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COURT OF APPEALS

STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I V

Case No. 2021AP001095

IN THE MATTER OF THE REFUSAL OF TARAS O.
HALIW:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TARAS O. HALIW,

Defendant-Appellant.

APPEAL FROM JUDGEMENT OF CONVICTION
ENTERED IN COLUMBIA COUNTY CIRCUIT COURT,
THE HONORABLE TODD J. HEPLER PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

Respectfully submitted,

STATE OF WISCONSIN,
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ISSUES PRESENTED

1. Did the Circuit Court clearly err when it found the testimony of Deputy Smit and Deputy Crary to be more credible than the testimony of Taras Haliw, Edward Owerko, and Sharon Osborn?

The Circuit Court answered: The Circuit Court found the testimony of Deputy Crary and Deputy Smit to be more credible than the testimony of Taras Haliw, Edward Owerko, and Sharon Osborn.

2. Did Deputy Crary and Deputy Smit have the requisite level of probable cause to believe that Taras Haliw had been driving a motor vehicle while intoxicated?

The Circuit Court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves only the application of well-settled law to the facts, which the briefs should adequately address.

STATEMENT OF THE CASE

I. The Nature of the Case

Taras Haliw appeals from a Circuit Court finding that he improperly refused to submit to a chemical evidentiary test of his blood. The Circuit Court based its findings of fact on testimony presented during evidentiary hearings on February 28, 2020, September 9, 2020, and May 24, 2021.

On appeal, Haliw only argues that police lacked probable cause to request an evidentiary chemical test as required by Wis. Stat. § 343.305 (9) (a) 5. a.

II. FACTS

In the Circuit Court, both the State and Haliw recognized that resolution of the issues presented in this case hinged upon the Circuit Court's credibility determinations and findings of fact. R. 48 In deciding the issues presented in favor of the State—and against Haliw—the Circuit Court implicitly found that the testimony of Deputy Craig Crary and Deputy Mark Smit was credible and the testimony relied on by Haliw was not credible. R. 48 See, *Jacobson v. Am. Tool Companies, Inc.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67, 70 (Ct. App. 1998) (“If a circuit court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness' credibility when analyzing the evidence.”). For that reason, unless specifically noted otherwise, the State will set forth the facts of this case below by supplementing the facts contained in the Court's written decision with relevant portions of the testimony of Deputy Craig Crary and Deputy Mark Smit.

There was a significant snowstorm on March 8-9, 2019. R. 48. On March 8, 2019 Taras Haliw and Eddie Owerko traveled from Chicago to the Ukranian Youth Club near Baraboo and then to the Waddle Inn, an establishment in Lodi. R. 48

Both Haliw and Owerko were drinking alcoholic beverages¹. R. 48 Haliw testified that he drank four or five shots of alcohol at the Ukrainian Club and maybe a beer or two in addition to two old fashioned at the Waddle Inn. R. 48.

In the early morning hours of March 9, 2019 law enforcement received a 911 call regarding a vehicle stuck in the snow. R. 48. Deputy Crary arrived on the scene first. Near the truck Deputy Crary found footprints and an area where it appeared as though someone had fallen in the snow after exiting the driver's seat. R. 79 at 41-42. Deputy Crary found several pill bottles bearing Haliw's name in the area where it appeared as though a person had fallen. R. 79 at 442.

The footprints followed a single path before forking off in different directions further down the yard. R. 79 at 44. Deputy Crary followed one set of footprints to Haliw's house. R. 79 at 45. There, Deputy Crary found Mr. Owerko. R. 79 at 45. Deputy Crary spoke with Owerko for a brief period of time. During this conversation, Owerko denied driving and, instead, informed Deputy Crary that Haliw had been driving. R. 79 at 45.

In the meantime, Deputy Smit had arrived in the area and proceeded to Sharon Osborn's nearby residence. R. 48 There Deputy Smit found Haliw. R. 48. Deputy Smit interviewed Haliw in Ms. Osborn's residence. R. 48. During the interview Haliw informed Deputy Smit that he (Haliw) had driven to his (Haliw's) cabin after leaving a bar. R.48, R. 79 at 10. Haliw went on to say that he had gotten out of the driver's seat of the truck. R. 79 at 10.

Deputy Crary soon arrived and began to investigate whether Haliw had been driving under the influence of an

¹ The Circuit Court explicitly found Owerko's testimony that they (Owerko and Haliw) only had two drinks was not credible.

intoxicant as Deputy Smit stood by. R. 79 at 18. It was at this time that Haliw changed his statement and began denying that he had driven the truck. R. 79 at 26.

Haliw exhibited indications of intoxication such as bloodshot eyes, slow and slurred speech, poor balance, and had an odor of intoxicants. R. 48. Crary attempted to begin field sobriety test instructions, but Haliw refused to perform any tests. R. 79 at 15. Deputy Crary placed Haliw under arrest. R. 79 at 14. Later, Deputy Crary read the “Informing the Accused” document to Haliw. R. 64 Haliw improperly refused to provide an evidentiary chemical test of his blood. R. 64.

III. PROCEDURAL HISTORY

The Columbia County District Attorney’s Office a misdemeanor charge (in Columbia County Circuit Court Case #: 19CM218) as well as civil forfeiture charges while intoxicated while also prosecuting actions for Operating a Motor Vehicle While Intoxicated (1st Offense), Operating a Motor Vehicle With a Prohibited Alcohol Concentration (1st Offense), and improperly refusing to submit to an evidentiary chemical test on March 9, 2019. R. 79 at 3.

In the Criminal and OWI cases, Haliw filed a motion alleging the Deputy Crary lacked probable cause arrest Haliw for operating a motor vehicle while intoxicated. R. 24. The motion sought to suppress statements of the defendant, physical evidence obtained during a search incident to arrest, and evidence of the blood draw and blood analysis. R. 24

The Court heard testimony on the suppression motion on February 28, 2020 and September 9, 2020. R. 41, R. 79. On December 17, 2020 the Circuit Court entered a written decision denying the suppression motion. R. 48. On May 24, 2021 the Circuit Court took further evidence in the Refusal

matter and found that Haliw improperly refused to submit to an evidentiary chemical test of his blood². R. 60.

ARGUMENT

I. STANDARD OF REVIEW

The Court of Appeals should review the Circuit Court's determination of historical facts with deference and should only overturn historical facts if the Circuit Court was "clearly erroneous." In re Refusal of Anagnos, 2012 WI 64, ¶ 21, 341 Wis. 2d 576, 586, 815 N.W.2d 675, 680. The Court should then review the application of those historical facts to the constitutional and statutory legal principles independently. Id.

For the purposes of this appeal, the Court must determine whether police had "probable cause" to believe that Haliw was operating a motor vehicle while intoxicated. Wis. Stat. § 343.305 (9) (a) 5. a. In the context of an improper refusal to submit to an evidentiary chemical test, "probable cause" is "that quantum of evidence 'within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.'" In re Refusal of Anagnos, 2012 WI 64, at ¶ 10 (quoting State v. Lang, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W. 2d 551).

Somewhat importantly for this appeal, the State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing. State v. Wille, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). At a suppression hearing, the State must establish probable cause to a "reasonable certainty." State v. Nordness 128 Wis. 2d 15, 36,

² The record in this case does not appear to contain a transcript of the May 24, 2021 hearing.

381 N.W. 2d 300, (1986). But, at a refusal hearing, the State need only establish the plausibility of an officer's account of probable cause. State v. Wille, 185 Wis. 2d at 681.

A refusal hearing is not “a forum to weigh the state's and the defendant's evidence” State v. Nordness, 128 Wis. 2d at 36. “We do not allow the trial court to weigh the evidence between the parties.” Id.

In this case Haliw appeals from a final order that he improperly refused to take an evidentiary chemical test of his blood. And, “a refusal hearing is distinct from a hearing that may be held in the prosecution of a separate OWI or PAC charge such as a suppression hearing.” In re Refusal of Anagnos, 2012 WI 64, at ¶ 68 (J. Ziegler concurring). The issues that a defendant may raise at a refusal hearing are limited by statute. Wis. Stat. § 343.305 (9) (a) 5. There is no statutory authority or procedure that would allow the a defendant to suppress evidence prior to a refusal hearing. Id.

So, while the Circuit Court took evidence in this matter in the context of a deciding a motion to suppress that was properly filed and heard in the course of criminal and civil traffic prosecutions, this court should not apply a standard of review that is greater than the Defendant is entitled to in the context of the refusal itself. That is, this court should review the evidence only with an eye to whether the State has established the plausibility of the officer's account establishing probable cause. State v. Wille, 185 Wis. 2d at 681.

II. THE COURT DID NOT CLEARLY ERR IN FINDING THE TESTIMONY OF DEPUTY SMIT AND DEPUTY CRARY TO BE CREDIBLE.

A. HALIW DOES NOT ARGUE THAT ANY PARTICULAR FACT FOUND BY THE CIRCUIT COURT WAS CLEARLY ERRONEOUS

Haliw's failure to grapple with the standard of review unnecessarily complicates this appeal. In particular, the Defendant does not make any cogent argument that the Circuit Court's findings were clearly erroneous. This comes in spite of the fact that Haliw cites State v. Richardson, 156 Wis. 2d 128, 456 N.W.2d 63 (Ct. App. 1991), for the proposition that the Circuit Court's factual findings must be upheld unless they are against the great weight and clear preponderance of the evidence. Def. Br. at 7. Instead, Haliw asks this Court to reverse the Circuit Court's credibility determinations and reweigh the evidence piecemeal and arrive at new factual findings. Def. Br. at 10, 11, 12, 13.

Haliw fails to appreciate that the Court of Appeals must accept the credibility determinations made by the Circuit Court and the reasonable inferences that can be drawn therefrom. Cogswell v. Robershaw Controls Co., 87 Wis. 2d 243, 249-50, 274 N.W. 2d 647 (1979). Only after accepting all of the credibility determinations and reasonable inferences drawn by the Circuit Court can the Court of Appeals examine whether the great weight and clear preponderance of the evidence supports a different finding of fact. Noll v. Dimiceli's, Inc., 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

None of Haliw's various piecemeal credibility arguments amount to a description of clear error. That is reason enough for this Court to deny Haliw's appeal for failing to develop an argument. See, State v. Pettit, 171 Wis. 2d 627, 646, 492 N.W. 2d 633 (Ct. App. 1992).

B. THIS COURT SHOULD NOT ATTEMPT TO REASSESS WITNESS CREDIBILITY IN THE ABSENCE OF A COMPLETE RECORD.

Additionally, as the appellant, it is Haliw's responsibility to provide a complete record as to all issues he raises on appeal. Joseph Hirschberg Revocable Living Tr. v. City of Milwaukee, 2014 WI App 91, ¶ 12 n.5, 356 Wis. 2d 730, 855 N.W.2d 699. A significant portion of the February 28, 2020 evidentiary hearing in this matter consisted of the playing of an audio video recording of Deputy Crary's contact with Owerko and Haliw. R. 79 at 47-48. The recording, Exhibit #1, does not appear to be in the record before the Court of Appeals. Haliw argues that Exhibit #1 does not capture Owerko's denial of driving. Defendant's Br. at 12. This Court should assume that the recording supports the findings, including the credibility findings, of the circuit court. Joseph Hirschberg Revocable Living Tr. v. City of Milwaukee, 2014 WI App 91 at ¶ 12 n.5.

C. OWERKO TOLD DEPUTY CRARY THAT HALIW HAD BEEN DRIVING

Deputy Crary testified that Owerko identified Haliw as the one who had driven the truck to the residence. R. 79 at 45-46. Haliw argues that this Court should discard this fact (which was impliedly accepted as fact in the Circuit Court). App. Br. at 12. To make this argument, Haliw misstates the testimony of Deputy Crary concerning the contents of his report (the report is not in the record on appeal).

Haliw argues that "Deputy Crary's own report describing his [Deputy Crary's] interaction with Mr. Owerko indicates only that he [Mr. Owerko] denied driving, not that Mr. Owerko identified Mr. Haliw as the driver." Def. Br. at 2.

But this argument ignores the testimony during the hearing that indicates that Deputy Crary did, in fact,

document in his report the fact that Mr. Owerko placed the Defendant behind the wheel.

Q. In your report you state that you asked Edward how they got back to the residence, and "He informed me he was not driving"; that's what is in your report?

A. Correct.

Q. In your report that you wrote -- well, let me -- was this report written soon after this incident?

A. How soon are you looking for?

Q. Days? A week?

A. I believe it was done that night.

Q. Okay.

A. Or, you know, within that 24-hour period.

Q. Okay. All right. And in that report you never mention Eddy specifically saying that Taras was driving?

A. Believe it is -- would be on the next page.

Q. Okay. You informed Taras that "Ed told me that Taras was driving"?

A. Correct.

R. 79 at 54-55.

The Court did not clearly err when it found Deputy Crary's testimony to be credible.

D. HALIW ADMITTED THAT HE HAD BEEN DRIVING.

Deputy Smit testified that Haliw admitted driving the truck from the bar to the location on top of the hill. R. 79 at 10. Haliw testified that he never made any such statement. R. 41 at 35-36. In denying Haliw's motion to suppress, the Court clearly found that Deputy Smit's testimony was more credible. R. 48 ("Ultimately, both the State and the Defendant recognize that this case comes down to credibility determinations. The Defendant asks the Court to find his testimony credible and the testimony of the deputies lacking in credibility and the State asks the Court to find the

opposite.”) From that fact alone, this Court should affirm the Circuit Court judgement in this case. Haliw’s sole argument is that police did not have probable cause to believe that he had been driving. App. Br. at 9. That argument disintegrates if one accepts, as this Court must, Deputy Smit’s testimony that the Haliw initially admitted to being the one who drove from the Waddle Inn to the cabin.

**E. CRARY TESTIFIED THAT FOOTPRINTS
CONVERGED INTO A SINGLE PATH AFTER THE
BODY IMPRESSION WHERE PILL BOTTLES
WERE FOUND**

Haliw also misstates the testimony as it relates to the footprints in the snow. Haliw argues that Deputy Crary followed a set of footprints that led from the driver’s seat of the truck to Owerko’s location. App. Br. at 5. This assertion is contradicted by the testimony in the record.

First, Deputy Crary testified that he found medication bottles with the Defendant’s name on them in an area where it appeared that someone had fallen in the snow immediately after emerging from the driver’s seat. R. 79 at 55. Based on the physical evidence found in the area outside of the driver’s side of the truck, it is reasonable to conclude that the Haliw had emerged from the driver’s seat of the truck and dropped medication bottles during a fall. (Why would Mr. Owerko have Mr. Haliw’s medication bottles?)

Second, while Deputy Crary testified that he initially did not realize that there were two separate sets of footprints.

Q: All right. That’s fine.

So after making these observations, what did you do next?

A: I followed the footprints down to a small cabin that was next to the residence that the red truck was parked in the driveway to.

Q: Was there more than one set of footprints?

A: Eventually, as you got further down into the yard, yes.

R. 79 at 44.

Deputy Crary further clarified that two sets of footprints converged into a single path—exactly as one would expect two people to behave when struggling to navigate unusually deep snow. R. 79 at 42-43. The Defendant's argument that Deputy Crary followed the same set of footprints that emerged from the driver's seat to Owerko's location the house is simply unsupported in the record. The Circuit Court did not make an explicit finding of fact on this point. R. 48. Given the various inferences that can be drawn from this testimony, at a minimum, this Court should not find that that the Court erred when it credited the testimony of Deputy Crary and Deputy Smit.

III. DEPUTY CRARY AND SMIT HAD PROBABLE CAUSE TO BELIEVE THAT HALIW HAD BEEN DRIVING WHILE INTOXICATED.

In this case, Deputy Crary and Deputy Smit responded to a 911 call regarding a vehicle stuck in the snow. R. 48. Owerko told Deputy Crary that Haliw had been driving recently. R. 79 at Deputy Crary further learned from Deputy Smit that Mr. Haliw had himself admitted to having driven a nearby pickup truck to its present location. That quantum of information was more than sufficient for Deputy Crary to reasonably believe that Mr. Haliw had been driving.

When coupled with Mr. Haliw's outward signs of intoxication, Mr. Haliw's statements concerning his drinking, and Mr. Haliw's refusal to perform standardized field sobriety tests, Deputy Crary had probable cause to place the Mr. Haliw under arrest for Operating a Motor Vehicle while Intoxicated. See, State v. Mallick, 210 Wis. 2d 427, 433-34, 565 N.W.2d 245 (Defendant's refusal to perform standardized field sobriety tests may be used as consciousness of guilt evidence); State v. Felton, 2012 WI App 114, ¶ 9, 824 N.W.2d 871 (odor of intoxicants used as evidence for probable cause of

intoxication); State v. Reese, 2014 WI App, 27 ¶13, 353 Wis. 2d 266, 844 N.W.2d 397 (unsteadiness used as evidence for probably cause of intoxication).

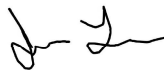
CONCLUSION

For the forgoing reasons, the State respectfully asks this Court to affirm the Circuit Court's judgment of conviction.

Dated this 18th Day of November, 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) for a brief produced using the following font:

Proportional serif font: 13 point body text, 11 point for block quotes and footnotes; line spacing of 1.15, block quotes and footnotes line spacing 1.0; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 3,079 words.

Dated: November 18, 2021.

Signed,



Jordan Lippert
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