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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III**

Appellate Case No. 2022AP186

STATE OF WISCONSIN,

Plaintiff-Respondent,

-VS-

NICHOLAS A. PAULSON,

Defendant-Appellant.

**APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN
THE CIRCUIT COURT FOR DUNN COUNTY, BRANCH II,
THE HONORABLE RONALD W. SMELTZER PRESIDING,
TRIAL COURT CASE NO. 18-TR-8068**

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

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

Trial Court Answered: NO. A sufficient basis existed to establish probable cause to arrest Mr. Paulson based upon the fact that: (1) even though the protocols for administering the horizontal gaze nystagmus test were not “specifically follow[ed],” subjective observations relating to the test may be used to “determine if there is probable cause”; (2) Mr. Paulson stepped off the line and turned improperly during the walk-and-turn test; (3) Mr. Paulson “appeared” to have “some balance” issues during the one-leg stand; (4) Mr. Paulson made “a couple of small errors” in the non-standardized field sobriety tests; and (5) other subjective indicia of impairment, such as bloodshot eyes and an odor of intoxicants, were also present in the instant case. R79 at 3:9 to 5:25; D-App. at 104-06.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question relating to the lower court’s interpretation of a set of facts which are well established in the record. The issue presented is of a nature that can be addressed by the application of long-standing legal principles to these facts, 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. Paulson was charged in Dunn County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—First Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—First Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on November 23, 2018. R5.

After retaining private counsel, Mr. Paulson filed several pretrial motions, including a motion challenging whether the law enforcement officer in the instant matter had probable cause to arrest him and whether the results of the horizontal gaze nystagmus field sobriety test ought to be excluded from admission at trial pursuant to, *inter alia*, Wis. Stat. § 904.03. R24 & R25, respectively. An evidentiary hearing was held on Mr. Paulson's motion on July 18, 2019, at which the arresting officer, Trooper Brett Boley, testified as the State's only witness. R30 at pp. 3-47. Beyond the trooper's testimony, the video recording captured by the trooper's forward-mounted squad camera was marked and received as Exhibit No.1 at the hearing. R29.

After the evidentiary hearing, Mr. Paulson filed a supplemental brief in support of his motions. R31. On September 12, 2019, the circuit court issued an oral decision denying Mr. Paulson's motions. R79 at 3:9 to 5:25; D-App. at 104-06.

Mr. Paulson's case proceeded to a jury trial on October 1, 2020, at which he was found guilty of both the operating while intoxicated offense and of the operating with a prohibited alcohol concentration offense. R98; D-App. at 101.

It is from the adverse decision of the circuit court on Mr. Paulson's pretrial motions that he now appeals to this Court by Notice of Appeal filed on February 7, 2022. R94.

STATEMENT OF FACTS

Trooper Boley made contact with Mr. Paulson because he had been dispatched to a scene where a "911 call [indicated] a subject . . . had jumped out of a moving pickup and had sustained injuries." R30 at 4:19-21. After arriving on the scene of the incident, Trooper Boley learned that it was Mr. Paulson who made the emergency call to the 911 dispatcher because "his wife jumped out of the vehicle as it was moving down the road." R30 at 5:15-22; 23:23 to 24:12. Trooper Boley testified that Mrs. Paulson had jumped from the vehicle "of her own volition." R30 at 24:18-21.

Upon making contact with Mr. Paulson, Trooper Boley allegedly observed that Mr. Paulson's speech was "thickly slurred" and that he had an odor of intoxicants emanating from his person. R30 at 6:2-16. Additionally, Trooper Boley noted that there were approximately twelve cans missing from a thirty-six pack of

beer. R30 at 7:4-19. The trooper did not, however, observe any open or empty cans of beer in the vehicle. R30 at 7:20-22; 27:17-24.

Based upon the foregoing observations, Trooper Boley asked Mr. Paulson whether he had been drinking, to which Mr. Paulson responded that he consumed six to twelve beers. R30 at 7:23 to 8:5. Despite observing the beer in Mr. Paulson's truck, Trooper Boley never bothered to inquire who consumed the missing beer or when those beverages might have been consumed. R30 at 26:7-12. At this time, the trooper also claims to have observed that Mr. Paulson's eyes were bloodshot and glassy. R30 at 8:6-11. Thereafter, Trooper Boley asked Mr. Paulson to submit to a battery of field sobriety tests, to which request Mr. Paulson consented. R30 at 9:2-4.

The first field sobriety test to which Mr. Paulson submitted was the horizontal gaze nystagmus [hereinafter "HGN"] test. R30 at 9:18-19. According to Trooper Boley, Mr. Paulson displayed six of six possible clues on this test. R30 at 9:23 to 11:14; R29 at Elapsed Time 25:25, *et seq.*

Upon completing the HGN test, a vertical gaze nystagmus test was administered as well which, according to the trooper, was positive for the presence of vertical nystagmus. R30 at 11:15 to 12:3. Trooper Boley next had Mr. Paulson perform a walk-and-turn [hereinafter "WAT"] test, during which Mr. Paulson allegedly displayed four of eight possible clues according to the trooper. R30 at 12:4 to 14:16; R29 at Elapsed Time 27:21, *et seq.*

The next test administered to Mr. Paulson was a one-leg stand [hereinafter "OLS"] test. R30 at 14:17 to 15:14. Trooper Boley observed no clues of impairment during this test. R30 at 15:11-14. Mr. Paulson was then asked to recite the alphabet from the letter "E" to the letter "P." R30 at 15:18 to 16:2; R29 at Elapsed Time 30:10, *et seq.* During this test, Mr. Paulson mistakenly said the letter "P" instead of the letter "G" after he began, however, he immediately caught himself and corrected his error by beginning the test again and successfully reciting the alphabet from "E" to "P." R30 at 16:4-6. The last field sobriety test administered to Mr. Paulson was to count backward from "64" to "49." R30 at 16:9-15; R29 at Elapsed Time 30:10, *et seq.* According to the trooper, Mr. Paulson skipped one number and counted to "47." R30 at 16:16-19.

At this time, prior to the administration of a preliminary breath test, Trooper Boley concluded that he had sufficient facts upon which to take Mr. Paulson into custody for operating a motor vehicle while impaired. R30 at 17:1-10.

The foregoing facts do not stand in a vacuum, however. Other facts of particular relevance to the issue Mr. Paulson raises on appeal include the following:

There are significant deviations between Trooper Boley's testimony regarding his administration of the HGN and what actually occurred on the night of Mr. Paulson's arrest which are explored in Section I.A., *infra*.

The State did not elicit any evidence from Trooper Boley that Mr. Paulson's mentation was impaired. Nowhere within the record is there any testimony that Mr. Paulson misunderstood Trooper Boley; had difficulty understanding directions being given to him; or was otherwise mentally slow or confused.

There is no allegation of bad driving on Mr. Paulson's part. Mr. Paulson's wife alit from the vehicle while it was moving on her own volition. R30 at 24:18-21.

Trooper Boley admitted that he "**never** noted any swaying [on Mr. Paulson's part or] . . . any uncoordination [*sic*]," and this was on a road that Trooper Boley conceded was "a little bit slick" R30 at 31:1-10.

Similarly, Trooper Boley stated that he is trained to look for "orbiting" (circular swaying) during the HGN test, but in Mr. Paulson's case, he never observed him to be orbiting. R30 at 44:9-24.

Regarding the walk-and-turn test, Trooper Boley claims Mr. Paulson failed this test, but upon closer examination of Exhibit No. 1 (R29) from the motion hearing, portions of the trooper's claim of failure are "nitpicky." For example, the trooper admitted that when he claimed that Mr. Paulson's steps were not "heel to toe," that was based upon the fact that the toe of his trailing foot would come slightly alongside the heel of his lead foot, and *not* that there was a "gap." R30 at 36:1-7. Likewise, the trooper testified that Mr. Paulson took the correct number of steps, did not stagger, wobble, sway, stop to steady himself, or otherwise use his arms for balance. R30 at 36:16 to 37:3. Mr. Paulson's alleged deficiency with the turn on this test "had nothing to do with his balance," but rather was deemed a "clue" by the trooper simply because he used both of his feet to turn rather than keeping one foot planted. R30 at 37:24 to 38:3. Finally, Mr. Paulson remained in perfect instructional stance for forty-three (43) seconds at the beginning of this test. R29 at Elapsed Time 27:21 to 28:04.

Mr. Paulson exhibited absolutely no clues on the OLS test. R30 at 15:11-14.

Trooper Boley alleges that Mr. Paulson had "thickly slurred speech" on the night of his encounter with him. R30 at 6:3-9. An objective review of the video record in this case, however, demonstrates that throughout the entire encounter between Mr. Paulson and the trooper, Mr. Paulson can be clearly heard and that no such "thick slurring" exists anywhere in the audio record. R29, *passim*. In fact, at one point during cross-examination when an audio portion of the record was played in court, Trooper Boley conceded that he could "clearly hear Mr. Paulson" responding to his questions. R30 at 28:17-23.

Beyond the foregoing, it is of particular import to this appeal to note that Mr. Paulson is a wounded military veteran. R30 at 33:13-15. When Trooper Boley

asked Mr. Paulson whether he had any medical conditions which “might cause him some difficulty on [the field sobriety] tests,” Mr. Paulson informed Trooper Boley that he had shrapnel in his neck and back from being wounded during combat. R30 at 33:3 to 34:15.

Ultimately, the circuit court concluded that probable cause to arrest Mr. Paulson existed under the totality of the circumstances. R79 at pp. 4-6; D-App. at 104-06.

STANDARD OF REVIEW ON APPEAL

This appeal presents a question relating to whether the circuit court’s findings of fact are clearly erroneous and therefore, do not rise to the level of providing a law enforcement officer with probable cause to arrest. Because the court’s findings of fact are at issue, this Court will not upset those finding unless they are “clearly erroneous,” whereupon it determines *de novo* whether the constitutional standard of probable cause has been satisfied by the adjudicative facts. *State v. Kutz*, 2003 WI App 205, ¶ 13, 267 Wis. 2d 531, 671 N.W.2d 660.

ARGUMENT

I. FACTUAL BASIS FOR CONCLUDING THAT THE LOWER COURT’S FINDINGS ARE “CLEARLY ERRONEOUS.”

Mr. Paulson acknowledges that he has a significant burden when it comes to establishing that the lower court’s findings of fact are clearly erroneous. Nevertheless, there are numerous considerations which weigh heavily against the circuit court’s findings.

First, the lower court’s disregard of the pervasive and serious defects in the administration of the HGN test undermines the credibility of its findings. In a twist of “logic” which resembles Escher’s famous “Ascending and Descending” lithograph more than it does any axiom of reason, the circuit court acknowledged that “[i]t is clear to the court that at least if you read the manual and you watch Trooper Boley administer the HGN, he wasn’t specifically following exactly what the standards reflect.” R79 at 4:7-11; D-App. at 105. Despite recognizing the clear defects in the administration of the HGN test—and contrary to the common law—the court found that there was “some evidence that was extracted from the HGN test that allowed Trooper Boley to incorporate that into his evidence that he was gathering that would support or not support to place Mr. Paulson under arrest.” R79 at 4:15-22; D-App. at 105. The court never, however, identified what it was that was salvageable from the plainly mis-administered HGN test. It simply—and vaguely—

concluded that whatever portions of the test did not follow protocol, the remaining parts still permitted the trooper to draw conclusions. Relying on the HGN test in this undefined, piecemeal fashion is not only contrary to the law, but additionally, does not protect the fundamental Fourth Amendment rights Mr. Paulson possesses in the fashion the Constitution requires. *See* Section II.A. & C., *infra*.

The video record in this case *objectively* shows Trooper Boley significantly deviating from the standardized protocols of the HGN test as developed by the National Highway Traffic Safety Administration. *See* NHTSA, *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*, Session VIII (Rev. 10/2015)[hereinafter “NHTSA Manual”]. The NHTSA standardized guidelines impose the following parameters upon the administration of an HGN test:

(A) **In order for an HGN test to yield valid results, officers must** “always begin with [a] subject’s left eye,” and **“position the stimulus approximately 12–15 inches from the suspect’s nose and slightly above eye level”** for each component test. NHTSA Manual, Session VIII, at p.27 (emphasis added).

(B) The first component test, assessing for medical impairment, **requires the officer to smoothly move the stimulus back and forth across the subject’s field of vision several times**. With each pass, the officer looks for equal pupil size, the presence of resting nystagmus, and whether the eyes track the stimulus together in an attempt to rule out any other cause of nystagmus observed. Each eye is checked twice.

(C) When conducting the second component test, smooth pursuit, the officer must begin with the left eye and **“move the stimulus smoothly at a speed that requires approximately two seconds to bring the subject’s eye as far to the side as it can go.”** *Id.* The stimulus is then moved back to center taking **another two seconds before checking the right eye**. During this component test, each eye is checked twice. *Id.*

(D) When conducting the third component test, distinct and sustained nystagmus at maximum deviation, the officer must again begin by examining the left eye. *Id.* at 39. After moving the stimulus right from center until the left eye has gone as far to the left side as possible, **the officer must hold the stimulus at maximum deviation for at least four seconds before moving the stimulus back to center**. The officer then examines the right eye by moving the stimulus left from center until the right eye has gone as far to the right as possible. Each eye is checked twice. *Id.* In other words, the officer must examine each eye only as it moves as far to the *outside* as possible.

(E) When checking for onset of nystagmus prior to 45° degrees, the final test component, the officer again begins with the left eye by moving the stimulus to the right but **at a much slower rate than in previous component tests. Taking approximately four seconds for the stimulus to reach the subject’s shoulder from center**, the officer must look for the moment when nystagmus begins. *Id.* at 43-45. Again, each eye is checked twice.

NHTSA Manual, Session VIII, at 27-45 (emphasis added).

Among the most serious problems which the objective video record reveals relates to the trooper's timing of his passes of the stimulus through Mr. Paulson's field of vision. For the purpose of assessing whether the first "clue" exists on the HGN test, *i.e.*, whether Mr. Paulson's eyes display a lack of smooth pursuit when tracking the stimulus, the stimulus is to be moved at a rate of two seconds out and two seconds back as noted above and as trooper Boley acknowledged. R30 at 41:23 to 42:1. This requires that the stimulus traverse the field of vision for each individual eye for a *minimum* four seconds. R30 at 42:16-18. When questioned on cross-examination, Trooper Boley admitted that he did *not* perform this element of the HGN test as required, and in fact, moved the stimulus *at least twice as fast* as it should have been moved through Mr. Paulson's field of vision. R30 at 42:21-25.

This admission is especially disconcerting in this case because, as Trooper Boley conceded, "[f]alse positives could occur if you move [the stimulus] too fast." R30 at 41:12-13. Based upon this fact alone, in conjunction with the NHTSA Manual's commentary on the test being "**valid[] . . . only when**" the "tests are administered in the prescribed, standardized manner,"¹ the HGN test result should not have formed part of the basis of the lower court's decision. This problem with the administration of the test, however, was not the only deviation from the "prescribed, standardized manner" in which it should be administered.

Trooper Boley also acknowledged that the stimulus should pass in front of a subject's eyes at a distance of twelve to fifteen inches from the person's face. R30 at 40:15-19. Trooper Boley claimed he complied with the rigors of his training by "starting out" at the appropriate distance, but that any deviation therefrom is simply due to the fact that the stimulus is moving away from Mr. Paulson's face. R30 at 40:8-12. The video record in this case, however, clearly reveals that Trooper Boley was holding the stimulus *far* in excess of the required twelve to fifteen inches, undermining the validity of the test on yet another front. R29 at Elapsed Time 25:25, *et seq.*

Similarly, the veracity of Trooper Boley's account is called into further question. The trooper averred on cross-examination that when checking for the second and third clues on the HGN test, one is supposed to move the stimulus out from center using a sweep of "a *minimum* four seconds," which he claims he did, but which the objective video record in this case reveals he did not. R30 at 43:6-9; 44:1-3; R29 at Elapsed Time 25:25, *et seq.* Apparently, Trooper Boley suffered from a temporal deficit when he testified because the objective time stamp on the video record does not come close to showing a *minimum* eight-second (four seconds out plus four back) sweep being employed by the trooper. R29 at Elapsed Time

¹NHTSA Manual, Session VIII, at p.13.

25:25, *et seq.* After being pressed on cross-examination, the trooper conceded that he “moved the stimulus too quickly . . . [b]y roughly twice the speed” it should have been moved. R30 at 42:12-24. It is important to note that these requirements are the *minimum* times a pass should take when checking for the second and third clues. Thus, it is not enough for the trooper to aver that he “came close enough” since the NHTSA Manual again reminds those officers who administer an HGN test that the test is valid “only when” it is “administered in the prescribed, standardized manner.” NHTSA Manual, Session VIII, at p.13.

Inherent in the foregoing divergence between the trooper’s testimony *under oath* and the *objective* video record is the second problem with the trial court’s findings of fact which make them clearly erroneous. More specifically, this Court, like the trial court, has the opportunity to review the objective video record against the testimony of Trooper Boley to determine whether the two “square up.” On review, this Court will note that Trooper Boley’s claim on direct examination that he administered the test in accordance with the NHTSA protocols is contradicted by the objective video record. This contradiction should lead any finder of fact to question the credibility of the witness who cannot conform his testimony to the objective, provable facts of the case. Yet, despite the contradiction between the objective truth and the testimony Trooper Boley was offering, nowhere within the four corners of the lower court’s oral ruling is there an acknowledgment that the trooper’s testimony is somewhat suspect, not wholly truthful, or less than credible. The lower court simply disregarded the obvious inconsistencies between what the trooper averred on the stand and what the objective video record demonstrated.

Lest this Court think that Mr. Paulson is attempting to “put lipstick on a pig” in terms of dressing up his credibility argument with nothing more than the inconsistencies in Trooper Boley’s HGN-related testimony, there are other problems with the trooper’s testimony which make him a less-than credible witness but of which the lower court ignored. For example, Trooper Boley alleges that Mr. Paulson had “thickly slurred speech.” R30 at 6:3-9. An objective review of the video record demonstrates that throughout the entire encounter between Mr. Paulson and the trooper, Mr. Paulson can be clearly heard and that no such “thick slurring” exists anywhere in the audio record. R29, *passim*. During cross-examination when an audio portion of the record is played in court, Trooper Boley conceded that he could “clearly hear Mr. Paulson” responding to his questions. R30 at 28:17-23. Again, like the discrepancies between the trooper’s testimony regarding what actually transpired on the HGN test, so too this “discrepancy” between the objective audio record in this matter and the trooper’s testimony further undermines his credibility. Irrespective of the mounting evidence undermining Trooper Boley’s

credibility, the lower court still did not factor this into its oral ruling, thereby rendering it clearly erroneous.

Yet another inconsistency in the trooper's testimony lends itself to the assessment that he is a less than credible witness. When confronted regarding the fact that he claimed Mr. Paulson had "slurred most of his letters together" in his narrative report but that the objective video record did not reflect the same, Trooper Boley initially attempted to avoid the falling into the punji stick pit he dug for himself by deflecting the question with an "I don't recall" answer. R30 at 45:17-24. When counsel for Mr. Paulson would not let up on catching the trooper in the net of his untruth by asking, "would the video somehow magically improve [Mr. Paulson's] speech for us, or does it capture what you heard," Trooper Boley remained evasive, answering, "It will capture what it heard." R30 at 46:3-6.

Perhaps what can best be characterized as the "final nail in the coffin" of the trooper's credibility is the fact that he acknowledged that Mr. Paulson told him that because he was a wounded combat veteran with shrapnel in his back and neck, the shrapnel caused him pain when he turned. R30 at 34:12-21. In a fashion which can only be characterized as insulting to all wounded combat veterans, Trooper Boley callously testified that he counted Mr. Paulson's improper *turn* on the WAT test as a clue of impairment. R30 at 35:8-11. Apparently in the trooper's universe, an individual who has muscular dystrophy will be assessed as failing a WAT test as well; or a person who is blind will fail an HGN test; or an individual with an amputated leg will not pass a OLS test. One must ask: What is the point of the trooper's inquiry regarding a person's disabilities—in this case a combat wound—if the trooper is simply going to ignore the person's answer and assess them as displaying a clue of impairment when it comes time for the subject to perform that part of the test related to their injury or disability? How is this even fair, let alone respectful to those persons who have honorably served our country and been wounded for their effort?

Mr. Paulson's point in the foregoing regard is that the trooper's own training manual advises "that **individuals . . . with [injuries] . . . may have difficulty performing**" the field sobriety tests. NHTSA Manual, Session VIII, at pp. 62 & 73 (emphasis added). The foregoing statement is nothing more than a written acknowledgment of what common sense dictates, namely: if an individual has ear, eye, ankle, knee, hip, spine, *etc.*, problems, that individual will find it difficult to successfully perform tests involving the eyes, coordination, and/or balance, depending upon the injury sustained, its severity, and which test is being performed. In fact, the NHTSA Manual warns that "[o]fficers should be alert for potential medical conditions that may mimic drug or alcohol impairment [including] . . . physical disabilities . . . or injur[ies]." NHTSA Manual, Session VI, at p.19.

This “common sense” fact is further emphasized in the NHTSA Instructor’s Guide in which the instructor is admonished to “[s]tress to participants to consider . . . injury, or physical ailments while administering” the tests. NHTSA, *DWI Detection and Standardized Field Sobriety Testing Manual: Instructor’s Guide*, at pp. 8-67 & 8-82 (Rev. 05/2013)(emphasis added). The NHTSA Instructor’s Guide also directs officers in the field to be trained to “check if the subject has any physical problems or disabilities” *prior to administering the tests*. *Id.* at p. 8-80.

Based upon how the trooper was trained, Mr. Paulson wonders how a law enforcement officer who is so willing to ignore the very protocols which he was instructed to employ be deemed credible? In this case, it is uncontroverted that Trooper Boley received standardized field sobriety training and, moreover, actually claims to be a “certified instructor” of the tests,² yet he grossly departs from his training and “certification” to either mis-administer tests or count clues inappropriately. A person of this ilk should not be deemed credible and, therefore, any reliance on his testimony is clearly erroneous.

Mr. Paulson’s purpose in making a foray into the foregoing specific instances in which Trooper Boley contradicted the objective truth and departed from his training is to identify for this Court that the circuit court’s findings were clearly erroneous because the court adopted, in part, the trooper’s version of the facts when rendering its decision. Reliance upon the testimony of an interested witness, *i.e.*, a witness who has a stake in the outcome just as Trooper Boley did, who has repeatedly contradicted objective evidence and who has abandoned the protocols to which he is expected to conform his testing is at best misplaced and at worst clearly erroneous. Mr. Paulson proffers that it is the latter.

With the foregoing as a backdrop, it remains for this Court to determine whether the remaining facts of this case rise to the level of establishing probable cause to arrest as a matter of law.

II. TROOPER BOLEY LACKED PROBABLE CAUSE TO ARREST MR. PAULSON 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:

²R30 at 8:17-23.

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 I, § 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 Boley to conclude that he had probable cause to believe that Mr. Paulson operated a motor vehicle while impaired. For the reasons set forth below, Mr. Paulson proffers that Trooper Boley’s decision to arrest him was constitutionally *unreasonable*.

B. Application of the Law to the Facts.

The issue to be determined from the evidence adduced at the hearing on Mr. Paulson’s motions is whether, under the totality of the circumstances, a sufficient factual basis exists to conclude as a matter of law that Trooper Boley had probable cause to arrest Mr. Paulson. 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 his concluding that he had probable cause to arrest Mr. Paulson:

Nowhere within the record is there any testimony that Mr. Paulson misunderstood Trooper Boley; had difficulty understanding directions being given to him; or was otherwise mentally slow, foggy, confused or impaired.

There is no allegation of bad driving on Mr. Paulson’s part. Mr. Paulson’s wife alit from the vehicle while it was moving on her own volition. R30 at 24:18-21.

Trooper Boley admitted that he “**never** noted any swaying [on Mr. Paulson’s part or] . . . any uncoordination [*sic*],” and this was on a road that Trooper Boley conceded was “a little bit slick . . .” R30 at 31:1-10.

Similarly, Trooper Boley stated that he is trained to look for “orbiting” (circular swaying) during the HGN test, but in Mr. Paulson’s case, he never observed him to be orbiting. R30 at 44:9-24.

Regarding the walk-and-turn test, Trooper Boley claims Mr. Paulson failed this test, but upon closer examination of Exhibit No. 1 (R29) from the motion hearing, portions of the trooper’s claim of failure are far less than serious. For example, the trooper admitted that when he claimed that Mr. Paulson’s steps were not “heel to toe,” that was based upon the

fact that the toe of his trailing foot would come slightly alongside the heel of his lead foot, and *not* that there was a “gap.” R30 at 36:1-7. Likewise, the trooper testified that Mr. Paulson took the correct number of steps, did not stagger, wobble, sway, stop to steady himself, or otherwise use his arms for balance. R30 at 36:16 to 37:3. Mr. Paulson’s alleged deficiency with the turn on this test “had nothing to do with his balance,” but rather was deemed a “clue” by the trooper simply because he used both of his feet to turn rather than keeping one foot planted and made without consideration of his combat injury. R30 at 37:24 to 38:3. Finally, Mr. Paulson remained in perfect instructional stance for forty-three (43) seconds at the beginning of this test without losing his balance. R29 at Elapsed Time 27:21 to 28:04.

Mr. Paulson exhibited *no* clues on the OLS test. R30 at 15:11-14.

Trooper Boley alleges that Mr. Paulson had “thickly slurred speech” during their encounter. R30 at 6:3-9. An objective review of the video record, however, demonstrates that throughout the entire encounter between Mr. Paulson and the trooper, Mr. Paulson can be clearly heard and that no such “thick slurring” exists anywhere in the audio record. R29, *passim*. In fact, at one point during cross examination when an audio portion of the record was played in court, Trooper Boley conceded that he could “clearly hear Mr. Paulson” responding to his questions. R30 at 28:17-23.

The foregoing facts are just a part of the “totality” which needs to be examined by this Court when assessing whether there was probable cause to arrest Mr. Paulson. In addition to the foregoing, as Mr. Paulson argued in Section I., *supra*, the circuit court’s failure to recognize the problems inherent in the trooper’s credibility undermines the validity of its holding.

It is Mr. Paulson’s position that when all of the foregoing are taken together, the scales do not simply “tip” in favor of Mr. Paulson in terms of the trooper lacking probable cause to arrest him, but swing heavily in his favor. In fact, when taken together, all of the foregoing serve to *undercut* such a conclusion.

Consider, for example, the OLS test. No clues of impairment were observed on this test. When one factors this observation into the observations made by the trooper of Mr. Paulson’s walking and standing—which were without flaw or misstep—it is reasonable to conclude that Mr. Paulson’s coordination and balance were *not* impaired by intoxicants. This **lack** of visible impairment is further *supported* by the utter absence of any flagging of Mr. Paulson’s mentation. The record throughout this case demonstrates that Mr. Paulson engaged in intelligent conversation with Trooper Boley, followed directions given to him, responded appropriately to questions put to him, *et al.*. This case altogether lacks any evidence of impairment of Mr. Paulson’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 clearly as well. When there is an absence of any effect on a person’s mentation, such evidence *contraindicates* impairment by alcohol *especially* when considered in light of a OLS stand test which yielded *zero* clues and Mr. Paulson’s

ability to walk, stand, and balance throughout his encounter with the trooper. Add to this equation the element of unimpaired speech—as the objective video record demonstrates—and one is even further removed from concluding that probable cause to arrest exists under the circumstances of this case.

Finally, while observations of “poor driving” are not the *sine qua non* of a prosecution for operating a motor vehicle while intoxicated, it is relevant to note that there is *no* observed “bad driving” in this case.

So what remains for the State upon which to rely when it comes to establishing probable cause? It will argue that the HGN and WAT tests add to the probable cause calculus. As noted in Section I., *supra*, however, these observations and results are specious not only because the trooper’s credibility is questionable, but additionally, because he egregiously departed from the NHTSA protocols when he administered these tests.

The State may next proffer that the counting backward and alphabet tests lend themselves to establishing probable cause to arrest. It is not even clear what constitutes a “failure” of these tests because they are non-standardized tests. How many “clues” must be observed before one can distinguish between impairment due to an intoxicant from that which may be caused by Mr. Paulson’s distraction due to his concern for his wife who had suffered a serious head injury and been transported to the hospital? These tests are of little value not only because there is no standard against which to measure them, but also because Mr. Paulson’s performance on the same is not especially egregious. For example, Trooper Boley admitted that Mr. Paulson immediately recognized his error on the alphabet test and immediately restarted the test, performing it perfectly thereafter. There is no allegation by the trooper that Mr. Paulson ever stopped improperly during the recitation of the alphabet, repeated any letters, transposed any letters, or skipped any letters. Mr. Paulson’s only “mistake” during his recitation is that he said “P” instead of “G.” If this was a standardized test, which it is not, this “error” would constitute what is otherwise referred to as a “clue,” however, on the standardized tests, *one clue is not considered evidence of impairment by alcohol*.

What does this leave for the State? It leaves Mr. Paulson’s allegedly bloodshot eyes and the odor of intoxicants. With respect to the trooper’s alleged observation of bloodshot eyes, 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. In fact, 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). Because 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 no value probable cause calculus here.

Regarding the observation of an odor of intoxicants, 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. Even the observation of a partial thirty-six pack of beer in the rear seat of Mr. Paulson’s vehicle is of little value because, as the trooper admitted, it is not illegal to transport unopened alcoholic beverages in Wisconsin. R30 at 27:13-16. There were not even any open intoxicants or empty cans of beer found in or around the Paulson vehicle. R30 at 7:20-22; 27:17-24.

When the facts of this case are considered in their totality, Mr. Paulson proffers that probable cause to arrest him for an operating while intoxicated offense did not exist and that the lower court’s findings were clearly erroneous under the circumstances because it failed to account for the trooper’s suspect credibility.

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

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

instant matter are heavily weighted in Mr. Paulson'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. Paulson 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. Paulson proffers that he has submitted more than enough proof that Trooper Boley'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. Paulson respectfully requests that this Court reverse the decision of the circuit court denying Mr. Paulson's motion and remand the case with further directions that absent the required probable cause, Mr. Paulson should not have been arrested for allegedly operating a motor vehicle while intoxicated.

Dated this 16th day of May, 2022.

Respectfully submitted:

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Electronically signed by:

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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 7,209 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 May 16, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 16th day of May, 2022.

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