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STATE OF WISCONSIN
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DISTRICT II

APPEAL NO. 2021AP000340 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL T. PACZKOWSKI,

Defendant-Respondent.

BRIEF OF PLAINTIFF-APPELLANT

ON APPEAL FROM THE DECISION OF
THE HONORABLE DANIEL S. JOHNSON, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH II

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STATEMENT OF THE ISSUES

- 1) Was there probable cause to request Paczkowski to submit to a preliminary breath test?

The trial court determined that there was no probable cause to request a preliminary breath test.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that the briefs of the parties will set forth well-established legal authority governing the issues presented. Resolution of the issues in this case requires only application of these established legal principles to the particular facts of this case. The State therefore requests neither oral argument nor publication.

STATEMENT OF THE CASE

Underlying charge.

By complaint filed July 2, 2020 and amended criminal complaint filed July 15, 2020, Defendant-Respondent, hereinafter Paczkowski, was charged, in part, with one count of operating a motor vehicle while intoxicated - second offense contrary to Wis. Stat. § 346.63(1)(a) and 346.65(2)(am)2, and one count of operating a motor vehicle with a prohibited alcohol content - second offense, contrary to Wis. Stat. § 346.63(1)(b) and 346.65(2)(am)2. (R1, R10). The violation date for these offenses is June 6, 2020. (R1, R10).

Suppression ruling.

In relevant part, by pretrial motion, Paczkowski sought to suppress all evidence derived from his illegal arrest, which resulted from an illegally obtained preliminary breath test. (R12). An evidentiary hearing was conducted on January 27, 2021. (R19). At the conclusion of this hearing, the Court made an oral ruling (R19). For the reasons set forth on the record at the hearing on January 27, 2021 Judge Daniel S. Johnson granted the motion to suppress (R19:37-43; Appendix 1). A formal order to this effect was filed on February 2, 2021 (R15).

By notice of appeal filed February 19, 2021, the State now appeals from the pretrial suppression ruling (R16).

**STATEMENT OF FACTS RELEVANT
TO THE SUPPRESSION HEARING**

At the suppression hearing the State called two witnesses to testify, Walworth County Sheriff's Deputy Tim Ruszkiewicz (R19:3-16); and Walworth County Sheriff's Deputy Crystal Jazdzewski (R19:16-25). Following is a summary of the deputies' testimony, and the trial court's oral ruling granting Paczkowski's motion to suppress the evidence resulting from requesting a preliminary breath test without probable cause.

Deputy Tim Ruskiewicz's Testimony:

Walworth County Sheriff's Deputy Ruskiewicz, who has been trained in detecting operators driving while under the influence, has been in law enforcement for approximately 28 years and made at least a thousand operating while intoxicated arrests (R19:4-5, 11). On June 6, 2020 at approximately 5:00 p.m., Deputy Ruskiewicz was on duty when he received information from dispatch of a one motorcycle accident that occurred on Highway 89 at Townhall Road in the Town of Richmond, Walworth County, Wisconsin (R19:5-6). Dispatch advised that the driver was not wearing a helmet and had head and facial injuries. Dispatch further advised that the caller advised that the driver of the motorcycle had been drinking (R19:5-6).

Upon arrival at the scene, Deputy Ruskiewicz observed a motorcycle laying on its side on the roadway in the intersection. There was a lot of gravel on the roadway, and Deputy Ruskiewicz believed the weather conditions to be cloudy (R.19:6). The driver, who was subsequently identified by his Wisconsin driver's license as Michael T. Paczkowski, was lying next to the motorcycle and had some blood on his face, leading Deputy Ruskiewicz to suspect Paczkowski may have a head injury (R19:6-7, 8-9, 15-16).

Deputy Ruszkiewicz made contact with Paczkowski and asked him what happened. Paczkowski stated that he slammed on his brakes to avoid another vehicle, hit the gravel, lost control and put his motorcycle on its side (R19:8). While speaking with Paczkowski, Deputy Ruszkiewicz detected the odor of intoxicants coming from Paczkowski's person and observed that Paczkowski had bloodshot eyes and abnormal speech (R19:8). Paczkowski further admitted that he had consumed two beers earlier (R19:8).

Based on the crash, Paczkowski's bloodshot eyes, his "off" speech and the odor of intoxicants emitting from Paczkowski's person, Deputy Ruszkiewicz formed the opinion that Paczkowski's ability to operate a motor vehicle may be impaired (R19:8-9, 11-12). Because Paczkowski was unable to perform field sobriety tests, Deputy Ruszkiewicz requested Paczkowski to submit to a preliminary breath test. Paczkowski agreed to submit to a PBT and a result of .140 was obtained (R19:10).

Deputy Ruszkiewicz, who did not prepare a report, was not 100% certain of Paczkowski's response to Ruszkiewicz's question if Paczkowski had been drinking (R19:12, 15).

Deputy Crystal Jazdzewski's Testimony:

Walworth County Sheriff's Deputy Jazdzewski has been a law enforcement officer for approximately two years and has

been trained in detecting motorist who drive while under the influence (R19:17, 21). On June 6, 2020, at approximately 5:00 p.m., Deputy Jazdzewski responded to Highway 89 in the Town of Richmond, Walworth County, Wisconsin, for a report of a motorcycle crash (R19:17-18). The caller told dispatch that the motorcycle driver did not have a helmet and had blood on his face (R19:18). The caller also told dispatch that she asked the driver if he had been drinking and he replied a little (R19:18).

Upon arrival on scene, Deputy Jazdzewski identified the driver of the motorcycle by his Wisconsin photo driver's license as Michael T. Paczkowski (R19:19). Deputy Ruszkiewicz was on scene talking to Paczkowski, while Deputy Jazdzewski helped with traffic control (R19:18). There were no witnesses to the motorcycle crash (R19:24).

While on scene, Deputy Jazdzewski also spoke with Paczkowski. At first Paczkowski stated he did not know what happened, but later stated that a vehicle in front of Paczkowski made a sudden stop, which caused him to stop suddenly (R19:19-20). Paczkowski said that is when his bike slide and he crashed (R19:20). While speaking with Paczkowski, Deputy Jazdzewski observed that Paczkowski had bloodshot, glossy eyes and blood on his face (R19:20). Deputy Jazdzewski further observed that Paczkowski's speech

appeared to be a little off, which Deputy Jazdzewski was unsure if it was from pain or from alcohol (R19:20-21). Deputy Jazdzewski, who was not in close proximity to Paczkowski as Paczkowski was laying on the ground and Deputy Jazdzewski was standing up, did not smell the odor of intoxicants (R19:21). Deputy Jazdzewski, however, spoke with Deputy Ruszkiewicz on scene who informed Deputy Jazdzewski that he did smell the odor of intoxicants on Paczkowski and also observed that Paczkowski had bloodshot glassy eyes (R19:21). Deputy Jazdzewski also heard Paczkowski tell rescue personnel that he had been drinking (R19:23).

Based on the crash, blood shot glassy eyes, odor of intoxicants and admission of drinking, Deputy Jazdzewski believed Paczkowski was not able to safely operate a motorized vehicle (R19:23). Due to Paczkowski's condition from the crash, however, standardized field sobriety tests were not completed (R19:22). Deputy Jazdzewski asked Paczkowski if he would take a preliminary breath test and he consented (R19:22). Paczkowski provided a breath test of .149 (R19:22).

THE TRIAL COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Based upon the evidence adduced at the suppression hearing, the trial court found that there was no probable cause to request Paczkowski to submit to a preliminary breath test. Specifically, the Court stated:

As I understand it, there are basically five or so factors that in this case law enforcement used to form an opinion that there was probable cause to give a PBT and the State's pointing to is the basis for that decision. And I'll go through those.

The first is the odor of alcohol. So there's a dispute at least between the witnesses regarding whether the odor of alcohol was present or not. One officer, one deputy has testified that it was. One has testified that it wasn't. I don't really see any inherent contradiction there, other than sort of the obvious one that they observed different things. This is an outside environment. I don't know exactly how close or how far away the two deputies were from the defendant in this case. So I don't think it would be uncommon that one deputy might smell something and one deputy might not. That doesn't seem to be necessarily a deal breaker for me. But what I think it does indicate is that when we rank the strength of the odor of intoxicants, it does seem to indicate that the odor of intoxicants must have been more on the mild end of the spectrum as opposed to the high end of the spectrum because if it was on the high end of the spectrum, common sense would tell us everybody would have smelled it that came into close contact with this defendant. Based on the testimony, we obviously know that that was not the case. So at best there seems to be more of a mild odor of intoxicants in this particular case.

The second fact that the State points to is the bloodshot and glassy eyes. Certainly bloodshot and glassy eyes are indicia of intoxication and something law enforcement are trained to look for in these types of cases to

help form a basis for probable cause and those facts, bloodshot and glassy eyes did exist in our particular case. Both deputies have testified to that. There are certainly other alternative explanations for bloodshot and glassy eyes other than intoxication. It could be an allergy issue or medical situation. There was obviously an accident in this case. So I don't know exactly the medical reasoning behind the bloodshot and glassy eyes. As Deputy Ruszkiewicz correctly pointed out, none of us are doctors. So it's there, it's present, it's certainly something the Court can consider. And I do believe it's one of the factors that could support a probable cause determination by these deputies and therefore be considered as part of the totality of the circumstances in giving a PBT.

The third is that the defendant admitted to drinking. The concern the Court has regarding this is just the specifics regarding that. We do have a witness, a citizen witness apparently who called the accident in, who gave a - at least one piece of information to dispatch that the defendant had apparently admitted to consuming alcohol. We don't know how much. We don't know when. We don't know the strength of that odor, if there even was one, that this citizen witnesses had observed. The defendant then admitted to drinking himself. He admitted drinking at least on two occasions as I understand the testimony. First he admitted drinking to Deputy Ruszkiewicz. So the concern I guess I have there is once again, it isn't clear to me what was said during that conversation. So obviously it matters how much the defendant is admitting to drinking as it goes into a probable cause determination. Similarly, the defendant admitted a second time to drinking which was to Rescue and once again, apparently without any specificity. So I'm not sure exactly whether it was 1 beer, 12 beers, something in the middle. We don't know because no one it sounds like asked him and that's common. Rescue is not there to try to determine how much he had to consume, they are there to make a medical determination of his situation and help him. So I'm not faulting anybody for there, but

those are the facts that are in the record regarding admissions of drinking.

Speech seemed a little off is the way it was described is the fourth factor. So slurred speech is certainly something the Court can consider. But in this particular case, it sounds like even the deputies were not completely sure whether this was slurred speech from intoxication or as they phrased it, speech that was just off as a result of this medical issue. So I don't believe that fact really points towards a probable cause determination, it's sort of a neutral fact is probably the best way of saying it.

Fifth, we have the accident itself. So a couple of different things with the accident. First of all, the accident itself with nothing else can be looked at as a factor in trying to determine if someone had been consuming alcohol. That's especially true when you combine it with other factors that may have existed at the time. So when the deputies arrive on an accident, certainly there are situations as the defense points out where nobody did anything wrong, there was just an accident, but then there are other situations where somebody did do something wrong and sometimes the cause of them doing something wrong is consumption of alcohol. In this case it looks like at least a preliminary investigation was done of the accident itself and one of the things the deputies pointed to as far as why this might be alcohol related is that the defendant either gave conflicting stories of how the accident occurred or simply did not remember or was unsure how exactly the accident occurred.

The concern I guess I have with this factor is that it's not uncommon for people involved in accidents, especially immediately, to not know how they happened. And that is the case whether they are intoxicated or not intoxicated, whether they are medically hurt or completely fine. It often times accidents happen quickly. Often times we don't know immediately exactly what happened, but then as we learn more information and we start to piece together what was going on,

eventually we develop an idea in our mind about how the accident may have happened. So the fact the defendant was unsure exactly and initially how the accident happened or maybe even gave conflicting stories, certainly could be looked at as a basis for intoxication, but it also has an innocent explanation which is simply that often times when accidents happen, immediately we aren't exactly sure what occurred that caused the accident to take place. Those are the five facts as I see them the Stat's pointing to.

R19:37-42. The Court continued:

There are some facts in the caselaw which are not present here. A big one is obviously field sobriety tests. Nothing wrong with not doing field sobriety tests in this case. In fact, it was the right call, I think, by law enforcement not to do field sobriety test in this case. Obvious accident. Obvious medical situation. Bleeding from the head. You don't do field sobriety tests in that situation. So the deputies were completely appropriate in how they handled that situation and handled that scene. The time of day is not really an indicia of intoxication. It doesn't help in the analysis there at all. You have basically a clear day, a sunny day or a cloudy day, but regardless, a day that's a day. Not at 2 o'clock in the morning. Not at 3 o'clock in the morning, around bar time. This wasn't in a district or area known for bars, at least there's no testimony to that effect. In other words, they didn't find the defendant in an accident a block away from a bar area of the Town of Richmond or any other municipality. So that fact if it had been present would certainly help push this towards probable cause.

So where that leaves us is that we have at least one fact, the bloodshot and glassy eyes that's pretty determinative and a lot of facts that could go one way or the other. And I just think when you look at the totality of those facts, they do not rise to the level of probable cause and I do not believe that the deputies in these circumstances looking at the totality of

those facts and given the discrepancies between the testimony between them had a probable cause determination, I believe the PBT should not have been given and therefore I believe the motion for suppression should be granted in this particular case.

R19:37:42-43, Appendix 1.

ARGUMENT

I. Deputy Jazdzewski And Deputy Ruszkiewicz Had The Required Degree Of Probable Cause To Administer A Preliminary Breath Test ("PBT") To Paczkowski.

A. Standard Of Review.

When a suppression motion is reviewed, the circuit court's finding of fact will be sustained unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, the Appellate Court will independently examine the totality of the circumstances at the time of the complained of conduct to determine whether the officer's acts were reasonable. *Id.*

B. Deputy Jazdzewski And Deputy Ruszkiewicz Possessed The Required Degree Of Probable Cause To Administer A PBT To Paczkowski.

The question before the court is whether there was probable cause to administer a PBT.

Wisconsin Stat. § 343.303 provides in relevant part:

If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) ... 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.... 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) ... The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest ...

In interpreting this statute on preliminary breath tests, the Wisconsin Supreme Court held that the level of probable cause required before an officer may request a PBT is greater than the reasonable suspicion necessary for an investigative stop and lower than the level of probable cause required for arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999). In *Renz*, the supreme court explained that the purpose of Wis. Stat. § 343.303 is "to allow officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed, if the arrest is challenged." *Renz*, 231 Wis. 2d at 304. The court stated that the statute "maximizes highway safety, because it makes the PBT an effective tool for law enforcement officers investigating possible OWI violations." *Id.* at 315.

While probable cause is a varying standard depending on the different burdens of proof that apply at a particular stage of the proceeding, see *Renz*, 231 Wis. 2d

at 308, the core concept of probable cause remains constant. Probable cause "is a test based on probabilities; and, as a result, the facts ... 'need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.'" *Dane County v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). As a result, the probabilities addressed by probable cause are not technical. *Id.* Instead, they rest on the practical considerations of everyday life upon which reasonable and prudent persons, not legal technicians, act. *Id.* Bottom line, probable cause represents a commonsense test. *Id.*

In *Renz*, the defendant exhibited several signs of intoxication, such as: a car smelling of intoxicants, his own admission that he drank three beers earlier in the evening, and poor performance on the one-legged stand, heel-to-toe and finger-to nose tests. *Id.* at 316-17. However, he did not speak in a slurred manner, "and he was able to substantially complete all the tests." *Id.* at 317. The court held that this was "exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." *Id.*

Here, Paczkowski's situation is similar to the indicia of intoxication exhibited in *Renz*. Deputies observed that

Paczkowski had been involved in a one-vehicle motorcycle accident. Neither the weather nor the time of day appeared to be a factor in the accident. Paczkowski initially told deputies he did not know how the accident occurred, but later stated that a vehicle in front of him made a sudden stop causing him to stop suddenly. The sudden stop made his motorcycle slide and crash. There were no witnesses to the motorcycle crash nor any evidence to support Paczkowski's statement. Upon contact with Paczkowski, both Deputy Jazdzewski and Deputy Ruszkiewicz observed that Paczkowski had bloodshot glassy eyes and "off" speech. Deputy Ruszkiewicz also detected the odor of intoxicants on Paczkowski's person, which corroborated the concerned citizen's statement to dispatch that Paczkowski had been drinking alcohol. Paczkowski also admitted to consuming alcohol prior to the crash, but did not say how much. Finally, because Paczkowski had been involved in a motorcycle accident, was found lying in the roadway and required hospitalization, he was unable to perform standardized field sobriety tests. Based on this information, both Deputy Jazdzewski and Deputy Ruszkiewicz believed that Paczkowski was intoxicated. Deputy Jazdzewski and Deputy Ruszkiewicz are both experienced officers, particularly Deputy Ruszkiewicz with twenty-eight years of

experience who has investigated numerous cases of intoxicated driving. See *State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994) (we may consider an officer's investigative experience in determining whether facts known to officer established probable cause). Consistent with *Renz*, taken together these factors are more than sufficient to constitute probable cause to request a PBT.

However, even if this court should find that the facts here are weaker than those in *Renz*, *Renz* did not declare that the facts there represented the minimum level of proof necessary to constitute probable cause under the PBT statute. Nor has any other court fashioned such a hard and fast probable cause standard. In fact, the Appellate Court has rejected an analysis that rigidly determines probable cause based upon similar or near-similar facts in prior cases. For instance, in *State v. Mata*, 230 Wis. 2d 567, 602 N.W.2d 158 (Ct. App. 1999), the State and the defense cited to competing cases, each with factual scenarios supportive of their competing positions on the probable cause question. *Id.* at 570-72. The court saw no need to engage in such factual comparisons because "the question of probable cause turns on the facts of the particular case" and "the totality of the circumstances." *Id.* at 572.

Here, Paczkowski was involved in an unexplained motorcycle accident with no witnesses. Paczkowski initially stated he did not know how the accident occurred, but later stated it was caused by a vehicle in front of him that made a sudden stop. There was no evidence to support Paczkowski's statement. Paczkowski had bloodshot glassy eyes, smelled of intoxicants, had "off" speech and admitted to drinking prior to driving. Due to the circumstances of Paczkowski's motorcycle accident he was unable to perform standardized field sobriety tests. These facts would warrant a reasonable and prudent person, not acting on legal technicalities, to conclude that it was more than a possibility that the defendant was driving a motor vehicle while intoxicated. See *Sharpee*, 154 Wis. 2d at 518. Cf. *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994) (an officer had probable cause to arrest a suspect who hit the rear end of a car parked along the highway, smelled of intoxicants, and stated "he had to quit doing this"). Because it remained possible that the defendant might not have been intoxicated, Deputy Jazdzewski and Deputy Ruszkiewicz turned to the PBT to assist them in making that determination. As the supreme court has observed, the PBT procedures of Wis. Stat. § 343.303 were designed to address this very kind of situation. See *Renz*,

231 Wis. 2d at 317. Thus, the probable cause level of Wis. Stat. § 343.303 was satisfied.

While it is true that there are explanations unrelated to intoxication for Paczkowski's behavior and condition, this is irrelevant to a probable cause determination. The mere fact that an innocent explanation for the driver's conduct and condition may be advanced is not enough to defeat probable cause. See *State v. Welsh*, 108 Wis. 2d 319, 347, 321 N.W.2d 245 (1982) (Abrahamson, J., dissenting), rev'd on other grounds, 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984). See also *State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125 (police need not rule out innocent explanations for behavior when there are reasonable inferences that favor probable cause or reasonable suspicion for the stop). In making a determination of probable cause, the relevant inquiry is not whether the particular conduct is "innocent" or "guilty." *United States v. Sokolow*, 490 U.S. 1, 104 L.Ed.2d 1, 109 S.Ct. 1581 (1989).

Based on the indicia of impairment exhibited by Paczkowski, it was reasonable for Deputy Jazdzewski and Deputy Ruszkiewicz to request Paczkowski to submit to a preliminary breath test.

CONCLUSION

For all the above stated reasons, the State respectfully requests that this Court reverse the trial court's order granting Paczkowski's motion to suppress as a result of an illegal obtained preliminary breath test on June 6, 2020.

Dated this 10th day of May, 2021.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

- Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is 20 pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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: May 10, 2021

Signed,

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