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 PAUL G. CZISNY PRESIDING, TRIAL COURT CASE NO. 19-CT-180

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE INFERENCES TO BE DRAWN FROM THE TOTALITY OF THE CIRCUMSTANCES IN THE INSTANT CASE DO NOT SUPPORT A PROBABLE CAUSE DETERMINATION.

The State expends a significant amount of effort attempting to convince this Court that that the absence of an extensive variety of factors typically observed in an operating while intoxicated prosecution is meaningless when it comes to assessing whether probable cause exists to arrest a person for the suspected violation. Regrettably for the State, this is not a correct expression of the standard. State's Response Brief at pp. 9-11.[1]

The State erroneously proffers that the plethora of indicia which are *absent* in the instant case "does nothing to disprove" the assertion that probable cause existed to arrest Mr. Keenan-Becht. State's Response Brief at p.10. There are two problems with the State's position, however.

First, the State mischaracterizes the "totality of the circumstances" standard in this matter by implying that the absent facts are not sufficient "disproof" of an independent reasonable suspicion to enlarge the scope of Mr. Keenan-Becht's detention. Mr. Keenan-Becht is not, however, required to *disprove* anything. The totality of the circumstances test does not *presume* an independent reasonable suspicion exists to enlarge the scope of a detention which must, by countervailing evidence, be "disproved." In other words, Mr. Keenan-Becht is not required to presuppose the State's assertion regarding a reasonable suspicion is accurate and that he must then "disprove" that assertion by presenting evidence to the contrary. Mr. Keenan-Becht does not bear the burden here. More correctly, what this Court is obligated to do is weigh the *totality* of all the circumstances, which totality includes the *absence* of a variety of otherwise commonly observed facts in an operating while intoxicated prosecution.

Second, the absence of the "typical" indicia of impairment is highly relevant. Mr. Keenan-Becht's point in this regard is best made by analogy. Assume,

[1]The State begins numbering the pages of its brief with the notation that its actual page four is page "1," and then continues on cardinally therefrom using standard Arabic numbers. The State used lower case Roman numerals for its cover page through the last page of its Table of Authorities. The State's numbering format is contrary to Wis. Stat. § 809.19(8)(bm) which requires "sequential [Arabic] numbering starting at '1' on the cover." Given this discrepancy, Mr. Keenan-Becht will refer to specific pages of the State's brief not by the erroneous page numbering employed by the State, but rather by the page's actual cardinal position if the cover of its brief had been treated as page one (1).

arguendo, that an individual is detained outside a tavern because he matches the description of a person who was recently involved in an altercation. In support of a probable cause determination, the State might rely upon the fact that (1) the person was found outside the complaining establishment and (2) the person matches the general description of the individual involved. Standing alone, these facts conspire to establish an argument—albeit a weak one—for probable cause to arrest. One must consider, however, the *totality* of the circumstances in this hypothetical. Suppose, instead of simply knowing the foregoing facts upon which the State relies, the following factors were *not* observed by the officer: (1) there was no blood on the suspect; (2) there were no visible scars on the suspect's hands; (3) the suspect's clothing was in prefect order rather than appearing disheveled; (4) the person was not breathing heavily or sweating as though he had just exerted himself—as one does in a fight; and (5) the individual is perfectly calm, rather than exhibiting indicia of anger or agitation. Under the State's approach, none of these facts which mitigate against the suspect individual having been involved in the altercation would be considered, despite the fact that they clearly point to a conclusion inapposite to the one the State wants to draw. Clearly, *absent* facts are just as relevant as present ones under the totality of the circumstances test.

The State's attention is next turned to what it characterizes as Mr. Keenan-Becht's "undervaluing" of the existing evidence. State's Response Brief at pp. 11-15. In support of this position, the State concedes that, for example, "4/6 clues [on the horizontal gaze nystagmus test] might not be enough on its own to arrest," but when taken together with the remaining facts, probable cause to arrest exists in the instant case. State's Response Brief at p.12. The State is correct only insofar as it implies that the appropriate standard is one involving the "*totality* of the circumstances," however, it utterly discounts the inferences to be drawn from Mr. Keenan-Becht's display of only one clue on both the walk-and-turn [hereinafter "WAT"] and one-leg stand [hereinafter "OLS"] tests as though they are valueless when assessing probable cause. *Id*.

The State wants to constrain this Court to examining only those facts which the circuit court relied upon to find probable cause without also recognizing both the value and the relevance of the National Highway Traffic Safety Administration's [hereinafter "NHTSA"] hard work in developing the standardized battery of field sobriety tests. NHTSA has predetermined, through a variety of "scientific" studies undertaken over a period of years, that exhibiting but a single clue on the WAT and OLS tests is ***not*** an indicator that the individual is under the influence of an intoxicant. *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*, Session VIII, pp. 5-12 Apparently, in the State's universe, it does not matter that something is

"scientifically" proven through ostensibly rigorous testing and development if it does not bolster the State's case. The State cannot have its cake and eat it too. If it trains its officers to rely on a standardized battery of field sobriety tests in order to determine whether there is probable cause to arrest a person suspected of operating a motor vehicle while intoxicated, then it must "live and die by that sword." In other words, it is highly disingenuous for the State, in countless other operating while intoxicated prosecutions throughout Wisconsin, to offer up evidence of impairment based upon the NHTSA tests when it suits it, but then, when those very tests upon which it normally relies undercut its position, cast them aside as indicative of nothing. What is even more remarkable in an ironic way is that the State freely admits that it is "[t]he duty of law enforcement to screen suspected drunk drivers from the roadway, and the use of field sobriety tests is one of the **primary tools** to do so." State's Response Brief at p.14 (emphasis added). Mr. Keenan-Becht would respond that if field sobriety tests are "primary tools," then *value* must be given them *both* when they do and do *not* support a probable cause determination.

The State also attempts to discount Mr. Keenan-Becht's reliance upon cases such as *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).[2] State's Response Brief at pp. 15-18. It does so in part by distinguishing *Gonzalez* on the ground that it "is a case about when reasonable suspicion is met and allows requesting field sobriety tests." State's Response Brief at p.16. Mr. Keenan-Becht would dispose of the State's argument by responding that if the indicia discussed in cases like *Gonzalez* do not justify removing a person from their vehicle to perform field sobriety tests under the ***lesser*** standard of "reasonable suspicion," then surely, the same observations have even less value in supporting the ***higher*** standard of probable cause. No matter whether dealing with the reasonable suspicion or probable cause standards, *Gonzalez*' true value is in its examination of the weight to be given the types of observations discussed therein. To this end, *Gonzalez* does an excellent job of describing where, precisely, in the pantheon of "indicia of impairment," observations such as "odor" and "admission to drinking" fit.

It is Mr. Keenan-Becht's position, as more fully set forth in his initial brief, that the totality of the circumstances of his case do not rise to the level of establishing probable cause to arrest.

CONCLUSION

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

Based upon the foregoing, and upon the authority set forth in Mr. Kennan-Becht's initial brief, Mr. Keenan-Becht respectfully requests that this Court reverse the decision of the circuit court.

Dated this 11th day of July, 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 1,417 words.

I hereby certify that I have submitted an electronic copy of this brief 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.

Dated this 11th day of July, 2022.

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