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DISTRICT IV

March 4, 2019

To:

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You are hereby notified that the Court has entered the following opinion and order:

2018AP501-CR

State of Wisconsin v. James K. Wussow (L.C. # 2016CF423)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

James Wussow appeals a judgment of conviction. The issue is whether there was probable cause to administer a preliminary breath test. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

In support of probable cause, the State relies on the undisputed facts that the officer knew Wussow was subject to a .02 blood level restriction, and that Wussow told the officer he had consumed three beers that evening, with the most recent being approximately a half hour earlier. The officer further testified that, based on his experience, a person could reach the .02 level with one drink.

Wussow argues that consumption of three beers is not sufficient to provide probable cause. His argument is based mainly on *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918. In *Goss*, the court held that probable cause was present when the officer knew of the .02 limit, could smell alcohol on Goss, and knew that Goss “could drink only a very small amount before exceeding the legal limit that applied to him.” *Id.*, ¶26. Wussow argues that his case is different from *Goss* because here the officer did not smell alcohol.

Wussow’s argument fails because he appears to assume that the court held in *Goss* that probable cause exists *only* when the smell of alcohol is present. However, *Goss* does not say or imply that. Beyond that, Wussow does not clearly explain why he believes that his admitted consumption amount and time are insufficient to establish probable cause, when the officer believed that a person could reach the .02 level with one drink. We are satisfied that Wussow’s admitted consumption was sufficient.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

IT IS ORDERED that the judgment appealed is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals