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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No, 2021AP002054
Court Case No. 2019CT000188

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBIN D. SMOLAREK,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR WAUPACA COUNTY
THE HONORABLE TROY L. NIELSEN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Did the trial court err in denying the defendant's motion to suppress?

STATEMENT ON ORAL ARGUMENT

The State is not requesting oral argument in this case. Rather, the State believes that the issue can be presented and addressed adequately in written argument.

STATEMENT ON PUBLICATION

The State does not request publication. This case can be resolved by applying well-established legal principles to the facts of the case.

STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)(2). Facts additional to those presented in Appellant's brief will be set forth where necessary within the argument section.

ARGUMENT

- II. **BASED ON THE TOTALITY OF THE CIRCUMSTANCES TROOPER BURDICK HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR OPERATING A MOTOR VEHICLE WITH A RESTRICTED CONTROLLED SUBSTANCE IN HIS BLOOD.**

On Sunday, April 16th, 2017 Trooper Sarah Burdick, of the Wisconsin State Patrol, responded to a pickup truck versus motorcycle crash where the truck was reported to have dragged the motorcycle down the roadway. Trooper Burdick made

contact with the driver of the motorcycle and arranged to meet him at the hospital to take a statement and investigate the crash. While investigating the crash, the driver (Robin Smolarek, the defendant-appellant) admitted to Trooper Burdick that he had smoked marijuana prior to the crash. Charges of OWI 3rd were referred and the defendant-appellant remained in the hospital for treatment of his injuries.

While at the hospital with Smolarek, Trooper Burdick spoke with Smolarek about the crash and events leading up to the crash as part of her crash investigation. Smolarek admitted to Trooper Burdick that he had been smoking marijuana prior to the crash. After this admission, Trooper Burdick read Smolarek the informing the accused and completed the Alcohol/Drug Influence Report. At this point, Smolarek, having been advised that he was suspected of having committed a crime, changed his version of the time of events and stated that he had only used marijuana after the crash. Smolarek then consented to an evidentiary chemical test of his blood.

Trooper Burdick noted in her narrative report that "While I cannot know if Smolarek did in fact smoke marijuana and take a shower immediately after the crash, I have reason to believe that he did neither of those activities. The marijuana smoking after the crash only came up after Smolarek was advised of how the blood test worked. This is odd because before being told he was being charged with OWI, he had stated he did nothing but wait for an officer. Smolarek was also wearing bloody ripped clothing when I arrived. His hair was not visibly wet either, making it hard to believe that he showered recently." (App.149 Para.2)

Smolarek moved the Circuit Court for an order suppressing the blood test evidence, which was denied by the Court. This appeal of the decision not to suppress the blood test evidence follows a plea of no contest entered by Smolarek to operating with a detectible amount of restricted controlled substance.

The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience. State v. Lange, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 392–93, 766 N.W.2d 551, 555.

In looking at the totality of circumstances in this case, Trooper Burdick had been employed as a Law Enforcement Officer with the State Patrol for over one year at the time of the crash underlying the charges in this case. She further indicated that one of her duties as a Patrol Officer is to investigate motor vehicle crashes and drunk-driving offenses. (App.104 Ln. 15-25, 105 Ln.7-19). Her involvement in the case at bar was to investigate the crash in which Smolarek had been involved, causing him to be injured. During the course of her investigation, Trooper Burdick asked questions to inform her investigation of the crash. Some of those questions related to whether there was any intoxicant that had been consumed by Smolarek, one of the drivers. (App.106 Ln.17-24)

Smolarek asserts on this appeal that there was insufficient basis for probable cause, and attempts to direct the Court's attention to the statements made after Smolarek was under arrest. However, the defendant-appellant conceded, at the plea and sentencing hearing nine months after the motion to suppress was heard, that there was a recording that was provided as part of discovery, which captured Smolarek admitting to smoking marijuana before the accident, and states that the fact that this recording would be presented by the State at trial was the basis for the plea of no-contest entered. (App.140 Ln. 23-25, 141 Ln. 1-2).

The Court correctly determined that "[o]bviously, the initial contact that Trooper Burdick had with this defendant was as a part of an accident investigation and through the course of that investigation, Mr. Smolarek, as I understand the testimony, admitted to smoking marijuana earlier in the day; thus prior to the operation of the motorcycle...through the course of the investigation...that statement changed for Mr. Smolarek. Obviously, I don't know what is or isn't true and, the reality is, a finder of fact at trial can discern that." (App.127 Ln.14-24). Due to Smolarek's having "...unequivocally admitted to driving a motorcycle who sounds like at one point admitted to consuming THC earlier in the day. That is enough for an arrest and blood draw..." (App.128 Ln.11-15).

CONCLUSION

Based on the record in this case, this Court should find that the Circuit Court did not err when denying the Defendant's motion to suppress. It is clear based on the totality of the circumstances that Trooper Burdick had probable cause to arrest the Defendant for Operating a Motor Vehicle with a detectable amount a restricted controlled substance in his system, and to perform an evidentiary test of his blood.

Respectfully Submitted,



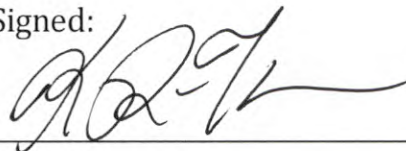
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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and 3b in that it is a monospaced font, 10 characters per inch, double spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 1,723 words.

DATED this 21st DAY OF APRIL 2022

Signed:



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

I hereby certify that:

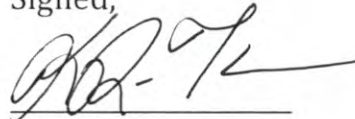
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 809.19(2). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

DATED this 21st DAY OF APRIL 2022

Signed,



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