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

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

I. The State's brief does not address Ms. Salzwedel's argument that Officer Miltimore did not have probable cause to conduct a traffic stop.

The State has abandoned any effort to justify Deputy Miltimore's stop on the grounds that he might have had probable cause to stop Ms. Salzwedel for turning without a signal. Instead, the State only argues that Deputy Miltimore had "reasonable suspicion" to conduct an investigative stop. By abandoning the former, the State has conceded the issue.

(A) The State does not refute that there was no probable cause to stop Ms. Salzwedel for a traffic infraction.

First, the State at no time argues that Deputy Miltimore had probable cause to stop Ms. Salzwedel for a traffic violation. Ms. Salzwedel's Brief-in-Chief devoted considerable time and effort to establishing that a violation of Wis. Stat. § 346.34(1)(b) requires that other traffic was affected by Ms. Salzwedel's failure to signal, and that there was no affect on other traffic. (Brief in Chief, pp. 14-18). The State mentions "probable cause" only once in its brief: when describing the defendant's suppression motion in the Supplemental Statement of Facts. (State's Br. p. 2). "An argument to which no response is made may be deemed conceded for purposes of appeal." *Hoffman v. Economy Preferred Ins. Co.,* 2000 WI App 22, ¶ 9, 232 Wis.2d 53, 606 N.W.2d 590.

(B) The State does not refute Ms. Salzwedel's argument that the circuit court's historical findings of fact were clearly erroneous.

In its "Conclusion," the State tells this Court that "In essence [Deputy Miltimore] was affected by her turn without using her turn signal, thus triggering a reasonable articulate suspicion for making the stop." (State's Br. 6). But the State offers no argument in support, or to rebut Ms. Salzwedel's argument that neither instance of unsignalled turning had an affect on traffic, as required by Wis. Stat. 346.34(1)(b), and that the circuit court's finding of historical fact was "clearly erroneous." The State's brief references the "clearly erroneous" standard only once, and makes no argument whatsoever. (State's Br. p. 3).

The State has therefore conceded that the circuit court's fact finding was "clearly erroneous." *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (1979) (we may treat as an implicit concession the respondent's failure to dispute a proposition in the appellant's brief). Ms. Salzwedel's turning had no effect on traffic. Deputy Miltimore only identified effects unrelated to his driving or to Ms. Salzwedel's failure to signal. (Brief in Chief, pp. 8-13).

II. The State's brief offers *post hoc* justifications for the traffic stop that neither the Deputy nor the Circuit Court relied upon.

For the very first time in this case, the State's brief introduces additional hypothetical traffic violations that the evidence may or may not have supported, even though they were never a part of the reason that Deputy Miltimore stopped Ms. Salzwedel in the first place. For example, the State cites Wis. Stat. § 346.34(1)(a)1.—turning from an improper position on the roadway—as a possible traffic offense that Ms. Salzwedel may have committed, despite the fact that neither the Deputy, nor the Prosecuting Attorney, nor the Circuit Court ever mentioned this offense during the prior proceedings. (State's Br. 4). Similarly, the State raises Wis. Stat. § 346.31(1)(a)3.—turning from a roadway with reasonable safety—even though it has never been raised at any state in the proceedings before this.

The inquiry that this Court must undertake is whether Deputy Miltimore actually relied upon probable cause of a traffic violation when he conducted the stop. He testified that he relied on a belief that Ms. Salzwedel was violating Wis. Stat. § 346.34(1)(b) when she did not signal two otherwise lawful turns. But his testimony clearly established that in both instances one of the elements of the statute was unmet: in neither case did her unsignalled turn have an affect on traffic.

It is not for this court, or the circuit court, to imagine what other offenses *might* have been supported based on the

testimony. The simple question the court must answer is, "What offense *was* suspected by the Deputy and did he have probable cause to believe the offense occurred?" The State's brief does not argue that there was probable cause to support the violation that the Deputy believed had occurred, because indeed there was no probable cause.

III. The State's brief incorrectly relies upon the "reasonable suspicion" standard even though this was not an "investigatory" stop and the officer did not suspect a crime.

The only argument the State offers is that "the investigatory stop was supported by reasonable suspicion." (State's Br. 2). But the State never specified what, exactly the officer may have suspected, based on the evidence. The State points to the fact that Ms. Salzwedel was driving slowly and did not have her lights on as part of the totality of the circumstances, but never identifies what suspicion these circumstances raised in the officer. Presumably, the totality of the circumstances might have indicated to *an* officer that the operator was under the influence.

However, these circumstances *did not raise any suspicion* in Deputy Miltimore, reasonable or otherwise. The Deputy's testimony clearly established that the reason he pulled Ms. Salzwedel over was because he believed she had committed an offense by turning without signaling. However, his was a mistake of law; turning without signaling is not an offense unless it affects traffic. In this case, there was no affect on traffic.

To rebut Ms. Salzwedel's argument that the Deputy did not, in fact, suspect a crime, the State relies on a *non sequitur*. The State notes that, "an officer does not have to rule out all innocent explanations before performing an investigatory stop." (State's Br. 4). But this is beside the point.

The Defendant's argument is not that Deputy Miltimore had to rule out innocent explanations, but rather that he did not in fact suspect any crime was occurring. In order for a stop to be lawful, the Deputy needs more than a "hunch," he need to suspect that a crime is afoot, and his suspicion must be reasonable based on the totality of the circumstances.

The State's recital of possibly suspicious facts were unrelated to Deputy Miltimore's reasons for stopping Ms. Salzwedel. His only reason for stopping her was her failure to signal, which the State has conceded by omission was not an offense. The other "suspicious" facts were not part of his decision to conduct a traffic stop.

In essence, the State is arguing that this Court should find the stop constitutional because Deputy Miltimore *could have* suspected a crime if he had considered the facts the State cites. But the fact remains that he *did not* suspect a crime, and therefore the stop could not be predicated on "reasonable suspicion."

Furthermore, this stop was never an "investigatory stop." Rather, this stop was affected for the purpose of giving a citation. In order to do so, the Deputy must have "probable

cause" that a violation has occurred. The *Terry* standard is so that law enforcement can conduct an investigation; but Deputy Miltimore was not stopping Ms. Salzwedel to conduct an investigation' he was stopping her to issue a citation. He believed, erroneously, that he already had the information he needed.

Deputy Miltimore did not suspect a crime warranting investigation; he observed an imagined traffic infraction. He conducted a stop because he erroneously believed that turning without signaling was a violation even if no other traffic was affected. It cannot be the law that police may stop a person for any reason at all, no matter how offensive or illegal, so long as other plausibly legal justifications can be found by a court after the fact. The actual reason of the Deputy is the proper area of scrutiny, not whether other additional facts may or may not have justified the stop for a different officer.

IV. The State's argument that a "plea of guilty as opposed to no contest" should waive review of this claim is without merit and contrary to sound public policy.

In its "Supplemental Statement of the Case," the State emphasizes that Ms. Salzwedel entered a guilty plea after her suppression motion was denied. (State's Br. 2). The State then concludes, without argument:

> Finally, this Court should deny this appeal based on Ms. Salzwedel entering a plea of guilty to the underlying charge of operating a motor vehicle under the influence of an intoxicant, third offense. Entry of a plea of guilty as opposed to no contest should bar a challenge to the stop as it shows an admission of the facts alleged in the complaint.

(State's Br. 6). Aside from the fact that this conclusion was not fully argued, and therefore need not be addressed, *see e.g. State v. Verhagen*, 2013 WI App. 16, ¶ 38, 346 Wis.2d 196, 827 N.W.2d 891, the State's conclusion is contrary to law and to the policies adopted by both the legislative and judicial branches of the Wisconsin Government.

Wis. Stat. § 971.31(10), makes no distinction between a "guilty" plea and a "no contest" plea:

> An order denying a motion to suppress evidence ... may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.

The State's conclusion that a *guilty* plea, as opposed to a *no contest* plea, should invoke the waiver rule is without basis in the statute. Perhaps that is why the State makes no argument in support of its conclusion.

Furthermore, Wis. Stat. § 971.31(10), was adopted to improve the efficient administration of our courts. "As a matter of state public policy, the legislature has abandoned the guilty-plea-waiver rule in one situation." *State v. Riekkoff*, 112 Wis. 2d 119, 125, 332 N.W.2d 744 (1983). Wis. Stat. § 971.31(10) "permits a defendant to appeal from a guilty plea when, prior to the entry of the guilty plea, the court had denied a motion to suppress evidence. On review, the appellate court can determine whether or not the order denying a suppression of evidence was proper." *Id.*

The legislature was addressing this exact situation when is passed Wis. Stat. § 971.31(10), effectively overruling *Hawkins v. State*, 26 Wis. 2d 443, 132 N.W.2d 545 (1965).

See Reikkoff, at 122-25. This statute was passed to *improve* judicial administration:

> This subsection ... should reduce the number of contested trials since in many situations, the motion to suppress evidence is really determinative of the result of the trial. In such instances defendants usually are only contesting the legality of the search and not whether or not they did, in fact, possess the item seized.

Id. at 125 (*citing* 1970 Wisconsin Annotations 2142).

Were the Court to begin applying the "guilty plea waiver rule" to this kind of case it would dissuade future litigants from entering a plea when the only question is one of suppression, and would waste valuable judicial resources by forcing defendants to take these cases to trial in order to preserve meritorious suppression claims. This would be the opposite of an efficient allocation of judicial resources, violating the spirit and the letter of both the statute and the "waiver rule" itself. The application of the "guilty plea waiver rule" should not be done in this case.

Furthermore, were the Court to adopt the State's position, it would simply reveal a violation of Ms. Salzwedel's Fifth, Sixth and Fourteenth Amendment rights. Her guilty plea was predicated on a reasonable belief, obtained from advice of trial counsel, that Wis. Stat. § 971.31(10) preserves her right to appeal a denial of a suppression motion after a guilty plea. If this Court applies the guilty plea waiver rule in this case, Ms. Salzwedel's plea would have been given under incorrect legal advice from trial counsel, and would be rendered unknowing, in violation of her due process rights under the Fifth and Fourteenth Amendment, and her right to effective counsel under the Sixth Amendment.

The State has essentially asked the Court to disregard the law and apply the "guilty plea waiver rule" of judicial administration, despite the legislature's decision to vitiate that rule in the case of guilty pleas that are predicated on denial of a suppression motion. This is contrary to legislative intent and to longstanding precedent, and the Court would be ill-advised to adopt the State's position.

Conclusion

THEREFORE, for the foregoing reasons, the Defendant-Appellant respectfully requests that this Honorable Court vacate her conviction and remand this matter to the circuit court with an Order to grant the suppression motion.

Dated this 15 July 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in 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 _2108_ words.

Dated this 15 July 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 15 July 2014

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