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 CHRISTINA M. MAYER PRESIDING, TRIAL COURT CASE NO. 18-TR-8068

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE MISCHARACTERIZES MULTIPLE PORTIONS OF MR. PAULSON'S ARGUMENT.

It appears that the main throughline in the State's response brief is to characterize Mr. Paulson's argument as "founded upon omissions of fact, law, or both." State's Response Brief at p.12. The State's brief, however, succumbs to its own accusation through its mischaracterization of Mr. Paulson's argument.

First, with respect to "omissions of . . . law," it should be noted that the probable cause standard described in the State's brief is the *same* standard as that described in Mr. Paulson's brief, albeit with citations to authority not also cited in the State's brief. *Cf.* Appellant's Initial Brief, at pp.16-17 *with* State's Response Brief, at pp. 8-9. The description and explanation of the probable cause standard—which is at the heart of the issue in this appeal—is correctly, appropriately, and adequately described by Mr. Paulson. Appellant's Initial Brief, at pp.16-17. He has "omitted" nothing in this regard. Simply because the parties do not share the same *approach* to the examination of the facts in the instant matter *does not equate* to an "omission of . . . law."

Second, the State accuses Mr. Paulson of omitting "key facts" from his brief and cites as chief among these Mr. Paulson's preliminary breath test result. State's Response Brief at pp. 4-5. Mr. Paulson did expressly aver in his Statement of Facts that Trooper Boley had him submit to a preliminary breath and even provided a pinpoint citation to the record for this assertion. Appellant's Brief at p.9. Perhaps what the State takes umbrage with is the fact that Mr. Paulson did not specifically set forth the result of the preliminary breath test. Mr. Paulson did not state the result of the preliminary breath test because Trooper Boley had already formed an opinion that Mr. Paulson was under the influence, and therefore, since his custody was a foregone conclusion—*i.e.*, he was not going to be released even if his breath test result was below the legal limit—the result of the test was immaterial to Mr. Paulson's argument. Put another way, whether a preliminary breath was or was not administered in the instant case, Mr. Paulson would have been arrested. Thus, the question is whether probable cause to arrest existed prior to that point.

In an effort to make Trooper Boley's decision to arrest Mr. Paulson appear as though it took Mr. Paulson's preliminary breath test into consideration, the State pricks out a non-contextual answer Trooper Boley provided during his direct examination that he based his arrest decision on "everything [he] observed from the

moment [he] first arrived on scene until the moment [he] took the defendant into custody." R30 at 17:7-9; State's Response Brief at p.12. What is ironically "omitted" from the State's description, however, is the ***context*** in which Trooper Boley provided the described answer. More specifically, the foregoing response was offered in reply to a question the State put to Trooper Boley about whether he formed an opinion regarding whether Mr. Paulson was under the influence of an intoxicant *immediately* ***after*** *the State had finished its line of questioning regarding the standardized field sobriety tests but* ***before*** *it asked any questions about a preliminary breath test.* R30 at 9:2 to 17:15. Understood contextually, the State's question about what conclusions the trooper might have drawn was proffered within the framework of what had been asked to that point, *i.e.*, based upon the *field sobriety tests* did the trooper draw any conclusions? Thus, the State's characterization of the trooper's testimony is not as encompassing as the State would lead this Court to believe and is frankly quite misleading.

Third, in a very ironic argument made by the Respondent, the State proffers that even if Trooper Boley had made the decision to arrest Mr. Paulson prior to the administration of a preliminary breath test, "it would not matter." State's Response Brief at p.12. The State premises its argument upon the fact that the lower court was not "bound by the officer's subjective assessment . . . ." If there was ever a perfect exemplar of the old saw about one "speaking out of both sides of their mouth" the State's argument provides it. Not one full page prior to making its argument that the trooper's opinion "would not matter," the State asserts that the "experience of [an] officer is 'a plus'" when assessing performance on the field sobriety tests. State's Response Brief at p.11, citing *State v. Hogan*, 2015 WI 76, ¶ 47, 364 Wis. 2d 167, 868 N.W.2d 124. Well, which is it? Is the experience of an officer something which is "a plus" which should be deemed helpful when a court objectively assesses whether probable cause to arrest exists or is it something which "would not matter?" Either the officer's appraisal of the circumstances is something worth considering or it does "not matter." Mr. Paulson's point remains that if the trooper had already drawn his conclusion to arrest Mr. Paulson prior to the administration of the preliminary breath test, the result of that test does not matter.

Fourth, the State asserts that Mr. Paulson "did not mention that he was having pain at any point during any of the tests" in an effort to bolster the conclusions Trooper Boley drew from his performance on the field sobriety tests. State's Response Brief at p.16. Mr. Paulson must question the State's position by rhetorically asking: Why would he since he already told the trooper that "[i]t's painful" when he turns as he is walking? State's Response Brief at p.7. Moreover, Mr. Paulson had also already informed the trooper that he was a wounded combat

veteran and that he had shrapnel in his neck and back from being wounded during combat. R30 at 33:3 to 34:15. Is Mr. Paulson expected to continually repeat this mantra throughout his entire encounter with Trooper Boley before the State will grant that a wounded veteran with shrapnel in his neck and back might have difficulty performing balance and coordination tests? It should be enough that Mr. Paulson put the trooper on notice of his problems without the State having to add insult to injury by arguing that Mr. Paulson did not complain *enough*.

Fifth, the State fails to directly address the factors Mr. Paulson identified in his initial brief regarding his performance on the walk-and-turn and one-leg stand tests. As Mr. Paulson noted in his initial brief:

> 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 no clues on the OLS test. R30 at 15:11-14.

Appellant's Brief at p.9. The foregoing facts are of significant moment and magnitude and remain undisputed by the State.

Sixth, the State again cherry picks a tiny handful of examples from the video record in the instant matter to argue that Mr. Paulson had "thickly slurred speech." State's Brief at pp. 14-15. Not only are these examples problematic because they could be due simply to the fact that the trooper's microphone simply did not record clearly, but far more importantly, the few examples provided do not take into account the *entire length of the full encounter* between the trooper and Mr. Paulson. That is, there was a *substantial* conversation between Trooper Boley and Mr. Paulson which took place over an *extended* period of time. During the entirety of their conversing, Mr. Paulson's speech was *not* "thickly slurred" as the State claims, and fortunately for Mr. Paulson, this is a fact that this Court can divine for itself simply by listening to Record Item No. 29. Tellingly ignored by the State in its brief is Trooper Boley's concession that he could "clearly hear Mr. Paulson" responding

to his questions at one point during cross examination. R30 at 28:17-23. Allegedly "slurred speech" is, therefore, a non-factor in this appeal.

Finally, the State makes much of the fact that Mr. Paulson was wholly truthful with the trooper regarding his consumption of beer by stating that he consumed six to twelve cans of beer. The State claims that this "would probably result in significant intoxication . . ." as though it was a foregone conclusion. State's Response Brief at p.9. Fortunately for Mr. Paulson, such conclusions are hardly foregone. For example, a man weighing 180 pounds who consumes one beer per hour over a twelve-hour period will have an alcohol concentration *below* the legal limit (0.07%). *See State v. Hinz*, 121 Wis. 2d 282, 284 n.2, 360 N.W.2d 56 (Ct. App. 1984). The same person, consuming six beverages over a four-hour period will have an ethanol concentration of 0.065%. *Id*. The timing of the ingestion of the beverages, along with the person's weight and the food the individual consumed prior to and during drinking make all the difference. Thus, contrary to the State's all-encompassing conclusion which treats every individual the same way, regardless of the particular circumstances of their case, Mr. Paulson's admission does not automatically support a foregone conclusion that he was "significantly" intoxicated.

CONCLUSION

Mr. Paulson proffers that probable cause to arrest him for an impaired driving related offense did not exist in the instant case and, therefore, this Court should reverse the decision of the court below.

Dated this 29th day of August, 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 1,706 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 29th day of August, 2022.

MELOWSKI & SINGH, LLC

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