STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP73-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ANDREW A. KEENAN-BECHT,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, BRANCH V, THE HONORABLE ROBERT J. WIRTZ PRESIDING, TRIAL COURT CASE NO. 19-CT-180

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

Other Authority

STATEMENT OF THE ISSUE

WHETHER THE ARRESTING OFFICER IN THE INSTANT CASE LACKED PROBABLE CAUSE TO ARREST MR. KEENAN-BECHT IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

> Trial Court Answered: NO. A sufficient factual basis existed to establish probable cause to arrest Mr. Keenan-Becht based upon his "admission to drinking, [his] eyes, the odor [of intoxicants], [and] the HGN clues." R86 at 6:16-18; D-App. at 106.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question of law regarding whether an undisputed set of facts rises to the level of meeting a legal standard. The issue presented is of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the common law at issue in this matter is fully developed, and therefore, publication would do little, if anything, to enhance the relevant body of jurisprudence.

STATEMENT OF THE CASE

Mr. Keenan-Becht was charged in Fond du Lac County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on February 10, 2019. R1.

After retaining private counsel, Mr. Keenan-Becht filed several pretrial motions, including a motion challenging whether the law enforcement officer in the instant matter had probable cause under Wis. Stat. § 343.303 to seize a sample of Mr. Keenan-Becht's breath and, in the same motion, whether probable cause existed to arrest him. R16 at Section IV., ¶¶ 14-21. An evidentiary hearing was held on

Mr. Keenan-Becht's motion on January 13, 2021, at which the arresting officer, Trooper Matthew Ackley, testified as the State's only witness. R29 at pp. 5-36.

After the evidentiary hearing, supplemental briefs were filed by both parties. R30, R31, R32. On March 22, 2021, the circuit court granted Mr. Keenan-Becht's motion with regard to the suppression of the preliminary breath test result, however, it denied his motion regarding probable cause to arrest on the ground that the time of day along with Mr. Keenan-Becht's "admission to drinking, [his] eyes, the odor [of intoxicants], [and] the HGN clues" cumulatively rose to the level of establishing probable cause to arrest. R86 at pp. 4-6; D-App. at 104-06.

Mr. Keenan-Becht's case proceeded to a jury trial at which he was found not guilty of the operating while intoxicated offense but was found guilty of operating with a prohibited alcohol concentration. R63, R64.

It is from the adverse decision of the circuit court that Mr. Keenan-Becht now appeals to this Court by Notice of Appeal filed on January 18, 2022. R70.

STATEMENT OF FACTS

On February 10, 2019, Mr. Keenan-Becht was stopped and detained in the Town of Friendship, Fond du Lac County, by Trooper Matthew Ackley of the Wisconsin State Patrol for allegedly operating his motor vehicle in excess of the posted speed limit. R1; R29 at 6:19 to 8:8.

Upon making contact with Mr. Keenan-Becht, Trooper Ackley "noticed that [Mr. Keenan-Becht had] some watery and red eyes and the odor of intoxicating beverages coming from inside the vehicle." R29 at 8:15-17. Trooper Ackley asked Mr. Keenan-Becht to submit to a battery of field sobriety tests, to which request Mr. Keenan-Becht consented. R29 at 8:19 to 9:15.

The first field sobriety test to which Mr. Keenan-Becht submitted was the horizontal gaze nystagmus [hereinafter "HGN"] test. R29 at 9:18-19. According to Trooper Ackley, Mr. Keenan-Becht displayed only *four* of six possible clues on this test. R29 at 9:12-17.

Upon completing the HGN test, a walk-and-turn [hereinafter "WAT"] test was administered to Mr. Keenan-Becht, which he passed, allegedly displaying only one clue according to the trooper. R29 at 10:25 to 11:22. The lower court, however,

had the opportunity to review the video record of Mr. Keenan-Becht's performance on the field sobriety tests and, based upon that review, found that:

> The officer, while trying to say there weren't clues on the walk-and-turn but that there were observations as part of the so-called totality of the circumstances, that Mr. Keenan-Becht had slowed to [nearly] losing his balance and that he typically wouldn't see that from sober drivers, I found that unbelievable. Quite honestly, the officer's attempt to over-exaggerate—maybe that's too strong of a term, but the attempt to say that the—that there were some indicia of some problems on the walk-and-turn just weren't obvious to this Court in watching that.

R86 at 5:14-23; D-App. at 105.

The last test administered to Mr. Keenan-Becht prior to the preliminary breath test was a one-leg stand [hereinafter "OLS"] test. R29 at 14:13-14. Mr. Keenan-Becht also passed this test by allegedly displaying only one clue of impairment,[1] however, the lower court found this "clue" specious as well when it observed:

> And, likewise, the same was true with the one-leg stand, where the trooper was trying to say that—that although not a clue, the defendant didn't follow instructions by being told to look at his foot. Again, this—this wasn't observable behavior from looking at the video and I found that testimony difficult to believe.

R86 at 5:24 to 6:4; D-App. at 105-06.

Other facts of particular relevance to the issue on appeal which were gleaned from Trooper Ackley's testimony at the evidentiary hearing include the following:

> Mr. Keenan-Becht drove his motor vehicle nine miles per hour over the posted speed limit, *i.e.* he was driving at 59 mph in a 50 mph zone (R29 at 21:6-8);
>
> The trooper observed no other erratic driving, lane deviation, swerving, weaving, *etc*. (R29 at 21:22 to 22:6);
>
> Mr. Keenan-Becht responded in a timely manner when the trooper turned on his emergency lights (R29 at 22:7-9);
>
> Mr. Keenan-Becht parked promptly, safely, and appropriately at roadside at the first point which he was able to do so (R29 at 22:10-20);
>
> Mr. Keenan-Becht did not exhibit any problems with his speech, *i.e.*, it was neither slow nor slurred (R29 at 22:21-25; 23:4-7);

[1]R29 at 14:14-16.

> Mr. Keenan-Becht had no difficulty with his fine motor skills in that he was able to retrieve his driver's license as requested, *i.e.*, he did not display poor finger dexterity, slow or unusual movements, *etc*. (R29 at 23:8-15);
>
> Mr. Keenan-Becht was fully oriented to his surroundings and did not appear confused, disoriented, or otherwise having trouble with his mentation throughout his encounter with the trooper (R29 at 23:15-21);
>
> Mr. Keenan-Becht had no difficulty exiting his motor vehicle when asked to do so, *i.e.*, he did not lose his balance nor demonstrate any unsteadiness on his feet (R29 at 23:22-25);
>
> When walking about or standing with the trooper, Mr. Keenan-Becht displayed no problems with his balance or coordination (R29 at 24:1-4); and
>
> Mr. Keenan-Becht did not sway or "orbit" during the HGN test (R29 at 25:8-12).

Despite suppressing the preliminary breath test result—and even in light of all of the foregoing—the circuit court nevertheless found that probable cause to arrest Mr. Keenan-Becht existed under the totality of the circumstances. R86 at pp. 4-6; D-App. at 104-06.

STANDARD OF REVIEW ON APPEAL

This appeal presents a question relating to whether a particular set of facts rises to the level of providing a law enforcement officer with probable cause to arrest. Because the facts are not in dispute, the question of whether those facts satisfy the constitutional standard of probable cause to arrest is a question of law which this Court reviews *de novo*. *State v. Drogsvold*, 104 Wis. 2d 247, 311 N.W.2d 243 (Ct. App. 1981).

ARGUMENT

I. TROOPER ACKLEY LACKED PROBABLE CAUSE TO ARREST MR. KEENAN-BECHT IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Statement of the Law as It Relates to the Fourth Amendment and the Probable Cause Standard in General.

The starting point for any analysis of the constitutionality of a seizure must begin with the foundations established by the Fourth Amendment itself. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

> shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

The principal "purpose [of the Fourth Amendment] is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious or arbitrary police action is not tolerated under the umbrella of the Fourth Amendment. "The basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d 516 (1983)(emphasis added); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

In order to safeguard individuals against arbitrary invasions of their security, the Fourth Amendment requires that before a person is arrested, probable cause first exists to believe that they have committed a crime. *Dunaway v. New York*, 442 U.S. 200, 208 (1979). "Probable cause, although not easily reducible to a stringent, mechanical definition, generally refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986)(citations omitted). "Probable cause exists where the *totality of the circumstances* within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe . . . that the defendant" has committed a crime. *Id*. (emphasis added).

According to the Wisconsin Supreme Court in *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982):

> The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. **The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense.**

Id. at 329 (emphasis added).

When assessing whether the conduct of law enforcement officers is constitutional under the Fourth Amendment, "the 'touchstone of the Fourth

Amendment is **reasonableness**.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)(emphasis added), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

The Wisconsin Supreme Court has held that an action is "reasonable" under the Fourth Amendment "'as long as the circumstances, viewed objectively, justify [the] action.'" *State v. Howes*, 2017 WI 18, ¶ 21, 373 Wis. 2d 468, 893 N.W.2d 812, citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006), quoting *Scott v. United States*, 436 U.S. 128, 138 (1978). Thus, the question in the instant case becomes whether it was reasonable for Trooper Ackley to conclude that he had probable cause to believe that Mr. Keenan-Becht operated a motor vehicle while impaired. For the reasons set forth below, Mr. Keenan-Becht proffers that Trooper Ackley's decision to arrest him was constitutionally *un*reasonable.

B. Application of the Law to the Facts.

The issue to be determined from the evidence adduced at the hearing on Mr. Keenan-Becht's motions is whether, under the totality of the circumstances, a sufficient factual basis exists to conclude as a matter of law that Trooper Ackley had probable cause to arrest Mr. Keenan-Becht. In order to make this determination, it is necessary to look beyond the few factors upon which the circuit relied when it rendered its decision to the *totality* of the facts which existed in this case.

As set forth in the Statement of Facts, *supra*, the following information was objectively known to the trooper prior to concluding that he had probable cause to arrest Mr. Keenan-Becht:

(1) Mr. Keenan-Becht was speeding by driving his motor vehicle nine miles per hour over the posted speed limit, *i.e.* he was driving at 59 mph in a 50 mph zone (R29 at 21:6-8);

(2) Mr. Keenan-Becht engaged in *no other* erratic driving, lane deviation, swerving, weaving, *etc*. (R29 at 21:22 to 22:6);

(3) Mr. Keenan-Becht responded in a timely manner when the trooper turned on his emergency lights (R29 at 22:7-9);

(4) Mr. Keenan-Becht parked promptly, safely, and appropriately at roadside at the first point which he was able to do so (R29 at 22:10-20);

(5) Mr. Keenan-Becht did not exhibit any problems with his speech, *i.e.*, it was neither slow nor slurred (R29 at 22:21-25; 23:4-7);

(6) Mr. Keenan-Becht had no difficulty with his fine motor skills in that he was able to retrieve his driver's license as requested, *i.e.*, he did not display poor finger dexterity, slow or unusual movements, *etc*. (R29 at 23:8-15);

(7) Mr. Keenan-Becht was fully oriented to his surroundings and did not appear confused, disoriented, or otherwise having trouble with his mentation throughout his encounter with the trooper (R29 at 23:15-21);

(8) Mr. Keenan-Becht had no difficulty exiting his motor vehicle when asked to do so, *i.e.*, he did not lose his balance or have to lean on his vehicle for support (R29 at 23:22-25);

(9) When walking about or standing with the trooper, Mr. Keenan-Becht displayed no problems with his balance or coordination (R29 at 24:1-4);

(10) Mr. Keenan-Becht did not sway or "orbit" during the HGN test (R29 at 25:8-12);

(11) Mr. Keenan-Becht displayed only *four of six* clues on the HGN test (R29 at 26:10-13);

(12) Mr. Keenen-Becht allegedly displayed only one clue on the walk-and-turn WAT test, however, the lower court found the trooper's assertion that there were any indicators of impairment on this test "unbelievable," and even it this Court rejects the lower court's finding, one clue is not indicative of impairment according to the National Highway Traffic Safety Administration [hereinafter "NHTSA"]; and

(13) The lower court found no "observable behavior" on the OLS test which was indicative of impairment and, more importantly, found the trooper's testimony in this regard "difficult to believe."

The foregoing facts are all a part of the "totality" which needs to be examined by this Court when assessing whether there was probable cause to arrest Mr. Keenan-Becht. It is Mr. Keenan-Becht's position that when all of the foregoing are taken together, the scales do not simply "tip" in favor of Mr. Keenan-Becht in terms of the trooper lacking probable cause to arrest him, but swing heavily in his favor because *nothing* of the foregoing supports a probable cause finding. In fact, when taken together, all of the foregoing serve to *undercut* such a conclusion.

During the trooper's testimony, and during the arguments made at the conclusion of the motion hearing, much was made of the "robustness" study NHTSA undertook to re-evaluate the HGN test. The arguments focused on the conclusions which could be drawn, if any, from an individual who displays only four of six clues on the HGN test. R29 at 47:22 to 49:10. This robustness study is significant because its data indicates that the majority of individuals who displayed only **four clues** had blood alcohol levels ***below* .08**. *See* U.S. Department of Transportation, National Highway Traffic Safety Administration, *The Robustness of the Horizontal Gaze Nystagmus Test*, Pub. No. DOT HS 810 831 (Sep. 2007). Mr. Keenan-Becht's alleged display of only four clues is therefore hardly damning

and, in fact, supports his contention that there was insufficient probable cause to conclude he was impaired.

Much ado was made by the State in the proceedings below about Mr. Keenan-Becht's performance on the WAT and OLS tests. Before Mr. Keenan-Becht carves into the meat on this bone, it is important to remember that *even if one counts the display of a single clue on each of these tests, one (1) clue is not considered to be evidence of impairment according to NHTSA*. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *DWI Detection and Standardized Field Sobriety Testing (SFST)*, Session VIII, at pp. 70 & 79 (Rev. 02/2018). The display of single clue on each of these tests is—for lack of a better word—a "pass."

Despite the foregoing, Mr. Keenan-Becht is ***not*** conceding that any clues were observed on either the WAT or OLS tests. The lower court correctly characterized Trooper Ackley's testimony regarding his observations on the WAT and OLS tests as "unbelievable," "over-exaggerated," and "difficult to believe." Based upon these conclusions, there is literally *nothing* to be taken from either the WAT or OLS tests which supports a probable cause determination, and, if anything, the lower court's finding regarding the trooper's credibility should have further undermined any conclusion that probable cause to arrest existed in this case.

Digging even deeper into the trooper's testimony, even though he asserted that Mr. Keenan-Becht displayed the clue of "stopping" during the WAT test, the trooper voluntarily backpedaled on this claim during direct examination at the evidentiary hearing. When he was being questioned by counsel for the State about Mr. Keenan-Becht displaying the clue of "stopping" during the WAT test, the trooper *sua sponte* admitted that "because of the hood of the car . . . blocking the camera view of his feet . . . for those first couple of steps that I indicated in the report where he stopped, **it may have been possible he did not stop or he could have stopped** . . . [I]t looked like he stopped, but I couldn't see the feet, so not 100 percent sure if he actually stopped for those first few steps." R29 at 11:6-11 (emphasis added). On cross-examination, counsel for Mr. Keenan-Becht confirmed that the trooper was "backing-off" on his assertion that Mr. Keenan-Becht stopped during the WAT test when he asked the trooper whether it appeared from the video record that Mr. Keenan-Becht had not "stopped at any point during the walk-and-turn test." R29 at 27:20-21. Counsel then pressed the trooper further on this point to confirm that "it seem[ed] that [he was] saying the same thing," *i.e.*, it appeared as though Mr. Keenan-Becht had *not* stopped walking. R29 at 27:21-23. Trooper Ackley conceded that not only did it appear that way, but also that he was concurring that this was a correct interpretation of the video record. R29 at 27:21-24. It is readily apparent that the trooper's concession in this regard is *significant* in that it further removes the WAT test from providing support for the conclusion that Mr. Keenan-

Becht was impaired. Again, the lower court agreed with Mr. Keenan-Becht's point in this regard when it found the trooper's testimony to be "unbelievable." R29 at 5:19-20; D-App. at 105.

Strikingly, the trooper's credibility was further diminished when he was examined regarding his interpretation of the OLS test. Even though Mr. Keenan-Becht could already have been characterized as "passing" this test by allegedly displaying only one clue, *i.e.*, "swaying" while standing, the trooper maintained that this clue was, in fact, present even in the face of *overwhelming video evidence* to the contrary which the lower court observed. The objective video evidence in this case—evidence which owes no allegiance to either party—so clearly showed that Mr. Keenan-Becht was standing like some immovable monolith during the OLS test that the lower court found the trooper's assertions to the contrary "difficult to believe."

Mr. Keenan-Becht must ask what value are field sobriety tests really supposed to have if a person can pass 75% of the same and still be deemed to be impaired to the point where probable cause exists to arrest him? The tests are supposedly designed to discern who is *likely* to be impaired. If the only tool law enforcement officers have to winnow the wheat from the chaff in a probable cause determination is disregarded or ignored when the outcome of the individual tests are not what the officer wanted or expected them to be, then the tests themselves should be dispensed with and law enforcement officers should simply proceed directly from the moment a person is pulled over to full-blown, formal custody.

Beyond the foregoing, the "value" of many of Trooper Ackley's other observations of alleged impairment, even when taken together, is *de minimus* or actually *counterintuitive* to evidence of impairment. To cite a few examples, this Court should consider that the alleged "bad" driving in the instant case—speeding—is potentially proof of Mr. Keenan-Becht's *lack* of impairment. Operating a vehicle at a speed in excess of the maximum safe speed posted for a highway requires a person to exercise *greater* control over the vehicle given the shortened reaction times at higher rates of speed. Impairment would be indicated by a *lessening* of one's ability to control the motor vehicle, not by proof of a person's ability to safely operate a vehicle with shorter reaction times as the trooper noted when he admitted that Mr. Keenan-Becht committed no other traffic violations and responded in a timely manner to his squad lights.

Similarly, nowhere within the four corners of this case is there any component allegation that Mr. Keenan-Becht's mentation was impaired. To the contrary, the record throughout demonstrates that Mr. Keenan-Becht engaged in intelligent conversation with Trooper Ackley, followed directions given to him,

responded appropriately to questions put to him, *et al*. In addition, there were no problems of any kind with Mr. Keenan-Becht's speech. He was able to speak without difficulty and articulate his words properly during prolonged periods of conversation with the trooper. In short, this case lacks any evidence of impairment of Mr. Keenan-Becht's mentation. It is well known that alcohol does not discriminate, *i.e.*, it not only affects *physical* coordination, but it affects a person's ability to think and articulate clearly as well. When there is an absence of any effect on a person's mentation, such evidence *contraindicates* impairment by alcohol.

These factors, or more correctly, the *absence* of any negative inferences from these factors, were not weighed as part of Trooper Ackley's decision to arrest Mr. Keenan-Becht because if they had been, Trooper Ackley would have realized that on balance, the objective totality of the circumstances in this matter did not rise to the level of satisfying the probable cause standard.

While the lower court found that probable cause to arrest Mr. Keenan-Becht existed, Mr. Keenan-Becht is of the opinion that the court did not consider the *totality* of the circumstances as it should have. Instead, the lower court took a narrower, more tunnel-visioned approach by focusing solely on Mr. Keenan-Becht's "admission to drinking, [his] eyes, the odor [of intoxicants], [and] the HGN clues."[2] R86 at pp. 4-6; D-App. at 104-06. Mr. Keenan-Becht proffers that this insular approach is erroneous for the following reasons.

First, from a purely legal perspective, the circuit court's narrow approach to the *totality* of the circumstances test undermines the very definition of what "totality" means. Precisely because it is an objective "*totality* of the circumstances" test which must be employed to assess probable cause to arrest, a court cannot consider only those facts favorable to the State as though they existed in a vacuum. A court must consider all of the facts which mitigate against a conclusion that probable cause exists just as it should account for those to be proffered by the State in support of a probable cause determination. Mr. Keenan-Becht's point in this regard is best made by analogy. Assume, *arguendo*, there is a housefire and arson is suspected. While officers are establishing a perimeter for the fire department, they observe an individual holding a cigarette lighter watching the housefire burn. If these were the only facts known to a reviewing court, it might conclude under the totality of the circumstances that the arrest of the individual for starting the housefire was justified. If, however, just a few more facts which were known to the officers were revealed, the arrest of the individual may no longer have been constitutionally justified, to wit: (1) the person was the neighbor of the house which was ablaze and

[2]Obviously, Mr. Keenan-Becht's speeding and red eyes factor into this equation as well. These factors, however, have been and are addressed throughout this Brief.

he was standing in his own yard, and (2) the individual was found to have a pack of cigarettes on his person; had a recently lit cigarette in his mouth and was known to the officers as a chain smoker. Suddenly, an examination of the *totality* of the circumstances undercuts the notion that probable cause existed to arrest this individual. This Court should, therefore, give close and careful consideration to **all** of the additional factors known to Trooper Ackley at the time he encountered Mr. Keenan-Becht beyond the few identified by the circuit court.

Second, the lower court's reliance on Mr. Keenan-Becht's admission to consuming intoxicants should not carry the weight the lower court believed it did. More specifically, in *State v. Gonzalez*, No. 2013AP2535-CR, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. May 8, 2014)(unpublished),[3] the court of appeals began its analysis by observing that:

> "Not every person who has consumed alcoholic beverages is 'under the influence' …." Wis JI—Criminal 2663. Instead, reasonable suspicion of intoxicated driving generally requires reasonable suspicion that the suspect is "[u]nder the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving." *See* Wis. Stat. §§ 346.63(1)(a) and 346.01(1).

Gonzalez, 2014 WI App 71, ¶ 13. Clearly, the *Gonzalez* court was recognizing that an odor of intoxicants is not the *sine qua non* of an operating while intoxicated violation and that its value in this regard is minimal precisely because it is *not* illegal to consume intoxicants and operate a motor vehicle. It is, as the *Gonzalez* court correctly observed, only illegal to do so if one becomes impaired by that consumption. Put another way, the odor of intoxicants is a "confirmatory" observation as opposed to a "direct" observation of impairment. That is, when considered in light of such things as an inability to control one's physical coordination or to think clearly, an odor of intoxicants can confirm that the observed impairment is due to the consumption of alcohol. Standing alone, however, the odor cannot directly establish that impairment of coordination and mentation exists in the *absence* of such other indicators. Reviewing the decision of the lower court, it appears as though the court was using odor as *direct* evidence of *impairment* rather than as being *confirmatory* because there was literally nothing negative exhibited by Mr. Keenan-Becht with respect to his coordination or mentation for the odor to have confirmed in the first instance. The circuit court's decision is, therefore, not supported by the facts.

Third, even the circuit court's reliance on Mr. Keenan-Becht having "red eyes" is not that telling given the hour of his detention. Mr. Keenan-Becht was

[3]The foregoing decision is a limited precedent opinion which may be cited for its persuasive value pursuant to Wis. Stat. § 809.23 (2021-22).

stopped at approximately 2:00 a.m. R86 at 5:3; D-App. at 105. Given the early hour, it is just as likely that Mr. Keenan-Becht's red eyes were the result of a lack of sleep or fatigue as they were evidence of impairment by alcohol. This is not to say that "red eyes" are wholly irrelevant to a probable cause inquiry, but they should not be considered as much of a pillar in the court's decision as they were because the alleged observation of "red" eyes is not an *objective* fact. Every person has a varying amount of redness in their eyes. What one person characterizes as "red," another may characterize as "normal" since there is no objective tool or measure by which "redness" may be calculated. To be sure, this much was recognized in a National Highway Traffic Administration sponsored study which *eliminated* the consideration of bloodshot eyes as an indicator of impairment given its subjective nature. J. STUSTER, M. BURNS, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, DOT Pub. No. HS 808 839, at p.13 (August 1998). Given that U.S. Department of Transportation researchers are not even willing to consider red eyes as having any value at all in the assessment of whether a person is impaired, it should have had no value whatsoever in the lower court's probable cause calculus.

Finally, it is worth noting that the odor of an intoxicant is not as weighty an observation as the circuit court found it to be. In *Gonzalez*, the court relied on an earlier decision rendered in *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755 (Ct. App. July 14, 2010)(unpublished),[4] and noted:

> In *Meye*, at 3:23 a.m., a police officer detected a "strong" odor of intoxicants coming from two individuals who had just exited a vehicle, but the officer could not determine whether the odor was coming from the driver or the passenger. *Meye*, No. 2010AP336-CR, 2010 WI App 120, ¶ 2, 329 Wis. 2d 272, 789 N.W.2d 755. The officer initiated an investigatory stop of the driver on this basis. *See id*., ¶¶ 2-3. **The court in *Meye* rejected the proposition that the odor was enough to provide reasonable suspicion. *Id*., ¶ 6. The court indicated that there were no cases, published or unpublished, in which a court has held that "reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped."** *Id*.; *see also*, *State v. Resch*, No. 2010AP2321-CR, 2011 WI App 75, 334 Wis. 2d 147, 799 N.W.2d 929, unpublished slip op., ¶ 19 (WI App Apr. 27, 2011)("In *Meye*, this court held that the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated ...."). So far as I can tell, the *Meye* court's decision did not hinge on the ambiguity of whether the odor was coming from the driver or passenger. Rather, the court concluded that this

[4]The foregoing decision is a limited precedent opinion which may be cited for its persuasive value pursuant to Wis. Stat. § 809.23 (2021-22).

> ambiguity "exacerbated" "[t]he weakness of this seizure." *See Meye*, 2010AP336-CR, 2010 WI App 120, ¶ 9, 329 Wis. 2d 272, 789 N.W.2d 755.

Gonzalez, 2014 WI App 71, ¶ 19 (footnotes omitted; emphasis added).

When the facts of this case are considered in their totality, Mr. Keenan-Becht proffers that probable cause to arrest him for an operating while intoxicated offense did not exist. Beyond the lower court's impugning of the trooper's character for truthfulness, what remains—if it is to be believed—consists of subjective observations in part or is itself counterindicative of impairment. If field sobriety testing is to have any credibility at all, then when a suspect passes two of three tests and scores less than the "typical" number of clues on the remaining test, probable cause to arrest should not be found lest the Fourth Amendment's protections become mere window dressing.

C. Other Considerations.

In closing, it is worth emphasizing that the parties to this appeal are *not* "starting on a level playing field." That is, from the first instance the scales in the instant matter are heavily weighted in Mr. Keenan-Becht's favor because it is well-settled that Fourth Amendment "provisions for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(citation omitted; emphasis added). It has been said of the Fourth Amendment's protections that "[a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973)(emphasis added).

Because proof of any wrongdoing is absent in this case, this Court has a "duty" to "liberally construe" the Fourth Amendment to guard Mr. Keenan-Becht against "stealthy encroachments" on his right to be free from unreasonable searches and seizures, and should, therefore, reverse the decision of the lower court. After all, when assessing whether the conduct of law enforcement officers is constitutional under the Fourth Amendment, "the 'touchstone of the Fourth Amendment is **reasonableness**.'" *Robinette*, 519 U.S. at 39 (emphasis added), quoting *Jimeno*, 500 U.S. at 250. The Wisconsin Supreme Court has similarly stated

that an action is "reasonable" under the Fourth Amendment "'as long as the circumstances, viewed objectively, justify [the] action.'" *Howes*, 2017 WI 18, ¶ 21, citing *Stuart*, 547 U.S. at 404, quoting *Scott*, 436 U.S. at 138. Mr. Keenan-Becht proffers that he has submitted more than enough proof that Trooper Ackley's actions were constitutionally unreasonable under the Fourth Amendment.

CONCLUSION

Because the totality of the circumstances in the instant matter do not rise to the level of objectively establishing the requisite probable cause to arrest, Mr. Keenan-Becht respectfully requests that this Court reverse the decision of the circuit court denying Mr. Keenan-Becht's motion and remand the case with further directions that absent the required probable cause, Mr. Keenan-Becht should not have been arrested for allegedly operating a motor vehicle while intoxicated.

Dated this 25th day of April, 2022.

Respectfully submitted:
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CERTIFICATION OF LENGTH

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 5,574 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 25, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 25th day of April, 2022.

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