STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014 AP 301-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEBORAH K. SALZWEDEL,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR JUNEAU COUNTY, THE HONORABLE PAUL S. CURRAN, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did the police officer have probable cause to stop the defendant's vehicle?

The circuit court determined that there was probable cause to stop the defendant's vehicle.

II. May the circuit court find generalized "reasonable suspicion" to conduct a traffic stop when the officer testifies that the reason for the stop was a specific traffic ordinance violation which did not occur?

The circuit court assumed yes, and found that there was reasonable suspicion for a stop.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The defendant-appellant believes that oral argument is unnecessary in this case as all of the legal issues can be decided on the record, but would welcome the opportunity should this Court feel it helpful.

Publication of the decision/opinion in this case is not authorized because this is a one-judge appeal in a misdemeanor case. Wis. Stat. § 752.31(2)(f), (3), and Wis. Stat. Rule 809.23(1)(b)(4). However, the chief judge may be warranted in convening a three-judge panel *sua sponte* if the Court must answer the important constitutional question: whether a circuit court may find reasonable suspicion to conduct a traffic stop when the officer testified only that he believed a civil forfeiture occurred. Wis. Stat. Rule 809.41(3).

STATEMENT OF THE CASE

Procedural History

On July 12, 2012, the State of Wisconsin filed a two-count criminal complaint charging Ms. Deborah Salzwedel with operation of a motor vehicle under the influence of an intoxicant, third offense, and also with operating a motor vehicle with a prohibited blood alcohol content, third offense. (R 1). On January 22, 2013, trial counsel filed a Motion to Suppress alleging that the officer who stopped Ms. Salzwedel had neither reasonable suspicion nor probable cause to stop Ms. Salzwedel in her vehicle on the day of the crime. (R 7). A hearing was held on the Motion to Suppress on February 7, 2013. (R 23). The circuit court denied the suppression motion. (R 23, 26:20-21). Ms. Salzwedel entered a no contest plea to count 2, was sentenced to 50 days in the county jail, and the sentence was stayed pending appeal. (R 17).

Statement of Facts

On June 23, 2012, at roughly 8:58 p.m., Deputy Patrick Miltimore was "running traffic" in the city of Mauston when he "saw a vehicle in front of [him] with no lights on." (R 23, 5:6-13). That vehicle—operated by Ms. Salzwedel—was in the left-turn lane at the intersection of State Street and North Union Street, in Mauston, "facing east, towards Union." (R 23, 5:22-

23). That lane is a left-turn only lane with a "green arrow." (R 23, 7:21).

Deputy Miltimore was stopped at the light behind Ms. Salzwedel. (R23, 8:10-12). When the light changed Ms. Salzwedel turned left onto North Union. (R 23, 6:18-7:2). She did not use her turn signal. (R 23, 7:3-4).

The deputy testified that he expected Ms. Salzwedel would go straight even though she was in a turn-only lane. "I anticipated the vehicle to go straight through the turn lane." (R 23 7:9-10). He testified that he was surprised by this because, even though it was a designated turn lane, he has often observed vehicles driving straight through. (R 23 7:13-18). He testified that because there was a green arrow, Ms. Salzwedel's failure to signal her turn did not affect other traffic. (R 23, 7:21-24). The only effect of her failure to signal was to surprise the deputy. (R 23, 7:5-24).

Ms. Salzwedel came to a stop at the red light at the intersection of North Union and Highway 82. (R 23 8:18-21). She still did not have her headlights on. (R 23 8:18-21). When the light changed, she continued on North Union, and the deputy continued behind her. (R 23 8:18-21).

Ms. Salzwedel apparently varied her speed, and averaged about 20 miles per hour in an area where the limit was 25 mph. (R 23, 8:6-7, 8:24-9:1). This portion of the road was under construction. (R 23, 6:18-22). Deputy Miltimore

decided to run her plate, and while he was doing that, Ms. Salzwedel turned left into a parking lot without using her signal. (R 23, 9:3-10). This left turn had no effect on traffic except that the deputy, following closely behind her, slowed when he observed Ms. Salzwedel's brake lights illuminated. (R 23, 9:16-24). He testified that he would have had to slow down regardless of whether or not Ms. Salzwedel used her turn signals. (R 23, 11:14-18). When asked whether use of a turn signal would have affected him "at all," he only indicated that he would not have made the traffic stop; he did *not* indicate that it affected his driving in any way. (R 23, 11:25-12:4).

Deputy Miltimore testified that the reason he stopped Ms. Salzwedel was, "[n]ot using directionals, her turn signal." (R 23 10:13). He testified that he decided to stop her only when she made the second turn without a signal. (R 23, 9:3-6). He did *not* testify that he stopped her because she was driving without her headlights, that he suspected her of operating under the influence, or for any other reason. (R 23, *passim*). Deputy Miltimore never testified that he did, in fact, suspect a crime. (R 23, *passim*).

After hearing the testimony, the circuit court ruled that the Deputy had both probable cause and reasonable suspicion to stop Ms. Salzwedel's car. The court made factual findings that Ms. Salzwedel's twice did not signal her left turn, and that this affected Deputy Miltimore. (R 23, 23:10-20). The court

found that this was probable cause that Ms. Salzwedel violated Wis. Stat. § 346.34.

The circuit court also went on to find reasonable suspicion:

> Okay. Well, the appropriate test to apply to this motion is, considering the totality of the circumstances, did Deputy Miltimore have a reasonable suspicion as a basis to pull over Ms. Salzwedel?
>
> Now that is not the same as probable cause to believe a crime has been committed. It is a much lower standard than probable cause to believe a crime has been committed.
>
> [...]
>
> [W]e're not taking it piecemeal. We're taking it totality of the circumstances. And we're not basing it on probable cause. We're basing it on reasonable suspicion.

(R 23, 22:23-24:2). The facts that the court felt were part of the "totality of the circumstances," were the following:

- Ms. Salzwedel did not have her headlights on. (R 23, 24:4-5).
- Most traffic had their headlights on. (R 23, 24:5-11).
- The streetlamps automatically activate due to declining levels of daylight and were illuminated at the time of the stop. (R 23 24:13-14).
- The stop occurred two days after the summer solstice and sunset was not until 8:46 p.m. (R 23, 26:2-7).[1]
- The stop occurred around 8:58 p.m.[2]

---

[1] The circuit court took judicial notice that the time of sunset on the day of the offense was 8:46 p.m. based on an attachment from the Naval Observatory which trial counsel provided with the suppression motion. (R 23, 21:25; R 7, p. 3).

[2] The circuit court did not explicitly rely on this fact, but it is impliedly referenced in the ruling. Deputy Miltimore testified that the stop occurred around 9:00 p.m. (R 23, 5:2-3). Deputy Miltimore's reports

- Ms. Salzwedel was driving 20 mph in a 25 mph zone. (R 23, 24:24-24:25).
- A portion of that stretch of road was under construction. (R 23, 25:1-3).

- That Ms. Salzwedel made two left turns without signaling. (R 23, 25:24-25).

The circuit court ruled, based on these circumstances, that there was reasonable suspicion to conduct a *Terry* stop. The circuit court never specified what offense Deputy Miltimore could reasonably have suspected based on these circumstances. (R 23, *passim*). The circuit court did not find that Deputy Miltimore did, in fact, suspect a crime when he stopped Ms. Salzwedel. (R 23, *passim*).

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attached to the criminal complaint state that he observed Ms. Salzwedel around 8:58 p.m. (R 1, p. 3). A second police report attached to the complaint states that around 9:00 p.m. Deputy Miltimore had already stopped Ms. Salzwedel. (R 1, p. 4). Under any circumstances, the stop occurred less than 15 minutes after sunset, and well before dark at 9:23 p.m. (R 7, p. 3).

ARGUMENT

I. Deputy Miltimore did not have probable cause to stop Ms. Salzwedel.

(A) Standard of Review

Whether there is probable cause or reasonable suspicion to conduct a traffic stop is a question of constitutional fact. ***State v. Popke,*** 2009 WI 37, ¶ 10, 317 Wis.2d 118, 765 N.W.2d 569. The Court of Appeals applies a two-step standard of review. ***State v. Powers***, 2004 WI App 143, ¶ 6, 275 Wis.2d 456, 685 N.W.2d 869. First, the circuit court's findings of historical fact are reviewed under the "clearly erroneous" standard. *Id.* Second, a de novo review is done to determine whether the deputy had reasonable suspicion or probable cause. *Id.*

(B) The circuit court's findings that Deputy Miltimore was affected by Ms. Salzwedel's lack of a turn signal were clearly erroneous.

(1) In the first instance, Deputy Miltimore testified that he was surprised but not affected by Ms. Salzwedel turning left in a left-turn only lane.

The circuit court found that "[a]t the corner of State Street and Union Street, Deputy Miltimore testified that he was affected by the fact that Ms. Salzwedel did not use her turn indicator." (R 23, 23:10-13).

However, a careful reading of the testimony reveals that Deputy Miltimore did not testify to any effect that Ms. Salzwedel's failure to signal had on traffic or on his driving:

> Q: You said the vehicle turned left. And that was the direction you were turning?
>
> A: Yes. On North Union.
>
> Q: Okay. Did the vehicle have its turn signal on?
>
> A: No, it did not.
>
> Q: And did that affect you in any way?
>
> A: Well, I mean yeah. I'm anticipating, you know, with traffic, the flow and stuff. But I didn't hit the vehicle or anything like that. But I was just – It was – You kind of wait. And I anticipated the vehicle to go straight through the turn lane, is what it was.
>
> Q: Okay. And the reason for that was why? Because the turn signal was not on?
>
> A: The turn signal was not on. And I have had other vehicles in the past when I am sitting there. It's one of the things that I always watch for. People following, you know, in a turn lane. **If you are in a turn lane, you are designated to turn.** But people will go straight through there.
>
> Q: Was there any other traffic that was affected besides yourself at the intersection?

> A: Well, it would have been a green arrow. So there was cars – you know, there was traffic there. I don't – To the effect – I was probably the only one affected at that point because I was right behind her.

(R 23, 6:25-7:24 (*emphasis added*)).

The scene Deputy Miltimore is describing is that he was at a stop and go light behind Ms. Salzwedel in a left-turn only lane. She turned left from a left-turn only lane without signaling. This is sensible because if she had gone straight from a left-turn lane, with a left-turn arrow, it would have been unlawful. But the deputy was surprised by her lawful action because he has seen others go straight at that intersection before.

Because she was obeying the traffic signal — a "green arrow" — oncoming traffic was not affected. Because he himself was turning left behind her, he had to wait for her to turn left and accelerate before he could go. Theoretically, if she had gone straight instead of turning, perhaps she would have accelerated more quickly and he could have made his turn a little sooner. But her failure to signal was not the cause of this momentary and inconsequential wait. Her lawful left turn through the intersection was why he had to wait for her to accelerate.

Despite the fact that he answered the state's question affirmatively, he offered no testimony describing any effect on his driving, or testimony that would lead to a reasonable

inference that he was affected. The only effect that he testified to, ironically, was his surprise that she did *not* violate a traffic law by going straight from a lane where she was only permitted to turn left. His surprise was based on the fact that he had observed other cars at that intersection go straight even though the light is a green arrow. This is as though he pulled her over for unsafe driving because she was driving 65 mph on a highway where everyone else is speeding.

In the end, the circuit court's finding of fact that the absence of a turn signal in the first instance affected Deputy Miltimore's driving is clearly erroneous.

(2) In the second instance, Deputy Miltimore testified that he had to slow down as Ms. Salzwedel turned, just as he would have regardless of whether she signaled her turn.

The circuit court found that "at the entrance to the parking lot for the various businesses that have been discussed, he testified again that he was affected by the fact that she did not use her turn signal." (R 23, 23:14-17). This finding is also clearly erroneous. The testimony:

> A: While I was heading north on North Union, the vehicle makes a quick left turn in front of me without using its turn signal a second time. And that's when I decided to make the stop.

[...]

Q: Okay. And was there traffic coming towards you at that time?

A: There was, you know – I can't say for sure that there was oncoming traffic. And I was right behind the car, though. And I was – I know there was other cars around. Nobody had to hit their brakes or swerve, if that's what you're asking, sir.

Q: Did you?

A: Well, I had – If I wasn't – I had to brake because she broke. But I was following right behind. So it was one motion.

(R 23, 9:3-24). Deputy Miltimore's testimony was cautious and precise; he did not testify that the lack of a turn signal had any effect on his operation of his car. He testified that he had to slow because she was slowing, not because she failed to signal. He did not testify that he was surprised by her turn, or forced to abruptly hit the brakes. He did not describe any difference in his driving based on the lack of a turn signal.

His testimony on cross-examination was even clearer:

Q: You hit your brakes because she braked to make the turn?

A: Well, yeah. I mean I had to slow up because she was turning in front of me. Yes.

Q: Okay. And you said earlier that you always try to maintain a few car lengths between you and other traffic"

A: Yes.

Q: Was that true at the time that she turned into that strip mall parking lot? That you, also, were a few car lengths behind her?

A: Yes.

Q: Okay. So, whether or not somebody would have had their signal on, you, obviously, would have had to slow down if you were a few car lengths behind them?

A: Yeah. I'm sure you would. Yes. I think that's a fair statement. Yes.

(R 23, 11:2-18). On redirect, the State tried to resuscitate their case, but Deputy Miltimore declined to describe any effect that her lack of a signal had on his driving:

Q: If Ms. Salzwedel would have used her turn signal turning into the parking lot, would that have affected you at all?

A: I wouldn't have made the stop had the turn signal been used.

(R 23, 11:25-12:4). When asked directly, Deputy Miltimore only identified a change in his law enforcement duties based on the failure to signal; he did not testify to any effect on his *driving*. He specifically affirmed that the lack of a turn signal was irrelevant to his driving.

Deputy Miltimore's testimony does not support a finding that traffic was affected. The Deputy specifically disavowed any effect on his driving from the lack of a turn signal, and specifically testified that no other traffic was affected. The circuit court's factual finding that traffic was affected was clearly erroneous.

(C) Because traffic was not affected, Deputy Miltimore did not have probable cause to stop Ms. Salzwedel for a violation of Wis. Stat. § 346.34.

A police officer may conduct a traffic stop when he or she has probable cause to believe that a traffic violation has occurred. ***State v. Popke,*** 2009 WI 37, ¶ 13, 317 Wis.2d 118, 765 N.W.2d 569. "When an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure." ***State v. Waldner***, 206 Wis.2d 51, 59, 556 N.W.2d 681 (1996). Probable cause exists when there is a "quantum of evidence" that would lead a reasonable police officer to conclude that a traffic violation occurred. *Id.*

(1) A violation of Wis. Stat. § 346.34(2) requires that other traffic was affected by the defendant's failure to signal.

The only reason that Deputy Miltimore gave for stopping Ms. Salzwedel was her failure to signal, ostensibly a violation of Wis. Stat. § 346.34(2):

> (b) In the event any other traffic may be affected by the movement, no person may turn a vehicle without giving an appropriate signal...

However, "the failure to give a right-hand turn signal is not a traffic violation unless 'other traffic may be affected by such movement.'" ***City of Milwaukee v. Johnson***, 21 Wis. 2d 411, 413, 124 N.W.2d 690 (1963).[3]

Despite the statute's use of the word "may," it is not enough that other traffic *could have been* affected; the statute requires that other traffic was actually affected. Interpreting the use of the verb "may affect" to indicate "could have affected" would be counterfactual, and would allow *all* unsignalled turns to be penalized regardless of the actual circumstances. Such an interpretation would render the introductory clause of the statute superfluous.

For example, if a driver makes a left turn without signaling while driving alone on a country road, and there is no other car in sight, they *might have* affected other traffic *if* other traffic had been present. This requires an assumption of fact that was not true at the time of the incident—i.e. that other cars were on the road.

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[3] In *State v. Anagnos*, the Court of Appeals interpreted *Milwaukee v. Johnson* to stand for the proposition that "[e]vidence in the record must support a finding that [the defendant's] failure to use a turn signal affected other traffic." ***State v. Anagnos***, 2011 WI App 118, ¶7, 337 Wis. 2d 57, 805 N.W.2d 722, (*overruled on other grounds by* ***State v. Anagnos***, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675).

Similarly in Ms. Salzwedel's case, in order for her to have affected traffic one would need to assume facts *that were not true*. One would have to assume that the deputy's car was closer than it actually was, or that other cars were driving faster than they actually were. The fact that Ms. Salzwedel's turn *did not in fact affect traffic*, means that she *could not have affected traffic.* To conclude otherwise requires that positing facts which did not exist at the time of the incident.

Construing the past tense of "may affect" to be "could have affected," effectively eliminates the element from the statute because in a counterfactual situation it is *always* the case that a left turn without a signal may affect traffic. Statutory construction requires that "a law be construed so that no word or clause is surplusage." *Johnson v. State*, 76 Wis. 2d 672, 251 N.W.2d 834 (1977).

The modal verb "may affect traffic" only has meaning anterior to the incident itself; it is a rule requiring that a driver anticipate how they will affect other traffic. In a posterior evaluation of the incident, the probabilistic term "may," changes to the definite term "did." It logically does not change to the counterfactual "could have."

(2) There was no evidence that other traffic was affected, and therefore there was no probable cause to conduct a traffic stop.

In this case, once the circuit court's erroneous findings of fact are discounted, there is no evidence that Ms. Salzwedel "affected other traffic." Deputy Miltimore testified that his driving was only affected by Ms. Salzwedel's presence on the road, not her failure to signal. He also testified that no other cars had to brake or to swerve. There is simply no evidence at all that other traffic was affected.

Though Deputy Miltimore was directly behind Ms. Salzwedel at the traffic light, his presence there does not establish that her failure to signal affected traffic for the purposes of the statute. There must be some evidence that her failure to signal directly caused a change in his driving, either causing him to brake more abruptly, swerve, or some other change in his driving. That evidence is wholly absent at the first instance when Ms. Salzwedel turned without signaling.

Similarly, there was no evidence that traffic was affected in the second instance. Deputy Miltimore testified that he slowed down as she was turning, but that this was no different than he would have done if she had signaled. He was clear in his testimony that "whether or not" Ms. Salzwedel had signaled, he "would have had to slow down." (R 23, 11:14-18).

Because the only effect of Ms. Salzwedel's unsignalled left turns was on Deputy Miltimore's thoughts and law enforcement decisions, not on his *driving*, there was no probable cause to believe that traffic was affected. From his testimony it is clear that Deputy Miltimore pulled over Ms. Salzwedel without a "quantum of evidence" that she violated the element of Wis. Stat. § 346.34(2)(b) that requires traffic to be affected.

(D) Deputy Miltimore's error was a mistake of law, not a mistake of fact, and therefore the stop was not lawful.

"The issue is, then, whether an officer has probable cause that a law has been broken when his interpretation of the law is incorrect." ***State v. Longcore***, 226 Wis.2d 1, 8, 593 N.W.2d 412 (1999)(*affirmed by an equally divided court*). "If the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred." *Id.* "We conclude that when an officer relates the facts to a specific offense, it must indeed be an offense; a lawful stop cannot be predicated upon a mistake of law." *Id.*

In this case, the stop was predicated on a mistake of law because Deputy Miltimore did not recognize that a violation of Wis. Stat. § 346.34(2)(b) includes an element of effect on

traffic. He never testified that he *believed* traffic was affected, and therefore his decision to stop Ms. Salzwedel was not predicated on a mistake of fact. Instead, he decided to stop her thinking simply that failure to signal was a violation even absent an effect on traffic. This is a mistake of *law*, and is therefore the stop could not be lawful.

II. The circuit court erred by applying the *Terry* standard of "reasonable suspicion," because Deputy Miltimore was not conducting an investigatory stop.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..." U.S. Const. amend. IV; *see also* W.I. Const. art. I, § 7. "In ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), the United States Supreme Court recognized that although an investigative stop is technically a 'seizure' under the Fourth Amendment, a police officer may, under the appropriate circumstances, detain a person *for purposes of investigating possible criminal behavior* even though there is no probable cause to make an arrest." ***State v. Waldner***, 206 Wis.2d 51, 54-55, 556 NW 2d 681 (1996)(*emphasis added*).

"Wisconsin [has] adopted the position of the United States Supreme Court that a police officer may in appropriate

circumstances temporarily stop an individual when, at the time of the stop, he or she possesses specific and articulable facts which would warrant a reasonable belief that *criminal* activity was afoot." ***Waldner***, 206 Wis. 2d at 55. "Our legislature codified the constitutional standard established in *Terry* in Wis. Stat. § 968.24 (1993-94)." *Id.* "Section 968.24 is the "statutory expression" of the *Terry* requirements, and in interpreting the scope of the statute, resort must be made to *Terry* and the cases following it." *Id.* (*citing* ***State v. Jackson***, 147 Wis. 2d 824, 830, 434 N.W.2d 386 (1989)).

(A) *Terry* stops under Wis. Stat. § 968.24 are limited to investigations of suspected criminal behavior.

The constitutional standard that applied to traffic seizures is whether an officer has "probable cause" to believe an offense has occurred. The "reasonable suspicion" standard is limited only to investigations of possible *criminal* conduct. The Wisconsin Court of Appeals recognized this in ***State v. Longcore***, 226 Wis.2d 1, 8, 593 N.W.2d 412 (1999) (*affirmed by an equally divided court*).

The distinction between a crime and a forfeiture for the purposes of a *Terry* stop is sensible because *Terry* is an *investigatory* law, permitting officers to gather information when they see behavior that they suspect is indicative of a

crime. When an officer makes a stop based on his belief that a violation constituting civil forfeiture has occurred, it is not an investigation; the stop needs to be justified by facts supporting probable cause to believe a violation has occurred.

In *State v. Krier*, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991), the Court of Appeals held that "when a person's activity can constitute either a civil forfeiture or a crime, a police officer may validly perform an investigative stop." *Krier*, 165 Wis. 2d at 678. This is because, "[s]uspicious activity justifying an investigative stop is, by its very nature, ambiguous." *Id.*

Krier involved a stop conducted by an officer to investigate a tip that the defendant was driving without a valid driver's license. *Id.* at 675. Driving without a valid license can be *either* a crime *or* a forfeiture. *Id.* at 677.

The holding of *Krier* is not that suspicion of a civil forfeiture alone can justify a *Terry* stop; the holding is that conduct that is ambiguous and could constitute a crime, can justify a *Terry* stop, even if it also could be charged as a forfeiture. It is that ambiguity—which is consistent with *Terry's* "totality of the circumstances based on specific and articulable facts"—that gives rise to suspicion of a crime. Absent suspicion of a crime, an investigative stop is not authorized.

Unlike in *Krier*, the offense that Deputy Miltimore believed he observed in this case—failure to use a left turn

signal—is never a crime. "A 'crime' is conduct which is prohibited by state law and punishable by fine or imprisonment or both." *Id.* at 677, (*citing* Wis. Stat. § 939.12). "Conduct punishable only by forfeiture is not a crime." *Id.* Failure to signal a turn is a forfeiture, and thus is not a violation subject to stop under Wis. Stat. 939.12 or *Terry v. Ohio*.

(B) In this case, Deputy Miltimore never suspected a crime was occurring, and therefore a *Terry* stop was not lawful.

Deputy Miltimore never testified that he suspected Ms. Salzwedel might have been drinking or driving under the influence. He never testified that her slow driving was indicative of a person operating while intoxicated. He never testified that he thought she might have come from a bar. He was not stopping Ms. Salzwedel because he suspected her of a crime and needed to do additional investigation to determine whether she was operating while intoxicated.

Deputy Miltimore only stopped her because he observed what he incorrectly thought was a traffic violation. He testified that he stopped Ms. Salzwedel for two left turns without signaling, which he erroneously believed constituted a violation of Wis. Stat. § 346.34(2)(b). As in *Longcore*, the officer "did not act upon a suspicion that warranted further

investigation, but on his observation of a violation being committed in his presence." ***Longcore***, 226 Wis. 2d at 8.

The circuit court cannot conjure from assorted facts in evidence a "suspicion" that the officer on the scene did not have. This would allow an officer to make an investigatory stop for patently unlawful reasons, and yet have it justified after the fact by a circuit judge seeking suspicion in the circumstances.

The court's reliance on the fact that Ms. Salzwedel was driving slightly below speed limit suggests that the court was assessing whether there was reasonable suspicion that Ms. Salzwedel was under the influence. But this was never a suspicion for Deputy Miltimore; he did not suspect, and was not investigating, an OWI until after making contact with Ms. Salzwedel.

Ultimately, it is not for the circuit court to invent reasons why the stop could have been lawful. The purpose of the inquiry must be whether the officer made a stop for lawful reasons. In this case, the reason for the deputy's stop was because he believed there was probable cause of a violation of Wis. Stat. 346.34. He did not suspect intoxicated driving; he did not suspect any other offense; he was not engaged in an investigation based on "reasonable suspicion." It is not for the circuit court to conjure suspicion where the arresting officer had none. The circuit court's application of the 'reasonable suspicion" test was misplaced.

CONCLUSION

WHEREFORE, because Deputy Miltimore did not have probable cause to stop Ms. Salzwedel's vehicle, and because the "reasonable suspicion" test is not properly applied in this case, THEREFORE, this Honorable Court should reverse the decision of the circuit court, suppress all evidence obtained during the unlawful stop, and remand to the circuit court for additional proceedings.

Dated this 24 April 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4739 words (*footnotes included*).

Dated this 24 April 2014

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby 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 on or after 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 24 April 2014

Signed:

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APPENDIX

I N D E X
T O
A P P E N D I X

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24 April 2014

Signed:

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