STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
CIRCUIT CASE NO. 21CT001767
APPEAL NO. 2022AP002112-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

LAQUANDA 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

DEFENDANT-RESPONDENT'S BRIEF

ROBERT G. LEBELL
State Bar No. 01015710
Attorney for Defendant-Respondent
819 N. Cass Street
Milwaukee, WI 53202
(414) 276-1233

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED Page(s)

WISCONSIN STATUTES CITED

ISSUE PRESENTED

Was there probable cause for the defendant's arrest?

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

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 Further, this appeal is being decided by one judge and may thus not be published.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 criminal complaint was issued on December 16th, 2021, charging the defendant with Operating a Motor Vehicle while Under the Influence – 3rd Offense and Operating with Prohibited Alcohol Concentration – 3rd Offense. (R. 4) The complaint alleged that on November 12th, 2021, the defendant engaged in conduct giving rise to the aforementioned counts. On April 29th, 2022, the defendant filed a motion to suppress physical evidence and statements with supporting memorandum, which alleged that there was no probable cause for her arrest.

(R. 7:8) On September 30th, 2022, the trial court conducted an evidentiary hearing. (R. 13:14-44)

The Honorable Jonathan D Richards issued a decision from the bench, followed by a written order which found that law enforcement lacked probable cause for the arrest and therefore all derivative evidence should be suppressed. (R. 13:56) The state filed its notice of appeal on December 12th, 2022. (R. 16)

FACTS

The direct examination of the state's lone witness is summarized as follows: On November 12th, 2021, at approximately 2:19AM, Officer James McLean, of the South Milwaukee Police Department, was flagged down by a citizen. (R. 13:4) This individual advised that an automobile accident had occurred "up the street." (R. 13:4) The officer went to the scene and observed a vehicle with extensive front-end damage and a female standing outside of the car, in the street. (R. 13:5) The defendant indicated to the officer that she had been driven off the road by another vehicle, which she was unable to describe. (R. 13:6)

The officer twice asked the defendant if she had had anything to drink and, on both occasions, she told him no. (R. 13:10) Thereafter, another officer told McLean that the

defendant admitted to him that she had had a drink. (R. 13:11) The defendant was continually challenged by the officer regarding the way in which the accident occurred. The defendant's responses were consistent with her previous explanation, that she was struck by a hit and run driver. (R. 13:11) The officer then, for the third time, asked her if she had anything to drink, to which she purportedly responded that she did. (R. 13:11)

Thereafter, the defendant was subjected to field sobriety tests, to wit: the Horizontal Gaze Nystagmus, One-Leg Stand, and Walk & Turn. According to the officer, the results of the test were as follows: HGN - 6/7 clues; Walk & Turn – the officer was unable to recall the exact number of clues but believed that she failed that test (R. 13:12); One Leg Stand – one out of four clues. Thereafter, the defendant was placed under arrest. (R. 13:12) The officer noted in his testimony that the defendant's description of her travel direction was inconsistent with what the evidence showed. (R. 13:9)

Officer McLean, on cross examination, provided starkly different testimony to that had been elicited on direct examination. He indicated that the individual who had initially flagged him down had stated that a female told her

[sic] vehicle had been hit by another vehicle which had then left the area. (R. 13:14,15) When the officer got to the site of the accident, he made no attempt to identify whether there was any physical evidence that did not belong to Ms. Strawder's vehicle, so as to discern the origin of the debris. (R. 13:15) He was asked whether, as an investigator of a purported accident, he would engage in an attempt to obtain such information and whether in a hit and run accident he would have wanted to know whether there was debris or tire marks that didn't belong to the defendant's vehicle. (R. 13:15,20) The following exchange occurred with Officer McLean:

> Q. So the first information you had was that the defendant had advised at least Mr. Montgomery and, I assume, all law enforcement officers that her vehicle had been struck by another vehicle; right?
>
> A. The first information I had was – was what you had just read there, yes.
>
> Q. And based on your extensive experience that you just described in direct examination, you're aware that when two vehicles collide it is sometimes difficult to discern the origin of debris, liquids, and other residue; correct?
>
> A. Restate that one. I'm sorry.
>
> Q. Sure. When – based on your experience as an investigator of automobile accidents where you have two vehicles that collide, it is often difficult to discern whether the debris that you observe, liquids, that sort of thing, comes from one vehicle as opposed to another; right?

> A. Well, you can match up debris from the vehicles, depending on, I mean, depending on what size the debris is.
>
> Q. Right. And in this particular case, did you make an attempt to identify whether there was any debris that didn't appear, from your perspective, to belong to Ms. Strawder's vehicle?
>
> A. I did not.

Officer McLean made no attempt to identify to what vehicle the debris appeared to belong. (R. 13:14,15) In fact, the officer indicated that his opinions that the source of the debris belonged to the defendant's vehicle, as opposed to another vehicle, were rendered based on incomplete information. (R. 13:18) The officer indicated he did not investigate the accident and that his opinions were based, in part, upon assumptions. (R. 13:19) He conceded that a sign, which was observed to have been knocked over during the accident, could have been the result of the phantom vehicle's contact. (R. 13:20) He furthermore conceded that his opinions regarding the direction from which the defendant's vehicle was traveling was undermined by the fact that she could have been looking for an open gas station or any other alternative explanations of why she was driving in the particular direction she described. (R. 13:20)

More importantly, the officer conceded that significant tried and true indicia of being under the influence were not present:

1. Her balance was fine (R. 13:21,25)
2. Her ability to walk was fine (R. 13:21)
3. She did not have slurred speech (R. 13:21)
4. The glassy eye that he claimed to observe could have been a result of the deployment of the airbag as in the instant case when a person's face comes near the airbag. (R. 13:22)
5. She was able to engage in routine physical activities, such as the ability to respond to questions; and the ability to retrieve identification within a wallet or purse. (R. 13:24)
6. He did not detect the odor of an intoxicant. (R. 13:24,25)
7. The only indication of drinking was that she had told one officer she had a drink. (R. 13:26,30)
8. The record reflects that the officer was not aware of any prior OWIs at the time of her arrest.
9. The defendant was able to describe that she had been run off the road. (R. 13:26)
10. No PBT was administered.
11. During the instructional period for the One-Leg Stand, the defendant indicated that she had a broken ankle. (R. 13:31,33)

12. During the HGN, there was no evidence of vertical nystagmus because the officer did not administer it. (R. 13:32,34)

13. The body cam of the officer captured the officer's statement: "I'm rusty on this OWI stuff." (R. 13:39) and it had been a few years since he had an OWI. (R. 13:40) and his assignment at the time of the alleged offense was as a school resource officer. (R. 13:40)

The court concluded that there was reasonable suspicion to justify the stop of the defendant (meaning to investigate by the administration of the field sobriety tests). (R. 13:54) However, the court concluded that there was no probable cause to arrest Ms. Strawder. (R. 13:54) The court relied upon the following facts: her performance on both the Walk & Turn and the One-Leg Stand should be discounted because of her broken ankle.

STANDARD OF REVIEW

The standard of review applied when ruling on a motion to suppress evidence is "clearly erroneous." The court's application of constitutional principles is "de novo."

ARGUMENT

I. The Court Employed the Correct Legal Standard When It Found That There Was No Probable Cause for Arrest

The determination of whether probable cause existed is made on a case-by-case basis when evaluating the totality of the circumstances. *State v. Kasian* 207 Wis.2d 611, 621 – 22 (Ct. A. pp. 1996) In this case, the court made findings of facts which justified the determination that no probable cause existed. Those findings of fact were not clearly erroneous. *State v. Felton* 2012 WI A. pp. 114 ¶8, see also *State v. Truax* 151 Wis.2d 254, 359-60 (Ct. A. pp. 1989) In evaluating the findings of fact, the trial judge is to be given deference regarding credibility of witnesses. *In Matter of Estate of Dejmal* 95 Wis.2d 141, 152 (1980) In this case, contrary to the assertion of the prosecution, the trial court clearly stated the findings of fact upon which it assessed the probable cause determination. Therefore, this court should not engage in an "ab initio" review of the factual record as urged by the state.

The trial court utilized the correct standard in assessing whether probable cause for arrest existed when it relied upon *State v. Lange* (2009) WI 49. The Supreme Court in *Lange* articulated the standard for assessing whether probable cause existed:

> "A warrantless arrest is not lawful except when supported by probable cause. Probable cause to arrest for operating while under the influence of an intoxicant 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. The burden is on the state to show that the officer had probable cause to arrest." *Lange* ¶19

II. The Court Did Not Find That There Was Probable Cause for Arrest.

The state incorrectly asserts that the court found probable cause and then failed to deny the defense motion. (Appellant's Brief Pg. 20) That argument is unsupported when the court's entire comments are read in proper context. Judge Richards first noted the correct standard for the termination of probable cause:

> "And for probable cause to arrest, this court is guided by the decisions of State v. Lange and State v. Swanson. Under those cases, the standards for where there's probable cause are whether there were facts and circumstances of an offense within the officer's knowledge, that such facts and circumstances were based on reasonably trustworthy information, and such facts and circumstances were sufficient in themselves to warrant a person of reasonable caution to believe an offense was committed. (R. 13:54)
>
> Probable cause for an arrest for an operating while intoxicated "refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest would" leave – "lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." The question of probable cause must be addressed on a case-by-case base – case – sorry, "case-by-case basis, looking at the totality of the circumstances. Probable cause is a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'"" (R. 13:54)

Thereafter, the court examined the facts which were presented and determined the considerations that the officer could have reasonably relied upon. He specifically noted the following:

> "In this case, the officer was relying on field sobriety tests and kind of the unusual situation that he found himself in and talking to Ms. Strawder at two o'clock in the morning. The officer did perform the Horizontal Gaze Nystagmus test, and she failed that test. And the other tests were not conclusive. And so, the officer did not – I say it's inconclusive though – even though she had the Walk-and-Turn, she disclosed that she had a broken ankle. And so, at that point, I don't believe the officer could reasonably rely on her performance on the Walk-and-Turn test to say if she was intoxicated; so…
>
> And she had one of four clues on the One-Leg Stand test. And, again, One-Leg Stand with a broken ankle, I think those – I think that we have to discount that. So really what the – the only thing we have here is performance on Horizontal Gaze Nystagmus test. We do not have a preliminary breath test." (R. 13:55)

After making its assessment of the reliability of the field sobriety tests and considering the broken ankle, the court then stated:

> "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, a kind of unusual circumstances, and her failure of the Horizontal Gase Nystagmus test." (R. 13: 56)

What the court was presumably articulating was that there was probable cause for the administration of the PBT and not for the arrest. The standards are not the same. The court of appeals, in *State v. Felton* 2012 WI App. 114, clearly

articulated the difference, which the state has failed to articulate. In *Felton*, the court, when addressing the difference between probable cause for arrest and probable cause for the administration of the PBT described the PBT statute Wis. Stat §343.303 as follows:

> "This section does not require that the officer have probable cause to arrest a driver for drunk driving before giving that driver a preliminary breath test. *County of Jefferson v. Renz*, 231 Wis.2d 293, 295, 315-316, 603 N.W.2d 541, 542, 551-552 (1999). Rather, the statute's phrase "'probable cause to believe' refers to a quantum proof greater than the reasonable suspicion necessary to justify an investigative stop… but less than the level of proof required to establish probable cause to arrest." *Id.*, 231 Wis.2d at 316, 603, W.W.2d at 552. Thus, a preliminary-breath test "may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest." *State v. Fischer*, 2010 WI 6, ¶5, 322 Wis.2d 265, 273, 778 N.W.2d 629, 633, *habeas corpus granted*, *Fisher v. Ozaukee County Circuit Court*, 741 F.Supp.2d 944 (E.D. Wis.2010)(magistrate judge)." (Felton ¶8)

For all these reasons the court correctly determined there was no probable cause for the arrest of the defendant and suppression of evidence was appropriate.

III. The Court Correctly Used the "Totality of the Circumstances" Standard.

The state next argues that the circuit court failed to apply the totality of the circumstances analysis. (Appellant's Brief, Pg. 21) It should be noted from the outset that the court's own words render this argument meritless.

Judge Richards unequivocally stated, "…the question of probable cause must be addressed on a case-by-case base – case – sorry, case-by-case basis, looking at the totality of the circumstances." (R. 13:55) The court, in its findings, thereafter, utilized the term "circumstances" twice in finding that probable cause did not exist for Ms. Strawder's arrest (R. 13:56)

Contrary to the assertion of the state, the court methodically assessed whether it could rely upon the results of the field tests in conjunction with the absence of other indicia of intoxication. In assessing the evidence presented, the court concluded that other than the Horizontal Gaze Nystagmus, the tests performed were inconclusive.

> "The officer did perform the Horizontal Gaze Nystagmus test, and she failed that test. And the other tests were not conclusive." (R. 13:55)

It noted that the defendant had disclosed that she had a broken ankle, therefore, the other field sobriety test could not be reasonably relied upon. (R. 13:55) He further noted the absence of the preliminary breath test and that although theoretically allowable by law, the officer failed to have her perform such 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 king of unusual circumstances and her failure of the Horizontal Gaze Nystagmus Test." (R. 13:56)

The state urges this court to ignore the trial court's conclusion that an officer could not reasonably rely on her performance on the field sobriety tests to say that she was intoxicated. (R. 13:55) This determination was made after hearing the evidence, assessing the credibility of the witness, and evaluating the totality of the circumstances. The prosecution effectively asks this court to replace the court's factual determination with the opinion of the arresting officer. (R. 13:26) Here the court exercised its discretion based on a logical rationale and the application of proper legal standards. *McCreary v. State* 49 Wis.2d 263, 282 (1971) The court's decision in this case provided adequate reasoning and explanation for its discretionary decision, see *State v. Hall* 2002 WI A. pp. 108 ¶16-17.

The prosecution incorrectly alleges that "…the trial court completely discounted evidence from two field sobriety tests. It did so without adequate record, basis, and seemed to act hastefully and without a proper command of the facts, effectively relying on the testimony of defense counsel to refresh its recollection. (Appellant's Brief, Pg. 25) The decision portion of the transcript starkly contrasts with the prosecution's assertion.

In addition to the articulated findings by the court, the 13 factors enumerated in the facts section of this brief are supportive of the court's decision. Each of these factors militate against a finding of probable cause. Her balance, speech, physical abilities, walking, and communications were all fine. The glassy eye *[sic]* was explainable by the deployment of the airbag. There was no detectable odor of intoxicant. Her only admission of drinking was that she had (a) drink. There was no PBT administered. There was no vertical HGN. The arresting officer was "rusty" on "OWI stuff", and was serving as a school resource officer.

IV. The Court Correctly Relied Upon the Defendant's Statements.

The state claims that the court erroneously relied upon Ms. Strawder's statement that she had a broken ankle. It does so by arguing that other than her statement there was no evidence of the injury (R. 13:26,27) The state's brief essentially asks that the burden be shifted to the defendant to provide supporting evidence of the injury when counsel argues the following:

> "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 this investigation." (Appellant's Brief, Pg. 27)[1]

What the state neglects to include in this portion of its argument is that the burden of proving probable cause is upon the prosecution and that the prosecutor failed to ask a single question about the ankle injury described by Ms. Strawder. There was no attempt to answer any of the questions which the prosecutor now raises for the first time in the passage above.

V. Inevitable Discovery Is Not a Proper Consideration

The court is also improperly presented with a secondary argument incorporated within footnote 13 of the state's brief. The footnote alleges that inevitable discovery (R. 13:23) is "…good law here." If this is an argument, it should have been incorporated into the body of the brief. However, it is wholly undeveloped and should be ignored in its entirety. The essence of the argument is that "…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

[1] The statement that the officer knew that the defendant had mislead and deceived him is pure conjecture, speculation, and unsupported by the evidence.

inevitably discovered these prior conditions, their existence would have been a factor to add to the long list of Officer McLean's other considerations." (Appellant's Brief, Pg. 23)

In essence, the state is asking this court to presume that had the officer run a record check, it would have determined the prior convictions and that that factor would have added to the probable cause determination. Besides being improperly briefed, this argument is meritless and introduces claims that are factually unsupported. The argument is completely inconsistent with the balance of the state's argument which urges this court to determine probable cause based on the knowledge of the arresting officer at the time of the arrest.

Lastly, the state urges this court to change the standard for the determination of probable cause by allowing that legal assessment to be determined by what is known to the officer:

> "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.*" (Appellant's Brief, Pg. 28)

It is the court's determination to evaluate the totality of the circumstances that led to the arrest of the defendant in determining whether probable cause then existed. The court is not a rubber stamp for the opinions of the arresting officer.

The opinion of the arresting officer is but one non-controlling factor in the court's evaluation whether a reasonable officer would have reached the opinion that probable cause existed. Here, after listening to the testimony of Officer McLean and in consideration of factors which would reasonably have been expected to be present, it concluded that probable cause did not exist.

In this case, the officers' opinions regarding the direction in which the defendant's vehicle was traveling should be afforded little, if any, weight. Officer McLean was a school resource policeman who hadn't done an OWI in years, and, who by his own admission, was "rusty" in OWI investigations. He did not conduct an accident investigation. Instead, he deferred that responsibility to another agency. (R. 13:40) No other testimony regarding the cause of the accident was introduced. His opinions regarding the direction in which the defendant was traveling were also suspect in light of the lack of foundation for his opinion and his concession that there were other alternatives for the position of her vehicle. (R. 13:20)

CONCLUSION

The court's suppression decision was based on the "totality of the circumstances" as required by law. It enunciated a proper exercise of discretion with well-

articulated reasoning. This court, for the reasons stated herein, should determine that the trial court properly exercised its discretion, applied the correct interpretation of law, and correctly determined that no probable cause existed for the attest of Ms. Strawder. The suppression order should therefore be sustained.

Dated this 31st day of July, 2023.

Respectfully Submitted,

Electronically Signed By:

/s/ Robert G. LeBell
Robert G. LeBell
Attorney for the Defendant
State Bar No. 01015710

CERTIFICATE OF COMPLIANCE

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 monospaced font. The page count of this brief is 18.

Electronically Signed by:

7/31/2023
Date

Robert G. LeBell
Robert G. LeBell
Attorney for the Defense
State Bar No. 01015710

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §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.

Electronically Signed by:

7/31/2023
Date

Robert G. LeBell
Robert G. LeBell
Attorney for the Defense
State Bar No. 01015710

Address:
Robert G. LeBell
819 N. Cass Street
Milwaukee, WI 53202
(414) 276-1233
Attorney for Defendant-Respondent