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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP101-FT

COUNTY OF FOND DU LAC,

Plaintiff – Respondent,

v.

NATHAN M. KOHLWEY,

Defendant – Appellant,

APPEAL FROM A JUDGEMENT OF CONVICTION
AND ORDER DENYING MOTION TO SUPPRESS
EVIDENCE OF THE FOND DU LAC
COUNTY CIRCUIT COURT, HONORABLE PETER L.
GRIMM, CIRCUIT COURT, BRANCH 2, PRESIDING

BRIEF OF DEFENDANT- APPELLANT

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ISSUES PRESENTED

1. WHETHER THE APPELLANT PASSENGER IN A CAR STOPPED BY POLICE HAS STANDING TO RAISE THE ISSUE OF PROBABLE CAUSE TO STOP AND DETAIN THE DRIVER?
ANSWERED BY THE TRIAL COURT, NO.

2. WHETHER THE STOP AND DETENTION OF THE DRIVER IN THIS CASE VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHTS ONCE THE OFFICER SAW THAT THE VEHICLE HAD A VALID TEMPORARY PLATE AND IT WAS DETERMINED THAT THE DRIVER WAS NOT IMPAIRED?
ANSWERED BY THE TRIAL COURT, THAT THERE WAS NO VIOLATION AND THAT THE MOTION TO SUPPRESS SHOULD BE DENIED.

STATEMENT OF THE CASE

On Wednesday, March 28, 2012, at about 11:36 p.m. the Fond du Lac County Sheriff's dispatcher received a 911 call from one Breanne Clark who gave her location as Old Bridge Road and County G. The caller indicated that she came up to a stop sign at that

intersection behind a Chevy S-10, black in color with a partial plate, GW164.. The vehicle did not move so the caller approached the driver's side window, knocked on it and woke the driver up, at which time the S-10 drove east across the intersection and headed down the dead end road. She believed the driver might be intoxicated, left her number for the officer to contact and left the scene. (R.33, p.7)

On Thursday, March 29 at approximately 12:11 a.m. two deputies of the Sheriff's Department arrived at the intersection of Old Bridge and County G. Deputy Dowland was in the front vehicle and when he got there he saw a light colored passenger vehicle without a front license plate coming toward him from the east. He allowed the vehicle to pass him, got on his two-way and advised Deputy Randall of the no front plate. Randall then went by the same vehicle, noting it did not have a rear plate, made a U-turn and pulled the vehicle over to the west of County G. (R.33, pp.10-12)

Deputy Randall walked up to the driver's side of the vehicle and noted that there was a temporary plate in the back window area. He made contact with the driver and in doing so, noted an odor of intoxicants coming from the vehicle, making no mention of the missing plates, asked for and obtained identification from both the driver and passenger, and then asked the driver why he was on Old Bridge Road to which the driver responded, "made a wrong turn." (R.33, pp.34-36)

Deputy Randall then asked the driver to step out of the vehicle to determine if he was impaired. The driver did that, and Randall was satisfied that he wasn't drinking or impaired and then instead of leaving the driver go, he commenced asking him questions about the

passenger. He asked what kind of vehicle the passenger drove. In response to that, the driver indicated an S-10. He then told the driver that the deputies were looking for a black S-10 possible intoxicated driver to which the driver responded that his passenger sometimes fell asleep and in response to whether he, the driver, had picked up his passenger, admitted that he did so. (R.33, pp.36-38)

Deputy Randall informed deputy Dowland of what he had learned from the driver, and Dowland approached the passenger side of the stopped vehicle, confronted Kohlwey with that information, asked him to exit and ultimately arrested him for OWI and several other violations. Kohlwey retained counsel who filed motions challenging the stop and detention. A hearing was held before Judge Grimm on July 25, 2012. The trial court made oral rulings in which it found that Kohlwey lacked standing to challenge the stop of the vehicle he was in and that the stop and detention were legal and in no way in violation of Kohlwey's rights under the Constitution. (R.33, pp.51-56, A-App.1-6)

It is from those oral rulings that this appeal is taken.

ARGUMENT

- I. WHEN OFFICERS MAKE A TRAFFIC STOP, ALL OCCUPANTS OF THE VEHICLE ARE SEIZED AND HAVE STANDING TO OBJECT TO THE SEIZURE. THE TRIALCOURT ERRED IN FINDING TO THE CONTRARY IN THIS CASE

In this case, Judge Grimm did not find that Kohlwey lacked standing to raise the issue of probable cause to stop the vehicle until he was at the end of his oral decision. (R.33, p.56, A-App.6) He had already made all of his findings concerning the stop by then. We submit that he was wrong on this point and it may have influenced his thinking on the other findings he made with reference to the stop since the driver was not in court or involved in this proceeding.

In any event, we submit, that *State v. Harris*, 206 Wis.2d 243, 557 N.W.2d 245 (1996) clears that up. In *Harris, supra*, our Supreme Court made it clear that from that day on, when a vehicle is stopped and it contains more than one occupant, the stopping of the vehicle is not just a seizure of the vehicle and its driver, but of any and all occupants and that any person occupying the vehicle can raise the issue of probable cause or reasonable suspicion to seize it or its occupants. Clearly, the trial court was in error in finding to the contrary.

II. WE ALSO SUBMIT THAT THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE STOP AND DETENTION OF THE DRIVER AS WELL AS QUESTIONING HIM AFTER ASCERTAINING THAT THE VEHICLE WAS REGISTERED AND THE DRIVER WAS NOT IMPAIRED CONSTITUTED A VIOLATION OF THE CONTITUTIONAL RIGHTS OF PASSENGER KOHLWEY AND ENTITLES HIM TO SUPPRESSION OF ANY AND ALL EVIDENCE OBTAINED DURING AND AFTER THAT DETENTION.

In this case, Kohlwey was a passenger in a vehicle which was allegedly stopped for not displaying registration plates front or rear. However, the vehicle did have a valid temporary plate in the rear window area as was observed by Officer Randall when he approached the driver's door. That did not become an issue because immediately upon confronting the driver Officer Randall asked him why he was driving on Old Bridge Road and got the response that he made a "wrong turn." Because Officer Randall smelled the odor of intoxicants, he asked the driver to exit the vehicle. The driver exited the vehicle at which time Randall verified that he was not impaired, but he did not release him. He continued to ask him "questions about the passenger." (R.33, p.42)

It is at this point that we maintain the Fourth Amendment rights of the passenger were being violated. We pointed that out in the Motion to Suppress as well as in summary to the Court prior to rendering its oral decision. We cited both in the motion and in argument, *Delaware v. Prouse*, 440 U.S. 648 (1979); *U.S. v. McSwain*, 29 F3d 558(CA 10th,1994); *Meredith v. State*, 878 NE2d 453 (Ind.CA 2007); and *U.S. v. Wilson*, 205 F3d 720 (CA 4th 2000).

All of the cited cases support our position, namely, that once an officer ascertains that the reason for the initial stop has been satisfied, he can no longer detain the vehicle or its occupants without it becoming an unreasonable detention. There is no magic timing device that tells him when he's gone too far, it is too far if there no longer is a legitimate reason to detain them. He can't just extend it to "investigate" thoughts he might have concerning the passenger or the dispatch which in no way described him in any way.

In *McSwain, supra*, the trooper stopped a vehicle with a temporary plate, ascertained that the plate was valid, then asked for ID's and other information as well as for permission to search the vehicle. There, it was held that what started out as a valid stop evolved into an unreasonable detention from the point where the officer had ascertained the validity of the temporary registration sticker. 29 F3d 558 at 562. In like manner, we ask that this Court find that what was a valid stop by Officer Randall became an unreasonable detention once he was satisfied that the temporary plate was valid and especially once he had been satisfied that Kohlwey's driver was not impaired. Any detention thereafter lacked reasonable suspicion, much less probable cause and any evidence obtained thereafter should have been suppressed.

CONCLUSION

For the foregoing reasons Kohlwey request this Court to reverse the decision of the Trial Court and enter judgment in his favor on his Motion to Suppress, or to remand to the Trial Court with instructions to grant that Motion and proceed without the evidence suppressed.

Respectfully submitted,

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CERTIFICATION

I certify that the brief and appendix meet form and length requirements of Rule 809.19(8)(b) and (c) and is a brief produced with monospaced font. The brief contains 1550 words.

I further certify that the text of the electronic copy of the brief is identical to the paper copy of the brief.

Dated this 1st day of March, 2013.

Jerome F. Pogodzinski
Attorney for Defendant-Appellant