STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NOS. 2021-AP-1350 & 1351

CITY OF WAUKESHA,

Plaintiff-Appellant,

vs.

BRIAN JOHN ZIMMER,

Defendant-Respondent

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CITY OF WAUKESHA

APPEAL OF A GRANT OF DISMISSAL IN THE WAUKESHA COUNTY CIRCUIT COURT, CASE NOS. 2020-TR-7032 & 7035 JENNIFER R. DOROW CIRCUIT COURT JUDGE

Brian E. Running
Wisconsin State Bar No. 1008960
City Attorney

Miles W.B. Eastman
Wisconsin State Bar No. 1029669
Assistant City Attorney

201 Delafield Street
Waukesha, WI 53188
Telephone: 262/524-3520
Fax: 262/650-2569

Attorneys for
Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

(1) Did the arresting officer in this case possess sufficient probable cause to arrest the Defendant-Respondent before administering a Preliminary Breath Test, particularly since the trial court held the officer had more than enough probable cause for the arrest without it?

Trial court answer: No, the officer relied on the PBT result and therefore lacked sufficient probable cause to arrest without it.

(2) Did the arresting officer administer the PBT correctly when he said to Zimmer, "What I'm going to have you do is wrap your lips around this like a balloon and blow into it like a balloon. Ok?"

Trial court answer: No, the statute in question states the officer must "request" the PBT and in this circumstance 'request' is a 'magic word;' furthermore, the officer's statement was directory in nature and not a question giving an option to the subject.

STATEMENT ON ORAL ARGUMENT

Plaintiff-Appellant City of Waukesha respectfully submits that oral argument would not serve to further develop the arguments of the parties and is not merited in this case.

STATEMENT ON PUBLICATION

This matter is decided by one court of appeals judge pursuant to Wis. Stat. §752.31(2) (2019-20) and therefore under Wis. Stat. §809.23(1)(b)4. (2019-20) should not be published. Additionally, the issue involves no more than the application of well-settled rules of law to a recurring fact situation.

INTRODUCTION

This case concerns the Waukesha County Circuit Court's decision to grant Defendant-Respondent Brian John Zimmer's motion to dismiss for lack of probable cause to arrest for Operating a Motor Vehicle Under the Influence of an Intoxicant and with a Prohibited Alcohol Concentration. The City respectfully submits that the Circuit Court applied an incorrect, subjective standard when determining whether probable cause to arrest was present. When the facts are reviewed *de novo*, independent of the Circuit Court's decision, the facts show sufficient evidence of probable cause to arrest without considering the Preliminary Breath Test administered by the arresting officer.

The City further contends that the Circuit Court applied an incorrect standard when it chose to disregard the Preliminary Breath Test administered by the officer. However, reaching this issue is unnecessary if this Court agrees with the City's first contention that the arresting officer possessed sufficient probable cause to arrest without the PBT result.

STANDARD OF REVIEW

When reviewing a trial court's ruling on a motion to suppress evidence, the Court of Appeals must uphold the court's factual findings unless they are clearly erroneous, but review *de novo* whether those facts satisfy the probable cause standard. County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541, ¶48 (1999) (citing State v. Richardson, 156 Wis. 2d 128, 137-138, 456 N.W.2d 830, 833 (1990)); *see also* Wis. Stat. §805.17(2). The proper interpretation of a statute and whether the facts of a case satisfy constitutional requirements are questions of law that are reviewed *de novo*. Renz, 231 Wis. 2d 293, ¶18; State v. Jackson, 147 Wis. 2d 824, 829, 434 N.W.2d 386, 388 (1989).

STATEMENT OF FACTS AND OF THE CASE

On Friday, November 6, 2020 at approximately 9:28 p.m., City of Waukesha Police Officer Christopher Moss observed Defendant-Respondent Brian John Zimmer's vehicle drive through two red lights without stopping. (R.23 at 19:9-21:11.) At the first red light, Zimmer made a left turn as if the light were green, causing another vehicle that had the right of way to brake to avoid hitting Zimmer's vehicle. (R.23 at 20:4-9.) Zimmer then drove straight through a red stop light at the intersection of Madison Street and East St. Paul Avenue without slowing down. (R.23 at 19:19-21:11.) Officer Moss activated the red and blue lights on his squad to execute a traffic stop of the vehicle. (R.23 at 21:12-14.) Zimmer turned into a parking lot, missed the lot's entrance apron and jumped the curb before stopping. (R.23 at 22:4-8.) When Officer Moss stopped his squad car behind Zimmer's vehicle,

Zimmer exited his vehicle; when Officer Moss told him to get back in his vehicle, he appeared confused and the officer had to tell him to return to his vehicle multiple times. (R.23 at 22:21-25.) When the officer approached Zimmer's vehicle and asked him for identification, Zimmer had a difficult time manipulating his wallet and retrieving his license. (R.23 at 24:3-5.) The officer observed that Zimmer displayed slightly slurred speech and bloodshot and glassy eyes. (R.23 at 24:15-16.)

Having made these observations of Zimmer, Officer Moss instructed him to exit his vehicle so the officer could administer field sobriety exercises. Zimmer complied. (R.23 at 25:12-13.) Once Zimmer was out of his vehicle, Officer Moss started a pat-down search of Zimmer's person and his backup officer pointed out that Zimmer had defecated in his pants. (R.23 at 26:22-23.)

The officer, who had received specialized training in administering field sobriety exercises, (R.23 at 25:19-22), had Zimmer first perform the Horizontal Gaze Nystagmus exercise. He first verified that Zimmer's pupils were the same size. Then, using a stimulus and moving it horizontally, he observed that Zimmer's right and left eyes did not follow the stimulus smoothly. He then checked for nystagmus ("bouncing") at maximum deviation in both eyes and found it present. Last, he checked for nystagmus prior to 45 degrees and observed the bouncing during that test in both eyes as well. (R.23 at 31:14-25.) The officer testified that this constituted 6 "clues" according to his training. He stated that during his training, when he had performed the HGN exercise on persons dosed with alcohol to a point where their blood alcohol concentration was greater than 0.08 g/100ml, he had observed those 6 clues, and when he performed them on someone dosed to a lower alcohol level, he had not observed all 6 clues. (R.23 at 29:3-16.)

The officer then had Zimmer perform the walk-and-turn exercise. Officer Moss first instructed Zimmer to stand in the "starting position," which involves standing with one's right foot directly in front of the left foot, heel touching toe, with arms at the sides, while listening to the officer's instructions. (R.23 at 34:2-15.) While the officer gave instructions, Mr. Zimmer was unable to remain in this "starting position" because he could not keep his balance. (R.23 at 35:11-18.)

Officer Moss instructed Zimmer to take nine heel-to-toe steps on an imaginary line, then turn around by keeping one foot on the line and making a series of small steps with the other foot, and then take nine heel-to-toe steps back. The officer instructed Zimmer to also keep his arms down at his side and to focus on his feet. (R.23 at 34:24-35:10.) The officer asked Zimmer if he had any questions and he responded that he did not. (R.23 at 35:23-36:1.) As Mr. Zimmer walked the first nine steps, he stepped off the line and missed heel-to-toe on multiple steps, beginning at the second step. Upon reaching the ninth step, he appeared confused as to what to do next; he then turned himself around without taking small steps as instructed. On his second set of nine steps, he again stepped off the line and missed stepping heel-to-toe. He also used his arms for balance. The officer testified he observed 5 out of a possible 8 clues he had been trained to look for during the exercise. (R.23 at 36:4-17.)

Officer Moss then asked Mr. Zimmer to perform the one-leg stand exercise. He instructed Mr. Zimmer to choose either foot and raise that foot approximately six inches off the ground with the toe pointed forward, keep the standing leg straight, with arms at the sides, focus on the raised foot and count 1000-1, 1000-2, etc. until told to stop. The officer told him this would be a timed 30-second exercise. (R.23 at 37:9-19.) Zimmer appeared to

understand the officer's instructions and said he had no questions. (R.23 at 37:20-24.) Zimmer raised his left leg and upon reaching 1000-4, he placed his left foot on the ground to maintain balance. He then brought the leg back up; Officer Moss then observed that he started to fall towards his right, causing him to put his foot down again. The officer terminated the exercise in the interest of safety because Zimmer appeared unable to maintain his balance; the officer did not want Zimmer to fall and harm himself. (R.23 at 38:5-15.) The officer also noted that Zimmer raised his arms during the exercise to assist with balance, contrary to his instructions. (R.23 at 38:18.)

The officer asked Zimmer if he understood the English alphabet and Zimmer said he did. Officer Moss asked him to recite the alphabet in order without rhyming or singing, beginning at the letter D and ending at the letter V. Mr. Zimmer successfully performed the test. (R.23 at 39:1-8.)

Officer Moss asked Zimmer if he understood the numbers 1 to 100 and counting backwards, and Zimmer said that he did. The officer asked him to count backwards from the number 82 to 68. Zimmer then counted from 82 down to 61, contrary to the officer's instructions, and stopped. (R.23 at 39:11-17.)

The last verbal exercise Officer Moss asked Zimmer to perform was to recite the calendar months in order from March to October. Zimmer performed the test correctly. (R.23 at 40:1-7.)

Officer Moss next obtained a Preliminary Breath Test unit from his squad. The officer showed it to Zimmer and said, "What I'm going to have you do is wrap your lips around this like a balloon and blow into it like a balloon. Okay?" (R.23 at 3:13-15; Pet'r's App. 1.) After the PBT was completed, the officer placed Zimmer under arrest for Operating a Motor Vehicle Under the Influence of an Intoxicant. (R.23 at 41:7-8.) The officer

issued a citation for Operating a Motor Vehicle Under the Influence of an Intoxicant to Zimmer that same day, November 6, 2020 (R.1 at 1, 2021-AP-001530). On December 1, 2020, Officer Moss issued an additional citation to Zimmer via U.S. Postal Mail for Operating with a Prohibited Alcohol Concentration. (R.1 at 1, appeal number 2021-AP-001531.)

Zimmer made a timely request for a jury trial, and consequently the matter was heard in Waukesha County Circuit Court instead of the City of Waukesha Municipal Court. (R.3 at 1; R.4 at 1.) After the Municipal Court transferred the case to Circuit Court, Zimmer filed a motion to exclude evidence of the PBT result and to dismiss for lack of probable cause to arrest. (R.17 at 1-11.) On August 13, 2021, a hearing was held before the Honorable Dennis Maroney, Reserve Judge for Waukesha County Circuit Court, Branch 2. At the hearing, the court first dealt with the motion to exclude the PBT. The parties stipulated as to the manner in which the officer had asked Zimmer to perform the PBT on the night of the arrest. (R.23 at 5:4-17; App. 1.) Zimmer argued that the statute permitting a PBT prior to arrest for OWI requires the officer "request" the person to provide a sample of his or her breath, and Officer Moss's statements to Zimmer prior to administering the test—"What I'm going to have you do is wrap your lips around this like a balloon and blow into it like a balloon. Okay?"—could not be considered a "request." (R.23 at 5:18-22, 7:18-9:10.)

The Circuit Court stated the issue was whether or not the term "request" was a "dramaturgic word," and "[d]ramaturgic words are words of art in the legal parlance." (R.23 at 14:6-9; App. 2.) The court went on to state that "it is important that under PBT usage… the option aspect of the PBT is such that, you know, it is a magic word which because of the nature of the beast should be used." (R.23 at 15:8-12; App. 3.) The court also

stated, “I think the word request should be part of the parlance that is used in this situation.” (R.23 at 16:1-3; App. 4.) When the court referenced its finding later in the decision, it stated, “I have already ruled that [the PBT] was performed impermissibly because he didn’t use the magic request form, request word.” (R.23 at 67:23-25; App. 11.)

The court further noted that the manner in which the officer described the PBT to Zimmer was directory, noting, “[T]his man was directed. It was, okay was a reaffirmation, if you will, of the fact that you are going to give a PBT and here is what you gotta do. Okay? In other words, you know, what option did he have?” (R.23 at 15:3-6; App. 3.) It also stated, “Request is basically an allowance for an option. There were no options given to you in this case.” (R.23 at 15:7-8; App. 3.) The court decided to exclude the PBT from consideration. (R.23 at 16:12-14; App. 4.) The court also mentioned there were “constitutional infirmities” in the manner in which the officer requested the PBT but did not specify what they were. (R.23 at 15:13-14; App. 3.)

The court then took up the question whether probable cause to arrest existed without the PBT test. It began by noting the legal standard: “what a reasonable officer would come to under all the circumstances and all the evidential factors he had a right to consider under the circumstances.” (R.23 at 16:20-22; App. 4.)

When Officer Moss was on the witness stand, the court asked whether he thought he had probable cause to arrest without the PBT result. (R.23 at 50:24-25; App. 7.) The officer responded, "Yes, your Honor; I did." (R.23 at 51:1; App. 8.) The court asked the officer why he did not arrest Mr. Zimmer before administering the PBT if he already believed he had probable cause to arrest. (R.23 at 51:2-10; App. 8.) Officer Moss explained that he

requested the PBT to obtain further evidence of intoxication prior to arrest. The officer further explained that it would assist in determining whether, if the result indicated no alcohol was present, a Drug Recognition Evaluator should be called to investigate whether the impairment was caused by some other form of drug. (R.23 at 51:11-14; App. 8.)

When the court evaluated this testimony, it said, "I wanted to find out whether or not he had probable cause before the PBT was rendered in any fashion…. And he said, yes. I said why didn't you arrest him then? He couldn't answer that question truthfully…. It is because he didn't rely on that, or didn't rely enough on that. He relied on the PBT result." (R.23 at 71:13-20; App. 15.)

Notwithstanding the officer's uncontroverted testimony that he thought he had probable cause to arrest before administering the PBT, the court reasoned that because Officer Moss administered a PBT, he must have thought he needed the PBT result to establish probable cause to arrest. The court stated, "[I]t was after the PBT test that he made his decision that, yes, there was probable cause to believe that this guy was operating in an impaired fashion." (R.23 at 68:2-4; App. 12.) It also stated, "If he would have had probable cause before, he should have arrested him…." (R.23 at 68:13-15; App. 12.) The court explained its decision by stating, "And as far as probable cause, he never got to a point of probable cause on his own. He was still at reasonable suspicion, as far as I was concerned, because he relied on the PBT to reach the probable cause finding." (R.23 at 72:14-17; App. 16.)

The court also stated, "I personally think he had more than enough probable cause to arrest without the PBT; but he didn't. And he is the guy who was the determining factor on the street…." (R.23 at 72:2-5; App. 16.)

The court granted Zimmer's motion to dismiss the case for lack of probable cause to arrest. (R23 at 72:20; App. 16.)

ARGUMENT

The City contends the arresting officer in this case, Officer Christopher Moss, possessed sufficient probable cause to arrest Zimmer for Operating a Motor Vehicle Under the Influence of an Intoxicant without taking the Preliminary Breath Test the officer administered into consideration. If this Court agrees, there will be no need to address whether Officer Moss administered the PBT correctly because the result is not admissible at trial. Wis. Stat. §343.303 (2019-20) ("The result of a preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest….") Therefore, the City addresses the probable cause issue first.

I. Officer Moss Possessed More than Enough Probable Cause to Arrest Mr. Zimmer for Operating a Motor Vehicle Under the Influence of an Intoxicant Prior to Administering the Preliminary Breath Test.

This Court must reverse the Circuit Court's finding that the officer lacked sufficient probable cause to arrest for two reasons. First, the Circuit Court made an error of law when it held the officer possessed "more than enough" probable cause to arrest Zimmer absent the PBT yet dismissed the case for lack of probable cause to arrest. Second, the Circuit Court's view of the evidence notwithstanding, the evidence introduced at the hearing was sufficient under the proper objective standard for determining probable cause to arrest for OWI even if the PBT result is not considered.

A. The Circuit Court Applied an Incorrect Standard of Law when It Stated It Thought the Officer Possessed "More than Enough" Probable Cause to Arrest and Yet Still Proceeded to Dismiss the Case for Lack of Probable Cause to Arrest.

When determining whether probable cause exists, this Court looks to "the totality of the circumstances to determine whether the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." State v. Babbitt, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Whether sufficient probable cause to arrest exists is an objective standard. "The officer's subjective intent does not alone render a search or seizure of an automobile or its occupants illegal, as long as there were objective facts that would have supported a correct legal theory to be applied and as long as there existed articulable facts fitting the traffic law violation." State v. Baudhuin, 141 Wis. 2d 642, 651, 416 N.W.2d 60, 63 (1987).

In this case, before Officer Moss administered the PBT to Zimmer, he observed Zimmer drive through two stop lights without stopping and at the second light, did not even slow down. (R.23 at 20:4-11.) He observed Zimmer jump the curb attempting to pull over. (R.23 at 22:4-8.) He observed slightly slurred speech and bloodshot, glassy eyes and slightly slurred speech. (R.23 at 24:15-16.) He discovered that Zimmer had defecated in his pants. (R.23 at 26:22-23.) He observed Zimmer present all 6 clues on the HGN test. (R.23 at 31:10-32:1.) He saw Zimmer unable to keep his balance in the starting position for the walk-and-turn test. (R.23 at 35:11-18.) He observed Zimmer attempt the test and step off the line and miss stepping

heel-to-toe multiple times, appear confused, fail to execute the turn correctly to complete the final nine steps, raise his arms for balance contrary to the officer's instructions, and step off the line and miss heel-to-toe on the final nine steps as well (R.23 at 36:4-17); all of which suggested that Zimmer may be impaired by intoxicants to the point where his balance was sharply affected. The officer observed Zimmer attempt to perform the one-leg stand test and nearly fall over, causing the officer to end the test early out of concern that Mr. Zimmer would hurt himself. (R.23 at 38:5-18.) Officer Moss also observed that Mr. Zimmer could not concentrate on counting backwards while remembering which number he was supposed to end on, as he counted back from 86 to 61 instead of stopping at 68. (R.23 at 39:11-17.) The officer observed all of the above before he administered the PBT.

The Circuit Court reasoned that because Officer Moss administered a PBT, the officer must have thought he needed the PBT result to establish probable cause to arrest. The court said, "he didn't rely on [the evidence gathered before administering the PBT], or didn't rely enough on that. *He relied on the PBT result*." (R.23 at 71:18-20; App. 15) (emphasis added.) "And as far as probable cause, he never got to a point of probable cause *on his own*. He was still at a reasonable suspicion, as far as I was concerned, because *he relied on the PBT to reach the probable cause finding*. And that was inappropriate under the circumstances of this case." (R.23 at 72:14-17; App. 16) (emphasis added.) In so concluding, the court applied a subjective standard.

The court then stated it believed Officer Moss had the requisite probable cause to arrest without the PBT: "I personally think he had *more than enough* probable cause before the PBT. But *he* didn't. *And he is the guy*

who was the determining factor on the street…." (R23 at 72:3-5) (emphasis added.)

The court opined the officer had "more than enough" probable cause to arrest, yet concluded the officer lacked probable cause to arrest because "he" (meaning the officer) "didn't" (think so) because "he relied on the PBT to reach the probable cause finding," and "he is the guy who is the determining factor on the street." When the Court based its decision not on how it viewed the evidence but instead on what it believed the officer relied upon, it based its decision on the officer's subjective state of mind.

"The fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officers' action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." State v. Anderson, 149 Wis. 2d 663, 675–76, 439 N.W.2d 840, 845 (Ct. App. 1989), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). *See also* Whren v. United States, 517 U.S. 806, 812-13 (1996) ("Not only have we never held, outside the context of inventory search or administrative inspection ..., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."; "[Our] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."; "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); State v. Brown, 2020 WI 63, ¶25, 392 Wis. 2d 454, 945 N.W.2d 584; *cert. denied*, 141 S. Ct. 881 (2020) ("[The officer's] subjective beliefs do not play any role under Fourth Amendment analyses. Under the Fourth Amendment, we review law enforcement actions with an objective lens.")

By opining Officer Moss possessed "more than enough probable cause before the PBT," yet concluding the officer lacked probable cause to arrest because “he relied on the PBT,” the court committed reversible error by basing its decision on the officer’s subjective belief at the time of the arrest. The court went so far as to state, "[the officer] is the guy who was the *determining factor*…" (R.23 at 72:5; App. 16) (emphasis added.)

When the court stated its objective view of the facts, it stated there was “more than enough” probable cause to arrest Mr. Zimmer. The motion to dismiss for lack of probable cause to arrest should have been denied at that point. Instead, the court invalidated the arrest based on its view of the officer’s state of mind at the time the arrest was made. It effectively held the officer possessed sufficient probable cause to arrest before he administered the PBT, but by requesting the PBT he somehow “lost” enough of that probable cause to merit dismissing the case.

The Circuit Court’s belief that the officer thought he lacked probable cause to arrest absent the PBT is confounding because it is not supported by the record. When Officer Moss was on the witness stand, the court asked whether he thought he had probable cause to arrest without the PBT result. The officer responded, "Yes, your Honor; I did." (R.23 at 50:24-51:1; App. 7-8.) The court then asked the officer why he did not arrest Mr. Zimmer before administering the PBT. Officer Moss explained that he requested the PBT to obtain further evidence of intoxication prior to arrest. The officer further explained that it would assist in determining whether, if the result indicated no alcohol was present, a Drug Recognition Evaluator should be called to investigate whether the impairment was caused by some other form of drug. (R.23 at 51:9-14; App. 8.) Incredibly, the court then disregarded the

officer's testimony when it held Officer Moss would not have requested the PBT unless he believed it was necessary to obtain probable cause to arrest.

The court's conclusion that Officer Moss thought he lacked sufficient probable cause to arrest without the PBT result runs so contrary to Officer Moss's uncontroverted testimony that it must be considered clearly erroneous and set aside. Wis. Stat. §805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.") The court directly asked the officer whether he thought he had sufficient probable cause to arrest without the PBT and the officer responded, "Yes, your Honor; I did." No testimony or other evidence was introduced disputing the officer's testimony, nor did the officer say anything to suggest it was not his sincere belief, yet the court concluded "[the officer] relied on the PBT to reach the probable cause finding." (R.23 at 72:14-19; App. 16.) The trial court went so far as to state that the officer was "very truthful about how he looked at this thing." (R.23 at 68:10-11; App. 12.) The court's conclusion runs not only "against the great weight and clear preponderance of the evidence," Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530 (2006), it runs against all of the evidence introduced in the case. The only reason not to set this finding aside is that it can have no effect on the case because the probable cause determination does not depend on what the officer thought.

The court may have been swayed by Zimmer's argument that an officer may only request a PBT if the officer lacks probable cause to arrest and needs the PBT result to obtain sufficient evidence to arrest, and that according to statute and the Renz case, a PBT cannot be used when an

officer already possesses the requisite probable cause to arrest. (R.23 at 59:2-25.)

Contrary to Zimmer's assertions, nothing in the law prohibits an officer from administering a PBT after having formed the requisite probable cause to arrest, as long as the officer has not yet arrested the person. In County of Jefferson v. Renz, the Wisconsin Supreme Court made this clear:

> The defendant argues that [interpreting the PBT statute to require an officer to have probable cause to arrest before the officer may administer a PBT] makes sense because an officer who already has probable cause for an arrest may decide to request a PBT before actually arresting the suspect. Although this may *occasionally be true*, as a practical matter, it seems unlikely. If the officer must have already established probable cause for an arrest without the PBT, the officer will save time and resources by arresting the suspect and administering the implied consent test authorized upon arrest under Wis. Stat. § 343.305(2)-(3). In reality, the effect of [the defendant's argument] would be to *restrict* the usefulness of the PBT in a manner that conflicts with the commonsense meaning of the second sentence [of the statute].

County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541, ¶27 (1999) (emphasis added).

Although the Renz court believed doing so would likely waste time and resources, it made it clear that an officer who has probable cause to arrest may request a PBT before making the arrest. The Renz court felt doing so would be "unlikely" since the officer would want to save time, but it very clearly left open the possibility it could occur. "Unlikely" is a far cry from "not permitted."

Prohibiting administration of a PBT after obtaining probable cause to arrest would not make sense—there is no cognizable reason to restrict an officer's ability to gather evidence prior to arrest. The authorizing statute does not prohibit its use in this manner. Officers investigating a violation of

the law would want to develop as good a case as possible before making an arrest and should be encouraged to do so. When investigating a burglary, an officer may find a person possessing the stolen items and obtain a confession from that person, thereby obtaining sufficient probable cause to arrest. But that does not prevent the officer from looking for the person's fingerprints on the stolen items or otherwise gathering additional evidence before making an arrest. There is no reason to limit the investigator's ability to build a case in this manner.

A finding that the law prohibits an officer from administering a PBT once the officer possesses sufficient probable cause to arrest would also require officers in the field to know without question when they have enough evidence to meet the standard. There would obviously be situations where an officer would not be certain probable cause to arrest has been established before administering a PBT. The officer's lack of certainty out in the field should not operate to invalidate the PBT result months later when a court concludes the officer possessed the requisite probable cause to arrest before administering it.

If requesting a PBT after sufficient evidence exists to support probable cause to arrest invalidates the PBT result and allows courts to infer that the officer lacked probable cause to arrest because one was requested (as was the finding here), a disturbing Catch-22 would result—officers could possess probable cause to arrest but lose it when they administer a PBT just to make sure. This is the direct opposite of the reason the PBT may be used. The Renz court said the PBT is a "preliminary screening tool, to be used by an officer during investigation of a person suspected of an OWI violation," 231 Wis. 2d 293, 603 N.W.2d 541 at ¶42, and noted that the legislature intended the PBT "to provide maximum safety for all users of highways in

the state," and "to encourage the vigorous prosecution of persons who operate motor vehicles while intoxicated." Id. at ¶46.

There is no need in this case to look beyond the Circuit Court's statement that the officer possessed "more than enough" probable cause to arrest. The Court should have denied Zimmer's motion if that is what it believed. It committed reversible error when it proceeded to determine that what it considered the officer's subjective belief on the issue of probable cause controlled the Court's ruling as to whether such arrest was lawful. The court's proper determination of probable cause to arrest must be made upon an objective basis as to what a reasonable police officer would determine based on the facts presented to the officer. The Circuit Court stated it would apply that standard at the outset (R.23 at 16:20-22; App. 4), but ultimately failed to do so.

B. When the Facts Are Considered De Novo, Officer Moss Possessed Sufficient Probable Cause to Arrest Without Considering the PBT Result.

When reviewing a circuit court's decision regarding probable cause to arrest, this Court reviews *de novo* whether the facts satisfy the probable cause standard. Renz, 231 Wis.2d 293, 603 N.W.2d 541, ¶48 (1999). Whether probable cause to arrest exists based on the facts of a given case is a question of law this Court reviews independently of the trial court. State v. Truax, 151 Wis. 2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

The Appellate Court must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe… that the defendant was operating a motor vehicle while under the influence of an intoxicant."

State v. Babbit, 188 Wis. 2d 349, 356-57, 525 N.W.2d 102, 104 (Ct. App. 1994).

Officer Moss observed Zimmer's vehicle drive through two red stop lights; at the first, Zimmer made a left turn as if the light was green, causing other vehicles to brake to avoid hitting his vehicle. (R.23 at 20:4-9.) At the second, Zimmer drove straight through a red stop light at the intersection in downtown Waukesha without even slowing down. (R.23 at 21:9-11.) A reasonable police officer would consider such a high degree of reckless driving, especially in a downtown area, as suggesting that the driver may be operating under the influence of an intoxicant.

After turning on his squad lights, Officer Moss observed Zimmer drive into a parking lot and miss the entrance apron, instead partially driving over the curb. (R.23 at 22:4-8). After stopping, Zimmer exited his vehicle, which prompted Officer Moss to instruct him to get back into his vehicle; Zimmer appeared confused and the officer had to repeat his command several times. (R.23 at 22:21-25). Zimmer had difficulty retrieving his license from his wallet. (R.23 at 24:3-5.) Zimmer displayed slightly slurred speech and bloodshot and glassy eyes. (R.23 at 24:15-16.) He also had defecated in his pants. (R.23 at 26:22-23.) A reasonable police officer would consider these observations as further evidence suggesting Zimmer was operating under the influence.

Officer Moss performed the Horizontal Gaze Nystagmus exercise on Zimmer and observed 3 incidents of nystagmus in both eyes, totaling 6 "clues." (R.23 at 31:10-32:1.) The officer had observed those 6 clues during his training, when he performed the test on individuals who had been dosed with alcohol to a BAC of 0.08 g/100ml. He did not observe all 6 clues when he performed the test on individuals dosed to a BAC less than 0.08g/100ml.

(R.23 at 29:3-16.) A reasonable police officer would definitely consider someone exhibiting all 6 clues on the HGN exercise as suggestive that Zimmer had operated a motor vehicle under the influence.

Officer Moss performed two other field sobriety exercises on Zimmer, the walk-and-turn and the one-leg stand exercise. Zimmer could not maintain his balance while the officer explained the exercises to him. (R.23 at 35:11-18.) During the walk-and-turn, Zimmer stepped off the line and failed to step heel-to-toe on multiple steps both on the first 9 steps and the second 9 steps making up the exercise. He also failed to make the turn at the halfway point as the officer had instructed. He also raised his arms from his sides to help with balance, contrary to the officer's instructions. During the one-leg stand, he could only raise his foot to a count of "4" and lost his balance to such an extent that the officer terminated the test out of concern he would fall and harm himself. He raised his arms during that test contrary to instructions. (R.23 at 38:5-18).

A reasonable police officer would consider Zimmer's failure to follow instructions, his lack of balance exhibited while standing and receiving instructions from the officer, the inability to step heel-to-toe in a straight line, and the extreme lack of balance exhibited when asked to lift his foot 6 inches as strong evidence that Zimmer's ability to concentrate and follow simple directions and his coordination had been considerably impaired. The City respectfully submits that once Zimmer failed every single one of the physical exercises to such a considerable degree, probable cause to arrest was established. But there was even more evidence of intoxication gathered.

Officer Moss asked Zimmer to perform some verbal tests, and although he performed one of them correctly, he failed to count down from 82 to 68 as instructed and instead kept counting to 61. (R.23 at 39:11-17.)

By failing to recall the correct number to end on while counting, Zimmer showed difficulty dividing his attention between the two tasks, an important ability to have when manipulating the controls of a motor vehicle while also responding to road signs and signals, other drivers, pedestrians, etc.

A reasonable police officer would view the totality of all these observations—reckless driving, driving over a curb, exhibiting confusion about officer instructions, having difficulty removing a driver's license from a wallet, having a slight odor of intoxicants and bloodshot, glassy eyes, losing control of one's bodily functions, exhibiting all 6 clues on the HGN test, exhibiting severe balance problems, failing to follow instructions throughout the other physical field sobriety tests, and then lacking the ability to concentrate on remembering a number while counting down—as ample evidence leading the officer to believe Zimmer had operated a motor vehicle under the influence of an intoxicant.

Zimmer argued at the hearing that this case was similar to the Renz case, where the arresting officer lacked probable cause to arrest until he obtained a PBT result. (R.23 at 56:14-21.) But in that case, the only facts the Supreme Court had before it were: Renz's car smelled of intoxicants; he admitted to drinking; after 18 seconds into the one-leg stand test he dropped his foot and restarted his count at the wrong number; during the heel-to-toe test he appeared unsteady, left a space between his steps, and stepped off the line; and could not touch the tip of his nose with his left finger. Renz, 231 Wis. 2d 293, 603 N.W.2d 541, at ¶49. The Court disregarded Renz's performance on the HGN test, id. at ¶13, and there was no evidence of bad driving; Renz had only been stopped for having a defective exhaust system. Id. at ¶4. Here, Zimmer exhibited extremely dangerous driving for which he was lucky to avoid an accident. He exhibited 6 clues on the HGN exercise,

which, as Officer Moss testified, are clear indicators of a BAC of 0.08 g/100ml or above. Zimmer's performance of the heel-to-toe and one-leg stand exercises were abysmally bad compared to Renz's—whereas Renz dropped his leg just once, 18 seconds into the one-leg stand, and then completed the exercise, Zimmer made it a mere 4 seconds in and then put his foot down, and was so unsteady the officer terminated the test.

To find sufficient probable cause to arrest exists, "[t]he evidence need not be sufficient to show guilt beyond a reasonable doubt, nor even to prove that guilt is more probable than not. The information need only lead a reasonable police officer to believe that guilt is more than a possibility." State v. Truax, 151 Wis. 2d 354, 361, 444 N.W.2d 432, 435 (Ct. App. 1989). In this case, the facts suggest guilt is not only more than a possibility, but a reasonable certainty.

II. The Preliminary Breath Test Was Administered in Accordance with the Law and Should Have Been Considered When Determining Probable Cause to Arrest.

A. The Circuit Court Committed an Error of Law by Concluding the PBT Was Administered Incorrectly due to Failure to Use 'Magic Words' when Conducting the Test.

The statute pertaining to the use of Preliminary Breath Tests in OWI cases states as follows:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1)… or a local ordinance in conformity therewith,… 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 using a device approved by the department for this purpose. 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)… or a local ordinance in conformity therewith,… and whether or not to require or request chemical tests as authorized under s. 343.305(3). 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, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305(3). The general penalty provision under s. 939.61(1) does not apply to a refusal to take a preliminary breath screening test.

Wis. Stat. §343.303 (2019-20). In this case, before administering the Preliminary Breath Test, Officer Moss said, "What I am going to have you do is wrap your lips around this like a balloon and blow into it like a balloon. Okay?" (R.23 at 5:13-15; App. 1.) Zimmer then blew into the PBT unit.

During the hearing, the parties argued about what the statute meant by the phrase, "*request* the person to provide a sample of his or her breath...." The court ultimately concluded that the word, "request" was a 'word of art,' such that "it is important that under PBT usage… the option aspect of the PBT is such that, you know, *it is a magic word* which because of the nature of the beast should be used." (R.23 at 15:8-12; App. 3.) (emphasis added.) The court then stated, "I think the word request should be part of the parlance that is used in this situation." (R.23 at 16:1-3; App.4.) Later, it explained its decision by stating, "I have already ruled that [the PBT] was performed impermissibly because [the officer] *didn't use the magic request form, request word*." (R.23 at 67:23-25; App. 11.) (emphasis added.) The court also mentioned there were "constitutional infirmities" in the manner in which the officer requested the PBT, but did not explain what they were. (R.23 at 15:13-14; App. 3.)

No case, published or unpublished, or any other legal authority, holds that there are "magic words" that an officer must use before obtaining a PBT

result during an investigation. Courts of this state and the U.S. Supreme Court generally do not impose "magic word" requirements and instead reject them. Matter of D.K., 2020 WI 8, ¶66, 390 Wis. 2d 50, 937 N.W.2d 901 (Bradley, concurring) (citing State v. Lepsch, 2017 WI 27, ¶36, 374 Wis. 2d 98, 892 N.W.2d 682; State v. Wantland, 2014 WI 58, ¶33, 355 Wis. 2d 135, 848 N.W.2d 810; Elections Bd. v. Wisconsin Mnfrs & Commerce, 227 Wis. 2d 650, 654, 669-70, 592 N.W.2d 721, 724, 730-731 (1999); Patchak v. Zinke, 138 S.Ct. 897, 905 (2018)). Consequently, there is no support for the Circuit Court's conclusion that Officer Moss's failure to use "magic words" invalidated his administration of the PBT in this case. The court's reliance on its completely unsupported conclusion that "magic words" were required mandates reversal. Although the court also believed the officer's statements to Zimmer were directory in nature, and the use of "ok" did not convert the directive into a question (R.23 at 15:3-6; App. 3), there is no way to discern whether the failure to use the alleged "magic word" or the fact that the court considered the officer's statements directory was the primary basis upon which the court rested its decision.

B. When the Officer's Statement Is Considered under the Appropriate Standard, Considering the Current State of the Law, His Request Should Be Deemed Sufficient.

Not only is there no support for the court's "magic words" requirement, existing case law strongly suggests the bar is quite low for what constitutes a 'request' under §343.303. The trial court's belief the officer's administration of the PBT had "constitutional infirmities" also has little if any support in the law. Recent case law makes it clear there is no Fourth Amendment right to refuse to submit to a blood draw when requested under

the implied consent statute, Wis. Stat. §343.305. If there is no Fourth Amendment right to refuse a blood draw, there cannot be a Fourth Amendment right to refuse a Preliminary Breath Test.

In State v. Levanduski, 2020 WI App 53, 393 Wis. 2d 674, 948 N.W.2d 411, the defendant moved to suppress blood test results, arguing that her consent had been involuntary because she had a constitutional right to refuse to submit to a blood draw, and the officer violated that right by telling her if she refused, the fact she refused would be used against her. Id. at ¶3. The court noted that the U.S. Supreme Court had analyzed a refusal to submit to a blood draw under the Fifth Amendment and held "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." Id. at ¶17 (quoting South Dakota v. Neville, 459 U.S. 553, 555 (1983)). The court ultimately concluded Levanduski had no Fourth Amendment right to refuse a request for a blood draw.

If there is no Fourth Amendment right to refuse a request for a blood draw under threat of civil penalty by the implied consent statute, Wis. Stat. §343.305, there cannot be a Fourth Amendment right to refuse a request for a breath test to determine one's BAC under Wis. Stat. §343.303, a statute that threatens no penalty whatsoever. This is especially the case since the U.S. Supreme Court has held breath tests are "significantly less intrusive than blood tests." Birchfield v. North Dakota, 136 S.Ct. 2160, 2185 (2016).

The Birchfield case is particularly instructive because the Court held that breath tests "may be administered as a search incident to a lawful arrest for drunk driving," and in that situation, "a warrant is not needed…." Birchfield v. North Dakota, 136 S.Ct. 2160, 2185 (2016). The Court went on to state that since no warrant was needed to administer the breath test, "[the defendant] *had no right to refuse it*." Id. at 2186 (emphasis added).

A search incident to arrest may be made before the arrest occurs if the officer has probable cause to arrest before the search. State v. Sykes, 2005 WI 48, ¶15, 279 Wis. 2d 742, 695 N.W.2d 277. Therefore, if Officer Moss possessed sufficient probable cause to arrest prior to administering the PBT, under Birchfield the officer could have demanded that Zimmer perform the test without implicating the Fourth Amendment. If administering a breath test is of so little moment that no warrant is required before demanding one incident to arrest, the bar cannot be particularly high when administering a PBT under Wis. Stat. §343.303.

Even if Zimmer had a Fourth Amendment right to refuse the request for a breath sample, by giving consent he extinguished any "constitutional infirmities" that could have been present. Consent to search is one of the few exceptions to the need to obtain a warrant before conducting the search. State v. VanLaarhoven, 2001 WI App 275, ¶6, 248 Wis. 2d 881, 637 N.W. 411.

Officer Moss first informed Zimmer as to what was needed to perform the test: "What I am going to have you do is wrap your lips around this like a balloon and blow into it like a balloon." The officer followed these instructions up with the question, "Ok?" (R.23 at 5:13-15; App. 1.) The officer gave Zimmer the opportunity to reply, "No, that's no ok," or otherwise refuse to take the test. That is all that is required to conform to Wis. Stat. §343.303's requirement that the officer "request" subjects to perform the test. Zimmer instead responded by blowing into the device.

The validity of a person's consent is not affected by whether an officer informs the person that they have the right to withhold consent. State v. Johnson, 2007 WI 32, ¶59, 299 Wis. 2d 675, 729 N.W.2d 182 (citing Ohio v. Robinette, 519 U.S. 33, 34 (1996)). Consent may be given "in the

form of words, gesture, or conduct." State v. Brar, 2017 WI 73, ¶17, 376 Wis. 2d 685, 898 N.W.2d 499 . Consent may be inferred: "consent by conduct or implication is constitutionally sufficient consent under the Fourth Amendment." Id. at ¶23. Consent given due to duress, coercion or misrepresentation by the police is not voluntarily given consent. Johnson, 299 Wis. 2d 675 at ¶60.

The officer did not physically force Zimmer's head toward the PBT unit or tell Zimmer he had no choice but to perform the test. The officer made no threat of adverse consequences if Zimmer refused the test. No coercion at all is shown in the record. By appending his instructions with, "Ok?" and thereby offering Zimmer the opportunity to respond that it was not "ok," when Zimmer blew into the device instead of responding "no," it is reasonable to infer that Zimmer gave his voluntary consent to perform the PBT.

Courts have noted that it's effectively impossible to force a PBT even if officers wanted to. "Measurement of BAC based on a breath test requires the cooperation of the person being tested. The subject must take a deep breath and exhale though a mouthpiece that connects to the machine… for a period of several seconds to produce an adequate breath sample…." Birchfield, 136 S.Ct 2160 at 2168. Since there is effectively no way to physically force someone to wrap their lips around a PBT and extract an adequate breath sample without the subject's help, the fact that Zimmer elected to take a deep breath and blow further indicates voluntary cooperation and consent.

The Court had no basis to find that administering a PBT requires officers use the magic word, "request." The case law indicates that the bar for making a "request" for a PBT under Wis. Stat. §343.303 is very low.

Therefore, not only must the Court's decision be reversed for applying the wrong legal standard, had it applied the correct standard it should have concluded that the officer's request in this case was made appropriately.

The threshold allowing an officer to obtain a PBT result requires "proof greater than the reasonable suspicion necessary to justify an investigative stop… but less than the level of proof required to establish probable cause to arrest." Renz, 231 Wis.2d 293 at ¶47. The evidence in this case has been discussed at length and is far greater than mere reasonable suspicion. Consequently, if this Court concludes Officer Moss lacked probable cause to arrest without the PBT result, it should remand the matter to the Circuit Court and direct the court to consider the PBT result once entered into evidence so that a proper probable cause determination may be made in this case.

CONCLUSION

The trial court's decision as to probable cause to arrest in this case is, respectfully, difficult to fathom. After ruling the PBT result was not admissible, the court held that the officer had "more than enough" probable cause to arrest Zimmer before administering the PBT. The officer testified he believed he had enough probable cause to arrest Zimmer before administering the PBT. Yet the court concluded the officer "relied on the PBT to reach the probable cause finding" and therefore lacked probable cause to arrest without the result. The trial court clearly based its probable cause determination on its view of the officer's subjective opinion. The court therefore committed an error of law. When the evidence is considered *de novo*, a reasonable police officer would believe probable cause to arrest

existed prior to administering the PBT—Zimmer engaged in extremely dangerous and poor driving; displayed bloodshot, glassy eyes and slightly slurred speech; had difficulty manipulating his wallet; lost control of his bodily functions; appeared confused; showed severe lack of balance; did not come close to successfully completing any of the physical sobriety exercises; and could not divide his attention between two tasks. The trial court's probable cause ruling must be reversed.

If this Court upholds the trial court's probable cause ruling, it should find that the officer properly administered the PBT. Contrary to the trial court's opinion, no "magic words" are required when requesting a PBT. The officer possessed more than enough probable cause to believe Zimmer had violated the OWI laws and therefore had the authority to administer the test. The officer made an appropriate "request" to Zimmer to perform the PBT by giving him the opportunity to state he would not perform the test. Instead of refusing, Zimmer provided a breath sample. If this Court concludes it must reach the PBT issue, it should direct the trial court to consider the PBT result as part of its determination of probable cause to arrest.

Dated this 3rd day of December, 2021.

Respectfully submitted,

CITY OF WAUKESHA

By: Electronically signed by,

Miles W.B. Eastman
Assistant City Attorney
State Bar No. 1029669

201 Delafield St.
Waukesha, WI 53188
262/524-3520
262/650-2569 - FAX

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,559 words.

I also hereby certify that the text of the electronic copy of this brief, filed pursuant to Wis. Stat. §809.19(12), is identical to the text of the paper copy of the brief.

Dated this 3rd day of December, 2021.

Electronically signed by,

_____

Miles W.B. Eastman
Assistant City Attorney
State Bar No. 1029669

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the

appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that the content of the electronic copy of the appendix, filed pursuant to Wis. Stat. §809.19(13), is identical to the content of the paper copy of the appendix.

Dated this 3rd day of December, 2021.

Electronically signed by,

_____

Miles W.B. Eastman
Assistant City Attorney
State Bar No. 1029669