

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 5, 2016**

Diane M. Fremgen  
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. 2015AP1718-CR**

**Cir. Ct. No. 2014CT293**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ZACHARY W. SWAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for La Crosse County:  
TODD W. BJERKE, Judge. *Affirmed.*

¶1 SHERMAN, J.<sup>1</sup> Zachary Swan appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), second offense. Swan contends that the arresting officer did not have probable

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

cause to request that he perform a preliminary breath test (PBT) and that the results of that test, and any evidence obtained thereafter, should have been suppressed.

¶2 Upon Swan's motion for reconsideration, this court has withdrawn its prior opinion that affirmed the judgment on the grounds that Swan had not argued that the circuit court's denial of his motion to suppress on the basis of issue preclusion was erroneous. Swan argued in his reconsideration motion that in light of the fact that both he and the State failed to address the circuit court's apparent denial of Swan's motion on the basis of issue preclusion in their briefs on appeal, he should be permitted to do so. The State did not oppose Swan's motion. For the reasons discussed below, I affirm.

### **BACKGROUND**

¶3 Swan was originally cited in municipal court with violation of Wisconsin's absolute sobriety law, WIS. STAT. § 346.63(2m) (which prohibits a person who has not attained the legal drinking age from driving with any alcohol concentration of more than zero but not more than 0.08) and PAC, first offense. Swan moved to suppress evidence obtained following his PBT on the basis that the officer who administered the PBT did not have probable cause to do so. The municipal court determined that the officer did not have probable cause to administer the PBT and granted Swan's motion.

¶4 The matter was appealed to the circuit court, for a trial de novo. Swan again moved to suppress evidence obtained following his PBT.

¶5 At the hearing on Swan's motion, the sole witness to testify was Officer Trenton Bowe. Officer Bowe testified that at approximately 2:36 a.m. on

July 16, 2012, he was dispatched to a residence “for an entry in progress.” Officer Bowe testified that when he made contact with the owner of the residence, the owner’s grandson, who he was informed was “not to be there,” ran out of the house. Officer Bowe testified that he chased after the grandson, who smelled of alcohol, and that he observed the grandson approach the driver’s side of a running vehicle and say to the driver “[s]omething along the lines of just get out of here.” Officer Bowe testified that he informed the driver, who was later identified as Swan, not to leave and that after the grandson was caught, he returned to Swan’s vehicle.

¶6 Officer Bowe testified that he identified Swan as the driver and ascertained that Swan was nineteen years old. Officer Bowe testified that Swan informed him that the grandson had asked him to drop the grandson off at the residence and to wait for him. Officer Bowe testified that he observed a “half empty Captain Morgan’s bottle” on the back seat of Swan’s vehicle, which Swan informed him belonged to the grandson. Officer Bowe also testified that Swan appeared to be “really nervous” and Swan’s speech was “kind of muffled,” but that he did not observe the odor of intoxicants on Swan and Swan’s eyes did not appear glossy.

¶7 In November 2013, the circuit court issued a decision and order denying Swan’s motion to suppress. It is undisputed that after the circuit court denied Swan’s motion to suppress, the municipal charges against Swan were dismissed.

¶8 In October 2014, the State filed a complaint charging Swan with PAC, second offense, in violation of WIS. STAT. § 346.63(1)(b), based on the same underlying acts as the originally charged first offense. *See County of Walworth v.*

*Rohner*, 108 Wis. 2d 713, 722, 324 N.W.2d 682 (1982) (State has exclusive authority to prosecute second offenses for drunk driving). In the second offense action, which is presently before this court on appeal, Swan moved the circuit court to suppress the results of his preliminary breath test (PBT) and evidence obtained following that test on the basis that there was no probable cause to administer the PBT.

¶9 The circuit court denied Swan’s motion to suppress on the basis of issue preclusion, noting that the circuit court in the municipal action had already held a hearing and issued a decision in which the court determined that Officer Bowe had probable cause to administer the PBT, which was made part of this record, and that it was “not necessary” for Officer Bowe to testify as to facts of the stop and arrest yet again.

¶10 Following the denial of his motion to suppress, Swan pled guilty to PAC, second offense. Swan appeals.

## DISCUSSION

¶11 Swan contends that the circuit court erred in denying his motion to suppress the results of his PBT and evidence obtained following that test. When reviewing the denial of a motion to suppress, we will uphold the circuit court’s factual findings unless those findings are against the great weight and clear preponderance of the evidence. *State v. McGill*, 2000 WI 38, ¶17, 234 Wis. 2d 560, 609 N.W.2d 795. We review independently, however, whether the facts as found by the circuit court satisfy constitutional requirements. *See id.*

¶12 As noted above, the circuit court denied Swan’s motion to suppress on the basis of issue preclusion.<sup>2</sup> Issue preclusion is a doctrine that limits the relitigation of issues in a subsequent action that have been “actually litigated and determined in [a] prior proceeding by a valid judgment in [the prior] action” and that are essential to the judgment. *In re Estate of Rille ex rel. Rille*, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693. Whether issue preclusion can apply is a question of law. *See id.*, ¶35.

¶13 Swan contends in his motion for reconsideration that the circuit court erred in determining that his motion to suppress was barred by issue preclusion, arguing that it cannot, and should not, apply in this case. This court directed the State to file a response to Swan’s motion. The State, in its response, does not dispute Swan’s contention that issue preclusion could not apply as a matter of law, and I agree that it does not. The municipal court action was dismissed, thus there was no final judgment on the merits in that action. Because there was no final judgment on the merits in that proceeding, issue preclusion is

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<sup>2</sup> Swan argues on reconsideration that the circuit court “did not actually *mean*” to “employ[] the issue preclusion doctrine” as the basis for denying his motion to suppress. Swan argues that if the court had, “it would have precluded Swan from appealing the suppression ruling.” I am not persuaded.

In its responsive brief to Swan’s motion to suppress, the State’s sole argument was that the court should deny Swan’s motion because the issues raised in Swan’s suppression motion are barred by issue preclusion. In denying Swan’s motion, the circuit court stated at least three times that the court was denying the motion on the basis of issue preclusion. There is nothing in the record to persuade me that the court did not mean to conclude that Swan was precluded from seeking suppression in this case because the issues raised in his motion had already been litigated in the municipal court proceeding. I recognize, as pointed out by Swan, that the court stated in its ruling that it “assume[s] that there’s a mechanism by which” this court “look at [the municipal court] decision.” However, the circuit court’s apparent belief that this court would be able to reach the merits of the municipal court suppression ruling, at most, reflects the court’s confusion about the effect of its ruling.

not applicable. *See Ellifson v. West Bend Mut. Ins. Co.*, 2008 WI App 86, ¶16, 312 Wis. 2d 664, 754 N.W.2d 197.

¶14 Because the circuit court denied Swan's motion to suppress on the basis of issue preclusion, no evidence was submitted to the circuit court for or against the motion and the court did not make any factual findings pertinent to Swan's suppression motion upon which to determine whether suppression is appropriate. However, it is clear from the parties' briefing and arguments for reconsideration that Swan seeks review of the merits of his motion for reconsideration and that the State agrees that such a review is appropriate. The parties have effectively stipulated that the circuit court did not need to hold a new hearing on Swan's motion and that if issue preclusion is not applicable, the facts pertinent are those from the suppression hearing held in the municipal court proceeding. Accordingly, I look to those facts to determine whether probable cause existed to administer Swan's preliminary breath test.

¶15 Pursuant to WIS. STAT. § 343.303, a law enforcement officer may request that a person provide a preliminary breath test if the officer "has probable cause to believe that the person is violating or has violated [WIS. STAT.] § 346.63(1) or (2m)."<sup>3</sup> Probable cause to administer breath test is less than the level of proof required to establish probable cause to arrest, but is more than the level of proof required to establish the reasonable suspicion necessary for an investigative stop. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 295, 315-16, 603 N.W.2d 541 (1999). Thus, a preliminary breath test "may be requested when

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<sup>3</sup> WISCONSIN STAT. § 346.63(2m) provides: "If a person has not attained the legal drinking age, as defined in s. 125.02(8m), the person may not drive or operate a motor vehicle while he or she has an alcohol concentration of more than 0.0 but not more than 0.08."

an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest.” *State v. Fischer*, 2010 WI 6, ¶5, 322 Wis. 2d 265, 778 N.W.2d 629, *habeas corpus granted*, *Fischer v. Ozaukee County Cir. Ct.*, 741 F.Supp.2d 944 (E.D. Wis. 2010) (magistrate judge). Whether Officer Bowe had probable cause to give Swan a PBT is a legal issue, which we decide de novo. *See Renz*, 231 Wis. 2d at 295, 316.

¶16 “The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior.’” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551 (quoted source omitted). Thus, the inquiry here is what did Officer Bowe know that led him to give Swan a PBT. The record reveals the following:

- Swan was nineteen years old;
- A “half empty” bottle of alcohol was on the backseat of the vehicle Swan was driving;
- Swan’s friend who ran from Officer Bowe had been drinking;
- Swan appeared to be really nervous; and
- Officer’s Bowe’s interaction with Swan occurred at 2:36 a.m.

¶17 I conclude that here, Officer Bowe’s knowledge that *Swan* was not permitted to drive with any detectable level of alcohol in his system, *see* WIS. STAT. § 346.63(2m), combined with the time of night, Officer Bowe’s observation of the partially consumed bottle of alcohol in the vehicle, Swan’s nervousness, and Officer Bowe’s observation that Swan’s friend had been drinking was sufficient

to create probable cause to administer a PBT. *See, e.g., State v. Babbit*, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994) (evidence of consciousness of guilt may contribute to establishing probable cause to arrest); *Lange*, 317 Wis. 2d 383, ¶32 (recognizing bar time is a factor supporting an officer's suspicion of intoxicated driving and stating that evidence of intoxicant usage is not required). Accordingly, I conclude that Swan's motion to suppress was properly denied and affirm Swan's judgment of conviction.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.



