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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001608-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LINSEY NICHOLE HOWARD,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, THE
HONORABLE STEVEN M. CAIN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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¹ Copies of all unpublished decisions cited for persuasive value pursuant to Wis. Stat. § 809.23(c) are included the appendix.

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INTRODUCTION

The circuit court properly denied Linsey Howard's motion to suppress evidence obtained following Howard's arrest for operating while under the influence (OWI). Officer Peter Morton stopped Howard's vehicle for driving without headlights at 12:53 AM. Howard was nervous and hesitant to make eye contact with the officer. She also had lethargic speech. Officer Morton testified that Howard seemed "lost and confused" and originally told the officer she was coming from Summerfest. However, the passenger corrected Howard and stated they were actually at the State Fair. Howard also told Officer Morton that they were traveling to Kohl's, but she had turned away from that destination and was entering the freeway at the time of the traffic stop. Officer Morton administered field sobriety tests and observed clues of impairment on the horizontal gaze nystagmus (HGN) test. Due to a physical disability, Howard could not perform the walk and turn and one leg stand tests. Officer Morton then administered non-standardized field sobriety tests with mixed results. Finally, Howard admitted that she had consumed prescription medications. Based upon the totality of these circumstances, there was probable cause to arrest Howard.

ISSUE PRESENTED

Did the law enforcement officer, at the time of Howard's arrest, have probable cause under the totality of the circumstances to believe that Howard was operating a motor vehicle while under the influence?

The trial court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4

STATEMENT OF THE CASE

On August 29, 2019, Officer Peter Morton of the Grafton Police Department was on patrol in the Village of Grafton. (R. 76:5.) Officer Morton had been trained in the investigation of OWI offenses and the administration of field sobriety tests as a tool to aid in the detection of impaired drivers. (R. 76:4.)

At approximately 12:53 AM, Officer Morton observed a vehicle traveling northbound on North Port Washington Road without its headlights on. (R. 76:5.) The vehicle turned eastbound on Washington Street and then turned onto the I-43 northbound on-ramp. (R. 76:37-38.) Officer Morton conducted a U-turn, caught up to the vehicle, and conducted a traffic stop on the on-ramp. (R. 76:5-6.)

The driver of the vehicle was identified as Linsey Howard. (R. 76:6.) Howard appeared very nervous and did not want to make eye contact with Officer Morton. (R. 76:5-6.) Officer Morton also observed that she had lethargic speech. (R. 76:6.) However, Howard denied drinking or using any drugs. (R. 76:7.)

Officer Morton later testified that Howard appeared to be “lost and confused” (R. 76:41) and did “not know where she was coming from or going” (R. 76:24). Howard told Officer Morton that they were traveling from Summerfest, which was not occurring at the time. (R. 76:7, 21.) The passenger in the vehicle then corrected Howard and told the officer they were actually coming from the State Fair. (R. 76:7, 19.) Howard also stated she was dropping the passenger off at Kohl’s. (R. 76:19.) However, the route Howard drove was inconsistent with traveling to that destination. Instead of traveling straight on North Port Washington Road, Howard instead turned onto Washington Street and then entered I-43 which would not lead to Kohl’s. (R. 76:37-39.)

Based on his observations of and interaction with Howard, Officer Morton asked Howard to perform field sobriety tests to determine if she could safely operate a motor vehicle. (R. 76:9.) The first test administered was the HGN test. Officer Morton testified that

he administered this test consistent with his law enforcement training. (R. 76:35.) During the HGN test, Howard did not follow Officer Morton's instructions to only follow the stimulus with her eyes and instead turned her head. (R. 76:42-43.) Officer Morton observed six out of six clues which was indicative of impairment. (R. 76:10.)

Officer Morton attempted to continue with standardized field sobriety tests, but learned that Howard had a prosthetic leg which would preclude administration of the walk and turn and one leg stand tests. (R. 76:11, 36.) The officer then administered several non-standardized field sobriety tests: the lack of convergence test, an alphabet test, and a number test. (R. 76:11-12, 36.) Officer Morton was unable to recall during the hearing if he observed anything on the lack of convergence test. (R. 76:50.) He testified that Howard successfully completed the alphabet test, but that she failed to correctly perform the number test by continuing past the number where she was asked to stop. (R. 76:11-12.)

Following the field sobriety tests, Officer Morton asked Howard to provide a Preliminary Breath Test (PBT) sample. (R. 76:12.) While discussing the PBT, Howard told Officer Morton that she had consumed medications for depression. (R. 76:13, 23.) A PBT was then administered with a result of zero. (R. 76:34.)

Based upon his observations of and interaction with Howard and upon her performance on the field sobriety tests, Officer Morton believed she was under the influence and took her into custody for OWI. (R. 76:41-42.) Howard was subsequently charged with Operating While Under the Influence (2nd Offense), Possession of Drug Paraphernalia, and Operating with a Restricted Controlled Substance (2nd Offense). (R. 25.)

Howard filed a motion to suppress alleging that Officer Morton lacked probable cause to arrest her for OWI. (R. 45.) At an evidentiary hearing on February 28, 2022, Officer Morton testified and the circuit court reviewed body camera video. (R. 76.) The circuit court made factual findings and held that Officer Morton had probable cause to

arrest based on the totality of the circumstances. The court engaged in thorough discussion of the evidence presented. The court noted Howard's performance on field sobriety tests and her admission to consuming anti-depressant medications, and further stated:

[W]e're looking at the totality. Time of day is a consideration. No headlights is a consideration. Could the error on Summerfest and state fair be entirely explainable or understandable, perhaps. But, again, in the big picture this is just one more thing that can be considered. And the officer thought that it wasn't adding up where they were coming and going for. Coming and going from.

And the same goes for the Kohl's explanation. That is odd. To get back on the freeway to—after missing the turn for Kohl's, based on the Court's knowledge of that area seems odd that she would have done that. That in the Court's mind doesn't necessarily add up.

The additional field sobriety tests, we understand that she has a prosthetic leg from the testimony that she wasn't going to be able to do the walk and turn and the one legged stand. That is understandable. That the officer moved on to those other tests. And the fact that they're nonstandardized doesn't mean they're any less valuable than the standardized. Those are commonly used.

So the officer perceived that there was a failure of HGN. He had a suspicion that she was under the influence. She did get the location wrong and had to be corrected by her passenger. It was 12:53 in the morning. Coming from not necessarily a bar but a place where—location where people like to use drugs and alcohol and enjoy themselves. Again, no headlights. I'm not—I wasn't entirely clear about the speech pattern, but the officer

perceived that there was a lethargic speech. That she was evasive with the eye contact.

And when we look at the totality of the circumstances I think it absolutely adds up to be probable cause.

(R. 76:61-63.) The circuit court denied the motion to suppress. (Id.) Howard entered a guilty plea to Operating with a Restrict Controlled Substance (2nd Offense) and the remaining charges were dismissed and read-in. (R. 55.) She now appeals.

STANDARD OF REVIEW

The review of a circuit court's order granting or denying a suppression motion presents a question of constitutional fact. *State v. Dearborn*, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97. The appeals court “will uphold the court’s factual findings unless they are clearly erroneous,” but will “independently apply constitutional principles to those facts.” *State v. Coffee*, 2019 WI App 25, ¶6, 387 Wis. 2d 673, 929 N.W.2d 245.

Howard relies upon *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551, to argue that this Court exercises *de novo* review. However, both parties in *Lange* stipulated to the findings of fact by the trial court. *See* Br. of Def.-Appellant at 6, *Lange*, 2009 WI 49 (No. 2008AP882-CR) (“In this case, the defendant does not challenge the Circuit Court’s findings of fact). Presented with undisputed facts, the issue before the court in *Lange* was a question of law which was reviewed independently of the trial court. *Lange*, 2009 WI 49, ¶ 20.

However, in this case there is significant disagreement about both the facts and the inferences to be drawn from those facts. Therefore, unless clearly erroneous, the factual findings of the trial court should be accorded deference. *Coffee*, 2019 WI App 25, ¶6. This standard of review appropriately takes into account the trial court’s better position to evaluate and determine issues of fact. “Questions of fact are accorded deference because the trial court was present at the

reception of evidence and had an opportunity to view the demeanor of witnesses and assess their credibility.” *State v. Pepin*, 110 Wis. 2d 431, 435–36, 328 N.W.2d 898 (Ct. App. 1982).

ARGUMENT

I. The circuit court properly denied Howard’s motion to suppress because there was probable cause to arrest her for operating while under the influence.

A. An officer may arrest a person when there is probable cause that the person committed a crime.

An officer may arrest a person on probable cause. *See* Wis. Stat. § 968.07(1)(d). Probable cause to arrest exists when the quantum of evidence within the officer’s knowledge at the point of arrest would lead a reasonable officer to believe that the defendant probably committed or was committing a crime. *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). The test to determine probable cause is an objective test that requires an examination of the totality of the circumstances. *State v. Weber*, 2016 WI 96, ¶ 20, 372 Wis. 2d 202, 887 N.W.2d 554. A court considers “whether the police officer had facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant committed or was in the process of committing an offense.” *State v. Blatterman*, 2015 WI 46, ¶ 35, 362 Wis. 2d 138, 864 N.W.2d 26 (citation omitted). A determination of probable cause “deals with probabilities” and must be sufficient “to lead a reasonable officer to believe that guilt is more than a possibility.” *Id.* (citation omitted).

“[P]robable cause eschews technicality and legalisms in favor of a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Secrist*, 224 Wis. 2d at 215 (citation omitted). Probable cause does not require proof of guilt beyond a reasonable doubt or even that guilt is more likely than not. *State v. Young*, 2006 WI 98, ¶ 22, 294 Wis. 2d 1, 717 N.W.2d 729. “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, 267 Wis. 2d 531, 671 N.W.2d 660.

B. Officer Morton had probable cause to arrest Howard for OWI based upon the totality of the circumstances.

The information available to Officer Morton was sufficient to establish probable cause to arrest for operating while under the influence. In an attempt to support her argument that probable cause was lacking, Howard individually parses each of the factors considered by the circuit court, instead of considering the totality of the circumstances giving rise to probable cause. An analysis of all factors together shows the arrest of Howard was lawful.

First, Officer Morton observed Howard’s vehicle being operated without headlights at 12:53 AM. Howard seeks to contrast this case with cases involving more aggravated driving or a crash. (Howard’s Br. 13-14.) However, driving without headlights during the hours of darkness is certainly dangerous driving behavior and calls into question whether a driver who fails to illuminate their headlights is alert enough to safely operate a motor vehicle.

The time of driving during the night hours is also an important consideration. In *State v. Post*, the Supreme Court found that driving at 9:30 PM, though not as significant as driving at or around bar time, “does lend some further credence” to suspicion of OWI. *State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 733 N.W.2d 634. Numerous Wisconsin cases have applied this principle to a variety of nighttime hours. *In re Refusal of Anagnos*, 2012 WI 64, ¶ 58, 341 Wis. 2d 576, 815 N.W.2d 675 (driving occurred at 1:15 AM); *State v. Kind*, No. 2011AP1875, unpublished slip op., ¶ 14 (WI App Dec. 29, 2011) (driving occurred at 10:28 PM); *State v. Burch*, No. 2011AP666, unpublished slip op., ¶ 12 (WI App July 21, 2011) (driving occurred at 12:44 AM). In the present case, Howard was stopped just prior to 1:00 AM which contributes to the probable cause determination.

Second, Officer Morton's observations of Howard after the traffic stop occurred support the finding of probable cause. He testified that she appeared to be very nervous, hesitant to make eye contact, and had lethargic speech. (R. 76:6-7.)

Third, Howard seemed "lost and confused" about her travel origin and destination. (R. 76:41.) She originally stated that she was coming from Summerfest—which was not occurring at the time—and her passenger had to interject that they were actually coming from the State Fair. She also told Officer Morton that she was driving to Kohl's but had actually turned off the route to Kohl's and was entering the freeway. This level of disorientation is a significant factor supporting probable cause. In *State v. Begicevic*, 2004 WI App 57, ¶ 9, 270 Wis. 2d 675, 678 N.W.2d 293, the court used as a factor in determining probable cause that the defendant was stopped at approximately 1:30 AM and appeared confused on how to get to Milwaukee.

Fourth, Howard was traveling from an event at which alcohol or drug consumption is more likely. While Howard questions whether the circuit court could base the probable cause finding on the increased likelihood of alcohol or drug consumption at an event such as the State Fair. That is entirely appropriate given that probable cause is a "flexible, common-sense measure." *Secrist*, 224 Wis. 2d at 215. The Court of Appeals has held that a factor in determining probable cause for OWI can include whether the driver is coming from a public event where common knowledge indicates adults often consume alcohol. See *State v. Hughes*, No. 2011AP647, unpublished slip op., ¶ 18 (WI App August 25, 2011) (traffic stop in Jefferson County following a University of Wisconsin football game); *State v. Kugler*, No. 2014AP220, unpublished slip op., ¶ 12 (WI App September 17, 2014) (traffic stop after coming from a Bucks game).

Fifth, Howard performed poorly on the HGN field sobriety test and had mixed results on additional non-standardized field tests. Field sobriety tests are "observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication," comprising "visual cues" of a person's "coordination,

balance, concentration, speech, ability to follow instructions, mood and general physical condition.” *City of West Bend v. Wilkens*, 2005 WI App 36, ¶¶1, 20, 278 Wis. 2d 643, 693 N.W.2d 324 (internal citation omitted).

Howard argued that the HGN test was improperly administered and that the circuit court should exclude it as a factor supporting probable cause. (R. 76:56-57.) The circuit court, as finder of fact, had the opportunity to observe Officer Morton’s testimony, question the officer directly, and review the video evidence twice. (R. 76:44-48, 50.) The court discussed Howard’s challenge to the HGN test as part of the findings of fact and ultimately noted that the officer testified that he performed the tests in accordance with his training and that the body camera angle did not provide clear support for Howard’s claims. (R. 76:60-61.) This is exactly the type of factual determination that is better suited for the circuit court. *Pepin*, 110 Wis. 2d at 435-36. Ultimately, the court utilized the HGN test as a portion of the circumstances supporting probable cause and this Court should as well.

In addition to Officer Morton’s testimony about the clues observed on the HGN test, Howard also demonstrated difficulty focusing and following directions while the officer attempted to administer field tests. (R. 76:43.) After the officer learned of a disability which would preclude administration of the walk and turn and one leg stand tests, he appropriately attempted to administer alternative field tests with mixed results. The case law is clear that there is no laundry list of required elements to establish probable cause. Rather, probable cause “must be assessed on a case-by-case basis.” *Washburn County v. Smith*, 2008 WI 23, ¶ 34, 308 Wis. 2d 65, 746 N.W.2d 243. In *Washburn County*, the Supreme Court explicitly rejected the notion that field sobriety tests are a prerequisite to establish probable cause. *Id.* at ¶ 33. Here, the tests that Officer Morton was able to administer support the finding of probable cause.

Sixth, prior to arrest, Howard informed Officer Morton that she had consumed anti-depression medications. (R. 76:13.) This statement arose in the context of a discussion about the PBT and can be

reasonably viewed as an admission by Howard that she had not been consuming alcohol—which would be detected on the PBT—and had instead consumed prescription medications.

Howard argues that all of the evidence supporting probable cause is “independently problematic” and spends a considerable time attempting to minimize or provide alternative explanations for the evidence of impairment. (Howard’s Br. 17-21.) However, her argument ignores that this Court is required to consider the totality of the circumstances.

While no factor standing alone established probable cause to arrest Howard, the totality of circumstances caused Officer Morton to reasonably believe that Howard was under the influence. The circuit court drew reasonable inferences from the credible evidence presented at Howard’s motion hearing, and those inferences supported the common-sense conclusion that the arrest of Howard was lawful. The circuit court properly denied Howard’s motion to suppress.

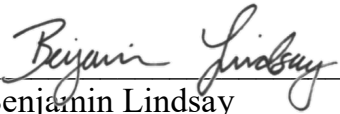
CONCLUSION

For the foregoing reasons, the State of Wisconsin respectfully requests that the Court of Appeals affirm the judgment of the circuit court.

Dated this 24th day of January, 2023.

Respectfully submitted,

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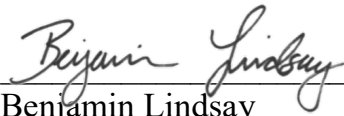
CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3,025.

CERTIFICATION AS TO APPENDIX

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 24th day of January, 2023.



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