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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Court of Appeals Case No. 2021AP000340-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL T. PACZKOWSKI,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

On Appeal from the Circuit Court for Walworth County, the Honorable Daniel S. Johnson, Presiding

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STATEMENT OF THE ISSUE

I. Under Wis. Stat. § 343.303, was there probable cause to believe that Paczkowski operated a vehicle while under the influence, thus permitting the deputies to request that he submit to a PBT?

Circuit Court Answer: The circuit court held, based on the totality of the circumstances, including the lack of field sobriety tests, there was no probable cause to believe that Paczkowski was under the influence. Therefore, the circuit court granted Paczkowski's motion to suppress evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves the application of well-established principles. Therefore, Paczkowski does not request oral argument or publication.

STANDARD OF REVIEW

In reviewing a circuit court's decision to suppress evidence, an appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous, and will independently apply constitutional principles to those facts. *State v. Sanders*, 2007 WI App 174, ¶ 9, 304 Wis. 2d 159, 737 N.W.2d 44.

ARGUMENT

I. Given the minimal evidence of impairment, combined with the absence of field sobriety testing, the circuit court correctly found that the State failed to establish probable cause to believe Paczkowski was impaired.

As the circuit court found, there was just one clear clue of impairment. R:19:43. With such minimal evidence of impairment, this is the kind of circumstance in which field sobriety testing is critical to determine whether probable cause exists. While it was reasonable for the deputies to skip field sobriety tests due to Paczkowski's injuries, a mere suspicion does not transform into probable cause just because field sobriety testing is not possible.

At the motion hearing, the State had to establish probable cause to believe Paczkowski's ability to drive was impaired. Before an officer may request that a driver take a PBT, the officer must have "probable cause to believe" that the driver violated § 346.63(1) by driving under the influence. Wis. Stat. § 343.303. In this context, "probable cause to believe" is a measure of proof greater than the reasonable suspicion necessary for an investigative stop but somewhat less than what is required to establish probable cause to arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

The phrase "under the influence" requires the State to show that the person's "ability to safely control the vehicle [is] impaired." WIS JI—Criminal 2663A. The State bears the burden to make this showing, and the circuit court can consider the collective knowledge of the officers, the existence or absence of field sobriety tests, and the officer's training and experience. *See State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d

551 (discussing the procedure for evaluating probable cause to arrest).

A. The circuit court correctly found Paczkowski's bloodshot eyes to be the only clear indication of possible impairment.

The court found: "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." R.19:43. The State argues that the circuit court erred because there are five clues; an odor of intoxicants, bloodshot and glassy eyes, speech that was "off," admission to drinking, and the nature of the accident. State's Brief at 16-17. However, as the circuit court found, these alleged clues do not hold up to scrutiny except for the bloodshot eyes.

The State failed to prove that Paczkowski emitted the odor of intoxicants. The witnesses disagreed on this issue, and the circuit court held: "*at best* there seems to be more of a mild odor of intoxicants." R. 19:38 (emphasis added). The court further questioned whether the odor existed at all. R:19:39 ("We don't know the strength of that odor, if there even was one…").

That finding is not clearly erroneous. Jazdzewski testified that she did not smell any odor of intoxicants, even though she was close to Paczkowski when she knelt beside him and had him blow into the PBT device. R. 19:24. In contrast, Ruszkiewicz testified he detected the odor of intoxicants, but he did not say how close he was or if the odor was strong. R. 19:9. On that record, in particular Jazdzewski's proximity to Paczkowski, a court could reasonably determine that the odor was very mild or that Ruszkiewicz was mistaken. Therefore, the circuit court's finding was not clearly erroneous.

In addition, because the circuit court did not explicitly find that there was or was not an odor, the Court should assume there

was not an odor. When a circuit court does not make an explicit finding, an appellate court should assume the circuit court made findings in a manner that supports its final decision. *State v. Pallone,* 2000 WI 77, ¶ 44 n. 13, 236 Wis.2d 162, 613 N.W.2d 568, *overruled on other grounds*, *State v. Dearborn,* 2010 WI 84, ¶¶ 25–29, 327 Wis.2d 252, 786 N.W.2d 97.

Similarly, the record supports the circuit court's finding that Paczkowski's manner of speech is a neutral fact. Significantly, the witnesses did not claim Paczkowski slurred his speech; instead, they said it was "a little off" or "somewhat off." R. 19:9, 20. Neither witness explained what that means, how it differs from ordinary speech. With no claim of a slur and such a vague description, the court correctly refused to consider this a sign of possible impairment.

Further, the deputies did not testify it was a sign of impairment. Ruszkiewicz testified, "I'm not sure whether [Paczkowski's speech being somewhat off] was from the accident or the alcohol." R. 19:9. Similarly, Jazdzewski testified, "I'm not sure if it was just because he was in pain or if that was due to the alcohol." R. 19:20-21.

In addition, the circuit court was correct to assign little weight to Paczkowski's statements about drinking. Jazdzewski testified that a Paczkowski admitted to drinking "a little." R.19:23. Ruszkiewicz asked Paczkowski about drinking, but he did not remember Paczkowski's response. R.19:15. Neither deputy asked how much he drank. R.19:40. Neither deputy asked when he drank.

As the circuit court noted: "obviously it matters how much the defendant is admitting to drinking." R.19:39-40. The critical inquiry is whether Paczkowski consumed enough alcohol, recently enough, to impair his ability to drive. That he drank something at some time does not help to answer that question.

Finally, the nature of the accident does not indicate that Paczkowski was impaired. An accident may suggest impairment, depending on the totality of the circumstances. *See State v. Wille*, 175 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994) (noting that one clue of intoxication was the driver inexplicably hitting a car parked alongside the highway on the shoulder).

In contrast to the accident in *Wille*, the circumstances of this accident do not suggest impairment. It was not unexplained; Paczkowski explained that he had to brake hard because another vehicle stopped suddenly, and his motorcycle hit gravel and slid out from under him. R:19:8, 20. The State presented no witnesses, no accident investigation results, and no other evidence that would contradict that explanation. On the contrary, Ruszkiewicz testified that there was a lot of gravel in the roadway, R.19:6, supporting Paczkowski's explanation. The deputies did not cite Paczkowski for any traffic violation. In sum, the nature of the accident does not suggest that Paczkowski was impaired.

The State claims that Paczkowski's initial statement that he could not recall how the accident occurred is inconsistent with his ability to remember later. However, as the circuit court correctly noted, R. 19:41-42, that overlooks the realities of a severe vehicle accident. As the circuit court aptly stated, it is typical for someone involved in an accident to be unable to explain the event immediately, and then later piece it together. R.19:41-42. That is particularly rational in this case, given that Paczkowski suffered a head injury and appeared to be in pain.

B. The minimal evidence of impairment is insufficient to establish probable cause.

The State can establish probable cause by showing some combination of clues of impairment. The clues may include the odor of intoxicants, unsteady walking, and performance on field sobriety tests. *See Renz*, 231 Wis. 2d at 296-98. In other cases, clues sufficient to support a finding of probable cause have included slurred speech, an odor of intoxicants, and bloodshot eyes, together with erratic driving or the nature of a motor vehicle accident. *See State v. Begicevic*, 2004 WI App 57, ¶¶ 4, 6, 9, 270 Wis. 2d 675, 678 N.W.2d 293 (holding that probable cause existed because the driver stopped in an intersection beyond the painted stop line at 1:30 a.m., had bloodshot and glassy eyes, appeared confused, emitted a strong odor of alcohol, and failed two field sobriety tests); *State v. Colstad*, 2003 WI App 25, ¶¶ 2-5, 21, 25, 260 Wis. 2d 406, 659 N.W.2d 394 (finding probable cause to request PBT from a driver who hit and killed a pedestrian on a street with no cars, trees, or other obstructions, the evidence contradicted the driver's explanation, driver emitted a mild odor of intoxicants, admitted to drinking two beers, slurred speech during alphabet test, and erred on each of the field sobriety tests); *State v. Felton*, 2012 WI App 114, ¶¶ 3, 9, 344 Wis. 2d 483, 824 N.W.2d 871 (finding probable cause based on driver waiting too long at one stop sign and "completely blowing another," bloodshot and glassy eyes, a strong odor of intoxicants, the driver admitted drinking three beers two hours earlier, and the officer knew the driver had other OWI convictions). In each of those cases, the driver exhibited multiple and undisputed clues.

In comparison, Paczkowski exhibited fewer signs of impairment. He did not fail any field sobriety tests. He was not driving near bar-closing time and did not drive erratically, slur his speech, appear confused, or commit any traffic violations. The State did not show that he emitted the odor of intoxicants, certainly not a strong odor. Unlike the driver in *Colstad*, the

evidence at the scene supported, rather than contradicted, his explanation of the accident. Further, the officers had no information about any prior OWI convictions.

The State attempts to analogize this case to *Renz*, State's Brief at 15-16, but that defendant showed much more substantial clues of impairment. In *Renz*, the officer observed all six clues on the Horizontal Gaze Nystagmus test, which indicates a BAC of more than .10. *Renz*, 231 Wis. 2d at 298. The driver also failed the finger-to-nose test, swayed while standing, and had minor falters on two other tests. *Id.* at 297-98. In addition, the stop occurred at 2:00 a.m., the driver admitted to drinking three beers that evening, and the officer detected a strong odor of intoxicants. *Id.* at 296-97.

That driver's failure of two field-sobriety tests, the time of the incident, and the strong odor of intoxicants is much more substantial evidence of impairment than the State presented in this case. In sum, *Renz* does not support the State's argument. The State cites no other opinion in which a court found probable cause to request a PBT with such exiguous evidence.

The facts of this case more closely resemble the circumstances this Court found insufficient to establish probable cause in *State v. Faruzzi*, No. 2019AP167-CR, unpublished slip op., ¶ 25 (Ct. App. September 25, 2019). In that case, a caller reported that the driver "might be intoxicated," the driver was speeding, had bloodshot and glassy eyes, all three officers testified the driver emitted a light odor of intoxicants, an empty beer bottle fell out of the car when the passenger exited, and the driver was argumentative. *Id.*, unpublished slip op., ¶¶ 3-6. However, though the driver exhibited some clues of impairment during field sobriety tests, the tests were unclear or invalid. *Id.*, unpublished slip op., ¶¶ 7-11, 19.

This case similarly meager clues of impairment. As in that case, Paczkowski had bloodshot and glassy eyes. Yet, unlike that case, the State did not establish that Paczkowski emitted the odor of intoxicants. R:19:37-38. Further, in this case, there is no evidence of a traffic violation, open intoxicants, a witness stating the driver might be intoxicated, or a combative driver.

The probable cause standard does not fluctuate based on whether field sobriety testing is possible. An officer can only request a PBT when there is probable cause to believe the driver is impaired. Wis. Stat. § 343.303. Thus, mere reasonable suspicion, combined with the inability to conduct field sobriety testing, cannot justify requesting a PBT. At best, the facts of this case amount to reasonable suspicion.

In sum, under the totality of the circumstances, the clues of impairment are insufficient to establish probable cause. Therefore, the circuit court correctly granted Paczkowski's motion to suppress.

CONCLUSION

For all of the foregoing reasons, Paczkowski respectfully requests that the Court affirm the circuit court order granting the motion to suppress.

Electronically signed July 29, 2021, by:
Andrew R. Walter, Attorney for Respondent
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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and 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 a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,211 words.

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