

RECEIVED

10-29-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

COURT OF APPEALS
District II

COUNTY OF CALUMET,

Plaintiff-Respondent,

v.

Appeal No. 14 AP 2100

Case Nos. 13 TR 709 & 13 TR 787

LISA L. DOLAJECK,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

Appeal from the circuit court for Calumet County,
Jeffrey S. Froehlich, Judge.

BOLLENBECK FYFE SC
Attorney Andrew Wagener
State Bar No. 1032494

W6260 Communication Court
Appleton, WI 54914
Phone: (920) 735-1711
Fax: (920) 735-1710

TABLE OF CONTENTS

i.	Statement of Issues.....	v
ii.	Statement on Oral Argument.....	v
1.	Statement of the Case.....	1
2.	Statement of Facts.....	2
3.	No Contest Plea.....	7
4.	Summary of the Law.....	9
	A. Reasonable Suspicion for Traffic Stop.....	9
	B. Failure to preserve exculpatory evidence.....	11
5.	Standard of Review.....	13
6.	Argument.....	14
	A. Reasonable Suspicion	14
	B. Preservation of Evidence	19
7.	Conclusion.....	25
8.	Certifications.....	27

TABLE OF AUTHORITIES

CASES

<i>County of Ozaukee v. Quelle,</i> 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App.1995)...	7
<i>Illinois v. Fisher,</i> 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004).....	13
<i>State v. Anderson,</i> 342 Wis.2d 251, 816 N.W.2d 352 (2012).....	10
<i>State v. Brown,</i> 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66	19
<i>State v. Greenwold,</i> 189 Wis.2d 59, 525 N.W.2d 294 (WI Ct. App. 1994)	11, 13
<i>State v. Huggett,</i> 2010 WI App 69, 324 Wis.2d 786, 783 N.W.2d 675..	12
<i>State v. Knapp,</i> 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899.....	13
<i>State v. Martwick,</i> 2000 WI 5, 231 Wis.2d 801, 604 N.W.2d 552.....	13
<i>State v. Post,</i> 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634.....	9, 11, 18
<i>State v. Williams,</i> 2001 WI 21¶22, 241 Wis. 2d 631, 623 N.W.2d 106..	9
<i>Terry v. Ohio,</i> 392 U.S. 1, 22, 88 S. Ct. 1868 (1968).....	9
<i>Village of Grafton v. Seatz,</i> 2014 WI App 23, 352 Wis.2d 747, 845 N.W.2d 672..	8

STATUTES

Wis. Stat. §346.13	14, 15, 25
Wis. Stat. §343.301.....	8
Wis. Stat. §346.65(2).....	8
Wis. Stat §968.24	10

i. STATEMENT OF ISSUES

1. Whether the Defendant-Appellant waived her right to appeal by entering a no contest plea.
2. Whether the officer's failure to properly record and document evidence in violation of Calumet County Sheriff's Department's policies and procedures and in violation of his training was a failure to record evidence in violation of defendant's due process rights and as a result the case should be dismissed because there is no other legal alternative to missing evidence.
3. Whether the officer had probable cause to initiate stop and investigate.

ii. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of the decision in this case would further clarify the points of law involved herein.

It is believed that the issues can be sufficiently set forth and argued in the briefs and therefore oral argument is not warranted and is not requested.

1. STATEMENT OF THE CASE

This is an appeal from a court decision denying Defendant-Appellant's Motion to Dismiss on the basis of reasonable suspicion for traffic stop and failure to preserve exculpatory evidence. [R.13]. The Court indicated in its decision that it was final order for purposes of appeal. [R.13] Defendant-Appellant appealed the decision but it was dismissed by the Court of Appeals on the basis that it was not actually a final order. [R 19] Since the officer failed to preserve the evidence from the traffic stop including, but not limited to video and audio recording of the alleged traffic violation and field sobriety test, it was determined that there was not enough evidence to present to a jury to defend the citations that had been issued against Mrs. Dolajack so it was negotiated with the District Attorney's office that Mrs. Dolajack would stipulate to the judgment by pleading no contest to operating a motor vehicle while under the influence of an intoxicant with the caveat that the enforcement of the judgment would be stayed pending appeal of the Court's Decision denying Defendant-Appellant's Motion

to Dismiss. [R 22]

2. STATEMENT OF FACTS

On June 6, 2014, Mrs. Dolajeck was traveling east bound on State Highway 11. Deputy Denny Galipo was following Mrs. Dolajeck and he made two observations. One, that she crossed the center line by approximately one-half foot and two, she drifted onto the fog line two times. [R.6 p.3]. At that point in time Deputy Galipo activated his emergency red and blue lights while still on State Highway 114. Mrs. Dolajeck turned right onto Pigeon Road and came to a stop. At this time Deputy Galipo began a series of field sobriety tests. The field sobriety tests included the recitation of the alphabet, Horizontal Gaze Nystagmus Test, The One Legged Stand, and The Walk and Turn test. According to Deputy Galipo Mrs. Dolajeck failed all four tests and she was placed under arrest for operating while intoxicated. [R.6 p.4]

After her arrest discovery was requested from Calumet County. [R.6 p.7-9] That discovery included the officer's report, an audio recording with the 911 operator, and a disk containing the video from Deputy

Galipo's vehicle. [R.6 p.11] After reviewing the video there are material events that were not recorded. In particular, the video fails to provide the events that led to Deputy Galipo's basis for initiating the traffic stop and it fails to show the field sobriety tests. This was brought to the attention of the District Attorney's office who confirmed that there were no additional recordings related to the events that are the subject of this matter. [R.6 p.13-14] Additional discovery was also requested through the Open Record Law requesting copies of the policies and procedures for traffic stops including, but not limited to use of camera and video recordings, all training materials related to the policies and procedures for traffic stops, and all specific training that Deputy Denny Galipo has received, including all training materials. [R.6 p.16-46] In that discovery it states the policy and purpose of in-squad video. That policy is:

II. POLICY.

The use of an in-squad video system provides persuasive documentary evidence and helps defend against civil litigation and allegations of officer

misconduct. Officers assigned the use of these devices **shall adhere (emphasis added)** to the operational objectives and protocols outlined herein so as to maximize the effectiveness and usefulness of the in-squad video and the integrity of evidence and related video documentation. [Wagener Aff. ¶7 (page 122)]

It goes on to state:

VI. PROCEDURES

A. General Procedures

1. It shall be the responsibility of this department to ensure that the audio-video recording equipment is properly installed to the manufacturer's recommendations.

a. The in-squad video **shall (emphasis added)** automatically activate when:

i. Emergency light bar or flashers are activated.

ii. An inertia switch is activated

iii. The squad exceeds 85 mph

b. The in squad video can also be activated manually with:

i. The remote

microphone

- ii. The record icon on the touch screen on the in-squad laptop
- iii. The record button located in the rear of the primary camera.
- iv. The record button on the recording unit itself.

B. Officers Responsibility

1

- a. In-squad video equipment **shall be (emphasis added)** operated in accordance with the manufacturer's recommendations guidelines and departmental training and policies.

...

C. Recorder Activation.

- 1. The in-squad video equipment shall be activated whenever the events in section I.14(V)(C)(2) are met and the recorder has not already been activated by a trigger.
- 2. Recommended Events Recorded.
 - a. Traffic Stops. (to include, but not limited to

traffic violations,
stranded motorists
assistance and all crime
interdiction stops.)

- b. Priority responses.
- c. Vehicle pursuits
- d. Crimes in progress.
- e. Interviews and
Interrogations conducted
outside or inside the squad
especially an interview
that may result in a felony
charge.
- f. Any situation or
incident that the officer,
through training and
experience believes should
be audibly and visually
recorded.

Defendant also requested all manufacturer documents and documents evidencing the maintenance, inspection and self-diagnostic exams related to the dash-cam that was installed on the squad car driven by Deputy Denny Galipo on June 6, 2013. [R.6 p.48] The Calumet County Sheriff's Department responded that no maintenance, inspection or self-diagnostic exams existed and confirmed that the camera system used was

a Toughbook Arbitrator Mobile Digital Video System P2 made by Panasonic. [R.6 p.49-54]

3. No Contest Plea.

The appeals court should not follow the waiver rule in this case because all of the factors considered in *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995) apply in this case. First, in this case the no contest plea saved the administrative costs of going through a jury trial just to preserve appeal procedure requirements. The blood alcohol test was clearly above the guidelines. [R.1] The issues raised on appeal were addressed in an evidentiary hearing prior to the trial. [R.27] Testimony was taken from two officers. Deputy Denny S. Galipo and Chief Deputy Brett J. Bowe testified at the suppression hearing on February 4, 2014. [R.27] As a result, the Appeals Court has an adequate record to determine the issues on appeal. Third, this appeal wasn't taken in an attempt to get a reduced sentence or lighter fine. This is clear from the fact that after the evidentiary hearing an appeal was filed as Case Nos. 14 AP 903, 14 AP 904 and 14 AP

905. However, the Appeals Court ordered that the issues we wanted to appeal were not final even though the trial court order stated that they were. [R.19 & R.13] Fourth, this case presents unique issues regarding an officer's requirement to document exculpatory evidence based on departmental policy and Wisconsin law. Fifth, this case is Mrs. Dolajack's second OWI but legally is considered a first because here prior was more than 10 years ago pursuant to Wis. Stat. §346.65(2). The result is that some penalties are being considered a first offense while others are treated like a second. For instance, the ignition interlock device pursuant to Wis. Stat. §343.301 and the recent case of *Village of Grafton v. Seatz*, 2014 WI App 23, 352 Wis.2d 747, 845 N.W.2d 672. Under *Seatz* there is a precedent that some penalties may be considered a first offense and other penalties are considered a second offense based on actual OWIs in a person's lifetime. In summary, as to this issue the Appeals Court should hear this case because the only remedy left for Mrs. Dolajack was to waste judicial resources by having a trial. She attempted to appeal

before trial but was ordered dismissed as not being a final order. So if the Appeals Court chooses not to hear the case then there is a policy in place that would require unnecessary trials in order to preserve rights to hear pretrial motions.

4. SUMMARY OF THE LAW

A. Reasonable Suspicion for Traffic Stop.

In *State v. Post*¹, the Wisconsin Supreme Court determined that merely weaving within a single lane of traffic is not a sufficient reasonable suspicion to conduct an investigative stop of a motor vehicle. The fourth amendment protects against unreasonable searches and seizures and an investigative stop is a seizure. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868 (1968). Rather, the officer "must be able to point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrant" a detention to investigate. *Id.* at 21. The reasonableness of the stop is based on the totality of the circumstances. *State v. Williams*,

¹ *State v. Post*, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634.

2001 WI 21¶22, 241 Wis. 2d 631, 623 N.W.2d 106.

Further, Wis. Stat §968.24 states:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

As a result the test to be used for reasonable suspicion for detention stops was articulated in *State v. Anderson*, 342 Wis.2d 251, 816 N.W.2d 352 (2012):

The test is an objective one, focusing on the reasonableness of the officer's intrusion into the defendant's freedom of movement: "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. **An 'inchoate and unparticularized suspicion or "hunch" ... will not suffice.'** " *Id.*

In *State v. Post.*, the Wisconsin Supreme Court explained why weaving alone is not enough:

Further, the State's proffered bright-line rule is problematic because movements that may be characterized as "repeated weaving within a single lane" may, under the totality of the circumstances, fail to give rise to reasonable suspicion. This may be the case, for example, where the "weaving" is minimal or happens very few times over a great distance.⁴ Courts in a number of other jurisdictions have concluded that weaving within a single lane can be insignificant *12 enough that it does not give rise to reasonable suspicion.⁵ In such cases, weaving within a single lane would not alone warrant a reasonable police officer to suspect that the individual has committed, was committing, or is about to commit a crime. *Id* at ¶60.

B. Failure to preserve exculpatory evidence.

The current law in Wisconsin requires that a case be dismissed if the prosecuting agency fails to preserve exculpatory evidence. *State v. Greenwold*, 189 Wis.2d 59, 67-68, 525 N.W.2d 294 (WI Ct. App. 1994). In *Greenwold*, the Court held that a defendant's due process rights are violated if:

- (1) The prosecuting agency failed to preserve evidence that is apparently exculpatory, or
- (2) Acted in bad faith by failing to preserve evidence which is potentially exculpatory. *Id*.

Further, there is an expectation on part of the prosecuting agency that they will preserve and accurately record evidence regardless of who is in possession. *State v. Huggett*, 2010 WI App 69, ¶17-18, 324 Wis.2d 786, 783 N.W.2d 675. In *Huggett*, a murder prosecution case was dismissed because the prosecuting agency failed to preserve electronic voice messages that were in possession of a third party telephone company. In addition, comparable evidence is not sufficient replacement. In *Huggett* the court rejected the argument by the state that witness testimony was comparable evidence. *Id.* The rationale is that the actual recording depicts sensory nuances regarding the event that cannot be depicted through eye witness testimony. *Id.* The definitions of apparently exculpatory and potentially exculpatory are as follows:

Evidence is deemed apparently exculpatory when its exculpatory nature was apparent to the government actor or actors who failed to preserve the evidence, and the evidence is of such a nature that the defendant cannot obtain comparable evidence by other reasonable means. *Munford*, 330 Wis.2d 575, ¶ 21,

794 N.W.2d 264 (citing *Oinas*, 125 Wis.2d at 490, 373 N.W.2d 463). In contrast, evidence is deemed potentially exculpatory when "no more can be said" of its value at the time it was not preserved than that it might be useful to establish innocence but is not "material" exculpatory evidence; it is only "potentially useful." See *Illinois v. Fisher*, 540 U.S. 544, 548, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004).

Lastly, a showing of bad faith requires that police were aware of the potentially exculpatory value of the evidence they failed to preserve and acted with either official animus or a conscious attempt to suppress the evidence. *Greenwold II*. at 69, 525 N.W.2d 294.

5. STANDARD OF REVIEW

Mixed question of law and fact on reasonable suspicion. The question of whether a traffic stop is reasonable is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis.2d 86, 700 N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. *State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis.2d 801, 604 N.W.2d 552.

Matter of law on destruction of evidence.

6. ARGUMENT

A. Reasonable Suspicion.

The arresting officer in this case failed to have reasonable suspicion regarding Mrs. Dolajeck as she did not violate Wis. Stat. §346.13 because there is no evidence that there were any safety issues to other vehicles that were approaching from the rear. In this case the officer testified that he was following Mrs. Dolajeck at approximately five car lengths. [R.27 p.34 l.11] Further, there was no testimony that there was oncoming traffic. [R.27 p.34] In addition, he also followed her while she went around the corner to Pigeon Road. Wis. Stat. §346.13 states:

- (1) The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.

In this case there is not a single piece of evidence to suggest that any lane deviations by Mrs. Dolajeck were not made without considering the safety to Officer Galipo who was the only car in the vicinity

of Mrs. Dolajeck. The trial court in its finding specifically cited §346.13 in its decision, but provided no analysis as to the safety of other cars approaching Mrs. Dolajeck's vehicle. [R.27 p. 50] In fact, the only logical implementation of Wis. Stat. §346.13(1) would be in the case of a vehicle that was about to pass Mrs. Dolajeck because it would be in that circumstance that the safety to others approaching from the rear would arise. Since it was Wis. Stat. §346.13(1) that the officer cited as the violation that was used to create reasonable suspicion for the traffic stop the case should be dismissed for lack of reasonable suspicion to investigate because the safety of any other vehicles was not at risk by the alleged lane deviation. This would leave the officer's decision to investigate to an inchoate hunch and in violation of Mrs. Dolajeck's constitutional rights. This combined with Officer Galipo's clear failure to recollect the events of that night as he testified it was a clear night but evidence supported that it was not.

EXAMINATION BY ATTORNEY WAGENER

Q All right. So then could you explain to me what the conditions were that evening during that period of time?

A It was a clear evening.

Q And was it a moonlit evening or not: do you recall?

A I don't recall.

Q But your recollection is on that evening that it was a clear evening? You don't recall the moon, and it wasn't misting or sleeting out?

A Not that I remember. I don't think it would sleet in June, but I don't recall that.

[R.27 p.35]

EXAMINATION BY THE COURT:

Q It wasn't foggy or raining or anything like that?

A Not that I recall

...

THE COURT: That's all that I have. Counsel, anything else?

MR. WAGENER: I mean, there's going to be one act that's disputed that I think - - I mean, the video would show that it was raining and misty out that night, so I don't know how you want to handle that issue.

THE COURT: Chief Deputy, when was the last time they had a spot on these citations where you could put in weather conditions?

MR. JONES: Actually, it's at the bottom. It's on the citations Judge.

...

MR. JONES: We can mark one of the citations. That's going to need to be marked.

MR. WAGENER: What does it say?

MR. JONES: Road conditions: Wet. Traffic: Light. Dark, not lighted. Weather condition: Rain.

Q (By The Court) Deputy, I'll show you what's been marked as Plaintiff's Exhibit Number 1. Would that refresh your recollection as to the weather and road conditions a little bit?

A Yes, sir.

Q And would you agree it was raining and the road was wet?

A Yes. If that's what I have on the citation, that's what it was then.

[R.27 p.47 l.9-11, p.48-49]

In addition, Officer Galipo was unable to accurately testify as to the route he traveled immediately upon encountering Mrs. Dolajeck [R.11 p.4]

This stop violates the caution promoted by the Wisconsin Supreme Court in *State v. Post*, when the Court Stated:

"[R]epeated weaving within a single lane" is a malleable enough standard that it can be interpreted to cover much innocent conduct. In *U.S. v. Lyons*, a police officer made an investigatory stop after having seen the defendant's vehicle weave three to four times within a single lane. 7 F.3d 973, 974 (10th Cir.1993). The court recognized "the universality of drivers' 'weaving' in their lanes." *Id.* at 976. It therefore **640 cautioned that allowing weaving to justify a vehicle stop may subject many innocent people to an investigation. "Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *Id.*; *United States v. Colin*, 314 F.3d 439, 446 (9th Cir.2002).

State v. Post, 2007 WI 60, 301 Wis. 2d 1, 12, 733 N.W.2d 634, 639-40

Further, the Wisconsin Supreme Court has also stated:

As the Seventh Circuit has explained, "[a]n officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable

cause are not prohibited by law." *McDonald*, 453 F.3d at 961. The grounds for a traffic stop must be objectively reasonable and "[a] stop based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable." *Id.* at 962.

State v. Brown, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66, 73

These factors together do not warrant a reasonable suspicion and the case should be dismissed.

B. Preservation of Evidence

The evidence is undisputed that Officer Galipo had the technology and the means to adequately record the events that unfolded on June 6, 2013. Officer Galipo is a seasoned enforcement officer with over 21 years of experience in a squad car. [R.27 p.28 l.5-12] He began using in-squad cameras in 2008. [R.27 p.28 l.13-18]. In addition, Officer Galipo was trained in the field with cameras.

Q So when you were an in-patrol deputy, describe to me what training was like.

A Learning policy and procedure, arrest and detention tactics, traffic stops, a regular FTO program kind of training where we go through the full aspect.

Q And so that training would have started in February of 2013, correct?

A Correct.

Q All right. And you did that for how long?

A I believe my last day off of field training was either May 27th or May 28th.

Q And when you say off of field training, what does that mean to me?

A They kicked me loose on my own.

Q All right. Prior to that, from February to May you were going around in a patrol car or squad car with somebody else?

A Yes.

Q And during that period of time, how many times did they turn the camera on and off?

A Well, in the beginning we had a car - - an old Crown Vic that had a malfunctioning camera, so that didn't always work, and when we got the new Caprices, then we used the camera almost every day.

Q And when did you get the new Caprices?

A April, around April, I believe, when they were put in service.

Q Okay. And did you participate in turning those cameras on and off while you were in training?

A Yes.

Q And how many times did you turn it on and off from April till you were let go in May by yourself?

A I couldn't tell you. I could just say numerous times.

Q More than a hundred?

A Maybe around a hundred. I couldn't tell you.

[R.27 p.30-31]

In addition, the Chief Deputy Sheriff testified that a video has a start time and a stop time. [R.27 P.11] That an "entire video" is described as from the start to the stop of the video. [R.27 p.11] That the officer controls when the video is started and stopped. [R.27 p.11] Further, there are three manual options to activate the video and there are three automatic mechanisms to start the video.[R.27 p.6 l.20 - p.7 l.11] The three automatic options are:

1. The squad car goes over 85 miles per hour.
2. The full light bar is activated.
3. An inertia switch.

The three manual options are:

1. The video camera runs through a laptop and there is a touch screen button that is activated by pushing a record button.
2. The back of the camera has a button.
3. The officer's microphone that he carries with him can be used to start the video.

In this case, the officer failed to activate the camera using any of the automatic or manual options during pivotal portions of the investigatory stop because of the following reasons:

1. He does not like to drive with his laptop up. [R.27 p.32] Therefore, not touching the touch screen to activate record.
2. He does not like to use the laptop to get information about a driver prior to approaching the vehicle. "Officer's option:" [R.27 p.39]
3. Officer Galipo did not need the full light bar activated because he did not need it in that area.[R.27 p.44] This is regardless of the fact that it was clearly a foggy night. [R.27 p.49]

The officer's testimony while being cross examined by District Attorney Jones is that he hit the button. It further appears that he intended to hit

the button just prior to exiting the car.

Q So you hit a button that you thought was causing the recording to go?

A Yes. I didn't even look up at the camera. I just touched the button by feel thinking I hit the record button.

Q You get out of your squad; you go up to the driver?

A Yes.

[R.27 p. 24 1.15-22]

From this testimony it is clear that the officer never intended to record the driving behavior prior to the traffic stop. This is in clear violation of the department policy to record all events. Chief Deputy Bowe testified that:

Q And if I go to Page 122, there's a specific policy that describes the purpose of the in-squad video, correct?

A Correct.

Q Now, when you're pulling - - when an officer is under suspicion in your department that somebody's under the suspicion of driving under the influence or in violation of the prohibited alcohol content, is the initial observations of them driving before they are stopped and pulled

over relevant evidence that your department would rely on to determine whether or not an arrest should be made?

A Yes.

Q And would that be something that your department promotes should be recorded for a later event?

A Yes.

[R.27 p.14 l.16 - p.15 l.7]

.

Finally, it is clear that this is a violation of department policy.

Q Okay. So in this case if an officer did not record the initial driving observations that led to the initial pull-over and did not record the field sobriety tests that would have led to the arrest, that would be a violation of your department's policy, correct?

A Yes.

[R.27 p.16 l.15-21]

It is clear that regardless of the alleged mistaken button that Officer Galipo in this case made several deliberate choices not to record key evidence regarding this case by failing to implement any of the other options. This is further supported by the fact

that his testimony fails to identify any attempt to record the initial driving but rather attempted to turn it on, conveniently at the traffic stop. This is acting intentionally and in bad faith considering the numerous manual and automatic options that are available. The evidence regarding the traffic stop, the PBT, and the field sobriety test as well as the blood alcohol test should all be suppressed as a matter of law and policy regarding this case. To allow this case to go on would simply continue to encourage officers to violate department policy in the interest of manufacturing evidence to obtain arrests that violate the constitutional rights of the citizens of this state.

7. CONCLUSION

The officer in this case manufactures a reasonable suspicion by trying to create a statutory violation under Wis. Stat. §346.13(1). However, there was never any evidence that a vehicle approaching from behind was at any safety issues as the testimony is that Officer Galipo was simply following Mrs. Dolajack. Second, Officer Galipo deliberately chose

not to record key pieces of evidence as required by department policy and in violation of Wisconsin law. Calumet County Sheriff's Department clearly requires the recording of the evidence that is missing in this case. The importance of the Calumet County Sheriff Department's recording policy is demonstrated in this case. The Officer could not even accurately remember the conditions that night or the route he drove but could conveniently remember that Mrs. Dolajack crossed the line. The fact that Officer Galipo clearly could not recollect the events of that night correctly because of his testimony regarding the weather conditions demonstrates the importance that officers should not be rewarded for failing to follow department policy.

Dated: October 29, 2014

BOLLENBECK FYFE, SC Attorneys for
Defendant-Appellant, Lisa Dolajack

By: s/Andrew Wagener
Andrew Wagener
State Bar No. 1032494

PO ADDRESS:
W6260 Communication Court
Appleton, WI 54914
Phone: (920) 735-1711
Fax: (920) 735-1710

CERTIFICATION

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

Monospaced font: 10 characters per inch; double-spaced; 1.5 inch margin on the left and right sides. The length of this brief is 26 pages.

Dated this 29th day of October, 2014.

BOLLENBECK FYFE, SC Attorneys for
Defendant-Appellant, Lisa Dolajack

By: s/Andrew Wagener
Andrew Wagener
State Bar No. 1032494

PO Address:
W6260 Communication Court
Appleton, WI 54914
920) 735-1711

CERTIFICATION OF MAILING

I certify that this brief and appendix was delivered via overnight courier on October 29, 2014. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 29th day of October, 2014.

BOLLENBECK FYFE, SC
Attorneys for Defendant-Appellant, Lisa
Dolajack

By: s/Andrew Wagener
Andrew Wagener
State Bar No. 1032494

CERTIFICATION OF COMPLIANCE WITH WIS STAT. §809.19(12)

I certify that I have submitted an electronic copy of this brief and the appendix which complies with the requirements of Wis. Stat. §809.19(12). I further certify that this brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 29th day of October, 2014.

BOLLENBECK FYFE, SC
Attorneys for Defendant-Appellant, Lisa
Dolajack

By: s/Andrew Wagener
Andrew Wagener
State Bar No. 1032494