STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2023AP2017-CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

JOSEPH S. SCHENIAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MANITOWOC COUNTY, BRANCH II, THE HONORABLE JERILYN M. DIETZ PRESIDING, TRIAL COURT CASE NO. 18-CT-82

BRIEF OF PLAINTIFF-RESPONDENT

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REPLY BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Joseph S. Schenian, appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (PAC), second offense, and sentence was stayed pending appeal. R118. Schenian was convicted of PAC after he pled no contest to the charge. R110.

The State charged Schenian with Operating While Intoxicated (OWI), second offense, and PAC, second offense. R110. Schenian moved to suppress the preliminary breath test (PBT) result due to coerced collection and moved to suppress evidence based on lack of probable cause to arrest. R18; R19. He asserted that the request for a PBT must be made in a particular matter, that, alternatively, that the PBT should be excluded from the probable cause determination, and that Deputy Cory Hartman lacked probable cause to arrest Schenian for OWI. R18; R19.

The circuit court, the Honorable Jerilyn M. Dietz, denied Schenian's motions after a motion hearing. R40. The court ruled that Schenian had voluntarily taken the PBT, concluding that Schenian retained his right to refuse the PBT without penalty, and the request for the tests made early on did not cease simply because the officer brought out the PBT. R40:4. The court further ruled that under the totality of the circumstances presented Deputy Hartman that he had probable cause to request a PBT and to arrest Schenian for OWI. R39:4.

Schenian plead no contest to PAC, second offense, and the court imposed a stayed sentence of five days jail, $350 fine plus costs, Alcohol Assessment, 13 months license revocation and ignition interlock period, pending the outcome of the appeal. R110:6. Schenian now appeals the judgment of conviction. R107.

ARGUMENT

I. THE ADMINISTRATION OF THE PRELIMINARY BREATH TEST WAS NOT IN VIOLATION OF THE FOURTH AMENDMENT OR WIS. STAT. § 343.303

A. Applicable legal principles

Wis. Stat. § 343.303 states:

> "If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) … the officer, prior to an arrest, *may request* the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. *The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1)*…" (emphasis added).

Schenian, in referencing to *Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160 (2016), notes in his brief that "that United States Supreme Cout again acknowledged that a suspect may not be compelled to provide a breath sample." Brief of Appellant, at 12. However, the Court in *Birchfield* held that the Fourth Amendment allows warrantless breath tests to be obtained by officers as searches incident to arrest as a "breath test does not 'implicat[e] significant privacy concerns.'" 579 U.S. 438, 463, 136 S.Ct. 2160, 2178 (2016) (*citing Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626, 109 S.Ct. 1402, 1418 (1989)). The *Birchfield* Court reasoned that: 1) "[h]umans have never been known…[to have a] possessory interest in… *any* of the air in their lungs[;]" 2) a breath tests reveals "only one bit of information" in comparison to the amount of information revealed by a DNA sample; and 3) a breath test causes no

further embarrassment than the arrest. 579 U.S at 461-63, 136 S.Ct. at 2177. While the *Birchfield* Court was discussing evidentiary chemical tests, the analogy is clear for PBTs: no warrant is necessary because it does not implicate a Constitutional right.

The ability to refuse to submit to a chemical test in the OWI context is a statutory privilege and not a constitutional right. *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 213 (1999). A subject's "right" to refuse a blood test is simply an opportunity bestowed by the Legislature and not a constitutional right. *South Dakota v. Neville*, 459 U.S. 553, 565 (1983). There is no constitutional right to refuse a breathalyzer test. *State v. Mallick*, 210 Wis. 2d 427, 433, 565 N.W.2d 245, 247 (Ct. App. 1997); *State v. Lemberger*, 374 Wis.2d 617, 634, 893 N.W.2d 232, 240 (2017) (Defendant "had no constitutional or statutory right to refuse to take the breathalyzer test….").

The Court of Appeals in *County of Ozaukee v. Quelle* considered, and rejected, a requirement that the officer explain beyond what is dictated by statute, stating that "the court did not intend to create a new defense of 'subjective confusion,' nor did it in any way suggest that officers should be required to provide a 'reasonable explanation' of the law to any driver who remains confused after being given the standard warnings." 198 Wis. 2d 269, 281, 542 N.W.2d 169, 200 (1995).

B. The circuit court did not err in concluding that Schenian had voluntary taken the PBT.

Schenian argues the circuit court erred in its ruling that Schenian consented to a PBT when he agreed to submit to field sobriety tests and that because he did not object to the PBT that there was a violation of the law. Specifically, Schenian argues that consent to submit to field sobriety tests is not like submitting to PBT because field sobriety tests do not implicate the Fourth

Amendment in the way the seizure of a person's breath does, and because the language the legislature chose use the word "request" in Wis. Stat. § 343.303. Brief of Appellant, at 15.

Schenian asks this Court to find that the PBT results should not be considered in the probable cause determination because he did not freely and voluntarily consent to the PBT by clear and convincing evidence. In his brief, Schenian claims that "Deputy Hartman had Mr. Schenian submit to a [PBT] … [and] told Mr. Schenian: 'I've got one last test for you to perform, and what I'm going to need you to do yes give me approximately an 8 second breath' without 'ask[ing] specifically for the PBT." Brief of Appellant, at 8-9 (citing to R30 at 27:16-20 and 64:18-19, respectively). However, the exchange between Deputy Hartman and Schenian leading up to the PBT shows that Schenian voluntarily and freely consented to conduct a PBT.

As noted by Schenian, he was "cooperative with [Deputy Hartman] from start to finish" of their encounter, he provided "appropriate responses" to Deputy Hartman, and that "[h]is responses were intelligent." Brief of Appellant, at 9. The field sobriety test were also conducted after Deputy Hartman asked Schenian if he would submit to the tests at an interior location, which he agreed to. R30:15-16. By Deputy Hartman's account of Schenian during the field sobriety tests, there were no indications that Schenian had any difficulty understanding instructions of the field sobriety tests, specifically as it relates to the "Walk and Turn" test. R30:20-21. The PBT conducted in this matter was also administered immediately following the completion of field sobriety testing without any interruption. R30:27. It should also be noted, per Deputy Hartman's testimony during the motion hearing, that during the conversation with Deputy

Hartman that Schenian was able to tell the deputy how much he had to drink ("…five beers." R30:13), the timeframe for his drinking ("…around four in the afternoon when he started, and he had his last drink approximately two in the morning." R30:16), and when asked by the deputy if he should be driving a vehicle that Schenian stated no (R30:27).

The plain meaning of the Wis. Stat. § 343.303 reads that a PBT is voluntary in that it cannot be forced or compelled, and is in that way distinguishable from an evidentiary test of an individual's blood, breath, or urine, which may be compelled by a warrant. Furthermore, as a threshold matter, it is physically impossible for an officer to force an individual to provide a breath sample; rather, a breath sample involves an explicit and controlled expulsion breath. Therefore it is necessarily always a willful act.

Schenian also argues that Wis. Stat. § 343.303 usage of the word "request" denotes a choice and "that the legislature's choice to require officers to 'request' PBTs under § 343.303 must be given a different effect than the use of the term 'shall provide' elsewhere." Brief of Appellant, at 14-15. However, Wis. Stat. § 343.303 does not state that the PBT request made by a law enforcement officer must be made using certain words or phrases. Wis. Stat. § 343.303 does not specify that the request must be made separate from the request to perform field sobriety tests. In addition, if the legislature sought to require a particular set of words that must be used in requesting a PBT, such as it has in Wis. Stat. § 343.305(4) for the Informing the Accused statute, it was certainly free to do so but chose not to do so for Wis. Stat. § 343.303. A "voluntarily taken" test does not require that a particular word or phrase be used, and stands in contrast to evidentiary tests as described in other parts of the

Wisconsin Statutes, such as the Informing the Accused statue under Wis. Stat. § 343.305(4).

All of the information pertaining to Schenian's understanding and cooperation with the field sobriety tests prior to the PBT, the information Schenian relayed to officers about his prior consumption of alcohol, and the plain language in Wis. Stat. § 343.303 as it relates to law enforcement requesting a PBT was made known to the circuit court prior to its ruling that the PBT administered here was voluntarily taken by Schenian. Therefore, as it is clear that Schenian freely and voluntarily consented to the PBT by his observed behavior and statements to Deputy Hartman, it is clear the circuit court did not err in its ruling that Schenian had voluntarily taken the PBT and that the PBT was not done in violation of the Fourth Amendment or Wis. Stat. § 343.303.

II. THERE WAS PROBABLE CAUSE TO ARREST SCHENIAN FOR OPERATING WHILE INTOXICATED UNDER THE TOTALITY OF THE CIRCUMSTANCES

A. Applicable legal principles

"Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *State v. Secrist*, 224 Wis.2d 201, 212, 589 N.W.2d 387, 392 (2001). The Supreme Court of Wisconsin has stated that "[i]n determining whether probable cause exists, we [must] examine the totality of the circumstances and consider whether the police officer had 'facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant ... committed or [was] in the process of committing an offense.'" *State v. Blatterman*, 362 Wis. 2d 138, 164, 864 N.W.2d 26, 38 (2015) (*quoting*

State v. Richardson, 156 Wis.2d 128, 148, 456 N.W.2d 830 (1990)).

Probable cause is a "practical, common-sense determination" based on the totality of the circumstances. *State v. Robinson*, 327 Wis. 2d 302, 322, 786 N.W.2d 463, 473 (2010). A court is to assess whether law enforcement acted reasonably, keeping in mind that probabilities are "the factual and practical considerations of everyday life." *See Robinson*, 327 Wis. 2d 302, ¶ 26, 786 N.W.2d 463. In reviewing whether there is probable cause, the court applies an objective standard considering the information available to the officer and the officer's training and experience. *State v. Lange*, 317 Wis. 2d 383, 392-93, 766 N.W.2d 551, 555 (2009). In determining whether probable cause exists, the courts look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994) (*citing State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986)).

Probable cause "'deals with probabilities' and must be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." *State v. Blatterman*, 362 Wis. 2d 138, 164-65, 864 N.W.2d 26, 38 (2015) (quoting reference omitted). It is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Lange*, 317 Wis. 2d at 392, 766 N.W. at 555 (quoting reference omitted).

B. The circuit court properly concluded that Deputy Hartman had probable cause to arrest Schenian for OWI

Schenian argues that the circuit court erred in its finding that there was probable cause to arrest Schenian for OWI under the totality of the circumstances. Specifically, Schenian argues seven points as to why probable cause did not exist, those being: (1) there were no observations by law enforcement officers or citizen witnesses of Schenian engaging in reckless, erratic, or unsafe driving; (2) the odor of intoxicants coming from Schenian and his admission to previously consuming alcohol are observations that have been "downplayed" by the Court in prior unpublished opinions; (3) Deputy Hartman did not hear Schenian slur his speech; (4) there was no testimony that Schenian was having difficulty with his fine motor skills; (5) Deputy Hartman did not observe Schenian exhibit any problems with his driving ability or in timely responding to the deputy's signal to stop; (6) Deputy Hartman did not observe Schenian have any problems with his mentation; and (7), Schenian's performance on field sobriety was "outstanding." Brief of Appellant, at 18-21. Schenian argues that these seven point case, specifically relating the lack of impairment of mentation, do not rise to a sufficient factual basis to conclude as a matter of law that Deputy Hartman had probable cause to arrest Schenian. Schenian further cites to four unpublished cases support his claim that an odor of intoxicants and his admission to previously consuming alcohol prior to operating a motor vehicle "is less than damming." Brief of Appellant, at 18.

However, just as it was noted by the circuit court, there is no citation provided that supports the proposition that the State must show impairment of Schenian's mentation in the form of slurred speech, lack of cooperation with law enforcement, or bad driving to support probable cause to arrest for OWI. R39:4. Case law is clear that probable cause is not met by a particular or preset number of observations; rather, "[i]n determining

whether probable cause exists, we must look to the totality of the circumstances to determine whether the '*arresting officer's knowledge* at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.'" *Babbitt*, 188 Wis. 2d at 356–57, 525 N.W.2d at 104 (Ct. App. 1994) (*citing State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986)) (emphasis added). Furthermore, as the Court noted in *Babbitt*, it is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]." 118 Wis.2d at 357, 525 N.W.2d at 104 (*citing State v. Koch,* 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993)).

When an officer's observations of a driver cause the officer to suspect the driver of OWI but the officer's observations do not rise to the level of probable cause for an arrest, the officer may, nonetheless, administer field sobriety tests. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541, 549 (1999). The officer may then administer a PBT if the officer has "probable cause to believe" that the person was violating the OWI laws – the officer is not required to have probable cause to arrest the driver for OWI, however. *Id*. The *Renz* Court noted that Renz exhibited several factors indicative of intoxication (vehicle smelled of intoxicants, admission to drinking three beers, difficulty on some field sobriety tests); however, he did not have slurred speech and "substantially" completed the field sobriety tests. *Id*., 231 Wis. 2d at 316-17, 603 N.W.2d at 552. The *Renz* Court then concluded that the circumstances presented "exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause to arrest for an OWI," thus, the officer was authorized to request a PBT. *Id*.

The totality of the circumstances here, as it relates to Deputy Hartman's knowledge at the time of the arrest, clearly present sufficient evidence to support probable cause to request a PBT, at the very least, and to arrest Schenian for OWI. The circumstances presented to Deputy Hartman were previously discussed by the circuit court in their prior ruling, that being:

> "…the deputy observed a strong odor of intoxicants, bloodshot and watery eyes on a person undisputedly operating a motor vehicle, an admission of the consumption of alcohol, at 2:30 in the morning on a Saturday night/Sunday morning, coming from a bar, clues on every standardized field sobriety test, and sufficient clues to be indicative of impairment on two of the three,[1] all strongly suggest that Deputy Hartman had sufficient probable cause to request a PBT. Similar to the facts in *Renz*, this appears to be the exact type of situation in which a PBT is most useful to a law enforcement officer." R39:4.

Schenian, to be sure, did not exhibit every potential indicator of possible impairment. However, those areas do not reduce the aggregate of the indicators Deputy Hartman observed, nor does it undermine the reasons why Deputy Hartman sought to conduct a PBT. Here, there were numerous observations made by and information relayed to Deputy Hartman that Schenian had been operating a motor vehicle while intoxicated. This information provided ample probable cause for the deputy to request a PBT from Schenian, and after the results of the PBT came in being .150, well in excess of the legal limit, the was probable cause to arrest Schenian for OWI. The fact that the Defendant did not display all the clues on each of the SFSTs does not undercut the clues that he did display. *Renz*, 231 Wis. 2d at 316-17, 603 N.W.2d at 552 (1999)

[1] Observed 6 of 6 potential clues on the Horizontal Gaze Nystagmus test, in addition to Vertical Gaze Nystagmus, 1 of 8 potential clues on the Walk and Turn test, and 2 of 4 potential clues on the One Leg Stand test.

(noting that the requested PBT was appropriate when the officer observed numerous factors indicative of intoxication but also failed to detect other indicators). Like the officer in *Renz*, Deputy Hartman was faced with exactly the situation in which a PBT is useful in determining probable cause to arrest for OWI. *See Id*., at 317. Given the numerous observations made by Deputy Hartman and the knowledge attained by the deputy during the course of the investigation under the totality of the circumstances, in addition the PBT results being .150, it is clear that the circuit court did not err in concluding that Deputy Hartman had probable cause to arrest Schenian for OWI.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment convicting the defendant-appellant Joseph S. Schenian of operating a motor vehicle with a prohibited alcohol concentration of an intoxicant, second offense.

Dated this 10th day of March, 2024.

Respectfully submitted:

Electronically signed by:
Seth J. Reinhard
State Bar No. 1121997
Attorney for State
Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief. The length of this brief is 3,816 words.

I also 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 10th day of March, 2024.

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