

FILED
02-09-2023
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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT IV
Appellate Case No. 2022AP1539-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Roger A. Wolf, Jr.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE
CIRCUIT COURT FOR WOOD COUNTY, BRANCH 1,
THE HONORABLE GREGORY J. POTTER PRESIDING,
TRIAL COURT CASE NO. 20-CT-363

BRIEF OF PLAINTIFF-RESPONDENT

Submitted by:

Jennifer C. Zima
Assistant District Attorney
Attorney for Plaintiff-Respondent
Wisconsin State Bar No. 1105352

Wood County District Attorney's Office
400 Market Street
P.O. Box 8095
Wisconsin Rapids, WI 54495-8095
(715) 421-8515

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ISSUE PRESENTED

Whether the law enforcement officer in this case had probable cause to administer a preliminary breath test and in so doing had probable cause to arrest the defendant for an OWI-related offense?

Trial Court Answered: Yes. 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.

STATEMENT ON ORAL ARGUMENT

The Petitioner-Respondent 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 principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Petitioner-Respondent will not request publication of this Court's decision as the common law authorities which set forth the standard regarding probable cause to administer a PBT and probable cause to arrest for an OWI-type offense are well-settled.

STATEMENT OF THE CASE AND FACTS

The Petitioner-Respondent agrees with the statement of the case and facts as set forth in the Defendant-Appellant's brief and does not feel it is necessary to set forth any additional facts, other than as necessary in the course of its argument.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress evidence, the Court of Appeals upholds the circuit court findings unless they are clearly erroneous. *State v. Eckert*, 203 Wis.2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); Wis. Stat. § 805.17(2). Whether those facts satisfy the statutory standard of probable cause is a question of law that is reviewed de novo. *State v. Ellenbecker*, 159 Wis.2d 91, 94, 464 N.W.2d 427 (Ct. App. 1990)

ARGUMENT

Sergeant Dean Had the Requisite Amount of Probable Cause for the Administration of a Preliminary Breath Test (PBT)

An investigative stop may be supported by reasonable suspicion even when the officer did not observe the driver violate any law. *State v. Anagnos*, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675; *See State v. Post*, 301 Wis.2d 1 ¶ 24, 733 N.W.2d 634. ("[I]t is clear that driving need not be illegal in order to give rise to reasonable suspicion" because such a standard "would allow investigatory stops only when there was

probable cause to make an arrest."); *State v. Waldner*, 206 Wis.2d 51, 57, 556 N.W.2d 681 (1996) ("The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot.")

Pursuant to Wis. Stat. § 343.305 an officer who suspects an individual of operating a motor vehicle while intoxicated may administer a PBT to that individual upon having "probable cause" to believe that the person violated Wis. Stat. § 346.63(1). The probable cause standard in this case is different from that of probable cause to arrest. It does not rise to the level that probable cause to arrest demands. Rather, this form of probable cause is interpreted to mean "quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop." *County of Jefferson v. Renz*, 231 Wis.2d 293, 317 and *State v. Fisher*, 2010 WI 6 para 5. "An officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of an OWI, and the PBT result will be admissible to show probable cause for an arrest, if the arrest is challenged. See *Renz*, 231 Wis.2d at 316, 603 N.W.2d 541.

In *Renz*, the defendant was stopped because of loud exhaust coming from his vehicle. *Id.* at 296, 603 N.W.2d 541. During

the initial conversation, the officer noted a strong odor of alcohol coming from inside the vehicle. *Id.* The defendant admitted to drinking three beers earlier in the evening and, when asked, agreed to perform field sobriety tests. *Id.* at 296-97, 603 N.W.2d 541. The defendant recited the alphabet correctly, his speech was not slurred, and he exhibited only one of four possible clues of intoxication in the one-legged stand test and two of eight possible clues of intoxication in the heel-to-toe test. *Id.* at 297-98, 603 N.W.2d 541. However, he was not able to touch the tip of his nose with his left finger during the finger-to-nose test.¹ Based on these observations, the officer administered a PBT, the results of which were later challenged on grounds of lack of probable cause. *Id.* at 299, 603 N.W.2d 541.

In addressing the defendant's argument, the Supreme Court addressed the purpose of the PBT which is "to help determine whether there are grounds for arrest." *Id.* at 304, 603 N.W.2d 541. In *Renz*, the Court found that given the mixed results and because the defendant "was able to substantially complete all of the tests," the officer was in an ambiguous area between reasonable suspicion to stop and probable cause for an arrest

¹ The *Renz* court found sufficient probable cause to request a PBT even without the results of the horizontal gaze nystagmus test during which the defendant exhibited all six clues for intoxication. *Renz*, 231 Wis.2d at 317 n. 15, 603 N.W.2d 541.

which justified giving the PBT. *Id.* at 316-17, 603 N.W.2d 541. The *Renz* Court observed that "[t]he officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." *Id.* at 317, 603 N.W.2d 541.

In *State v. Tadych*, 2009AP1911, filed January 20, 2010, 2010 WL 1741118, (unpublished) a RULE 809 persuasive value case, the defendant argued (1) that the trial court erred in denying his motion to suppress evidence based on lack of sufficient probable cause to believe Tadych had violated § 346.63 prior to requesting preliminary breath test (PBT); and (2) that the results of the preliminary breath test were erroneously admitted into evidence at the motion hearing. The Court concluded that the arresting officer had the requisite degree of probable cause to request a PBT. The Court further concluded that the results of the PBT were appropriate admitted for purposes of establishing probable cause to arrest. The Court upheld the trial court's ruling and affirmed judgment.

In *Tadych*, on April 26, 2008 the officer involved was dispatched to a rollover accident and when he arrived on scene located a vehicle overturned in a ditch. *Id.* at ¶ 3. There were no occupants in the vehicle or at the scene but the registration came back to Tadych. *Id.* The officer proceeded to

Tadych's residence only to learn from Tadych's sister that Tadych was at the hospital being treated. *Id.* The officer arrived at the hospital and located Tadych. *Id.* at ¶ 4. When asked if he was the driver of the vehicle and what caused his vehicle to enter the ditch, Tadych stated that he had swerved to avoid a deer. *Id.* During this exchange, the officer noticed a "slight odor of intoxicant" on Tadych's breath and asked whether Tadych had been drinking. *Id.* Tadych did respond that he had been drinking. *Id.* The officer did not request field sobriety testing because of the medical treatment Tadych was receiving. *Id.* The officer informed Tadych that "he would be requesting him to take a PBT, a preliminary breath test, to kind of gauge where he was at." Tadych complied and the result indicated a PBT of .10. The officer arrested Tadych for operating while under the influence of an intoxicant. *Id.*

In *Tadych*, the first argument arises from Wis. Stat. § 343.303, which states that before an officer administers a PBT, the officer must have "probable cause to believe that the person: has operated while intoxicated in violation of Wis.

Stat. § 346.63.² Tadych then cites to the correct “quantum of proof” language given in *Renz*. Tadych contended that the facts did not rise to the requisite proof required. However, the Court found that the trial court made specific findings as to the facts relevant to its determination of probable cause to administer a PBT which included the fact of an accident, the fact that Tadych indicated a reason for the accident, the odor of intoxicants, and Tadych’s admission to drinking. Tadych at ¶ 9. Tadych attempted to argue that the facts in the case fell short to those in *Renz*, and the Court disagreed.³ *Id.* Tadych argued that he was not in the ambiguous area—that the quantum of proof was not greater than needed for reasonable suspicion, that there were not sufficient facts to give rise to the required degree of probable cause for a PBT. *Id.* at ¶ 12.

² WISCONSIN STATUTE § 343.303 provides in relevant part:

Preliminary breath screening test. If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m)... or s. 346.63(2)... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the defendant for this purpose. The result of this preliminary screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1), (2m), (5), or (7)... and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3)....

³ Tadych also pointed to the facts presented in *State v. Colstad*, 2003 WI App 25, 260 Wis.2d 406, 659 N.W.2d 394, and *State v. Begicevic*, 2004 WI App 57, 270 Wis.2d 675, 678 N.W.2d 293, in support of his argument that the officer needed more “indicators of intoxication” to reach the level of probable cause necessary to administer a PBT. The *Tadych* Court reviewed those cases and the facts did not alter their conclusion that the facts in this case supplied the officer with enough probable cause consistent with *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999) to administer a PBT.

However, the Court in *Tadych* concluded that the rollover accident and odor of intoxicants coupled with the admission of drinking were "sufficient to provide an officer with not only reasonable suspicion to believe that Tadych may have committed a crime, but also a quantum of proof greater than that." *Id.*; See also *Renz* at 317, 603 N.W.2d 541

In this case, Sergeant Dean's contact with the defendant initially began because the defendant was involved in an accident and Sgt. Dean was dispatched to that location. R24 at 5:10-23; 7:4-6. It is true that Sgt. Dean did not observe the defendant commit any traffic violations as he was dispatched to the crash after it already occurred. R24 at 16:14-17. On scene, the defendant indicated that his motorcycle struck a deer. *Id.* The citizen witness on scene did not mention bad driving behaviors from the defendant as he passed him coming the opposite direction to Sgt. Dean. R24 at 16:14-21. When Sgt. Dean made contact with the defendant he noted bleeding on the defendant's head. R24 at 7:19-23; 18:15-17. Sgt. Dean also indicated at that time, when he initially made contact with the defendant, that there was an odor of intoxicants emanating from his person. R24 at 7:19-23. Emergency responders arrived on scene soon after Sgt. Dean's arrival. When asked about how the accident occurred the defendant also stated that he could

not remember but told Sgt. Dean that someone else was on the motorcycle with him. R24 at 8:6-16. Sgt. Dean observed that the motorcycle was a single-seat bike. R24 at 8:15-16. Sgt. Dean did mention during his testimony that individuals who have a head injury "cause [have] problems with the accuracy of the information they convey..." but also indicated that being the reason he did not make mention of the defendant's speech or physical state for indicators of impairment. R24 at 20:2-7. When Sgt. Dean asked the defendant whether he had been drinking, the defendant replied that he had been drinking all day. R24 at 11:3-7. It is important to note that EMT's arrived on scene rather quickly and Sgt. Dean did not have an unlimited amount of time to ask follow up questions as the defense proposes. The defendant also had a wet mark around his groin area that Sgt. Dean thought could be a urine stain but this was not confirmed on scene. R24 at 22:15-24. EMT's then took the defendant into the ambulance a short time later and Sgt. Dean administered the PBT before the defendant was transported to the hospital. R24 at 12:3-7.

The facts of this case are closely related to that in *Tadych*. The reason for dispatch in this case was for a vehicle crash involving a deer. The same occurred in *Tadych*. It is interesting that a majority of the defense's argument deals

with innocent explanations when they state in their own brief that the defendant could not remember how the accident in this case occurred other than striking a deer. R24 at 8:6-16. In both cases the defendant's obtained medical assistance for their injuries. Additionally, both defendant's made an admission to drinking. And although the defense argues that Sgt. Dean did not ask any follow up questions regarding the drinking he also had the odor of intoxicants coupled with the defendant's response. Tadych also had an odor of intoxicants coming from his person. Sgt. Dean did not instantly presume that alcohol was involved as the defense contends. Sgt. Dean observed an odor of intoxicants coming from the defendant's person. Sgt. Dean put the indicators he was presented with together and came to the determination that probable cause existed to administer a PBT. The "indicators of impairment" in this case were laid out by the trial court in its determination that the requisite probable cause existed for Sgt. Dean to administer a PBT. The facts in this case also do not fall short in a comparison to *Renz*. The facts in this case provided Sgt. Dean with the ambiguous area discussed in *Renz* and although Sgt. Dean had enough, by law, to administer the PBT once he obtained the PBT that cleared any ambiguities and provided probable cause to arrest for an OWI offense. The trial court's

findings in this case pointed to the totality of the circumstances presented in the form of testimony in this case and based on the facts presented including the accident, the odor, and admission to drinking the court correctly found, based in law, that Sgt. Dean obtained the quantum of proof necessary to administer a PBT to the defendant.

CONCLUSION

The circuit court was not clearly erroneous in its denial of the defendant's motion to suppress evidence. This Court should deny the appeal and uphold the ruling of the circuit court.

Dated this 9th day of February, 2023

Respectfully submitted:

Electronically signed by:

Jennifer C. Zima

Jennifer C. Zima

Assistant District Attorney

Attorney for Petitioner-Respondent

State Bar Number: 1105352

CERTIFICATION OF BRIEF AND APPENDIX

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 11 pages.

I hereby certify that filed with this brief is an appendix that complies with §809.19(3)(b) and that contains, at a minimum: (1) a table of contents and (2) a copy of any unpublished opinion cited under §809.23(3)(a) or (b).

Dated this 9th day of February, 2023.

Respectfully submitted:

WOOD COUNTY DISTRICT ATTORNEY

Electronically signed by:

Jennifer C. Zima

Jennifer C. Zima

Assistant District Attorney

Attorney for Plaintiff-Respondent

State Bar Number: 1105352

Wood County District Attorney's Office
400 Market Street
P.O. Box 8095
Wisconsin Rapids, WI 54495-8095
(715) 421-8515