

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

In the matter of the refusal of George R. Ferrell:

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

Appeal No.: 12 AP 2602

GEORGE R. FERRELL,
Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
OCTOBER 9, 2012
IN THE CIRCUIT COURT FOR SAUK COUNTY,
BRANCH I, THE HON. PATRICK J. TAGGART PRESIDING.

Respectfully submitted,

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STATEMENT OF THE ISSUES

- I. WAS FERRELL UNLAWFULLY ARRESTED
BECAUSE TROOPER THIEDE LACKED PROBABLE
CAUSE TO BELIEVE FERRELL OPERATED WHILE
IMPAIRED?

TRIAL COURT ANSWERED: NO.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a refusal finding. The refusal hearing was held on July 23, 2012. R.14. The lone witness was Wisconsin State Trooper Scott Thiede.

On a winter afternoon, Trooper Thiede heard a dispatch about a possible domestic dispute involving a motorist stopped along the highway, reportedly yelling at a female inside the same car. R.14, p.4. Dispatch also said that the driver had been speeding. R.14, p.4.

A full thirty minutes later, Trooper Thiede saw Ferrell's car driving along the interstate and thought it matched the one described in the earlier domestic dispatch. R.14, p.5-6. Thiede got behind it. There, Thiede saw that Ferrell's car was speeding (about 82 MPH on the interstate) and drifting within its lane of travel with a few "jerky" corrections to the center of its lane of travel. R.14, p.7-8. Thiede activated his patrol car's lights and then his siren to signal for Ferrell to stop. R.14, p.8-9. Ferrell took an exit ramp and came to a stop along the shoulder of the exit ramp. R.14, p.9.

Thiede spoke with Ferrell alongside the car from the passenger side. R.14, p.9. Thiede asked about Ferrell's comings and goings. Ferrell pointed at a nearby resort and said they were headed there. R.14, p.10.

Thiede asked if Ferrell knew how fast he was going, and Ferrell gave an accurate answer, admitting he was going too fast. R.14, p.10.

When asked for his license, Ferrell looked through his wallet, while the female passenger offered Thiede the insurance card; Ferrell eventually found and produced his license. R.14, p.11.

Thiede neither smelled nor saw any alcohol or drugs. Further, Thiede had no information that either Ferrell or the passenger had been drinking or using intoxicating substances at all. R.14, p.12.

So what got Thiede's attention?

Thiede thought that Ferrell appeared "rigid", that is, his forearms were tense as Ferrell gripped the wheel. R.14, p.13-14. Thiede also thought that Ferrell's pupils were "very small", and that his eyes looked bloodshot. R.14, p.12. Ferrell was "very fit" and was wearing a t-shirt bearing the name of a dietary supplement on the front. R.14, p.13-14. Ferrell appeared to be "in good physical

condition.” R.14, p.14. Thiede thought that Ferrell answered questions quickly, and may have slightly slurred a bit. R.14, p.12.

At this point, Thiede detained Ferrell until a second officer arrived. After the second officer was there, Thiede told Ferrell to step out of his car. R.14, p.14. Thiede directed Ferrell out of his car for the purpose of a drunk driving investigation. R.14, p.15. Ferrell complied and stepped out of his car. R.14, p.14.

As Ferrell walked to the rear of his own car as Thiede had directed him, Ferrell extended his arms in front of him and appeared to have what Thiede described as a “1,000-yard stare.” R.14, p.14.

Thiede next asked Ferrell to perform field sobriety tests. Ferrell declined to do so. R.14, p.17.

Based on these observations, Thiede arrested Ferrell for impaired driving. R.14, p.17. A while later, back at the station, Thiede asked Ferrell to take a breath test for alcohol. Ferrell refused to do so.

At no time before arresting Ferrell during this stop did Thiede smell or see any alcohol. R.14, p.24-26. At no time before arresting Ferrell did Trooper Thiede see or smell any drugs. R.4, p.26. At no time before arresting Ferrell did Thiede have any information from any witness or from items observed in Ferrell’s car that Ferrell had

been drinking or using drugs or medications. R.14, p.38-39.

Similarly, Thiede had no information of that sort regarding the passenger, either. R.14, p.38-39.

The trial court found as follows:

The Court finds based on the testimony of Trooper Thiede, based upon the erratic and dangerous driving behavior, based upon the additional observation made of the Defendant's behavior and appearance during the traffic stop, and the Defendant's refusal to admit [sic] to field sobriety tests Trooper Thiede did have probable cause to arrest the Defendant for operating a motor vehicle while intoxicated. ...[T]he Court finds that considering the totality of the circumstances ... shown to the Court that Trooper Thiede had probable cause to arrest while operating while intoxicated. R.8, p.3.

The trial Court then went on to restate its findings as follows:

The Court agrees with the State's argument but further considered the following:

- 1) Defendant's dismissive behavior when asked about his speed.
- 2) That the Defendant's pupils were constricted unusually and his eyes were bloodshot.
- 3) That the Defendant's speech was slurred and his answers were very quick.
- 4) The Defendant fumbled through his wallet for locating his driver's license.
- 5) The Defendant's rigid and aggressive posture.

Trooper Thiede had a duty to inquire further asking the Defendant to perform some field sobriety tests so that he could be sure the Defendant was safe to drive, but the Defendant refused those tests and based upon the Court having found that the refusal was not reasonable, the Court revokes the Defendant's driver's license for one year. R.8, p.4.

Ferrell now appeals to this Court on the refusal case (R.9).

ARGUMENT

I. FERRELL WAS UNLAWFULLY ARRESTED BECAUSE TROOPER THIEDE LACKED PROBABLE CAUSE TO BELIEVE FERRELL HAD DRIVEN WHILE IMPAIRED

A. Standard of Review.

Whether there is probable cause to arrest is a question of constitutional fact, where a two-step standard of review is conducted.

See: State v. Popke, 317 Wis. 2d 118, 765 N.W.2d 569 (2009), and State v. Powers, 275 Wis. 2d 456, 685 N.W.2d 869 (Ct. App. 2004).

First, the reviewing Court is to review the findings of fact of the circuit court and uphold them unless those findings are clearly erroneous. Powers, supra; State v. Anagnos, 337 Wis. 2d 57, 805 N.W.2d 722, 725 (Ct. App. 2011). Second, this Court is to apply a *de novo* review to determine whether probable cause justified the arrest. Anagnos, supra.

B. The Totality of the Circumstances show that Thiede Lacked Probable Cause to Arrest Ferrell for OWI

In the case at bar, there were far fewer signs of possible impairment or intoxication than in the vast majority of operating while under the influence prosecutions. Specifically, Trooper Thiede detected no odor alcohol, he heard no admission of drinking, he saw no evidence of alcohol consumption (cans, bottles, and so forth).

Instead, at the time of Ferrell's arrest, Thiede had only these facts to support a belief that Ferrell operated while intoxicated.

1. Ferrell drove aggressively.
2. Ferrell slurred an unknown few words.
3. Ferrell was slow in locating his license in his wallet.
4. Ferrell's pupils appeared "constricted".
5. Ferrell refused to undergo field sobriety tests.

That is the sum total of facts known to Thiede when he placed Ferrell under arrest.

Thiede made reference to certain other facts which, although present, do not assist in determining impairment by alcohol.

6. Ferrell some thirty minutes or so earlier had been seen engaged in a possible domestic dispute along the shoulder of the highway.
7. Ferrell was "rigid" in his movements and his posture and looked like a "body builder".
8. Ferrell had what the officer called a "thousand yard stare."¹

¹ This phrase came into vogue in 1944, when Life magazine published a painting dubbed "Marines Call It That 2,000 Yard Stare" by Life Magazine's WWII artist & correspondent Tom Lea. The painting depicted a young marine at the Battle of Peleliu in 1944, and it sits at the U.S. Army Center of Military History in Virginia. About the real-life Marine who was his subject, Lea wrote: "He left the States 31 months ago. He was wounded in his first campaign. He has had tropical diseases. He half-sleeps at night and gouges Japs out of holes all day. Two-thirds of his company has been killed or wounded. He will return to attack this morning. How much can a human being endure?" Later, WWII cartoonist Bill Mauldin wrote (in his book "Up Front"), "Look at an infantryman's eyes and you can tell how much war he has seen." Frank Johnston, a Vietnam War photographer later employed the term in a magazine interview: "I looked up and saw a Marine with what they call the thousand-yard stare, and I lifted my Leica and snapped his picture. The soldier's gaze never left my lens." This term, a Thousand Yard Stare, refers to battle fatigue. That is more than ironic, because arguments with spouses often produce the same sort of fatigue, just from a different battleground.

9. Ferrell had on a shirt which named a body building supplement by name.
10. Ferrell did not notice that an unmarked squad was behind him.
11. Ferrell's eyes were bloodshot.

Although these facts were "present", none of them made impairment by alcohol any more likely. Hence, reliance on them was misplaced.

In addition, Thiede faced quite a lengthier list of facts known to him that defeated the notion of probable cause to believe that Ferrell was operating under the influence of alcohol. These include the following facts.

12. Thiede never smelled alcohol on Ferrell before arrest.
13. Thiede never smelled alcohol inside the car before arrest.
14. Thiede never smelled alcohol on the female passenger before arrest.
15. Thiede was told by Ferrell that he had NOT had any alcohol to drink.
16. Thiede was told by Ferrell that Ferrell had NOT been drinking at all.
17. Thiede had no statement from Ferrell's passenger that Ferrell had been drinking.
18. Thiede had no statement from that passenger that she had been drinking, either.
19. Thiede saw no unopened alcohol in the car.
20. Thiede saw no open containers of alcohol in the car.

21. Thiede never saw any drugs or prescription medications in the car.
22. Thiede never heard Ferrell say that he had taken any drugs or medications.
23. Thuede never heard the passenger say she or Ferrell had used any drugs or meds.
24. It was the middle of the afternoon as opposed to being at or near “bar time”.
25. Ferrell pulled over safely on the ramp.
26. Ferrell was aware of his speed.
27. Ferrell knew he had been going “way too [expletive deleted] fast.”
28. Ferrell responded to Thiede’s questions in a direct, comprehending manner.
29. Ferrell was able to walk to the rear of the squad without any balance issues.
30. Ferrell understood that Thiede was asking him to undertake balance tests.

As noted in the cases cite above, this Court must accept facts that are supported by the record. But then this Court must engage in its own de novo review of the probable cause determination.

Here, with all of the above facts in mind (as opposed to just a hand-selected few), it strains logic to find conclude Ferrell was probably under the influence of an intoxicant at that time.

Coming out of an apparent mid-afternoon domestic argument, Ferrell may have been unhappy, tense or even a well-conditioned body builder in a spat. But all of these facts, taken together, did not show a sufficient likelihood that he was under the influence of an intoxicant – unless the charm of romance gone slightly sour were the intoxicant. As the late Clara Peller might have said were she a Wisconsin Appeals Court judge rather than an actress, “Where’s the beef?” In this exhaustive recitation of all facts known to Trooper Thiede, where is there any evidence that Ferrell had any alcohol before driving? Here, where a domestic dispute broke out in broad daylight along a highway shoulder, it seems strange that Trooper Thiede transformed it immediately into an investigation of impaired driving, rather than the one that related to the domestic dispute.

It is stranger, though, that with no evidence of alcohol or drug use or even presence, Thiede requested that Ferrell undergo field sobriety tests of Ferrell. Ferrell’s refusal to do those seems as reasonable as was his refusal to submit to a breath test later, following his arrest. Trooper Thiede, in effect, bootstraps Ferrell’s refusal to do those field tests into probable cause to arrest where no reasonable suspicion existed before that. This should not be okay.

Hence, the refusal by Ferrell was not unreasonable, because
Ferrell was not lawfully under arrest.

CONCLUSION

For the reasons stated, the judgment of the trial court should
be reversed, and this action be remanded to the trial court, with
directions that the trial court vacate the previously entered finding of
an unreasonable refusal and vacate, as well, the order of revocation
of Ferrell's driving privileges, and to thereafter dismiss the refusal
proceeding altogether.

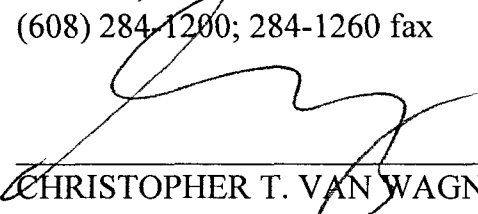
Dated at Madison, Wisconsin, 5/16 2013.

Respectfully submitted,

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CERTIFICATION

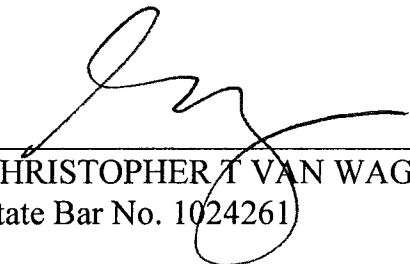
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Dated: May 16, 2013.

Signed,



CHRISTOPHER T VAN WAGNER
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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 § 809.19(2)(a) and that contains, at a minimum:

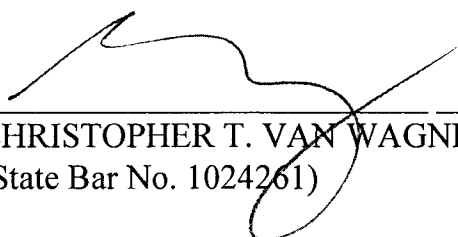
- (1) a table of contents;
- (2) the findings or opinion of the circuit court; and
- (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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: May 16, 2013.

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