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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP1796

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

ASIF AHMED,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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This is a run-of-the-mill probable cause case that Defendant-Appellant-Petitioner Asif Ahmed tries to transform into a “novel” constitutional issue in an attempt to entice this Court’s review. (Pet. 7.) Contrary to Ahmed’s argument, the court of appeals correctly affirmed the circuit court’s determination that Ahmed improperly refused to provide a blood sample. *State v. Ahmed*, No. 2023AP1796, 2024 WL 1109291 (Wis. Ct. App. March 14, 2024) (unpublished). This case neither presents novel issues of law nor conflicts with existing caselaw, and there is consequently no need for this Court’s review.

**THIS COURT SHOULD DENY AHMED’S
PETITION FOR REVIEW BECAUSE IT DOES
NOT MEET THE CRITERIA SET FORTH IN
WIS. STAT. § (RULE) 809.62(1R).**

Ahmed’s petition arises out of a refusal hearing after the circuit court found that Officer Lozano, who responded to Ahmed’s motorcycle crash, had probable cause that Ahmed was operating while intoxicated. La Crosse police were dispatched to conduct a welfare check on Ahmed after he was discovered lying on the ground with his motorcycle on the side of the road. Lozano could smell the odor of intoxicants coming from Ahmed’s breath. Lozano decided to have Ahmed perform field sobriety tests. Lozano originally intended to take Ahmed to the La Crosse City Hall to ensure the ground was flat and level. However, Lozano’s sergeant advised him to take Ahmed to an area with a level surface that was closer in distance to the accident. Accordingly, Lozano transported Ahmed to the Bluffside Tavern to have Ahmed perform the field sobriety tests in the parking lot.

Lozano first had Ahmed perform the HGN test, and he observed six clues. Lozano then attempted to have Ahmed do the walk-and-turn test. Ahmed disagreed with Lozano that the spot in the parking lot was flat, and Lozano offered an alternative area in the parking lot to conduct the test. Ahmed

initially agreed to that spot, but then he said the spot was still not flat and not a reasonable surface to do the test. Lozano asked Ahmed if he was still willing to do the walk-and-turn test. Ahmed said yes but only if Lozano transported him to a different location with a flat surface. This debate continued for several minutes until Lozano told Ahmed that his continued insistence to be taken to a new location would be deemed a refusal. Ahmed did not perform the walk-and-turn test in the parking lot, and Lozano arrested him.

Upon Ahmed's arrest, Lozano read him the Informing the Accused form; Ahmed initially consented to a blood draw. Ahmed then asked Lozano what the consequences would be for refusing consent, Lozano read Ahmed the form again, and Ahmed refused to submit to a blood test. Ahmed requested a refusal hearing. The circuit court heard testimony from Lozano, watched footage from his bodycam, and received briefing from the parties. The circuit court concluded that Lozano had probable cause that Ahmed was operating while intoxicated and his refusal was therefore improper.

The court of appeals affirmed. In a one-judge opinion, the court of appeals concluded that none of the circuit court's factual findings were clearly erroneous. *Ahmed*, 2024 WL 1109291, ¶¶ 16–17. Accordingly, the following facts supported probable cause:

(1) Ahmed was involved in an accident while operating his motorcycle; (2) the officer smelled an odor of intoxicants coming from Ahmed; (3) the video from the officer's body camera showed that Ahmed was 'swaying, had slow or slurred speech and [was] uncooperative'; and (4) Ahmed refused to perform the field sobriety tests on a 'safe, flat public spot in close proximity to' the scene of the accident.

Id. ¶ 15 (alteration in original). Based on those facts, the court of appeals concluded that "the information available to the officer at the time of arrest would lead a reasonable

police officer to believe that Ahmed had been operating a motor vehicle while intoxicated.” *Id.* ¶ 20.

The court of appeals rejected Ahmed’s myriad arguments that the officer did not have probable cause. *Id.* ¶¶ 21–26. As most relevant to Ahmed’s petition, the court rejected his argument that “it was reasonable for him 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,’ and that that request did not constitute a refusal to perform the walk-and-turn test as a factor supporting probable cause.” *Id.* ¶ 26. The court of appeals rejected that argument because “Ahmed [did] not cite to any authority to support the proposition that a person does not refuse to perform a field sobriety test if the person does not consent to the location for the test.” *Id.*

Ahmed’s petition does not present a compelling reason to disturb the court of appeals’ decision. Before addressing the myriad problems with Ahmed’s argument, it is important to untangle it. Ahmed bases his argument on the false premise that the officer “duped” him regarding the location in an effort to get Ahmed to hopefully perform the field sobriety tests. (Pet. 14.) According to Ahmed, because he was “duped,” his refusal to do the tests in the Bluffside Tavern parking lot was not actually a refusal at all, but merely a reasonable request to move locations. (Pet. 14.) Ahmed’s argument, then, is that because he merely made a reasonable request to move test locations, his refusal to take the tests cannot represent consciousness of guilt or be a basis for the officer’s probable cause. (Pet. 13–14.) There are at least three problems with that argument.

First, and perhaps most importantly, Lozano didn’t “engage in subterfuge” or “dupe” Ahmed into anything. (Pet. 4, 7, 14.) Lozano originally planned to take Ahmed to City Hall, but he was advised that that was too far away from the crash site. Lozano decided to take Ahmed to a closer location

with a level surface: the Bluffside Tavern parking lot. The circuit court found that the parking lot was a level enough surface to validly conduct field sobriety tests, and Ahmed does not challenge that factual finding. *Ahmed*, 2024 WL 1109291, ¶ 17. The purpose of Lozano moving locations was to adhere to what he was advised the law was while still giving Ahmed a level surface upon which he could perform the tests. *Id.* ¶ 5. Ahmed's tortured attempt to impute a nefarious reason onto the location change is sorely unsupported by the record, and this Court should reject the premise out of hand.

The second problem with Ahmed's argument is, as the court of appeals recognized, the absence of *any* caselaw supporting the proposition that a defendant must consent to a field sobriety test location before his refusal to do the tests can actually be deemed a refusal. *Id.* ¶ 26. Ahmed cites nothing that supports the idea that defendants have the right to request an alternate field sobriety test site, that officers have to acquiesce to that request, or that abjectly refusing to do the field sobriety tests *unless* the officer acquiesces to the request to move is anything other than an actual refusal. This Court should not accept Ahmed's invitation to invent multiple legal premises out of whole cloth.

Finally, the third issue with Ahmed's argument is that the case he does attempt to use for support has nothing to do with the situation at hand. At issue in *Munroe* was whether Munroe's consent was voluntary or merely granted "only in acquiescence to an unlawful assertion of authority." *State v. Munroe*, 2001 WI App 104, ¶¶ 9–11, 244 Wis. 2d 1, 630 N.W.2d 223. There, the court of appeals recognized that the officers' stated purpose for entering Munroe's room was "not true . . . , but it *was* the reason Munroe acquiesced to their entry and cooperated with them." *Id.* ¶ 11. The court held that "[o]nce the officers were assured that Munroe had not violated the ordinance—again, this was the proffered but false reason for their having knocked on his door at 7 a.m.—their 'license'

granted by Munroe's acquiescence to their presence in his room vanished." *Id.* In turn, the officers "had no authority to use their continued presence in his room to conduct a general search, and Munroe denied their first request to do so. Their continued questioning and their renewed request to search made Munroe's 'consent' not voluntary." *Id.*

Ahmed's reliance on *Munroe* is misplaced for two reasons. First, unlike Munroe who eventually consented to a search of his motel room based on the officers' unlawful assertion of authority, Ahmed *didn't consent to anything* here. He refused to consent to the field sobriety tests, and he refused to consent to a blood draw. Because Ahmed didn't consent to anything, there is no need to assess the voluntariness of any consent regardless of whether Lozano engaged in trickery or deception. Second, and on the other side of the coin, Lozano did not engage in subterfuge or intentionally deceive Ahmed in order to gain his consent. So, even if Ahmed *had* eventually consented to the field sobriety tests or a blood draw, there would be no need to evaluate whether Ahmed's later consent was invalid due to any deception or trickery. *Munroe* is dually inapplicable to the facts of this case, and the court of appeals' decision does not conflict with it.

At bottom, the court of appeals applied the correct standard of review and legal principles to the basic probable cause issue that it faced. Its decision was correct, and Ahmed's petition is nothing more than his disagreement with the court of appeals' decision. But that disagreement alone is not a justifiable reason for this Court's review.

CONCLUSION

This Court should deny Ahmed's petition for review.

Dated this 13th day of May 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,617 words.

Dated this 13th day of May 2024.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of May 2024.

Electronically signed by:

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