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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

**03-31-2015**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

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Appeal No. 2014AP002603-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLENN T. ZAMZOW,

Defendant-Appellant.

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**On Appeal from the Judgment of Conviction and the Order  
Denying Postconviction Relief Entered in Fond du Lac County  
Circuit Court, the Honorable Gary R. Sharpe, Presiding**

Circuit Court Case No. 2011CT000145

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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**TABLE OF CONTENT**

Authorities Cited ..... ii

Argument ..... 1

CONCLUSION ..... 7

CERTIFICATION ON FORMAT ..... 8

CERTIFICATION OF MAILING ..... 8

CERTIFICATION OF ELECTRONIC FILING ..... 9

**AUTHORITIES CITES**

**CASES CITED**

Crawford v. Washington, 541 U.S. 36 (2004) ..... 4

State v. Frambs, 157 Wis.2d 700,  
460 N.W.2d 811 (Ct. App. 1990) ..... 3

State v. Manuel, 2005 WI 75, ¶42,  
281 Wis.2d 554, 697 N.W.2d 811 ..... 4

State v. Williams, 2001 WI 21, ¶18,  
241 Wis.2d 631, 623 N.W.2d 106 ..... 2

**WISCONSIN STATUES CITED**

§901.04(1) ..... 6

## ARGUMENT

The State contends that the statement on the squad video is sufficient as evidence to form the basis for a constitutional fact that reasonable suspicion was present to justify the stop of Zamzow's car. **Brief of Plaintiff-Respondent, page 2-4.** The State contends this, even though the State admits that "the video was not dispositive of the issue as to whether a traffic violation for crossing the center line had occurred." **Brief of Plaintiff-Respondent, page 3.**

The State first argues that "because the statement by Officer Birkholz to Zamzow was nontestimonial, the statement was reliable..." **Brief of Plaintiff-Respondent, page 4.** Whether a statement is testimonial or nontestimonial has no bearing on whether it is reliable or not. The State seems to confuse the issue of reliability with accuracy, and credibility. There is no dispute that Officer Birkholz made the statement. The fact that he made the statement is the sole piece of evidence that the video corroborates. The trial court made the obvious ruling of historical fact that Officer Birkholz made the statement. [80:23-24; App.116-117]

However, that does not automatically translate into the

conclusion that the constitutional fact of reasonable suspicion exists. Whether reasonable suspicion exists is a question of constitutional fact. State v. Williams, 2001 WI 21, ¶18, 241 Wis.2d 631, 623 N.W.2d 106. Just because Officer Birkholz made the statement does not mean that it is a reliable statement as to the conditions on the road, or as to Zamzow's actual driving. Nor does the fact that the statement exists mean that the statement is credible as to his ability to perceive Zamzow's actual driving. Determining whether reasonable suspicion exists, based upon those historical facts, is a constitutional fact and is determined de novo. Id.

The State also seems to imply that Zamzow is suggesting that Officer Birkholz "falsified" the reason for the traffic stop. **Brief of Plaintiff-Respondent, page 4.** It is not clear from the State's reference to Zamzow's Brief where they get that idea. But, the State seems to imply that any challenge to a police officer's statement is the same as calling them liars and casting aspersions on their honor. **Brief of Plaintiff-Respondent, page 9.** That notion is contrary to the reason that cross-examination is so important in our system of justice.

In this case, where there is no dispute that the

statement was made, the importance of cross-examination is to determine if there were any defects in perception. The officer does not have to be a liar, to have thought he saw something that cross-examination shows was impossible for him to see. At one of the many motion hearings in this case, the defense argued that cross-examining Officer Birkholz on his perception is critical to determining the reliability of the statement. It was argued:

Now when he says..."He crossed the center line," what does that mean? Am I just able, without being able to confront him, meaning he crossed over the line? Did he touch the line? How far was it? How big was it? Was it a violation of the law? I have to be able to go into the amount, the scopes, the measures.

[80:16] There is nothing in that line of questioning that implies the officer was a liar, or that he falsified the reason for the stop. Therefore, any argument by the State that implies such an allegation is misplaced.

The State continues to rely on the case of State v. Frambs, 157 Wis.2d 700, 460 N.W.2d 811 (Ct. App. 1990), for the argument that the confrontation clause is not applicable to a pre-trial motion such as this stop motion. **Brief of Plaintiff-Respondent, page 5-6.** Zamzow does not dispute that this case had not been overruled directly, but does

argue that the State stretches the holding beyond the constitutional limits and that Crawford v. Washington, 541 U.S. 36 (2004), limits how far the holding can be stretched.

Zamzow acknowledges that the Frambs case allows hearsay to be considered at pre-trial type hearings, but argues that hearsay can not be the sole basis for the finding of a constitutional fact. It is one thing to have hearsay that is corroborated with direct testimony subject to cross-examination. It is something entirely different to allow hearsay to be the sole evidence for a constitutional fact. If that were the case, the court would have no function except to determine if the police officer drafted his report with the proper wording, and there would be no credibility or reliability determination made by the finder of fact.

The State next tries to argue that the recorded statement is nontestimonial, and that the holding in State v. Manuel, 2005 WI 75, ¶42, 281 Wis.2d 554, 697 N.W.2d 811, is over-broad. **Brief of Plaintiff-Respondent, page 6-7.** It is not clear what the State is arguing here, but the proof of the fallacy of their argument is their circular reasoning. The State argues that the single recorded statement at issue in this appeal is non-testimonial, yet that statement is the sole evidence for the finding of

constitutional fact. Zamzow argues that any statement necessary for the determination of a constitutional fact is testimonial, and therefore subject to the requirement for cross-examination.

The State continues the earlier argument that the reliability of the statement is the same as whether the statement was actually made or not, when they argue "the statement is significantly more reliable because of the availability of the video." **Brief of Plaintiff-Respondent, page 7-8.** Zamzow argues that in this case the importance of the Confrontation Clause is to make sure that a finding of constitutional fact is only made upon evidence where any defects in perception were tested by cross-examination. That is where the Due Process concern arises.

In this case, the trial court made the finding of historical fact that the statement was made, and from that alone, made the finding of constitutional fact that the officer had reasonable suspicion to stop the car. Zamzow argues that it is a violation of his Due Process rights to have a constitutional fact based solely upon hearsay, where he was unable to test thru confrontation any defects in perception embedded in the statement.

In addition, the argument that Due Process applies to

the finding of constitutional fact has nothing to do with the constitutionality of §901.04(1), Stats., as argued by the State. **Brief of Plaintiff-Respondent, page 8.**

Finally, the State seems to argue that because of the inherent danger faced by law enforcement in doing their jobs, that rigorous application of the confrontation clause might result in unjust results. **Brief of Plaintiff-Respondent, page 10-11.** There is no doubt that it is a tragedy that Officer Birkholz was not available in this case. Tragic as that is, that is no reason to lessen any constitutional protections. The technology that allowed the statement to be heard provides no further help in determining what defects in perception were embedded in that statement. Rather, the video shows that there was no traffic violation and supports the view that there were defects in perception. Those defects were never tested by cross-examination and that makes the audio statement too unreliable to form the sole basis for a constitutional fact.

**CONCLUSION**

For all of the reasons stated above, the defendant, Glenn T. Zamzow, hereby asserts that the trial court's finding of a constitutional fact was clearly erroneous and the trial court erred in denying the motion to suppress. Zamzow requests that this Court should vacate the Judgment of Conviction and reverse the trial court's order.

Dated this 31<sup>st</sup> day of March, 2015.

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**CERTIFICATION ON FORMAT**

I hereby that this brief conforms to the rules contained in §809.19(8) (b) and (c) for a Reply Brief produced using the following font:

Mono spaced font: **Courier New** at 12 point font, which is 10 characters per inch; double spaced; 1.5 inch margins on left side and 1.0 inch margins on other 3 sides.

The length of the brief is   7   pages.

**CERTIFICATION OF ELECTRONIC FILING**

I hereby certify that I have submitted an electronic copy of this REPLY BRIEF OF APPELLANT-DEFENDANT, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic petition is identical in content and format to the printed form of the petition for review filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this   31<sup>st</sup>   day of   March  , 2015.

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**CERTIFICATION OF MAILING**

I, William J. Donarski, hereby certify that pursuant to §809.80(3), Stats., that I deposited in the United States mail for delivery to the Clerk, by first class mail, postage prepaid the Reply Brief of Defendant-Appellant, addressed to:

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P.O. Box 1688  
Madison, WI 53701-1688

I have enclosed ten (10) copies of this document to the Court of Appeals. I have also served by U.S. mail three (3) copies of the said document upon the Wisconsin Attorney General at the following address:

ADA Eric Toney  
Fond du Lac County  
District Attorney's Office  
160 South Macy Street  
Fond du Lac, WI 54935

I certify that the packages containing the said documents postage prepaid were deposited in the U.S. postal receptacle on this 31<sup>st</sup> day of March, 2015.

\_\_\_\_\_  
William J. Donarski