STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2022AP1539-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ROGER A. WOLF, JR.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WOOD COUNTY, BRANCH I, THE HONORABLE GREGORY J. POTTER PRESIDING, TRIAL COURT CASE NO. 20-CT-363

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE LAW ENFORCEMENT OFFICER WHO DETAINED MR. WOLF LACKED PROBABLE CAUSE TO ADMINISTER A PRELIMINARY BREATH TEST, AND IN SO DOING, THEREBY ALSO LACKED PROBABLE CAUSE TO ARREST HIM IN VIOLATION OF MR. WOLF'S FOURTH AMENDMENT RIGHTS?

> Trial Court Answered: NO. The circuit court concluded that the officer in this case had probable cause to administer a preliminary breath test to Mr. Wolf, and ultimately probable cause to arrest him, because "the case law is clear in that looking at the totality of the circumstances when there is an accident coupled with an odor of alcohol, that's sufficient for a finding of probable cause." R52 at 4:12-16; D-App. at 104.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Wolf will NOT REQUEST publication of this Court's decision as the common law authorities which set forth the standard for detaining an individual based upon anonymously tipped information are well-settled.

STATEMENT OF THE CASE

On November 2, 2020, Mr. Wolf was charged in Wood County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b). R4.

After retaining counsel, Mr. Wolf filed, *inter alia*, a motion to suppress evidence on the ground that the arresting officer in the instant case, Sgt. Nathan Dean of the Wood County Sheriff's Office, lacked probable cause to administer a preliminary breath test [hereinafter "PBT"] in violation of Wis. Stat. § 343.303, and thereby, also lacked probable cause to arrest him. R19. An evidentiary hearing was held on Mr. Wolf's motion on April 14, 2021. R24.

At the evidentiary hearing, the State offered the testimony of a single witness, Sgt. Dean. R24 at pp. 3-35. At the conclusion of the hearing, the court ordered the parties to submit additional briefs. R24 at 37:5-23. Based upon the court's order, the parties filed their supplemental briefs. R25; R26; R27.

Subsequently, the circuit court issued an oral decision at which it denied Mr. Wolf's motion, finding that because "the case law is clear in that looking at the totality of the circumstances when there is an accident coupled with an odor of alcohol, that's sufficient for a finding of probable cause." R52 at 4:12-16; D-App. at 103. The court then went on to observe that when "you couple that with the fact that the defendant himself made the admission that he had been drinking all day, that definitely puts it over the threshold." R52 at 4:12-19; D-App. at 104.

On June 21, 2022, Mr. Wolf entered a plea of no contest to the charge of operating with a prohibited alcohol concentration. R42 & R44. Based upon his change of plea, the court found Mr. Wolf guilty. R45; D-App. at 101-02.

It is from the adverse judgment of the circuit court that Mr. Wolf now appeals to this Court by Notice of Appeal filed on September 9, 2022. R55.

STATEMENT OF FACTS

On September 23, 2020, Mr. Wolf, was detained in the Town of Cary, Wood County, by Sgt. Nathan Dean of the Wood County Sheriff's Office for having been involved in an accident in which his motorcycle struck a deer on an unlit road. R24 at 5:10-23; 7:4-6. After the accident, there is no dispute that Mr. Wolf had lost consciousness. R24 at 6:6-9; 19:1-5.

Sgt. Dean did *not* observe Mr. Wolf commit any traffic violations such as weaving within his lane, operating his vehicle recklessly, endangering the safety of other traffic, speeding, obstructing traffic, *etc*., as he was dispatched to the scene after the accident had already occurred. R24 at 16:14-17. Similarly, a citizen witness to the accident did not aver that Mr. Wolf's motorcycle had crossed the centerline or drove in an erratic or otherwise unsafe manner. R24 at 16:14-21. In fact, upon further investigation, law enforcement officers discovered the deer carcass at the scene which Mr. Wolf had struck. R24 at 17:7-14. Sergeant Dean admitted that there was neither any witnesses nor any physical evidence which indicated that "this was an accident that could have been avoided." R24 at 17:7-21. Of further note, the citizen witness never made "any claim to [the sergeant] or anyone else present on the scene that he believed Mr. Wolf was impaired." R24 at 23:7-11.

Upon making contact with Mr. Wolf, it was apparent to Sgt. Dean that Mr. Wolf had suffered a head injury because evidence of significant bleeding covered portions of Mr. Wolf's head. R24 at 7:19-23; 18:15-17. Sgt. Dean also observed that Mr. Wolf had an odor of intoxicants emanating from his person, however, he did not note that Mr. Wolf had bloodshot eyes nor had slurred speech. R24 at 7:19-23. Additionally, Sgt. Dean thought that "it appeared maybe possibly [Mr. Wolf] urinated himself." R24 at 8:1-3.

Mr. Wolf was then questioned about how the accident occurred and he could not remember other than to inform the deputy that he was riding on his motorcycle with another male whose name he could not recall. R24 at 8:6-16. Sergeant Dean testified that persons who have a head injury and lost consciousness "can cause problems with the accuracy of the information they convey . . . ." R24 at 20:2-7. Sergeant Dean subsequently observed that Mr. Wolf's motorcycle was a single-seat bike. R24 at 8:15-16.

The sergeant asked Mr. Wolf whether he had been drinking, to which he replied that he had been drinking all day. R24 at 11:3-7. Unfortunately, Sgt. Dean never asked "Mr. Wolf what he meant by that" nor "went into details as far as what he meant . . . ." R24 at 29:16-20. There were no "follow-up[questions] as to how many [drinks Mr. Wolf] had, what types he had, the time of his last drink, *et cetera*." R24 at 29:21-24.

Sergeant Dean also observed what he believed to be a urine stain on Mr. Wolf's pants, however, he neither confirmed that with Mr. Wolf nor with the paramedics. R24 at 22:15-24. Sergeant Dean also conceded that he was unaware "that someone would urinate themselves when they're rendered unconscious in an event like this." R24 at 23:3-6.

Paramedics then took Mr. Wolf into an ambulance for the treatment of his injuries, and shortly thereafter, Sgt. Dean also entered the ambulance with his PBT device to obtain a PBT sample from Mr. Wolf. R24 at 12:3-7.

In the midst of the EMT's treatment of Mr. Wolf, Sgt. Dean exchanged places with one of the EMTs and, while Mr. Wolf's head was turned because he was speaking to an EMT, Sgt. Dean asked Mr. Wolf to submit to a PBT test. R24 at 23:22 to 24:2. Sergeant Dean conceded that "[i]t did not appear that [Mr. Wolf] had heard [him]" because he was speaking with the EMT treating him at the moment. R24 at 24:2. When Mr. Wolf finally turned his head to see that the deputy had taken a seat next to him, Sgt. Dean placed the PBT in front of Mr. Wolf's mouth and told him to provide a breath sample. R24 at 24:7-13.

STANDARD OF REVIEW

The issue presented in this appeal is premised upon whether an undisputed set of facts rises to the level of establishing a reasonable suspicion to detain Mr. Wolf's vehicle. When assessing whether a particular set of facts satisfies a constitutional standard, this Court reviews the constitutional question *de novo*. *State v. Drogsvold*, 104 Wis. 2d 247, 256, 311 N.W.2d 243 (Ct. App. 1981).

ARGUMENT

I. THE LAW IN WISCONSIN AS IT RELATES TO PROBABLE CAUSE TO ADMINISTER A PRELIMINARY BREATH TEST UNDER WIS. STAT. § 343.303.

A. The Fourth Amendment 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:

> 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 Fourth Amendment's purpose 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); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 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).

Both federal and state courts have consistently held that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**."

Mapp v. Ohio, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction deprives [these protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], 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).

The foregoing authority does not stand alone as time and again the Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be **liberally construed to prevent impairment of the protection extended**." *Grau v. United States*, 287 U.S. 124, 127 (1932)(emphasis added). The High Court has admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931).

The Fourth Amendment is implicated in the instant case because it is well-settled that "the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, ..." *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608 (Ct. App. 1980), citing *Wood Mem'l Hosp., Inc. v. Baird*, 45 Wis. 2d 629, 173 N.W.2d 700 (1970), and *State v. Bentley*, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979); *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 616-17 (1989).

Despite these stringent pronouncements, the circuit court nevertheless concluded that Sgt. Dean's actions in the present case were both constitutional and consistent with the standard established by Wis. Stat. § 343.303.

B. The "Probable Cause" Standard as It Relates to the Administration of a Preliminary Breath Test.

Typically, within the ambit of the Fourth Amendment, there are recognized three levels of encounter, namely: (1) the "simple encounter" for which the individual is afforded no constitutional protection because his or her movement is not restricted; (2) the investigatory detention, or *Terry*[1] stop, for which the officer must have a "reasonable suspicion" to detain the person; and (3) the custodial arrest which requires probable cause. *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982); *Henry v. United States*, 361 U.S. 98 (1959).

[1]*Terry v. Ohio*, 392 U.S. 1 (1968).

In the context of the administration of a preliminary breath test [hereinafter "PBT"], however, there is a fourth standard employed beyond the three described above. In Wis. Stat. § 343.303—which authorizes the use of PBTs—the Wisconsin Legislature has created what could be characterized as a "special-circumstances" seizure which requires the application of a "hybrid" standard.

More specifically, § 343.303 provides that an officer who suspects an individual of operating while intoxicated may administer a preliminary breath test upon having "probable cause to believe that the person . . . has violated s. 346.63(1)." Wis. Stat. § 343.303 (2021-22). The "probable cause" referred to in § 343.303 does not, however, rise to the level of "probable cause to arrest" described above, but rather, has been interpreted to mean that "quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop . . . but less than the level of proof required to establish probable cause for arrest." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999); *see also State v. Fischer*, 2010 WI 6, ¶ 5, 322 Wis. 2d 265, 778 N.W.2d 629. The notable and particular part of the *Renz* standard relevant to the inquiry in Mr. Wolf's case is whether there existed a "**proof that is greater than the reasonable suspicion necessary to justify an investigative stop**." Mr. Wolf believes, based upon the arguments presented hereinbelow, that no such standard was satisfied in the instant case.

As far as the standards related to reasonable suspicion and probable cause are concerned—and presumably any "hybrid" standard in between the two—the Wisconsin Supreme Court has reflected that the test to determine the constitutionality validity of the same "**focuses on the reasonableness of the governmental intrusion**." *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(emphasis added), quoting *United States v. Hensley*, 469 U.S. 221, 228 (1985).

II. APPLICATION OF THE LAW TO THE FACTS.

A. Preliminary Considerations.

Mr. Wolf does not doubt that the State will likely rebut much of the argument he proffers in Section II.B., *infra*, with what he believes is an over-utilized legal saw about how law enforcement officers are not obligated to consider or account for innocent explanations for the observations they make under the totality of the circumstances. *See, e.g.*, *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. The State will protest that the notion of a "totality" merely equates to

the notion that whatever circumstances the officer observes, if that particular "totality" adds up to a reasonable suspicion, probable cause, or presumably the hybrid *Renz* standard, it is sufficient to justify the action taken by the officer. Mr. Wolf believes that this is *not* the correct approach to take because: (1) it fails to acknowledge the overarching standard of reasonableness which is applicable to all Fourth Amendment questions; (2) flies in the face of the commonly understood definition of the word "totality"; and finally, (3) such a myopic approach to the definition of "totality" leads to absurd results. Each of these issues will be briefly examined below before Mr. Wolf turns to the facts of his case in particular.

First, 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). Employing "reasonableness" as the overarching standard means that the actions taken by a law enforcement officer must be those which "warrant a man of **reasonable** caution" under the circumstances to proceed as they did. *State v. Welsh*, 108 Wis. 2d 319, 330, 321 N.W.2d 245 (1982) (quotation marks and citations omitted; emphasis added); *Henry v. United States*, 361 U.S. 98 (1959); *Carroll v. United States*, 267 U.S. 132 (1925). As a general rule, and as more fully described hereunder, Mr. Wolf posits that if the "touchstone of the Fourth Amendment is reasonableness," it is patently unreasonable to always and only examine the facts which support a law enforcement officer's decision to act rather than considering ***all*** of the facts and circumstances known to the officer at the time he or she took the action at issue. For Fourth Amendment purposes, the Supreme Court has long recognized that the proper inquiry necessitates a consideration of "**all** the circumstances surrounding the encounter" between the officer and the citizen. *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (examining whether law enforcement officers boarding a bus constitutes a "seizure").

Second, the common and accepted definition of "totality" is "the whole or entire amount of something; *with nothing left out*."[2] Notably, looking at something only partially, as the State will likely ask this Court to do, would be considered an *antonym* for the concept of "totality." Such a view of the facts is not consistent with the very first word describing the "*totality* of the circumstances" test.

[2]https://www.britannica.com/dictionary/totality

Finally, the United States Supreme Court has condemned the approach of reviewing courts which adopt a "divide-and-conquer analysis" in which the facts that are "readily susceptible to an innocent explanation [are] entitled to 'no weight.'" *United States v. Arvizu*, 534 U.S. 266, 274 (2002). If this statement is true—that facts which are "innocent" in nature ***are*** entitled to some "weight"—then the lower court should have considered in its decision the facts of Mr. Wolf's case which mitigated against Sgt. Dean's belief that he had probable cause to administer a PBT, yet it did not.

The simplest method by which Mr. Wolf can make his point that "innocent facts" are deserving of some weight is by engaging in a hypothetical. For example, according to § 947.01(1), it is unlawful for a person to engage in "profane, boisterous, [or] unreasonably loud" conduct in a public place which tends to provoke a disturbance. Wis. Stat. § 947.01(1) (2021-22). Assume, *arguendo*, that local police receive a report from diners at a public café that a person sitting at the table next to them is shouting profanities. Clearly, this satisfies the "profane" and "unreasonably loud" elements of the disorderly conduct statute. A law enforcement officer arrives to investigate the complaint, and the minute she enters the café, she observes an individual bellowing the "F-word" (to use a euphemism). Examining this fact alone as the "totality" of what was observed, the suspect is destined to be arrested, and adopting what is likely to be the State's approach to the question presented in this appeal, it would be sufficient to justify the officer's actions in arresting the individual. Mr. Wolf would question, however, whether this action is *reasonable* if the narrow lens of the State's definition of "totality" was expanded to include the following fact, namely: the individuals seated at the table with the putative scofflaw informed the officer that the accused suffered from Tourette's Syndrome, symptoms of which include both disinhibition (difficulty inhibiting inappropriate thoughts and behaviors) and coprolalia (the unwelcome and unwanted utterances of words or phrases that are not appropriate).[3] Mr. Wolf believes that it would be constitutionally unreasonable to arrest this hypothetical individual for suffering from a disease with which they never asked to be afflicted.

Without examining ***all*** the circumstances as *Bostick* (and other) Courts suggest, absurd results would follow. People suffering from Tourette's Syndrome would fear going out in public; persons suffering from Huntington's Corea (which causes uncontrollable movements and difficulty in mentation, *et al*.) could be

[3]https://tourette.org/resource/understanding-behavioral-symptoms-tourette-syndrome/

arrested for public intoxication; diabetics with acetone on their breath could be detained for field sobriety tests if they happen to be stopped for speeding; considerate homeowners who collect the mail for their vacationing neighbors could be arrested for a violation of § 943.204(2) (theft of mail); *etc*.—if, in each of the foregoing examples, an examination of the "reasonableness" of the officers' decisions was predicated solely upon those facts which *supported* the officers' decisions to detain and/or arrest rather than considering ***all*** of the information the officers respectively received from the parents of the putative disorderly person that she suffered from Tourette's, the fact that the Huntington's patient expressly informed the officer of her condition, the fact that the officer learned that the driver was a diabetic, or the fact that the neighbor collecting mail was asked to do so by the vacationing recipient. These examples provide the proof of why the term "totality" should encompass an examination of *more than* simply those facts which tend to support an officer's conclusions when examining whether the officer's actions were constitutionally reasonable.

Based upon the above and foregoing authority, Mr. Wolf proffers that the appropriate approach to the question involved in his appeal must consider facts and observations *other than* the two facts—the odor of an intoxicant and a motorcycle accident—upon which the lower court relied.

B. The Totality of Mr. Wolf's Circumstances.

The starting point for the analysis of the issue presented by Mr. Wolf in this appeal must be one of a presumption of innocence. That is, when first approached by Sgt. Dean, simply because the instant matter involved a deer-vehicle accident, it cannot either summarily or instantly be presumed that alcohol may have been involved. Mr. Wolf informed the lower court in both his initial motion and reply brief that in 2019, the last year for which complete statistics were available at the time he filed his motion, there were 18,414 crashes involving deer in Wisconsin, and 20,183 the year before.[4] Of these, 116 occurred in Wood County alone in 2019.[5] Not all of the foregoing accidents were the result of impaired driving, and in fact,

[4]https://wisconsindot.gov/Pages/about-wisdot/newsroom/news-rel/100720FallDeer.aspx#:~:text=Last%20year%20in%20Wisconsin%2C%20there,to%20record%20the%20most%20crashes.

[5]https://wisconsindot.gov/Documents/about-wisdot/newsroom/news-rel/050720deercrashes.pdf

the vast majority, over 66%, did not involve alcohol.[6] These statistics alone make it far more likely than not that Mr. Wolf's motorcycle-deer crash did *not* involve alcohol.

With the foregoing in mind, attention can now be turned to what other factors, Sgt. Dean may have relied upon when reaching his conclusion that probable cause existed to administer a preliminary breath test. The first factor to examine is the ostensible odor of intoxicants emanating from Mr. Wolf's person. As this Court is aware, it is *not* illegal in Wisconsin to consume intoxicating beverages and operate a motor vehicle. What *is* illegal is to consume a sufficient amount of an intoxicating beverage and become less able to exercise the steady hand and clear judgment necessary to safely operate a motor vehicle. The court of appeals recognized as much in *State v. Gonzalez*, 2014 WI App 71, Case No. 2013AP2535-CR, Wisc. App. LEXIS 379 (Ct. App. May 8, 2014) (unpublished),[7] when it observed 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. The *Gonzalez* court continued:

> As to the odor of intoxication alone, neither Gonzalez nor the State cites a published case addressing whether the smell of alcohol coming from a driver is sufficient to provide reasonable suspicion of intoxicated driving. Gonzalez does, however, identify two unpublished cases that support the conclusion that the odor of alcohol alone is not enough: *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755, unpublished slip op. (WI App July 14, 2010), and *County of Sauk v. Leon*, No. 2010AP 1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929, unpublished slip op. (WI App Nov. 24, 2010).

Gonzalez, 2014 WI App 71, ¶ 18.

[6]https://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx

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

Beyond the alleged odor, the officer will also likely rely upon Mr. Wolf's admission that he consumed intoxicants to support the justification for his expanding the scope of Mr. Wolf's detention. The admission to consuming intoxicants is *not*, however, an admission of any illegal activity, *especially* when one considers that Sgt. Dean made no effort whatsoever to inquire as to what Mr. Wolf meant by his admission, what types of beverages he was consuming, when he consumed them, what size they were, the recency of his last drink, *etc.*

This is also not a case which represents any law enforcement observations of poor driving, or for that matter, any citizen witnesses' observations of erratic driving. To the contrary, the one citizen witness in this matter stated he did *not* observe any erratic or unusual maneuvers made by Mr. Wolf while he was driving. In fact, this case represents a circumstance in which it is undisputed that Mr. Wolf struck a deer while he was driving given that law enforcement officers located a deer carcass at the scene of the accident.

As for the alleged urine stain on Mr. Wolf's pants, Sgt. Dean admitted that he *believed* it was urine, however, he could not dispute that persons who lose consciousness as a result of a motor vehicle accident can become incontinent. Not only could the staining be the by-product of the loss of consciousness, but because Mr. Wolf was involved in a violent crash, it could just as easily be the result of a bladder injury.

Finally, any alleged confusion on the part of Mr. Wolf with respect to the name of the individual with whom he claimed to be riding, Sgt. Dean conceded that persons with serious head injuries, especially when they lose consciousness, are often confused or misremember things.

Mr. Wolf's point in the foregoing regard is this: All of the officer's observations are consistent with those an innocent individual may suffer as the result of being involved in a serious crash, and the only reason the lower court—and this Court for that matter—did not have more detailed and specific information upon which to premise a conclusion that the accident was the result of impairment by alcohol is because Sgt. Dean failed to make the few, simple inquiries he could have to "pin down" the involvement of alcohol, if any, in this matter. Had the sergeant asked just a few more questions, as an officer acting *reasonably* should have done, there might not be any dispute in this case. Regrettably, however, the record in this

case lacks this additional information, and as a result, there was not probable cause for Sgt. Dean to request a PBT from Mr. Wolf, especially as the lower court found it, *i.e.* based upon the odor and an accident alone.

III. THE CIRCUIT COURT'S MISTAKE OF LAW.

The circuit court premised its decision to deny Mr. Wolf's motion upon its erroneous belief that because "the case law is clear in that looking at the totality of the circumstances **when there is an accident coupled with an odor of alcohol, that's sufficient for a finding of probable cause**," Mr. Wolf proffers that the circuit court's interpretation of the law is wholly erroneous. R52 at 4:12-16 (emphasis added); D-App. at 104.

There is nothing within the four corners of the *Renz* decision which permits a finding of probable cause to administer a PBT based solely upon the fact of an accident and an odor of intoxicants being present. *See*, *Renz*, 231 Wis. 2d 293. Similarly, there is no decision subsequent to *Renz* which sets forth any bright-line rule that the combination of the foregoing is *per se* sufficient to establish probable cause to administer a PBT. Frankly, there is no basis whatsoever for the lower court to have stated that "the case law is clear" that "an accident coupled with an odor of alcohol" of itself satisfies the *Renz* standard.

Given its erroneous belief about the applicable standard and its failure to consider the facts identified in Section II.B., *supra*, Mr. Wolf proffers that the lower court lacked a basis upon which to deny Mr. Wolf's motion.

IV. IN THE ABSENCE OF THE PBT, THERE WAS NOT PROBABLE CAUSE TO ARREST.

Should this Court concur that Sgt. Dean lacked probable cause to administer a PBT, Mr. Wolf respectfully requests that this Court reexamine the remaining facts and find that, on balance, they do not rise to the level of supporting probable cause to arrest Mr. Wolf for one simple reason: if the facts do not rise to the intermediate level of establishing probable cause to administer a PBT, they certainly cannot satisfy the higher standard of supporting probable cause to arrest.

CONCLUSION

Because Sgt. Dean lacked sufficient grounds upon which to establish probable cause to administer a PBT to Mr. Wolf, the PBT result should be

suppressed and upon suppression thereof, this Court should find that probable cause to arrest Mr. Wolf did not exist, whereupon this Court should remand this matter to the lower court for further proceedings not inconsistent with the Court's judgment.

Dated this 28th day of November, 2022.

Respectfully submitted:
MELOWSKI & SINGH, LLC

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 4,856 words.

Dated this 28th day of November, 2022.

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