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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2013 AP 001128

In the Matter of the Refusal of David Adams:

VILLAGE OF HALES CORNERS,

Plaintiff-Respondent,

v.

DAVID E. ADAMS,

Defendant- Appellant.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DATED MAY 14, 2013, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Carolina Stark, Presiding
Trial Court Case No. 2012 TR 16882

Respectfully submitted:

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ARGUMENT

I. THE VILLAGE'S HEAVY RELIANCE ON THE COLLECTIVE KNOWLEDGE DOCTRINE BETRAYS THE WEAKNESS OF ITS ARGUMENT, PARTICULARLY SINCE IT ERRONEOUSLY ENDEAVORS TO EXTEND THE DOCTRINE'S REACH BEYOND WHAT BINDING PRECEDENT ALLOWS.

In its effort to validate the *Terry* stop of Adams, the Village leans heavily, almost exclusively, on the collective knowledge doctrine. (*See* Response Brief, pp. 8-13). In reality, the collective knowledge doctrine has a rather limited role to play in the disposition of this case. It affects only whether the information to be imputed to Officer Sayeg is that which he actually possessed ("possible drunk driver"), or should also include that which he was never told ("van all over the road"), simply because such was known to the dispatcher. With so little ultimately at stake, the abject reliance on the doctrine virtually constitutes a tacit concession this Court should reverse the conviction. Indeed, the doctrine is so central to the Village's argument that if one pulls that linchpin, it collapses.

The doctrine is of such little import because even if one were to impute to Officer Sayeg knowledge that the vehicle was reportedly "all over the road," this case would still fall far short of the legal standard established by *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, given the other, larger circumstances at play. Such would not change, for example, the more significant fact that the record contains nothing to

establish Officer Sayeg had any articulable basis, at the critical point in time, to believe the tipster had exposed himself to identification (and in fact he had not). Nor would it change the fact the vehicle was off the road, properly parked, and the driver now a pedestrian, which afforded Officer Sayeg the opportunity to "surreptitiously observe the individual for a reasonable period of time without running the risk of death or injury with every passing moment." *Rutzinski* at ¶35.

The Village, however, does not really venture into this heart of this case because its analysis is too wrapped up in the collective knowledge doctrine. Indeed, so wrapped up in the doctrine is the Village that rather than respond in any meaningful manner to Adams' *Rutzinski* analysis, it simply discards that analysis out of hand:

> Adams' analysis is viewed solely from Officer Sayeg's perspective, without taking into consideration the information known to the dispatcher that was provided by the citizen caller. Therefore, Adams' legal analysis is flawed and without merit. Had Adams performed a proper legal analysis, as conducted under the collective knowledge doctrine . . . .

(Response Brief, p. 12). All of which comes on the heels of the Village wrongly accusing Adams of failing to address the doctrine altogether. (*Id*. at 10).

The myopic focus on the collective knowledge doctrine is compounded by an erroneous application of that doctrine to

this case. There is nothing wrong with viewing the facts and circumstances "solely from Officer Sayeg's perspective." On the contrary, the totality of the circumstances is *supposed to be* viewed "solely from the [acting officer's] perspective." *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690 (1996)("a court must identify all of the relevant historical facts *known to the officer at the time of the stop*")(emphasis added); *In re Refusal of Anagnos*, 2011 WI App 118, ¶10, Wis. .2d 57, 805 N.W.2d 722 ("[t]he determination of reasonableness is a commonsense test based on the totality of the facts and circumstances *known to the officer at the time of the stop*")(emphasis added). Nor did Adams fail to address the doctrine:

> The finding of fact that Officer Sayeg possessed information that the citizen caller had reported a van "all over the road" was erroneous, clearly. The error is important, because although this was information Officer Sayeg could have acquired with a minimum of additional investigation (i.e., simply radioing dispatch), he unequivocally did **not** have that information at the time of the stop. And the stop's reasonableness, after all, must be examined from the standpoint of information *Officer Sayeg* possessed, whether from his own observations, or as communicated to him by other members of law enforcement. *See State v. Orta*, 2000 WI 4, ¶23, 231 Wis. 2d 782, 604 N.W.2d 543 (citing *State v. Friday*, 147 Wis. 2d 359, 434 N.W.2d 85 (1990)(overruled on other grounds)).

(Adams' Brief-in-Chief, p. 19).

If there is any analytical shortcoming that stands out on appeal, it is that the Village neither cites nor discusses *Friday* or *Orta*. The Village's failure to explain how its analysis can coexist with *Friday* is particularly unfortunate because *Friday* examined the precise limitations of the collective knowledge doctrine that are implicated by this case:

> In a footnote to *State v. Middleton*, 135 Wis. 2d 297, 312 n. 7, 399 N.W.2d 917, 924 (Ct. App. 1986), we cited *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977), for the proposition that "in determining the existence of probable cause for a search, [the] court looks to the collective knowledge of [the] police . . . rather than the sole knowledge of the officer who performed the actual search." But *Clark* is not nearly as broad as the *Middleton* footnote suggests. Indeed, the quotation omits a crucial qualification. The *Clark* court's statement, in its entirety, was: "In addition to examining the totality of the circumstances, ***in view of the degree of communication between them***, we look to the collective knowledge of the police officers, rather than the sole knowledge of Officer Kennedy, who performed search of the truck." *Id.* at 424. (Emphasis added.)

Friday at 712. (Emphasis in original).

Friday then went on to examine two Wisconsin cases cited in the *Middleton* footnote: *Johnson v. State*, 75 Wis. 2d 344, 249 N.W.2d 593 (1977), and *State v. Drogsvold*, 104 Wis.

2d 247, 311 N.W.2d 243 (Ct. App. 1981). *Friday* rejected the idea that either of those cases supported such an expansive reading of the collective knowledge doctrine by noting that:

> the briefs in [*Johnson*] demonstrate that the department's "collective knowledge" actually had been communicated to the arresting officers; they were fully conversant with all of the information about the case that was in the department's possession when they made the arrest. . . .The same is true of *Drogsvold*. Imputation simply was not an issue in that case, and there is nothing in the opinion to indicate that the arresting officers were not acting on information supplied to them by other officers when they went to Drogsvold's house to arrest him for murder.

Friday at 713. (Citations omitted).

Friday got to the crux of the issue *sub judice* when it stated:

> There are many cases upholding a police officer's probable cause determination when the officer relied on the collective information within the police department relayed through police channels. However, none of them hold that the on-the-scene officer's determination may be based on *uncommunicated* information reposing in other officers elsewhere in the department. The collective knowledge or imputation rule has

> always been couched in terms of the arresting (or searching) officer's reliance upon a police communication.

Friday at 713-714. (Emphasis in original; quotations and footnote omitted), *citing Schaffer v. State*, 75 Wis. 2d 673, 677, 250 N.W.2d 326 (1977)(where officer relies on police "communication" in making arrest, arrest will be valid when such facts exist within police department); *State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981)("where an arresting officer *is given information through police channels* such as roll call, this court's assessment of whether the arrest was supported by probable cause is to be made on the collective knowledge of the police force.").

Friday also examined *Salter v. State*, 321 N.E.2d 760 (Ind. App. 1975), wherein the police attempted to justify the search of a purse by use of information that was in the possession of an officer "not on scene and whose knowledge was never communicated to the searching officer." *Salter*, noting it is generally permissible to determine the existence of probable cause "on the basis of the collective information known to the law enforcement organization as a whole," held that the searching officer lacked probable cause because "there is no evidence [showing] . . . any communication between [the [o]fficers . . . . There is no evidence that [one] had the benefit of [the other's] information." *Id.* at 762.

Friday ultimately held that information possessed by one investigating officer could not be used to support the search of Friday's car because the information was not communicated to the officers conducting the search. *Friday* at 715. *Friday* noted substantial additional support for the rule. *Id.* at 714-15, *citing United States v. Woods*, 544 F.2d 242, 259-61 (6th Cir. 1976) (information in hands of superior officer could not be used to validate arrest where officer making arrest not acting on superior's orders); *State v. Crowder*, 613 P.2d 909, 915 (Hawaii App. 1980) ("cannot impute the information received by any other officer to the arresting officer" where there is no evidence that any of the officers "communicated with each other or exchanged information" prior to the arrest); *People v. Creach*, 387 N.E.2d 762, 769 (Ill. App. 1979), *aff'd in part*, 402 N.E.2d 228 ("the ordinary presumption that for purposes of probable cause the knowledge of one officer is imputed to the others involved in the cause" held inapplicable because there had been no communication between the officers in question); *Com. v. Gambit*, 418 A.2d 554, 557 (Pa. Super. 1980), *aff'd per curiam*, 462 A.2d 211 (1983) ("[i]nformation scattered among various officers in a police department cannot substitute for possession of the necessary facts by a single officer related to the arrest"). Professor LaFave has called the rule declining to impute an absent officer's uncommunicated knowledge to the searching officer "sound" and states that it "should unquestionably be applied in cases like *Salter*, where the officer who did possess the probable cause was not in a close time-space proximity to the questioned . . . search." 2 LaFave, *Search and Seizure*, sec. 3.5(c), p. 17 (1987).

The Village, either uninformed as to this body of case law, or informed but undeterred, relies on the unpublished opinion of *State v. Wittrock*, 2012 WI App 40, 340 Wis. 2d 499, 812 N.W.2d 540 (though it neither filed nor served a copy of that decision, contrary to Rule 809.23(3)(c); Adams therefore appends a copy to this brief). *Wittrock*, however, addressed a rather different scenario - one where an All Points Bulletin had been issued by a law enforcement agency - and to that end, *Wittrock* turned to *U.S. v. Hensley*, 469 U.S. 221, 231-33 (1985), for guidance. (App. A-4). *Hensley*, however, had addressed an even more unique scenario where police flyers (i.e., the functional equivalent of "Wanted" posters) had circulated among various law enforcement agencies regarding a past, completed crime from which the suspect had escaped from the scene. *Hensley*, 469 U.S. at 228. The flyers twice stated Hensley was wanted for investigation of an aggravated robbery and described both Hensley and the date and location of the alleged robbery, and asked other departments to pick up and hold him for the St. Bernard police in the event he were located. The flyer also warned other departments to use caution and to consider Hensley armed and dangerous. *Hensley* concluded that if a flyer or bulletin has been issued on the basis of articulate facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification and gather information. In such a case, which is decidedly not the case here, the acting officer possesses the information from the flyer and the basis for

the stop is the product of a considerable investigation conducted by the law enforcement agency *en toto*.[1]

This is, admittedly, a lengthy analysis of the collective knowledge doctrine and all for the sole purpose of demonstrating that when Officer Sayeg stopped Adams, all he knew was that some unidentified motorist had alleged that there was a "possible drunk driver." The distinction is subtle, but to the extent it matters, it further augers against the lawfulness of the stop. The allegation, as it was known to Officer Sayeg,

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[1]The Village also calls on *State v. Rissley*, 2012 WI App 112, 344 Wis. 2d 422, 824 N.W.2d 853, in making this argument. In *Rissley*, however, a wealth of specific information was communicated by dispatch to the officer who made the traffic stop, (*see* Appellant's Brief at p. 3), the defendant thus conceded the applicability of the collective knowledge doctrine, (*id.* at 8, fn 3), and the thrust of this Court's ruling was therefore a rejection of the idea that "[t]he officer making the stop was . . . required to exercise his independent discretion." *Rissley* at ¶19. This Court stated:

> As the State points out, under the collective knowledge doctrine, "[t]he police force is considered as a unit **and where there is police-channel communication to the arresting officer** and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department.

Id. (Emphasis added).

skewed bald, and the basis for the allegation remained ambiguous. Had the tipster observed driving behavior? Or had he followed the driver from some establishment after an in-person encounter? Or was the report an outgrowth of a road-rage type incident? Officer Sayeg could only guess.[2]

In the end, and for what it's worth, it cannot be denied that the circuit court *did* make a clearly erroneous finding of fact when it stated that dispatch communicated to Officer Sayeg that "the van was all over the road." The Village chides Adams for the observation, but the record unambiguously establishes such information was never communicated to Officer Sayeg. (App. C, p. 1; App. D, p. 1). Thus, the stop in this case was based on a vague report from an unidentified and unidentifiable informant at a point in time when there was no exigency of an imminent threat with each passing moment and channels available for the officer to instantly obtain additional information for what was

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[2]That a bald allegation of wrongdoing is of relatively little value is confirmed by the *published* Wisconsin case upon which *Wittrock* relied. *State v. Pickens*, 2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1. In *Pickens*, this Court held that in a collective knowledge situation, adequate proof is **not** supplied by the mere testimony of the investigating officer that he relied on the unspecified knowledge of another officer that he suspected the defendant had committed a crime. *Pickens* at ¶¶11-13.Such testimony provided no basis for the court to assess the validity of the police suspicion — it contains no specific, articulable facts to which the court can apply the reasonable suspicion standard. *Id*. In *Pickens,* the unspecified knowledge came *from another police officer,* while here it came from an unidentified tipster!

then an inchoate investigation. While there is no reason to doubt the good intentions of Officer Sayeg, the stop in this case cannot survive a reasonable *Rutzinski* analysis.[3]

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Adams respectfully requests this Court vacate the refusal conviction, and remand to the circuit court with directions that it dismiss that charge with prejudice.

Dated this 22nd day of November, 2013.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

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[3]The Village argues the stop occurred when Officer Sayeg engaged his emergency lights. Adams posits the stop occurred when Officer Sayeg positioned his vehicle a few feet off Adams' bumper effectively blocking him into his parking spot and Adams assented to that show of authority by walking back to the squad car. It seems rather artificial to argue Adams was not detained as he was walking back in response to Officer Sayeg's actions but suddenly became detained when the officer turned on the emergency lights. In either event, the Village cannot have its cake and eat it too. By the time Officer Sayeg engaged his emergency lights, any exigency would have dissipated further, and it would have been apparent that use of the car frame to step down from the van would not have been terribly probative for a 77-year-old man with his legs fully bandaged.

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,678 words.

Dated this 22nd day of November, 2013.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the reply brief and appendix, if available electronically, in *City of Hales Corners v. David Adams,* Appeal No. 2013 AP 001128, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of November, 2013.

/s/ Rex Anderegg
Rex Anderegg