STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP002603-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLENN T. ZAMZOW,

Defendant-Appellant.

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

REPLY TO ATTORNEY GENERAL BRIEF OF DEFENDANT-APPELLANT

William J. Donarski
State Bar No. 1021567
Attorney for Defendant-Appellant

OFFICE ADDRESS:
Law Office of William J. Donarski
2221 South Webster Avenue, #166
Green Bay, WI 54301

(920) 339-5216

TABLE OF CONTENT

AUTHORITIES CITES

CASES CITED

WISCONSIN STATUES CITED

ARGUMENT

The State, now through the Attorney General, 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. The Attorney General contends this, even though the video was not dispositive of the issue as to whether a traffic violation for crossing the center line had occurred. The Attorney General tries to claim that the video is "ambiguous" on whether Zamzow crossed the center line. **Brief of Attorney General, page 7.** However, the trial court was clear when it stated "But the Court could not discern to the extent that there was an actual cross of the center line..." [80:19-20; App. 112-113] This means that there was no video evidence that Zamzow crossed the center line. The only evidence of a cross of the center line was the audio portion of the recording.

The Attorney General also argues that a clearly erroneous standard of review should be used, based upon State v. Walli, 2011 WI App 86, ¶17, 334 Wis.2d 402, 799 N.W.2d 898. **Brief of Attorney General, page 6.** However, Walli deals with a situation where there was "disputed

testimony" **and** video evidence. In this case, there was no disputed testimony because the officer never "testified". His voice was heard on the audio recording. It may or may not be evidence, but that is not "testimony". The sole evidence to justify the stop was the audio recording, and Zamzow argues that this court should apply a *de novo* standard of review to determine if that sole piece of evidence is sufficient and reliable enough to find a constitutional fact.

The Attorney General starts their argument by slightly mis-construing the issue for this appeal. They argue that the single issue is whether the admission of the squad video violated his right to confront the witness. **Brief of Attorney General, page 7-8.** They also claim that "Zamzow's brief refers to "probable cause as the necessary requirement..." **Brief of Attorney General, page 7, n.4.** It is unclear where they find this reference.[1]

They might be concerned about the bigger picture, but Zamzow is solely concerned with whether the stop of his vehicle was proper. Zamzow set forth his Argument that The

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[1] A word search of Zamzow's brief finds the term "probable cause" in only two locations. Once at page 5, quoting the trial court, and a second time at page 21, discussing adversarial evidentiary hearings in general.

Audio Recording Should Not Have Been Admitted, and in the alternative, The Audio Recording is Too Unreliable to Form the Basis for a Constitutional Fact.

The Attorney General is correct in stating that "Zamzow does not appear to dispute that under *State v. Frambs*, ... and *State v. Jiles*, ... Wisconsin permits hearsay at suppression hearings as an evidentiary matter." **Brief of Attorney General, page 8.** Zamzow also acknowledges that Wis. Stat. §901.04(1) and §911.04(4)(a), allow hearsay to be admitted at hearings before trial. Zamzow is not arguing that those statutes are unconstitutional. Rather, he is arguing that in this case, since there was no other evidence to corroborate the constitutional fact of a cross of the center line, that it was error to admit the audio portion of the squad car recording. Zamzow is not arguing that the Confrontation Clause applies to every witness and piece of evidence at a suppression hearing, but that it **should** apply before any critical piece of evidence, is admitted and relied upon by the trial court for a finding of a constitutional fact.

The Attorney General then spends ten pages argueing what is essentially not in dispute. **Brief of Attorney General, page 9-18.** Zamzow asserts that this case can be

decided without the need to declare that the right to confront does not apply to suppression hearings, in all cases and for all witnesses. Nor does this case need to wade into the thicket of exactly what is testimonial for the constitutional Confrontation Clause. Rather, this case is fact specific, in what is hoped for will be a very rare occurrence; i.e., where the arresting officer has passed away shortly after the arrest.

It might be better to consider the argument about the "Confrontation Clause" to be a "small 'c' right" rather than a "Capital 'C' right". The Capital C right to Confront applies to trial. There is no question about that. The Capital C right to confront does not apply to pre-trial proceedings in every situation and for every witness. Zamzow never argued that it did. If he had made that argument, he would have to have argued that Wis. Stat. §901.04(1) and §911.04(4)(a), were unconstitutional. He did not do that.

He also would have had to argue that Frambs and Jiles should be overturned. He did not make that argument either. Rather, he argued that Frambs should be re-interpreted so "that at an adversarial evidentiary hearing, where constitutional facts need to be determined, that **some right**

to confrontation does apply." **Brief of Defendant-Appellant, pages 14 (emphasis added).** Zamzow argues that the small 'c' right to confront should apply to his specific situation.

In Zamzow's first brief, he addressed the issue of whether the audio recording was testimonial. **Brief of Defendant-Appellant, pages 11-14.** This was essentially in response to the trial court's finding that it was non-testimonial, and thus admissible. The trial court ruled on this issue, and Zamzow raises it as a grounds for relief. If there is any right to confront a witness at a suppression hearing, Zamzow argues in this instance that the audio recording was "testimonial" and should have been suppressed. If there is no right to confront any witness at a suppression hearing, Zamzow wonders how can it be called an adversarial evidentiary hearing?

Zamzow maintains his argument that it was testimonial as argued in his brief and reply brief. The Attorney General cites the recent case of Ohio v. Clark, 576 U.S. ____, 135 S.Ct. 2173 (2015), for the proposition that the "primary purpose test" is the standard to determine what is testimonial. **Brief of Attorney General, page 26.** The primary purpose test deals with statements to law

enforcement officers, not from law enforcement officers. Zamzow argues that Ohio v. Clark is not relevant to decide this case. Rather, as explained in the concurrence by Justice Scalia in that case, Crawford is still the law on the Confrontation Clause.

> I write separately, however, to protest the Courts shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford v. Washington*, 541 U. S. 36 (2004). For several decades before that case, we had been allowing hearsay statements to be admitted against a criminal defendant if they bore indicia of reliability.' Ohio v. Roberts, 448 U. S. 56, 66 (1980). Prosecutors, past and present, love that flabby test. Crawford sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconfronted statements made by witnesses—i.e., statements that were testimonial. 541 U. S., at 51. We defined testimony as a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact,' ibid.—in the context of the Confrontation Clause, a fact "potentially relevant to later criminal prosecution," Davis v. Washington, 547 U. S. 813, 822 (2006). *Crawford* remains the law.

Ohio v. Clark, 576 U.S. ____, 135 S.Ct. 2173 (2015)(Scalia, J., concurring). Zamzow argues that since this was not a statement to a police officer, that the primary purpose test does not apply. Rather, the standard announced in Crawford, still applies. A testimonial fact is a solemn declaration that is potentially relevant to a later criminal prosecution. The audio recording falls into that category.

The vast majority of the Attorney General's brief deals with the black or white issue of whether the Confrontation Clause applies to pre-trial hearings in every situation and for every witness. Zamzow takes no position on whether the Confrontation Clause (or confrontation right) applies at any other hearing besides a suppression hearing.

However, maybe the best example of Zamzow's argument is the recent Wisconsin case that determined that hearsay is admissible at Preliminary Hearings. State v. O'Brien, 2014 WI 54, 354 Wis.2d 753, 850 N.W.2d 8. There is no dispute that hearsay is admissible at a Preliminary Hearing.[2] However, the O'Brien court did caution that:

> §970.038 does not set forth a blanket rule that all hearsay be admitted. Circuit courts remain the evidentiary gatekeepers. They must still consider, on a case-by-case basis, the reliability of the State's hearsay evidence in determining whether it is admissible and assessing whether the State has made a plausible showing of probable cause.

State v. O'Brien, 2014 WI 54, ¶4, 354 Wis.2d 753, 850 N.W.2d 8. In the same way, Zamzow argues that the circuit erred by finding that hearsay could be admitted, and should have acted as a gatekeeper to not admit the audio recording as it

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[2] It should be noted that a Preliminary Hearing is not a Constitutional Right, *Id.*, ¶25, unlike those at a suppression hearing.

was unreliable.

The Attorney General never addresses Zamzow's argument, that without some right to confront a witness at a suppression hearing, that such a hearing would merely turn into a trial by affidavit. At **Brief of Defendant-Appellant, pages 19,** Zamzow argued that:

> While the full scope of the Confrontation Clause might not apply to pre-trial proceedings, Due Process should require that the defense be allowed to test the evidence against the accused in the crucible of cross-examination before the evidence can be found reliable and trustworthy enough to be a constitutional fact.

Zamzow used the example that if the words on the audio recording had merely been written in a police report, how could simply admitting the report into evidence pass a due process challenge? At **Brief of Defendant-Appellant, pages 19 to 21.**

The Attorney General cited a lot of cases from other jurisdictions to reinforce the O'Brien holding, that hearsay can be admitted at a preliminary hearing, but never addressed how the circuit could needs to be the evidentiary gatekeeper. Zamzow argues that, at least in this case, the gatekeeper function should have led the trial court to not admit the audio portion of the squad car recording. Or, at least to not rely exclusively upon it to make a finding of

constitutional fact.

The Attorney General also argues a lot of cases that do not apply to this specific situation. *Confer* United States v. Raddatz, 447 U.S. 667, 679 (1980). That case dealt with a suppression hearing with live testimony before a Magistrate, and whether the Federal District Court could approve the Magistrate's findings based upon the record, without itself having heard the live testimony. *See also*, Smith v. Illinois, 390 U.S. 129 (1968) and McCray v. Illinois, 386 U.S. 300 (1967). Both of these cases deal with confidential informants, and whether the identity should be revealed. That is irrelevant to this case. *See also*, State v. Padilla, 110 Wis.2d 414, 329 N.W.2d 263 (Ct. App. 1982). That case dealt with the testimony of a child at a Preliminary hearing. These cases are irrelevant.

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. Zamzow argues that in this case the importance of the confrontation right 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.

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.

The Attorney General seems to argue that there is no due process right whatsoever to cross-examine a witness at a suppression hearing. **Brief of Attorney General, page 28-32.** If that is indeed the law, why have prosecutors ever called witnesses to these hearings. They could just submit the police report with the foundation provided by an officer who wasn't even present at the critical scene. At some point, common sense dictates that there is a limit to how far the law can be pushed.

This case is not about whether the Confrontation Clause applies to every pre-trial hearing, and to every witness. Rather, it is about where the limit is for due process in ensuring that a constitutional fact is based upon reliable evidence. Cross-examination is the means for ensuring the reliability of the evidence. If the Attorney General had any idea what other means besides cross-examination would

ensure the evidence was reliable, they didn't mention it.

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 17th day of August, 2015.

By:_____
William J. Donarski
Attorney for Defendant-Appellant
State Bar No. 1021567

Office Address:
Law Office of William J. Donarski
2221 South Webster Avenue, #166
Green Bay, WI 54301

(920) 339-5216

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 11 pages.

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I hereby certify that I have submitted an electronic copy of this REPLY TO ATTORNEY GENERAL 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 17th day of August, 2015.

_____
WILLIAM J. DONARSKI
Attorney for Defendant-Appellant
State Bar No. 1021567

Law Office of William J. Donarski
2221 South Webster Avenue, #166
Green Bay, WI 54301

(920) 339-5216

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 to Attorney General Brief of Defendant-Appellant**, addressed to:

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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 and the District Attorney at the following address:

Wisconsin Department of Justice
Mr. Warren D. Weinstein
P.O. Box 7857
Madison, WI 53707-7857

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 17th day of August, 2015.

_____
William J. Donarski