STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001608-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LINSEY NICHOLE HOWARD,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Ozaukee County Circuit Court, the Honorable Steven M. Cain, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Police stopped Ms. Howard's car because she was driving at night without headlights. Although a preliminary breath test proved that she had not been drinking—and police were unable to administer two of the three standardized field sobriety tests due to her disability—she was arrested for a suspected operating while intoxicated (OWI) offense.

Did police have probable cause to arrest Ms. Howard?

The circuit court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case is statutorily ineligible for publication. Ms. Howard does not request oral argument.

STATEMENT OF THE CASE

Ms. Howard was charged with three misdemeanors as a result of this traffic stop: (1) operating a motor vehicle while under the influence (OWI) as a second offense; (2) possession of drug paraphernalia (a pot pipe) and (3) operating with a detectable amount of a restricted controlled substance (THC) in her blood. (25:1-3).

Counsel for Ms. Howard filed a motion to suppress, arguing that police lacked probable cause to arrest Ms. Howard. (45). The court, the Honorable Steven M. Cain presiding, denied the motion after conducting an evidentiary hearing. (76:63); (App. 9). Thereafter, Ms. Howard resolved the case by pleading guilty to operating with a detectable amount of a restricted controlled substance and was sentenced to 20 days in jail. (55:1); (App. 3). This appeal follows. (88).

STATEMENT OF FACTS

At the suppression hearing, the State's only witness was Sergeant Peter Morton of the Grafton Police Department.[1] (76:3). While on patrol on August 29, 2019, Sergeant Morton observed a car traveling without headlights. (76:5). Sergeant Morton could not recall whether the daytime running lights were on. (76:15). It was 12:53 A.M. (76:5). The car was not speeding and Sergeant Morton could recall no other "erratic" driving behavior. (76:47).

Sergeant Morton stopped the car and spoke to the driver, Ms. Howard. (76:6). According to his testimony (given 2.5 years after the traffic stop), Sergeant Morton recalled that Ms. Howard was nervous. (76:6). He testified that she had "lethargic"

[1] Sergeant Morton was not yet promoted to sergeant at the time of this traffic stop; however, counsel will refer to him by his title at the time of his testimony to avoid confusion.

speech.[2] (76:7). Based on these observations, Sergeant Morton believed Ms. Howard "was impaired and not able to operate a motor vehicle." (76:7).

However, Ms. Howard denied drinking or drug use. (76:7). She told Sergeant Morton she was driving back from Summerfest. (76:7). Her passenger, hearing Ms. Howard misspeak, "chimed in" and corrected her by stating that that they were actually returning from the Wisconsin State Fair.[3] (76:7). Sergeant Morton conceded that whether this misstatement was relevant to his OWI investigation depended on the extent to which it could be construed as a "grossly inaccurate answer." (76:26-27).

During this encounter, Sergeant Morton did not see any alcohol containers in the car, did not smell marijuana or alcohol, and did not observe any drugs or paraphernalia in plain view. (76:23-24). Other than misstating where she was driving from, Ms. Howard

[2] The State appeared to concede that a body camera video did not totally corroborate its claim of lethargic speech. (76:53). The court, in its eventual ruling, noted the video of the encounter "wasn't entirely clear about the speech pattern." (76:63); (App. 9). As the court made no findings that Ms. Howard's speech *was* lethargic and did not cite this as a basis for its decision to deny the suppression motion, Ms. Howard will not further address the speech pattern herein.

[3] When another officer arrived on scene, Sergeant Morton would also misspeak, telling the officer that Ms. Howard had told him she was coming from the State Fair when, in fact, she was really coming from the county fair. (76:22).

said or did nothing else Sergeant Morton would label as "unusual." (76:24).[4]

Nevertheless, Sergeant Morton radioed for a K9 unit and returned to his squad car to "run" Ms. Howard's registration. (76:7-8). While Sergeant Morton was inputting Ms. Howard's information, another officer arrived on scene. (76:9). At that point,[5] Sergeant Morton asked Ms. Howard to exit the car to participate in "standardized field sobriety testing." (76:9).

Sergeant Morton testified that he had been trained to administer these tests during his MATC Police Academy training several years earlier. (76:24). He could not recall whether these methods tracked the protocols set forth by the National Highway Traffic Safety Administration (NHTSA). (76:24-25).[6]

The first "test" that Sergeant Morton administered was the "horizontal gaze nystagmus."

[4] Sergeant Morton believed that Ms. Howard was "lost and confused." (76:41). He could not recall whether Ms. Howard had told him that she had just made a wrong turn and missed her exit. (76:44). The video was then played for the court, demonstrating that Ms. Howard had in fact informed the officer that she missed her turn and was looking for a place to perform a U-turn. (76:50).

[5] The State elicited no testimony about what results, if any, Sergeant Morton obtained after running Ms. Howard's information.

[6] While objecting to this line of questioning, the State phrased Sergeant Morton's answer as "declaim[ing] any knowledge of [the protocols]." (76:25).

(HGN). (76:10). In this procedure, Sergeant Morton asked Ms. Howard to follow the movement of his finger. (76:27). As her eyes tracked that moving object, Sergeant Morton examined whether Ms. Howard's eyes had "smooth pursuit" or whether there was any "jerkiness" or "nystagmus" visible. (76:10).

According to Sergeant Morton, a properly conducted "test" would require that the administrator follow certain protocols. (76:27). His fingertip needed to be 12-15 inches from Ms. Howard's face and held "at or just slightly above eye level." (76:27). Each "pass" of the fingertip across the subject's face should take two seconds, with the officer then holding the fingertip at the corner of the subject's vision for four seconds. (76:27-29).

After administering the "test," Sergeant Morton claimed to observe "six total clues" which, in his training and experience, he believed to be "indicative of impairment." (76:10). These "clues" were not specifically enumerated but included "lack of smooth pursuit," "distinct jerkiness at nystagmus," and failure to keep the head still. (76:10; 76:42). Sergeant Morton did not observe any "vertical gaze nystagmus." (76:32).

Sergeant Morton also conceded that he failed to position his fingertip at eye level; instead, he agreed that Ms. Howard had to tilt her head up in order to view his finger. (76:30). He also agreed that he failed to follow requirements as to how quickly he moved his fingertip across her field of vision. (76:31). Sergeant

Morton testified that failure to follow these requirements rendered the test "invalid." (76:34).

After conducting the concededly invalid nystagmus "test," Sergeant Morton administered a non-standard "convergence test." (76:33). He could not recall the results of this procedure. (76:50).

Next, Sergeant Morton administered another non-standard field sobriety "test," the "alphabet test." (76:11). He identified no indicia of impairment. (76:11). Finally, Sergeant Morton administered a final non-standard procedure, the "number test." (76:11). Ms. Howard did not stop counting when she was instructed to do so and therefore did not successfully complete this "test." (76:12).[7]

Sergeant Morton then asked Ms. Howard to comply with his request for a preliminary breath test (PBT). (76:12). Before doing so, Ms. Howard informed Sergeant Morton she was taking medications but that those medications did not impact her ability to drive. (76:13). Sergeant Morton could not recall what medication she was taking. (76:13).

Following a negative PBT result, Ms. Howard was arrested for a suspected OWI. (76:13; 76:34).

After hearing this evidence, the circuit court denied the motion to suppress. (76:63); (App. 9). In the

[7] Police did not administer the other two "standardized" field sobriety tests, presumably because Ms. Howard has a prosthetic leg. (76:49).

court's view, the video of the encounter did not make it "entirely clear" whether Sergeant Morton administered the HGN procedure correctly. (76:60); (App. 6). However, it relied on his testimony that "[h]e felt that he was doing it perhaps his training and perceived that he saw six clues [sic]." (76:61); (App. 7). However, the court also found it notable there was no vertical nystagmus, which would be more indicative of drugged driving, the crime Ms. Howard was ultimately charged with. (76:62); (App. 8).

The court found both the time of day and the lack of headlights relevant. (76:62); (App. 8). While Ms. Howard's misstatement about coming from Summerfest was perhaps "entirely explainable or understandable," the court found it was still one more piece of evidence that could be considered under a totality of the circumstances analysis. (73:62); (App. 8). In any case, the court made a finding that Ms. Howard had admitted to have been "coming from … a location where people like to use drugs and alcohol and enjoy themselves." (73:62-63); (App. 8-9). The court also found Ms. Howard's choice of route incompatible with her explanation of where she was attempting to travel to, based on its own familiarity with the area in question. (73:62); (App. 8). Finally, it relied on the results of the field sobriety tests as well as Ms. Howard's "evasive" lack of eye contact during the stop. (73:63); (App. 9).

ARGUMENT

I. Ms. Howard's arrest was unlawful as it was not supported by probable cause.

A. Because the State arrested Ms. Howard without a warrant, it needed to prove the existence of probable cause at the point she was taken into custody.

It is a well-settled principle of Fourth Amendment jurisprudence that a warrantless arrest is not lawful unless supported by probable cause. *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551. In this context, probable cause refers to "that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." *Id.*

Probable cause must be assessed on a case-by-case basis with reference to "the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). It is the State's burden to prove that the information available at the time of the arrest would "lead a reasonable officer to believe that guilt is more than a possibility." *Id.*; *Lange*, 2009 WI 49, ¶ 20.

In assessing whether the State met its burden at the hearing below, this Court exercises *de novo* review. *Lange*, 2009 WI 49, ¶ 20.

B. Under the totality of the circumstances, police lacked probable cause to believe that Ms. Howard had committed an OWI offense.

Beginning with Ms. Howard's driving, the record is clear there was no evidence of speeding, erratic driving, weaving, sudden acceleration or deceleration, early or other inappropriate stopping or signaling, or any other conventionally suspicious driving behaviors. There was nothing that would indicate Ms. Howard lacked the "steady hand necessary to handle and control a motor vehicle." *See* Wis. JI-Criminal 2663; *cf. Lange*, 2009 WI 49, ¶ 24 ("The driving was not merely erratic and unlawful; it was the sort of wildly dangerous driving that suggests the absence of a sober decision maker behind the wheel.").

While Ms. Howard was traveling without headlights, that traffic violation does not independently justify an arrest and contributes only slightly to the probable cause analysis.[8] Moreover,

[8] In every OWI case involving a headlight violation, this Court has relied on the presence of additional, highly suspicious, conduct to justify further law enforcement intrusion. *See, e.g., State v. Foston*, Appeal No. 2022AP387, unpublished slip op., (Wis. Ct. App. September 14, 2022) (police were justified in further detaining Foston after he was stopped for a headlight violation because he fled on foot, stumbled, exhibited bloodshot eyes, and had slurred speech); *State v. Argall,* Appeal No. 2020AP907-CR, unpublished slip op., (Wis. Ct. App. November

Sergeant Morton was unable to recall whether Ms. Howard had her running lights on. (76:15). Sergeant Morton also lacked any information about how long Ms. Howard had been operating without headlights and the record does not disclose whether there was any explanation requested or given for what could be an otherwise innocuous malfunction.

And, while the time of night is a relevant consideration, *Lange*, 2009 WI 49, ¶ 32, it is obviously not dispositive, especially considering that people can lawfully use public streets at all hours of the day. While poor driving becomes more significant when it

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18, 2020) (slurred speech, glossy, red and yellow eyes, inability to follow officer's questions, recent presence at bar, admission of drinking four to six beers and odor of intoxicants in addition to driving without headlights justified extended stop and arrest); *State v. Vaaler*, Appeal No. 2019AP2174-CR, unpublished slip op., (Wis. Ct. App. August 6, 2020) (police had justification to extend traffic stop for field sobriety testing after headlight violation based on odor of intoxicants, open beer can in car, and delayed responses to law enforcement questioning); *City of Sheboygan v. Van Akkeren*, Appeal No. 2017AP120, unpublished slip op., (Wis. Ct. App. June 14, 2017) (police had probable cause to request PBT after headlight violation due to numerous indicia of impairment including odor of intoxicants, admission of drinking, and multiple clues during FSTs); *State v. Litke*, Appeal No. 2013AP1606-CR, unpublished slip op., (Wis. Ct. App. March 11, 2014) (police had probable cause to request PBT based on headlight violation in conjunction with bloodshot and glassy eyes, admission of drinking, and inability to complete one-leg stand FST).

Pursuant to Wis. Stat. § 809.23(3)(c), copies of these unpublished decisions are also being included in the appendix.

"takes place at or around 'bar time,'" *State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 733 N.W.2d 634, here, it was not yet bar closing time (2:00 A.M.) on a weeknight, Ms. Howard was not pulled over in the vicinity of any bars, and police did not observe any erratic or unusual driving.

Upon being pulled over by police, there was also no evidence that Ms. Howard admitted to drinking or using illegal drugs. There was also no evidence that Ms. Howard had any of the usual physical signs of impairment such as red, glassy, or watery eyes, flushed skin, or excessive perspiration. There was also no odor of intoxicants or illegal drugs coming from her person or her vehicle. The State has never alleged that she was in any way uncooperative during the initial law enforcement contact and, aside from the single mistake about her point of origin, there was nothing else "unusual" about her conduct. (76:24).

And, while Ms. Howard was nervous and hesitant to make eye contact with the armed law enforcement officer pulling her over at 1:00 in the morning, this fact alone is worth negligible weight in the overall probable cause analysis. Because nervousness is a routine occurrence in almost every traffic stop, it is only "unusual" nervousness that "may indicate wrongdoing." *State v. Sumner*, 2008 WI 94, ¶ 38, 312 Wis. 2d 292, 752 N.W.2d 783. Here, Sergeant Morton never testified whether Ms. Howard's "nervousness" was normal or abnormal based on his experience; in fact, he gave almost no descriptive details enabling review of that alleged behavior. And,

while the circuit court made a finding that Ms. Howard was acting in an "evasive" fashion, (76:63); (App. 9), that descriptor appears nowhere within Sergeant Morton's testimony.

Following the initial contact with Ms. Howard, police ran her license, presumably to check for prior offenses. However, the record does not disclose that the officer ever discovered her prior OWI; without knowledge of that offense, it cannot be considered in the probable cause analysis. *See State v. Blatterman*, 2015 WI 46, ¶ 38, 362 Wis. 2d 138, 864 N.W.2d 26 (officer's actual knowledge of driving record is a factor in probable cause analysis).

After Ms. Howard was asked to exit her vehicle, police would have had an opportunity to see whether there were any open beverage containers, drugs, or paraphernalia in plain view. Nothing was observed. (76:23-24). And, despite standing near the car as Ms. Howard exited it, Sergeant Morton was clear that he did not smell any marijuana. (76:23-24).

Police did not gather much in the way of useful evidence after Ms. Howard exited the car, either. At no point in Sergeant Morton's testimony did he ever claim that Ms. Howard was unsteady on her feet, that she was clumsy or otherwise lacking in hand-eye coordination. Moreover, tests designed to gather evidence of that nature—the one-leg stand and the walk and turn—were not administered. For at least one test—the convergence test—the State did not put the results into this record and, for another, the

alphabet test, Ms. Howard "passed." (76:11). Finally, there was also no suggestive PBT result; in fact, that test revealed zero alcohol in Ms. Howard's system. (76:34).

At this point, the totality of the evidence shows an utter *lack* of probable cause. Police validly stopped Ms. Howard for a headlight violation but, throughout the stop, failed to develop any particularized facts which would justify their eventual decision to arrest her. Against this imposing body of evidence demonstrating a lack of probable cause, the only remaining possible pieces of "evidence" supporting the circuit court's decision are: (1) the HGN result; (2) the counting "test," (3) Ms. Howard's explanation of her route; (4) Ms. Howard's recent presence at the Wisconsin State Fair; and (5) Ms. Howard's admission of taking prescription medications. However, each piece of evidence is independently problematic; even when aggregated together, this evidence cannot satisfy the constitutional requirement of probable cause.

Beginning with the HGN, the results of that "test" contribute nothing to the probable cause analysis. While Sergeant Morton testified that he observed "clues" of impairment, he also unambiguously testified that: (1) if the test is not properly administered, it is invalid (76:34); and (2) he did not properly administer the test (76:30-31). Thus, while the court found the video unclear on this second point, (76:60), the video (which was not entered into evidence) simply does not matter in light of the

officer's testimony—he did not administer the test correctly and the result is therefore invalid.

This is not therefore a scenario where Ms. Howard is asking this Court to ignore the HGN "evidence" on appeal because of newly developed extrinsic considerations, such as its lack of scientific validity or because the test was not administered in accordance with NHTSA standards. Instead, Ms. Howard is relying on the officer's explicit testimony, wherein he conceded that the evidence used to develop probable cause was "invalid" based on his own training and experience.

Thus, as a matter of law, Ms. Howard is asking this Court to entirely disregard concededly "invalid" evidence in assessing whether the constitution permits the warrantless arrest at issue. *See Village of Little Chute v. Bunnell*, Appeal No. 2012AP1266, ¶ 19, unpublished slip op., (Wis. Ct. App. November 14, 2012) ("If the test results were not valid, they cannot be used to support a determination of probable cause to arrest.").[9]

However, Ms. Howard also concedes that the case law—much of it unpublished but persuasive—suggests that the lower court's decision to accept or reject HGN testimony is intertwined with its factual and credibility findings. *See State v. Krumm*, Appeal No. 2019AP243-CR, ¶¶ 18-19, unpublished slip op.,

[9] Pursuant to Wis. Stat. § 809.23(3)(c), *Bunnell* appears in the appendix beginning at page 15.

(Wis. Ct. App. May 5, 2020).[10] Because the HGN "test" is *not* scientific, this Court may conclude that it should defer to the circuit court's findings of fact (and the weight assigned to HGN evidence) with respect to the officer's subjective observations of intoxication during the administration of the "test." *See id*.

However, even if the HGN issue is reviewed under this clearly erroneous standard, the circuit court still failed to make clear findings of fact consistent with the record evidence. The court made a finding that the video was ambiguous as to whether the test was properly done, ignored the officer's own testimony as to invalidity, and then made a confusing statement only that the officer "perceived" a failure of that test. (76:61); (App. 7).

The court never resolved the underlying issue—whether the test was properly conducted—despite clear testimony showing it was not. Moreover, the court also did not clearly explain what weight it was assigning to this potentially invalid evidence and why it was reaching that decision given the contested record evidence. Accordingly, even if the decision to rely on the HGN must be deferentially reviewed, the circuit court clearly failed to make a reasonable determination under these facts and circumstances. Regardless of the analytical lens employed on appeal, the record is clear that the HGN test matters little in assessing probable cause.

[10] App. 34.

Moving to the "counting test," Ms. Howard concedes, as she must, that the results of this non-standardized procedure can be validly considered in the overall probable cause rubric despite the procedure's lack of scientific grounding. *State v. Colstad*, 2003 WI App 25, ¶ 25, 260 Wis. 2d 406, 659 N.W.2d 394. Yet, such evidence contributes only scant weight in the overall probable cause assessment, especially in context of the other evidence such as Ms. Howard's ability to "pass" the similar alphabet "test." Moreover, Ms. Howard did not "fail" the test because she was slurring, disoriented, or unable to comprehend basic number sequence. Her only misstep was not stopping at the arbitrary number selected by the officer. (76:11). Against all of the other evidence, this exceedingly minor slip-up has little, if any, relevance.

As to Ms. Howard's route of travel, the evidence shows that Ms. Howard was "lost" and that she had missed a turn while attempting to drop off her passenger at the Kohls parking lot, which, based on publicly available Google Maps, is immediately adjacent to Highway I-43. (76:41). The court found it suggestive that, after missing her turn, Ms. Howard ended up headed toward that nearby highway on-ramp. (76:62); (App. 8). It based this conclusion not on the testimony offered by the State, but on its own recall of the specific geographic area. (76:62); (App. 8). Setting aside the court's consideration of facts outside the record, Ms. Howard's route of travel, while perhaps suggestive, does not necessarily imply she was intoxicated. It is equally consistent with a

fatigued driver or simply, as she told the officer during the stop, a lost and confused motorist. (76:41).

Ms. Howard's point of departure, while concededly relevant in the broadest sense, does not meaningfully inform the probable cause analysis, either. According to the court, the State Fair is a setting known for drug and alcohol usage. (76:62-63); (App. 8-9). However, there was nothing in the record supporting the contention that the Wisconsin State Fair is a hotbed of illegal drug use. And, while alcohol may be consumed there, there was no odor of intoxicants and no proof of consumption in this case. Any substantial reliance on the point of departure, under these facts, is speculative and does not support a finding of probable cause.

Finally, Ms. Howard also admitted to consuming prescription medication during the stop. However, the record is totally silent as to what medications she consumed, how much, or how recently. She did not describe any warnings against taking those medications while driving and the mere fact she was taking lawfully prescribed medications cannot plausibly furnish probable cause to arrest when coupled with no other evidence that the person has become impaired as a result of ingesting them.

Accordingly, even when the evidence is aggregated, there are simply not enough facts and reasonable inferences presented in this record to justify the intrusive law enforcement conduct. Accordingly, this Court should reverse the circuit

court and hold that Ms. Howard's arrest was unsupported by probable cause. As a result, all derivative evidence stemming from that arrest must be suppressed on remand. *State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899.

CONCLUSION

For the reasons set forth herein, this Court should reverse the circuit court's order denying the suppression motion.

Dated this 22nd day of November, 2022.

Respectfully submitted,

Electronically signed by Christopher P. August

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,922 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 22nd day of November, 2022.

Signed:
Electronically signed by
Christopher P. August
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