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 REPLY BRIEF

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Contents

Arguments

The Seizure of Elisabeth Wesela Became Unreasonable at the Moment Officer Menger's Computer Display Confirmed Wesela Had a Valid Drivers License and Had No Prior OWI/PAC Convictions.

A. The Village Largely Avoids Acknowledging That Officer Menger Detected a "Little Bit" of the Odor of Alcohol Emanating from the Interior of the Defendant's Vehicle.

The Respondent's Statement of Facts is generally accurate; there are some significant and not unintentional variances with the record.

In the second full paragraph on page 1 of the Respondent's Brief (2020AP001416, Respondent's Brief, 02-03-2021, Page 4 of 16), it is asserted, "While talking with Wesela, the officer could smell the odor of alcohol coming from inside the car. R. 35 at 8." The Respondent additionally omits the "little bit" adjective at page 5 (*Id.*, Page 8 of 16); at page 8 (*Id.*, Page 11 of 16); at page 9 (*Id.*, Page 12 of 16). Only at the Respondent's discussion of what it terms "brief report" (which the Respondent intends this court to understand as *unimportant*) is "little bit" acknowledged. *Id.*, Page 6; Page 9 of 16.

Not for no reason did Wesela, in her opening Brief, assert that in the initial encounter at Wesela's driver's side window, what Officer Menger detected, as seen and heard on both Officers' body cam videos, was a "little bit" of the odor of

alcohol. Officer Menger says to Officer Volkert,[1]

> 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)[2]

Then, when Officer Menger approaches the vehicle (the second time), he can be seen and heard stating,

> 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).

It is also significant that Officer Menger did not claim, at the motion hearing, that the "little bit" of the odor of alcohol, emanating from the interior of the vehicle, intensified when he was conversing with Ms. Wesela during either the initial encounter or when removing her from her vehicle.

The intensity of the perceived odor of alcohol matters when assessing 'reasonable suspicion' that an operator has a [prohibited] PAC. *County of Jefferson v. Renz,* 222 Wis. 2d 424, 444, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds,* 231 Wis. 2d 293, 603 N.W.2d 541 (1999).

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[1] Officer Volkert did not testify at the Motion Hearing; his body cam video was introduced during the cross-examination of Officer Menger. There is no indication anywhere in the record that Officer Volkert confirmed any of Officer Menger's observations.

[2] Wesela, apologizes that she, and the Village, unfortunately are employing two different forms of citation to R20 - the CD containing the squad and body cam videos from Officer Menger and Officer Volkert. For internal consistency, Wesela continues with the form of citation provided in her Brief, and in her Appendix, specifically her guide to viewing the CD. See 2020AP001416, Appellant's Appendix, 01-04-2021, Page 3 of 36).

As an initial matter, Wesela asserts that "little bit" is no different from "faint" in the context of subjective assessments of the strength of an odor.[3] And "little bit," as argued by Wesela in her Brief (Page 23; Page 30 of 37), seems to be less of an indication of possible impairment than "slight." *State v. Quitko,* No. 2019AP200-CR, unpub slip op. ¶21 (WI App May 12, 2020)(16).

The odor of alcohol, in assessing reasonable suspicion to investigate whether an operator has a PAC, doesn't convey the same 'reasonable suspicion' as the odor of a "restricted controlled substance." See, Wis. Stat. § 346.63(1)(am); *United States v. Peltier,* 217 F.3d 608, 610 (8th Cir. 2000); *United States v. Smith,* 789 F.3d 923, 929 (8th Cir. 2015)(refusing to distinguish between a faint smell of marijuana and a strong smell of marijuana in determining whether the odor alone justified an automobile search).

"No person may drive or operate a motor vehicle," with "a detectible amount of restricted controlled substance." Wis. Stat. §§ 346.63(1), (am). However, where alcohol is involved, a violation of the statute only occurs when the person has a "prohibited alcohol content." *Id.,* at (b); *Renz, supra,* 222 Wis. 2d at 444.[4]

In this case, Wesela concedes that Officer Menger, not being able to confirm the status of Elizabeth's license while standing at Elizabeth's open drivers side window, was acting

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[3] https://www.collinsdictionary.com/us/dictionary/english/faint# Accessed February 9, 2021.

[4] In *County of Jefferson v. Renz,* 222 Wis. 2d 424, 439, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds,* 231 Wis. 2d 293, 603 N.W.2d 541 (1999), this court held that the "probable cause" required by Wis. Stat. §343.303 before an officer may ask a person to submit to a PBT was the same standard as the probable cause required for an arrest. This court then concluded that the officer did not have probable cause to arrest Renz before performing the PBT. The supreme court reversed on the first issue, concluding that the "probable cause" in §343.303 was a lesser standard than the probable cause needed to arrest, but it did not reverse this court's conclusion that the facts known to the officer at the time he administered the PBT were not sufficient to constitute probable cause to arrest.

reasonably when he retreated to his squad to run her license.[5] Not all facially valid licenses are actually valid. But as Officer Menger's body cam video clearly demonstrates, it took less than a minute for him to learn that her license was valid - and that Elizabeth had no prior OWI or PAC violations.

This moment is where the "little bit" of the odor of alcohol emanating from the interior of the vehicle is where Officer Menger had to understand that he possessed insufficient information to reasonably conclude that Elizabeth, who was subject to a 0.08 PAC restriction, was possibly above that amount. See Wis. Stat. § 340.01(46m). Indeed, at the hearing Officer Menger acknowledged as much; while the Village complains that Officer Menger's acknowledgement that all he had was a "hunch" that Elizabeth was intoxicated was just an 'a-ha!' moment in the hearing (35:30-31; Respodent's Brief, Page 9; Page 12 of 16), that subjective assessment is supported by the objective evidence that that's all he had.

Officer Menger never asserted (and the Village doesn't either), that the "little bit" of the odor of alcohol emanating from the interior of the vehicle was sufficient for him to run Wesela's license (from his squad computer) to learn whether she was subject to the reduced PAC that two prior OWI/PAC convictions would subject her to. Said differently, that Officer Menger failed to articulate a belief that the "little bit" of the odor of alcohol was consistent, in his experience, with a BAC of 0.02. Menger certainly did not offer any belief that "little bit" was consistent with a 0.08 PAC. Thus, whether the analysis is constrained by the unusual "little bit" perception of the odor of alcohol, or whether "little bit" is no different from "faint" or "slight" reasonable suspicion to believe Wesela's BAC was in fact a PAC is entirely absent.

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[5] The Village argued, at Page 7 of 16, that Wesela asserts that the stop became unreasonable once she gave Officer Menger a facially valid license. Not exactly. As noted in Wesela's opening Brief, that issue is contingent, perhaps, on the decision pending in *State v. VanBeek*, Case 2019AP000447-CR.

B. The Officer's Body Cam Video Was Of Sufficient Quality To Conclude that Wesela Did Not Display "Slightly Bloodshot Eyes" During The Initial Encounter At Her Drivers Side Window.

As with the Village's description of the intensity of the odor of alcohol, the description of the later-reported (after the arrest) observation of Elizabeth's eyes varies within the Respondent's Brief. To its credit, the first mention, at Page 1 (Page 4 of 16), is "somewhat bloodshot." However, at Page 4 (Page 7 of 16), the Respondent, writes that this case *echos* (meaning is no different from) the "bloodshot eyes" recounted in *State v. Smith,* 2018 WI 2, ¶6. At Page 5 (Page 8 of 16), the Respondent returns to "somewhat bloodshot eyes," but at Pages 8 and 9 (Pages 11 and 12 of 16), the Respondent settles on "bloodshot eyes."

The studied, indeed intentional variances in describing the state of Elizabeth's eyes, as with the description of the strength of the odor of alcohol, both internally and with the record, are no more than an attempt to up the ante in what is a close case. Nowhere in the Village's Respondent's Brief is an argument that Officer Menger had reasonable suspicion to further detain Elizabeth, past the point of learning that she was not subject to a reduced PAC, because a "little bit" of the odor of alcohol came from the interior of her vehicle *and* she exhibited "somewhat bloodshot eyes."

In any event, the argument over what Elizabeth's eyes revealed is a 'red herring' because the Officer's after-arrest report is inconsistent with his own body cam video. Wesela asserted in her opening Brief that the circuit court's findings on whether Elizabeth had 'somewhat bloodshot eyes' was clearly erroneous. The circuit court never articulated what was seen on the video regarding this important 'building block' of the analysis. Thus, this court is free in its *de novo* review of the video, to make it's own finding.

What should be found credible - Officer Menger's report, written well after his face to face encounter with Elizabeth at the scene, or Officer Menger's body-cam video recording the encounter as it was occurring? The Village of course supports the Officer's backfilling his after-written report with the

term "slightly bloodshot;" the circuit court, as noted in the Appellant's Brief, erroneously adopted the Officer's report's notation without any analysis of what the Officer acknowledged was clearly seen on the body cam video - no bloodshot eyes.[6]

The Village asserts that Officer Menger was under no obligation to explain to fellow officer Volkert that he observed slightly bloodshot eyes. That might be true, but the Village offered no explanation at the motion hearing, or in its Brief, why Officer Menger would omit an important detail in explaining to Officer Volkert why his plan was to remove Ms. Wesela from her vehicle and have her perform field sobriety tests.

Officer Menger made no claim that he intentionally refrained from mentioning "slightly bloodshot eyes" to either Officer Volkert or Ms. Wesela. One can understand Officer Menger not mentioning it to Ms. Wesela if his intention was to avoid having Ms. Wesela feeling coerced if for any reason he later asked for consent to search her car. But he made no such claim at the motion hearing, and the Village, wisely, doesn't pursue any such claim on appeal. It is harder to understand why Officer Menger didn't mention "slightly bloodshot eyes" when discussing with Officer Volkert how he was going to proceed, unless, of course, as seen on the video, that isn't what he saw.

Curiously, the Village makes no argument that slightly bloodshot eyes can indeed be seen on the body cam video; the Village relies merely on the high bar that appellants claiming erroneous fact finding must hurdle. Respondent's Brief, Page 10: Page 13 of 16. However, the circuit court did not make a finding on what the video showed concerning bloodshot eyes. The circuit court's credibility findings thus ignored an unambiguous video recording and are therefore unsupportable. *Scott v. Harris*, 550 U.S. 372, 380-81, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Indeed, the post-arrest inclusion into a

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[6] The Village has never claimed that the Officer's body cam video is insufficiently clear in sight and sound for either the trial court or this court to determine, on de novo review, whether the defendant exhibited "slightly bloodshot eyes" or even slurred speech.

written report of an observation that cannot be at all corroborated by the video recording more than suggests a disingenuous post-hoc attempt to justify the arrest. *Miller v. Sanilac Cnty.*, 606 F.3d 240, 250 (6th Cir. 2010). The circuit court's findings concerning bloodshot eyes are clearly erroneous. The failure to at the least articulate a comparison analysis between the testimony and the video by the circuit court is a failure to examine the totality of the circumstances in this case. *State v. Lange,* 2009 WI 49, ¶¶20, 37, 317 Wis. 2d 383, 766 N.W.2d 551.

The Officer's deviations from standard testing protocol in the HGN and Walk-and-Turn Tests rendered the observations unreliable.

The Village in essence asserts that Officer Menger's deviations from NHTSA Field Sobriety Testing protocol were irrelevant to the Officer's decision to proceed with administering the Preliminary Breath Test. First, the Village makes no claim on appeal that Wesela failed to alert the circuit court to the necessity of an officer complying with the NHTSA FST Manual for the applied tests to be considered standardized, and credible. All of that was supplied by Officer Menger, on cross examination, as fully developed in Wesela's opening Brief. Officer Menger agreed his procedures were non-standard in the HGN and in the walk-and-turn tests.

As with the failure to cite the body cam video in analyzing "bloodshot eyes" the circuit court failed to incorporate what was clearly seen on the body cam videos depicting the administration of the FSTs. The Village coyly asserts that the circuit court did not make a finding that the field sobriety tests were administered incorrectly. Respondent's Brief, Page 11; Page 14 of 15. If the Village is implying that the finding impliedly was that the FSTs were administered according to NHTSA protocol, that finding would be countered by the Officer's testimony, and by the body cam videos.

The circuit court's sole finding on the administration of the tests was unhelpful, and clearly erroneous. The court stated that, "one explanation is she wasn't clearly given the directions or she was confused because of the way the officers

demonstrated it." (35:43)(Appellant's Appendix, at 105). In other words, the other explanation, according to the circuit court, is that Wesela was intoxicated, and so the deviations from testing protocol don't matter. The circuit court in essence ruled that the PBT finding supported the administration of the FSTs, no matter how they were conducted. That insufficient analysis might be overlooked if there had been sufficient observations in the initial encounter to warrant further investigation, *see, for example, State v. Wilkens,* 2005 WI App 36, ¶2 ("red, glassy eyes, the odor of alcohol, Wilkens' admission that he had consumed a few beers at a local tavern, and slurred speech.")

There was no testimony offered by the Village that despite any flaws in the administration of the FSTs, the observations were nevertheless reliable. The Village asserts that Wesela is asserting that any inadequacies in the testing provide innocent explanations for the clues of impairment, and that these conflicting inferences are resolved by the circuit court. *Id.* True, the circuit court resolved the issues, but not by analyzing in any significant way the information provided in the videos and the testimony concerning how those tests were conducted.

In *Wilkens, supra,* at ¶1, this court noted that the FSTs are not scientific; they are just observational tools for assessing intoxication, "the perception of which is necessarily subjective." Wesela suggests that the analogy to 'hearsay within hearsay' is enlightening in analyzing what occurs when the Officer conducting FSTs provides misinformation or conducts the tests in a manner that is non-standard.

Following that logic, each stage within the individual FST has to be reliable for the ultimate observation to be reliable. So if the Officer holds the stimulus too high in conducting the HGN testing, as happened here, the subject's response cannot be analyzed according to protocol. If the instructions in how to make the turn in the walk-and-turn test are non-standard or are otherwise misleading, as happened here, the subject's response (her turn), is likely to model or mimic the Officer's deviation from protocol. Thus, the conclusive subjective observation of likely intoxication is unreliable, and there is no basis to proceed to the PBT.

Conclusions

With all this it is clear the Officer's observations supporting the use of the PBT were unreliable, and it was clear error to find otherwise, and Wesela's motion to suppress, for illegally extending her seizure beyond determining her drivers license status, should have been granted.

Dated this 15th day of February 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 monospaced font. The length of this brief is 12 pages.

Electronically signed by: Lew A. Wasserman

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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.

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