

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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COURT OF APPEALS

Appeal No. 2021AP001095

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TARAS O. HALIW,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
COLUMBIA COUNTY, BRANCH I, THE HONORABLE
TODD J. HEPLER, PRESIDING

Respectfully submitted,

TARAS O. HALIW,
Defendant-Appellant

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ISSUES PRESENTED

A. Did law enforcement officers have probable cause to believe that the Defendant-Appellant was operating a motor vehicle under the influence of an intoxicant at the time of his arrest?

Trial court. Yes. The trial court concluded that the Defendant-Appellant’s arrest was supported by probable cause.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant does not request that the opinion in this appeal be published, nor does he request oral argument of the issues presented in this case, but stands ready to so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE

By a Notice of Intent to Revoke filed in the Columbia County Circuit Court on March 11, 2019, the defendant-appellant, Taras O. Haliw (hereinafter Mr. Haliw), was charged in Columbia County case number 19TR1045R with an Implied Consent Law refusal violation, contrary to Wis. Stat. § 343.305(9)(a), as well as companion cases 19CM218, charging Mr. Haliw with operating a firearm while intoxicated, and 19TR1025, charging him with first offense operating a motor vehicle while intoxicated, and 19TR3496, charging him with first offense operating a motor vehicle with a prohibited alcohol concentration.

On January 1, 2020, Mr. Haliw filed a Motion to Suppress – Unlawful Arrest in all matters. On February 28, 2020, a motion hearing was held. The hearing was continued and ultimately resumed and concluded on September 9, 2020. By a written decision dated December 17, 2020, the Court issued a ruling denying Mr. Haliw's

suppression motion. Subsequently, a refusal hearing was held in 19TR1045R on May 24, 2021, at which time the parties stipulated that the Court could rely on the motion hearing testimony in determining the probable cause element of the Implied Consent violation. The trial court found the defendant's refusal to be unreasonable.

By Notice of Appeal filed on May 24, 2021, Mr. Haliw appeals the trial court's denial of his motion to suppress and the judgment in this matter in its entirety.

FACTS

Five witnesses testified at the suppression hearings in this matter. The testimony of these witnesses, taken in turn, reveal the following:

DEPUTY MARK SMIT

On March 9, 2019, Deputy Smit was dispatched in response to a 911 call regarding someone stuck in snow. Upon arriving at a residence at Pleasant View Park Road in the Town of West Point, he observed a truck parked in what he presumed to be a driveway. He observed footprints outside of the vehicle, but did not make any attempt to determine where the respective sets of footprints led, which would have shown in which directions the driver and passenger went (79:19). Nor did he make any attempt to determine whether the driver side prints were consistent with Mr. Haliw's

shoes (79:19). He approached a residence in which Deputy Crary and Edward Owerko were present. Deputy Smit observed Mr. Owerko to appear intoxicated and was slurring his words (79:8). Deputy Smit testified that upon speaking with Deputy Crary, he was informed that “Edward said he was not driving and that his friend Taras was the one that drove him home.” However, Deputy Crary’s own report describing his interaction with Mr. Owerko indicates only that he denied driving, not that Mr. Owerko identified Mr. Haliw as the driver (79:55).

Deputy Smit then went to the residence of Sharon Osborne, two houses down and made contact with Mr. Haliw. Deputy Smit acknowledged that Ms. Osborne was present and in close proximity during his questioning of Mr. Haliw (79:10-11). According to Deputy Smit, Mr. Haliw then proceeded to tell him that he “parked his car at the top of the hill,” even though the vehicle was in fact not “his” at all (79:21). Deputy Smit further states that Mr. Haliw told him that he “got up out of the driver’s seat” (79:23).¹ Shortly thereafter Deputy Crary took over the investigation. Deputy Smit acknowledges that within five to ten minutes Mr. Haliw denied

¹ Counsel for the defendant can honestly say that he doesn’t believe that he has ever described exiting a vehicle with such detail as to specify that he got out of “the driver’s seat” and would suggest that Deputy Smit’s testimony in this regard is lacking in credibility, although his acknowledgment that he could be mistaken is not.

driving to Deputy Crary. Deputy Smit returned to make contact with Mr. Owerko but found him to be passed out (79:8). Despite now knowing that Mr. Haliw was denying driving and that Mr. Owerko was the owner of the vehicle, Deputy Smit made no attempt to confirm or clarify with Mr. Owerko who was actually driving (79:27).

Deputy Smit admitted that he was equipped with a microphone during his interaction with Mr. Haliw, although the audio and video “was not saved for some reason” (79:11).

DEPUTY CRAIG CRARY

When Deputy Crary responded to the call, he observed a red truck near Mr. Haliw’s residence. He observed footprints originating at the driver’s side door of the vehicle and followed them to a small cabin where he found Mr. Owerko (79:55-56). While he did observe footprints coming from the passenger side, he did not check to see where they led (79:56). He observed a set of keys, later identified as belonging to Mr. Haliw, but did not determine whether they were for the red truck (79:57). Nor did he ask Mr. Owerko whether the keys belonged to him (79:58). According to Deputy Crary, Mr. Owerko indicated that he was not driving, and that Mr. Haliw was, although, again, Deputy Crary’s own report describing his interaction with Mr. Owerko indicates only that he denied

driving, not that Mr. Owerko identified Mr. Haliw as the driver (79:46, 55). During his interaction with Mr. Owerko, Deputy Crary noted that Mr. Owerko informed him that he had been drinking \$2 old fashioned, yet moments later told the deputy that he had not been drinking (79:52).

Deputy Crary then responded to the Osborn residence and questioned Mr. Haliw. During that interaction, Mr. Haliw never admitted to being the driver (79:59). In fact, when it became evident from Deputy Crary's questioning that he suspected that Mr. Haliw was the driver, Mr. Haliw specifically denied that being the case and stated that Eddy was driving (79:59). Further, when Deputy Crary suggested he had admitted driving to Deputy Smit, he denied that as well. Despite Mr. Haliw denying that he was the driver, and knowing that the truck was registered to Mr. Owerko, Deputy Crary also made no attempt to inquire any further of Mr. Owerko regarding just who actually was the driver (79:59-60).

SHARON OSBORN

As Deputy Smit acknowledged, Ms. Osborne was present during his questioning of Mr. Haliw. She testified unequivocally that Mr. Haliw did not tell Deputy Smit that he drove himself and Eddy home or that he got out of the driver's seat (79:68-69).

EDWARD OWERKO

Mr. Owerko testified unequivocally that he was the driver of the vehicle, his own truck, and that at no time during their visit to Wisconsin did Mr. Haliw drive his truck (41:18, 21).

TARAS HALIW

Mr. Haliw testified unequivocally that he was not the driver, that Mr. Owerko was, and that he at no time stated to anyone that he had been driving (41:31, 35).

ARGUMENT**I. MR. HALIW'S ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE TO BELIEVE THAT HE WAS OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT.****A. Burden of Proof and Standard of Review**

When reviewing a circuit court's determination regarding the suppression of evidence, the findings of fact made by the circuit court are to be upheld unless they are against the great weight and clear preponderance of the evidence. State v. Richardson, 156 Wis. 2d 128, 137, 456 N.W.2d 63 (Ct. App. 1991). Whether these facts constitute probable cause to arrest is determined by considering the totality of the circumstances known to the officer at the time of the arrest. Illinois v. Gates, 462 U.S. 213 (1983); State v. Babbitt, 188 Wis. 2d 349, 525 N.W.2d 102, 104(Ct. App. 1994); State v. Paszek, 50 Wis.

2d 619, 184 N.W.2d 839, 840 (1971).

An officer, in other words, is not free to pick and choose only those facts which suggest an offense has been committed. Instead, the officer must view the facts in light of ordinary experience and other factors either present or not present. State v. Truax, 151 Wis. 2d 354, 44 N.W.2d 432, 435 (Ct. App. 1989); State v. Wilkes, 117 Wis. 2d 495, 345 N.W.2d 498, 501 (Ct. App. 1984). The facts known to the officer must establish that guilt is more than a mere possibility. Truax, 444 N.W.2d at 435; State v. Cheers, 102 Wis. 2d 367, 306 N.W.2d 676 (1981). Rather, the totality of the circumstances must amount to “that quantum of evidence which would lead a police officer, acting as a reasonable man, to believe that the defendant probably committed a crime.” Browne v. State, 24 Wis. 2d 491, 503, 129 N.W.2d 175 (1964); State v. McAttee, 2001 WI App 262, 248 Wis. 2d 865, 637 N.W.2d 774.

The Fourth Amendment applies to all police contacts. Moreover, the burden of proving that the police contact in this case was lawful is, in all respects, upon the Plaintiff-Respondent. The burden of proving the legality of any police contact, including the lawfulness of an arrest, is always on the government, never on the defendant, and a warrantless arrest is *per se* unreasonable. State v. Verhagen, 86 Wis. 2d 262, 272 N.W.2d 105 (Ct. App. 1978); Leroux v. State, 58 Wis. 2d 671, 207 N.W.2d 589 (1973).

B. Probable Cause Determination

The trial court characterized the probable cause determination as coming down to a credibility determination (50:2). The court did not make detailed findings of fact in its decision, but did find Mr. Owerko's testimony to be lacking in credibility (50:2). Rather, the Court simply concluded that:

While at trial the State may struggle to prove beyond a reasonable doubt that Mr. Haliw drove or operated a motor vehicle, the purported statements made by Mr. Owerko, alleged admission and recantation of driving by Mr. Haliw and the other circumstances attendant thereto established sufficient basis for the arrest and therefore the defendant's motion to suppress is DENIED.

(50:2)

The Defendant-Appellant disagrees. Deputy Smit's testimony forms the only basis from which the trial court could reasonably have concluded that there was probable cause to believe that Mr. Haliw was driving the night of his arrest. Aside from Mr. Owerko's alleged denial of driving, all other evidence adduced at the motion hearing suggests that Mr. Owerko was, in fact, the driver.

Deputy Crary testified that he observed a set of footprints leading from the driver's side of the vehicle to the cabin in which Mr. Owerko was found (79:55-56). Obviously, if Mr. Haliw was the driver, those footprints would have led to him, not Mr. Owerko.

From the very inception of this investigation, physical evidence, the significance of which should have been obvious, pointed directly to Mr. Owerko having been the operator of the vehicle.

Mr. Haliw is not the owner of the vehicle in question, Mr. Owerko's Chevy Silverado (41:18). There is no earthly reason for him to have been driving Mr. Owerko's vehicle. The deputies testified that both parties appeared to be intoxicated, and both admitted to drinking, before Mr. Owerko subsequently blurted out a denial of drinking (79:52). And it is worth noting that Mr. Owerko would have no reason to issue such a denial unless he had a sense of being in some degree of peril regarding intoxicated driving. Given his inconsistencies and condition, there would be no reason for law enforcement or this Court to simply accept his statements the night of Mr. Haliw's arrest at face value.

In contrast, this Court should accept Mr. Owerko's testimony as being credible and accurate. As Wisconsin law recognizes, statements against penal interest carry a unique trustworthiness. To discredit Mr. Owerko's testimony, one would have to believe that Mr. Haliw's spell over him is so strong that he would travel to Wisconsin to testify on Mr. Haliw's behalf (as he did for the February hearing), perjure himself *and* subject himself to prosecution for obstructing an officer. That is not something friends

simply do for friends. Mr. Owerko testified that he was the driver of *his* truck because he *was* the driver of his truck.

In its cross examination of her, the State attempted to discredit the testimony of Ms. Osborne by suggesting that she is biased in his favor. Ms. Osborne is a neighboring property owner to Mr. Haliw's getaway cabin. They are on friendly terms and Ms. Osborne clearly respects Mr. Haliw. But there is nothing in the record to suggest that their relationship is such that Ms. Osborne would be anything but entirely honest and transparent with the Court. The State further argued that the contents of her testimony could have been influenced the letter, exhibit 3, Mr. Haliw provided to Ms. Osborne days before the original hearing. However, as exhibit 2 demonstrates, just days after the incident, Ms. Osborne noted that Mr. Haliw *denied* having driven the night of his arrest. Moreover, the affidavit referenced by the State was signed on January 9, 2020, nearly two months before the hearing and is consistent with her testimony at the hearing. Consequently, it is unlikely that Mr. Haliw's supplying Ms. Osborne with his thoughts corrupted her testimony or rendered it inaccurate.

While it would be hard to disagree with the notion that Mr. Haliw is to some degree biased in his own favor, that is no reason to disregard his testimony. Mr. Haliw, himself a 35-year veteran law

enforcement officer, testified credibly and consistently (41:49). Mr. Haliw testified that Mr. Owerko was the driver of his own vehicle for the same reason that Mr. Owerko testified that he was the driver of his own vehicle – because he was.

That brings us to the testimony of the deputies. Mr. Haliw takes no issue with the bulk of Deputy Crary's testimony. For the most part, it is exculpatory. Mr. Haliw never admitted to driving to Deputy Crary and denied telling Deputy Smit that he had been, as heard through Deputy Crary's squad video mic on exhibit 1. That said, it is worth noting that the one inculpatory alleged statement, Mr. Owerko's denial of driving (which Mr. Owerko does not recall making), appears nowhere in the recording of his conversation with Mr. Owerko (41:21). Taken together, the testimony of the deputies reveals a remarkably shoddy investigation, one incapable of establishing probable cause to believe that Mr. Haliw was operating a motor vehicle while intoxicated. Between the fundamental failure to put two and two together regarding the driver's side footprint leading to Mr. Owerko rather than Mr. Haliw, fogginess on where exactly this occurred, lighting and weather conditions, inability to accurately identify who was speaking on the video recording, stating that the truck was parked near the residence's garage, when in fact there is no garage (79: 41, 69), failure to examine physical evidence

such as footprints or car keys, the failure to preserve critical audio/video evidence and, more than anything, the failure to recontact Mr. Owerko when it was clear that there was a dispute as to who was driving, this was not a “job well done.” To find probable cause to arrest Mr. Haliw on this record would be tantamount to relieving the officers of their responsibility to execute their duties competently.

Furthermore, Deputy Smit’s testimony is simply not credible. While prosecutors and officers themselves may characterize law enforcement testimony as being that of a disinterested third party, it would be naïve to believe so. An officer’s judgment, and indeed motivations, are “necessarily colored by their primary involvement in the ‘often competitive enterprise of ferreting out crime.’” Terry v. Ohio, 392, U.S 1, 12 (1968) (quoting United States v. Johnson, 333 U.S. 10, 14 (1948)). There is an implicit incentive to succeed, and the desire to support an arrest and secure a conviction creates a bias against the defendant. Once Deputy Crary told Deputy Smit that Mr. Owerko had denied driving, Mr. Haliw was the target and reports and testimony will inevitably be tailored against him. Whether in the form of embellishing Mr. Haliw’s alleged statements with improbably specific, bordering on absurd, admissions, or stubbornly ignoring indications that Mr. Haliw was not driving, or the

inexplicable and undeniably convenient failure to preserve Deputy Smit's recording, it is clear that the arrest of Mr. Haliw was based on unfounded presumption, not probable cause.

II. CONCLUSION

For the reasons stated above, the Defendant-Appellant respectfully requests that this Court reverse the trial court's denial of his motion to suppress and remand this matter for further proceeding.

Dated at Middleton, Wisconsin, October 5, 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 14 pages and 2798 words.

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