

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 14, 2010**

A. John Voelker  
Acting 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. 2010AP129-CR**

**Cir. Ct. No. 2009CT654**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSHUA M. FRANZEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 ANDERSON, J.<sup>1</sup> Joshua Franzen appeals from a circuit court's pretrial ruling that a preliminary breath screening test (PBT) during a traffic stop

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

was properly conducted. Franzen argues that the circuit court erred in denying his motion because the arresting officer did not have “probable cause to believe” Franzen was driving while intoxicated and therefore did not meet the requirements to perform a PBT under WIS. STAT. § 343.303.

¶2 We do not reach the merits, however, because Franzen’s motion failed to specifically assert the order or relief sought, and therefore fell short of the threshold requirements to obtain an evidentiary hearing. We affirm the circuit court on these grounds.<sup>2</sup>

¶3 On June 12, 2009, at approximately 2:00 a.m., Officer Dan Wilson of the City of Fond du Lac Police Department made a traffic stop of Franzen’s vehicle after determining that the vehicle’s registered owner had a suspended driver’s license. When he approached Franzen’s vehicle, Wilson discerned a strong odor of intoxicants coming from the vehicle. He further observed that Franzen had bloodshot eyes, appeared nervous, and was slurring his speech. A female passenger was with Franzen in the car, and Wilson had seen this woman intoxicated in the past. Franzen stated he and his passenger were coming from a local bar, and the passenger told Wilson the two were celebrating her new job. However, Franzen twice denied drinking.

¶4 Another officer backing up Wilson administered a PBT, the result of which indicated a blood-alcohol content level of .12 percent. The officers then performed field sobriety tests, which also presented signals that Franzen was

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<sup>2</sup> This court is free to sustain a lower court’s holding on a theory or on reasoning not presented to the lower court. *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

intoxicated. Franzen was subsequently arrested and, after refusing to take a breath test at the police station, charged under WIS. STAT. §§ 346.63(1)(a) and 343.305(9)(a).

¶5 Before trial, Franzen filed a motion “to challenge the existence of probable cause necessary for the use of a PBT,” which read as follows:

Comes the Defendant, Joshua M. Franzen, appearing specially, by his attorney, Timothy Lennon, upon all of the files, records and proceedings heretofore had herein, respectfully moves this Court for an evidentiary hearing challenging the probable cause for the use of PBT on Joshua M. Franzen, upon the following grounds:

1. The officer failed to obtain probable cause “to believe” Franzen was driving under the influence prior to requesting Franzen to submit to the PBT test prior in violation of Wis. Stat. 343.303 and therefore the 4th Amendment of United States Constitution.<sup>3]</sup>

**THEREFORE**, the defendant respectfully requests the Court hold an evidentiary hearing at its earliest convenience to determine if the officer met the requirements of 343.303.

¶6 WISCONSIN STAT. § 971.30 deals with the required form of motions and pleadings in criminal matters, and defines “motion” as “an application for an order.” Sec. 971.30(1). The statute requires the movant to “state *with particularity* the grounds for the motion *and the order or relief sought.*” Sec. 971.30(2)(c) (emphasis added).

¶7 At the hearing, the State moved to dismiss the motion for failure to specify relief sought, which was denied. However, the circuit court repeatedly

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<sup>3</sup> Here, the motion also cited *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), to support its conclusion.

expressed confusion at what Franzen sought from the court in the first place. At multiple times during the hearing, the circuit court asked Franzen’s attorney to explain the ends of his motion. Franzen’s attorney argued that, if the PBT was improperly administered, “all the fruits of the illegal search would be extinguished.” A PBT is already inadmissible at trial by statute, and under these circumstances is used “for the purpose of deciding whether or not the person shall be arrested” or to show probable cause for arrest. WIS. STAT. § 343.303. In essence, it appears Franzen intended to use an invalid PBT as a means to suppress any evidence obtained after the PBT to support probable cause for his arrest—including the field sobriety tests. We need not address the viability of such a strategy, and we note that this can only be discerned from the record of the evidentiary hearing and not from the motion itself.

¶8 Eventually, the circuit court denied what he called a “motion to rule the PBT improper,” noting this was a “narrow issue raised” and that the arrest itself was not challenged. However, Franzen’s pleadings on appeal refer to the circuit court’s ruling as “denying suppression of evidence,” even though the motion itself never requested such a remedy. Moreover, the State argued that suppression was not the prescribed relief for an invalid PBT, and the circuit court never referred to the motion as a request for suppression.

¶9 This outright confusion stems from the cursory nature of Franzen’s motion, which fails to state the order or relief sought with particularity as required by WIS. STAT. § 971.30(2)(c). The text of the motion requests the circuit court to “determine if the officer met the requirements” to administer a PBT, but does not ask for suppression of evidence or request any other form of relief from the circuit court. On the face of the motion, it appears Franzen is requesting some sort of declaratory judgment or a ruling that would be of no legal consequence. Franzen

attempted to explain his strategy at the hearing, but never stated the relief he sought *in the motion itself*, as required. “Particularity” as used in § 971.30(2)(c) has been alternatively stated as a requirement to “specifically assert” the relief sought. *See State v. Caban*, 210 Wis. 2d 597, 606, 563 N.W.2d 501 (1997). Simply implying the movant’s anticipated remedy with cursory references to the Fourth Amendment or WIS. STAT. § 343.303 does not meet the threshold requirements of § 971.30(2)(c).

¶10 Therefore, the circuit court should have dismissed Franzen’s motion for failure to specify relief sought. As the circuit court correctly noted, Franzen did provide notice of the *grounds* for his motion, as “the opposing party and the circuit court must have notice of the issues being raised by the defendant in order to fully argue and consider those issues.” *See Caban*, 210 Wis. 2d at 605-06. However, Franzen failed to state the *relief sought* with any degree of particularity, and he did not notify the court or the State what the implications of an improper PBT would be. As a result, it is unsurprising that both the circuit court and the State were unsure of what Franzen was asking the court to do. If a motion does not seek some affirmative relief from the court, it is not “an application for an order” as defined by WIS. STAT. § 971.30(1) and should be denied without an evidentiary hearing.

¶11 We conclude that Franzen’s motion did not meet the requirements of WIS. STAT. § 971.30(2)(c) and, therefore, an evidentiary hearing should not have been granted. Close scrutiny of a defendant’s motions in line with the threshold requirements of the statute ensures the preservation of scarce judicial resources.

*By the Court.*—Judgment affirmed.

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

