STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2022AP002112-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

LAQUANDA N. STRAWDER,

Defendant-Respondent.

ON NOTICE OF APPEAL TO REVIEW A DECISION AND ORDER TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JONATHAN D. RICHARDS, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Is a finding of probable cause supported where the arresting officer determined, inter alia, that (a) around 2 AM (b) the defendant had come from a party where she consumed alcohol and (c) had driven her vehicle into signs and over a "cul-de-sac" (d) producing severe front-end damage to her vehicle and (e) causing the driver's side airbag to deploy; (f) made false and misleading statements relating to her consumption of alcohol; (g) had glassy eyes and (h) failed a series of field sobriety tests; (j) was confused or untruthful about the direction of her travel; and (k) where the defendant had a prior drunk driving record which was discovered shortly after the arrest?

The Circuit Court Answered: NO.
This Correct Answer Is: YES.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted because the issue presented can be resolved by well-settled principles and because the legal theories and authorities will be fully developed through briefing. *See* Wis. Stat. § 809.22(1)(b). Further, this appeal is being decided by one judge and may thus not be published. *See* Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE CASE

A. Summary.

At approximately 2:19 AM on November 12, 2021, Ms. Laquanda N. Strawder was arrested at the scene of a car accident for operating a vehicle while intoxicated. Testing of Ms. Strawder produced an intoximeter result of 0.19 grams of alcohol in 210 liters of breath. (R. 4.)

On December 16, 2021, the State of Wisconsin filed a criminal complaint charging two counts: (1) Operating a Motor Vehicle While Under the Influence – 3rd Offense, and (2) Operating with a Prohibited Blood Alcohol Concentration – 3rd Offense. (Id.)

On April 29, 2022, Ms. Strawder moved for the suppression of all evidence discovered as fruits of her arrest, including the intoximeter test results. An evidentiary hearing occurred on September 30, 2022. (R. 7, 8.) The arresting officer was the sole witness. (R. 13.)

The circuit court found that the officer lacked probable cause to arrest.[1] (R. 13:56) This appeal follows.

B. Direct Examination of South Milwaukee Police Officer James McLean.

On November 12, 2021, around 02:19 am, South Milwaukee Police Officer James McLean was flagged down by a citizen who reported seeing a crashed vehicle parked in the street just blocks away, near the border between

[1] The court acknowledged that the officer had a reasonable suspicion for stopping and talking with Ms. Strawder, but the court then decided that the officer lacked probable cause, resulting in the suppression of the .19 BAC intoximeter test result.

Oak Creek and South Milwaukee. (R. 13:4, 14, 22) Officer McLean accordingly responded to the 1800 block of College Avenue where he observed Laquanda Strawder standing (not on a sidewalk, but) in the street outside of a 2020 Chevrolet Trailblazer that had "extensive front end damage." The vehicle was stationary, spread across both eastbound travel lanes of the thoroughfare. (R. 13:5)

Officer McLean then spoke with Ms. Strawder who declined any need for medical attention and explained that she was heading home towards Silver Spring Road when another vehicle had "run her off" the road. (R. 13:6) However, at the point where the officer found the 2020 Chevrolet Blazer, it was not located off the road. Instead, it was located on the road in the middle of two lanes of traffic. (R. 13:5)

There was no other vehicle present. (R. 13:5, 6, 8); the defendant could not describe the other vehicle that allegedly "ran her off" the road. (R. 13:6)

A trail of tire marks, vehicle fluid, and downed traffic road signs led from the roadway over a so-called "cul-de-sac"[2] to where the defendant's vehicle had come to rest with its airbags deployed. (R. 13:7) Officer McLean's testimony from the motion hearing provided (*Id.*):

> [T]here was a lot of liquid and tire marks and debris that went across Pennsylvania / Nicholson… [a]nd the stuff led – it was – all the liquid and

[2] Although the hearing transcript uses the term "cul-de-sac" to describe the area over which Ms. Strawder's vehicle had driven, the proper term would have been "culvert." For purposes of this appeal, the State adopts this misusage of the term to remain consistent with the hearing transcripts and because ultimately the term itself is inconsequential to the analysis and leads to no prejudice or benefit to a party.

> tire and debris had – was going across College.[3] So I follow that trail back and observed that there was some signs that had been knocked down and – like there was somebody drove up over the cul-de-sac, took down a bunch of signs, which could be what caused the accident and all the damage to her vehicle.

Asked whether there was consistency between Strawder's statements pertaining to how the accident occurred and the actual evidence, Officer McLean testified: "I believe her statements of where she stated that she was coming from were inconsistent to what the evidence showed." (R. 13:9)

The prosecutor then followed up with Officer McLean about the accident scene itself compared with the plausibility of Ms. Strawder's version of events. To that, Officer McLean responded: "It[4] was inconsistent with her statements." (R. 13:10) Officer McLean further explained (*Id.*):

> Well, she said that she was travelling southbound on Pennsylvania Avenue and the liquid led – that I followed all the way across College Avenue – would indicate that that vehicle came from eastbound from College … [a]nd not Pennsylvania.

As mentioned, Strawder also made the claim that she had been travelling towards her home on Silver Spring.

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[3] Pennsylvania is in Oak Creek but Nicholson is a "bordering street" in South Milwaukee which crosses College Avenue. Officer McLean testified that all the liquid and tire tracks and debris went across College Avenue. (R. 13:7)

[4] "It" is referring to the observations of Officer McLean, as to the scene of the incident.

(R. 13:7). Silver Spring Drive is located north. As Officer McLean testifies on this point (R. 13:7):

> This didn't make sense to me that when she said she lived on Silver Spring, that she was heading home, that she was travelling southbound on Pennsylvania, because I believe Silver Spring is north of South Milwaukee. So I didn't know how she ended up – so it just didn't seem like she was supposed to be in the area where – if she was heading home, that she wasn't going the right way.

Officer McLean noted that Silver Spring was north of the crash site, and Ms. Strawder's vehicle was going in the opposite direction heading southbound on Pennsylvania Avenue before turning east on College Avenue. (R. 13:7-8) Despite this, Ms. Strawder insisted on her version of events, even when Officer McLean indicated how this version of events seemed irreconcilable with the tracks and debris. (R. 13:11)

Officer McLean struggled with the defendant's version of event because, *inter alia*, he saw no evidence of a supposed second car, and Ms. Strawder claims she was trying to go north but had clearly been headed south at the time of the accident. (R. 13:7-11)

Ms. Strawder told Officer McLean repeatedly that she had nothing to drink. However, Officer McLean would shortly learn from another officer (Officer Meyer) who had separately questioned Ms. Strawder that she admitted to having consumed alcohol that evening. (R. 13:11) In addition, her eyes appeared glassy to the officer. (R. 13:13) To this point, Officer McLean testified, as follows (R. 13:10-11):

> I asked her a few different times if she had anything to drink. At first, she had told me no. And as I continued questioning her, one of the things that didn't make sense to me prior to following the – the trail of liquid to back to see where the accident occurred, she had told me that – I asked her a second [time], and she had said no.
>
> I had left her with another officer as I went back to investigate the accident scene, which ended up being in Oak Creek, so they took the accident report, and spoke to an Oak Creek officer. Then I came back. And at that time, Officer Meyer, who was with her, told me that she did admit to him that she had a drink.
>
> So I questioned her further about the – the accident, saying, 'It looks like your vehicle came from this way.' She said no. She again made – advised me that 'I came' – that she was travelling southbound on Pennsylvania and turned eastbound onto College Ave. And – and at that point in time, I asked her if she had anything to drink. And she had said she did… So I told her that we were going to be doing field tests.[5]

Officer McLean testified that Ms. Strawder was subjected to three field sobriety tests (FST's), and that she failed them all. (R. 13:11-12) On the HGN test, there were five out of six clues showing signs of intoxication. (R. 13:12) On the walk-and-turn test, there were four out of eight clues showing signs of intoxication; on the one-legged

[5] Officer McLean's testimony from the motion hearing strongly supports that the critical moment (but not sole factor) in deciding to transition from a more generalized investigation into one focusing on OWI is when it seemd apparent to him that Ms. Strawder was attempting to mislead and deceive him on matters pertaining to her consumption of alcohol, i.e., whether she had been drinking.

Further, it seems that defense did not challenge this aspect of the events. See R. 13:30.

stand test, there was one out of four clues showing signs of intoxication. (R. 13:11-12)

Thereafter, the defendant was arrested based on a probable cause determination. (R. 13:12) An interchange to this point occurred during direct examination, between the prosecutor and Officer McLean (R. 13:13):

> **Assistant District Attorney Gregg Herman:** Officer, based upon the defendant's representation of where she was headed, how the accident occurred, the physical evidence you saw, her glassy eyes, her admitting coming from a party and [having] one drink, and her failing the field sobriety tests, did you have a, at that time, an opinion as to whether or not she was probably intoxicated?
>
> **Witness Officer James McLean:** I believed that she was intoxicated.[6]

C. Cross Examination of South Milwaukee Police Officer James McLean.

After clarifying that Officer McLean was flagged down by a citizen at 2:19 am on November 12, 2021 (R. 13:14), Officer McLean answered questions pertaining to the location of debris, and he stated that, "[M]y opinion was that there was debris where she (the defendant) said it was not." (R. 13:17, parenthetical note added)

Defense counsel asked about downed road signs (R. 13:18), tire marks across the "cul-de-sac" (R. 13:18), a

[6] An intoximeter test of Ms. Strawder produced a result of 0.19 grams of alcohol per 210 liters of breath. Because of her two prior drunk driving convictions, the two-count complaint charged her with Operating Under the Influence-3rd offense and Operating with a Prohibited BAC-3rd offense, and was filed on December 16, 2021. (R. 17:1)

"phantom vehicle" (R. 13:18), and the relationship of this evidence to the accident scene; Officer McLean responded (R. 13:19):

> The liquid was from her vehicle all the way back to the signs, if I remember. So that, in – in my opinion, came from her vehicle, since there were no other vehicles that would trail off leaving – … – that there was no other trails off of liquid, if that makes sense.

Officer McLean would further testify (R. 13:19):

> Well, the liquid – again, the liquid stopped where the vehicle was stopped, and it led all the way back to the cul-de-sac. So the assumption is, is that the liquid if from that – from her vehicle.

Officer McLean then explained what he believed to have caused Ms. Strawder's vehicle "excessive damage" or "extensive front end damage" when he stated that, "The contact appeared to have been made in the cul-de-sac by knocking over the signs, which is probably what did the damage to her vehicle. . . running over the signs." (R. 13:20)

Defense counsel got an apparent concession when he asked Officer McLean whether Ms. Strawder's "ability to walk was fine," and Officer McLean responded to him: "Correct." (R. 13:21) On a second occasion, defense counsel raised the issue of Ms. Strawder's "balance" being "fine" to which Officer McLean did not quarrel with the characterization. (R. 13:29)

However, soon after eliciting testimony that Ms. Strawder appeared to be walking "fine" and that therefore her walking was not a factor underlying Officer McLean's

determination that Ms. Strawder was probably intoxicated, defense proceeded to elicit testimony about a medical condition that would severely disable Ms. Strawder's ability to walk "fine" (R. 13:33) [7]:

> Attorney LeBell: . . .the Defendant advised you that she had a broken ankle, correct? It had been broken before, I think is [sic] the words.
>
> Officer McLean: Correct.

Defense counsel would later cross-examine Officer McLean on his decision to administer field tests, suggesting that McLean's observation of Ms. Strawder's "glossy eyes" was the sole indicium to support the decision to administer field tests. (R. 13:35-36). Officer McLean disagreed, responding (R. 13:36):

> I would disagree on your question there because I did have other factors other than the – the odor of intoxicants, I didn't have that. But there was other factors that I had: where she was not able to explain where she came from, it didn't make sense to me where she was going, and her eyes were glossy and she's just been in an accident, she just came from a friend's party, and she had been drinking. So I think there was other factors that were involved there that I felt I had enough to do field sobriety tests, and I did."

[7] This mention of Ms. Strawder's prior broken ankle is the only reference made in the entire record. The record lacks any further details as to the who, what, when, where, how, or why related to Ms. Strawder's ankle being harmed. No medical reports or additional evidence to this point was offered or received by the court.

D. The Court's Decision.

After the close of formal arguments but prior to rendering a decision, a remarkable exchange was placed on the record (R. 13:51):

> Court: And I guess for both counsel, I – I – refresh my memory. I believe during the Walk-and-Turn test, Ms. Strawder disclosed that she had an ankle injury. Is that right?
>
> Defense Counsel: Broken.
>
> Court: A broken ankle?
>
> Defense Counsel: Correct.
>
> Court: All right.

Moments later, the court would render its decision which was broken into two parts. It was determined that Officer McLean had reasonable suspicion to stop Ms. Strawder. The court's findings of facts for reasonable suspicion note Ms. Strawder's version of events, the officer's viewing of the evidence before him, it being 2 am (bar time), the confusion about which direction she was going and intending to go, and her attendance at a party. (R. 13:53-54) From these facts, the court surmised: "So based on all of those factors, and considering that reasonable suspicion is a low bar, I do find that the officer had reasonable suspicion to stop Ms. Strawder." (R. 13:54)

The court then began a new analysis related to probable cause to arrest wherein excluded from consideration were any facts used by the court to support the existence of reasonable suspicion to investigate. In addition, the court's determination on probable cause discounted two of the three field sobriety tests which

would have required Ms. Strawder to use her lower extremities because: "she disclosed that she had a broken ankle." (R. 13:55) The court discussed Ms. Strawder's performance on the Walk-and-Turn test, stating: "...I don't believe the officer could reasonably rely on her performance on the Walk-and-Turn test to say if she was intoxicated". (R. 13:55) The court then discussed the One-Legged Stand field sobriety test, indicating: "I think we have to discount that." (R. 13:55)

In a sort of distillation of the basis for its decision, the court made the following statement on the record, which is critical to understanding the court's analysis (R. 13:55-56.):

> So really what the – the only thing we have here is her performance on Horizontal Gaze Nystagmus test. We do not have a preliminary breath test. And I believe that the officer had probable cause to believe that she was intoxicated and would've been allowed under the law to perform a preliminary breath test but didn't in this case. So the only thing we had was the fact of kind of unusual circumstances and her failure of the Horizontal Gaze Nystagmus test.
>
> I believe that under those circumstances that the officer did not have probable cause to arrest Ms. Strawder for operating while intoxicated under the – under the circumstances. And so, I will grant the defense's motion that the officer did not have probable cause to arrest Ms. Strawder for operating while intoxicated.

STANDARD OF REVIEW

On review of an order on a motion to suppress, the circuit court's factual findings are upheld unless clearly erroneous. *State v. Marten–Hoye*, 2008 WI App 19, ¶ 5, 307 Wis. 2d 671, 746 N.W.2d 498. The trial judge receives deference regarding the credibility of witnesses. *In Matter of Estate of Dejmal*, 95 Wis. 2d 141, 152, 289 N.W.2d 813, 818 (1980). Once the facts have been established, the reviewing court independently determines whether probable cause exists, as a matter of law. *State v. Drogsvold*, 104 Wis. 2d 247, 261-62 n. 6, 311 N.W.2d 243, 250 n. 6 (Ct. App. 1981). The application to a set of facts of constitutional principles like probable[8] cause is a question of law. *State v. Drew*, 2007 WI App 213, ¶ 11, 305 Wis. 2d 641, 740 N.W.2d 404. Whether the factual findings satisfy any statutory standard of probable cause is also a question of law.[9] *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Here, the facts are undisputed and thus they should be reviewed de novo. *See Id.*

Should the trial court fail to clearly state the findings of fact on which it assesses probable cause, the reviewing court will examine the factual record *ab initio* and determine, as a matter of law, whether the evidence constitutes probable cause. *State v. Williams*, 104 Wis. 2d 15, 22, 310 N.W.2d 601, 605 (1981); *State v. Nordness*, 128 Wis.2d 15, 36, 381 N.W.2d 300, 308-09 (1986).

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[8] Because arrest is a seizure of an accused person, it is subject to the probable cause requirement of the 4th Amendment.

[9] "Probable cause" as used in the PBT statute, Wis. Stat. § 343.305, means something less than the standard probable cause to arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541, 552 (1999). How this lower standard is distinguished from the standard for arrest is not precisely articulated; however, neither are PBT tests mandatory.

Probable cause generally is that "'quantum of evidence which would lead a reasonable police officer to believe' that a traffic violation has occurred." *State v. Popke,* 2009 WI 37, ¶ 14, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)). A reviewing court examines the totality of the circumstances to determine whether probable cause exists. *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551. "In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience." *Id*.

Probable cause may be found even when routine and ordinary "evidence of intoxicant usage" did not exist because the test is totality of the circumstances. *Id*. at ¶ 37. "Probable cause to arrest requires that, at the moment of arrest, the officer knew of facts and circumstances which were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense." *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985). It is enough if a reasonable officer believes that guilt is more than just a possibility. *Id*.[10] More specifically to OWI's, "It is sufficient that the evidence known to [the officer] would lead a reasonable police officer to believe that the defendant probably was under the influence of an intoxicant while operating his vehicle." *State v. Lange*, 2009 WI 49, ¶ 38, 317 Wis. 2d 383, 399, 766 N.W.2d 551, 558.

[10] With respect to statutory versus constitutional probable cause, see preceding notes.

ARGUMENT

I. THE TRIAL COURT'S DECISION TO SUPPRESS EVIDENCE BASED ON LACK OF PROBABLE CAUSE WAS IN ERROR.

A. The Totality of the Circumstances (Even When Excluding the Walking and Standing FST's) Gave Sufficient Grounds for Probable Cause to Arrest.

There was strong evidence to support probable cause for arrest. The record included each of the following factors, which at later sections will be discussed in more detail:

- **Citizen Reports Accident.** Officer McLean was flagged down by a citizen witness who told him about a motor vehicle accident.
- **2AM Incident.** The time was past 2 a.m., a time of night when taverns close and which the court noted to be strongly associated with drunk driving.
- **Vehicle Condition.** Officer McLean observes a 2020 Chevrolet Trailblazer with "extensive front end damage", also described as "excessive damage." The air bags on the vehicle had been deployed.
- **Encounter with Ms. Strawder.** Officer McLean observes Ms. Strawder standing in the street, beside the vehicle.
- **Vehicle Location.** Officer McLean notes that the vehicle was positioned across both lanes of travel.[11]

[11] It is somewhat perplexing that the trial court engaged in a "reasonable suspicion for a stop" analysis. It is hard to argue that Officer McLean would have been anything else but derelict in his duties had he not stopped. It was his duty and responsibility to tend to the scene of a motor vehicle accident or disabled vehicle

- **Strawder admits to Losing Control of Motor Vehicle.** Whether Ms. Strawder lost control of her motor vehicle because her BAC level was at .19, or because an alleged vehicle "ran her off the road", she nonetheless lost control of her motor vehicle to the point that it left the roadway and drove into a "cul-de-sac."
- **Street Signs Downed.** Officer McClean observed several downed street signs which led him to logically conclude were the source of the extensive damage to the front end of the 2020 Chevrolet Trailblazer.
- **Strawder Coming from a Party.** Ms. Strawder indicated that she came from a party at a friend's home. Implications are obvious, as the court noted. (R. 13:54)
- **Strawder's Misleading Statements.** Ms. Strawder lied about her alcohol consumption not once, but twice. After concealing her alcohol consumption, she finally admitted to drinking alcohol.
- **Irreconcilability of the physical evidence with Strawder's Version.** Officer McLean noted that Ms. Strawder provided an account of her origin and destination that were inconsistent with, and ran contrary to, the physical evidence at the scene.
- **Glossy Eyes.** Officer McLean noted that Ms. Strawder had glossy eyes, consistent with the consumption of alcohol.
- **Horizontal Gaze Nystagmus.** Ms. Strawder failed the HGN test with five out of six clues all corresponding to an intoxicated person. Those test results alone are sufficient for a probable cause finding.

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blocking traffic. Officer McLean must stop and render aid to any potential victims, which he did in this situation.

- **Walk-and-Turn.** Ms. Strawder failed this field sobriety test with four out of eight possible clues, corresponding to impairment.
- **One-Legged Stand.** Ms. Strawder tested with one out of four possible clues, corresponding to impairment.
- **Two Prior Drunk Driving Convictions.** As noted in the criminal complaint, Ms. Strawder has a known and established record of drunk driving.

A brief discussion of these signs shows just how damning they are, individually and collectively.

A trail of destruction, tracks and vehicle marks suggested Ms. Strawder's car had run off the road and plowed through several obstacles. A reasonable inference would be that she had drunkenly lost control of the vehicle and crashed it. Had a jury been asked to find guilt beyond a reasonable doubt under these circumstances, it could reasonably have done so, but the standard that must be met here is much lower.

While a second vehicle *could* have been involved, the only evidence of this was the defendant's self-serving and unreliable report. There was no physical evidence of a second vehicle, no side impact damage to the defendant's car, no independent witnesses, no second set of tracks. Had the defendant been an innocent victim, run off the road by a reckless second driver, one might expect she would have reported this. The fact that the defendant did not report the alleged incident but waited for a curious passerby to alert law enforcement could indicate that the story about a second car was made up, fabricated on the spot to divert blame.

Alternatively, the failure of Ms. Strawder to report her accident could reflect a reticence to involve the authorities. The fact of the accident was an indicator of a possible OWI and even if there had been a second driver more responsible for having caused the accident, this would not resolve the issue. The ultimate question here is not related to responsibility for the accident but to determine whether the defendant was likely to have been intoxicated, or have had a prohibited alcohol concentration. Even if Ms. Strawder had been forced to react to a second vehicle, she would have been more likely to lose control in response to the second vehicle's behavior if she were not sober.

These conditions were all observed just after 2 a.m., a time of night when alcohol-related accidents are most prevalent. Add to this basic setting the fact that Ms. Strawder had glassy eyes, seemed to misrepresent her origin or destination, first dissembled, then admitted to having attended a party at which she consumed alcohol, and one already has plenty of reason to suspect driving under the influence of alcohol. The initial signs of her intoxication, even prior to the administration of field sobriety tests, were more than sufficient to establish a reasonable probability that she had been intoxicated.

Because the trial court did not clearly state its findings of fact to assess probable cause, the Court of Appeals should examine the factual record *ab initio* and determine, as a matter of law, whether the evidence constitutes probable cause. *See State v. Williams*, 104 Wis. 2d 15, 22, 310 N.W.2d 601, 605 (1981); *State v. Nordness*, 128 Wis. 2d 15, 36, 381 N.W.2d 300, 308-09 (1986).

B. The Court Did Not Opine on the Weight to be Given Certain Evidence or Conclusions.

Given the testimony describing a trail of destruction to road signs, the tire tracks, the roadway debris, the extensive front end damage to Ms. Strawder's vehicle, the deployment of airbags, and the vehicle's dead stop in the middle of two lanes of traffic, the arresting officer's concerns about Ms. Strawder's irreconcilable version of the accident were well founded. And the court gave no reason to discount them. Officer McLean was cross-examined about others of his conclusions, and the court made no credibility findings that would undermine his conclusions. Particularly, Officer McLean testified that, from the physical evidence he viewed at the scene, Ms. Strawder drove over a "cul-de-sac," leaving road signs downed.

While Ms. Strawder maintained that she was "run off the road", Officer McLean testified that Ms. Strawder's theory contradicted the physical evidence. The record was devoid of any physical evidence of a second "phantom" vehicle. There was no second set of tracks. Neither did evidence exist of side impact damage to Ms. Strawder's car. No independent witnesses testified to corroborate Ms. Strawder's version of events. Just what was said by Ms. Strawder who Officer McLean had learned to be giving him misleading information.

Even if the "I got run off the road" version being advanced was credited (notwithstanding physical evidence to the contrary), an impaired driver's ability to react to a reckless driver would be different than a sober driver's ability. Nowhere in the record did the court show that it analyzed such an apparent point. Neither did the court

consider why an innocent victim of a reckless second driver would fail to immediately call police to alert them about what happened. Nor did the court consider that Ms. Strawder provided no description of the other vehicle. In essence, the state's argument views the "phantom car" version as being a story fabricated by Ms. Strawder on to divert blame. The trial court also neglected to note that the narrative advanced by Ms. Strawder was considered by Officer McLean in the light of her dissembling about alcohol consumption.

C. The Trial Court Found Probable Cause and Then Failed to Deny the Defense Motion.

When rendering its decision, the trial court stated the following (R. 13:55-56, emphasis added):

> So really what the – the **only thing** we have here is her performance on Horizontal Gaze Nystagmus test. We do not have a preliminary breath test. And **I believe that the officer had probable cause to believe that she was intoxicated** and would've been allowed under the law to perform a preliminary breath test but didn't in this case. So the **only thing** we had was the fact of kind of unusual circumstances and her failure of the Horizontal Gaze Nystagmus test.
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> I believe that **under those circumstances** that the officer did not have probable cause to arrest Ms. Strawder for operating while intoxicated under the – under the circumstances. And so, I will grant the defense's motion that the officer did not have probable cause to arrest Ms. Strawder for operating while intoxicated.

Effectively, the trial court affirmatively stated its belief that Officer McLean had probable cause to determine that Ms. Strawder was intoxicated. It stated: "***And I believe that the officer had probable cause to believe that she was intoxicated***…" (R. 13:56, emphasis added)[12] The trial court's finding that Ms. Strawder was intoxicated (coupled with her own admission that she was driving the vehicle) was enough to deny the defense motion. It is unclear why the court did not do so.

D. The Circuit Court Failed to Apply a 'Totality of the Circumstances' Analysis: It Partitioned the Factual Findings Used to Reach the Issue of "Reasonable Suspicion" from the Factual Findings Available to Its Determination of "Probable Cause".

Drawing upon the record cited above, on two occasions, the trial court incorrectly stated that the "*only thing*" (R. 13:56, italics added) it could factually rely upon for probable cause was the HGN field sobriety test. This was done after it had "exhausted" all the other inidicia in the course of finding reasonable suspicion and wrongly determined that the Standing test and walking test should be excluded from consideration. The court erred by disregarding evidence that supported a finding of reasonable suspicion where that evidence was part of the same circumstances in which probable cause was found.

Probable cause generally is that "'quantum of evidence which would lead a reasonable police officer to believe' that a traffic violation has occurred." *State v.*

[12] See footnote 9. The court's finding supported probable cause for arrest but it only deemed its finding to be enough for a PBT test, but it is unclear as to why.

Popke, 2009 WI 37, ¶ 14, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)). A reviewing court examines the **totality of the circumstances** to determine whether probable cause exists. *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551 (emphasis added). "In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience." *Id*.

In a situation like this, the trial court is supposed to consider all of the information available to the officer. Then, the trial court must decide whether a *prudent person* or a *reasonable police officer* had sufficient facts to believe that a driver was probably under the influence of an intoxicant when operating the motor vehicle. Here, after discounting the other field sobriety tests, the trial court excluded from its analysis the rest of Officer McLean's testimony concerning the entire situation and totality of the circumstances. For the purposes of determining probable cause, the trial court formed its ruling on the basis of one isolated factor, the HGN field sobriety test. However, Officer McLean explained that, in addition to results from the HGN test, many other factors led him to form the conclusion that Ms. Strawder was intoxicated.

Officer McLean found probable cause on the basis of all of the facts which form the totality of the circumstances in this particular case, including: the time of night (past 2 a.m.), the glassy/glossy eyes, the apparent inconsistencies between the actual evidence of the accident and the defendant's description of the accident, the confusion surrounding the direction of her vehicle compared with

her claims of where she was supposedly headed, the fact that she came from a party, and then admitting to having consumed alcohol after repeated denials.[13]

Even prior to the administration of the field sobriety tests, these initial signs of intoxication provided a sufficient basis to establish the quantum of evidence needed to justify an arrest based upon probable cause. However, in analyzing probable cause, the trial court did not consider these factors. Instead, the trial court discounted two out of the three field sobriety tests. Then, it incorrectly characterized the sole remaining field sobriety test as the "only thing" remaining before the court. The trial court seemed to bifurcate different portions of facts, somehow creating two different "totalities" – one "totality" to substantiate its reasonable suspicion to stop analysis – and then, a second completely separate "totality" which considered a single field sobriety test to underlie Officer McLean's probable cause determination.

[13] The doctrine of inevitable discovery is good law here. It recognizes that evidence obtained from an unreasonable search and seizure remains admissible if the evidence would have come to light absent a Constitutional violation. *See State v. Jackson*, 2016 WI 56, recognizing *Nix v. Williams*, 467 U.S. 431 (1984). Absence of probable cause was a necessary, but not wholly sufficient, basis for the suppression of evidence. A trial court may take judicial notice of the kinds of facts known generally to the public, or which may be reasonably imputed to a court based on its known experience. See *In re Gudde's Will*, 260 Wis. 79, 84-86, 49 N.W.2d 906 (1951). Trial courts and the public know that police officers routinely run driving records of persons, and Ms. Strawder had two prior drunk driving convictions. Given that the officer would have inevitably discovered these prior convictions, their existence would have been a factor to add to the long list of Officer McLean's other considerations. Considering a suspect's prior OWI convictions is appropriate in determining probable cause. *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d 551. Ms. Strawder's two prior drunk driving offenses were destined to be uncovered and could be further used to credit a finding of probable cause if it is determined that this case was a close call.

In terms of its "reasonable suspicion to stop" analysis, the trial court never acknowledged the fact that any police officer would have been derelict to have not stopped to investigate the crash scene upon being informed of a car accident and then verifying that tip by witnessing a motor vehicle, stationary, in the middle of two lanes of traffic at 2 a.m. Wisconsin Statute §§ 346.66, 346.665, 346.67, 346.675, 346.68, 346.69, 346.70, and 346.74 place various responsibilities and duties upon citizens involved in motor vehicle accidents, as well as duties pertaining to law enforcement officers. Operators of motor vehicles must immediately report accidents. See Wis. Stat. § 346.70(1). For Officer McLean to not stop, attempt to render aid, or investigate the circumstances would have been contrary to law. The trial court's analysis fails to consider this.

E. Weight Should Be Given to the Walking and Standing FST's; Their Negation Was a Misuse of the Court's Discretion.

An appellate court first looks to the record to see whether discretion was in fact exercised. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Assuming discretion was exercised, the appellate court will then look for reasons to sustain the trial court's discretionary decision. *Loomans v. Milwaukee Mutual Insurance Company*, 38 Wis. 2d 656, 662, 158 N.W.2d, 318, 320 (1968).

While a trial court has discretion to assign weight and credibility determinations to different facts, its reasoning must still reflect a reasonable basis for its determination. The court record must reflect a reasonable basis for its conclusions.

The exercise of discretion incorporates a process of reasoning and requires proper explanation. *State v. Salas Gayton*, 2016 WI 58, ¶ 19, 370 Wis. 2d 264, 882 N.W.2sd 459 ("An exercise of discretion contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." (quotations and citations omitted)); *McCleary v. State*, 49 Wis. 2d at 282 (holding that a circuit court that did not provide adequate reasoning or explanation for a discretionary decision "fail[ed] to exercise discretion," and explaining that "[d]iscretion is not synonymous with decision-making"); *State v. Hall*, 2002 WI App 108, ¶ ¶ 16-17, 255 Wis. 2d 662, 648 N.W.2d 41 (reasoning that a discretionary decision which was supported by minimal and inadequate explanation by a circuit court "reflect[ed] decision making" but not "a process of reasoning based on a logical rationale," as is required for a proper exercise of discretion (citations and quotations omitted)).

Here, the trial court completely discounted evidence from two field sobriety tests. It did so without adequate record basis, and seemed to act hastily and without a proper command of the facts, effectively relying on the testimony of defense counsel to refresh its recollection (See R. 13:51) of "an ankle injury." The transcript provides:

> Court: And I guess for both counsel, I – I – refresh my memory. I believe during the Walk-and-Turn test, Ms. Strawder disclosed that she had an ankle injury. Is that right?
>
> Attorney LeBell: Broken.

> Court: A broken ankle?
>
> Attorney LeBell: Correct.
>
> Court: All right.

In reality, Officer McLean noted Ms. Strawder claimed to have had a prior "broken" ankle (See R. 13:33) which appears to have been misunderstood or misconstrued by the court.

In completely ignoring observations of the police officer that relate to the walking and standing tests, the trial court relied upon an unverified, self-serving remark by Ms. Strawder, that at some unspecified time "in the past" she had suffered a broken ankle. (R. 13:55) Worse yet, the court's finding abjured the officer's observations and training and experience that Ms. Strawder was not behaving like a person with a broken ankle and instead found, without an adeaquate basis, that Ms. Strawder had a broken ankle at the time Officer McLean was investigating her, or that her performance was being substantially hindered by a prior broken ankle. Even though that is not what was said or in any meaningful way developed or supported by the record.

It is worth repeating here that Ms. Strawder denied medical attention and Officer McLean did not determine she needed any. Further, defense's presentation of evidence included bodycam footage from cameras worn by Officer McLean at the time of the incident. (R. 13:2, 51) At no time was that footage used to demonstrate that Ms. Strawder had any noticeable issue walking or standing, which may have supported the argument for an injured ankle. While Officer McLean could never affirmatively

confirm that Ms. Strawder's ankle was uninjured, his failure to notice any issue implicating Ms. Strawder's ankle meant that there was no evidence in the record of a presently "broken" ankle, let alone an inkling of Ms. Strawder suffering from an injury of that high a severity, which would render most incapable of walking, let alone walking "fine."

To summarize: the record is devoid of any explanation of when the injury occurred, how it occurred, how it was treated, whether the ankle had been casted, which ankle had been broken, any extent of the injury, or any resulting disability or debilitating effect. Was the alleged break recent or one that occurred decades ago? The record is also unclear as to whether the officer already factored Ms. Strawder's injury into her performance on the field sobriety tests. Nor was there any weighing and balancing of Ms. Strawder's credibility, in the light of Officer McLean knowing that he had already been misled and deceived by Ms. Strawder during his investigation.

Perhaps to prove her lack of intoxication, the defense repeatedly referenced Officer McLean's failure to identify problems with either Ms. Strawder's balance or walking. (R. 13:21, 28) Defense counsel asked, "And her ability to walk was fine, right?" and Officer McLean responded: "Correct." (R. 13:21) Defense counsel again returned to the subject during cross examination, to highlight that Ms. Strawder's "balance" during the interaction was "fine". (R. 13:28)[14]

[14] Defense certainly wanted the trial court to give weight and credit to the officer's observations of Ms. Strawder walking normally as well as her "fine" balance. In several ways, the defense asked about an "unsteady gait", whether Ms. Strawder "ambulate[d] in an unsteady fashion", and whether she was "walking unsteadily".

Moreover, at no time did the officer testify that Ms. Strawder was standing abnormally. The record does not indicate any hobbling or faltering due to an unsteady foot prior to the administration of the field sobriety tests. Had there been a past injury, its present effects were not so severe as to prevent Ms. Strawder from driving.

It is worth repeating here that probable cause is determined by what is known to the officer so the question of whether Ms. Strawder had an injury that would invalidate the tests is not in fact the relevant issue. The point of inquiry is *whether the officer believed that Ms. Strawder had such an injury*. The fact that he proceeded with the tests is one indicator that he did not. Everything he observed, from the defendant standing and walking normally, to the wording of her statement, to the refusal of medical care, suggested she could complete the tests. The fact that she had previously lied to him meant that he was not necessarily inclined to accept her uncorroborated statement as proof that she had any injury, past or present.

Further, it is commonly understood that persons suspected of drunk driving may exaggerate conditions in order to pre-emptively diminish the significance of tests that they fear they will fail. The officer could rely on training and experience to inform him of how much weight to give the claimed injury, and evidently decided to give it little or none. The evidence simply does not support an understanding by the officer at any point that Ms.

(R. 13:21) However, in a turn of events during its decision, the court actually gave an advantage to the defense by making a contrary finding concerning Ms. Strawder's alleged prior broken ankle, finding her incapable of walking properly enough to complete the Walk-and-Turn field sobriety test and balancing properly enough for the One Legged Stand field sobriety test. (R. 13:55)

Strawder suffered from any affliction, pain, or symptom that would render the findings of field test unreliable.

Additionally, while the officer's testimony that Ms. Strawder seemed to have been standing and walking "fine" prior to the field tests may appear to cut both ways, it really does not. Here it provided the officer with justification to believe that field tests requiring Ms. Strawder to walk or stand are reliable because there was no reason for the officer to suspect that Ms. Strawder was unable to perform such tests or was hindered in their performance, i.e., that she was suffering from a severe foot injury.

One might argue that Ms. Strawder's ability to stand and walk weighs against her having been impaired, and would detract from probable cause, but this argument is extremely weak. Had Ms. Strawder been tilting over, stumbling and swerving erratically, there would have been no need (or indeed ability) to perform FSTs.

Field tests are designed to be challenging enough to detect impairment in someone who isn't obviously drunk. Ms. Strawder was a proper subject for the tests because she presented as someone able to walk and stand normally, but when even mildly challenged by testing, the clues for impairment started to pile up, showing Ms. Strawder was too intoxicated to be trusted behind the wheel of a car.

Even if the record concerning this alleged broken ankle had been properly developed, imputed to the officer, and treated as having effects contemporaneous with the time of the tests, it would still be plain error to conclude that the efficacy of two of the administered field tests was

completely nullified by the subject's putative ankle injury. Here is why: field tests are used as a tool to gauge whether clues of intoxication exist based on the subject's performance. These clues offer indicative value to officers who must consider the circumstances in their totality.

One such clue is based on the subject's ability to follow directions. The officer in this case testified that Ms. Strawder was unable to follow his directions, a clue with no bearing on Ms. Strawder's ankle. Therefore, their indicative value as to a subject's level of intoxication would at worst be somewhat diminished, not completely negated --as the court assumed. The relevant exchange is at pages 38-39 of the motion hearing transcript (R. 13):

> Attorney LeBell: All right. And so, you administered the Walk-and-Turn. And the criticism of the Walk-and-Turn is as follows. And I'm reading from your report. Correct me if I'm in any way, shape, or form wrong.
>
> I gave instructions not to start the test until after I explained, demonstrated, and told her start the test. As I started to explain and demonstrate the test by taking steps in a heel-to-toe fashion, Strawder started the test: one clue. I told Strawder to stop and to get back into position and wait until I tell her to start the test.
> …
> Strawder had a total of four out of eight clues. Correct?"
>
> Officer McClean: Yes.

Ms. Strawder made the decision that she was capable of driving. Before the field sobriety tests, she walked fine and kept her balance fine. Yet, during the field sobriety tests, she did not. Officer McLean was

correct in his assessment that Ms. Strawder was intoxicated. These and the many, many factors outlined herein give rise to several bases for overturning the circuit. One being that the circuit improperly exercised its discretion by discrediting the field sobriety tests and finding that Ms. Strawder suffered from some debilitating ankle injury. Another being that the circuit court failed to provide an adequate record to make the improper finding it did. Another one yet being that the record permeates with evidence that supports finding, as a matter of law, that probable cause existed for the arrest of Ms. Strawder. The most appropriate outcome in this case, given a record replete with evidence to support that Ms. Strawder was probably intoxicated, is a finding by this court that probable cause exists, as a matter of law.

CONCLUSION

WHEREFORE, the State of Wisconsin respectfully asks this court to determine as a matter of law that Ms. Strawder's arrest was supported by probable cause, and that accordingly therefore, the circuit court's decision should be reversed and this cause remanded.

Dated this 26th day of April, 2023.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH[15]

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 **7,734**

04/26/2023 *Electronically Signed by M. Samir Siddique*
Date M. Samir Siddique

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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RULE 809.19(8g)(b) CERTIFICATION OF THE 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 rulings 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 of 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.

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[15] Undersigned counsel altered the format of the electronic signatures herein on 4/27/23 after the signature of 4/26/2023 was rejected so technically the date of signature may be April 27, 2023.