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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2023AP001796

STATE OF WISCONSIN
Plaintiff-Respondent
v.
ASIFAHMED
Defendant-Appellant

ON APPEAL OF A JUDGMENT OF CONVICTION ENTERED IN LA
CROSSE COUNTY CIRCUIT CASE NUMBER 22TR002265, THE
HONORABLE GLORIA L. DOYLE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

Did the circuit court properly enter the refusal as unreasonable because the officer had probable cause to believe Asif Ahmed operated a motor vehicle while under the influence?

The circuit court stated the officer had probable cause and entered the refusal as unreasonable.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent State of Wisconsin (“the State”) agrees with defendant-appellant Asif Ahmed (“Ahmed”) that oral argument and publication is not warranted as the briefs should fully present the issues on appeal pursuant to Wis. Stats. §§809.22 and 809.23. This opinion cannot be published as it will be decided by one judge under Wis. Stat. §752.31(2). Wis. Stat. §809.23(1)(b)(4).

STATEMENT OF THE CASE

On October 2nd, 2022, at 9:21 p.m., Officer Kevin Lozano of the La Crosse Police Department gets dispatched to a welfare check on Bliss Road. (R. 15 at 5:19-22). Officer Lozano receives information that Ahmed was originally lying on the ground with his motorcycle on the side of the road. (R. 31 at 21:32:20-21:32:41). Officer Lozano is also told of a scrape mark on the road from the accident involving the motorcycle. *Id.* Ahmed also admits to getting into an accident with his motorcycle. (R. 31 at 21:32:50-21:33:00). When Officer Lozano approaches to speak to Ahmed, he detects the odor of intoxicants on Ahmed’s breath. (R. 15 at 6:23-25). Ahmed is also slurring his words throughout the interaction. (*See i.e.* R. 31 at 21:33:05-23:33:10). Ahmed admits to having one beer in the morning (R. 31 at 21:34:07-21:34:15). Officer Lozano does not believe Ahmed regarding how much Ahmed had to drink, and when confronted, Ahmed stammers and states, “you have to do your job, I apologize for that part, my friend.” (R. 31 at 21:34:25-21:34:35).

Officer Lozano decides to have Ahmed perform Standardized Field Sobriety Tests. Originally, Officer Lozano wants Ahmed to perform the tests at City Hall. (R. 15 at 7: 5-6). However, Officer Lozano is advised against that due to the distance City Hall is from the accident area, and therefore transports him to the

Bluffside Tavern, which is closer than City Hall. (R. 15 at 7:6-11). At no point during the interaction does Ahmed complain about not being at City Hall. Once at the Bluffside Tavern, Ahmed performs the first Standardized Field Sobriety Test, the Horizontal Gaze Nystagmus test, and observes six of six clues. (R. 15 at 8:8-9). Officer Lozano observes Ahmed struggle to follow directions to keep his head still during this test. (R. 31 at 21:50:00-21:50:05). During this test, Ahmed does not complain about the location of the test. When instructed to get into the starting position of the Walk and Turn test, Ahmed now complains that the area is not flat. (R. 31 at 21:52:27-21:53:00) Officer Lozano gives Ahmed multiple opportunities to do field sobriety tests at the Bluffside Tavern. At one point, Ahmed even agrees that the testing surface is “reasonable.” (R. 31 at 21:53:20-21:53:30). However, eventually, Ahmed continues to argue that the surface is not flat even after a different officer reassures him that the ground is flat. Eventually, Officer Lozano warns Ahmed that Officer Lozano would take it as a refusal to do the tests if Ahmed continues to argue. (R. 31 at 21:57:50-21:58:00). Officer Lozano offers one final place to do the tests, which Ahmed again refuses. (R. 31 at 21:58:15-21:58:28) Ahmed is then arrested for Operating while under the Influence.

After the arrest, Officer Lozano reads the Informing the Accused form to which Ahmed initially consents to the blood draw. (R. 15 at 9:9-13). However, Ahmed has second thoughts and Officer Lozano reads the Informing the Accused again at which time, Ahmed refuses. (R. 31 at 22:20:40-22:23:06)

Ahmed moved to suppress the evidence in adjacent criminal case because he argues Officer Lozano lacked probable cause to arrest. At the same time as the motion to suppress, the Court conducted a Refusal Hearing regarding his refusal to submit to evidentiary sample of his blood. After considering Officer Lozano’s testimony, watching the body camera of the incident, and reading the briefs of counsel, the circuit court found the refusal to be unreasonable in a written ruling. (R. 20)

Ahmed now appeals the circuit court’s finding that his refusal to submit to an evidentiary test of his blood was unreasonable, advancing the argument that the circuit court’s factual findings were clearly erroneous and Officer Lozano did not have probable cause to believe that Ahmed was operating while under the influence of an intoxicant.

STANDARD OF REVIEW

Despite what Ahmed stated, the State believes that there is a contested set of facts. The circuit court's findings of fact are upheld unless they are clearly erroneous. *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830 (1990). Whether those facts satisfy the standard of probable cause is a question of law that is reviewed de novo. *Id.* at 137-38.

ARGUMENT

A. Officer Lozano had probable cause to arrest Ahmed.

The issues at a refusal hearing are: 1) whether the officer had probable cause to believe the person was driving while under the influence; 2) whether the officer properly informed the person of their rights under the implied consent law; and 3) whether the defendant improperly refused the officer's request to test the defendant's breath, blood, or urine. Wis. Stat. §343.305(9)(a). The State believes that Ahmed is only contesting probable cause. The test of probable cause under the refusal hearing statute is less than the level of proof necessary to establish probable cause for arrest but greater than the reasonable suspicion. *See County of Jefferson v. Renz*, 231 Wis.2d 293, 314, 603 N.W. 2d 541, 551 (1999).

Probable cause exists where the totality of the circumstances within the officer's knowledge at the time would lead a reasonable officer to believe a violation has occurred. *State v. Nordess*, 128 Wis.2d 15, 35, 381 N.W. 2d, 300, 308 (1986).

Field Sobriety Tests are not required to have probable cause for an OWI. *See State v. Kasian*, 207 Wis.2d 611, 622, 558 N.W.2d 687, 692 (Ct. App. 1996); *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). Field Sobriety Tests can be used in probable cause determination even if done incorrectly. *City of West Bend v. Wilkens*, 2005 WI App 36, ¶1, 278 Wis. 2d 643, 693 N.W.2d 324., Field Sobriety Tests are not scientific tests but instead observation tools that assist officers in OWI investigations. *Id.*

Refusal to do field sobriety tests can be used in a probable cause determination. *State v. Babbitt*, 188 Wis.2d 349, 362, 525 N.W.2d 102 (Ct. App. 1994). Officers do not have to defer to innocent explanations of conduct and can infer criminal conduct. *State v. Goebel*, 103 Wis.2d 203, 210 (1981).

In *State v. Kasian*, the court found that there was probable cause when there was an accident caused by the defendant, there was an odor of intoxicants, and the defendant's speech was slurred. *Kasian*, 207 Wis.2d at 622, 558 N.W.2d 687. In *State v. Wille*, the court found probable cause when there was an accident, the defendant made a potentially incriminating statement, and there was a smell of intoxicants. *Wille*, 185 Wis.2d at 683-84, 518 N.W.2d 325. Those cases did not even involve the attempt to do field sobriety tests. There are more observations here than in either of those cases.

Ahmed seems to focus on potential innocent explanations for the defendant's conduct. However, the officer does not have to defer to any innocent explanation. Ahmed is correct that the accident *could* have occurred due to an environmental factor, but that is why the probable cause is the totality of the circumstances test. Officer Lozano can consider that the accident could have occurred due to Ahmed being under the influence of an intoxicant.

Ahmed does not seem to contest that there was an odor of intoxicants. The circuit court also found slow and slurred speech. R. 15 at 43:10-15. Again, Officer Lozano does not have to defer that the slurred speech was due to an accent. The circuit court's finding is not clearly erroneous. There are multiple places on the video where Ahmed appears to be slurring his words. *See i.e.* R. 31 at 21:33:05-23:33:10. The circuit court also found that Ahmed was swaying, and was uncooperative, both of which can be considered for a probable cause determination. R. 15 at 43:10-15.

Ahmed first cites *Gonzalez*. *State v. Gonzalez*, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905. The State would first note that *Gonzalez* was about reasonable suspicion. Though Ahmed contested reasonable suspicion at the circuit court, the State does not believe that he is contesting it now. The State therefore believes *Gonzalez* is inapplicable to this case. However, the State will still distinguish *Gonzalez*. In *Gonzalez*, the officer did not observe any bad driving as Gonzalez was pulled over for a defective taillight. *Id.* ¶3. Here, there was an accident. An accident can be a clue for impairment. *Gonzalez* also had the odor of intoxicants coming from his vehicle and no other indicators of intoxication. *Id.* ¶17. The officer in *Gonzalez* could not testify that the odor was specifically coming from the defendant and the defendant stated other individuals were in the vehicle that night. *Id.* ¶17. We have no such facts here. Ahmed said that there was no slurred speech in this case. However, the circuit court did find there was slurred

speech. R. 15 at 43:10-15. That finding is not clearly erroneous as Ahmed does slur his words throughout the interaction. Finally, here, the odor of intoxicants came directly from the defendant. The State would also note that Ahmed admits to drinking that day, which is not the case in *Gonzalez*. That is plenty for reasonable suspicion.

Ahmed also cites *Bunnell. Vill. of Little Chute v. Bunnell*, 2013 WI App 1, 345 Wis. 2d 399, 824 N.W.2d 929. In *Bunnell*, the court reversed the circuit court's dismissal of the refusal and found the refusal to be unreasonable even without the results of the HGN test. *Id.* ¶21. In *Bunnell*, it was the circuit court who decided to not consider the results of the HGN as part of its probable cause determination. That is in the circuit court prerogative as an exercise of its discretion. However, *Wilkins* clearly states that even incorrect field sobriety tests can be admissible. *City of West Bend v. Wilkins*, 2005 WI App 36, ¶1, 278 Wis. 2d 643, 693 N.W.2d 324. *Wilkins* states that field sobriety tests are just observations that officers use in determining impairment so even incorrectly done field sobriety tests are admissible for probable cause determinations. *City of West Bend v. Wilkins*, 2005 WI App 36, ¶1, 278 Wis. 2d 643, 693 N.W.2d 324. Field Sobriety Tests are just one part of the totality of circumstances, and it was just one part of what the court used in its totality of the circumstances determination. That the circuit court chose to use the HGN in its probable cause determination is entirely within the discretion of the circuit court.

Ahmed does not dispute that Officer Lozano observed six clues on the Horizontal Gaze Nystagmus Test. The State would first dispute that the test was done incorrectly. Even if it was, the court can still consider the results as it still goes to the weight of the evidence not its admissibility. Also, during the test, Ahmed did not keep his head still as part of the directions given by Officer Lozano, another observation that can be considered for the probable cause determination though not considered a standardized clue.

Ahmed also ignores the numerous opportunities that Officer Lozano gave Ahmed to do the other field sobriety tests. At some point, even if the defendant believed that they were going to City Hall to do tests, when the officer said first, "No we are doing them here" and later "if we do not do them here, it will be counted as a refusal" he had to know continuing to refuse would count as a refusal. R. 31 at 21:57:50-21:58:00. More importantly, Officer Lozano can believe that he is refusing to do the tests when the Officer warns that the Officer is considering it

a refusal. Probable cause is not in the eye of what a defendant thinks, it is what a reasonable officer thinks. A reasonable officer can believe that Ahmed refused to do Field Sobriety Tests when Officer Lozano gave Ahmed the option to move around multiple times, told him it was a flat surface multiple times, and warned that continued refusal would mean the Officer Lozano would mark it down as a refusal.

The State would also note that Ahmed first did not contest the HGN being done in the parking lot, and second, during most of the discussion with Officer Lozano, did not say he wanted to do them somewhere else, instead he tried to challenge the area where Officer Lozano wanted to do them was not flat. It was only towards the end that Ahmed asked to move 5 minutes away. Ahmed does not say he wants to move to City Hall. The circuit court also stated that City Hall is not 5 minutes away from that area. R. 15 at 22:24-25, 23:1-3, The circuit court found (and probably knows from experience) that the area where Officer Lozano brought Ahmed was a flat surface. R. 20. The court found that Ahmed refused to do field sobriety tests. That can be considered for probable cause purposes.

Finally, Ahmed seems to contest that it is a major issue for probable cause that the State does not know the exact time of operation. However, Ahmed does not dispute that he operated the vehicle. He is on the side of a narrow road, and he does not admit to drinking recently. For probable cause determinations, it is reasonable for the officer to believe that he drove and since driving, he had no alcohol (considering there is no alcohol nearby and he is standing on his motorcycle at the time, and Ahmed states he has not drunk alcohol in 12 hours), therefore making it reasonable that if Ahmed is impaired now, he was impaired while driving.

Based off the court's factual determinations of slurred speech, an accident, swaying, the odor of intoxicants, admittance to drinking, 6 of 6 clues on the HGN tests, the refusal to do further field sobriety tests when offered, Officer Lozano had probable cause to believe Ahmed operated while under the influence.

Conclusion

The circuit court found that there was probable cause to believe that Ahmed was under the influence of an intoxicant and found the refusal unreasonable. This Court should affirm.

Dated this 27th day of December 2023.

Respectfully submitted,
Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b), (bm), and (c) for a brief. The length of the brief is 2878 words.

Signed: Electronically signed by Gideon Wertheimer

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Assistant District Attorney

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.

Signed: Electronically Signed by Gideon Wertheimer

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