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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State failed to provide an adequate constitutional justification for its intrusive and invasive conduct.

A. The constitutionally-imposed probable cause standard poses a significant hurdle for the State and its evidence does not overcome that obstacle.

In this case, Ms. Howard was arrested without a warrant for an alleged violation of the criminal traffic laws. Such a deprivation of Ms. Howard's liberty without prior judicial authorization is a constitutionally significant event; accordingly, the State had the burden of proving the existence of valid probable cause. However, when given an opportunity to do so, the State failed. As a result, this Court must reverse.

Importantly, before delving into the cited evidence proffered by the State, it is worth commenting on one of its initial arguments—a complaint that Ms. Howard has impermissibly asked this Court to consider each piece of evidence "individually" rather than as part of a properly conducted "totality of the circumstances" analysis. (State's Br. at 11).

The State's description of the academic exercise this Court is called upon to conduct is logically suspect.

While it is true that the Wisconsin Supreme Court has condemned a "divide and conquer" methodology in assessing whether a constitutional requirement has been met (in that case, reasonable suspicion), *see State v. Genous,* 2021 WI 50, ¶ 12, 397 Wis. 2d 293, 961 N.W.2d 41, the original meaning of the phrase has been lost in translation here.

Of course, when determining whether probable cause existed, the Court's task is to assess the aggregate weight of the facts and circumstances presented to the officer; thus, even concededly negligible pieces of evidence may—when paired with other facts—add up to reasonable suspicion or probable cause in a given case. *See id.*

Yet, it strains credulity to assert that the reviewing court, when conducting a totality of the circumstances analysis, must blind itself to facts within the "totality" which also suggest that individual pieces of evidence are so problematic that they cannot plausibly move the needle—even when aggregated with other, similarly weak, "facts." That is, a court necessarily engages with the component pieces of evidence in order to assess whether their aggregate weight equals constitutionally sufficient probable cause.

This case shows the importance of a properly conducted totality of the circumstances analysis, one that engages with the substantive weight of individual pieces of evidence. Here, the State offers a case for probable cause it claims to be constructed from solid

steel. On closer examination, however, the State's case turns out to be nothing more than soldered pot metal which, when subjected to any serious stress, will bend, crack, and, ultimately, shatter into its true form: junk.

B. Even when aggregated, the six pieces of "evidence" identified by the State do not add up to probable cause.

As pointed out in the brief-in-chief, it is first worth noting what evidence police did not have, but which one would normally expect to see in an OWI prosecution. Police had no conventionally suspicious driving behaviors, such as weaving, crossing the center line, following too close, etcetera. Ms. Howard did not have the usual signs of impairment, such as glassy or red eyes, slurred speech, or an odor of intoxicants emanating from her person. Ms. Howard was cooperative and consistently denied any illegal conduct. Police lacked proof she had any prior OWIs, never observed drugs or alcohol within the car, and did not conduct two of the three standardized field sobriety tests. Police also had a 0.0 PBT result.

Against this impressive body of non-evidence, the State contrives six factors which it believes add up to probable cause. The State is mistaken.

First, the State cites Ms. Howard's lack of headlights while driving late at night. (State's Br. at 11). The State claims that this traffic infraction adds weight to the probable cause rubric, but ignores the totality of the case law establishing that other highly significant facts would have to be found before a

simple traffic infraction makes it "probable" that an OWI offense has occurred. Thus, while Ms. Howard does not deny that a traffic violation *may* be considered in the probable cause analysis, it is obviously a very weak piece of overall evidence—otherwise, police would be empowered to transform every stop for any infraction into an OWI investigation. The case law does not support such an approach.

The State therefore attempts to build up the suggestiveness of this traffic infraction by pointing to the time of night at which it was observed, arguing that this lends "some further credence" to "suspicion" of OWI. (State's Br. at 11). This, however, is not a reasonable suspicion case; it is a probable cause case. More to the point, mere time of operation is yet another very weak piece of evidence in the overall assessment of probable cause; thousands of Wisconsinites are traveling on Wisconsin roads on any given night; surely not all of them are "probably" committing a crime such that police have a right to yank them out of their vehicles and place them in police custody.

Additionally, the cited cases bear out the relatively minor contribution of time of night to the overall analysis. For example, in *State v. Anagnos*, 2012 WI 64, ¶ 56, 341 Wis. 2d 576, 815 N.W.2d, the Wisconsin Supreme Court held there was reasonable suspicion for a traffic stop when "the driver of the vehicle made a series of unusual and impulsive driving

choices, suggestive of impairment." Time of night was cited, but not dispositive to that conclusion. *Id*., ¶ 58.

And, in *State v. Kind*, Appeal No. 2011AP1875-CR, ¶ 15, unpublished slip op., (Wis. Ct. App. December 29, 2011), this Court concluded that the time of night, standing alone, was insufficient to establish reasonable suspicion. (App. 17). However, the driver's repeated and otherwise inexplicable crossing of the fog line—at that time and day—was sufficient to overcome the weaker reasonable suspicion standard. *Id.* (App. 17). A similar result occurred in *State v. Burch*, Appeal No. 2011AP666-CR, ¶ 16, unpublished slip op., (Wis. Ct. App. July 21, 2011), another reasonable suspicion case where "suspicious driving behavior"—inappropriate and incorrect stopping of the vehicle (behavior not observed in this case)—was sufficient to meet that burden when observed late at night. (App. 9). These cases present stronger facts under a more forgiving constitutional requirement; they do not support the law enforcement conduct at issue in this case.

The second cited factor is "Officer Morton's observations of Howard after the traffic stop […]." (State's Br. at 12). However, the case law makes clear that "nervousness" is a very weak foundation for probable cause precisely because "[n]ervousness during a routine traffic stop is typical […]." " *State v. Sumner*, 2008 WI 94, ¶ 38, 312 Wis. 2d 292, 752 N.W.2d 783. It is only "unusual" nervousness, tied to articulable facts—such as perspiration or "trembling, shaking or fidgeting hands, shifting eyes, tapping

one's fingers or feet, placing one's hands in and out of one's pockets, and the like" which adds anything to the probable cause rubric. *Id*., ¶ 39. No such observations were testified to in this case. And, while the State cites Ms. Howard's allegedly "lethargic" speech, it already made an apparent concession that the video did not corroborate such a claim in the hearing below, (76:53), and the court, in its findings of fact, did not find that Ms. Howard's speech *was* lethargic; instead, it pointed to only ambiguous evidence on this point. (76:63).

Third, the State argues that Ms. Howard was "lost and confused" and even goes so far as to label her as "disoriented." (State's Br. at 12). Ms. Howard was driving late at night trying to reach the Kohl's store located at Grafton Commons, a shopping center adjacent to the freeway, in a somewhat chaotically-zoned, sprawling, business-centric area in the exurbs of Milwaukee. While Ms. Howard accepts that getting lost *may* be of negligible weight in the probable cause analysis, she objects to the undue weight the State has placed on that set of facts here. To call this a "significant factor" therefore vastly overstates the evidence. The State's citation to *State v. Begicevic*, 2004 WI App 57, ¶ 9, 270 Wis. 2d 675, 678 N.W.2d 293 is also inapt. In that case, an obviously drunk driver—who had already exhibited a number of bizarre driving behaviors—was "confused" as to how to get to Milwaukee from his present location in Brookfield. Here, Ms. Howard was not obviously drunk and had not exhibited such behaviors.

Fourth, the State doubles down on the circuit court's dubious reference to Ms. Howard's point of departure in determining probable cause. (State's Br. at 12). The State argues "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." (State's Br. at 12). However, both unpublished cases cited by the State deal with reasonable suspicion, not probable cause. They are also irrelevant because police knew that Ms. Howard had not been drinking alcohol at the time they arrested her by virtue of the negative PBT result. This leaves only the circuit court's conclusory assertion—totally unsupported by any record evidence—that the Wisconsin State Fair is such a notorious hotbed of drug use that anyone traveling from it can be rationally suspected of illegal intoxication. (73:62-63).

Fifth, the State argues that "Howard performed poorly on the HGN field sobriety test and had mixed results on additional non-standardized field tests." (State's Br. at 12). Turning first to the HGN, the State avers that the circuit court credited the results obtained by the law enforcement officer and properly included them in the probable cause rubric. (State's Br. at 13). Here, the officer plainly testified that he did not perform the test correctly, and that if the test is not done correctly, the result is invalid. (76:30-31; 76:34). Accordingly, whether classed as a discretionary finding of fact or a question of law, the circuit court made an obvious error when it appeared to rely on

those results when tallying up facts in support of its probable cause finding.[1]

As to the other field sobriety tests, the State claims Ms. Howard "demonstrated difficulty focusing and following directions while the officer attempted to administer field tests." (State's Br. at 13). The assertion is misleading as the actual record cite refers back to a single failure-to-follow instruction error with respect to the already-discussed HGN test; the officer did not describe a pattern of non-compliance or lack of focus throughout the overall testing. This leaves only the minor deviation from the non-standard "counting test" measured against Ms. Howard passing the similar alphabet test. Once again, the evidence is simply too scant to add up to constitutionally significant probable cause.

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[1] Two other points are worth making. First, it is false to assert, as the State does, that the "claims" of Ms. Howard were somehow disproven by the video evidence. (State's Br. at 13). Although the court noted that the video evidence did not clearly capture whether the HGN was properly administered, (76:60), any lack of clarity in the video is simply irrelevant given the officer's testimony that he did, in fact, fail to administer the test correctly. (76:30-31).

Second, the actual findings by the circuit court are highly confusing and do not rationally support an appropriate exercise of discretion; the court's assertion that the officer "felt that he was doing it perhaps his training and perceived that he saw six clues" does not meaningfully resolve the factual issue at hand nor does it make clear what weight the court was placing on the HGN result.

Finally, the State avers that Ms. Howard "informed Officer Morton that she had consumed anti-depression medications." (State's Br. at 13). However, the officer could not actually recall what the medication was and instead described it "as a depressant medication." (76:13). An admission of taking prescription medication would not supply the needed probable cause to arrest and it is simply irrelevant that Ms. Howard made this statement in context of the PBT, contrary to the State's confusing implication. (State's Br. at 13).

Adding everything up, police had: (1) a traffic infraction occurring on a weeknight, afterhours, but not near any bar or tavern district; (2) Ms. Howard's nervousness upon being seized by an armed law enforcement officer; (3) Ms. Howard's single misstatement about her point of departure; (4) Ms. Howard being lost; (5) the fact that she had previously been at the Wisconsin State Fair, where she did not drink any alcohol; (6) Ms. Howard's single error on a non-standardized field sobriety test; and (7) her admission to taking an unknown prescription medication with unknown side effects. Against these facts is an imposing body of non-evidence—no suggestive PBT, no odor of intoxicants, no observation of drugs or open containers, etcetera.

Clearly, police lacked sufficient probable cause to arrest Ms. Howard. Even when these weak pieces of evidence are piled on top of one another, they cannot add up to constitutionally requisite probable cause. This Court must reverse.

CONCLUSION

For the reasons set forth herein, Ms. Howard asks this Court to reverse the ruling of the circuit court.

Dated this 7th day of February, 2023.

Respectfully submitted,

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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 2,200 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 7th day of February, 2023.

Signed:
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