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DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appellate Case No. 2014AP002100

COUNTY OF CALUMET,

Plaintiff-Respondent,

-VS-

LISA L. DOLAJECK,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CALUMET COUNTY CIRCUIT COURT
THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING
Trial Court Case Nos. 2013TR000709 & 2013TR000787

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent believes that the written briefs presented will adequately present the relative positions of the parties, and therefore, oral argument is not requested. Publication is not necessary because this is not a case of substantial and continuing public interest.

STATEMENT OF THE CASE

The Statement of the Case and Statement of the Facts included in defendant-appellant Lisa L. Dolajec's (Dolajec) brief are sufficient to frame the issues presented for review. The State will include any additional relevant facts in the Argument section.

ARGUMENT

I. DEPUTY GALIPO HAD BOTH PROBABLE CAUSE AND REASONABLE SUSPICION FOR THE TRAFFIC STOP

A. Standard Of Review

The Wisconsin Supreme Court addressed the standard for an appellate review of a traffic stop in *State v. Popke*, 2009 WI 37, 317 Wis.2d 118, 765 N.W.2d 569 (2009) at ¶ 10.

¶ 10. Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Mitchell*, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992); *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106. A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the "clearly erroneous standard," and the application of these historical facts to constitutional principles, which we review de novo. *Id.*, ¶¶ 18-19.

B. Legal Principles

The Wisconsin Supreme Court addressed the legal principles of a law enforcement stop of a motor vehicle in *State v. Popke*, at ¶ 11.

¶ 11. "The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a

limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the **Fourth** Amendment." *State v. Gaulrapp*, **207 Wis. 2d 600, 605, 558 N.W.2d 696** (Ct. App. 1996) (citing *Whren v. United States*, **517 U.S. 806, 809-10** (1996)). An automobile stop must not be unreasonable under the circumstances. *Gaulrapp*, **207 Wis. 2d at 605** (citing *Whren*, **517 U.S. at 810**). "A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred,' *id.*, or have grounds to reasonably suspect a violation has been or will be committed." *Gaulrapp*, **207 Wis. 2d at 605** (citing *Berkemer v. McCarty*, **468 U.S. 420, 439**, (1984); *Terry v. Ohio*, **392 U.S. 1**, (1968)).

C. The Circuit Court's Findings Of Fact

On February 4, 2014, the circuit court made the following findings of evidentiary and historical fact at the conclusion of an evidentiary hearing on Defendant's Motion to Dismiss. At 2:09 a.m. Deputy Denny S. Galipo (Galipo) observed a "vehicle cross the centerline and strike the fog line, go back to the centerline and then the fog line again". (Motion Hearing Transcript at 50:9-13) The court read into the record the language of Wisconsin Statutes §346.13 (3) and stated "That's not what happened here. There was a lane deviation. The vehicle could be stopped for that violation alone". (51:3-5) The court went on to find that the vehicle was operating in a "serpentine path" and was "a hazard to be out on the roadway and is driving inattentively". (51:7-13)

D. Probable Cause To Believe A Traffic Violation Had Occurred

The defendant's brief argues that there was not reasonable suspicion to believe that Dolajec violated Wisconsin Statutes §346.13(1). Defendant's

argument misses the point of the circuit court's ruling, that is that there was a violation of Wisconsin Statutes §346.13(3).

346.13 (3) Notwithstanding sub. (2), when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.

The circuit court found that the vehicle crossed the center line, struck the fog line and then went back to the centerline. (50:11-12) The circuit court's finding of a violation of §346.13(3) was not clearly erroneous but was supported by testimony of Deputy Galipo. Galipo testified at the motion hearing that the vehicle first caught his attention when it crossed the center line by "About a foot". (21:25 – 22:6) Galipo next observes the vehicle drift to the right and place both passenger side tires on the white fog line. (22:11-15) According to Galipo the vehicle then goes back to its left and crosses the center line by about half a foot. (22:20-24) As the vehicle then drifts back toward the fog line, Deputy Galipo decides to initiate a traffic stop and activates the squad lights. (23:6-11) Deputy Galipo had probable cause to believe a violation of 346.13(3) had occurred.

E. Reasonable Suspicion For A Traffic Stop

In *State v. Popke*, at ¶ 11, the Court articulated that a stop is permissible if an officer has grounds to "reasonably suspect a violation has been or will be committed". In the present case in addition to crossing the center line and driving on the fog line, Deputy Galipo verified that the time was "approximately 2:09 a.m.. (21:22-24) When asked whether the initial crossing of the center line was a

jerky motion, a smooth action, or a drift, Galipo responded “A drift, like a drift”. (22:7-10) Later in his testimony Galipo stated “Then it drifts back again to the fog line with a back and forth motion”. (23:6-7) After observing Galipo’s testimony live, the circuit court used the term “serpentine path” to describe the drifting pattern. (51:7) As the circuit observed, the combination of the time of day, the lane violations and the serpentine drifting pattern cause concern that there was an impaired driver or someone falling asleep and creating a hazard on the roadway. The State asserts this combination creates a reasonable suspicion for officer to believe a traffic violation has or will occur.

II. THERE WAS NO FAILURE TO PRESERVE APPARENTLY EXCULPATORY EVIDENCE

A. Standard Of Review

As it relates to finding of facts, appellate courts apply a “clearly erroneous standard. *State v. Popke*, at ¶ 10.

B. Legal Principles Related To Failure To Preserve Evidence

In *State v. Wolf*, 2008 WI App 172, ¶¶ 7 & 8, 314 Wis.2d 748, 760 N.W.2d 183 (Ct.App. 2008) the Wisconsin Court of Appeal addressed the legal standard for a motion to dismiss based upon a failure to preserve exculpatory evidence.

¶ 7 When the State fails to preserve evidence, the defendant's right to due process can be violated in either of two ways. *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct.App. 1994)

(Greenwold II). The first is when police fail to preserve evidence "that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). To satisfy this standard, the evidence must both: (1) "possess an exculpatory value that was apparent to those who had custody of the evidence . . . before the evidence was destroyed, and (2) . . . be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *State v. Oinas*, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct.App. 1985).

¶ 8 The second way is when the State, acting in bad faith, fails to preserve evidence that is merely potentially useful. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *State v. Greenwold*, 181 Wis. 2d 881, 884-85, 512 N.W.2d 237 (Ct.App. 1994) (Greenwold I) (adopting the federal *Youngblood* analysis). The defendant has the burden of proving bad faith, by showing the State acted with official animus or made a conscious effort to suppress the evidence. *Greenwold II*, 189 Wis. 2d at 69-70.

As stated in *Wolf*, there are two ways that the failure to preserve evidence violates due process. The first requires that the evidence had apparent exculpatory value to those who had custody of the evidence and that the evidence was of a nature that the defendant would be unable obtain comparable evidence. The second way requires the defendant to prove bad faith by the State.

C. The Circuit Court's Findings Of Fact

On April 1, 2014, the circuit court issued a written DECISION AND ORDER. (App. Pages 1-3) In the circuit court's decision under the heading of "FACTS" the circuit court stated "It was not until after Dolajack had been arrested and was placed in the back seat of the squad car that Deputy Galipo noticed when turning on his computer that the camera had not been activated". Under the heading "CONCLUSION" the court stated that "this case involves merely the

failure to preserve potentially exculpatory evidence” and “Deputy Galipo’s failure to record the traffic stop and field sobriety testing was not an intentional act and merely a human error”. Lastly, the circuit court found that “There was no evidence collected and held by the State”.

D. No Evidence Was Lost Or Destroyed

In the present case it is undisputed by either party and supported by testimony at the suppression hearing and the DECISION AND ORDER of the circuit court that no video was ever made of Dolajeck’s driving and field sobriety tests. The cases cited in the defendant’s brief all involve cases where law enforcement possessed a piece of evidence and failed maintain that evidence.

E. Observed Driving Was Not Apparently Exculpable

The State earlier in this brief guided this court to points in the testimony of Deputy Galipo that establish reasonable suspicion and probable cause for the stop. It would be contrary to that the testimony and contrary to the fact findings of the circuit court that presided over the motion hearing to now find that the observations if recorded would have created apparently exculpable evidence.

F. No Bad Faith By The State

The state asserted above that no evidence was lost or destroyed because no evidence existed. However, for sake of argument the State will address the “evidence” as if had at some point existed. When evidence that is merely

potentially exculpatory is destroyed or lost, due process is not violated unless the State acts in bad faith. The burden of establishing bad faith is upon the defendant. See *Wolf*, at ¶ 8. The circuit court that presided over the motion hearing specifically found that the failure to record was “human error” and “not an intentional act”.

CONCLUSION

Deputy Galipo had probable cause to believe that Dolajeck violated §346.13 (3). Deputy Galipo also had reasonable suspicion to believe Dolajeck was an impaired driver. Consequently the stop was proper and not contrary to law. The circuit court’s fact finding with regard to the stop were not unreasonable. The failure to record was not intentional and there was no apparently exculpable evidence to be recorded or preserved. The circuit court’s fact finding regarding evidence was not unreasonable. Dolajeck has failed to establish there was apparently exculpable evidence that could have been preserved, failed to establish bad faith by the deputy or the State and failed to establish that the circuit court’s findings of fact were unreasonable or unsupported by the evidence.

Respectfully submitted this 25th day of November, 2014.

Douglass K. Jones
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), for a brief and appendix produced with a proportional serif font. The length of this brief is 1,783 words.

Dated this 25th day of November, 2014.

Douglass K. Jones
Assistant District Attorney
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CERTIFICATION 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 the requirements of Rule 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 25th day of November, 2014.

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