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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,
-vs-
Appeal No. 2014AP000109 CR
ANDREW J. KUSTER,
Defendant-Appellant.

In the Matter of the Refusal of Andrew J. Kuster
STATE OF WISCONSIN,
Plaintiff-Respondent,
-vs-
Appeal No. 2014AP000227
ANDREW J. KUSTER,
Defendant-Appellant.

ON APPEAL FROM JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE JAMES L. CARLSON, PRESIDING, AND FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE DAVID M. REDDY, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

ARGUMENT

Matters not refuted by respondents on appeal can be taken by this Court as admitted. ***Charolais Breeding Ranches, Ltd. vs. FPC Secs. Corp.,*** 90 Wis. 2d 97, 109, 279 N.W. 2d 493, 499 (Ct. App. 1979). Likewise, this Court has traditionally declined to consider arguments not supported by citations to the record. ***State v. Betow***, 226 Wis. 2d 90, ___, 593 N.W.2d 499, 503 (Ct. App. 1999).

I. BASIS FOR THE STOP MUST BE FOUND IN THE CIRCUMSTANCES KNOWN TO POLICE AT THE TIME OF THE STOP.

In determining whether a traffic stop passes constitutional muster, courts are to consider the totality of the circumstances known to police at the time. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). As noted in appellant's principal brief, the car observed in the parking lot was tan. R. 37, pp. 59-60. The car ultimately stopped was silver. R. 37, p. 60. The State does not directly address this color discrepancy in its responsive brief, referring only to a conversation which occurred between the officer and the driver of the silver vehicle ***after*** the silver vehicle was stopped. The State also does not attempt to refute appellant's argument that if the driving behavior observed of the tan vehicle is thus excluded from consideration, under this Court's holding in ***State v. Fields***, 2000 WI App 218, 239 Wis. 2d 38, 619 N.W.2d 279, the driving behavior observed of the silver car is insufficient to justify the stop. Accordingly, both the refusal conviction

and the PAC conviction must be reversed, mooting the balance of the issues raised on this appeal.

The same holds true whether the Court is considering probable cause to believe a traffic violation has been committed, or reasonable suspicion to believe that the driver of the silver vehicle was operating under the influence. None of the cases cited on this point by the State in its reply brief address the issue of this color discrepancy. In ***State v. Popke***, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569, ***State v. Krier***, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991), ***State v. Post***, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 624, and ***State v. Betow***, *supra*, there is no question but that the vehicle stopped was the same vehicle to which all of the relevant observations of record applied. The other two cases cited by the State, ***State v. Colstad***, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394, and ***State v. Lange***, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551 were accident cases, which did not involve traffic stops.

II. THERE WAS NO OBJECTIVE BASIS TO EXPAND THE SCOPE OF THE TRAFFIC STOP.

In its brief, the State makes no attempt to refute appellant's factual assertion that when asked to articulate the basis for detaining appellant for field sobriety tests, the officer simply recited the driving behavior addressed above, and the time of night. R. 37, pp. 66-67. Nor does the State offer any additional facts, or citations to the record for objective factors supporting the expansion of the scope of the stop,

other than the moderate odor of intoxicants, R. 37, p. 32, the admission of drinking, and inconsistent answers as to how much alcohol had been consumed. R. 37, p. 33.

The only case cited by the State in support of its argument that this is enough is ***State v. Colstad***, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. ***Colstad*** was an accident case that involved the death of a child pedestrian. The dispositive determination in ***Colstad*** was the determination by our Supreme Court that notwithstanding the odor of intoxicants and admission of drinking, ". . . that the officer possessed reasonable suspicion that Colstad was guilty of inattentive driving, contrary to Wis. Stat. §346.89(1)." 260 Wis. 2d at 418 [footnote omitted]. ***Colstad*** therefore fails to speak to the issue before this Court.

In the absence of any of the common indicia of impaired ability to safely drive, there was no basis to detain appellant for field sobriety tests. Independent of the absence of a basis for the stop itself, the lack of an objective basis to expand the scope of that stop also requires reversal of both the refusal conviction and the PAC conviction, mooting the balance of the issues raised on appeal.

III. THE TOTALITY OF THE CIRCUMSTANCES FAIL TO SUPPORT A CONCLUSION THAT THERE WAS MORE THAN A POSSIBILITY THAT KUSTER WAS TOO IMPAIRED TO SAFELY DRIVE.

In ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) this Court concluded that the facts recited at length in appellant's principal brief did not support a finding of probable cause for the arrest of Renz absent the PBT.

> We conclude that the instances of ***Renz***'s unsteadiness, when considered in the context of all the evidence that he was not under the influence of an intoxicant, are minimal and do not demonstrate that there was "more than a possibility" that he was under the influence of an intoxicant to the degree that made him incapable of driving safely. We therefore conclude Officer Drayna did not have probable cause to arrest at the time he asked ***Renz*** to submit to a PBT.
>
> 222 Wis. 2d at 447.

In reversing this Court on other grounds, our Supreme Court did not address this specific holding, and therefore on this point, this Court's conclusion remains undisturbed. The State's quibbling on the interpretation of the Supreme Court's decision in ***Renz*** notwithstanding, the factual comparison between that case and this is a fair one, and the State offers no specific facts, record cites, or case law to rebut it.

The State also neglects to refute, or address in any way appellant's arguments regarding the absence in the record of any basis to impart any relevant meaning to the officer's observation of four clues on the HGN test under the standard ostensibly applied by the trial court, or any other standard. The State does not dispute the assertion in appellant's principal brief that "with the exception of the HGN test, Kuster passed the field sobriety tests." Brief and Appendix of Appellant, at p. 13.

Finally, acknowledging that the trial court did not consider the appellant's declination of the PBT, the State ignores, and thus fails to refute the appellant's constitutional arguments regarding the impropriety of drawing an adverse inference from the declination of a consent search like the PBT, conceding those arguments as well.

Accordingly, under either applicable standard, the officer's testimony regarding his objective observations could be both plausible and credible, and the record would still remain insufficient to support a finding of probable cause on *de novo* review by this Court. The refusal conviction and the PAC conviction must therefore both be reversed. Even if the Court were to sustain the refusal conviction due to the lower burden of persuasion applicable, the PAC conviction must still be reversed, mooting the balance of the issues raised on appeal.

IV. THE STATE'S FAILURE TO REFUTE THE ANALOGY TO *CARROLL* ON THE INDEPENDENT SECOND SEARCH ARGUMENT AMOUNTS TO CONCESSION.

Independent of the good-faith analysis below, appellant advanced the argument that once ***Missouri v. McNeely,*** 569 U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696. (2013) was decided, a warrant was required for the search of Kuster's unlawfully seized blood sample for alcohol by means of gas chromatography. As noted in appellant's principal brief, even if good-faith were to save the warrantless seizure of Kuster's blood, that seizure remains unlawful, but by application of the good-faith exception, not subject to suppression. As argued extensively in appellant's principal brief, the unlawfulness of that seizure distinguishes appellant's second search argument from those rejected in other cases, making it most analogous to ***State v. Carroll***, 2008 WI App 161, 314 Wis. 2d 690, 762 N.W.2d 404, *affirmed* 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1. The State's brief does not even address the application of ***Carroll*** to this case.

The post-***McNeely*** warrantless search of Kuster's blood for alcohol by use of gas chromatography was thus improper, and those results should have been suppressed. Therefore, if this appeal is not resolved in Kuster's favor on other grounds, Kuster's PAC conviction must still be reversed.

V. UNABLE TO REFUTE THE ARGUMENT THAT THE RECORD IS INSUFFICIENT TO SUPPORT OBJECTIVELY REASONABLE RELIANCE ON *BOHLING*, THE STATE IGNORES IT.

In its brief, the State asserts "[t]he defendant only challenges the blood draw based on the first requirement espoused in ***Bohling***." Brief and Appendix of Respondent, at p. 14. This completely ignores the argument made in appellant's principal brief that ***independent*** of the probable cause issue, summary denial of his ***McNeely*** motion was improper. Brief and Appendix of Appellant, at pp. 21-22. Appellant's analogy of the record required on such a determination to that required for the application of the community caretaker exception is thus conceded, as is appellant's reference to the decision in ***State v. Carroll***, 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1 as applicable to the good-faith analysis. Specifically, as ***McNeely*** was decided before Kuster's blood was analyzed, there was nothing stopping law enforcement from seeking a warrant, after the fact, before testing the sample unconstitutionally seized, as was done in ***Carroll*** regarding the content of the cell phone. The fact that they chose not to do so, even after it became clear that the blood had been unconstitutionally seized, goes to the issue of good faith. If not mooted by

the other issues raised above, this requires reversal of the summary denial of this motion.

CONCLUSION

The State's failure to address the distinction between the tan vehicle observed in the parking lot and the silver vehicle ultimately stopped undercuts both the State's argued basis for the stop, and its expansion. Absent a basis for the stop, and an objective basis to expand the scope of that stop, both the refusal and the PAC conviction must be reversed. Even if the stop was good, the record does not support a finding of probable cause for Kuster's arrest under either applicable standard, resulting in the same outcome. A determination that summary disposition on Kuster's ***McNeely*** motion is improper would also require reversal in the criminal traffic case, if the PAC conviction is not otherwise disposed of based upon his unrefuted second search argument. For any and all of the above reasons, the trial court must be reversed, with instructions consistent with this Court's decision.

Dated at Jefferson, Wisconsin this ____ day of August, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and foot notes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,460 words.

I further certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §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: August _____, 2014.

Signed:

MICHAEL C. WITT
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