STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2022AP73-CR

v.

ANDREW A. KEENAN-BECHT
Defendant-Appellant.

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# BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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

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## I. Statement of Issue Presented for Review

1) Whether there was probable cause to arrest the defendant-appellant for an OWI-related offense?

Trial Court Holding: Yes, the totality of the evidence supported probable cause to arrest.

## II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument, as this matter involves only the application of well-settled law to the facts of the case.

## III. Statement of the Case

Mr. Keenan-Becht, the defendant-appellant, was charged in Fond du Lac County with 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), after an arrest in the early morning hours of February 10, 2019. R1 and R29 16:11. He was

since then convicted of the latter charge by jury verdict, and now appeals, challenging the probable cause of his arrest. R63, R64, and R70.

Mr. Keenan-Becht filed several pretrial motions, most notably motions under Wis. Stat § 343.303 challenging whether probable cause had existed to seize a sample of his breath and to arrest him. R16 at Section IV., ¶¶ 14-21. At an evidentiary hearing on January 13, 2021, the trial court accepted supplemental briefs from both parties and critically considered the testimony of the State's only witness, the arresting officer, Trooper Matthew Ackley. R29 throughout. The trial court distinguished the two motions. The trial court found that probable cause to seize a breath sample had not been met at the time, in part because it was ordered, not requested, and so suppressed the evidence. R86 6:8-10. But the trial court found that the totality of the evidence did permit the arrest of the defendant – that there was probable cause to arrest someone speeding at around 2:00 a.m., "after bar time,", that had admitted to drinking, that had red eyes, where the officer could smell the odor of intoxicants, and picked up multiple HGN clues indicating intoxication. R86 5:1-9.

The defense attempted, both in that motion and in their appellate brief, to refocus the question of probable cause to arrest on possible

indicators of intoxication that were not present in this case. And the jury, much like the trial court judge at the evidentiary hearing, incorporated this information into their decisions. The trial court, while finding probable cause for the arrest, excluded the seized breath sample. And the jury, noting some absent indicators of intoxication, acquitted the defendant of the Operating While Under the Influence charge – but found that the evidence did point to proof beyond a reasonable doubt of guilt of the Operating with a Prohibited Alcohol Concentration. R63, R64.

After being convicted of the second charge, the defendant appealed the case, filing a brief which the State now responds to.

## IV. Standard of Review

Defendant-Appellant has argued, per State v. Drogsvold, 104 Wis. 2d 247, 311 N.W.2d 243 (Ct. App. 1981), that the question of if a set of undisputed facts meets the constitutional standard of providing probable cause for an arrest merits *de novo* review. This is true. When there is review for a decision on a motion to suppress evidence, a reviewing court will uphold a circuit court's findings of historical fact unless they are clearly erroneous. State v. Pinkard, 2010 WI 81, ¶ 12, 327 Wis.2d 346, 785

N.W.2d 592. However, the reviewing court applies constitutional principles to those facts independently, as questions of law. Id. Mr. Keenan-Becht's brief characterizes the facts of his case as "undisputed." We agree, clarifying that it is the legal conclusion from what may be inferred from the facts, namely probable cause, where we disagree. As such, we agree with Drogsvold that the Circuit Court should review this legal question *de novo.* Subsequent pages of this brief will prove both the diligence of the trial court, including instances where the Trial Court ruled against the State, and how the court very reasonably inferred probable cause as its finding. The full review of both the totality of the evidence and the court's diligent inquiries into the same can result in only one conclusion: that the court was not only reasonable but right to infer that Trooper Ackley had probable cause to arrest Mr. Keenan-Becht.

## V. Argument

### i. The Totality of the Evidence Meets Probable Cause

Trooper Ackley, at around 2:00 a.m. on February 10, 2019, observed a vehicle going 59 mph on a 50 mph road. R29 16:10-11 and 7:21-25. After initiating a lawful traffic stop, he encountered the defendant, Andrew

A. Keenan-Becht. R29 8:5-10. Trooper Ackley first noticed that the defendant had "some watery and red eyes" and that there was "the odor of intoxicating beverages coming from inside the vehicle." R29 8:15-17. Trooper Ackley requested the defendant submit to field sobriety tests, to which the defendant consented. R29 9:11-17. On the Horizontal Gaze Nystagmus (HGN) test, the defendant was noted for four of six possible clues of intoxication. R29 10:13 and 20:20-21. Finally, the defendant had earlier in the stop freely acknowledged that he had been drinking earlier. R29 9:10.

Probable cause does not require proof beyond a reasonable doubt. Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. State v. Secrist, 224 Wis. 2d 201, 212, 589 N.W.2d 387, 392, There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. State v. Mitchell, 167 Wis. 2d 672, 482 N.W.2d 364. Whether probable cause exists in a particular case must be judged by the facts of that

case. *Id.* Looking at the facts here, guilt of the defendant driving over the legal limit was far more likely than not – but that isn't the standard, that's exceeding the standard. A reasonable officer absolutely would find probable cause with these facts, and the trial court agreed. More importantly, the trial court was inferring the facts met probable cause **reasonably**, and reasonable inferences by the trial court must not be overturned. State v. Drogsvold.

The bulk of the defendant-appellant's brief is spent trying to increase the value of other possible indicia of intoxication that were not found at this particular scene and trying to decrease the value of what the officer did observe and learn. The final section of this brief will be spent rebutting these arguments.

### ii. **Absent Indicators Don't Overrule Proof of Intoxication**

The defendant-appellant suggests a number of absent indicators as evidence contraindicating driving above the legal limit. The defense points out that the defendant wasn't driving erratically or dangerously, that he didn't take a long time to stop for the officer or in complying with the

officer's other instructions, that there were no noticeable difficulties in the defendants ability to think, speak, or exercise fine motor skills, that 2 clues were missing from the HGN, and that the other two field sobriety tests (walk and turn and OLS) did not come back as indicative of intoxication. App. Brief, p. 11-16, referencing facts from R29 p.21-26. But the defendant-appellant misunderstands what impact these have on the totality of the evidence. The totality of the evidence simply means this: when all the evidence is considered, is the threshold of probable cause met. Something like lack of noticeably impaired mentation could suggest that the defendant is someone less effected by alcohol when drunk driving – but it does nothing to disprove the great likelihood that he was drunk driving. And there was probable cause to believe he had been driving with a BAC over the legal limit. The defendant was someone driving at "not quite 2:00 a.m. after bar time," that had admitted to drinking, that had red and watery eyes, with a car smelling of intoxicants, and multiple HGN clues indicating intoxication. R86 5:1-9. In circumstances like this, a reasonable police officer is not only thinking about how very likely it is that this person is driving over the legal limit, but about how **not** arresting this person could

be considered a dereliction of duty, not stopping a highly likely crime and placing the defendant and the public in danger of a drunk driver.

### iii. **Defense Attempts to Undervalue the Evidence**

The defendant-appellant tries to undercut the value of what Trooper Ackley observed by focusing on the HGN having 4/6 instead of all clues, the already largely disregarded WAT and OLS tests, questioning the use of field sobriety tests, making a poor analogy about totality, and challenging watery red eyes as evidence of intoxication. App. Brief, p. 11-16, referencing facts from R29 21-26. But here too, the Defendant-Appellant's argument boils down to the claim that because other indications of intoxication are absent, what is present and proves the presence of intoxicants in the defendant's blood should be ignored.

First, the defendant-appellant argues that 4/6 on an HGN **often**, **often**, **but not always** indicates 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). But it can indicate BAC above .08, and the Defendant-Appellant did not seem to challenge the HGN itself

as a test that can detect the presence of intoxicants in general. App. Brief, referred to in total. But it's here that a recurring mistake is found in the defendant-appellant's brief: a piece of evidence that on its own is not enough to constitute probable cause still adds up alongside other pieces of evidence. 4/6 clues might not be enough on its own to arrest, but the state and the trial court agree—together with the rest of the evidence, taken in totality, it meets probable cause.

Second, the defendant-appellant discusses how Trooper Ackley noted only one clue out of multiple possible for both the WAT and the OLS, which they argue discredits them from weighing towards the totality of the evidence indicating probable cause. But the trial court already discredited these two tests in this case—the defendant appellant is trying to knock down a foundation that the trial court didn't use in finding probable cause. The defendant-appellant cites the NHTSA as concluding that a single clue for the WAT or OLS as not being considered evidence of impairment. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *DWI Detection and Standardized Field Sobriety Testing (SFST),* Session VIII, at pp. 70 & 79 (Rev. 02/2018). But the trial court effectively rejected these two results, having reviewed the footage and

evidence itself. The trial court disagreed with Trooper Ackley on these claims – and the defendant-appellant's brief even openly notes this, trying to strike at the credibility of Trooper Ackley's claims of witnessing these single clues as indicators of intoxication. But there is an element of credibility they fail to recognize here, not of Trooper Ackley's claims involving these two tests, but of a trial court willing to choose what evidence it believes is or is not credible. Here we have a perfect example of the trial court inferring as to the facts – including what they find credible and ignoring what they did not. So the defendant-appellant is welcome to criticize the WAT and OLS clues. The trial court certainly did. But not only was that evidence not considered as part of the justification for finding probable cause, but we now have proof that the trial court was diligently and reasonably inferring from the facts when it concluded there was probable cause from the totality of the evidence available to Trooper Ackley that morning.

Third, the defendant-appellant's brief asks the question of what value field sobriety tests hold if a person can only have a few clues of intoxication but still be deemed impaired and arrested. The answer is that field sobriety tests are yet another piece of evidence to be included into the

totality of the evidence. Field sobriety tests are one of many means of looking for intoxication, as County of Jefferson v. Renz, 231 Wis.2d 293, 310, 603 N.W.2d 541 (1999) explains:

> After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances.

*Id*. (Emphasis added).

The duty of law enforcement is to screen suspected drunk drivers from the roadway, and the use of field sobriety tests is one of the primary tools to do so. The purpose of the field sobriety test is to make a preliminary determination of whether the defendant is intoxicated. State v. Babbit, 188 Wis. 29 349, 359 (Wis. App. 1994). To this end, the use of field sobriety tests is designed to ensure that not everyone who is suspected of drunk driving is arrested, but rather screened to support the higher requirement for probable cause for an arrest. And as a screen, they are a tool for law enforcement officers trying to see if the totality of the evidence meets probable cause, useful to this end both when returning some clues or all of them.

A similar argument is made about the worth of the watery, red eyes. A National Highway Traffic Administration sponsored study chose not to considered red eyes as an indicator of impairment. 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). Not only is the state of Wisconsin not bound by that choice, but this is just one study and the study itself does not disprove the situational use of looking at someone's eyes as an intoxication indicator. Simultaneously, the defendant-appellant's brief suggests red eyes could be because of other factors, like fatigue at 2:00 a.m.. That would be a valid inference. But the trial court inferred the red eyes were consistent with the other indicators of intoxication, not merely fatigue. And on appeal, the trial court's inference is to be kept. And, like above, red eyes alone are not enough for probable cause. But they are part of the totality, a legitimate factor adding to the others to meet the threshold of probable cause.

### iv. **State v. Gonzalez Distinguished From Case at Hand**

Finally, the Defendant-Appellant makes two more arguments largely centered around the Court of Appeals of Wisconsin's unpublished opinion

in State v. Gonzalez, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905, 2014 WL 1810115. The defense first uses Gonzalez to challenge the weight of the defendant's admission to drinking. "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). State v. Gonzalez. But Gonzalez itself is a case about when reasonable suspicion is met and allows requesting field sobriety tests. This is a lower standard than probable cause for arrest with OWI's, especially as field sobriety tests are often a prerequisite step to finding probable cause for an OWI arrest. Gonzalez, referencing another unpublished opinion by the Court of Appeals of Wisconsin, presents the purely persuasive argument from State v. Meye, 2010 Wisc. App. LEXIS 537, 2010 WI App 120, 329 Wis. 2d 272, 789 N.W.2d 755, where odor as the sole indicator of intoxication was not enough to reach reasonable suspicion (or, resultantly, probable cause). The Defendant-Appellant then tries to suggest that the odor of intoxicants is not strong evidence towards probable cause. But Gonzalez is easily

distinguishable from today's case, and the arguments derived from it are largely inapplicable. We do not have a Gonzalez fact pattern in our case. In Gonzalez, the only evidence the trial court used to find reasonable suspicion was two instances of smelling of intoxicants and two alleged instances of contradictory statements from the defendant. This is nothing like the arrest of Mr. Keenan-Becht, who was found to have been driving at "not quite 2:00 a.m. after bar time," that had admitted to drinking, that had red and watery eyes, with a car smelling of intoxicants, and multiple HGN clues indicating intoxication. R86 5:1-9.

First, the defendant-appellant correctly points out that drinking and driving in Wisconsin is not itself a crime, but rather driving under the influence to the point of danger or above the legally prescribed limit are the crimes. State v. Gonzalez. They argue based on this that the smell of alcohol is not a "direct" observation of impairment, but rather is a "confirmatory" observation, and that admitting to drinking is not admitting to a crime. We would contest the definitions, but acknowledge a truth here – the smell of alcohol alone would not constitute reasonable suspicion or probable cause, and an admission to drinking alone is not proof of a crime. *Id.* But at no point has the State or the Trial Court suggested that the odor

from Mr. Keenan-Becht's car alone or the admission to having been drinking alone would constitute probable cause on their respective own. Rather, each it is yet one more real, weighted piece of evidence that together with all of the other evidence meets probable cause.

Later in their brief, the defendant-appellant again tries to discredit the value of an odor alone by citing the analysis of the analysis of *Meye* found in Gonzalez. To which the State will again say, at no point have we or the Trial Court tried to use odor alone as grounds for probable cause. And while the State has already made general arguments about how odor was used in totality, not on its own, and would additionally point out that both Gonzalez and Meye are purely persuasive opinions and the court is not bound to agree with their assessments on the odor of intoxicants, we can instead further point to a series of cases that bolster the worth of our evidence.

Gonzalez itself recognizes there are times when odor alone can provide probable cause for an arrest, quoting State v. Secrist:

> Finally, the State relies on State v. Secrist, 224 Wis. 2d 201, 589 N.W.2d 387 (1999). In Secrist, the court held that "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances." Id. at 217-18. But the obvious problem with the State's reliance on Secrist is that possession of even the smallest amount of marijuana is illegal in Wisconsin whereas the same cannot be said for consuming alcohol and driving.

State v. Gonzalez.

But looking past Gonzalez, the full picture of probable cause rulings strongly supports an inference of probable cause here. The time of night, which the Trial Court used in its finding of probable cause, is a relevant factor in an OWI investigation. State v. Lange, 2009 WI 49, ¶ 32, 317 Wis.2d 383, 766 N.W.2d 551. County of Jefferson v. Renz backs this up, ruling that indicators of intoxication include odor of intoxicants and admission of drinking. And finally, Gonzalez rejected an argument by the State that cited State v. Waldner that is far more applicable here. There, the Wisconsin Supreme Court held that, "We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. State v. Waldner, 206 Wis. 2d 51, 58, 556 N.W.2d 681, 685. Now, the Appeals Court in Gonzalez had a response to Waldner, that the State "does not explain what other "building blocks" there might be here." State v. Gonzalez. That's a fair point in Gonzalez, where odor and contradictions alone were the trial court's basis for probable cause. But the Trial Court's probable cause finding was based on

that Mr. Keenan-Becht was driving at "not quite 2:00 a.m. after bar time," that he had admitted to drinking, had red and watery eyes, had a car smelling of intoxicants, and had multiple HGN clues indicating intoxication. There are significantly more and significantly bigger building blocks of fact accumulating here, and the Trial Court reasonably and correctly inferred from them that probable cause was definitively met before the arrest.

## VI. **Conclusion**

For the reasons set forth above, Trooper Ackley had probable cause to arrest the defendant, and the Court committed no error in inferring probable cause for the arrest.

Dated at Fond du Lac, Wisconsin this 1st day of July, 2022.

ELECTRONICALLY SIGNED BY:
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## CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3568 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief, ***other than the appendix material is not included in the electronic version.***

I further 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; and (3) portions of the record essential to an understanding of the issues raised, including oral or written findings or decision showing the circuit court's reasoning regarding these issues.

I further certify that if this appeal is taken from a circuit court order of 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 person, 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.

Dated this 1st day of July, 2022 at Fond du Lac, Wisconsin by:

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