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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Case No. 2021AP000484
Washington County Circuit Court Case No. 2020TR000836

In the Matter of the Refusal of Edward R. Gasse

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Edward R. Gasse.,

Defendant-Appellant.

ON APPEAL FROM THE TRIAL COURT IN FINDING
THAT THERE WAS PROBABLE CAUSE TO ARREST
THE DEFENDANT FOR OPERATING WHILE
INTOXICATED AND HE THEREFORE IMPROPERLY
REFUSED THE BLOOD DRAW IN WASHINGTON
COUNTY, THE HONORABLE JAMES G. POURROS,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Is the Defendant precluded from raising this appeal as the issue was not litigated at the trial court level?

Answer: Trial court found that probable cause was not in dispute.

2. Whether Officer Farnsworth had probable cause to arrest the Defendant for Operating While Intoxicated?

Answer: The trial court found that probable cause was not in dispute and the refusal was in all respects improper.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent will not be requesting oral argument or publication of the Court's decision. The Respondent believes that briefs will adequately address the issues presented.

STANDARD OF REVIEW

The State agrees that the Standard of Review as outlined in the Defendant's brief is correct.

STATEMENT OF THE CASE AND FACTS

Facts in addition to those set forth by the Defendant are contained in the argument section as needed.

ARGUMENT

I. THE DEFENDANT IS PRECLUDED FROM RAISING THIS ISSUE AS HE CONCEDED PROBABLE CAUSE DURING THE MOTION HEARING AS THERE WERE NO ARGUMENTS REGARDING THAT QUESTION.

The Defendant did not dispute probable cause at any time prior to the filing of this appeal. This is clear from all circuit court filings regarding this issue which are included in the Respondent's Appendix A – 1-71.

Specifically, in Judge Poulos' Decision and Order he stated outright that issues one and two with regards to refusal hearings were not in dispute. [Def. App. 3]. Issue one is whether the officer had probable cause to arrest the Defendant for Operating While Intoxicated and issue two was whether the officer read the Informing the Accused form to the Defendant. Wis. Stat. §343.305(9)(a)5. The only issues litigated at the hearing on September 23, 2020 were whether the Defendant actually refused the blood draw and whether there were exigent circumstances that justified a warrantless blood draw. The Trial Court found that the refusal was improper and there were exigent circumstances which justified the warrantless blood draw. [Def. App. 5].

Issue preclusion is a doctrine designed to limit the relitigation of issues that have been contested in a previous action between the same or different parties. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955). There are competing goals of judicial efficiency and finality as well as the right to litigate one's claims before a jury when deciding whether to permit parties to collaterally estop one another. *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 288 (1993). The Respondent argues that since this is the first time the Defendant is raising this issue and the interests of judicial efficiency and finality are of the utmost importance that he be precluded from arguing this now in front of this court.

II. OFFICER FARNSWORTH HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR OPERATING WHILE INTOXICATED AND SUBSEQUENTLY READ HIM THE INFORMING THE ACCUSED FORM.

Even if the Court finds that Defendant is not precluded from first raising this issue on appeal, there was probable cause to arrest the Defendant for Operating While Impaired. The burden is on the State at a refusal hearing only to show that the officer's account is plausible and that probable cause exists under that account. *State v. Wille*, 185 Wis. 2d 673, 681 (1999).

“Probable cause exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Kennedy*, 359 Wis. 2d 454, 468 (2014). Furthermore, “Wisconsin has no requirement that police must perform field sobriety tests in order to determine whether probable cause exists.” *Id.* However, even if an officer does perform field sobriety test and a person passes them in the eyes of the officer, that does not automatically negate the existence of probable cause. *State v. Felton*, 344 Wis. 2d 483, (Ct. App. 2012).

The State believes that there are numerous factors that came into play to develop probable cause to arrest the Defendant in this case. Initially, other Germantown officers interacted with the Defendant who was intoxicated mere hours before he drove himself to the police department and Officer Farnsworth was aware of that incident. [Res. App. A-10-11]. Officers knew the intoxicated state the Defendant was in at that time and even advised him to call if he had any questions instead of coming into the station. *Id.* at A-13. When asked if he had anything to drink, the Defendant admitted to one to two beers around 5 or 6 pm. *Id.* at A-14. The Defendant at first

admitted to driving but then changed his story and said that a neighbor drove him to the police station, even though video evidence showed it was only the Defendant who drove. *Id.* at A-14-15. While speaking with the Defendant, Officer Farnsworth observed the him to have droopy, glassy and bloodshot eyes, slurred speech and the odor of intoxicants emitting from his breath. *Id.* at A-12.

Based on these observations, Officer Farnsworth requested the Defendant perform Standardized Field Sobriety Tests (SFSTs) which he stated he could partially complete due to a leg injury. *Id.* at A-17. On the HGN test the Defendant showed multiple signs of impairment. *Id.* at A-18. Then, the Defendant refused to submit to a preliminary breath test. *Id.* at A-19. This ultimately led to Officer Farnsworth placing the Defendant under arrest for Operating While Intoxicated. *Id.*

The arguments made by the Defendant mostly center around the lack of clues that the Defendant was impaired. Yet, after only being around the Defendant for a short period of time, Officer Farnsworth questioned the defendant's state of mind and asked if he was willing to perform SFSTs to determine if he was able to safely operate a motor vehicle. *Id.* at A-17.. This was after the Defendant spoke with officers and

then gave false information about his neighbor driving him to the police department. *Id.* at A-15. This indicates that Officer Farnsworth was questioning the Defendant's ability to operate his vehicle safely and wanted further information. Then, after administering the SFSTs, Officer Farnsworth testified that he placed the Defendant under arrest based upon his admission to driving, his consumption of alcohol, and his performance on the SFSTs. *Id.* at A-20.

The Defendant states that there was no foundation laid as to what Officer Farnsworth was trained to look for on the HGN or the significance of the observations he made relative to impairment. [Def. Brief 17-18]. However, ADA Schepper did elicit testimony about Officer Farnsworth's qualifications to administer Standardized Field Sobriety tests which he testified that he was trained and certified to administer through the police academy. Res. App. A-15-16]. Officer Farnsworth stated that he administered the test in the manner in which he had been trained and although he did not specify whether or not he saw each clue present in each eye, he also did not specify that he only saw the clues in one eye. *Id.* at A-17. The manner in which he responded to the question asked can be construed as Officer Farnsworth stating that he observed those three clues in

each of the Defendant's eyes for a total of six clues on the HGN.

The defendant further argues that Officer Farnsworth admitted that he could not gauge the Defendant's level of impairment without completion of the entirety of the SFSTs and that is why he forced the blood draw. [Def. Brief 11]. Although that is a proper reason for requesting a blood draw by Officer Farnsworth, the Defendant argues that Officer Farnsworth did not believe he had enough probable cause, by his own admission, to arrest the Defendant. *Id.* This misconstrues Officer Farnsworth's words and completely omits the next question asked by ADA Schepper at the refusal hearing:

"At any point prior to the blood draw did your earlier opinion that he was under the influence of an intoxicant change at all?"

Officer Farnsworth:

"No."

[Res. App. A-37].

There is no way Officer Farnsworth could know the Defendant's actual level of impairment. Only a blood result which is a scientifically accurate and reliable measure of the Defendant's alcohol level could determine that. Officer

Farnsworth correctly testified to his reasoning for requesting the blood draw based on his observations.

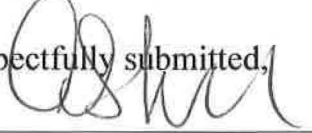
There is no requirement that every single probable cause factor to be present to arrest someone. There are more than enough boxes checked in this in situation to warrant Officer Farnsworth taking the Defendant in to custody. It is also up the discretion of the arresting officer to perform any non-standard field sobriety tests before placing someone under arrest which Officer Farnsworth decided not to perform. *Id.* at A-18-19. That does not negate everything that Officer Farnsworth did observe which was that the Defendant drove to the police department himself, showed signs of impairment, failed the SFST that he was able to perform, and refused a preliminary breath test. Any reasonable officer in Officer Farnsworth's position would have concluded that the Defendant's ability to safely operate a vehicle was impaired. The totality of the circumstances that evening gave Officer Farnsworth probable cause to arrest the Defendant and read him the Informing the Accused form which he ultimately refused.

CONCLUSION

Although the Respondent believes that the Defendant is precluded from bringing this issue on appeal, Officer Farnsworth observed numerous indicators of impairment during his interaction with the Defendant. This was all in addition to the Defendant's own admissions to drinking and driving. All of which resulted in probable cause to arrest the Defendant for Operating While Intoxicated. Therefore, the Respondent respectfully requests that this Court affirm the Trial Court's ruling that there was probable cause to arrest the Defendant, Officer Farnsworth read the Informing the Accused, the Defendant refused the blood draw and therefore the refusal was improper.

Dated this 25th day of August, 2021.

Respectfully submitted,


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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 1979 words.

8/25/21
Date

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