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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2022AP186

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS ALLEN PAULSON

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT
ENTERED IN THE CIRCUIT COURT FOR DUNN
COUNTY, BRANCH II, THE HONORABLE
CHRISTINA M. MAYER PRESIDING, TRIAL
COURT CASE NO. 18-TR-8068

PLAINTIFF-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	2
ISSUES PRESENTED	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	4
INTRODUCTION	4
STATEMENT OF THE CASE	5
STANDARD OF REVIEW	7
ARGUMENT	8
I. The circuit court properly held that law enforcement had probable cause to arrest Paulson	8
A. Relevant law	8
B. Law enforcement had probable cause that Paulson was violating Wis. Stat. § 346.63(1)	9
C. Paulson's contrary arguments are unpersuasive	12
CONCLUSION.....	18
CERTIFICATION AS TO FORM AND LENGTH ...	19

TABLE OF AUTHORITIES

	Page
 CASES:	
 <u>Bond v. United States,</u> 529 U.S. 334 (2000)	8, 9
 <u>Brigham City v. Stuart,</u> 547 U.S. 398 (2006)	8
 <u>City of West Bend v. Wilkens,</u> 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324	<i>passim</i>
 <u>State v. Allen,</u> 226 Wis. 2d 66, 593 N.W.2d (Ct. App. 1999)	11
 <u>State v. Anderson,</u> 2019 WI 97, 389 Wis. 2d 106, 935 N.W.2d 285	7
 <u>State v. Anson,</u> 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776	15
 <u>State v. Colstad,</u> 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 39...	14
 <u>State v. Felton,</u> 2012 WI App 114, 344 Wis. 2d 483, 824 N.W.2d 871	13, 14
 <u>State v. Hogan,</u> 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124	11

State v. Kennedy,

2014 WI 132, 359 Wis. 2d 454, 856 N.W.2d 834 13

State v. Koch,

175 Wis. 2d 684, 499 N.W.2d 152 (1993)8

State v. Kutz,2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660
.....*passim*State v. Ortiz-Mondragon,2014 WI App 114, 348 Wis. 2d 423, 856 N.W.2d 339
..... 17State v. Secrist,

224 Wis. 2d 201, 589 N.W.2d 387 (1999)8

State v. Weber,

2016 WI 96, 372 Wis. 2d 202, 887 N.W.2d 5548

State v. Wille,

185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994) ... 13

STATUTES:

Wis. Stat. § 340.01(46m)(a) 11

Wis. Stat. § 343.63(1)*passim*

OTHER:

National Highway Traffic Safety Administration, *DWI
Detection and Standardized Field Sobriety (SFST)
Refresher: Instructor Guide* (Rev. 02/2018) 16

ISSUE PRESENTED

(1) Did law enforcement have probable cause to arrest Nicholas A. Paulson?¹

The circuit court answered “yes.”

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves application of well-settled law to the facts, which the briefs should adequately address.

INTRODUCTION

Nicholas A. Paulson appeals a judgment of conviction for first-offense operating a motor vehicle while intoxicated and first-offense operating a motor vehicle with a prohibited alcohol concentration. Paulson argues that law enforcement lacked probable cause to arrest him for an offense.

Paulson is wrong. Paulson omits multiple key facts from his arguments, including his preliminary breath test result of .198. This fact, in combination with proof of his driving, easily establishes probable cause of a prohibited alcohol concentration offense. Even ignoring this fact, Paulson omits other facts that also establish probable cause. This Court should affirm the circuit court.

¹ The State has reframed the issue to be less argumentative than as presented by Paulson.

STATEMENT OF THE CASE

As plaintiff-respondent, the State exercises its discretion to not present a full statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

However, Paulson has omitted a number of key facts that are paramount to his appeal. Chief among these omitted facts is his preliminary breath test result of .198. (R. 30, 17:11—17.)

Paulson's preliminary breath test result was obtained prior to his arrest by Wisconsin State Trooper Brett Boley. Indeed, per the motion hearing transcript:

Q You have had occasion to observe persons under the influence of an intoxicant during the course of your duties as an officer, correct?

A Correct.

Q And that's many times?

A Yes.

Q Did you have an opinion as to whether or not the defendant was under the influence of an intoxicant?

A I did.

Q What was your opinion?

A My opinion, based on my training and experience and everything I observed from the moment I first arrived on scene until the moment I took the defendant into custody, was that he was impaired by intoxicants.

Q Did you request he provide a preliminary breath test sample?

A I did.

Q Did he do so?

A He did.

Q What was the result?

A The result was I believe .198.

Q And after that, you placed him under arrest; is that correct?

A That's correct.

(R. 30, 16:20—17:17.)

These events are corroborated by the video evidence introduced at the hearing. The video shows the field sobriety tests being administered. (DVD of Traffic Stop at 23:00 to 30:52). Trooper Boley then returns to his vehicle, retrieves the preliminary breath test device, and asks Paulson to blow into it. (DVD of Traffic Stop, at 30:52 to 33:08.) The following conversation ensues prior to Paulson's arrest:

Boley All right. Do you think you're over or under the legal limit?

Paulson I'm probably over.

Boley Probably over? Where do you think you're at?

Paulson I know I'm right there from home.

Boley No, where do you think you're at? Above .08?

Paulson Oh, I have no idea.

Boley Okay. I'll let you know your PBT reading was a .198. I'm going to have you face the car for me; hands behind your back.

(*Id.*) Paulson is then arrested.

Paulson omits other facts germane to his appeal. These omissions include, *inter alia*, the full conversation about Paulson's injury. Per the video:

Boley So I noticed your license plates say wounded combat veteran.

Paulson Yep.

Boley What are your injuries?

Paulson I have shrapnel [sustained?] in my back and my neck.

Boley How does that affect you?

Paulson Uh, [I can stand a little bit?] but, it distorts me a little bit.

Boley It what?

Paulson It distorts me a little bit.

Boley It distorts you? What do you mean by that?

Paulson Like it [unintelligible]

Boley Okay, so what if you turn one direction and turn another direction, then what?

Paulson It's painful.

Boley Oh it's painful? Okay. Is that pretty much it? You don't lose balance or anything?

Paulson Not really.

Boley Okay, okay. Do you have any inner ear problems then because of that?

Paulson: Um, no, not that I recall.

(DVD of Traffic Stop at 23:00 to 23:43.)

Paulson omits yet further facts. For example, at the oral ruling, the circuit court based its decision upon, *inter alia*, the video, the parties' briefs, and the totality of the circumstances. (R. 79, 3:9—16.)

The State will cite to further relevant facts in the Argument section below.

STANDARD OF REVIEW

An appellate court reviewing a decision on a motion to suppress applies a two-step standard of review. *State v. Anderson*, 2019 WI 97, ¶ 19, 389 Wis. 2d 106, 935 N.W.2d 285. It upholds “the circuit court's findings of fact unless they are clearly erroneous,” meaning that “it is against the great weight and clear preponderance of the evidence.” *Id.* ¶ 20. A reviewing court applies “constitutional principles to those facts independently of the decisions rendered by the circuit court and court of appeals.” *Id.*

ARGUMENT

1. The circuit court properly held that law enforcement had probable cause to arrest Paulson.

A. Relevant law

To be lawful, an arrest must be based on probable cause. *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). While the information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is “more than a possibility,” it “need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *Secrist*, 224 Wis. 2d at 212, 589 N.W.2d 387. Probable cause is a “*flexible, commonsense measure of the plausibility of particular conclusions about human behavior.*” *State v. Kutz*, 2003 WI App 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660 (emphasis added).

Probable cause is an objective standard, and courts are not bound by the officer's subjective assessment or motivation. *Id.*, ¶ 12. Indeed, “an action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer's state of mind, ‘as long as the circumstances, *viewed objectively*, justify [the] action.’ *The officer's subjective motivation is irrelevant.*” *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). (emphases added). *Accord State v. Weber*, 2016 WI 96, ¶ 19 n.6, 372 Wis. 2d 202, 887 N.W.2d 554. *See also Bond v. United States*, 529 U.S. 334, 338, n.2 (2000) (“The parties properly agree that the subjective

intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . the issue is not his state of mind, but the objective effect of his actions”).

When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest. *State v. Kutz*, 2003 WI App 205, ¶ 12.

B. Law enforcement had probable cause that Paulson was violating Wis. Stat. § 346.63(1).

After considering the evidence at the suppression hearing, the circuit court concluded that there was probable cause to arrest Paulson for violating Wis. Stat. § 346.63(1). (R. 79, 5:16—23.)

The circuit court was correct. A person violates Wis. Stat. § 346.63(1) by driving under one of three circumstances: (1) while under the influence of alcohol or drugs or a combination of alcohol and drugs, (2) with a prohibited alcohol concentration, or (3) with a detectable amount of a restricted controlled substance in his system. Here, the facts were easily sufficient to satisfy the probable cause standard and arrest Paulson for violating the statute.

First, Paulson said that he consumed an excessive amount of alcohol in “six to twelve beers.” (R. 30, 7:23—8:5.) Quite frankly, it is within the contours of common experience that six to twelve beers would probably result in significant intoxication to an individual and/or a near-guarantee of a blood alcohol concentration greater than the legal limit of 08. Paulson’s excessive drinking was manifested in his outward physical appearance. His eyes were bloodshot and glassy. (R. 30, 8:6—11.) His person emanated an

odor of intoxicants. (R. 30, 6:10—16.) His vehicle, further, contained a 36 pack of beer with 12 cans missing from its top row. (R. 30, 7:4—19.) Paulson's excessive drinking of six to twelve beers is a considerable fact – both by itself, and by how it informs the nature of the other facts.

Second, Paulson exhibited significant issues with his mentation. He “initially appeared confused as to how much he had actually drank.” (R. 30, 7:23—8:5.) When pressed further on his drinking, he was only able to give a non-precise, wide-range answer of “six to twelve beers.” (*Id.*) Paulson would go on to exhibit issues with following directions by starting too soon on the Walk and Turn test, (R. 30, 13:4-12), and by not raising his leg properly for the One Leg Stand test. (R. 30, 15:11—14.) Paulson would also perform the Alphabet Test incorrectly by reciting “E, F, P, oh...” (Video of Traffic Stop, 30:02 through 30:20.) And he would make significant mistakes on the Counting Test, where he was asked to count from 64 to 49. (R. 30, 9-19). Indeed, Paulson counted “60” twice, counted “57, 56, 57, 56,” counted “50” twice, paused at several moments throughout, and continued past “49” to “48” and “47” and “46” and “45.” (Video of Traffic Stop, 30:20 through 30:46.) Paulson's mentation was therefore significantly impaired due to alcohol.

Third, Paulson also exhibited balance issues prior to his arrest. Indeed, upon arrival, Trooper Boley observed Paulson stumble and come closing to falling over. (R. 30, 5:23—6:9.) Paulson would go on to exhibit an observed four out of eight possible clues for the Walk and Turn test. (R. 30, 14:9—12.) It is important to emphasize that Paulson displayed these balance issues despite earlier indicating that his injury did not cause balance issues or ear pressure problems. (DVD of Traffic Stop at 23:00 to 23:43.)

Fourth, Paulson also exhibited impairment through six of six clues on the Horizontal Gaze Nystagmus test. It is true that the test was not administered perfectly. However, by case law, field sobriety tests are observational tools, not scientific tests. *City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 1, 278 Wis. 2d 643, 693 N.W.2d 324. This point is addressed further in section C, *infra*. However, at this point, it suffices to say that Trooper Boley is an experienced law enforcement officer who had observed impairment before in many individuals. (R. 30, 16:20—17:25.) *See State v. Hogan*, 2015 WI 76, ¶47, 364 Wis. 2d 167, 868 N.W.2d 124 (experience of officer is “a plus”); *State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999) (training and experience of an officer is a factor to be considered in the totality of the circumstances analysis). Trooper Boley’s opinion – based on all of his observations prior to Paulson’s arrest – was the Paulson was under the influence of an intoxicant. (R. 30, 17:1—10.)

Fifth, and most critically, Paulson’s preliminary breath test result was over two times the legal limit at .198. This fact, in combination with Paulson’s admission to driving, irrefutably establishes probable cause to arrest him for a prohibited alcohol concentration offense. Wis. Stat. § 346.63(1)(b); Wis. Stat. § 340.01(46m)(a) (establishing .08 limit). Indeed, impairment is irrelevant to such an offense. WIS JI CRIMINAL 2660A (2015-current).

Paulson tries to hand-wave this determinative fact by suggesting that “prior to administration of the preliminary breath test, Trooper Boley concluded that he had sufficient facts upon which to take Paulson into custody.” (Paulson’s Br. 8.)

Paulson, though, is wrong. Trooper Boley did not testify to this at the hearing – rather, he made his

conclusion based on “everything I observed from the moment I first arrived on scene *until the moment I took the defendant into custody.*” (R. 30, 17:1-10) (emphasis added). Moreover, even if Trooper Boley had believed otherwise, it would not matter. Probable cause is an objective standard, and courts are not bound by the officer’s subjective assessment or motivation. *State v. Kutz*, 2003 WI App 205 ¶ 12.

Paulson’s preliminary breath test was irrefutably administered prior to his arrest. (Video of Traffic Stop, 30:46 through 33:08.) Paulson also admitted prior to his arrest that he would “probably be over” the limit. (*Id.*) His preliminary breath test was, in fact, over two times the legal limit at .198. (*Id.*) Paulson was then appropriately arrested – both on the determinative fact of the PBT, as well as the plethora of other facts that established the low-but-fair threshold of probable cause to arrest. Accordingly, Trooper Boley’s arrest of Paulson was proper.

C. Paulson’s contrary arguments are unpersuasive.

Paulson asserts several arguments in his brief that are founded upon omissions of fact, law, or both. They are therefore unpersuasive.

Throughout his brief, Paulson essentially repeats his arguments to attack the circuit court’s factual findings as well as probable cause overall. However, the circuit court’s factual findings were not erroneous for the reasons stated below. Further, even if they were, there was overwhelming probable cause to arrest Paulson for the reasons aforementioned, and for the reasons stated below.

Paulson argues at length about the Horizontal Gaze Nystagmus test, and asserts that its administration was flawed such that any reliance

upon it is contrary to alleged “common law.” (Paulson’s Br., 10). Paulson ignores the case law to the contrary, such as *City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324.

In *Wilkens*, the Wisconsin Court of Appeals upheld the circuit court’s ruling admitting testimony of non-standardized tests and field tests that were not conducted following the NHTSA protocol. *Id.*, ¶ 1. *Wilkens* held that field sobriety tests are not “scientific tests.” *Id.* Rather, they are mere observational tools that officers commonly use to help discern various indicia of intoxication – the perception of which is necessarily subjective. *Id.* Indeed, “it is not beyond the ken of the average person to understand such indicia and to the form an opinion about whether an individual is intoxicated.” *Id.*

Wilkens further rejected the proposition that following the standardized procedures that NHTSA recommends leads to scientifically valid determinations. *Id.*, ¶ 18. Further, “even if science ‘validates’ observations that police officers make when administering FSTs, that would not mean the observations themselves are based on scientific phenomena rather than plain common sense.” *Id.*, ¶ 21. Accordingly, there is no reason to exclude the testimony of the field tests if they are non-standardized tests or if they are not conducted exactly pursuant to the NHTSA manual. *Id.*, ¶ 6.

Wisconsin, moreover, does not require law enforcement officers to even give field sobriety tests to establish probable cause. *State v. Kennedy*, 2014 WI 132, ¶21, 359 Wis. 2d 454, 856 N.W.2d 834; *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). Indeed, “passing” a field sobriety test does not, by itself, preclude a finding of probable cause. *State v. Felton*, 2012 WI App 114, ¶ 10, 344 Wis. 2d 483,

824 N.W.2d 871 (“That Felton successfully completed all of the properly administered field-sobriety tests does not ... subtract from the common-sense view that Felton may have had a blood-alcohol level that violated WIS. STAT. § 346.63(1)”). Even partial performance on a field sobriety test can inform the officer and can form part of probable cause. *See State v. Colstad*, 2003 WI App 25, ¶25, 260 Wis. 2d 406, 659 N.W.2d 39

Accordingly, Paulson’s performance of a non-perfect HGN test is properly considered in the probable cause analysis. Such consideration, as the trial court appropriately noted, is limited to “some evidence” from it, as non-standardization “lessened the specific impact of the HGN test.” (R. 79, 4:15—22). Moreover, as the State argued in its motion-brief:

Quite frankly, if the Trooper had been closer to Paulson and if Trooper Boley had moved his stimulus slower, he would have been in a better position to detect nystagmus.

...

Trooper Boley is a trained and experienced officer. When he administered the HGN test, he witnessed nystagmus which is a physical symptom of impairment. He had seen many nystagmus many times and could recognize it.

(R. 26.) This brief was expressly considered by the circuit court prior to its ruling. (R. 79, 3:9—14.)

Paulson also argues that he did not have “thickly slurred speech” per the video record, and that this hurts Trooper Boley’s credibility. (Paulson’s Br. 13). Paulson overlooks two things. First, Paulson’s speech does appear to be slurred or less than clear at times, including during the following timestamps in the video; 20:00—20:10 (“My name’s Nick.”; “Your name’s Nick?” “Yeah”); 21:37—21:42 (“So what, what happens

if I don't pass these tests will I [unintelligible]"; 23:00—23:43 ("Uh, [I can stand a little bit?] but, it distorts me a little bit."; "It what?"; "It distorts me a little bit."; "It distorts you? What do you mean by that?"; "Like it [unintelligible]"); 27:43—27:47 ("[unintelligible]"). Second, the video record in this case does not cover law enforcement's initial contact with Paulson. However, as Trooper Boley testified:

Boley During the initial part of my arrival on scene, whenever [Paulson] spoke, I observed his speech to be strongly slurred – or, correction, thickly slurred. I also observed when he stood up to back away from EMS personnel that were attending to his wife, he stumbled and came close to following over.

(R. 30, 6:2—9.) This portion of testimony went unattacked by Paulson, despite him generally engaging in an in-depth cross examination. Accordingly, Paulson did have slurred speech at times, and his arguments to the contrary are misplaced.

Paulson also argues that Trooper Boley misremembered things at times and therefore has credibility issues. (Paulson's Br. 14.) However, it is not surprising that an officer may be less-than-familiar with every precise, nit-picky detail from an incident that occurred nearly nine months prior to the hearing. (R. 30, 4:3—10.) Moreover, the circuit court had the benefit of observing Trooper Boley's demeanor on the stand, and was able to view his lengthy testimony as a whole, rather than through cherry-picked examples. *See State v. Anson*, 2005 WI 96, ¶ 32, 282 Wis. 2d 629, 698 N.W.2d 776 ("... the trial court ... is the ultimate arbiter of both the credibility of the witnesses, and the weight to be given to each witness' testimony[.] *This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand.*") (emphasis added).

Paulson also argues that counting his improper turn during the Walk and Turn test was wrong due to his injury. (Paulson's Br. 14.) Paulson ignores four things. First, Trooper Boley had already confirmed that Paulson did not have balance or ear pressure issues prior to the test. (DVD of Traffic Stop at 23:00 to 23:43.) Second, Paulson did not mention that he was having pain at any point during any of the tests. (Video of Traffic Stop, 23:00 through 33:08.) Third, the NHTSA Manual portions cited by Paulson do not instruct law enforcement to disregard or discount clues based on potential condition, but to instead "consider" the condition. (Paulson's Br. 15.) And fourth, even if discounting that clue, Paulson still would have exhibited three clues of impairment on the test such that he failed it. *See* National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Test (SFST) Refresher: Instructor Guide*, at page 171 of 201 (available online) (Rev. 02/2018).

Paulson's arguments, as a whole, omit key facts and law from their analysis. Ultimately, he appears to want to inflame and to present his version of the case as the only one that exists. In so doing, he ignores that this is not a trial where the parties' perspectives seek verdict. Rather, the analysis here is probable cause, and competing reasonable inferences are decided in favor to law enforcement. *See State v. Kutz*, 2003 WI App 205, ¶ 12.

Reasonable inferences derive from the facts. And the clear facts of our case include, *inter alia*, that Paulson consumed an excessive amount of alcohol in "6-12 beers"; that he showed significant issues with his mentation at several points; that he exhibited balances issues at several points; that he exhibited clues of impairment on the Horizontal Gaze

Nystagmus and Walk and Turn tests; and that he had a preliminary breath test result of .198, which irrefutably established probable cause.

The State will not attempt to predict Paulson's reply. Rather, the State will note only that the Court of Appeals need not address issues raised for the first time in a reply brief. *State v. Ortiz-Mondragon*, 2014 WI App 114, ¶ 10 n 4., 358 Wis. 2d 423, 856 N.W.2d 339.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction and order denying Cormican's suppression motion.

Dated this 2nd day of August, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,107 words.

Dated this 15th day of August, 2022.

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