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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

**Appeal No. 2023AP002120
Fond du Lac County Circuit Court Case Nos. 2022CT23**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MITCHELL D. BUTSCHLE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT RULING DENYING THE DEFENDANT-
APPELLANT MOTION FOR SUPPRESSION OF
EVIDENCE, IN FOND DU LAC COUNTY, THE
HONORABLE PAUL G. CZISNY, JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT MITCHELL D. BUTSCHLE**

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STATEMENT OF THE ISSUES

Did Deputy Michael Vis have the requisite level of suspicion to arrest Mr. Butschle?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Mitchell Butschle, (Mr. Butschle) was charged in the County of Fond du Lac, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a) and with having operated a motor vehicle with a detectable amount of a restricted controlled substance contrary to Wis. Stat §346.63(1)(am) both as second offenses and possession of drug paraphernalia contrary to Wis. Stat. Sec 941.573(1) on January 19, 2022. On March 15, 2022, Mr. Butschle, by counsel, filed a motion for suppression of evidence claiming the officer did not have the requisite level of suspicion to arrest him. A hearing on said motion was held on July 29, 2022, the Honorable Paul G. Czisny, Judge, presiding. The Court denied said motion by oral ruling on that same date. (R.45:29-31/App.22-24). A written Order was entered on October 18, 2023. On October 6, 2023, Mr. Butschle entered a guilty plea to count the charge of operating a motor vehicle with a restricted controlled substance and possession of drug paraphernalia. The Court among other things imposed a jail sentence, a fine and revocation of Mr. Butschle's operating privileges. The defendant, by counsel, timely filed a Notice of Intent to Seek Post-

Conviction relief on October 17, 2023 and a Notice of Appeal on November 10, 2023.

The evidence pertinent to this appeal was introduced through the testimony of Deputy Michael Vis. Deputy Vis testified as follows.

Deputy Vis testified he is a seven-year veteran of the Fond du Lac County Sheriff Department. (R.45:4/App.2). Vis testified regarding his training to become a police officer and his continued training in the detection and investigation of impaired drivers. (R.45:5/App.3).

On January 19, 2022 at approximately 2:09 a.m., Deputy Vis was on duty, traveling southbound on Interstate 41 near Lost Arrow Road when he observed a vehicle driven by Mr. Butschle. Deputy Vis ran the license and determined it was expired. (R.45:5/App.3).

Vis initiated a traffic stop, and the vehicle pulled over to the shoulder just south of Lost Arrow Road. *Id.* Mr. Butschle was the lone individual in the vehicle. (R.45:6/App.4). Deputy Vis observed a strong odor of intoxicant coming from Mr. Butschle's breath and his eyes to be bloodshot and glassy. *Id.* Deputy Vis asked Mr. Butschle to exit his vehicle. Mr. Butschle questioned why the officer wanted him to exit the vehicle. (R.45:7/App.5).

Deputy Vis explained it was the process and he wanted to see if Mr. Butschle was possibly impaired. *Id.*

When Deputy Vis had Mr. Butschle out of the vehicle, he asked if Mr. Butschle consumed any alcohol and Mr. Butschle shook his head “no”. Vis confronted Mr. Butschle about his observations, and Butschle indicated he did not want to answer any more questions and said to just continue with the field sobriety tests. (R.45:7/App.5).

Mr. Butschle indicated he had a prior foot surgery, and said he was cold, but did not want to be transported to a warmer location for the field sobriety tests. (R.45:8/App.6). Deputy Vis also questioned Mr. Butschle about consuming illegal drugs, Mr. Butschle denied using any illegal drugs. (R.45:8/App.6).

Vis performed the Horizontal Gaze Nystagmus test and observed six of six indicators or clues. (R.45:8/App.6). Over defense counsel’s objection Vis testified that four of six clues on this test suggested there was a 77% chance an individual’s blood alcohol concentration was above .10. However, he acknowledged a PBT performed shortly after the arrest showed an alcohol concentration of .048.

Vis had Mr. Butschle perform a Walk and Turn test, and observed zero clues of impairment on the test, but observed Mr. Butschle almost lose his balance on the third step. (R.45:9/App.7).

Deputy Vis next had Mr. Butschle perform a One Leg Stand test where he observed one out of the four clues.

On cross-examination, Deputy Vis agreed he performed a PBT test at the scene, and Mr. Butschle registered a .048.

Vis also conceded prior to activating his emergency lights and stopping Mr. Butschle for the expired registration, there was nothing about the manner in which Mr. Butschle operated his vehicle which suggested impairment. (R.45:15/App.8). While Vis said Mr. Butschle pulled over slowly, he could not estimate the amount of time or distance it took Mr. Butschle to stop.

Furthermore, Deputy Vis could not remember observing any problems with Mr. Butschle's motor coordination upon contact with Mr. Butschle. (R.45:16-17/App.9-10).

On the Walk and Turn test, Deputy Vis testified to each potential clue of impairment which he is trained to observe. (R.45:18-19/App.11-12). Vis acknowledged he observed no clues of impairment on this test. (R.45:20/App.13).

Vis also agreed that on the One Leg Stand test he is trained to look for four potential indicators of impairment.

(R.45:20/App.13). Furthermore, he conceded 2 or more clues indicate impairment on this test. (R.45:21/App.14). Vis explained the clues of impairment include putting the foot down before the 30 seconds expired, swaying, raising arms from one's side, and hopping. In terms of Mr. Butschle's performance on the One Leg Stand test, Mr. Butschle kept his leg raised for 30 seconds as directed. (R.45:22/App.15). Mr. Butschle did not have to raise his arms from his side and did not hop. (R.45:22/App.15). According to Deputy Vis, the only clue Mr. Butschle exhibited on this test was a slight sway back and forth. (R.45:22/App.15).

On redirect, Deputy Vis indicated there was no PBT done initially, but Mr. Butschle insisted on performing one, and one was performed after the arrest showing a result of .048. (R.45:23/App.16).

He also testified after the arrest the officer observed what he suspected was a blunt on the ground, but Deputy Vis testified he could not recall if he tested the blunt for the presence of THC. (R.45:24/App.17). On redirect, the officer testified that based on what he was charged with, he would have tested the blunt, but he agreed this would have all occurred after the arrest. (R.45:25/App.18)

The defense argued the officer did not have the requisite level of probable cause to arrest Mr. Butschle. (R.45:26-27/App.19-20). The State argued the observations made by Deputy Vis provided sufficient probable cause to arrest Mr. Butschle. (R.45:27/App.20).

The Court found the evidence sufficient to establish probable cause for Deputy Vis to arrest Mr. Butschle. (R.45:28-29/App.21-22). The Court denied the defendant's motion.

Mr. Butschle entered a plea to the charge of operating a motor vehicle with a detectable amount of a restricted controlled substance on October 6, 2023. A Judgment of Conviction was entered on October 12, 2023. The defendant appeals from the Judgment of Conviction and the Court Order denying his motion for suppression of evidence.

STANDARD OF REVIEW

Constitutional issues are reviewed de novo, however the appellate court will uphold the lower court's "finding of fact unless they are against the great weight and clear preponderance of the evidence." *State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386 (1989).

ARGUMENT

DEPUTY VIS DID NOT HAVE THE REQUISITE LEVEL OF PROBABLE CAUSE TO ARREST MR. BUTSCHLE

Warrantless arrests not supported by probable cause are unlawful. *State v. Lange*, 2009 WI 49 ¶19, 317 Wis.2d 383, 766 N.W.2d 551. Pursuant to both the Fourth Amendment to the United States Constitution and Article I sec 11 of Wisconsin Constitution, probable cause must exist to justify an arrest. At the suppression hearing, the Court must weigh the evidence for and against suppression and choose between conflicting versions of the facts determining the credibility of each witness. *State v. Wille*, 185 Wis.2d 673, 681 518 N.W.2d 325 (Ct. App. 1994). “Probable cause to arrest...refers to that quantum of evidence within the arresting officer’s knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while [impaired].” *State v. Lange*, 2009 WI 49, ¶19, 317 Wis.2d 282, 766 N.W.2d 551. In making the probable cause determination, courts examine the totality of the circumstances. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The State shoulders the burden of establishing enough facts which would

lead a reasonable law enforcement officer to reasonably “believe that guilt is more than a possibility.” *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). However, the burden “need not reach the level of proof beyond a reasonable doubt or even that guilty is more likely than not.” *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d 282, 766 N.W.2d 551.

“In the context of an arrest for a drunk-driving related violation or crime, officers may consider numerous factors in order to determine probable cause to arrest. Probable cause may be established through a showing of erratic driving and the subsequent “stumbling” of the driver after getting out of the motor vehicle. See *State v. Welsh*, 108 Wis.2d 319, 335-35, 321 N.W. 2d 245 (1982) overruled on other grounds, *Welsh v. Wisconsin*, 466 U.W. 740, 104 S.Ct. 2091, 80 L. Ed. 2d 732 (1984). In other cases, factors sufficient to support a finding probable cause have included bloodshot eyes, an odor of intoxicants, and slurred speech, together with motor vehicle accident or erratic driving. See *State v. Willie*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994 (holding that the officer’ observation of an odor of intoxicants, the nature of the accident and the defendant’s statement that he had “to quit doing this”, supported probable cause); *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (holding the officer’s observations of erratic driving and physical indications of intoxication supported probable cause); *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1960) (holding the nature of the single-vehicle accident, odor of intoxicant and slurred speech supported probably cause). These cases illustrate that “probable cause is a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior.’” *Lange*, 317

Wis. 2d 383, ¶20 (quoting *State v. Higginbotham*, 162 Wis.2d 978, 989, 471 N.W. 2d 24 (1992).” *State v. Kennedy*, 2014 WI 132, ¶22, 359 Wis.2d 454, 856 N.W.2d 834.

Consumption of alcohol alone does not equate to a violation of Wisconsin OWI laws nor is it sufficient alone to justify an arrest. “Not every person who has consumed alcoholic beverages is “under the influence”. What must be established is the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.” To arrest an individual, an officer needs sufficient probable cause to believe the individual more than possibly was operating the vehicle while impaired or with a prohibited alcohol concentration.

The probable cause analysis is “not an unvarying standard because “each decision at the varies stages of the proceedings is an independent determination with the varying burdens of proof.” *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999). *Renz* diagramed the different levels of probable cause required at the different stages of a proceeding. The traffic stop requires reasonable suspicion of a potential violation, or probable cause that a violation was committed. After a stop, an officer is permitted to extend the detention if the officer observes additional

evidence of suspicion conduct. See *State v. Colstad*, 2003 WI App 25, 260 Wis.2d 406, 659 N.W.2d 394. In the context of an OWI investigation, if an officer has probable cause to believe the individual is impaired, an officer may request a subject submit to a preliminary breath test. See Wis. Stat. Sec 343.303. Finally, when the evidence rises to the level of probable cause, an officer is permitted to make an arrest.

In the Mr. Butschle's case, the evidence adduced at the suppression hearing established Deputy Vis possessed reasonable suspicion (or probable cause) to stop Mr. Butschle for a registration violation, and established Deputy Vis had the requisite level of suspicion to extend the stop for field sobriety testing. However, the evidence adduced was insufficient to establish probable cause to believe Mr. Butschle probably operated a motor vehicle while impaired.

Here, Mr. Butschle was stopped for a registration violation. This isn't a case as those cited *supra* where the driving behavior added to the suspicion of impaired driving. There was no erratic driving, no traffic law violations (such as speeding), and there wasn't an accident. What the evidence established is that there was nothing about the manner in which Mr. Butschle operated his motor vehicle which suggested he was impaired. He

was stopped solely because his registration was expired. Nothing about the reason for the stop herein could suggest to the deputy that Mr. Butschle was impaired.

While Deputy Vis testified he observed an odor of intoxicant from Mr. Butschle, and his eyes to be bloodshot and glossy, he conceded there was nothing about Mr. Butschle's motor coordination that suggested he might be impaired. The odor of intoxicant and the observation of Mr. Butschle's eye alone does not suggest Mr. Butschle was less able to safely operate his motor vehicle. See *State v. Waldner*, 206 Wis.2d 51, 58, 556 N.W.2d 681 (1996) (These facts standing alone would not amount to probable cause for an arrest but are "building blocks" in the probable cause analysis).

Deputy Vis then performed field sobriety tests. He testified he performed a Horizontal Gaze Nystagmus test and observed all six of the six potential indicators of impairment. Over defense counsel objection, Vis testified that based on his training, six clues established a 77% chance that Mr. Butschle was over .10. Notably, the preliminary breath test performed at the scene showed an alcohol level of .048. The PBT result, shortly after testing casts significant doubt on the accuracy of Deputy Vis observations on the HGN test.

However, Vis performed two additional tests. A Walk and Turn and One Leg Stand test. On the Walk and Turn test, Deputy Vis recorded no signs of impairment. Mr. Butschle passed the test, the test did not establish there was more than a possibility that Mr. Butschle was less able to safely operate his motor vehicle.

Likewise, on the One Leg Stand test, Vis testified his training required him to look for four potential indicators of impairment. Vis further testified two indicators suggested possible impairment. Mr. Butschle exhibited one clue (he exhibited a slight sway as he held his foot off the ground). However, Mr. Butschle properly kept his foot off the ground for 30 seconds, properly kept his arms at his side, and did not hop during the test. Again, based on his training, Deputy Vis could not have thought the result of the one leg stand test established more than a possibility that Mr. Butschle operated his motor vehicle while impaired.

The evidence adduced at the motion hearing clearly established Deputy Vis did not have the requisite level of probable cause to arrest Mr. Butschle. The odor of intoxicant and the observations of Mr. Butschle's eyes did not suggest impairment, but rather established consumption. Furthermore,

the additional observations made by Deputy Vis during the continued investigation did not provide additional “building blocks” suggesting there was more than a possibility that Mr. Butschle operated his motor vehicle while impaired. Mr. Butschle successfully completed two of the field sobriety tests, and provided a PBT showing a result of .048, which contradicted Deputy Vis’ testimony that the clues on the HGN test established a 77% possibility that an individual was above .10. Because of the above, the court should have granted Mr. Butschle’s motion for suppression of evidence.

CONCLUSION

Because of the above, the trial court erred in finding that the Deputy Vis had probable cause to arrest Mr. Butschle for operating a motor vehicle while impaired. The Court should vacate the Judgement of Conviction and reverse the order denying Mr. Butschle’s motion.

Dated this 9th day of January, 2024.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 24 pages. The word count is 4286.

Dated this 9th day of January, 2024.

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**CERTIFICATION 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.

Dated this 9th day of January, 2024.

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 first names and last initials 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.

Dated this 9th day of January, 2024.

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APPENDIX

Order	App.1
Excerpts from Motion Hearing 07/29/2022	App.2