STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NOS. 2021-AP-1530 & 1531

CITY OF WAUKESHA,

Plaintiff-Appellant,

vs.

BRIAN JOHN ZIMMER,

Defendant-Respondent

REPLY BRIEF 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**

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I. The Lower Court Did Not Find the Officer's Testimony Lacked Credibility.

Defendant/Respondent Brian Zimmer asserts throughout his brief that the Circuit Court found Waukesha Police Officer Christopher Moss' testimony not credible, especially regarding the issue of probable cause to arrest. Many of his arguments hinge on this assertion. He argues this Court cannot engage in a *de novo* review of the lower court's decision notwithstanding the need to do so according to County of Jefferson v. Renz, 231 Wis. 2d 392, 603 N.W.2d 541, ¶48 (1999) and other cases requiring it, because doing so would ignore the lower court's credibility finding. Resp't Br. 9-14, 18-19.

All of Zimmer's arguments relying on the officer's lack of credibility fail because the Circuit Court actually found the officer's testimony "very truthful" except for one answer. The answer was not related to the officer's opinion as to probable cause, and even if it was, his opinion does not matter—the probable cause test is objective, not subjective. State v. Baudhuin, 141 Wis. 2d 642, 651, 416 N.W.2d 60, 32 (1987); *see also* Pet'r's Br. 13-16.

Zimmer's argument relies on the following statement the Circuit Court made when it reiterated its position that the officer lacked probable cause to arrest:

> I wanted to find out whether or not he had probable cause before the PBT was rendered in any fashion and whether or not, you know. And he said, yes. I said why didn't you arrest him then? *He couldn't answer that question truthfully*, and I give the officer all the credit for that. It is because he didn't rely on that, or he didn't rely enough on that. He relied on the PBT result.

Resp't Br. 11 (quoting R20 at 71:13-20; Pet'r's App 15.) Zimmer fails to mention (or include in his appendix) the Circuit Court's statement made a few moments earlier:

> [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. It is that decision that, at that juncture, people, which makes the decision the fruit of the poisonous tree at that juncture. Now until I had this information I couldn't determine that. But his own testimony obviously, *truthful though it may be, and I want the officer to understand that he was very truthful about how he looked at this thing*. But under all the circumstances the PBT was, was the one that tipped the bird into probable cause. If he would have had the probable cause before, he should have arrested him and done that and not even done a PBT….

(R.20 at 68:2-15; Pet'r's App. 12) (emphasis added.) Contrary to Zimmer's assertions, the Circuit Court actually considered the officer's testimony to be "very truthful." The Circuit Court never said the officer's testimony as to Zimmer's appearance, behavior, statements, or Field Sobriety Test performance on the night

of his arrest lacked credibility—it in fact stated the direct opposite. Consequently, it is entirely proper for this Court to rely on the officer's observations of Zimmer when it considers whether the Circuit Court failed to apply the proper standard for probable cause, and when it engages in its *de novo* review to determine whether the officer's observations satisfy the probable cause standard.

Zimmer asserts that when the Circuit Court said Officer Moss "couldn't answer that question truthfully," the court was referring to whether probable cause existed to arrest Zimmer. Resp't Br. 11. This assertion ignores the actual statement made on the record. Contrary to Zimmer's argument that the officer's lack of credibility pervaded the entire lower court proceeding, or that it related directly to the question of probable cause to arrest, the only answer the lower court said was not answered truthfully was the officer's response to the question, "Why didn't you arrest him then?" (R.20 at 71:16; Pet'r's App. 15; Resp't App. 116)

The officer's answer was, "Because we attempt to utilize a PBT to determine the level of intoxication on the subject as far as where they are at or if there is a possibility that a drug or narcotic is involved as well." The court responded, "Yeah, but it is not even admissible anyway. You know that," and the officer admitted that was true, the PBT is not admissible at trial. (R.20 51:11-17; Pet'r's App. 8.) The court may have believed the officer was admitting his first answer was wrong when he agreed that the PBT result was not admissible at trial. Yet the lower court did not explain how the result's inadmissibility at *trial* would prevent a police officer in the field from considering the result an indicator of Zimmer's level of impairment (especially since that is the entire point of the PBT), or from considering a negative result may suggest consumption of intoxicating substances other than alcohol.

Zimmer contends that the court was giving the officer "credit" for not digging himself a "deeper hole," Resp't Br. 11, but the only "hole" that had been dug was the officer's opinion that the PBT result could be used to determine the subject's level of impairment and whether other drugs may be on board instead of

alcohol. Even *Zimmer* agrees that the PBT is used for this purpose: "[I]f the PBT result is below the legal limit, but the subject is demonstrating significant signs of impairment, the officer *will almost certainly* order blood work because the officer suspects that the person may be under the influence of drugs beyond alcohol." (Resp't Br. 17) (emphasis in the original.) Why the court did not believe the PBT could be used in this manner is unclear. What *is* clear is the Circuit Court considered the other answers proffered by the officer "very truthful," and therefore proper for this Court to consider when engaging in its review as to whether probable cause to arrest was present without the PBT result.

II. This Court Is Not Precluded from Deciding the Appeal Merely Because the City Failed to Object to the Lower Court's Decision.

A. An Appellant Need Not Object after the Lower Court Renders Its Decision to Preserve the Right to Appeal that Decision.

Zimmer asserts that because the City did not object to the Circuit Court's decision at the close of the hearing, the City waived the issues raised in its Brief in Chief. (Resp't Br. 14-16.) Zimmer does not cite any authority for his assertion the City was required to object to the Circuit Court's ultimate decision on the merits of the motion the City had just vigorously argued against. Nor could he, since no such authority exists.

The point of the waiver rule is to ensure the lower court has the opportunity to consider an issue and address it prior to an appeal. State v. Huebner, 2000 WI 59 ¶12, 235 Wis. 2d 486, 611 N.W.2d 727. The lower court obviously had such an opportunity here—the entire hearing concerned whether Officer Moss had probable cause to arrest and whether he properly administered the PBT. It ruled on those issues after it considered the arguments of the parties and heard evidence in the form of sworn testimony. The issue as to whether it reached a proper decision on those issues is properly before this Court.

B. The City Did Not Waive Its Right to Appeal by "Actively Contributing" to the Lower Court's Decision to Dismiss.

Zimmer next cites two sections of the record he believes shows the City "actively contributed" to the court's dismissal of the case. Resp't Br. 15-16. The cases Zimmer cites describing the rule he calls "active contribution" do not stand for the proposition that the City's actions warrant dismissal of this appeal. Furthermore, the City never "actively contributed" to the case's dismissal.

The case upon which Zimmer relies for the proposition that the City waived its right to appeal because the City "actively contributed" to the case's dismissal, *see* Resp't Br. 15, does not apply to the situation here. In State v. Gove, the Court of Appeals held:

> It is contrary to the fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was in error.

148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). Here, the City gained no advantage due to the case's dismissal. It also never took the position that Officer Moss lacked probable cause to arrest or had improperly administered the PBT.

The City's statements were made *after* the Circuit Court found the officer improperly used the PBT and lacked probable cause to arrest. The parties and the court then discussed the effect those decisions had on the case. The City made the first statement after the court had already decided the officer lacked probable cause to arrest and had stated, "I am going to find that the matter of fruit of the poisonous tree." (R.20 at 69:15-16; Pet'r's App. 13; Resp't App. 114.) After Zimmer responded by moving to exclude evidence of the chemical test result, the City said, "*based on the court's decision* it would be appropriate for it to suppress the test result." (Id.) (emphasis added.) There was no other logical response to make after the court had already said the fruit of the poisonous tree doctrine applied.

The City made the second statement after the lower court reiterated its findings that Officer Moss lacked probable cause to arrest and the blood test was suppressed. (R.20 at 70:21-24; Pet'r's App. 14; Resp't App. 155.) The City responded, "*And if the Court does all those things,* the officer had no probable cause at all to arrest, then it would be appropriate to dismiss the charges." (R.20 at 70:25-71:3; Pet'r's App. 14-15; Resp't App. 115-116) (emphasis added.) Again, the City merely expressed the obvious: since the court decided that the officer lacked probable cause to arrest, the arrest and the charges stemming from the arrest were unsupported by sufficient evidence, violated Zimmer's Fourth Amendment rights, and were invalid. The writing was on the wall—the court was going to dismiss because the charges were invalid based on its decision.

The City argued against the court's ultimate decision at the hearing and also prior to the hearing in a brief. (Index filed in consolidated case 21-AP-1531 at R.21.) It has not deviated from those positions and has not waived its appeal right.

C. The Record Does Not Support Zimmer's Contention that the Court Used an Objective Standard When Determining Probable Cause.

Zimmer next argues when the court stated, "I personally think he had more than enough probable cause before the PBT," (R.20 at 72; Pet'r's App. 16, Resp't App. 117), and then held the officer lacked probable cause, it was because the court was separating its own "subjective" view of the evidence from its "objective" one. Resp't Br. 19. But the lower court did not say anything on the record suggesting its 'personal' belief differed from its 'objective' belief. Instead, it stated, "[Officer Moss] is the guy who was the determining factor," (R.20 at 72; Pet'r's App. 16, Resp't App. 117).

If a court thinks an officer possesses sufficient probable cause based on the facts presented, that logically *is* its 'objective' opinion unless the judge disagrees

with the law. There is no evidence the lower court disagreed with the law regarding probable cause to arrest.

III. The Officer's Use of the PBT Unit in this Case Was Proper, Notwithstanding Whether Its Use Is Governed by the Fourth Amendment.

Zimmer argues that even if the officer possessed sufficient probable cause to arrest him without relying on the PBT result, the improper use of a PBT requires suppression of the results of a post-arrest draw of Zimmer's blood, taken pursuant to Wis. Stat. §343.305, the Implied Consent statute. Resp't Br. 16. No case involving a PBT stands for this proposition.

Zimmer relies on a 1963 Supreme Court case, Wong Sun v. U.S., 371 U.S. 471 (1963), for his contention that if the blood test was an "indirect product" of the PBT, the blood test must be suppressed. Resp't Br. 16-17. Zimmer argues that "because the PBT can be directly tied to a law enforcement officer's decision whether to seek a blood, breath or urine test from a suspected impaired driver, if there is a Fourth Amendment violation, it should result in suppression of the blood test under the fruit of the poisonous tree doctrine…." Resp't Br. 16.

There is no evidence in this case "directly tying" the PBT result with the officer's later request for a blood sample under the Implied Consent law. The PBT result was not even introduced at the hearing. The officer never testified that the PBT result drove his decision to request a blood test instead of a breath or urine test. Zimmer also offered no other evidence suggesting Waukesha Police Officers regularly select a particular test based on the PBT result.

Zimmer argues that the blood test must be at least indirectly related to the PBT result because,

> [i]t is the *seizure* of the breath sample—and *only* this seizure—which provides the distinguishing information between alcohol and other substances and thereby affects the officer's decision regarding how to proceed.

Resp't Br. 18 (emphasis in the original.)

The problem with Zimmer's argument is an officer need not determine the type of intoxicating substance consumed before requesting a test under the Implied Consent statute. The Implied Consent statute only requires that the arrestee be under "arrest… for violation of s. 346.63(1)… or a local ordinance in conformity therewith" in order to request a sample of the arrestee's "breath, blood *or* urine…." Wis. Stat. §343.305(3)(a) (emphasis added.) Nothing prohibits the officer from requesting a blood draw in every instance, which would reveal all intoxicating substances the subject consumed.

The Implied Consent statute goes on to state that "Compliance with a request for one type of sample *does not bar a subsequent request for a different type of sample*." Id. If an officer possessed probable cause to arrest without a PBT, an officer could therefore use an Intoxilyzer to obtain a breath result to determine whether to request a blood draw. Consequently, the PBT result is not the only piece of evidence—or even the only *seizure*—informing the officer's decision to request a particular test.

Zimmer also misapplies the Wong Sun case upon which he relies to make his argument. The Wong Sun Court explicitly held that the real question "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made *has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint*." Wong Sun, 371 U.S. at 488 (emphasis added).

If the PBT in question was improper but the officer possessed probable cause to arrest before he requested it, then the subsequent blood draw was obtained without using the PBT result "at all." Consequently, the officer obtained the blood test result by a "means sufficiently distinguishable" from the PBT result.

Based on the foregoing, issues regarding the PBT's administration need not be decided in this case if Officer Moss possessed probable cause to arrest without it. State v. Castillo, 213 Wis. 2d 488 ¶12, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.")

Finally, Zimmer asserts the City is arguing an officer need not "request" that a subject perform a PBT. *See* Resp't Br. 19. That is not the City's argument; a "request" is expressly required by the statute. Wis. Stat. §343.303. The City differs with Zimmer as to what that "request" must entail. Pet'r's Br. 26-28.

CONCLUSION

Most of Defendant/Respondent Zimmer's arguments in his Response Brief fail because they rely on his assertion the officer's testimony was not credible, when the court expressly stated his testimony was "very truthful." The City did not lose its right to appeal because it failed to object after the lower court made its decision, or because it acknowledged that the case would be dismissed after the court threw out practically all the evidence. Zimmer's arguments as to the PBT result only potentially hold water if officers have to request a particular test based on the PBT result, and they do not.

The City requests that this Court reverse the lower court's finding of no probable cause to arrest without the PBT result; or, if it concludes probable cause to arrest was not shown before the PBT was administered, direct the trial court to consider the PBT result as part of its determination of probable cause to arrest.

Dated this 28th day of January, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 2,783 words.

Dated this 28th day of January, 2022.

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