

STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP882-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MITCHELL A. LANGE,

Defendant-Appellant.

On Appeal from an Order of the
Dane County Circuit Court, the
Honorable Diane M. Nicks,
Presiding

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF THE CASE.....	2
ARGUMENT.....	6
I. THERE WAS PROBABLE CAUSE TO ARREST FOR OWI WHERE THE DEFENDANT WAS OBSERVED DRIVING AT OVER 80 MPH ON THE WRONG SIDE OF THE ROAD AT ABOUT “BAR TIME,” HE CRASHED INTO A UTILITY POLE, AND HE WAS UNABLE TO PERFORM FIELD SOBRIETY TESTS BECAUSE HE WAS UNCONSCIOUS.	
II. THE PROBABLE CAUSE STANDARD DOES NOT REQUIRE SPECIFIC INDICIA OF ALCOHOL CONSUMPTION; RATHER, THE “TOTALITY OF THE CIRCUMSTANCES” STANDARD REQUIRES THAT ALL FACTS SUGGESTIVE OF IMPAIRMENT BE CONSIDERED.	
CONCLUSION.....	11
CERTIFICATION.....	13

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<u>Dunlap v. Pennsylvania</u> , 129 S. Ct. 448, 449, WL 4550630 (2008).....	8
<u>State v. Higginbotham</u> , 162 Wis. 2d 978, 989 471 N.W. 2d 24 (1991).....	6, 8
<u>State v. Kasian</u> , 207 Wis. 2d 611, 558 N.W. 2d 687 (Wis. App 1996).....	10
<u>State v. Kutz</u> , 267 Wis. 2d 531, 671 N.W. 2d 660 (Wis. App 205. 2003).....	7
<u>State v. Multaler</u> , 252 Wis. 2d 54, 643 N.W. 2d 437 (Wis. App 35, 2002).....	6
<u>State v. Parker</u> , 256 Wis. 2d 154, 647 N.W. 2d 430 (Wis. App 159. 2002).....	6
<u>State v. Post</u> , 301 Wis. 2d 1, (Wis. 60. 2007).....	8
<u>State v. Sykes</u> , 279 Wis. 2d 742, 695 N.W. 2d 277 (Wis. 48. 2005).....	6
<u>State v. Swanson</u> , 164 Wis. 2d 437, 475 N.W. 2d 148.....	9
<u>State v. Wille</u> , 185 Wis. 2d 673, 518 N.W. 2d 325 (Wis. App 1994).....	10
<u>Washburn v. Smith</u> , 308 Wis. 2d 65, 746 N.W. 2d 243 (Wis. 23. 2008).....	9, 10
 <u>STATUTES CITED</u>	
§346.63 (1)(a), Wis. Stats.....	2

INTRODUCTION

The plaintiff-respondent-petitioner, State of Wisconsin, by its attorney, Dane County Assistant District Attorney Tim Kiefer, requests this court to reverse the decision and order of the Wisconsin Court of Appeals, District IV. *State v. Lange*, No. 2008AP882-CR, slip op. at ¶ 14 (Ct. App. Oct. 2, 2008). (P-Ap. 7-8).

ISSUES PRESENTED FOR REVIEW

1. Was there probable cause to arrest for OWI where the defendant was observed by police driving on the wrong side of a four-lane road at speeds over 80 m.p.h. in a 30 m.p.h. zone shortly after “bar time,” and crashed into a utility pole causing his car to flip onto its roof and rendering him unconscious and unable to perform field sobriety tests?

The court of appeals held that there was not probable cause. *State v. Lange*, slip op. at ¶14 (P-Ap. 7-8).

2. To establish probable cause to arrest for OWI, must the state prove in every case specific “indicia” of intoxicant usage such as odors of intoxicants, the driver’s admission to using intoxicants or the presence of intoxicant containers? Or, can probable cause be established without such indicia when the totality of the circumstances still support a reasonable inference that the driver was impaired by intoxicants?

The court of appeals held as a matter of law that probable cause was lacking where there were no such specific indicia of intoxicant usage. *State v. Lange*, slip op. at ¶14 (P-Ap. 7-8).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication. For the reasons explained in detail *infra*, the issues presented by this case will clarify the law on probable cause and therefore this Court's decision will be of substantial precedential value.

STATEMENT OF THE CASE

Mitchell Lange (Lange) was charged with Operating a Motor Vehicle While Intoxicated – 2nd Offense, contrary to Wis. Stat. 346.63 (1)(a), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration – 2nd Offense, contrary to Wis. Stat. 346.63(1)(b). *State v. Lange*, slip op. at ¶1. (P.Ap. 1-2). Lange filed a motion to suppress evidence, alleging that there was not probable cause for his arrest and subsequent blood draw. *State v. Lange*, slip op. at ¶4. (P.Ap. 3).

Following an evidentiary hearing, the trial court determined that there was probable cause to arrest, and therefore denied Lange's motion. *Id.*

Following the denial of Lange's suppression motion, he entered a no contest plea and was found guilty. (P.Ap. 53). He then appealed the denial of the suppression motion. *State v. Lange*, slip op. at ¶4. (P.Ap. 3).

The Wisconsin Court of Appeals, District IV, reversed. *State v. Lange*, slip op. at ¶14. (P.Ap. 7-8).

The facts in this case are undisputed. *Lange*, slip op. at ¶2 (P.Ap. 2). On Sunday, January 21, 2007, at approximately 2:52 a.m., Maple Bluff Police Officer Don Penly (Penly) was off duty and returning home from work. (R.21: 7; P.Ap. 15) As he drove down Sherman Avenue, Penly observed a white vehicle cross the center line by at least 24 feet as it was driving toward him.

(R.21: 7-8; P.Ap. 15-16). Penly also observed that the vehicle was traveling at a speed between 40 and 45 miles per hour in a 30 mile per hour zone. (R.21: 7; P.Ap. 15). There was no other traffic on the street at that time. (R.21: 11-12; P.Ap. 19-20). Shortly before making these observations, Penly had passed Maple Bluff Police Officer Margaret Hoffman (Hoffman), who was parked and running stationary radar. (R.21: 8, 21; P.Ap. 16, 29). When Penly saw Hoffman turn on her lights and pursue the white vehicle, he turned around and followed her. (R.21: 9; P.Ap. 17).

Hoffman testified that at approximately 2:53 a.m., she observed a white vehicle drive past her in the farthest left-hand lane of the four lane road. (R.21: 21, 23; P.Ap. 29, 31). The vehicle continued to travel in this lane for about 50 to 75 feet before it moved back into the proper lane. (R.21: 22; P.Ap. 30). Hoffman visually estimated that the vehicle was traveling at a speed of 45 miles per hour in a 30 mile per hour zone. (R.21: 22; P.Ap. 30). Hoffman began to pursue the vehicle and turned on her red-and-blue lights. (R.21: 22-3; P.Ap. 30-31).

With Hoffman's squad in pursuit with its lights flashing, the defendant's vehicle sped up. (R.21: 22-23; P.Ap. 30-31). Hoffman testified that she was driving at 84 miles per hour, but was still not able to catch up to the defendant's vehicle. (R.21: 23; P.Ap. 31). Hoffman observed the vehicle once again swerve into the left-hand lane. (R.21: 23; P.Ap. 31). The defendant made a hard right turn, and Hoffman then saw a cloud of gray smoke. (R.21: 24; P.Ap. 32). The road conditions at this time were dry and the roadway was free of debris. (R.21: 24; P.Ap. 32).

When Hoffman arrived at the scene, she observed that the vehicle had rolled over and was now upside down. (R.21: 25; P.Ap. 33). The defendant's car had sheared off a utility pole, and the upper half of the pole was hanging by the wires. (R.21: 25; P.Ap. 33). Loud music was playing from the vehicle. (R.21: 26; P.Ap. 34).

Penly arrived soon after Hoffman. (R.21: 10; P.Ap. 18). He saw the defendant, who had been thrown from the vehicle, lying on the sidewalk. (R21: 17; P.Ap. 25). Blood was coming out of the defendant's nose and mouth and he was unconscious. (R21: 13; P.Ap. 21).

Both officers testified that the smell of gasoline was so strong that it was all that they were able to smell at the scene. (R.21: 12-13, 26; P.Ap. 20-21, 34). The officers did not search the vehicle because the gas tank was on top of the upside-down car, gasoline was pouring through the car, and the officers believed a fire or explosion might soon occur. (R.21: 13, 15, 27-28; P.Ap. 21, 23, 35-36). They could not perform field sobriety tests because the defendant was unconscious. (R.21: 15, 28; P.Ap. 23, 36).

At the scene, the two officers discussed their observations. Penly told Hoffman that he had observed the defendant speeding and crossing the center line before she had observed the vehicle. (R.21: 29-30; P.Ap. 37-38).

The officers testified that the timing of the incident was also an important consideration. (R.21:17, 29; P.Ap. 25, 37). Bar time traffic from downtown Madison normally arrives in the Village of Maple Bluff around 3 a.m. (R.21: 17, 29; P.Ap. 25, 37). Hoffman further testified that the day of the week (early Sunday morning) was significant. Many people tend to drink on Friday and Saturday nights because they don't have to work the next day. (R.21: 29; P.Ap. 37).

Based on her own observations, what she learned from Penly, and her experience as a Maple Bluff police officer, Hoffman placed the defendant under arrest for OWI. (R.21: 28; P.Ap. 36).

In an oral ruling, the circuit court held that there was probable cause on the basis of the "driving record plus bar time." (R.21:42; P.Ap. 50). The circuit court

held that where "horrendous driving" occurs at about the same time that the bars are closing, "the first thought is that they've been drinking and driving." (R:21:42-43; P.Ap. 50-51).

The circuit court further explained its decision as follows:

There may be some other possibilities like oh my gosh, they're having a heart attack or oh, they're just emotional at the moment, but if it's 2:30 or 3:00 in the morning those are way down the line. The most probable explanation for that kind of driving is someone's drinking and driving, there's a lack of control of the vehicle, there's a show of lack of judgment, there is the fact that it's not temporary but rather appears to be going on over an extended time period [and] while in fact some people who are slightly intoxicated work hard to control that, people who are really intoxicated really don't care, they don't give a rip, they're not trying to hide it from anyone, they're, from what I gather in this case, playing loud music, going way over the speed limit, driving in the wrong lane and then crashing. So I do find there is probable cause on the facts before me. Even though there is not the odor of intoxicants . . . this is a pretty extended observation of driving, there are multiple judgment errors and these are occurring at bar time at about the time necessary for someone to get to Maple Bluff from downtown, I think there certainly is a reason to believe that the driver of the vehicle was probably drinking."

(R.21: 43-44; P.Ap. 51-52).

ARGUMENT

- I. THERE WAS PROBABLE CAUSE TO ARREST FOR OWI WHERE THE DEFENDANT WAS OBSERVED DRIVING AT OVER 80 MPH ON THE WRONG SIDE OF THE ROAD AT ABOUT "BAR TIME," HE CRASHED INTO A UTILITY POLE, AND HE WAS UNABLE TO PERFORM FIELD SOBRIETY TESTS BECAUSE HE WAS UNCONSCIOUS.

The facts in this case are undisputed. *Lange*, slip op. at ¶2 (P.Ap. 2). Therefore, it is only necessary to determine whether those facts establish probable cause to arrest. The application of constitutional principles to the facts is a question of law that the reviewing court decides *de novo*. *State v. Parker*, 2002 WI App 159, ¶ 8, 256 Wis. 2d 154, 647 N.W. 2d 430.

Determining whether probable cause exists does not entail evaluating a laundry list that can be checked off until a certain number adds up to probable cause. Rather, "every probable cause determination must be made on a case-by-case basis, looking at the totality of the circumstances." *State v. Multaler*, 2002 WI 35, ¶ 34, 252 Wis. 2d 54, 643 N.W.2d 437.

Probable cause is a common-sense concept that requires only that evidence necessary to establish that guilt is more than a possibility. *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277. Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991) (quoted source omitted).

In determining whether there is probable cause, the court applies an objective standard, and it considers the information available to the officer, taking into account the officer's training and experience. *State v. Kutz*, 2003

WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. “When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.” *Id.*

Here, by far the most reasonable conclusion to be drawn from all the facts was that drawn by the officers. Lange was impaired by an intoxicant based on all of the following:

- He was operating well over the speed limit in the wrong lane of travel for a significant distance. (R.21:21-23; P.Ap. 29-31).
- He did not merely veer to the left or straddle the centerline – he was driving at least 24 feet over the line, in the furthest left lane of this four-lane road. (R.21:7-8; P.Ap. 15-16).
- When Officer Hoffman pursued with lights flashing, the defendant sped up to over 80 mph before crashing. (R.21:23-24; P.Ap. 31-32).
- This was shortly after bar time on a Sunday morning when Maple Bluff police expect cars to be heading home down Sherman Avenue from Madison bars to points north. (R.21:17, 29; P.Ap. 25, 37).
- There was no other traffic and the roadway was dry and free of debris. (R.21:24; P.Ap. 32).
- The car crashed into a utility pole and flipped over, throwing the defendant out of the vehicle. (R.21:17, 25; P.Ap. 25, 33).
- Loud music could be heard emanating from the upside-down car. (R.21:26; P.Ap. 34).

The only reasonable inference to be drawn from these facts is the one drawn by these officers; Lange was impaired as he careened down Sherman Avenue at bar time.

Impaired by what? Not conditions: the roadway was dry and free of debris. Not cell phone usage: one does not deviate that far over the centerline for that distance at that speed simply because one is using a cell phone while driving, nor speed up when pursued by police. Not falling asleep at the wheel: Lange was already speeding, but he significantly accelerated after the officer activated her lights. As the chief justice of the US Supreme Court recently remarked, “judges are not required to exhibit a naivete from which ordinary citizens are free.” *Pennsylvania v. Dunlap*, 129 S.Ct. 448, 449, 2008 WL 4550630 (Roberts, C.J., dissenting) (quoted source omitted).

The only reasonable inference to be drawn from these facts, then, is that Lange was impaired by drugs (legal or illegal) and/or alcohol. In short, he was intoxicated. Add to the equation the fact that this crash occurred at bar time, and the inference becomes compelling. See *State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 21 (poor driving takes on added significance when it occurs around bar time). Moreover, even if there were a competing inference that offered an innocent explanation for Lange’s driving, Hoffman was entitled to the reasonable inference that justified arrest. See *Kutz*, 2003 WI App at ¶ 12.

Probable cause is a “measure of the plausibility of particular conclusions about human behavior,” *State v. Higginbotham*, 162 Wis. 2d 978, 989 (1991), and here the conclusion that Lange was intoxicated was more than plausible or probable. It was the only reasonable inference to be drawn under the totality of the circumstances.

II. THE PROBABLE CAUSE STANDARD DOES NOT REQUIRE SPECIFIC INDICIA OF ALCOHOL CONSUMPTION; RATHER, THE “TOTALITY OF THE CIRCUMSTANCES” STANDARD REQUIRES THAT ALL FACTS SUGGESTIVE OF IMPAIRMENT BE CONSIDERED.

In its decision in the instant case, the court of appeals relied on *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 in its holding that probable cause was not shown. *Lange*, slip op. at ¶¶8-12 (P.App. 4-8). The issue before this Court is whether *Washburn County* requires affirmative proof of alcohol consumption, or if all facts suggestive of impairment be considered.

The court of appeals suggests that probable cause can exist only where there is some affirmative proof (or, using its term, “indicia”) of intoxicant use (such as the odor of alcohol, the driver’s admission to drinking, empty beer cans, or the like). *Lange*, slip op. at ¶14 (P.Ap. 7-8). In so holding, the court of appeals contradicted precedent of this court requiring that the totality of the circumstances be considered.

In *Washburn County*, this Court unanimously found probable cause on facts similar to but less aggravated than those presented here. The only difference is that the officer smelled alcohol on Smith’s breath and Smith admitted to drinking for some time before he was stopped. 308 Wis. 2d 65, ¶¶8-12. As here, there were no field sobriety tests. Smith argued that the absence of any field sobriety tests prevented, as a matter of law, a probable cause finding. Smith relied on a footnote in *State v. Swanson*, 164 Wis. 2d 437, 453-54 n.6, 475 N.W.2d 148 (1991), for that proposition. 308 Wis. 2d 65, ¶24. This Court rejected that notion, holding:

Swanson did not announce a general rule requiring field sobriety tests in all cases as a prerequisite for establishing probable cause to arrest a driver for operating a motor vehicle while under the influence of an intoxicant.

308 Wis. 2d 65, ¶33.

Moreover, in the very next paragraph of *Washburn County*, this court added: "The question of probable cause must be assessed on a case-by-case basis." *Id.* at ¶34.

The same reasoning should be applied to the court of appeals' requirement here that affirmative evidence of intoxicant usage is as a matter of law a prerequisite to establishing probable cause for an OWI arrest whether or not other circumstances already point in that direction.

The State acknowledges that in some previous cases where probable cause for OWI was found, the arresting officers did detect the odor of intoxicants. *See Washburn County* at ¶10, 308 Wis. 2d at 72, *State v. Wille*, 185 Wis. 2d 673, 683-684, 518 N.W.2d 325 (Ct. App. 1994), and *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W. 2d 687 (Ct. App. 1996). Nevertheless, in none of these cases did the reviewing court require that an odor of intoxicants be detected in order to establish probable cause. Moreover, in none of the above-cited cases were the officers faced with the unusual circumstances presented in the instant case, where the strong odor of gasoline masked any other odors which might be present, the possibility of an imminent fire or explosion precluded searching the vehicle for bottles or cans, and the defendant's medical condition prevented any field sobriety tests from being performed. It is true that "[g]ood reasons for a lack of evidence are not themselves evidence," *Lange*, slip op. at ¶14, fn. 5 (R.21:7-8, P.Ap. 7-8). But it is also true that the scenario presented here is not the same as one where the defendant passed field sobriety tests, a search of the vehicle found no cans or

bottles, and the officer could not detect any odor of intoxicants in the absence of any masking odors.

Evidence of intoxicant usage – such as odors, an admission or containers – certainly strengthens the existence of probable cause, but its absence should not be held as a matter of law to defeat its existence. There is nothing in the case law that *requires* such proof. This is to be a case-by-case determination based upon common sense and reasonableness. In this case, common sense and reasonableness support the finding of probable cause.

CONCLUSION

Therefore, for the above-stated reasons, the plaintiff-respondent-petitioner, State of Wisconsin, respectfully requests that this court reverse the decision of the court of appeals.

Dated this 10th day of February, 2008.

Respectfully submitted,

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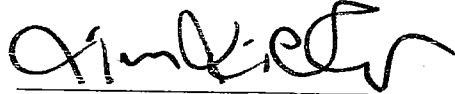
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CERTIFICATION

I certify that this petition meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. This brief contains 3,242 words.

A handwritten signature in black ink, appearing to read 'Tim Kiefer', written over a horizontal line.

Tim Kiefer

STATE OF WISCONSIN
IN SUPREME COURT

No. 2008 AP 882 CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MITCHELL A. LANGE,

Defendant-Appellant.

APPENDIX TO PLAINTIFF-RESPONDENT-PETITIONER'S BRIEF IN CHIEF

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TABLE OF CONTENTS

COURT OF APPEALS DECISION.....	1
TRANSCRIPT OF MOTION HEARING AND ORAL RULING	9
JUDGMENT OF CONVICTION.....	54

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP882-CR
STATE OF WISCONSIN

Cir. Ct. No. 2007CT565

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL A. LANGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DIANE M. NICKS, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, J.¹ Mitchell Lange appeals from a judgment convicting him of operating a motor vehicle while intoxicated, second offense, contrary to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a). Lange argues that police did not have probable cause to arrest him for OWI after witnessing his erratic driving at bar time leading to a one-car crash. The State responds that those facts amount to probable cause to believe Lange had committed the offense of OWI. We conclude that the facts of this case do not establish probable cause to arrest Lange for OWI, and therefore reverse and remand with directions to grant Lange's motion to suppress.

Background

¶2 The following facts are undisputed. On January 21, 2007, at 2:52 a.m., Police Officer Don Penly was driving home from work when he saw a white car traveling ten to fifteen miles per hour above the speed limit on Sherman Avenue in Maple Bluff. The white car was traveling toward Penly, and Penly witnessed the car significantly cross the road's center line in his direction.

¶3 At approximately the same time, Police Officer Margaret Hoffman was running stationary speed radar at the intersection of North Sherman Avenue and Commercial in Maple Bluff when she observed the white car traveling in the far left-hand lane of the four-lane road, so that it was two lanes into the southbound side while travelling northbound. She visually estimated the car was travelling at fifteen miles per hour over the speed limit. Hoffman followed the vehicle and activated her overhead lights. She observed the car travelling for fifty to seventy-five feet before it started moving back toward the correct lane. Hoffman increased her speed to eighty-four miles per hour, but was unable to close the distance between herself and the white car. She then saw a cloud of gray smoke up ahead, and when she reached it, she saw a downed utility pole held off the ground by its wires, the white car flipped onto its roof, and Lange lying unconscious on the ground. The only thing she smelled at the scene was gasoline.

¶4 When Penly saw in his rearview mirror that Hoffman had activated her overhead lights, he turned his car around and travelled in Hoffman's direction. When he reached her location, he also witnessed the sheared utility pole held up by its wires, the white car on its roof and Lange lying unconscious on the ground. The only smell he detected on the scene was gasoline. After Penly and Hoffman discussed their observations, and the fact that it was around bar time, Hoffman arrested Lange for OWI. Lange moved to suppress the evidence obtained when his blood was drawn following his arrest, arguing police did not have probable cause to arrest him.² The trial court denied Lange's motion, and he appeals.

Standard of Review

¶5 Whether an arrest was supported by probable cause is a question of constitutional fact. *State v. Secrist*, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). Questions of constitutional fact present a mixed question of fact and law; we review the trial court's factual findings under the clearly erroneous standard, but review the application of those facts to constitutional principles independently. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. Because the facts here are undisputed, we address only the question of law of whether the facts supported probable cause, which we review de novo. *See id.*

² Lange concedes that if police had probable cause to arrest him, they had authority to draw his blood.

Discussion

¶6 The parties present a very narrow issue for our review: whether there was probable cause to arrest Lange for OWI.³ We conclude that there was not.

¶7 “There is probable cause to arrest when the totality of the circumstances within [the arresting] officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277 (citation omitted). Further, “[t]he objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.” *Id.* (citation omitted).

¶8 The supreme court recently revisited the issue of probable cause to arrest for OWI in *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. There, Smith was arrested for OWI after police observed him driving well above the speed limit, he had a delayed response and crossed the highway’s double-yellow centerline twice in the process of pulling over, and police detected alcohol on his breath and he admitted he had been drinking. *Id.*, ¶¶8-12. Smith argued that the facts amounted only to reasonable suspicion of OWI, but not probable cause to arrest. *Id.*, ¶7.

³ “Although an appellate court may, *sua sponte*, consider an issue not raised by the parties, we will usually decline to do so, and we see no reason to depart from that practice in this case.” *State ex rel. S.M.D. v. F.D.L.*, 125 Wis. 2d 529, 532, 372 N.W.2d 921 (Ct. App. 1985) (citation omitted).

¶9 In concluding that police had probable cause to arrest Smith, the supreme court reviewed two of its oft-cited cases relied upon by the defendant (and which Lange relies on here), *State v. Seibel*, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), and *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). See *Smith*, 308 Wis. 2d 65, ¶¶17-37. The *Smith* court distinguished *Seibel* because in *Seibel*, the court held that police needed only reasonable suspicion to draw Seibel's blood when they had probable cause to arrest for negligent homicide by use of a motor vehicle, and did not address whether police had probable cause to arrest for OWI. *Smith*, 308 Wis. 2d 65, ¶20. The *Seibel* court then determined there was reasonable suspicion to draw Seibel's blood based on police observation of Seibel's erratic driving and subsequent serious accident, a strong odor of alcohol on Seibel's fellow motorcycle drivers, an officer's belief that he smelled alcohol on Seibel, and Seibel's belligerent and out-of-touch conduct.. See *Smith*, 308 Wis. 2d 65, ¶21. As Lange argues here, Smith argued that *Seibel* supported his position that police lacked probable cause based on similar facts. See *Smith*, 308 Wis. 2d 65, ¶17. The supreme court stated that *Seibel* was not dispositive because, first, that court never considered whether those facts amounted to probable cause; and, second, because the police in *Smith* had greater indicia of intoxication than in *Seibel*: unlike Seibel, Smith admitted he had been drinking and gave inconsistent statements to the police about the amount, putting his credibility in doubt. *Smith*, 308 Wis. 2d 65, ¶¶22-23.

¶10 Next, the supreme court distinguished *Swanson*. There, police observed Swanson drive onto the sidewalk in front of a tavern and nearly hit a pedestrian at 2:00 a.m. *Smith*, 308 Wis. 2d 65, ¶25. When the police spoke to Swanson, they smelled intoxicants on his breath. *Id.* Police searched Swanson and discovered contraband, then arrested him for possession of a controlled

substance. *Id.*, ¶¶26-27. The court concluded that the search violated the Fourth Amendment of the United States Constitution because Swanson was not under arrest when searched. *Id.*, ¶¶27-29. Although the State argued that the police could have arrested Swanson for a number of offenses, the court rejected that argument “[b]ecause the State failed to show that an arrest for anything other than possession of a controlled substance was ever implied, attempted or accomplished.”⁴ *Id.*, ¶29. Although the court did not address whether probable cause for OWI existed, it observed in a footnote that “[u]nexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.” *Id.*, ¶32 (quoting *Swanson*, 164 Wis. 2d at 453 n.6).

¶11 The *Smith* court explained that *Swanson* did not guide its outcome because, first, “*Swanson* did not announce a general rule requiring field sobriety tests in all cases as a prerequisite for establishing probable cause to arrest a driver for operating a motor vehicle while under the influence of an intoxicant.” *Smith*, 308 Wis. 2d 65, ¶33. Instead, probable cause must always be assessed on a case-by-case basis. *Id.*, ¶34. Second, the court distinguished *Swanson* because in *Smith* there were greater indicia of intoxication: Smith’s admission to drinking an indeterminate number of drinks during ten hours at a bar prior to driving. *Smith*, 308 Wis. 2d 65, ¶34.

⁴ The supreme court later abrogated one of its holdings in *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), in *State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. In *Sykes*, 279 Wis. 2d 742, ¶27, the supreme court held that police are not required to arrest for the same crime that supported probable cause to arrest prior to a search.

¶12 Thus, while not retreating from its holdings in *Seibel* and *Swanson*, the supreme court held that the facts in *Smith* were sufficient to establish probable cause to arrest for OWI. While not establishing any bright line rules and reiterating that probable cause is always determined on a case-by-case basis, the court emphasized that the significant indicia of intoxication in *Smith*—the odor of intoxicants and Smith’s admission of drinking—distinguished it from those cases where the indicia of intoxication were not as strong.

¶13 Our prior cases follow the reasoning reaffirmed in *Smith*. In *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), we concluded that there was probable cause to arrest for OWI when police found Kasian injured at the scene of a one-car accident, smelled intoxicants on Kasian, and noted Kasian’s speech was slurred. Similarly, in *State v. Wille*, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994), we concluded that police had probable cause to arrest Wille after Wille struck a car parked on the shoulder of a highway and the police smelled intoxicants on Wille at the hospital, knew that a firefighter had smelled intoxicants on Wille as well, and Wille told them he had “to quit doing this.”

¶14 In contrast, the facts here show no actual evidence of alcohol consumption. Although erratic driving and a crash at bar time create a suspicion of intoxicated driving, it is only the possibility of intoxicated driving. See *Sykes*, 279 Wis. 2d 742, ¶18. Unlike in *Smith*, *Kasian*, and *Wille*, police did not smell any intoxicants on the scene and Lange did not admit to drinking alcohol prior to his arrest, and there are no comparable indicia of intoxication.⁵ Accordingly, we

⁵ We recognize the State’s argument that any odor of intoxicants was masked by the smell of gasoline, police were focused on saving Lange rather than on searching for evidence of
(continued)

reverse and remand with directions to suppress the evidence obtained in drawing Lange's blood.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

intoxicants, and that Lange was unconscious when police arrived at the scene. Nonetheless, if the particular facts of a case preclude a finding of probable cause, an arrest is not justified. Good reasons for a lack of evidence are not themselves evidence.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 5

DANE COUNTY

=====

STATE OF WISCONSIN,

Plaintiff,

-VS-

CASE NO:07-CT-565

MITCHELL LANGE,

Defendant.

COPY

=====

PROCEEDING: Motion Hearing;

BEFORE: The Honorable DIANE NICKS,
Circuit Court Judge;

DATE: August 7, 2007;

APPEARANCES: The State of Wisconsin represented
by Assistant District Attorney
TIM KIEFER;

MITCHELL LANGE present with
Attorney STEVEN COHEN,
Madison, Wisconsin.

Heather Kieta
Official Court Reporter

INDEX OF WITNESSES

DON PENLY

PAGE

Direct Examination by Mr. Kiefer

5

MARGARET HOFFMAN

Direct Examination by Mr. Kiefer

19

1 (Proceedings commenced.)

2 THE CLERK: State versus Mitchell
3 Lange, 07 CT 565.

4 MR. KIEFER: State appears by
5 Assistant District Attorney Tim Kiefer.

6 MR. COHEN: Mr. Mitchell Lange
7 appears in person with his attorney
8 Steve Cohen.

9 THE COURT: All right. We're
10 here -- the Court has scheduled an
11 evidentiary hearing. I have reviewed
12 Mr. Kiefer's motion to dismiss and
13 Mr. Cohen's response. Do either of the
14 attorneys wish to make any further
15 argument on that?

16 MR. KIEFER: Well, Your Honor, I
17 think my motion's fairly
18 self-explanatory. I won't rehash it. I
19 guess in replay to what Mr. Cohen had
20 stated in his letter, I realize he's now
21 attaching a copy of one of the police
22 reports and I think that that really
23 doesn't remedy the problem that's
24 essentially saying to the State and the
25 Court here's the raw data and now you

1 can go through it and try to figure out
2 what the basis for the motion is. I
3 think it's not remedying the problem
4 that it's not sufficiently specific
5 motion with a sufficient factual basis
6 to warrant an evidentiary hearing.

7 THE COURT: All right. Mr. Cohen.

8 MR. COHEN: Yeah, Judge, the nature
9 of the motion is that there wasn't
10 enough evidence to arrest Mr. Lange or
11 take his blood. So what facts do I
12 assert.

13 I'm asserting that there's a lack
14 of facts, that there's certain
15 circumstances, just simply I'm saying
16 there's not enough evidence there and as
17 I put in my letter what can I do? Well,
18 state there's an absence of this and
19 absence of that, so, I mean, I think the
20 reports indicate what the facts are and
21 I'm just saying that under the totality
22 of the circumstances there's not going
23 to be probable cause for a blood draw or
24 the arrest.

25 THE COURT: I think in this case

1 that because it is a motion that
2 challenges the sufficiency of the
3 evidence that's necessarily not a motion
4 that will contain a great factual
5 detailing and while it is extremely
6 short and the allegation that there's
7 some erratic driving and -- but no
8 evidence of use of intoxicants together
9 is sufficient to entitle the defendant
10 to an evidentiary hearing, so I'm going
11 to deny the motion to dismiss for that
12 reason and I'm prepared to hear the
13 motion.

14 MR. KIEFER: Well, we are going to
15 call our first witness then and that is
16 Officer Penly of the Maple Bluff Police
17 Department. I'll go get him.

18 (Clerk swears the witness.)

19 DON PENLY,

20 called as a witness,

21 after having first been duly sworn,

22 testified as follows:

23 DIRECT EXAMINATION BY MR. KIEFER:

24 Q Can you please state your name for the record
25 and spell your last name.

1 A Officer Don Penly, P e n l y.
2 Q Officer Penly, what is your occupation?
3 A I'm a police officer.
4 Q And for whom are you a police officer?
5 A The Village of Maple Bluff.
6 Q How long have you been employed as a police
7 officer for the Village of Maple Bluff?
8 A For eight years in May.
9 Q And could you very briefly describe some of the
10 training you have received while a police
11 officer?
12 A Some of the training, I attended the academy of
13 course out of MATC after graduating with an
14 Associate's Degree in police science.
15 Throughout the years I have had various
16 trainings in gang task force, standardized
17 field sobriety. I went to school to become a
18 FTO, which is a Field Training Officer, and I'm
19 certified to do that. I've attended classes in
20 radar, various other drunk driving courses,
21 courtroom testimony, things like that.
22 Q And during your career with the Maple Bluff PD
23 about how many OWI cases have you worked on?
24 A I would have to say somewhere between a hundred
25 to maybe 120, somewhere in that area.

1 Q And have you also worked on injuries involving
2 accidents?

3 A When you say working could you --

4 Q Well, involved with investigating or responding
5 to in some way injury related accidents?

6 A Yes, at least preliminary investigations.

7 Q Now I'd like to direct your attention to
8 January 21st, 2007, at about 2:52 in the
9 morning. What were you doing at that date and
10 time?

11 A I was on my way home from work.

12 Q Were you at that moment off duty?

13 A I was off duty, yes.

14 Q Were you in uniform or out of uniform?

15 A I was I guess I'd say halfway in uniform. I
16 believe I still had my boots and pants on, just
17 a regular T-shirt.

18 Q And as you were driving did you notice anything
19 unusual at roughly 2:52 a.m.?

20 A As I was driving down North Sherman Avenue
21 towards Fordem Avenue I saw a white car coming
22 at me at between 40 and 45 miles per hour.

23 Q What is the speed limit in that area?

24 A 30.

25 Q Did the white vehicle do anything else unusual?

1 A The white vehicle crossed the center line
2 pretty significantly as it was coming towards
3 me.
4 Q About how many feet across the line did it go?
5 A I'd say probably at least 24 feet.
6 Q 24 feet?
7 A Yeah.
8 Q Now the location that you saw it cross the
9 center line, was that in Maple Bluff?
10 A Yes, it was.
11 Q And was it in the County of Dane and State of
12 Wisconsin?
13 A Yes.
14 Q Now after you saw the vehicle cross the center
15 line what, if anything, did you do?
16 A I continued driving southbound. At that point
17 a couple of things were going through my head,
18 of course I had just passed the other Officer
19 who was parked in the parking lot of Kirk
20 Appliance. From what I understand that's a
21 good place where we would normally run radar at
22 night. And I was positioned over to the right
23 side -- the far right side of my lane as the
24 white car and I passed -- and I normally drive
25 like that later at night because of such

1 incidents because I've seen it before, that's
2 just for my own protection that's the way that
3 I drive at night.

4 Q And as you drove along, what happened, what
5 happened next as you were driving along?

6 A As I continued driving I started slowing up as
7 I approached the intersection of Fordem and
8 Lakewood Gardens and my thoughts were that he
9 was probably going to be going past her radar
10 assignment at an excessive amount of speed and
11 I was thinking that there might be a traffic
12 stop, and as I looked in my rear view mirror I
13 saw her lights go on and saw her squad go after
14 the white car.

15 Q And what did you do, if anything, at that
16 point?

17 A At that point I turned around, I still had my
18 side arm on me so at that point I turned around
19 and I was going to act as a standby backup
20 while she waited for Madison PD if it in turn
21 needed to be -- if they needed to be called for
22 any reason basically just for her protection if
23 I could offer any.

24 Q And what happened next?

25 A I turned my vehicle around and started back

1 northbound on North Sherman Avenue. As I
2 continued on past the boundaries of the Village
3 of Maple Bluff at Oxford Place or North
4 Sherman, I still couldn't see her lights or
5 white car, so I began looking down side streets
6 and I kept driving northbound until I came upon
7 the white vehicle or a white vehicle at that
8 point next to a sheared telephone pole on its
9 roof.

10 Q What did you do then?

11 A At that point I pulled into a nearby parking
12 lot and I saw that the other officer was
13 already up at -- there was a person laying in
14 the street or on the sidewalk and it appeared
15 that she was checking his pulse. I saw
16 various, what I would assume to be civilians,
17 kind of milling about the area. I checked the
18 area before entering the scene to make sure
19 that there wasn't anything horribly dangerous
20 that I was going to be walking into. I did see
21 that the one telephone pole had been sheared
22 off at the bottom and the two poles next to it
23 were holding that one up by the wires and, of
24 course, the vehicle was on its roof, and as I
25 started getting towards the scene, I was in my

1 mind just going through what I needed to do to
2 possibly extract everybody away from this car
3 because I could smell a very strong odor of
4 gasoline.

5 Q If I could bring you back a little bit to the
6 vehicle itself. Was the white vehicle that you
7 saw flipped over on the roof crashed into the
8 telephone pole, was that the same white vehicle
9 that you had seen pass you a few minutes
10 earlier?

11 A The vehicle that I saw that was crashed had
12 very little resemblance to a vehicle, so I
13 couldn't say if it was the same one. It was a
14 white vehicle, it was heading in that direction
15 and I had lost sight of it of course as I had
16 turned around.

17 Q About how long did you lose visual contact of
18 the vehicle?

19 A I want to say maybe one to two minutes.

20 Q Was -- and what time of night was this all
21 occurring?

22 A This was at around 3:00 a.m., 2:50, somewhere
23 in there.

24 Q Was traffic heavy, light, moderate at that
25 time?

1 A There was no other cars on the road.
2 Q And so that would also mean no other white cars
3 on the road?
4 A Yeah, I didn't see any other vehicles at all.
5 Q Would you have any basis to believe that that
6 white vehicle that you saw flipped over on the
7 roof was not in fact the same vehicle that
8 passed you?
9 A I wouldn't have any basis to believe that it
10 was any other vehicle but that one.
11 Q Now going back to the scene of the accident.
12 You had indicated you had smelled the smell of
13 gasoline; is that correct?
14 A Yes.
15 Q How strong was that smell of gasoline?
16 A Very strong.
17 Q Was the smell of gasoline sufficiently strong
18 that it masked whatever other odors might have
19 been present at that time?
20 A All I could smell was gasoline.
21 Q Could you smell anything else at all?
22 A No.
23 Q Would you have been able to smell anything
24 else?
25 A I don't know, all I know is that all I could

1 smell is gasoline at the scene.

2 Q Now -- well, going back to where you are coming
3 up on the scene, what actions did you perform
4 at that point?

5 A When I arrived?

6 Q Yes.

7 A When I first arrived I exited my car, again
8 evaluated the scene for safety as best I could,
9 came up, I looked at the person lying on the
10 sidewalk, saw that they had blood coming from
11 their mouth and nose and they were unconscious.
12 I was at that point also hearing sirens
13 assuming that that was the City of Madison
14 paramedics, which it was, and I started
15 assisting Officer Hoffman as best as I could
16 getting -- I also -- I think the first thing
17 that I did was I made sure that the civilian's
18 ~~got out of the way as fast as they could~~
19 because I was actually in my mind making
20 preparation to move the driver of the vehicle
21 away from the car because I was very concerned
22 that there could be, you know, a fire or an
23 explosion of some sort.

24 Q At some point in the process what was your top
25 priority at this point in the process?

1 A My top priority at that moment was the life of
2 the person on the sidewalk, the life of the
3 other officer that was right next to me and to
4 make sure that the civilians were as far away
5 from that car as possible.

6 Q And between saving the life of the driver
7 versus investigating the driver for OWI, which
8 was a higher priority for you at that moment?

9 A I could care less about an OWI at that moment.

10 Q Now you've been trained however in
11 investigating OWI cases, correct?

12 A Yes.

13 Q And one of the -- is one of the indications of
14 OWI the smell of intoxicants?

15 A Yes.

16 Q And did you attempt to smell the area to see if
17 you could smell intoxicants?

18 A No.

19 Q And why not?

20 A I just wanted to make sure we were getting out
21 of there as fast as possible.

22 Q And are you trained to search the defendant's
23 vehicle when you suspect there could be an OWI
24 situation?

25 A Yes.

1 Q And in this case did you search the vehicle?
2 A No.
3 Q And why did you not search the vehicle?
4 A The vehicle was on its roof, it looked like an
5 accordion, it was crunched up pretty good, the
6 engine was still running, there was gas all
7 over the street and to me that just doesn't
8 seem like a very smart thing to do.
9 Q And are you trained to perform field sobriety
10 tests?
11 A Yes.
12 Q And did you perform any field sobriety tests on
13 the driver of the vehicle?
14 A No.
15 Q And why not?
16 A The driver was unconscious.
17 Q Now did you have occasion to have a
18 conversation with Officer Hoffman?
19 A Yes.
20 Q And did you during that conversation convey to
21 her any of your observations about what you had
22 seen that night?
23 A Yes, I did.
24 Q And what was -- let me back up. Did you draw a
25 conclusion based on your training and

1 experience as to whether or not there was in
2 your view probable cause for an arrest for
3 operating while intoxicated at this point?
4 A Could you rephrase that, I'm sorry I didn't
5 hear it.
6 Q Sure. Based on your training and experience
7 did you come to a conclusion as to whether or
8 not there was probable cause for an OWI arrest?
9 A Yes.
10 Q And what was that conclusion?
11 A My conclusion was based on what I saw and based
12 on what the other officer saw, that there was
13 probable cause to arrest for OWI.
14 Q And did you discuss your conclusion and the
15 reasons for your conclusion with Officer
16 Hoffman?
17 A Yes.
18 Q And did you have that conversation prior to the
19 time that Officer Hoffman made the arrest?
20 A Yes.
21 Q And what facts did you convey to Officer
22 Hoffman that you felt were relevant?
23 A Speed, crossing the center line, time of night.
24 Q And what was the last part?
25 A Time of the night that we're dealing with.

1 Q How is the time of the night why is that
2 important?

3 A Well, in the City of Madison bar time is 2:30
4 and lots of times being in the Village of Maple
5 Bluff on the north side of Madison bar time
6 traffic normally gets into the Village later
7 bar time traffic gets into the Village around
8 3:00 or so from downtown, so it's just based on
9 my experience for working for the Village of
10 Maple Bluff as well as the fact that the car
11 went through a telephone pole, too, so that's
12 all together encompassing with all of those
13 pieces of information.

14 Q Okay. And is -- you did see the defendant on
15 the sidewalk, correct?

16 A Yes.

17 Q And was he -- could you tell that he'd been
18 thrown onto the sidewalk or was he laying on
19 the sidewalk where someone had brought him out,
20 do you know?

21 A He had been thrown from the vehicle, or at
22 least it looked like that from my perspective.
23 That's as far as I can testify to that, I just
24 saw him on the sidewalk.

25 Q Okay. And while I'm sure the defendant looks

1 different today than he did at the time of
2 this?

3 A Yes.

4 Q Can you recognize if the driver of the vehicle
5 is present here in the courtroom today?

6 A From that night the recollection would be
7 pretty hazy, but I did see him in municipal
8 court pretty recently, so yes, that's the
9 person.

10 Q And could you identify where he is in the
11 courtroom by what color shirt he's wearing and
12 where he's sitting?

13 A Gentleman in the yellow shirt sitting at the
14 defense table.

15 MR. KIEFER: Ask that the record
16 reflect that the witness has identified
17 the defendant.

18 THE COURT: It will.

19 MR. KIEFER: Okay. I have no
20 further questions. Your Honor.

21 THE COURT: Mr. Cohen.

22 MR. COHEN: No questions.

23 THE COURT: All right. You can
24 step down.

25 (Witness is excused.)

1 MR. KIEFER: The State -- the State
2 would ask permission for Officer Penly
3 to remain in the courtroom since Officer
4 Hoffman's testimony, since Officer Penly
5 is done testifying.

6 MR. COHEN: No objection.

7 THE COURT: That's fine.

8 MR. KIEFER: The State calls
9 Officer Hoffman.

10 (Clerk swears the witness.)

11 MARGARET HOFFMAN,
12 called as a witness,
13 after having first been duly sworn,
14 testified as follows:

15 DIRECT EXAMINATION BY MR. KIEFER:

16 Q Can you please state your name for the record
17 and spell your last name.

18 A Margaret Hoffman, H o f f m a n.

19 Q And Ms. Hoffman, if you can move the microphone
20 closer it will be easier. Thank you.

21 Officer Hoffman, what is your occupation?

22 A I'm a police officer with the Maple Bluff
23 Police Department.

24 Q And how long have you been a police officer for
25 the Maple Bluff Police Department?

1 A Just over 11 months.

2 Q Could you briefly describe some of your
3 training that you've received as a police
4 officer?

5 A I've received field sobriety training. I've
6 done my field training as a new officer. I've
7 went to a 2-year academy. I've taken the
8 advance standing courses at the academy at
9 MATC.

10 Q And about how many OWI cases have you worked on
11 during your career as a police officer?

12 A I would say probably about 20.

13 MR. COHEN: Your Honor, I guess I'd
14 object to any experience she gained
15 after the arrest in this case. I think
16 we're relying on her experience as of
17 the night that she arrested Mr. Lange.

18 MR. KIEFER: I can rephrase the
19 question.

20 MR. COHEN: So --

21 BY MR. KIEFER:

22 Q As of January 21st of 2007, do you know about
23 how many OWI cases that you worked on as of
24 January 21st of 2007?

25 A My best guess would be between 10 and 15.

1 Q Now I would like to direct your attention to
2 2:53 a.m. on January 21st, 2007. Where were
3 you and what were you doing on that day and
4 time?
5 A At that time I was running our stationary radar
6 at the intersection of North Sherman and
7 Commercial in one of our parking lots.
8 Q Is the intersection of North Sherman and
9 Commercial in the Town of Maple Bluff or City?
10 A Village.
11 Q Village of Maple Bluff. Is that intersection
12 within the Village of Maple Bluff?
13 A Yes, it is.
14 Q And is that in Dane County, Wisconsin?
15 A Yes, it is.
16 Q While you were running the radar did you
17 observe anything unusual?
18 A I observed headlights in my outside-right
19 mirror, and as they drove past me they were in
20 the far left-hand lane, which is going
21 northbound in the southbound lanes.
22 Q How many lanes wide is the road at that point
23 total?
24 A It is four lanes wide at that point and it was
25 in the farthest left-hand lane.

1 Q So it was not one lane in the wrong lane, it
2 was actually two lanes in the wrong lane?
3 A Yes.
4 Q And how long did you observe the vehicle
5 driving up the wrong lane of the street?
6 A Best guess, again it would probably be 50 to
7 75 feet before it started moving back over.
8 Q And then what did it do at that point?
9 A Then it got back into the northbound lanes of
10 travel.
11 Q What speed was the vehicle driving at this
12 point?
13 A Approximately.
14 Q Well, I'm going back to when you first spotted
15 it when it was driving in the wrong lane. What
16 speed was it going at that point?
17 A Visual estimate it was about 45 miles per hour.
18 Q And what was the speed limit in that area?
19 A 30 miles per hour.
20 Q What did you do at that point?
21 A At this point I turned on my headlights and
22 attempted to get out after the vehicle.
23 Q Did you turn on your colored lights on top of
24 the vehicle?
25 A Not right away, but soon after I exited the

1 parking lot I did, yes.

2 Q And were you able to easily catch up with the
3 defendant vehicle, or not the defendant vehicle
4 but the vehicle?

5 A No, the vehicle kept pulling away from me.

6 Q And how fast were you going to try to catch up
7 with the vehicle?

8 A When I radioed in to dispatch I said that I was
9 going 84 miles per hour.

10 Q And with going 84 miles per hour are you
11 closing the gap?

12 A No, not at that point.

13 Q And by the way was this a white vehicle?

14 A Yes, it was.

15 Q Okay. What did you -- what happened next?

16 A I observed the vehicle swerve into the
17 left-hand lane going -- the southbound lane of
18 travel as he was still heading northbound and
19 make a hard right which looked like he was
20 going to --

21 Q Well, let me stop you there.

22 A Okay.

23 Q So when you said that he went into the
24 southbound lane of travel was this now a
25 separate incident of going in the wrong way on

1 the road?

2 A It was at least the second, he could have done
3 it more than that, but like I said he was too
4 far away from me to tell which side of the road
5 he was on.

6 Q Did you at all times have a visual on the
7 vehicle?

8 A I could see the taillights.

9 Q Sorry to interrupt you, you were talking about
10 a turn I believe?

11 A Yes, he had traveled into the southbound lanes
12 and had made a hard right turn, which looked
13 like he was going to be turning onto a street,
14 and then after he had done that I saw a cloud
15 of gray smoke come up.

16 Q What did you do then?

17 A I then radioed in that he had crashed and I had
18 pulled up to the scene, parked the squad about
19 50 feet from where his vehicle was.

20 Q And I don't mean to break up the narrative, but
21 just to clarify this, what were the road
22 conditions that night?

23 A At that particular time they were dry and free
24 of debris.

25 Q So going back to where you pulled up to the

1 scene. What did you do when you arrived?

2 A I arrived on the scene, I noticed a utility
3 pole hanging by the wires holding half the
4 utility pole above the ground. I noticed that
5 the vehicle was on the hood and roof of the car
6 so it had rolled over. I had gotten out of the
7 squad and looked for the defendant in the
8 vehicle, did not find him in the vehicle,
9 walked around -- I didn't walk, but I basically
10 walked around the vehicle as I was searching
11 the vehicle and noticed a white male on the
12 other side of the vehicle.

13 Q Is that white male who you saw on the other
14 side of the vehicle, is that white male here in
15 the courtroom today?

16 A Yes, he is.

17 Q And using where he's sitting and what he's
18 wearing, can you identify him for the record?

19 A Yes, he is wearing a yellow button up shirt in
20 the defendant chair over there.

21 MR. KIEFER: I would ask that the
22 record reflect that the witness has
23 identified the defendant.

24 THE COURT: It will.

1 BY MR. KIEFER:

2 Q Now at that point what was your priority at
3 that point in the process?

4 A My priority was not only to keep myself safe,
5 but to keep him safe and try to keep him alive.

6 Q And between saving the defendant's life and
7 investigating the OWI, which was the more
8 important priority to you at that point in the
9 process?

10 A Saving the defendant's life.

11 Q Now did you -- as you came up on the scene
12 could you just describe a little more of what
13 you were seeing and smelling and hearing if
14 anything?

15 A When I rolled up on the scene I first heard
16 loud music and a car alarm sounding, and as I
17 approached the defendant I smelled a strong
18 odor of gasoline. I also noticed that there
19 were many civilians out asking if they could
20 help in any way, shape or form.

21 Q Now with regard to the smell of gasoline, was
22 that smell strong enough that it would have
23 masked other smells in the area?

24 A Yes, I couldn't smell anything else other than
25 the gasoline.

1 Q And going back to your training and
2 investigating OWI's, is one of the things that
3 you're trained to look for the smell of
4 intoxicants when you are investigating an OWI?

5 A It is, yes.

6 Q And did you attempt to smell the area around
7 the defendant to see if you could smell any
8 intoxicants?

9 A I didn't want to get too close to the ground
10 because there was gasoline all over the place,
11 so as far away as I was all I could smell was
12 gasoline, so.

13 Q Now in your training with OWI are you trained
14 to conduct searches of suspect vehicle in
15 connection with an OWI?

16 A Yes, I am.

17 Q And did you conduct a search of the defendant's
18 vehicle in this case?

19 A I did not.

20 Q Why did you not search the vehicle?

21 A For personal safety and safety of the vehicle
22 it didn't seem safe. It was compacted.
23 Gasoline was pouring through the car because
24 the gas tank was on top, it was going through
25 the car. I was covered in gasoline and I felt

1 that if I went into the vehicle at that point I
2 don't know if I would have been able to get out
3 had it started on fire.

4 Q And was the vehicle's engine still running?

5 A It was.

6 Q Are you trained to perform field sobriety
7 tests?

8 A I am, yes.

9 Q And did you perform field sobriety tests in
10 this situation?

11 A No, I did not.

12 Q And why did you not perform field sobriety
13 tests?

14 A The defendant was unconscious and I did not
15 want to move him to perform any sort of
16 horizontal gaze nystagmus test, which I have
17 been trained to do, and the walk-and-turn, and
18 the one-leg stand with him laying on the
19 ground. I couldn't do those either.

20 Q Now at some point in this process you did
21 arrest the defendant for operating while
22 intoxicated, correct?

23 A Yes, I did.

24 Q And could you tell us what were the factors
25 that went into that decision?

1 A The factors that went into that decision were
2 his excessive speed, as not only passing me but
3 gaining speed as I was trying to catch up with
4 him, crossing the center line, driving in the
5 far leftbound lane heading northbound, the time
6 of day or time of night and the particular day
7 that it happened on.

8 Q Now why would that -- in your training and
9 experience why would that be relevant?

10 A We find that a lot of people tend to drink on
11 Fridays and Saturdays because they don't have
12 to work the next day and at that point that
13 would be when the bars close, driving from
14 downtown it takes approximately that long to
15 get to the Maple Bluff area from downtown.

16 Q And do you know what day of the week that was
17 occurring on?

18 A It was a Sunday morning at bar time, so he
19 would have been drinking Saturday night into
20 Sunday morning..

21 Q Okay. So what other factors if any played into
22 your decision?

23 A Officer Penly had contacted me on scene and
24 told me of his observations even before I had
25 seen the defendant's vehicle and those with his

1 estimated speed of when he -- Officer Penly saw
2 him, Officer Penly also told me that he had
3 crossed the center line when he passed him.

4 Q And I believe you testified at some length
5 about the accident. Did the fact of the
6 accident itself play any role in your decision?

7 A Yes, the inability to control the vehicle
8 driving left of center and with the way the
9 vehicle had been in that accident led me to
10 believe that he could have been under the
11 influence of alcohol.

12 MR. KIEFER: I have no further
13 questions, Your Honor.

14 MR. COHEN: No questions.

15 THE COURT: You can step down.

16 (Witness excused.)

17 MR. KIEFER: And I would ask if
18 Officer Hoffman wants to if she could
19 remain in the courtroom if she so
20 desires.

21 THE COURT: Certainly.

22 MR. KIEFER: Well, I have no
23 further questions, Your Honor, so -- I
24 don't know if the defense is planning on
25 calling anyone?

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THE COURT: Okay. Arguments.

MR. KIEFER: Yes.

MR. COHEN: Do I go first since it's my motion? I guess typically I would go first.

What I'm seeing here is that there was no probable cause to arrest and no probable cause to withdraw blood. The blood draw standard is in the statutes, I got a copy of it with me, I thought that I'd cite it for you, I'm not sure where it went. Well, I swear I had it a minute ago, it's in the implied consent statute.

Basically the situation of an unconscious driver is specifically anticipated by the statutes and officers are allowed to draw blood from an unconscious individual, but the standard is there has to be probable cause. So I think we're talking about basically the same roughly level of probable cause for the arrest and for the blood draw, so I think if there's probable cause for one there might be for the other, too. I

1 think they may not be exactly the same,
2 but they're close probably. Sometimes
3 this gets confusing because there's five
4 or six different levels of probable
5 cause depending on the situation, but I
6 think they're close. I think that what
7 we heard today, certainly there was
8 horrible driving and there's no question
9 about that. We heard about excessive
10 speeding and being in the wrong lane and
11 taking the sharp turn at a high rate of
12 speed and crashing. And then we also
13 heard that the officers were more
14 concerned about saving his life then
15 about investigating an OWI, and I think
16 they did a great job, and I'm sure that
17 Mr. Lange appreciates that very much,
18 but today we're here to decide whether
19 or not there was enough to arrest
20 Mr. Lange and I don't think there was.

21 You know, I think in some ways the
22 tremendous carelessness with which he
23 was driving sort of dictates against the
24 cause of it being alcohol or drugs. I
25 think that in a lot of cases that you

1 know you've seen the most cases of OWI,
2 the guy's trying to drive normal, he
3 doesn't want to draw attention to
4 himself and there's some small
5 deviations, maybe crossing the center
6 line, and that indicates that they're
7 trying to drive well but they can't,
8 they're impaired. In this case we have
9 such wild driving it doesn't appear that
10 he was trying to drive correctly or
11 properly, I don't think we can
12 automatically assume it's the alcohol
13 that's causing this wild driving. There
14 could be reasonably a lot of different
15 explanations. He could have been
16 responding himself to some kind of
17 emergency, some kind of -- he could have
18 been emotionally upset about something,
19 he could have had a medical problem, he
20 could have been dry trying to commit
21 suicide, a whole host of things.
22 There's really nothing in this case that
23 says alcohol. There was no containers
24 of alcohol found at the scene, there's
25 no evidence that he had been drinking,

1 no odor of alcohol in the car or on his
2 person. I understand that maybe the
3 situation made it difficult for the
4 officers to find that, but still just
5 because it's difficult for an officer to
6 find it and then they fail to find the
7 evidence doesn't excuse the lack of
8 evidence. All right? I mean, there may
9 be some flexibility built into a law. I
10 know that when a guy is unconscious it's
11 not required that they do field sobriety
12 tests and that's reasonable because they
13 just can't, but I think there's
14 certainly a point where you can't just
15 say well, you know, due to circumstances
16 we couldn't find any evidence so we
17 don't need any evidence. I think they
18 still need something. I think they need
19 something that shows alcohol was being
20 used. They, I guess, didn't smell any
21 alcohol, but the evidence that I heard
22 from the testimony was that they really
23 didn't get too close to him either and I
24 know that it wasn't their priority. But
25 still I think we need some connection to

1 impairment to alcohol as being, you
2 know, as causing some kind of impairment
3 or drugs or something. You know, no
4 drug paraphernalia was found, it's
5 just -- there's just zero. What we've
6 got is reckless driving and I think it
7 goes a little bit too far to say that in
8 all cases where a guy's driving
9 reckless, well, you know, you can arrest
10 him for a OWI. You know, I think that's
11 way beyond what's reasonable. You know,
12 obviously the -- there's reckless
13 driving statutes and there's OWI
14 statutes, and even the legislature has
15 seen fit to say that these are separate
16 offenses, they're not necessarily all
17 going to be, you know, all that
18 correlated. You know, young people when
19 they're with their friends late at night
20 they like to drive wild, sometimes they
21 like to drive fast, they like to squeal
22 their tires, it doesn't mean that they
23 have been drinking. You know here we
24 have had driving in an accident and
25 that's it, and the driving was so bad it

1 tells me that maybe something else was
2 going on besides just a simple drunk
3 driving case, you know, just simple
4 impairment, so I think in this case we
5 don't have that crucial bit of evidence
6 that suggests what caused the accident,
7 you know, that there was any impairment,
8 so that's what I'm asking for is to have
9 you determine there's no probable cause
10 to arrest him for OWI and find that the
11 arrest was not legal and the blood draw
12 was not legal.

13 MR. KIEFER: Your Honor, the
14 question before the Court is whether or
15 not Officer Hoffman had probable cause
16 to make the OWI arrest and as she
17 testified near the end of her testimony
18 she had a number of factors that led to
19 that decision, which when put together
20 would add up to more than probable
21 cause.

22 Just to summarize what those
23 factors were, the excessive speed of the
24 defendant driving at about 45 miles per
25 hour in a 30 zone, crossing the center

1 line, which she observed twice during
2 her observation of the defendant, the
3 driving in the wrong lane, she had
4 testified that he drove approximately 50
5 to 75 feet in the far left lane, so two
6 lanes over in the wrong lane. The
7 inability to control his vehicle, which
8 resulted in the severe accident with the
9 impact with the utility pole. The time
10 of night. She testified that this
11 accident happened at approximately
12 2:52 a.m. and that 2:52 a.m. Maple Bluff
13 time so to speak is bar time because
14 that's the time that the people from the
15 downtown bars are driving through Maple
16 Bluff on the way home if they are
17 leaving a bar in the downtown Madison
18 area.

19 Finally the information from
20 Officer Penly regarding the driver's
21 excessive speed and Officer Penly's
22 observation of the defendant crossing
23 the center line, so when you add it all
24 together there is I think ample probable
25 cause. And now the defendant's -- or

1 I'm sorry, the officers both testified
2 that their highest priority was saving
3 the defendant's life that evening and I
4 think that they're both heroes here
5 today, they saved his life and that was
6 their priority that evening, it was
7 saving his life not searching for
8 evidence of OWI. So they didn't search
9 the vehicle for open containers of
10 alcohol, it would have been virtually
11 impossible to do so under those
12 circumstances with the vehicle upside
13 down crushed dripping with gasoline
14 potentially about to explode, they
15 didn't perform the field sobriety tests
16 on the defendant because he was
17 unconscious. Neither of them smelled
18 intoxicants partly because the smell of
19 gasoline was so strong I think that's a
20 reasonable inference for the Court to
21 make. Partly because again going up to
22 the defendant to smell the defendant to
23 see if they could smell intoxicants,
24 that was not their priority, their
25 priority was saving his life and they

1 did that that evening and that was what
2 the priority should have been. But I
3 don't think that it's right to hold that
4 against the State. Now that we're here
5 in the courtroom, I think the question
6 is given the information they had, did
7 they do what they could to gather the
8 information needed to make an informed
9 decision on probable cause, and I think
10 that Officer Hoffman did that for the
11 reasons that I summarized earlier. She
12 had more than adequate factors to
13 support a finding of probable cause to
14 arrest the defendant for OWI therefore I
15 ask that the motion be denied.

16 THE COURT: And any final words
17 Mr. Cohen?

18 MR. COHEN: No, thank you.

19 THE COURT: All right. Well, let
20 me begin with the fact that there is an
21 agreement that probable cause is
22 necessary for the arrest and the blood
23 draw and that that standard remains in
24 place regardless of what else is going
25 on. In other words the fact that there

1 is an overriding necessity for the
2 officers to address safety concerns,
3 make certain that there isn't an
4 explosion, the vehicle damages a person
5 or persons does not change the law such
6 that there's a need for less probable
7 cause or no probable cause. So the
8 standard is probable cause and while the
9 other factors have a bearing on what
10 happened in that particular night, what
11 it doesn't do is change the law.

12 The basis for the arrest in this
13 case is as Mr. Cohen said horrible
14 driving. This Officer Penly observes,
15 first observes Mr. Lange coming at him,
16 he's speeding and he's over the side of
17 the line coming toward Officer Penly.
18 The -- As I understand it from the
19 testimony that observation was made was
20 driving before Officer Hoffman observed
21 Mr. Lange. Now sometimes again people
22 who are driving recklessly or carelessly
23 will go to the lane, often it shakes
24 them out of it to realize that they are
25 over the line and coming toward another

1 vehicle and there would then be some
2 improvement in the driving. But that
3 certainly doesn't happen in this case.
4 Next Officer Hoffman observes not merely
5 over the center line, but over the
6 center line and over the first lane into
7 the second lane, the wrong, going the
8 wrong way. The -- and her testimony was
9 some 50 to 75 feet, a pretty substantial
10 distance, two lanes over going
11 northbound in the southbound lane. The
12 visual estimate at that time you saw him
13 was 45 miles per hour in a 30 miles per
14 hour zone. It does appear that there
15 may have been an increase in speed, but
16 at any rate Officer Hoffman is
17 travelling up to 85 miles per hour
18 trying to catch up to Mr. Lange and
19 having no luck, so at that point, if I'm
20 understanding correctly, there's
21 continuous speeding and at least two
22 occasions of being over the line and
23 it's not improving, it's actually more
24 dramatically bad driving. A third, at
25 least one other time observed by Officer

1 Hoffman and then finally the crash that
2 occurs.

3 There is -- what is -- the question
4 in this case is I think is really can
5 you arrest someone for operating while
6 under the influence of an intoxicant
7 without the smell of an intoxicant, a
8 statement about drinking or observation
9 of open intoxicants in a vehicle, can
10 you do it on the basis of horrendous
11 driving of a very extensive kind of an
12 extensive view of horrendous driving, up
13 to and including crashing a vehicle and
14 bar time, and I don't think I need to
15 determine -- I'm not going to determine
16 whether or not there's probable cause on
17 the driving record alone. The driving
18 record plus bar time is enough for this
19 Court to find that there is probable
20 cause. We all get out on the road at
21 night toward bar time after midnight
22 between midnight and 3:00 a.m. We all
23 know that people who have been drinking
24 are out on the road at the same time as
25 us and we see someone who is not

1 driving. We will, and the first thought
2 is that they've been drinking and
3 driving. Now that could be wrong, but
4 that is one of the first things that
5 someone thinks of around bar time. When
6 you see extensive and horrible driving.
7 There may be some other possibilities
8 like oh my gosh, they're having a heart
9 attack or oh, they're just emotional at
10 the moment, but if it's 2:30 or 3:00 in
11 the morning those are way down the line.
12 The most probable explanation for that
13 kind of driving is someone's drinking
14 and driving, there's a lack of control
15 of the vehicle, there's a show of lack
16 of judgment, there is the fact that it's
17 not temporary but rather appears to be
18 going on over an extended time period
19 while in fact some people who are
20 slightly intoxicated work hard to
21 control that, people who are really
22 intoxicated really don't care, they
23 don't give a rip, they're not trying to
24 hide it from anyone, they're, from what
25 I gather in this case, playing loud

1 music, going way over the speed limit,
2 driving in the wrong lane and then
3 crashing. So I do find there is
4 probable cause on the facts before me.
5 Even though there is not the odor of
6 intoxicants, I don't think that it's
7 necessary to draw from all of the
8 circumstances and again I emphasize this
9 is a pretty extended observation of
10 driving, there are multiple judgment
11 errors and these are occurring at bar
12 time at about the time necessary for
13 someone to get to Maple bluff from
14 downtown, I think there certainly is a
15 reason to believe that the driver of the
16 vehicle was probably drinking. So for
17 that reason the motion to suppress is
18 denied under all the circumstances of
19 this case. And we'll be scheduling this
20 for further proceedings.

21 MR. COHEN: Yes.

22 THE COURT: All right. That's all,
23 Court is adjourned.

24 (AT WHICH TIME the proceedings concluded.)
25

1 STATE OF WISCONSIN)
2) SS
3 COUNTY OF DANE)
4
5

6 I, HEATHER J. KIETA, Official Court Reporter, do
7 hereby certify that I reported in stenographic machine
8 shorthand the above-entitled proceedings had before the
9 Court on the 7th day of August, 2007, and that the
10 foregoing transcript is a true and correct copy of all
11 such notes and proceedings.
12

13 Dated this 14th day of January, 2008.
14

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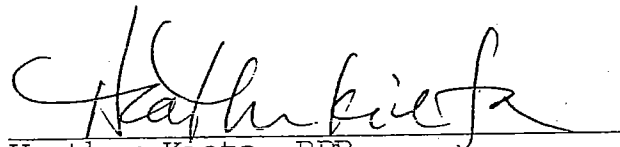
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Heather Kieta, RPR
Official Court Reporter

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apply to any reproduction of the same by any means
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certifying reporter.

State of Wisconsin vs. Mitchell A Lange

**Judgment of Conviction
and Sentence to the
County Jail/Fine/Forfeiture**

OCT - 4 2007

Date of Birth: 11-18-1986

Case No.: 2007CT000565

The defendant was found guilty of the following offense(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1.	Operating While under Influence (2nd)	346.63(1)(a)	No Contest	Misd. U	01-21-2007		10-01-2007

The defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Conc. with/Cons. to/Comments	Begin date	Begin time	Agency
1	10-01-2007	Alcohol assessment					
1	10-01-2007	Forfeiture / Fine					
1	10-01-2007	Restitution		DA has 90 days to prepare/submit order.			
-1	10-01-2007	Local jail	150 DA	w/huber. After serving 30 days, def is eligible for TAP. If accepted into TAP, remainder of jail sentence is stayed once def begins TAP, and if successful completion of TAP, balance permanently stayed.	11-30-2007	07:00 am	Dane County Jail
1	10-01-2007	License revoked 18 MO			10-01-2007		

Obligation Detail:

Ct.	Schedule	Amount	Days to Pay	Due Date	Failure to Pay Action	Victim
1	Misd. DIS - w/CC	1461.00	60	11-30-2007	Collection Agency	
1	Rest. w/ 10% cost	TBD				

Obligation Summary:

Ct.	Fine & Forfeiture	Court Costs	Attorney Fee	Restitution	Other	Mand. Victim/ Witness Sur.	5% Rest. Surcharge	DNA Analysis Surcharge	Totals
1	1018.00	375.00			8.00	60.00			1461.00

Total Obligations: 1461.00It is **adjudged** that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.It is **ordered** that the Sheriff shall execute this sentence.

BY THE COURT:

Diane M. Nicks, Judge
 Timothy D Kiefer, District Attorney
 Steven Cohen, Defense Attorney
 County Sheriff

Donna Con
 Circuit Court Judge/Clerk/Deputy Clerk

October 4, 2007

Date

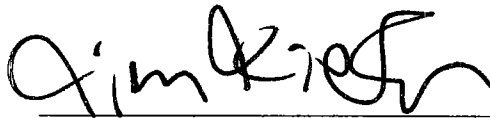
APPENDIX CERTIFICATION

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, 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 this 11th day of February, 2008.

A handwritten signature in black ink, appearing to read "Tim Kiefer", written over a horizontal line.

TIM KIEFER

Dane County Asst District Attorney
State Bar No. 1029008

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2008 AP 000882 CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MITCHELL A. LANGE,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Appeal of an Order of the Dane
County Circuit Court, the Honorable
Diane M. Nicks, Presiding

Steven M. Cohen
WI Bar 1026188
30 W. Mifflin St. #1001
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(608) 255-9000

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	2
ARGUMENT I	3
THERE WAS NO PROBABLE CAUSE TO ARREST DEFENDANT BASED ON ERRATIC DRIVING WHICH OCCURRED AROUND BAR TIME.	
A. STANDARD OF REVIEW	3
B. RELEVANT CASE LAW.....	4
C. APPLICATION OF LAW TO CURRENT CASE	7
ARGUMENT II	10
THE COURT OF APPEALS CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES AND APPLIED THE LAW CORRECTLY.	
CONCLUSION	12
FORM AND LENGTH CERTIFICATION	13
APPENDIX CERTIFICATION	14
APPENDIX AND TABLE OF CONTENTS	15

TABLE OF AUTHORITIES

<u>City of West Bend v. Wilkens</u> , 278 Wis.2d 643, 693 N.W.2d 324 (Ct.App. 2005)	9
<u>State v. Guzy</u> , 139 Wis.2d 663, 407 N.W.2d 548 (1987)	9
<u>State v. Hoyt</u> , 21 Wis.2d 284, 128 N.W.2d 645 (1964)	3
<u>State v. Kasian</u> , 207 Wis.2d 611, 558 N.W.2d 687 (Ct.App. 1996)	4
<u>State ex rel. Lawrence v. Burke</u> , 253 Wis.2d 240, 33 N.W.2d 242 (1948)	11
<u>State v. Mitchell</u> , 167 Wis.2d 672, 482 N.W.2d 364 (1992)	4
<u>State v. Richardson</u> , 156 Wis.2d 128, 456 N.W.2d 830 (1990)	3
<u>State v. Riddle</u> , 192 Wis.2d 470, 531 N.W.2d 408 (Ct.App.1995)	3
<u>State v. Sanders</u> , 304 Wis.2d 159, 737 N.W.2d 44, 2007 WI App 174	4, 9
<u>State v. Seibel</u> , 163 Wis.2d 164, 471 N.W.2d 226 (1991)	5
<u>State v. Swanson</u> , 164 Wis.2d 437, 475 N.W.2d 148 (1991)	4
<u>State v. Sykes</u> , 279 Wis.2d 742, 695 N.W.2d 277, 2005 WI 48	10
<u>State v. Wille</u> , 185 Wis.2d 673, 518 N.W.2d 325 (Ct.App. 1994)	4
<u>Stoughton Trailers, Inc. v. Labor and Industry Review Com’n</u> , 303 Wis.2d 514, 735 N.W.2d 477, 2007 WI 105	7
<u>Washburn Co. v. Smith</u> , 308 Wis.2d 65, 746 N.W.2d 243, 2008 WI 23	5

STATEMENT OF THE ISSUES

1. Does erratic driving which results in an accident around bar time constitute probable cause to arrest for Driving Under The Influence?

The trial court answered yes. The Court of Appeals held there was not probable cause. State v. Lange, slip op. at ¶ 14, (Ct.App. Oct. 10, 2008).

2. Can probable cause to arrest a suspect for Driving Under The Influence exist without direct evidence of intoxicant use i.e. odor of intoxicants or driver's admissions?

The trial court implicitly answered yes, because it found probable cause to arrest despite no findings of direct evidence of intoxicant use. The Court of Appeals did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested as this case will clarify the standard of probable cause to arrest for Driving Under The Influence when a traffic accident has occurred and there is no direct evidence of intoxicant use.

STATEMENT OF THE CASE

Mitchell Lange was charged in Dane County with Operating A Motor Vehicle While Under The Influence (OWI)–2nd Offense (count I) and Operating A Motor Vehicle With A Prohibited Alcohol Concentration (PAC)–2nd Offense (count II). (2:1-9). Mr. Lange filed a motion to suppress evidence because the arrest and blood draw occurred without probable cause. (7:1). Judge Nicks, after hearing evidence on the motion, denied the motion entirely. (21: 44).

Mr. Lange was convicted of count I, and then appealed to the Court of Appeals which reversed the trial court. (16:1); State v. Lange, slip op., (Ct.App. Oct. 10, 2008). The state then petitioned for Supreme Court review, which was granted.

STATEMENT OF THE FACTS

In the early morning of January 21st, 2007, Officer Don Penly was off duty and heading home. (21:7). He saw a vehicle coming toward him from the opposite direction traveling an estimated 40 to 45 miles per hour in a 30 mile per hour zone, and crossing over the center line “significantly”. (21:7-8). The next thing he saw was Mr. Lange’s car on its roof next to a sheared telephone pole, and Mr. Lange lying on the sidewalk. (21:10).

On the scene, Officer Penly focused on keeping civilians away from the crash, and rendered assistance to Mr. Lange. (12: 13-14). He did not detect an odor of intoxicants at the scene, did not search the vehicle, nor do any field sobriety tests. (21:11-15).

Officer Margaret Hoffman was running radar when she noticed Mr. Lange’s vehicle speeding and traveling in the wrong lane. (21:22). The vehicle went back into the correct lane as it accelerated, and then crashed into a utility pole. (21:23-24).

Officer Hoffman did not detect any odor of intoxicants, nor did she investigate further the possibility of intoxicant use; she did not search Mr. Lange's vehicle, nor do field sobriety tests. (21:27-28).

Officer Hoffman then arrested Mr. Lange at the accident scene for Operating While Intoxicated based on excessive speed of the vehicle, driving in the wrong lane, the resulting accident, and the time of day was close to bar time. (21:28-30).

ARGUMENT

I. THERE WAS NO PROBABLE CAUSE TO ARREST DEFENDANT BASED ON ERRATIC DRIVING WHICH OCCURRED AROUND BAR TIME.

A. Standard Of Review

When reviewing a trial court's determination regarding constitutional principles, the appellate court uses two standards of review. First, the trial court's findings of fact must be evaluated, and will be upheld unless they are clearly erroneous. State v. Richardson, 156 Wis.2d 128, 137, 456 N.W.2d 830 (1990). Second, if the appellate court determines that the trial court's findings of fact are not clearly erroneous, then the application of constitutional principles to those facts is independently reviewed by the appellate court. State v. Hoyt, 21 Wis.2d 284, 305-06, 128 N.W.2d 645 (1964).

In this case, Mr. Lange does not challenge the Circuit Court's findings of fact. Therefore it is only necessary to consider whether those facts satisfy the constitutional standards at issue; specifically, whether probable cause to arrest Mr. Lange for OWI existed.

Under both the United States and Wisconsin Constitutions, a legal arrest must be supported by probable cause. State v. Riddle, 192 Wis.2d 470, 475-76, 531

N.W.2d 408 (Ct.App.1995). Probable cause exists when, at the time of the arrest, a police officer knows reasonably trustworthy facts and circumstances sufficient to believe that the suspect has committed or is committing a crime. State v. Sanders, 304 Wis.2d 159, 737 N.W.2d 44, 2007 WI App 174. Whether probable cause existed at the time of arrest is reviewed under an objective standard; the police officer's subjective opinion is irrelevant. Id. The conclusion must be based on more than suspicion. State v. Mitchell, 167 Wis.2d 672, 681-82, 482 N.W.2d 364 (1992).

B. Relevant Case Law

In State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 148 (1991), the defendant had driven onto a sidewalk in front of a tavern around bar time, almost hitting a pedestrian. Id. The investigating officer obtained no explanation for this erratic driving, but did observe an odor of alcohol on defendant's breath. Id. In footnote 6 of the opinion, the Supreme Court stated "The first indicia of criminal conduct included Swanson's unexplained erratic driving. The second indicia included the approximate time of the incident, which occurred at about the time that bars close in the state of Wisconsin...Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants." Id.

In State v. Wille, 185 Wis.2d 673, 518 N.W.2d 325 (Ct.App. 1994), the defendant hit a car which was parked on the roadside with its emergency flashers on, causing a fatality and injuries to others. During the investigation, several emergency workers smelled intoxicants coming from Wille. Id. At the hospital, Wille told an officer "I've got to quit doing this." Id. The court found this statement indicated consciousness of guilt. Id. Probable cause was found based on the combination of all the factors.

In State v. Kasian, 207 Wis.2d 611, 558 N.W.2d 687 (Ct.App. 1996), the defendant collided his van with a utility

pole. He was found by the arresting officer lying next to the van, injured. Id. The officer noticed a strong odor of intoxicants coming from Kasian, and also that his speech was slurred. Id. The court found these circumstances constituted probable cause to arrest. Id.

In Washburn Co. v. Smith, 308 Wis.2d 65, 746 N.W.2d 243, 2008 WI 23, the defendant was stopped around 2:40 am for speeding significantly over the 55 mph limit. While pulling over, his vehicle crossed the centerline twice. Id. The officer detected an odor of alcohol, and defendant initially admitted to having two beers. Id. He then changed his story to increase that number as well as admitting he was in a bar for about 10 hours just prior to being stopped. Id. The Supreme Court found probable cause on the totality of the circumstances. Id.

In State v. Seibel, 163 Wis.2d 164, 471 N.W.2d 226 (1991), the defendant was driving his motorcycle on a highway when he drifted over the centerline by approximately a foot, causing a multi vehicle collision with injuries and fatalities. The defendant was arrested for OWI and his blood was drawn by consent under the implied consent law. Id. at 169-70. After the blood results came back, Seibel was charged with Homicide– Intoxicated Use Of Motor Vehicle and Homicide–Prohibited Alcohol Concentration. Id. at 170.

Defendant moved the trial court to suppress the blood results, alleging the arrest lacked probable cause for OWI, and the blood draw thereby violated the 4th Amendment to the U.S. Constitution. Id. at 170. The trial court denied defendant's motion to suppress, reasoning that there was probable cause to arrest for a different crime, i.e. Homicide–Negligent Operation Of Motor Vehicle, plus reasonable suspicion that defendant's blood would contain alcohol (evidence of alcohol use was relevant to criminal negligence). Id. at 170.

The Court of Appeals reversed the trial court, concluding that blood may be drawn incident to arrest only upon probable cause to believe that the blood would contain evidence of a crime. Id. at 171.

The Supreme Court then accepted review and reversed the Court of Appeals, deciding that a blood draw incident to a lawful arrest only requires reasonable suspicion to believe that the blood contains evidence of a crime. Id at 179.

The Supreme Court found the known indicia of intoxicant use by Seibel established reasonable suspicion. Id at 181. The first indication was the circumstances of the accident. Id. It was undisputed that the defendant crossed the center line just before a curve in a no-passing zone for no justifiable reason. Id. The second was the strong odor of intoxicants the officers detected emanating from the defendant's traveling companions. Id. The third was the police chief's belief that he smelled intoxicants on the defendant. Id. The fourth indication of alcohol use was the defendant's conduct at the hospital by exhibiting a belligerence and lack of contact with reality. Id. "While none of these indicia alone would give rise to a reasonable suspicion that the defendant's driving was impaired by alcohol, taken together they gave the police reason to suspect that the defendant's driving was impaired by alcohol." Id.

Seibel clearly implies that its facts did not add up to probable cause to arrest for OWI. The issue in Seibel, as it went from the trial court, to the Court of Appeals, to the Supreme Court was the same: Upon probable cause to arrest for a non OWI related crime, may blood be drawn on reasonable suspicion to believe the blood contains evidence of a crime? Id.

It must be remembered that Seibel was actually arrested for OWI, just before his blood was drawn under the implied consent statute. Id at 169. *Had there been probable cause to arrest Seibel for OWI, the blood draw would have been valid because he consented to it under the implied consent law.* It would have been unnecessary for any court to decide whether reasonable suspicion is adequate for a blood draw incident to arrest on a non OWI crime, if the OWI arrest was valid. Because the Court of Appeals and the Supreme Court found it necessary to resolve the issue, they must have implicitly found there was no probable cause to

arrest for OWI. The Supreme Court decides cases on the narrowest grounds possible. Stoughton Trailers, Inc. v. Labor and Industry Review Com'n, 303 Wis.2d 514, 735 N.W.2d 477, 2007 WI 105.

C. Application Of Law To Current Case

In Mr. Lange's case, the question is whether the facts and circumstances within Officer Hoffman's knowledge at the time of the arrest constituted probable cause. Stated simply, she knew there was erratic driving around bar time. The erratic driving Officer Hoffman saw consisted of high speed, extreme lane changes, and an accident. (21:22-24).

The case law up to now has in every case relied on a concurrence of many indicia that, taken together, suggest impairment. See Swanson, Wille, Kasian, Smith and Seibel, supra. The totality of the circumstances in any given case may be comprised of various combinations of factors such as: erratic driving, admissions, odor of intoxicants, observations of the driver (physical coordination and speech patterns); field sobriety tests; and Preliminary Breath Test (PBT) results.

In ordinary drunk driving cases there will be many indicia such as is found in the underlying facts of the relevant case law. The concurrence of many indicia increases the reliability of the inference of impairment. This reliability is not present in Mr. Lange's case. The observations made by Officer Hoffman were minimal: there were no admissions by the suspect, no odors of intoxicants, no field sobriety tests, no PBT, no slurred speech or difficulty balancing, no known visits to a bar, no companions who consumed alcohol, and no changed stories.

In no case known to counsel has there been probable cause based on such sparse facts as in Mr. Lange's case. The required "reasonably trustworthy facts" suggesting impairment by drugs or alcohol were not discovered. It was a situation where the officer's first concern may not have been to gather evidence of a crime, but to attend to the safety of the public and Mr. Lange. (21:14). But, as the

Court of Appeals stated in footnote 5 of the opinion, “good reasons for a lack of evidence are not themselves evidence.” State v. Lange, slip op., (Ct.App. Oct. 10, 2008).

Further investigation could have uncovered additional evidence, had it been done. The Officers on the scene could have followed Mr. Lange to the hospital--he may have regained consciousness by then--providing an opportunity to obtain statements or make additional observations. Whether Lange regained consciousness or not, that course of action would have given the officers the opportunity to smell Mr. Lange’s clothing and breath for alcohol away from the gasoline smell at the scene.

Neither can counsel find any case where the degree of erratic driving has obviated the need for corroborating factors suggesting impairment by drugs or alcohol. Bad driving, even where there is an accident, has always been just one relevant factor out of many.

It may also be questioned whether a higher degree of bad driving helps establish probable cause or obfuscates it. One suspects that in most drunk driving situations, one does not observe the extreme driving found in this case. Rather, one would more likely see speeds closer to, or under, the speed limit, a lesser degree of weaving, etc. In that respect, Mr. Lange’s driving was unexpected even for an impaired driver, weakening the officer’s ability to make good inferences. The less usual a situation is the less one can reliably infer what is occurring.

No evidence in the record links the kind of driving behavior observed in this case with alcohol impairment. For instance, the record does not answer whether excessive speeding indicates alcohol impairment. It is tempting to make the assumption, but is it a fact? Are alcohol impaired drivers more likely to speed moderately, speed excessively, or go slower than the limit? How likely is the kind of reckless driving displayed in this case attributed to alcohol impairment compared to other circumstances? The record is devoid of this type of information, and it could be an unjustified leap of logic to assume that all accidents or traffic violations indicate alcohol impairment. Officer

Hoffman, a relatively inexperienced Officer who had only 10 or 15 OWI cases under her belt at the time she made the arrest, may not have had the experience to know. Facts outside the officer's knowledge cannot be used to support a finding of probable cause. State v. Sanders, 304 Wis.2d 159, 737 N.W.2d 44, 2007 WI App 174.

Probable cause to arrest for OWI logically requires a connection between the suspect and the use of intoxicants to begin with. If there was no intoxicant use at all, there cannot be OWI. Mere use, however, does not equate with excessive use (impairment). Nonetheless, a connection to the use of intoxicants is prerequisite.

Field sobriety tests are one way to make that connection. City of West Bend v. Wilkens, 278 Wis.2d 643, 693 N.W.2d 324 (Ct.App. 2005). The physical task portion of field sobriety testing allows an officer to assess a suspect's coordination. There is also an assessment of a driver's abilities related to memory, attention, and comprehension. One important aspect to field sobriety tests is that officers will have been trained to both administer the tests and interpret the results. The Horizontal Gaze Nystagmus (HGN) test yields an observable physical reaction the eye has to the presence of alcohol. Id.

In the absence of field sobriety tests, a connection to the use of intoxicants can be established by: detecting an odor of intoxicants; PBT results; admissions of intoxicant use by the suspect; alcoholic beverage bottles or cans; possession or presence of intoxicants; statements from eye witnesses. The Court of Appeals was correct when it said "police did not smell any intoxicants on the scene and Lange did not admit to drinking alcohol prior to his arrest, and there are no comparable indicia of intoxication." State v. Lange, slip op., ¶ 14 (Ct.App. Oct. 10, 2008). Even the lower standard of reasonable suspicion requires at least a "particularized and objective basis" to believe. State v. Guzy, 139 Wis.2d 663, 407 N.W.2d 548 (1987).

On the one hand, field sobriety tests may indicate impairment if a suspect's performance is poor. From that fact, it may be reasonable to infer the cause is by the use of

intoxicants. On the other hand, evidence of consumption of intoxicants coupled with other facts, could be used to infer impairment. However, with no field sobriety tests and no evidence of consumption of intoxicants, there is not enough to get to probable cause.

If the unusual fact pattern in this case were to support a finding of probable cause to arrest, it would allow the arrest for all drivers involved in an accident during very late or very early hours. This temporal rule would be expanded probably to include other times as well. Bar time is not the only time when impaired drivers may be prevalent. What about immediately after college or professional sporting events in cities that host those events? What about during special days, such as St. Patrick's Day, Christmas, New Year's Eve? As long as there would be an accident, field sobriety tests could be disposed of in such circumstances. Traffic accidents happen to almost everyone at one time or another. Arrests under this precedent would be too indiscriminate.

II. THE COURT OF APPEALS CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES AND APPLIED THE LAW CORRECTLY.

The State suggests the Court of Appeals did not consider the totality of the factual circumstances in this case. This is not correct.

The Court of Appeals, in its opinion, correctly stated the applicable standard when it said: "There is probable cause to arrest when the totality of the circumstances within [the arresting] officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." State v. Lange, slip op., ¶7 (Ct.App. Oct. 10, 2008), quoting State v. Sykes, 279 Wis.2d 742, 695 N.W.2d 277, 2005 WI 48. The opinion correctly and completely recited all the relevant facts. There is nothing to suggest that the Court of Appeals did not

consider the totality of the circumstances. In the absence of countervailing evidence, there is a presumption of regularity that the Court acted validly. State ex rel. Lawrence v. Burke, 253 Wis. 240, 33 N.W.2d 242 (1948).

The State suggests the Court of Appeals required “affirmative proof of alcohol consumption.” It is assumed that the State is speaking of direct proof, such as in admissions to drinking, odor of intoxicants, actual possession of intoxicants or a Preliminary Breath Test (PBT). As discussed in part I of this brief, Lange does not contend that this type of evidence is the only acceptable evidence; field sobriety tests may also suffice.

The Court of Appeals did not interpret Smith as requiring direct proof of alcohol consumption. The State makes the assertion, perhaps referring to the following quote from the opinion: “Unlike in Smith, Kasian, and Wille, police did not smell any intoxicants on the scene and Lange did not admit to drinking alcohol prior to his arrest, *and there are no comparable indicia of intoxication.*” State v. Lange, slip op., ¶14 (Ct.App. Oct. 10, 2008) (Emphasis added). This is not a requirement that direct proof of alcohol consumption be present. The State completely ignores the second part of the sentence which implies other ways to establish probable cause--field sobriety tests or a Preliminary Breath Test or any other evidence that is equal. The Appeals Court did not require any *specific* type of indication be present; the problem in this case was that there just wasn’t enough. Id.

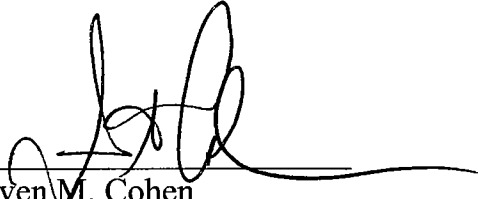
The Court of Appeals interpreted Smith correctly. Smith requires indicia of impairment by intoxicants to establish probable cause to arrest for OWI. This is logical, since impairment is the sine qua non of an OWI offense. Without impairment by intoxicants, there is no OWI crime. Without indicia of impairment by intoxicants, it is impossible to have probable cause to arrest for that offense. The Smith court said “...in the present case the Deputy had knowledge of *significant indicia of intoxication* that were not present in Seibel” and in another part of the opinion stated “Swanson, like Seibel, is distinguishable from the present case because the Deputy in the instant case had knowledge of *significant indicia of intoxication* that were not present in Swanson.”

CONCLUSION

Because Mr. Lange's arrest was based solely on the observation of reckless driving around bar time, and because there was no evidence of any odor of intoxicants or other indicia of alcohol influence, the order of the trial court denying the motion to suppress should be reversed.

Dated this 28th day of February, 2008.

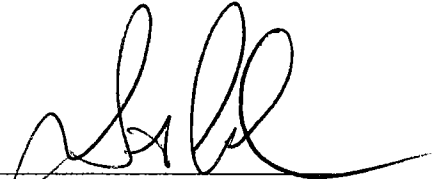
Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,357 words.



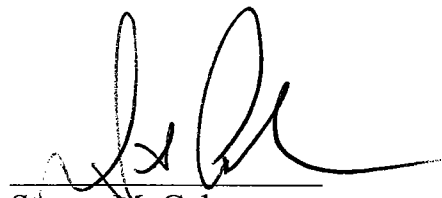
Steven M. Cohen

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 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.



Steven M. Cohen

APPENDIX

TABLE OF CONTENTS

EXCERPT FROM TRANSCRIPT
DATED 8/7/07--JUDGE NICK'S DECISION
FROM MOTION HEARING A-1

1 did that that evening and that was what
2 the priority should have been. But I
3 don't think that it's right to hold that
4 against the State. Now that we're here
5 in the courtroom, I think the question
6 is given the information they had, did
7 they do what they could to gather the
8 information needed to make an informed
9 decision on probable cause, and I think
10 that Officer Hoffman did that for the
11 reasons that I summarized earlier. She
12 had more than adequate factors to
13 support a finding of probable cause to
14 arrest the defendant for OWI therefore I
15 ask that the motion be denied.

16 THE COURT: And any final words
17 Mr. Cohen?

18 MR. COHEN: No, thank you.

19 THE COURT: All right. Well, let
20 me begin with the fact that there is an
21 agreement that probable cause is
22 necessary for the arrest and the blood
23 draw and that that standard remains in
24 place regardless of what else is going
25 on. In other words the fact that there

1 is an overriding necessity for the
2 officers to address safety concerns,
3 make certain that there isn't an
4 explosion, the vehicle damages a person
5 or persons does not change the law such
6 that there's a need for less probable
7 cause or no probable cause. So the
8 standard is probable cause and while the
9 other factors have a bearing on what
10 happened in that particular night, what
11 it doesn't do is change the law.

12 The basis for the arrest in this
13 case is as Mr. Cohen said horrible
14 driving. This Officer Penly observes,
15 first observes Mr. Lange coming at him,
16 he's speeding and he's over the side of
17 the line coming toward Officer Penly.
18 The -- As I understand it from the
19 testimony that observation was made was
20 driving before Officer Hoffman observed
21 Mr. Lange. Now sometimes again people
22 who are driving recklessly or carelessly
23 will go to the lane, often it shakes
24 them out of it to realize that they are
25 over the line and coming toward another

1 vehicle and there would then be some
2 improvement in the driving. But that
3 certainly doesn't happen in this case.
4 Next Officer Hoffman observes not merely
5 over the center line, but over the
6 center line and over the first lane into
7 the second lane, the wrong, going the
8 wrong way. The -- and her testimony was
9 some 50 to 75 feet, a pretty substantial
10 distance, two lanes over going
11 northbound in the southbound lane. The
12 visual estimate at that time you saw him
13 was 45 miles per hour in a 30 miles per
14 hour zone. It does appear that there
15 may have been an increase in speed, but
16 at any rate Officer Hoffman is
17 travelling up to 85 miles per hour
18 trying to catch up to Mr. Lange and
19 having no luck, so at that point, if I'm
20 understanding correctly, there's
21 continuous speeding and at least two
22 occasions of being over the line and
23 it's not improving, it's actually more
24 dramatically bad driving. A third, at
25 least one other time observed by Officer

1 Hoffman and then finally the crash that
2 occurs.

3 There is -- what is -- the question
4 in this case is I think is really can
5 you arrest someone for operating while
6 under the influence of an intoxicant
7 without the smell of an intoxicant, a
8 statement about drinking or observation
9 of open intoxicants in a vehicle, can
10 you do it on the basis of horrendous
11 driving of a very extensive kind of an
12 extensive view of horrendous driving, up
13 to and including crashing a vehicle and
14 bar time, and I don't think I need to
15 determine -- I'm not going to determine
16 whether or not there's probable cause on
17 the driving record alone. The driving
18 record plus bar time is enough for this
19 Court to find that there is probable
20 cause. We all get out on the road at
21 night toward bar time after midnight
22 between midnight and 3:00 a.m. We all
23 know that people who have been drinking
24 are out on the road at the same time as
25 us and we see someone who is not

1 driving. We will, and the first thought
2 is that they've been drinking and
3 driving. Now that could be wrong, but
4 that is one of the first things that
5 someone thinks of around bar time. When
6 you see extensive and horrible driving.
7 There may be some other possibilities
8 like oh my gosh, they're having a heart
9 attack or oh, they're just emotional at
10 the moment, but if it's 2:30 or 3:00 in
11 the morning those are way down the line.
12 The most probable explanation for that
13 kind of driving is someone's drinking
14 and driving, there's a lack of control
15 of the vehicle, there's a show of lack
16 of judgment, there is the fact that it's
17 not temporary but rather appears to be
18 going on over an extended time period
19 while in fact some people who are
20 slightly intoxicated work hard to
21 control that, people who are really
22 intoxicated really don't care, they
23 don't give a rip, they're not trying to
24 hide it from anyone, they're, from what
25 I gather in this case, playing loud

1 music, going way over the speed limit,
2 driving in the wrong lane and then
3 crashing. So I do find there is
4 probable cause on the facts before me.
5 Even though there is not the odor of
6 intoxicants, I don't think that it's
7 necessary to draw from all of the
8 circumstances and again I emphasize this
9 is a pretty extended observation of
10 driving, there are multiple judgment
11 errors and these are occurring at bar
12 time at about the time necessary for
13 someone to get to Maple bluff from
14 downtown, I think there certainly is a
15 reason to believe that the driver of the
16 vehicle was probably drinking. So for
17 that reason the motion to suppress is
18 denied under all the circumstances of
19 this case. And we'll be scheduling this
20 for further proceedings.

21 MR. COHEN: Yes.

22 THE COURT: All right. That's all,
23 Court is adjourned.

24 (AT WHICH TIME the proceedings concluded.)
25

STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP882-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,
v.

MITCHELL A. LANGE,
Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF
APPEALS REVERSING A DECISION OF THE DANE
COUNTY CIRCUIT COURT, THE HONORABLE
DIANE NICKS, PRESIDING

**REPLY BRIEF
OF PLAINTIFF-RESPONDENT-PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT.....	1
THE OFFICER HAD PROBABLE CAUSE TO ARREST UNDER THE TOTALITY OF THE CIRCUMSTANCES	1
WHILE TIME OF DAY IS A RELEVANT FACTOR THAT THE OFFICER MAY CONSIDER, IT IS JUST ONE POSSIBLE FACTOR.....	3
THE TOTALITY OF THE CIRCUMSTANCES STANDARD DOES NOT INCLUDE A REQUIREMENT THAT THERE BE SPECIFIC INDICIA OF INTOXICATION.....	3
CONCLUSION.....	4
CERTIFICATION.....	5

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<u>Ohio v. Crump</u> , 2002 Ohio 3284.....	2
<u>State v Higginbotham</u> , 162 Wis, 2d 978, 989 471 N. W. 2d 24 (1991)	2
<u>State v. Lange</u> , No. 2008AP882-CR, Ct. App. Oct. 2, 2008.....	1
<u>State v. Post</u> , 2007 WI 60, 301 Wis. 2d 1,	3
<u>State v. Swanson</u> , 164 Wis. 2d 437, 475 N.W. 2d 148 (Sup. Ct 1991).....	3
<u>Washburn County v Smith</u> , 2008 WI 23, 308 Wis 2d 65, 746 N.W. 2d 243	1,3

INTRODUCTION

The plaintiff-respondent-petitioner, State of Wisconsin, by its attorney, Dane County Assistant District Attorney Tim Kiefer, requests this court to reverse the decision and order of the Wisconsin Court of Appeals, District IV. *State v. Lange*, No. 2008AP882-CR, slip op. at ¶ 14 (Ct. App. Oct. 2, 2008). (P-Ap. 7-8).

ARGUMENT

I. THE OFFICER HAD PROBABLE CAUSE TO ARREST UNDER THE TOTALITY OF THE CIRCUMSTANCES.

As previously argued in the State's brief-in-chief (at 6-8), the arresting officer had a number of reasons to conclude that Lange was impaired by alcohol and/or other drugs: it was shortly after bar time; Lange was driving at over 80 mph on the wrong side of the road; Lange sped up when the officer tried to pull him over; Lange crashed into a utility pole and flipped over; and loud music was heard emanating from the upside-down car.

It is also true that there were no field sobriety tests, PBT test, or admissions by Lange (who was unconscious, P.Ap. 21), no odor of intoxicants (which, if it had existed, would have been masked by the strong odor of spilled gasoline, P.Ap. 20-21, 34), and no observation of empty cans or bottles (which, had they existed, would have been inside the car which was now flipped upside down, pouring out gasoline and possibly about to catch on fire, P. Ap. 21, 23, 35-36).

The case law is clear that there is no laundry list of required elements to establish probable cause. Rather, probable cause "must be assessed on a case-by-case basis." *Washburn County v. Smith*, 2008 WI 23, at ¶ 34, 308 Wis. 2d 65, 746 N.W.2d 243. In *Washburn County*,

this Court explicitly rejected the notion that field sobriety tests must always be performed in order to establish probable cause. *Id.* at ¶ 33.

The State agrees with Lange that in “ordinary drunk driving cases” there may be indicia such as field sobriety tests, an odor of intoxicants, and an admission to drinking. *See* Lange’s Brief at 7. But the State also agrees with Lange’s statement that this case presents an “unusual fact pattern.” Lange’s Brief at 10. Where the facts are unusual, the evidence to show probable cause might also be unusual.

For example, in *Ohio v. Crump*, 2002 Ohio 3284, the defendant repeatedly crossed the centerline and then ran off the road and struck a tree. *Crump* at ¶ 6. The defendant attempted to walk away from the accident scene, but was detained by David Marcum, an off-duty police officer who was on his way to work in another jurisdiction. *Id.* at ¶¶ 4-8. Officer Marcum observed the defendant to have slurred speech, glassy eyes, and difficulty with agility while walking. *Id.* at ¶ 7. It does *not* appear, however, that Officer Marcum detected any odor of intoxicants, observed any empty containers, conducted any field sobriety tests, or asked the defendant about drinking. *See Id.* The appeals court held that “Defendant’s erratic driving behavior and the traffic violations which Officer Marcum observed, and the resulting accident, gave Officer Marcum sufficient probable cause to stop Defendant.” *Id.* at ¶ 12.

In sum, probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). The possible combinations of circumstances which could add up to probable cause cannot be reduced to a checklist or a formula.

II. WHILE TIME OF DAY IS A RELEVANT FACTOR THAT THE OFFICER MAY CONSIDER, IT IS JUST ONE POSSIBLE FACTOR.

Lange argues that if the Court finds probable cause in this case, “it would allow the arrest of all drivers during very late or very early hours.” (Lange’s Brief at 10.) Further extending his “parade of horrors,” Lange then suggests that a finding of probable cause in this case would give the police *carte blanche* to stop drivers merely because it was St. Patrick’s Day or Christmas. (Lange’s Brief at 10.)

These suggestions are unfounded. The State never argued that the time of day, the day of the week, or the day of the month would, standing alone, constitute probable cause to arrest for OWI. However, the time of day, the day of the week, and any other temporal factor may legitimately be considered as part of the totality of the circumstances. Wisconsin courts have repeatedly held that whether an incident occurs at around bar time is a relevant factor. See *Washburn County v. Smith*, 2008 WI 23, ¶ 31, 308 Wis. 2d 65, 79, *State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 21, *State v. Swanson*, 164 Wis. 2d 437, 453 n. 6 (Sup. Ct. 1991).

III. THE TOTALITY OF THE CIRCUMSTANCES STANDARD DOES NOT INCLUDE A REQUIREMENT THAT THERE BE SPECIFIC INDICIA OF INTOXICATION.

As previously argued in the State’s brief-in-chief (at 9-11) the totality of the circumstances standard does not include a requirement that there be affirmative proof of alcohol consumption or specific indicia of intoxicant use. Such indicia may be present in any given case, but the case law does not *require* any specific indicators. Rather, as argued previously by the State (State’s Brief-in-Chief at 11), whether probable cause exists is a case by case determination based upon common sense and reasonableness.

CONCLUSION

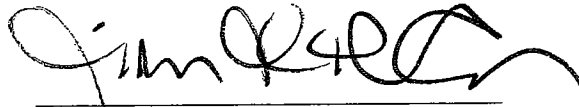
Therefore, for the above-stated reasons, the plaintiff-respondent-petitioner, State of Wisconsin, respectfully requests that this court reverse the decision of the court of appeals.

Dated this 13th day of March, 2009.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font.

This brief contains 1,256 words.

A handwritten signature in black ink, appearing to read 'Tim Kiefer', written over a horizontal line.

Tim Kiefer