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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2020AP001465

In the matter of the refusal of Brian M. Steinert

Forest County,

Plaintiff-Respondent,

v.

Brian M. Steinert,

Defendant-Appellant.

On Appeal From a Judgement of the Circuit Court
For Forest County, Case No. 2020TR000561,
Honorable Leon D. Stenz, Presiding

BRIEF OF
PLAINTIFF-RESPONDENT

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INTRODUCTION

This is a Fourth Amendment case. Petitioner-Appellant Brian M. Steinert was issued a citation for refusing to comply with the implied consent laws of Wisconsin. Steinert thereafter requested a hearing on the refusal to ask the circuit court to determine if the refusal was reasonable under the circumstances. At the conclusion of the refusal hearing, the circuit court determined that the refusal was not reasonable and a judgement against Steinert was entered.

Steinert argues that he was unlawfully arrested without probable cause and was transported beyond the vicinity of the investigation in violation of the Fourth Amendment of the U.S. Constitution and Section I, Article 11 of the Wisconsin Constitution and Wis. Stat. § 968.24, respectively. Steinert is wrong because probable cause did exist to arrest him at the scene of the traffic stop, as the circuit court correctly suggested at the refusal hearing.

ISSUES PRESENTED

Did probable cause exist to arrest the defendant at the scene of the traffic stop?

Answer by the circuit court: The circuit court stated that probable cause likely existed to arrest the defendant at the scene of the traffic stop.

This Court should answer: Yes.

**STATEMENT OF ORAL ARGUMENT AND
PUBLICATION**

Oral argument is not requested or necessary.
Publication is unwarranted, as this case involves settled law
to the facts alleged.

STATEMENT OF THE CASE

I. Factual background

Steinert was pulled over on June 8, 2020 at approximately 10:47 pm after Deputy Connor Johnson of the Forest County Sheriff's Department observed a head light to be inoperable. (Refusal Hearing Tr. July 27, 2020 at Appendix 30:18-31:8). As Johnson was advising Steinert of the reason for the traffic stop, Steinert interjected that his headlight was out. While speaking with Steinert, Johnson observed Steinert's speech to be slow and that Steinert was stumbling over his words. (App. at 32:2-7). Notably, Johnson did not smell the odor of an intoxicating beverage. (App. at 32:23-34).

Based on Johnson's past experience with Steinert involving Methamphetamine, Johnson requested Officer Ryan Wilson, a Canine Officer, to respond to his location. (App. at 33:2-5). After Johnson returned to his squad car and began writing a warning for the defective headlight, Wilson and Deputy Adam Boney arrived on scene. (App. at 33:6-10).

Wilson directed Steinert and his passenger to exit the vehicle. (App. at 33:20-21). Johnson then observed Steinert appearing to give Boney a hard time about getting out of the vehicle, stopped writing the warning and went to assist the other officers. (App. at 33:23-8:2).

Johnson was then advised by Boney that Steinert had a syringe with a brown residue. (App. at 34:14-16). Based on the syringe located on Steinert, Johnson and Wilson searched Steinert's vehicle, but did not located anything. (App. at

34:25-9:4). After the vehicle was searched, Boney advised that Steinert admitted to using “meth” at 2:00 pm that same day. (App. at 35:7-9). The current time was approximately 10:30 pm. (App. at 35:12-15). At that time, based upon his training and experience and speaking with the drug recognition experts, who had advised him that meth can stay in the system up to 24 hours, and the observed slow and stuttered speech, Johnson believed Steinert to be under the influence of methamphetamine. (App. at 35:18-24). Johnson later advised Steinert that he was under arrest for possession of drug paraphernalia. (App. at 36:11-12)

Upon arrival to the Forest County Jail, Steinert refused to perform field sobriety tests and, after being read the informing the accused, refused to submit to a blood draw. (App. at 38:20-24 and 39:7-14:3). A warrant for a legal blood was applied for and granted. (App. at 41:1-4).

II. Procedural History

On June 9, 2020 a citation for violation of Wis. Stat. § 343.305(9)(a) was filed. On June 15, 2020, a request for a refusal hearing was filed. The hearing was scheduled for July 27, 2020.

On July 27, 2020, the circuit court held a hearing on Steinert’s refusal. At the conclusion of the hearing, the circuit court determined that that Steinert was lawfully stopped and arrested, the officer complied with the informing the accused requirement and that the defendant did in fact refuse the test. The circuit then determined that Steinert’s refusal was unreasonable. On that same day, a judgement was filed against Steinert. Notice of appeal was filed on August 25, 2020.

STANDARD OF REVIEW

This appeal involves whether probable cause existed to arrest, which is a question of law that is reviewed de novo. *State v. Kutz* 267 Wis.2d 531 ¶ 13, 671 N.W.2d 660 (2003).

ARGUMENT

The circuit court properly found Steinert's refusal to be unreasonable. At the time Steinert was placed under arrest, law enforcement had probable cause to believe that Steinert had committed the crime of operating a motor vehicle with a detectable amount of a restricted controlled substance, in violation of Wis. Stat. § 346.63(1)(am).

I. Officer's subject intent regarding what charge to arrest for is not determinative.

In *State v. Repenshek*, 277 Wis.2d 780, 691 N.W.2d 369 (Ct. App. 2004) the Court of Appeals held the following:

“the legality of an arrest does not depend on whether the arresting officer articulates the correct legal basis for the arrest. [It] does not depend on the subjective motivation of the arresting officer.”

Id at ¶ 10.

In *Repenshek*, the defendant was arrested, according to the officer's testimony, for “causing great bodily harm by reckless driving.” *Id* at ¶ 8. After his arrest, the defendant's blood was drawn without a warrant. *Id*. The defendant moved to suppress the evidence obtained from the blood draw arguing that the offense for which he was arrested did not exist and, therefore, his arrest was illegal. *Id* at ¶ 9. The

Court held that even if the defendant was arrested for a nonexistent crime, the arrest was still legal because there was probable cause to arrest him for an actual crime, in that case, reckless driving. *Id.* As the Court pointed out, “[e]ven when an officer acts under a mistaken understanding of the crime committed, an objective test is used to determine the legality of the arrest. *Id.* at ¶ 11. The Court went on to note that this rule is accepted uniformly by both state and federal courts. *Id.*

In the present case, Johnson erroneously placed Steinert under arrest for possession of drug paraphernalia based up the untested syringe produced by Steinert from his pocket. However, since Johnson had objective facts before him that would lead to probable cause that Steinert committed a crime the arrest of was lawful.

II. Law enforcement had probable cause to arrest Steinert at the scene.

As Steinert points out, Deputy Johnson wrongfully arrested him at the scene of the traffic stop for possession of drug paraphernalia. Wis. Stat. § 961.571(1)(b)(1) specifically excludes “hypodermic syringes” from what is considered drug paraphernalia. Had law enforcement field tested the brown residue located in the syringe and received a positive test for an illegal substance, there may have been probable cause to make an arrest based upon the syringe. Absent that scenario, an arrest based on syringe was improper. However, as the circuit court suggested, there was probable cause to arrest Steinert at the scene for operating with a detectable amount of a restricted controlled substance.

Wis. Stat. 346.63(1)(am) provides that “No person may drive or operated a motor vehicle while the person has a detectable amount of a restricted controlled substance in his

or her blood. The term “restricted controlled substance” includes methamphetamine. (See Wis. Stat. § 340.01(50m)(d)) Furthermore, a conviction of operating a motor vehicle with a detectable amount of a restricted controlled substance does not require a showing of impairment. *State v. Smet*, 288 Wis.2d 525, ¶¶15-16, 709 N.W.2d 474 (Ct. App. 2005).

Under Wisconsin case law, Johnson had probable cause to arrest Steinert for operating with a detectable amount of a restricted controlled substance. In *State v. Hubbard*, 356 Wis.2d 831, 855 N.W.2d 721 (Ct. App. 2014), the defendant was arrested for operating a motor vehicle with a detectable amount of a restricted controlled substance. *Id at* ¶ 2. In addition to having red, bloodshot eyes, admitting to consuming two shots, failing the one leg stand and exhibiting other clues of impairment on other field sobriety tests and providing a preliminary breath test of .02, the defendant admitted to smoking “weed” about nine hours prior and a search of his vehicle yielded two glass pipes containing burnt residue and a Ziploc bag containing a green leafy substance that smelled like marijuana. *Id.*

The defendant brought a motion to suppress arguing that the arresting officer did not have probable cause to arrest him. *Id at* ¶ 3 The circuit court denied the defendant’s motion after hearing testimony from the arresting officer, which added that he had been a police officer for more than two years and that he had received drug training, which included learning that marijuana can stay in the blood stream for 24 hours or longer. *Id.*

On appeal, the defendant focused his argument on the fact that there was no erratic driving, no odor of burnt

marijuana, no odor of intoxicants, no indicators of intoxication on some of the field sobriety tests and that the preliminary breath test was below the legal limit. *Id* at ¶ 7. In affirming the lower court's decision, the Court of Appeals found that "the officer had sufficient *other* evidence to support a reasonable belief that [the defendant] had operated his vehicle with a detectable amount of a restricted controlled substance." *Id* (Emphasis added). Specifically, the Court of Appeals pointed to the defendant's admission to having smoked marijuana within nine hours of driving, the officer's training that that would have been recent enough to be in the defendant's blood, the defendant's red, bloodshot eyes, which suggested the defendant may have smoked marijuana more recently and the marijuana and pipes that were located in the defendant's car that could have been used to smoke marijuana. *Id*.

The Court of Appeals came to a very similar conclusion in *State v. Leach*, 392 Wis. 2d 383, 944 N.W. 2d 366 (Ct. App. 2020). In that case, the defendant was pulled over after running a stop sign, turning around in a church parking lot, which the officer thought was strange, swerving abruptly in their lane of travel twice and randomly braking twice. *Id* at ¶5. The defendant was eventually arrested after a marijuana pipe and marijuana was discovered and the defendant admitted to recently smoking marijuana. *Id* at ¶¶ 8-9. There was also mention of a standardized field sobriety test, however the results of that test were not addressed. *Id* at ¶ 9

On appeal, the marijuana pipe was suppressed after it was determined that it was discovered through coercive means. *Id* at ¶ 21. However, in finding that there was still probable cause to arrest the defendant for operating a motor

vehicle with a detectable amount of a restricted controlled substance, the Court of Appeals again held that there was “sufficient *other* evidence”. *Id* at ¶ 29 (Emphasis added). Specifically the Court of Appeals noted the following:

“The most persuasive evidence was [the defendant’s] own admission that she had smoke marijuana a short time before driving. In addition, [the defendant] exhibited driving behaviors that [the officer] found suspicious based upon his training, and [the officer] discovered the presence of raw marijuana inside [the] vehicle.”

Id.

Upon these findings, the Court concluded that based upon the totality of the circumstances, the officer had probable cause to believe the defendant operated a vehicle with a detectable amount of a restricted controlled substance. *Id.*

In the present case, Johnson, at the time Steinert was placed under arrest for the drug paraphernalia, had sufficient information available to him to support probable cause to arrest Steinert for operating a motor vehicle with a detectable amount of a restricted controlled substance. First, upon initially speaking with Steinert, Johnson observed Steinert’s speech to be slow and that he was stumbling over his words. Second, Steinert was in possession of syringe, which is commonly used to inject illegal drugs. While possession of a syringe alone is not an arrestable offense, it is still allowed to be considered in the totality of the circumstances analysis. See *State v. Manlick* 362 Wis.2d 541 ¶ 11, 865 N.W.2d 885 (Ct. App. 2015). Third, Johnson had prior experience with Steinert where meth was involved. (App. at 7:2-3 and 11:25-

12-1). Fourth, Steinert admitted to using meth approximately eight and a half hours prior to the driving and Johnson was aware through his training, experience and speaking with drug recognition experts that meth can stay in the system for up to 24 hours. Based on the totality of the circumstances and consistent with *Hubbard* and *Leach*, there was probable cause to arrest Steinert for operating a vehicle with a detectable amount of a restricted controlled substance at the time he was erroneously arrested for possession of drug paraphernalia.

CONCLUSION

This Court should affirm the circuit court's finding that the refusal was not reasonable and find that probable cause to arrest existed at the time that Steinert was arrested.

Dated this 5th day of February, 2021

Respectfully submitted,



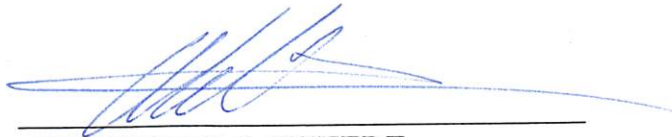
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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2179 words.

Dated this 5th day of February, 2021

Signed:



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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of February, 2021

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