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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 REPLY BRIEF

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

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1. Reasonable Suspicion.

The response brief provided by the State simply attempts to make the assumption that any movement onto the fog line or onto the center median is a basis for reasonable suspicion. The deputy acted on a hunch in this case. In addition, the deputy's memory is suspect in this case. Deputy Galipo incorrectly testified that it was clear out and there were no weather conditions, a key fact to consider when evaluating the evidence and the crux of Deputy Galipo's testimony that the State simply amounts to a vehicle moving in a lane of traffic on two occasions in weather conditions. When Deputy Galipo was asked on cross examination the conditions he clearly testifies that "[i]t was a clear evening." [R.27 p.35 l.10]. This is after he incorrectly states the route that he traveled immediately upon encountering Mrs. Dolajeck. [R.27 p.34 l.5-9, R.11 p.4 & 12] Deputy Galipo testifies that he was about five car lengths behind. [R.27 p.34 l.9-11] He then proceeds to testify how he can tell Mrs. Dolajeck crossed the centerline by the movement of the vehicle. [R.27 p.36 l.1-p.38 l.8]

Deputy Galipo testifies that he can see it under the

assumption that it is a clear evening, but as pointed out before the weather conditions indicate that it was wet and raining. [R.27 p. 49] Considering the fact that the deputy failed to record this evidence using the squad camera and failed to recognize the weather conditions at the time he was giving reasonable suspicion testimony it appears that Deputy Galipo was essentially manufacturing testimony to overcome inchoate hunch. The State's argument is merely an assumption that the deputy had reasonable suspicion and ignores other factors that erode the reasonable suspicion argument. The inaccuracies of the deputy's testimony establishes that he had a hunch and therefore he had to manufacture evidence of suspicion and that is why there is no evidence of the vehicle activity and therefore Deputy Galipo did not have reasonable suspicion and the case should be dismissed. "An investigative stop cannot be based on an "inchoate and unparticularized suspicion or 'hunch'" *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 1968). The "Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). *State v. Fields*, 2000 WI App

218, ¶ 21, 239 Wis. 2d 38, 47-48, 619 N.W.2d 279, 284.

2. Failure to Preserve Evidence.

Given the current climate at the time that this reply is written, meaning Ferguson and New York City where these cities are now looking to police body cameras to document events, it is clear that there is a movement to require officers to provide recorded evidence to maintain the integrity of the system and the trust by the public in the system. This case demonstrates that this policy should be advanced.

The testimony by Chief Deputy Bowe establishes that the Sheriff's Department has a policy to record that Deputy Galipo clearly violated in this case. [R.27 p.16 l.15-21] Deputy Galipo appears to have elected to record only those events that he was sure would provide incriminating evidence. Is it a coincidence that the potentially exculpatory evidence that the fact finder would be able to review in defense of Mrs. Dolajack was not recorded or is it a choice by an officer motivated to increase OWI convictions at the expense of Mrs. Dolajack's constitutional rights? In this case the deputy's version of why the camera was not activated is under suspicion and

is in violation of department policy. A precedent needs to be set that if a department has a policy then it should be followed to promote the policy of recording exculpatory evidence and to maintain integrity in the enforcement of Wisconsin laws. Further, it is clear that Deputy Galipo violated the policy in this case yet the State does not make any reference to that in its brief.

3. CONCLUSION

This case should be dismissed as a result of the State's failure to prove reasonable suspicion over and above an inchoate hunch. It should further be dismissed as a result of the deputy's failure to follow the department's policy to record exculpatory evidence which equates to a failure to preserve evidence.

Dated: December 10, 2014

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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 side. The length of this brief is 4 pages.

Dated this 10th day of December, 2014.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was delivered via overnight courier on December 10, 2014. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 10th day of December, 2014.

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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 10th day of December, 2014.

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