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

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**Appellate Case No. 2023AP1796**

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

-vs-

**ASIF AHMED,**

Defendant-Appellant.

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**APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY, BRANCH I, THE HONORABLE GLORIA L. DOYLE PRESIDING, TRIAL COURT CASE NO. 22-TR-2265**

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# BRIEF OF DEFENDANT-APPELLANT

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## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Wisconsin Supreme Court Cases**



**Wisconsin Court of Appeals Cases**

**Other Authority**

## STATEMENT OF THE ISSUE

WHETHER MR. AHMED'S REFUSAL TO SUBMIT TO AN IMPLIED CONSENT TEST WAS REASONABLE BECAUSE HE WAS ARRESTED WITHOUT PROBABLE CAUSE TO BELIEVE THAT HE OPERATED A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT IN VIOLATION OF THE FOURTH AMENDMENT?

> Trial Court Answered: NO. The circuit court concluded that the officer in this case had probable cause to arrest Mr. Ahmed based upon the totality of the circumstances, and therefore, his refusal to submit to an implied consent test was unlawful. R20 at pp. 2-3; D-App. at 102-04.

## STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

## STATEMENT ON PUBLICATION

Mr. Ahmed will NOT REQUEST publication of this Court's decision as the common law authority which sets forth the standard for expanding the scope of a detention is well-settled.

## STATEMENT OF THE CASE

On October 3, 2022, Mr. Ahmed was charged in La Crosse County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 346.63(1)(b). R1.

After retaining counsel, Mr. Ahmed requested a hearing on the lawfulness of his alleged refusal to submit to an implied consent test. R5. A hearing on the same was held on June 1, 2023. R15.

At the refusal hearing, the State offered the testimony of a single witness, the arresting officer, Kevin Lozano of the La Crosse Police Department. R15 at pp. 4-40. During the course of the hearing, Officer Lozano's body-camera video recording of his encounter with Mr. Ahmed was received by the Court as Exhibit No.1. R15 at 33:9-10. At the conclusion of the hearing, the court ordered the parties

to submit supplement briefs on the issue, *inter alia*, of whether probable cause existed to arrest Mr. Ahmed for operating a motor vehicle while under the influence of an intoxicant. R15 at 46:1-2.

Mr. Ahmed timely filed a supplemental brief as did the State. R16 & R17. After receiving the briefs of the parties, the circuit court issued a written decision denying all of Mr. Ahmed's pretrial motions. R20. The circuit court concluded that Mr. Ahmed's refusal was unreasonable under the circumstances, principally relying upon the odor of intoxicants, "other observations," and Mr. Ahmed's declination to perform field sobriety tests in the parking lot of a local tavern. R20 at pp. 2-3; D-App. at 103-04.

On September 20, 2023, the Court entered an order finding Mr. Ahmed's refusal unlawful. R20; D-App. at 101.

It is from the adverse judgment of the circuit court that Mr. Ahmed now appeals to this Court by Notice of Appeal filed on September 27, 2023. R22.

## STATEMENT OF FACTS

On October 2, 2022, Asif Ahmed was detained in the City of La Crosse by a deputy of the La Crosse County Sheriff's Office after allegedly having been involved in a single-vehicle motorcycle accident. R15 at 5:19-23. Shortly after his initial detention, Officer Kevin Lozano of the La Crosse Police Department arrived on the scene and took control of the investigation. *Id*.

At some point after arriving on scene, Officer Lozano observed that Mr. Ahmed had an odor of intoxicants coming from him. *Id*. at 6:20-25. When Officer Lozano questioned Mr. Ahmed about whether he had consumed any intoxicants, he responded that he had one Corona beer that morning. *Id*. at 6:25 to 7:2. Officer Lozano then directed Mr. Ahmed to submit to a battery of field sobriety tests. *Id*. at 16:7-13.

The first field sobriety test Mr. Ahmed performed was the horizontal gaze nystagmus [hereinafter "HGN"] test. *Id*. at 26:25 to 27:3. Officer Lozano claimed to have observed six out of a possible six clues on this test. *Id*. at 8:6-9.

Mr. Ahmed was next asked to perform the walk-and-turn [hereinafter "WAT"] test. *Id*. at 8:17-20. Mr. Ahmed and the officer, however, disagreed whether the surface on which he was asked to perform the test was, in fact, level.

*Id*. at 22:14-23. A debate ensued between them, ultimately resulting in Mr. Ahmed being arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant without ever having performed this or any of the remaining tests. *Id*. 8:21 to 9:8.

The foregoing is a general overview of what transpired between the officer and Mr. Ahmed, however, for purposes of Mr. Ahmed's appeal, there remain other relevant facts of which this Court should be apprised and which will play a significant part in the development of his legal argument below. For example:

> Officer Lozano was dispatched to a "welfare check" after an accident had been reported on Bliss Road. (R15 at 5:19-23);
>
> After arriving on the scene, he made contact with Mr. Ahmed and "detected an odor of intoxicants coming from his breath." (R15 at 6:23-25);
>
> Mr. Ahmed informed Officer Lozano that the accident occurred because as "he was going around [a] curve . . . [he] hit some gravel and put [his] bike down." (R15 at 12:19-22);
>
> Officer Lozano admitted that "given the environmental conditions around the area where the accident occurred," Mr. Ahmed's explanation was "plausible." (R15 at 13:5-9);
>
> While at the scene, Officer Lozano conceded that he "noticed no problem with Mr. Ahmed's balance or coordination." (R15 at 14:23-25);
>
> While claiming that Mr. Ahmed had "somewhat slurred" speech, the officer also conceded that he "spoke with a somewhat thick accent." (R15 at 14:14-18);
>
> Mr. Ahmed did *not* have "bloodshot or glassy" eyes. (R15 at 15:18-22);
>
> The deputy who arrived on scene prior to Officer Lozano never told him that Mr. Ahmed had any "difficulty producing his license" when asked to do so. (R15 at 16:4-6);
>
> Mr. Ahmed remained wholly cooperative with Officer Lozano throughout his encounter with him at the scene. (R15 at 20:5-6);
>
> Officer Lozano informed Mr. Ahmed that he wanted to take him to an alternate location for field sobriety testing. (R15 at 16:7-13);
>
> Mr. Ahmed consented to be removed to the alternate locale. (*id*.);
>
> **Mr. Ahmed was informed that the alternate location was going to be inside City Hall.** (*Id*.);

Officer Lozano's intention was to take Mr. Ahmed to City Hall, however, after consulting with his supervisor, Officer Lozano changed his mind and instead elected to take Mr. Ahmed to an alternate location. (R15 at 17:13-25);

Officer Lozano transported Mr. Ahmed to the parking lot at Bluffside Tavern. (R15 at 19:6-20);

After changing the destination to which Mr. Ahmed was to be taken, **Officer Lozano admitted that he could not recall whether he informed Mr. Ahmed of the change in plans prior to arriving at the Bluffside.** (R15 at 19:21 to 20:1);

Prior to arriving at the Bluffside, there had been no disagreement between Officer Lozano and Mr. Ahmed being willing to perform field sobriety tests. (R15 at 21:11-14);

After arriving at the Bluffside, and informing Officer Lozano that he felt the parking lot on which he was being asked to perform balance and coordination tests was not level, Mr. Ahmed still "repeatedly told [Officer Lozano] that he was willing to do the field sobriety tests." (R15 at 22:14-16);

**"At no point from start to finish in this case did [Mr. Ahmed] ever indicate that he was unwilling to do the field sobriety tests."** (R15 at 22:17-20);

Because of what he perceived to be an unlevel surface at Bluffside, Mr. Ahmed said to Officer Lozano, "[O]fficer, if you could just drive me five minutes away [to City Hall, which was the original plan], I'll do them [referring to the field sobriety tests]." (R15 at 22:21-23);

The first test he had Mr. Ahmed perform was the horizontal gaze nystagmus [hereinafter "HGN"] test, which is supposed to begin with a diagnostic pass to ensure that Mr. Ahmed does not have resting nystagmus and that his pupils are of equal size, however, no such pass was made. (R15 at 26:25 to 27:3; R31 at 21:49:41, *et seq*.);

Officer Lozano stated that after the diagnostic pass, he is supposed to check each eye twice for each of three clues. (R15 at 27:6 to 28:5; 28:16-20);

Officer Lozano was trained to administer the HGN test consistent with the protocols established by the National Highway Traffic Safety Administration [hereinafter "NHTSA"]. (Tr at 29:11-24);

According to his NHTSA training, the pass Officer Lozano is to make when testing for the first of the three clues should take a total of four seconds for each eye, however, this was not correctly performed. (R15 at 30:21 to 31:10; R31 at 21:49:41, *et seq*.);

When assessing whether the second HGN clue exists, distinct and sustained nystagmus at maximum deviation, Officer Lozano was trained "to hold the stimulus at maximum for a minimum period of [four seconds]," again however, this was not done. (R15 at 32:13-22; R31 at 21:49:41, *et seq*.);

Officer Lozano was "trained that one of the biggest false positives for nystagmus is when an officer moves the stimulus too quickly." (R15 at 31:11-14);

If the stimulus is moved too quickly or not held long enough, Officer Lozano conceded that the **"results of the HGN test would not then be valid."** (R15 at 31:23 to 32:2; 32:23 to 33:1);

Officer Lozano "noticed no problems with Mr. Ahmed's balance or coordination" at the scene. (R15 at 14:23-25);

Officer Lozano was dispatched to the scene of Mr. Ahmed's accident "around 9:00 p.m.," but he does not "know the exact time." (R15 at 11:6-9);

Officer Lozano did not "know what time this crash occurred." (R15 at 12:12-14);

Officer Lozano confirmed that there were no witnesses to Mr. Ahmed's accident. (R15 at 11:15-17); and

Officer Lozano admitted that "we don't know what time this crash occurred." (R15 at 12:12-14).

Additionally, the record is devoid of any evidence that Mr. Ahmed exhibited impaired mentation as he responded intelligently to questions put to him and engaged in appropriate conversation with the officer.

## STANDARD OF REVIEW

The issue presented in this appeal questions whether the circuit court erred in finding that probable cause existed to arrest Mr. Ahmed based upon the facts adduced at the evidentiary hearing. Because this question involves applying a constitutional standard to an undisputed set of facts, this Court reviews the constitutional question *de novo*. *State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423.

## ARGUMENT

### I. PROBABLE CAUSE TO ARREST MR. AHMED DID NOT EXIST UNDER THE TOTALITY OF THE CIRCUMSTANCES IN THIS CASE, CONTRARY TO THE LOWER COURT'S RULING.

#### *A. The Fourth Amendment in General.*

Because the issue before this Court implicates the Fourth Amendment, the starting point for any analysis of the constitutionality of a seizure must begin with the foundations established by the Fourth Amendment itself. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious police action is not tolerated under the umbrella of the Fourth Amendment. As the Wisconsin Supreme Court noted in *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983), "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id*. at 448-49; *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

When applying the protections against unreasonable searches and seizures, both federal and state courts have consistently held that "[c]onstitutional provisions

for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction deprives [these protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

*Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973)(emphasis added).

The foregoing authority does not stand alone as time and again the Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be **liberally construed to prevent impairment of the protection extended**." *Grau v. United States*, 287 U.S. 124, 127 (1932)(emphasis added). The High Court has admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Ultimately, "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

It is under the rubric of the foregoing paradigm that the question presented by Mr. Ahmed must be analyzed. Thus, any "close calls"—in the common vernacular—with respect to whether the officer's decision to arrest Mr. Ahmed was constitutionally unreasonable should be resolved in Mr. Ahmed's favor.

### *B. The Probable Cause Standard.*

To safeguard individuals against arbitrary invasions of their security, the Fourth Amendment requires that before a person is arrested, "probable cause" first exists to believe that the person has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 208 (1979). "Probable cause, although not easily reducible to a stringent, mechanical definition, generally refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986)(citations omitted). "Probable cause exists where the *totality of the circumstances* within the

arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe . . . that the defendant" has committed a crime. *Id*. (emphasis added).

According to the Wisconsin Supreme Court in *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982):

> The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. **The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense.**

*Id*. at 329 (emphasis added).

When assessing whether the conduct of law enforcement officers is constitutional under the Fourth Amendment, "the 'touchstone of the Fourth Amendment is **reasonableness**.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)(emphasis added), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

The Wisconsin Supreme Court has held that an action is "reasonable" under the Fourth Amendment "'as long as the circumstances, viewed objectively, justify [the] action.'" *State v. Howes*, 2017 WI 18, ¶ 21, 373 Wis. 2d 468, 893 N.W.2d 812, citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006), quoting *Scott v. United States*, 436 U.S. 128, 138 (1978). Thus, the question in the instant case becomes whether it was reasonable for Officer Lozano to conclude that he had probable cause to believe that Mr. Ahmed operated a motor vehicle while impaired. For the reasons set forth below, Mr. Ahmed proffers that Officer Lozano's decision to arrest him was constitutionally *un*reasonable.

### *C. Application of the Law to the Facts.*

The issue to be evaluated by this Court is whether, under the totality of the circumstances, a sufficient factual basis exists to conclude as a matter of law that Officer Lozano had probable cause to arrest Mr. Ahmed. To make this determination, it is necessary to look beyond the sparse factors upon which the circuit relied when it rendered its decision to the ***totality*** of the facts which existed in this case.

First, there were no observations by law enforcement officers or citizen witnesses of Mr. Ahmed actually operating his motor vehicle in a reckless or erratic manner. The State will likely protest that the fact that Mr. Ahmed lost control of his motorcycle is evidence of impaired operation, however, this fails to take into

consideration the following facts: (1) Officer Lozano admitted that "given the environmental conditions around the area where the accident occurred," Mr. Ahmed's explanation of how his accident occurred was "plausible"; and (2) for the most recent year available prior to Mr. Ahmed's accident (2020), the Wisconsin Department of Transportation recorded 114,697 accidents statewide.[1] Of these, 2,585 occurred in La Crosse County.[2] According to the DOT, 6,050 of the crashes were "alcohol-related."[3] As a percentage of the whole, this equates to a mere 5.3% of the total accident crashes statewide involving alcohol. While Mr. Ahmed does not believe that an assessment of probable cause to arrest should be reduced to some hard, mathematical formula, he nevertheless does posit that when so few accidents—just 5.3%—involve alcohol, there should *not* be some "default" assumption by a law enforcement officer, or a court, that the mere fact of an accident itself gives rise to probable cause to arrest. The Fourth Amendment is far more rigorous than that.

Second, with respect to there being an odor of intoxicants coming from Mr. Ahmed , the court of appeals has already—and notably, *repeatedly*—discounted this factor as having much of an impact upon Fourth Amendment questions in cases such as *State v. Gonzalez*, No. 2013AP2535-CR, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. May 8, 2014)(unpublished); *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755 (Ct. App. July 14, 2010)(unpublished), and *County of Sauk v. Leon*, No. 2010AP 1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (Ct. App. Nov. 24, 2010)(unpublished).[4]

In *Gonzalez* for example, the court of appeals examined whether the extension of Ms. Gonzalez's detention to include an investigation for impaired driving was justified under the circumstances of her case. *Id.* ¶ 1. More specifically, Gonzalez was initially detained for having a defective headlight. *Id.* ¶ 3. After the detaining officer approached Gonzalez's vehicle, he observed that Ms. Gonzalez had an odor of intoxicants about her person, but he did not observe any slurred

[1]https://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final-county.aspx

[2]*Id.*

[3]https://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx

[4]The foregoing decisions are limited precedent opinions which may be cited for their persuasive value pursuant to Wis. Stat. § 809.23 (2021-22).

speech or bloodshot eyes (the same facts as in this matter). *Id*. ¶ 4. Nevertheless, the officer had Gonzalez alight from her vehicle to perform field sobriety tests. *Id*. ¶ 5.

Gonzalez moved to suppress the evidence obtained after the enlargement of the scope of her detention. *Id*. ¶ 6. The circuit court denied Ms. Gonzalez's motion to suppress evidence on the ground that (1) she had an odor of intoxicants emanating from her person, and (2) she had "told an untruth" to the officer because she denied consuming intoxicants yet the odor was not coming from her vehicle but rather from her person. *Id*. ¶¶ 1, 7.

The court of appeals reversed the decision of the lower court. *Id*. ¶ 26. In so doing, the court of appeals began its analysis by observing that:

> "Not every person who has consumed alcoholic beverages is 'under the influence' …." Wis JI—Criminal 2663. Instead, **reasonable suspicion of intoxicated driving generally requires reasonable suspicion that the suspect is "[u]nder the influence of an intoxicant** . . . to a degree which renders him or her incapable of safely driving." *See* Wis. Stat. §§ 346.63(1)(a) and 346.01(1).

*Gonzalez*, 2014 WI App 71, ¶ 13 (emphasis added).

The *Gonzalez* court also examined other decisions of a similar nature which reached the same conclusion as it did. It is worth quoting the *Gonzalez* court at length here because the cases which the *Gonzalez* court examined are relevant to the issue raised by Mr. Ahmed:

> There appears to be no published case law addressing reasonable suspicion on similar facts. As to the odor of intoxication alone, neither Gonzalez nor the State cites a published case addressing whether the smell of alcohol coming from a driver is sufficient to provide reasonable suspicion of intoxicated driving. Gonzalez does, however, identify two unpublished cases that support the conclusion that the odor of alcohol alone is not enough: *State v. Meye*, No. 2010AP336-CR, 2010 WI App 120, 329 N.W.2d 272, 789 N.W.2d 755, unpublished slip op. (WI App July 14, 2010), and *County of Sauk v. Leon*, No. 2010AP 1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929, unpublished slip op. (WI App Nov. 24, 2010). Both cases, in terms of the odor of alcohol and the time of day, are as suspicious or more suspicious than the facts here.
>
> In *Meye*, at 3:23 a.m., a police officer detected a "strong" odor of intoxicants coming from two individuals who had just exited a vehicle, but the officer could not determine whether the odor was coming from the driver or the passenger. *Meye*, No. 2010AP336-CR, 2010 WI App 120, ¶ 2, 329 Wis. 2d 272, 789 N.W.2d 755. The officer initiated an investigatory stop of the driver on this basis. *See id*.,

> ¶¶ 2-3. **The court in *Meye* rejected the proposition that the odor was enough to provide reasonable suspicion. *Id*., ¶ 6. The court indicated that there were no cases, published or unpublished, in which a court has held that "reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped**." *Id*.; *see also*, *State v. Resch*, No. 2010AP2321-CR, 2011 WI App 75, 334 Wis. 2d 147, 799 N.W.2d 929, unpublished slip op., ¶ 19 (WI App Apr. 27, 2011 ("In *Meye*, this court held that the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated. . . ."). So far as I can tell, the *Meye* court's decision did not hinge on the ambiguity of whether the odor was coming from the driver or passenger. Rather, the court concluded that this ambiguity "exacerbated" "[t]he weakness of this seizure." *See Meye*, 2010AP336-CR, 2010 WI App 120, ¶ 9, 329 Wis. 2d 272, 789 N.W.2d 755.
>
> In *Leon*, at approximately 11:00 p.m., a police officer detected alcohol on the breath of a suspect who admitted to consuming one beer with dinner an hour or two earlier. *See Leon*, No. 2010AP 1593, 2011 WI App 1, ¶¶ 2, 9-10, 330 Wis. 2d 836, 794 N.W.2d 929. **The court in *Leon* concluded that the "admission of having consumed one beer with an evening meal, together with an odor [of intoxicants] of unspecified intensity," was not sufficient to provide reasonable suspicion of intoxicated driving**. *Id*., ¶ 28.

*Gonzalez*, 2014 WI App 71, ¶¶ 18-20 (footnotes omitted; emphasis added). What is notable about the *Gonzalez* court's description of the circumstances of the case before it and those faced by other courts is that all these decisions *downplayed* the value of an "odor of intoxicants" in the reasonable suspicion calculus in part because it is *not* illegal in Wisconsin to consume intoxicants and drive—it is only illegal to consume a sufficient amount of an intoxicant that one becomes impaired—and that it is, in large measure, a *subjective* observation rather than an objective one. The fact of an accident coupled with an odor of intoxicants does not somehow magically provide a law enforcement officer with an "automatic" justification for any arrest.

Third, regarding the observation of "somewhat slurred" speech, Officer Lozano conceded that Mr. Ahmed "spoke with a somewhat thick accent." Clearly, the officer's allegation is not based upon Mr. Ahmed *actually* having slurred speech, but rather, is premised upon the officer's Anglo-biased experience. Obviously, a person's accent cannot be held against them under any circumstances.

Fourth, the *totality* of the circumstances in Mr. Ahmed's case includes the absence of any observation of bloodshot/glassy eyes on his part, the dearth of any testimony that Mr. Ahmed was having difficulty with his fine motor skills, the absence of any problems with his balance or ambulation, *etc*. Apart from the absence of these observations, perhaps the most revealing part of the totality of the circumstances test is that Officer Lozano did *not* observe that Mr. Ahmed had any

problems with his mentation. The record is literally devoid of any testimony from Officer Lozano that Mr. Ahmed was having any difficulty understanding him, following his directions, answering his questions, *etc*. As is well known, alcohol does *not* discriminate, *i.e.*, it affects an individual's mentation just as it does his coordination. In fact, this is why field sobriety tests are referred to as "divided attention tasks"—they are designed to test a person's ability to think clearly *and* whether they can balance and coordinate their movements. The absence of any diminution of Mr. Ahmed's mental acuity is exceptionally revelatory, in a manner *favorable* to him.

Fifth, when it comes to the administration of the field sobriety tests and the information they reveal about Mr. Ahmed's condition, they support a conclusion that Mr. Ahmed was not impaired. For example, regarding the HGN test, the test results can be wholly discounted as providing any value in the probable cause determination given its grossly deficient administration. Officer Lozano freely admitted that not only was he trained to employ the NHTSA standard, but also that a departure from the same rendered the conclusions to be drawn from the HGN test invalid. As the objective video record admitted into the record at the refusal hearing demonstrated, not only did the officer fail to perform a diagnostic pass, but when checking for clues, he also failed to pass and hold the stimulus for the required times. This is significant not only because the NHTSA Manual states that the test results are not valid if the protocols are not followed, but Officer Lozano admitted the same on cross-examination when he confessed that he was "trained that *one of the biggest false positives for nystagmus is when an officer moves the stimulus too quickly*." R15 at 31:11-14 (emphasis added). He further testified that if the stimulus is moved too quickly or not held long enough, the "results of the HGN test would not then be valid." R15 at 31:23 to 32:2; 32:23 to 33:1. Once this admission is made, under *Village of Little Chute v. Bunnell*, Case No. 2012AP1266, 2013 WI App 1, 345 Wis. 2d 399, 824 N.W.2d 929 (Wis. Ct. App. Nov. 14, 2012)(unpublished), the death knell for including the HGN test as part of the probable cause determination has rung. According to the court of appeals in *Bunnell*:

> By contrast, at a suppression hearing on an OWI charge, the government is required to present evidence sufficient to establish that probable cause existed to a "reasonable certainty." *Id.*
>
> The Village argues the circuit court erred in its probable cause determination, in part, because it improperly discounted Boucher's observations from the HGN test. It asserts Boucher administered the test correctly and, even if he did not, his HGN observations should be considered in the probable cause

> determination. We disagree. **The circuit court, as finder of fact, determined Boucher did not follow the standardized procedure when administering the test. As Boucher testified, failure to follow the standardized procedure compromises the validity of the test results. If the test results were not valid, they cannot be used to support a determination of probable cause to arrest**. The circuit court did not err by refusing to consider Boucher's HGN observations.

*Bunnell*, 2012 WI App 1, ¶¶ 18-19 (citation omitted; emphasis added). It follows, as the *Bunnell* court acknowledged, that if the test results are not valid, they lack relevance to the probable cause issue.

Concurring with Officer Lozano's assessment that the HGN test lacks validity if the protocols for its administration are not followed is the officer's own training manual which provides that:

> It is necessary to emphasize this **validation applies only when the tests are administered in the prescribed and standardized manner**, the standardized clues are used to assess the subject's performance, and the standardized criteria are employed to interpret that performance. **If any one of the SFST elements is changed, the validity may be compromised**.

NHTSA, *SFST DWI Detection and Standardized Field Sobriety Testing Participant Manual*, Session 8, at p.12 (Rev. 02/2023)(emphasis added)[hereinafter "NHTSA Manual"].

Regarding the remaining field sobriety tests, the evidence revealed that Mr. Ahmed did not refuse to perform the tests based upon "consciousness of guilt," but rather because he was engaged in a debate with Officer Lozano regarding whether the surface on which he was asked to perform the tests was level, after being misled about the location at which the tests were going to be performed. As Officer Lozano admitted, Mr. Ahmed not only remained entirely cooperative throughout his encounter with him, but importantly, he *never* refused to submit to field sobriety tests. All Mr. Ahmed ever did was request to be removed to the more level surface inside the City Hall—**the place he was originally told he was being taken and the change in location *of which he was never informed*.** It was perfectly reasonable for Mr. Ahmed to request that he be transported to the location to which he originally *agreed* to be taken from the location to which he *never consented* to go. Frankly, from Mr. Ahmed's perspective, at the juncture when he arrived at the Bluffside Tavern, it would naturally appear to him that Officer Lozano had "duped" him. To use an *officer-induced* state of mind against Mr. Ahmed is patently unfair.

Eventually, the officer became so frustrated with Mr. Ahmed's opinion about the pavement that he simply elected to arrest Mr. Ahmed.

In summary, what facts had the lower court to rely upon to conclude that probable cause existed to arrest Mr. Lozano? A valid HGN test? No. Proof of consciousness of guilt based upon an expressed refusal to submit to field sobriety testing? No. An uncooperative demeanor? No. Bloodshot or glassy eyes? No. Slurred speech? No. Any individual who witnessed Mr. Ahmed operating his vehicle recklessly or inattentively? No. An admission by Mr. Ahmed that he was impaired? No. Any impairment of Mr. Ahmed's ability to think clearly, follow instructions, or appropriately respond to officer inquiries? No. An inability on Mr. Ahmed's part to coordinate his movements or ambulate? No. Any impairment of his fine motor skills? No. An implausible explanation for his accident? No. The fact of an accident? Yes. The odor of intoxicants? Yes. It appears that when the *totality* of the circumstances test is applied to the probable cause inquiry at hand, the circuit court's finding of probable cause comes up well short.

Further exacerbating matters in this case is that the State could not even ascertain with any accuracy the time at which Mr. Ahmed actually drove his vehicle. As noted in the recitation of facts above, no law enforcement officer observed him operating his motorcycle. Most importantly, Officer Lozano admitted that the State did not even know when the accident occurred. The absence of any nexus between the time the officer made his observations of Mr. Ahmed and his *actual vehicle operation* leaves an enormous hole in the State's proof.

The circuit court's short-shrift "analysis" did not consider—or more correctly, ignored—all of the foregoing undisputed facts. Had a thorough analysis of the facts been undertaken, the lower court should have reached the conclusion that no probable cause existed to arrest Mr. Ahmed.

## CONCLUSION

Because the totality of the circumstances in the instant matter do not rise to the level of objectively establishing the requisite probable cause to arrest, Mr. Ahmed respectfully requests that this Court reverse the decision of the circuit court denying Mr. Ahmed's motion and remand the case with further directions that absent the required probable cause, Mr. Ahmed should not have been arrested for allegedly operating a motor vehicle while intoxicated.

Dated this 25th day of November, 2023.

Respectfully submitted:

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## CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,398 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 25th day of November, 2023.

**MELOWSKI & SINGH, LLC**

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