STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 14-AP-2860-CR
Circuit Court Case No. 14-CT-459

v.

TIMOTHY J. RELYEA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE IMPOSED IN THE CIRCUIT COURT OF DANE COUNTY ON JULY 8, 2015, DANE COUNTY CASE NO 14-CT-459, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. DRINKING OUT OF A BROWN BOTTLE AND LOOKING AROUND WHILE OPERATING A MOTOR VEHICLE CANNOT ESTABLISH REASONABLE ARTICULABLE SUSPICION TO CONDUCT AN INVESTIGATORY STOP.

The protection of the Fourth Amendment requires that police must have more than an "inchoate and un-particularized suspicion or 'hunch.'" Terry v. Ohio, 392 U.S. 1, 27 (1968). The sole reason why Timothy Relyea was stopped was Officer Gowan's assumption that the bottle which Relyea took a drink out of was "perceived to be like a microbrew out of a bottle." (R. 33, p. 6) (App. A-7). Gowan didn't know it was a microbrew, he only perceived it as such. Gowan knows that non-alcoholic beverages come in brown bottles including many different kinds of root beer. The only other observation that Gowan claims he saw was that the defendant looked around after he took a drink from the bottle. In fact he stated "he looked around almost to see if anyone was looking and then put the beer down out of my sight." (R. 33, p. 6) (App. A-7). Even though Gowan testified that the bottle was beer by his own admission he did not know if it was or wasn't.

Obviously, Gowan's observation that Relyea looked around to see if anyone was looking was speculative but it would not be unusual and it is not suspicious for a driver to look around as he or she is driving. In fact that is what you are supposed to do while you are driving; look around to gauge traffic and make sure no other vehicles are crossing the roadway in front of you and to be observant. Indeed the officer testified that he observed

the Ford F-150 truck near the intersection of Lynn Street and it would not be unusual or suspicious at all for the driver of a vehicle who is either approaching or near an intersection to look around to see if other traffic is coming. After making this observation, Gowan then followed Relyea, through heavy traffic, without noticing any inappropriate driving behavior or traffic infractions.

In State v. Post, 2007 WI 60, the court determined that weaving within a single traffic lane does not alone arise to reasonable suspicion. Id. at 37. (finding reasonable suspicion by accumulation of traveling across traffic and parking lanes, weaving in an S pattern and canting in a parking lane). Surprisingly the State does not cite the Post case or analyze its application to the facts. In State v. Waldner, 206 Wis.2d 51 (1996) our supreme court determined that an investigatory stop can be based on the observation of lawful conduct so long as reasonable inferences of unlawful activity may be drawn. There the court determined that reasonable suspicion existed based upon the officer's observation shortly after midnight of a vehicle stopping at an intersection that did not require a stop, accelerating quickly within a short period of time and then pouring out a mixture of liquid and ice. Id. at 53. The court stated:

> "Any one of these facts, standing alone, might well be insufficient but that is not the test we apply. We looked at the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the accumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. This is what we have here. These facts give rise to a reasonable suspicion that something unlawful might well be afoot."
>
> Id. at 58.

In this case the sum of the whole is not greater than the sum of its individual parts. Unlike the building blocks of facts in Waldner, Officer Gowan determined that Relyea violated the law without knowing whether he was drinking from a bottle of root beer or a bottle of beer. He simply assumed without more that it was in fact an open intoxicant. The building blocks of facts that existed in Waldner simply are not present here. If someone can be subject to an investigative stop merely because they drink from a bottle which a police officer assumes is a beer bottle and then looks around, Fourth Amendment protections for the average citizen will be eviscerated. It is common knowledge that people drink beverages from cans and bottles while driving. Gowan had a generalized suspicion or a "hunch" that the bottle was a microbrew and he lacked sufficient articulable and particularized facts to warrant a Fourth Amendment intrusion.

CONCLUSION

The totality of the circumstances in this case and the inferences derived from those facts do not establish reasonable suspicion that any criminal activity was afoot or that Timothy Relyea was in any way involved in illegal activity. Drinking from an unidentified brown bottle while in a vehicle in and of itself cannot provide the necessary specific and articulable facts necessary to support a Terry stop nor can it meet the demand for specificity required to warrant a Fourth Amendment intrusion. The officer's stop was predicated on nothing more than an assumption that the bottle contained alcohol and without additional specific facts substantiating that any criminal activity was afoot the stop was an illegal infringement of the Fourth Amendment. The trial court erred in finding reasonable suspicion and the investigatory stop violated the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution which prohibit unreasonable searches and seizures. This court should reverse the trial court's denial of the motion to suppress.

Respectfully submitted this 8th day of June, 2015.

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CERTIFICATION

Undersigned counsel hereby certifies that this appellate brief conforms to the rules contained in §809.19 (8) (b) and (c) Wis. Stats. for a brief produced with the proportional serif font. The length of this brief is 1,255 words.

Signed:

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Patrick J. Stangl

CERTIFICATION OF COMPLIANCE WITH RULE 809.19 (12)

The undersigned certifies that an electronic copy of this brief, excluding the appendix, if any, complies with the requirement of §809.19 (12). The electronic brief is identical in content and format to the printed brief filed this date.

A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

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Patrick J. Stangl