol detected was a "little bit." (36:5). Counsel asserted that nothing heard on the videos, or asserted by Officer Menger at the motion hearing, was consistent with slurred speech (36:5). Counsel further asserted that Elizabeth did not, as at the motion hearing, concede bloodshot eyes (36:5). Indeed, counsel asserted Elizabeth was not waiving her right to contest the information in Exhibit B (36:6). The judge proposed to resolve inconsistencies from 'copious notes' and to permit argument concerning any inconsistencies between evidence at the motion hearing and the court trial (36:8-9).

Elizabeth asserts that the trial objections to portions of Exhibit B are sufficient to avoid waiver or forfeiture of those arguments in this appeal. *See State v. Huebner,* 2000 WI 59, ¶11 n. 2, 235 Wis.2d 486, 611 N.W.2d 727.

CONCLUSIONS

The initial stop of Elizabeth's vehicle, valid because the sole registered owner had an expired license, became a seizure when Officer Menger returned to his squad car with her valid license. Upon quickly learning that Elizabeth was not subject to a reduced PAC, under the totality of the circumstances, the seizure became unreasonable because Officer Menger lacked any reasonable suspicion to believe that Elizabeth was operating with a PAC.

Officer Menger's decision to administer FSTs just to check

was, as he conceded, no more than a hunch that Elizabeth was operating with a PAC, therefore the seizure was illegally extended from the original mission. Officer Menger should have terminated the seizure prior to administering FSTs.

The substantial deviations from NHTSA protocol in administering the HGN and WAT tests deprived the observations from any probative value in assessing whether Elizabeth was operating with a PAC, and the seizure was now extended far beyond the original mission.

Officer Menger did not have the statutory required probable cause to administer the PBT; without those results he could not have probable cause to arrest Elizabeth for any alcohol related operating violation.

The circuit court's findings that Officer Menger was credible are clearly erroneous because the court failed to assess the entirety of Officer Menger's testimony in making that finding, moreover, the court's basis for finding Officer Menger credible - that he didn't make a big issue out of Elizabeth's performance in the non-standard counting test, defies logic.

WHEREFORE, Elizabeth A. Wesela respectfully asserts that this court should reverse the circuit court's denial of her motion to suppress evidence and reverse the civil judgement entered finding her guilty of two alcohol related driving offenses.

Dated this 4th day of January 2021.

Electronically signed by: Lew A. Wasserman

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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 length of this brief is 10,293 words.

Electronically signed by: Lew A. Wasserman

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Lew A. Wasserman 1019200

e-Filing Pilot Program Certification:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Electronically signed by: Lew A. Wasserman

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