

**FILED**  
**06-28-2023**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

**STATE OF WISCONSIN      COURT OF APPEALS      DISTRICT IV**

---

**STATE OF WISCONSIN,**

**Plaintiff-Appellant,**

**v.**

**Appeal No. 2023AP890-CR**  
**Circuit Court Case No. 22CT150**

**Lauren Dannielle Peterson,**

**Defendant-Respondent.**

---

**ON APPEAL FROM THE FINAL ORDER SUPPRESSING EVIDENCE  
DUE TO LACK OF PROBABLE CAUSE TO REQUEST THE  
DEFENDANT PERFORM A PRELIMINARY BREATH TEST, THE  
HONORABLE PATRICIA A. BARRETT, PRESIDING.**

---

**BRIEF OF PLAINTIFF-APPELLANT**

---

**Natalia J. Gess**  
**Assistant District Attorney**  
**Sauk County District Attorney's Office**  
**515 Oak Street**  
**Baraboo, WI 53913**  
**(608) 355-3280**  
**State Bar No. 1115667**

## TABLE OF CONTENTS

ISSUE PRESENTED .....	5
STATEMENT ON ORAL ARGUMENT AND PUBLICATION .....	5
STATEMENT OF FACTS.....	5
<i>The Charges</i> .....	5
<i>The Suppression Motion</i> .....	6
STANDARD OF REVIEW .....	9
ARGUMENT.....	9
I. Deputy Trager had “probable cause to believe” that Peterson was operating a motor vehicle under the influence of an intoxicant such that he could lawfully request Peterson submit to a Preliminary Breath Test .....	9
CONCLUSION .....	12
CERTIFICATION.....	13
CERTIFICATE OF COMPLAINE WITH RULE 809.19(12).....	14
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(3)(b) .....	15

## TABLE OF AUTHORITIES

### Cases

<i>City of West Bend v. Wilkens</i> , 2005 WI App 36, ¶17, 278 Wis. 2d 643, 693 N.W.2d 324.....	11
<i>Cty. of Dane v. Sharpee</i> , 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).....	10
<i>Cty. of Jefferson v. Renz</i> , 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999).....	9, 10, 11
<i>State v. Babbitt</i> , 188 Wis. 2d 349, 355-57, 525 N.W.2d 102 (Ct. App. 1994).....	10
<i>State v. Begicevic</i> , 2004 WI App 57, ¶¶ 8-10, 270 Wis.2d 675, 678 N.W.2d 293.....	10
<i>State v. Colstad</i> , 2003 WI App 25, ¶ 25, 260 Wis. 2d 406, 659 N.W.2d 394.....	11
<i>State v. Conner</i> , 2012 WI App 105, ¶ 15, 344 Wis. 2d 233, 243, 821 N.W.2d 267, 271.....	9
<i>State v. Eckert</i> , 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).....	9
<i>State v. Felton</i> , 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871.....	10
<i>State v. Goss</i> , 2011 WI 104, ¶¶2, 27, 338 Wis. 2d 72, 806 N.W.2d 918.....	9
<i>State v. Hampton</i> , 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901.....	9
<i>State v. Haynes</i> , 2001 WI App 266, ¶¶ 2, 12, 14, 248 Wis. 2d 724, 638 N.W.2d 82.....	10
<i>State v. Kasian</i> , 207 Wis. 2d 611, 621-22, 558 N.W.2d 687 (Ct. App. 1996).....	11

<i>State v. Kennedy</i> , 2014 WI 132, ¶ 21, 359 Wis. 2d 454, 856 N.W.2d 834.....	10, 11
<i>State v. Nordness</i> , 128 Wis. 2d 15, 35–37, 381 N.W.2d 300 (1986).....	10
<i>State v. Pfaff</i> , 2004 WI App 31, ¶¶ 5, 20, 269 Wis. 2d 786, 678 N.W.2d 293.....	10
<i>State v. Wille</i> , 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994).....	11
<i>State v. Wolske</i> , 143 Wis. 2d 175, 189–90, 420 N.W.2d 60 (Ct. App. 1988).....	10
<b><u>Statutes</u></b>	
Wis. Stat. § 343.303.....	9
Wis. Stat. § 805.17(2).....	9

### ISSUE PRESENTED

Did Deputy Trager have “probable cause to believe” that Peterson was operating a motor vehicle under the influence of an intoxicant such that he could lawfully request Peterson submit to a Preliminary Breath Test?

The circuit court answered, “no.”

This Court should answer, “yes.”

### STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is requesting neither publication nor oral argument.

### STATEMENT OF FACTS

#### *The Charges*

On May 15, 2022, at approximately 9:03pm, Deputy Bryce Trager of the Sauk County Sheriff’s Department stopped Peterson’s vehicle for a defective tail light. Report 1; App. 100. Deputy Trager contacted Peterson and “smelled the odor of intoxicants emitting from the vehicle.” *Id.* Deputy Trager also “noticed that [Peterson] had glossy, bloodshot eyes.” *Id.* Deputy Trager informed Peterson of the reason for the stop. *Id.* Peterson stated that she had no idea that she had a taillight out. Report 1-2; App. 100-101. While talking with Peterson, Deputy Trager noticed that there was a young child, approximately seven years old, in the back seat. Report 2; App. 101. Deputy Trager asked Peterson where she was coming from. *Id.* Peterson stated that she was at the residence of her soon-to-be brother-in-law’s watching the Bucks game. *Id.* Deputy Trager asked Peterson if she had anything to drink. *Id.* Peterson stated that she had two White Claws and finished the last one approximately 20 minutes prior to the stop. *Id.*

Deputy Trager instructed Peterson to remain in her vehicle while he returned to his squad and ran Peterson through dispatch. *Id.* Dispatch informed Deputy Trager that Peterson had one prior operating while intoxicated conviction. *Id.* At

this point, Deputy Trager returned to the vehicle and informed Peterson he would like her to perform field sobriety tests. *Id.* She agreed. *Id.*

Peterson exhibited six out of six clues on the Horizontal Gaze Nystagmus (“HGN”) test, one out of eight clues on the Walk and Turn Test (“WAT”), and zero out of four clues on the One Leg Stand Test (“OLS”). Report 2-3; App. 101-102. Peterson submitted a sample of her breath into a Preliminary Breath Test (“PBT”). *Id.* The result was 0.103. *Id.*

The State charged Peterson with (1) Operating While Under the Influence 2nd Offense, with Minor Child in Vehicle and (2) Operating with a Prohibited Alcohol Concentration 2nd Offense, with a Minor Child in the Vehicle. Complaint 1-2; App. 135-136.

#### *The Suppression Motion*

Peterson filed a motion to suppress all evidence derived from Deputy Trager’s request for the Preliminary Breath Test. Def. Mot. 1; App. 138. Specifically, she argued:

[i]n light of Ms. Peterson’s global performance on the SFSTs as well as the paucity of facts justifying the request for such SFSTs, even if there was sufficient reasonable suspicion to support expansion of the stop to an OWI investigation and to request SFSTs, a point which is not conceded, Traeger did not have ‘probable cause to believe’ that Ms. Peterson was operating while impaired.

Def. Mot. 3; App. 140. Therefore, in Peterson’s view, Deputy Trager did not have the requisite amount of probable cause to request Peterson submit to a preliminary breath test. *See Id.*

The circuit court held an evidentiary hearing on Peterson’s motion. To meet its burden of proof, the State elicited the testimony of Deputy Trager. Deputy Trager has received OWI investigation training. Mot. Hr’g Tr. 5:1-8; App. 108. Deputy Trager received training on administering field sobriety tests and observing signs of impairment when someone is under the influence. Mot. Hr’g Tr. 5:9-22; App. 108.

Through that training, Deputy Trager indicated that signs of impairment include loss of dexterity glossy, bloodshot eyes, the inability to focus on more than one thing at a time, slurred speech, and loss of balance. Mot. Hr'g Tr. 5:23-6:3; App. 108-109. At the hearing, Deputy Trager estimated that he completed approximately 15 OWI-related investigations and made approximately 10 OWI arrests. Mot. Hr'g Tr. 6:4-7; App. 109.

Deputy Trager testified that he stopped Peterson's vehicle for having a taillight out on May 15, 2022. Mot. Hr'g Tr. 6:16-17; App. 109; 7:3-4; App. 110; 8:7-8; App. 111. While speaking with Peterson Deputy Trager noticed an odor of intoxicants emitting from the vehicle, though Deputy Trager could not tell exactly where it was coming from. Mot. Hr'g Tr. 9:5-19; App. 112. A second passenger was in the front passenger seat and there was a child in the back seat. Mot. Hr'g Tr. 8:24-9:4; App. 111-112. Deputy Trager also noticed Peterson's eyes were glossy and bloodshot. Mot. Hr'g Tr. 9:20-22; App. 112.

Peterson told Deputy Trager she was coming from her soon-to-be brother-in-law's where she was watching the Bucks game. Mot. Hr'g Tr. 10:11-13; App. 113. Deputy Trager asked Peterson whether she had been drinking, and Peterson stated she had two White Claws during the game and finished the last one approximately 20 minutes prior to their contact. Mot. Hr'g Tr. 10:14-22; App. 113. Deputy Trager ran Peterson through dispatch and learned that she had one prior OWI conviction. Mot. Hr'g Tr. 11:3-8; App. 114.

After learning of the prior OWI, Deputy Trager requested Peterson perform standardized field sobriety tests (due to the odor of intoxicants, glossy and bloodshot eyes, and admission to drinking). Mot. Hr'g Tr. 11:13-21; App. 114. Once Peterson was out of the vehicle, Deputy Trager noticed that he could smell the odor of intoxicants coming from her person. Mot. Hr'g Tr. 13:8-12; App. 16. Deputy Trager noted six out of six clues on the HGN test. Mot. Hr'g Tr. 14:9-18; App. 117. Deputy Trager testified that based on his training, four out of six clues are indicative of impairment. Mot. Hr'g Tr. 14:19-21; App. 117. Deputy Trager testified that

nystagmus is an involuntary shaking of the eye. Mot. Hr'g Tr. 14:7-8; App. 117. Deputy Trager noted one out of eight clues on the WAT test (improper turn). Mot. Hr'g Tr. 16:5-8; App. 119. Deputy Trager noted zero out of four on the OLS test. Mot. Hr'g Tr. 17:12-15; App. 120. Deputy Trager instructed Peterson on all three tests as he was trained to do. Mot. Hr'g Tr. 13:19-21; App. 116; Mot. Hr'g Tr. 15:20-22; App. 118; Mot. Hr'g Tr. 17:5-7; App. 120.

Deputy Trager requested that Peterson submit a sample of her breath in a PBT. Mot. Hr'g Tr. 17:19-22; App. 120. The PBT indicated that defendant's breath alcohol concentration was 0.103. Mot. Hr'g Tr. 18:12-13; App. 121. After seeing the result of the PBT, Deputy Trager arrested Peterson for OWI second with a person under 16. Mot. Hr'g Tr. 18:14-17; App. 121.

On cross-examination, Deputy Trager testified that no singular field sobriety test is determinative of the decision whether to ask for a PBT or continue with the OWI investigation. Mot. Hr'g Tr. 20:13-17; App. 123. He also testified on cross-examination that prior to removing Peterson from the vehicle he was not able to localize the source of the odor beyond just that it was coming from the vehicle. Mot. Hr'g Tr. 22:17-21; App. 125.

Following the testimony, Peterson argued that the totality of the field sobriety tests indicates that there was no probable cause to believe Peterson was operating while impaired, thus the officer was not able to request the PBT. Mot. Hr'g Tr. 24:2-9; App. 127. After summarizing the facts testified to, the State argued that Peterson's performance on field sobriety tests coupled with the facts which caused the officer to request the tests rose to the level of probable cause needed to request a preliminary breath test. Mot. Hr'g Tr. 24:14-26:13; App. 127.

The circuit court granted Peterson's motion to suppress. Mot. Hr'g Tr. 29:17-22; App. 132. The court acknowledged the defendant showed six clues on the HGN test, but glanced over the fact that four clues on that test are indicative of impairment. Mot. Hr'g Tr. 28:21-22; App. 131. The court reasoned that, other than an improper turn, there were no additional clues of any kind on either of WAT or



OLS tests. Mot. Hr'g Tr. 28:24-29:1; App. 131-132. The court ruled there was not "probable cause to proceed to requesting the PBT." Mot. Hr'g Tr. 29:15-16; App. 132.

The State appeals.

### STANDARD OF REVIEW

When reviewing the denial of a motion to suppress evidence, the Court of Appeals upholds the circuit court findings unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); Wis. Stat. § 805.17(2). Whether those facts warrant suppression is a question of law that is reviewed de novo. *State v. Conner*, 2012 WI App 105, ¶ 15, 344 Wis. 2d 233, 243, 821 N.W.2d 267, 271 (citing *State v. Hampton*, 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901).

### ARGUMENT

- I. **Deputy Trager had "probable cause to believe" that Peterson was operating a motor vehicle under the influence of an intoxicant such that he could lawfully request Peterson submit to a Preliminary Breath Test.**

The legislature has provided Wis. Stat. § 343.303 as a "screening tool" to assist the police in enforcing OWI laws. *See State v. Goss*, 2011 WI 104, ¶¶ 2, 27, 338 Wis. 2d 72, 806 N.W.2d 918. Wisconsin Statute § 343.303 authorizes law enforcement officers to request a PBT of drivers under certain circumstances. As relevant to Ms. Peterson's case, an officer may request a PBT if the officer "has probable cause to believe" that the driver is violating or has violated Wis. Stat. § 346.63(1), which prohibits driving or operating a motor vehicle under the influence of an intoxicant or with a prohibited alcohol concentration. *See Wis. Stat. § 343.303*. The definition of what satisfies probable cause varies depending on the circumstances. *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999). Probable cause sufficient to request a PBT requires that an officer has evidence that is greater than reasonable suspicion, but less than the amount of

evidence required to make an arrest. *State v. Felton*, 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871. This standard allows “officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest exist[s].” *Renz*, 231 Wis. 2d at 304. The totality of the circumstances “need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.” *Cty. of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted).

In *Renz*, The Wisconsin Supreme Court concluded that a law enforcement officer had “the required degree of probable cause to request the defendant to submit to a PBT.” *Renz* at 317. The defendant “smelled strongly of intoxicants” and admitted to “drinking three beers earlier in the evening.” *Id.* The defendant displayed six out of six clues of impairment on the HGN test, two out of eight clues of impairment on the WAT test, and only one out of four clues on the OLS test. *Id.* at 297-98, 316-17. In addition, the defendant’s “speech was not slurred, and he was able to substantially complete all of the tests.” *Id.* at 317.

Peterson’s situation is similar to the indicia of intoxication exhibited in *Renz*. Peterson exhibited an odor of intoxicants. Mot. Hr’g Tr. 9:5-19; App. 112. She had glossy and bloodshot eyes.<sup>1</sup> Mot. Hr’g Tr. 9:20-22; App. 112. She admitted to drinking. Mot. Hr’g Tr. 10:14-22; App. 113. She had one prior operating while intoxicated conviction. Mot. Hr’g Tr. 11:3-8; App. 114. Further, she exhibited six clues on the HGN test (Mot. Hr’g Tr. 14:9-18; App. 117) and one out of eight clues

---

<sup>1</sup> The Wisconsin courts in numerous cases have used/recognized bloodshot and glassy eyes or just bloodshot eyes as an indicator/indication of alcohol intoxication. *State v. Kennedy*, 2014 WI 132, ¶¶ 9, 21–24, 359 Wis. 2d 454, 856 N.W.2d 834 (the defendant’s eyes were glassy and bloodshot); *State v. Felton*, 2012 WI App 114, ¶¶ 3, 9, 10, 344 Wis. 2d 483, 824 N.W.2d 871 (glassy and bloodshot eyes); *State v. Begicevic*, 2004 WI App 57, ¶¶ 8–10, 270 Wis.2d 675, 678 N.W.2d 293 (bloodshot and glassy eyes); *State v. Pfaff*, 2004 WI App 31, ¶¶ 5, 20, 269 Wis. 2d 786, 678 N.W.2d 293 (defendant’s eyes were wet or maybe glassy/red, watery eyes); *State v. Haynes*, 2001 WI App 266, ¶¶ 2, 12, 14, 248 Wis. 2d 724, 638 N.W.2d 82 (glassy and bloodshot eyes); *State v. Babbitt*, 188 Wis. 2d 349, 355–57, 525 N.W.2d 102 (Ct. App. 1994) (bloodshot and glassy eyes); *Sharpee*, 154 Wis. 2d at 517–520 (bloodshot eyes); *State v. Wolske*, 143 Wis. 2d 175, 189–90, 420 N.W.2d 60 (Ct. App. 1988) (bloodshot eyes); *State v. Nordness*, 128 Wis. 2d 15, 35–37, 381 N.W.2d 300 (1986) (bloodshot eyes).

on the WAT test, an improper turn. Mot. Hr'g Tr. 16:5-8; App. 119. Deputy Trager had probable cause to believe that Peterson had violated or was violating Wisconsin's OWI laws based upon the indicators discussed above, along with Peterson's performance on the field sobriety tests. Similar to the officer in *Renz*, Deputy Trager "was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." *Renz* at 317.

The circuit court also improperly considered the clues Ms. Peterson exhibited on the Field Sobriety Tests. The circuit court placed little weight on these clues, despite there being no testimony that any of the SFSTs were administered incorrectly, or are otherwise uncredible. Field sobriety tests are not a scientific measurement of impairment, rather "[t]hey are observational tools, not litmus tests that scientifically correlate certain types or numbers of 'clues' to various blood alcohol concentrations." *City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 17, 278 Wis. 2d 643, 693 N.W.2d 324. Wisconsin does not require law enforcement officers to give field sobriety tests to establish probable cause. *State v. Kennedy*, 2014 WI 132, ¶ 21, 359 Wis. 2d 454, 856 N.W.2d 834; *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). Probable cause determinations are made on a case-by-case basis based on the totality of the circumstances. *State v. Kasian*, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687 (Ct. App. 1996). Even partial performance on a field sobriety test can inform the officer and can form part of probable cause. *See State v. Colstad*, 2003 WI App 25, ¶ 25, 260 Wis. 2d 406, 659 N.W.2d 394. The observational clues derived from the field sobriety tests add to the totality of circumstances.

In this case, looking at the totality of circumstances, this Court should hold that sufficient evidence existed to lead a reasonable law enforcement officer to believe that Ms. Peterson was operating a motor vehicle while under the influence of an intoxicant. These factors include the odor of intoxicants coming from the car (later determined to be coming from Ms. Peterson) her bloodshot and glassy eyes,

admission of drinking, and her performance during SFSTs (six of six clues on the HGN and one of eight clues on the WAT). Notwithstanding the absence of other indicia of impairment, these considerations were sufficient to provide probable cause to Deputy Trager, an experienced law enforcement officer, to request Peterson perform a PBT.

### CONCLUSION

For the reasons as outlined above, the State respectfully requests that the Court of Appeals find that Deputy Trager had the requisite level of probable cause to believe Peterson was operating a motor vehicle under the influence of an intoxicant and lawfully requested she submit to a preliminary breath test and remand this case for further proceedings consistent with that ruling.



Natalia J. Gess  
Assistant District Attorney  
Sauk County District  
Attorney's Office  
515 Oak Street  
Baraboo, WI 53913  
(608) 355-3280  
State Bar No. 1115667

**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,739 words.

Signed:

A handwritten signature in black ink, reading "Natalia J. Gess", written over a horizontal line.

Natalia J. Gess

Assistant District Attorney

Sauk County District Attorney's Office

515 Oak Street

Baraboo, WI 53913

(608) 355-3280

State Bar No. 1115667

**CERTIFICATE OF COMPLAINT WITH RULE 809.19(12)**

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

A handwritten signature in black ink, reading "Natalia J. Gess", written over a horizontal line.

Natalia J. Gess  
Assistant District Attorney  
Sauk County District Attorney's Office  
515 Oak Street  
Baraboo, WI 53913  
(608) 355-3280  
State Bar No. 1115667

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(3)(b)**

I hereby certify that filed with this brief, in a separate document, is an appendix that complies with Wis. Stat. § 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 Wis. Stat. §§ 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.

Signed:

A handwritten signature in black ink, appearing to read "Natalia J. Gess", written over a horizontal line.

Natalia J. Gess  
Assistant District Attorney  
Sauk County District Attorney's Office  
515 Oak Street  
Baraboo, WI 53913  
(608) 355-3280  
State Bar No. 1115667