COURT OF APPEALS OF WISCONSIN
DISTRICT II

State of Wisconsin,

Plaintiff – Respondent,

v.

Robert Blankenheim,

Defendant – Appellant.

Appeal No. 15-AP-239

Circuit Court No. 14-CM-52

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR OZAUKEE COUNTY, CASE NO. 14-CM-52 THE HONORABLE JOSEPH W. VOILAND, PRESIDING

BRIEF OF DEFENDANT – APPELLANT

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1. The second traffic stop was illegally conducted without consent and should result in suppression of all subsequent evidence, which thereby mandates dismissal.

   The Trial Court found that the second stop was consensual.

2. The Trial Court presumed the second stop was legally initiated through consent without proof beyond the unreliable testimony of Officer Hurda.

   The Trial Court found the stop was conducted by consent and that the testimony of Officer Hurda was credible.

3. There is no proof of operation on a state highway by Robert C. Blankenheim.

   The Trial Court found that Robert C. Blankenheim operated his vehicle on a state highway.

Statement as to Oral Argument

The issues presented in this appeal are governed by well-settled law and as the brief and record sufficiently provide the facts and arguments for the Court to render a decision, therefore, Robert C. Blankenheim does not request oral argument on the issues raised in this appeal but is willing to provide it upon request.

Statement as to Publication

Robert C. Blankenheim does not request publication in this case.

Statement of the Case

Nature of the Case

This case revolves around two independent traffic stops that occurred within minutes of one another, on private property. The second of those stops was conducted illegally and all evidence stemming from it should be suppressed. Further, the credibility of the arresting officer is questionable, but was relied upon by the Trial Court to find the stop was consented to and the vehicle was operated on a state highway.

Procedural Posture

Defendant-Appellant, Robert Blankenheim (Hereinafter "Mr. Blankenheim"), was arrested on January 29, 2014. (R 1, page 1) He made his initial appearance, represented by State appointed public defender the following day, January 30, 2014, for case number 14-CM-52. (R 2, page 1) A signature bond was signed and his plea hearing scheduled for March 4, 2014. (R 4, page 1) On March 4, 2014 the plea hearing in 14-CM-52 was held where Mr. Blankenheim plead not guilty and further proceedings were scheduled for April 8, 2014. (R 42, page 2) That hearing was adjourned until May 6, 2014. (*Id*.) At the May 6, 2014, hearing the State informed the trial court that additional charges would be filed

and joined with 14-CM-52, and a request to file motions was made by Mr. Blankenheim's attorney, and granted by the Honorable Joseph W. Voiland; "You can wait until you get your amended complaint or the next complaint then file your motions as soon as possible after that." (R 45, page 3-4, App. 2-3) According to the state, they "received some reports back on chemical testing that's going to lead to additional charges", yet these additional charges based on the chemical testing that was obtained by the state prior to the May 6, 2014, hearing were never issued. (*Id*.)

A Motion to Dismiss was filed by Mr. Blankenheim's counsel on May 9, 2014 in 14-CM-52, but was never ruled upon, and his counsel was substituted on May 30, 2014. (R 9, page 1) (R 13, page 1-2) The original Motion to Dismiss was never addressed by the State, or ruled upon by the Court. On June 3, 2014 the two cases (12-CM-52 and 12-TR-324) were joined into the same proceeding because the facts of the two cases were inextricably bound together; then Mr. Blankenheim's new counsel requested, and was granted, adjournment. (R 45, pages 3-4, App. 2-3) A second Motion to Dismiss by Mr. Blankenheim's new counsel was filed on June 23, 2014 and cured by an amended complaint on June 26, 2014, again, *without resolution of the first Motion to Dismiss*. (R 16, page 1) (R 19, page 1)

During the scheduled trial, September 3, 2014, the Honorable Judge Voiland demanded that defense counsel review evidence first produced by the state at the trial. (R 47, pages 5-8, App. 6-9) He insisted that defense counsel review the tape and attempt to proceed if possible. (R 47, pages 5-7, App. 6-8) Only when defense Attorney Paul Bucher asserted that he was limited in time and that the video was over an hour long did the Trial Court determine that an adjournment was required. (R 47, page 8, App. 9)

Defense counsel was, for the first time, despite several and ongoing discovery requests, informed of the existence of lapel camera recordings on the day the trial was supposed to take place. (R 47, page 2-4, App. 4-5) At the September 3, 2014 hearing, Mr. Blankenheim's counsel noted that "previous counsel also filed a discovery demand. But I filed one on June 5th, 2014. And I think that we've been in court twice since then, June 13th [sic] and July 18 [sic]." (R 47, page 3, App. 5) While Mr. Blankenheim's counsel was incorrect about the specific court dates, he correctly asserted that two additional hearings had occurred between his June 5th request and the September 3rd hearing, in addition to the time since prior counsel's original discovery request. (*Id*.) None of these requests produced the video lapel recordings of Officer Ryan Hurda until the date of the September 3, 2014 trial. (*Id*.) The September 3,

2014 trail was eight months after the night that the video recordings were created. (*Id*.)

The matter was adjourned and set for trial on October 8, 2014. (R 48, page 1) The trial was held on October 8, 2014. (*Id*.) Sentencing was postponed until October 17, 2014. (R 48, page 92-93) Notice of intent to pursue post-conviction relief was filed that same day. (R 31, page 1) Notice of Appeal was submitted on February 2, 2015. (R 37, page 1)

Disposition at Trial

At the bench trial, the Trial Court made several findings of fact that went beyond the scope of the evidence at trial, including that the officer was dispatched and initiated an investigation of a parked car "that wasn't usually there." (R 48, page 83, App. 30) The Trial Court found that the officer arrived at the residence, entered the private property, and located two men seated in the vehicle in the back of the private property, one of which he recognized as living on the property on which the vehicle was parked. (*Id*.) During the first stop, the officer noted no suspicious behavior by Mr. Blankenheim; no indications of nervousness, agitated behavior, pacing back and forth, Mr. Blankenheim's speech was not noted to be slow and metered, his eyes appeared unremarkable, and there was no smell of

marijuana noted; in stark contrast to the officer's asserted justification for arrest during the second stop, mere minutes later. (R 48, page 9-10, App. 12-13) Hurda did not request identification or verification of any information about the vehicle at the time of this first stop. (*Id*.) Having his suspicions dispelled, the officer then ended the stop, returned to his vehicle, and left the private property. (R 48, page 84, App. 31)

The Trial Court further found that the officer, several minutes later, learned that the vehicle's license plates did not match the registration; he returned to and entered the private property. (*Id*.) Based solely on the officer's testimony, the Trial Court found that upon his second return to the private property, the Officer requested that the men speak with him when he was fifty feet or more away, and the men voluntarily engaged in a discussion rather than being detained. (*Id*.) (R 48, page 12, App. 15) Based on the testimony of Thomas Kassouf, whose credibility the Trial Court said was questionable, and who stated he did not witness Mr. Blankenheim operate the vehicle "Q: How did [Robert] get there? A: I don't know", a finding was made that Mr. Blankenheim drove the vehicle to the private property where the arrest was made. (R 48, page 87, App. 34) (R 48, page 58-60, App. 25-27) The Trial Court found the Officer credible about Mr. Blankenheim's appearance and behavior

during the second stop when the Officer made the arrest, after presuming that the car must have been driven to the location, despite a complete lack of any witnesses or admissions of operation on a state highway. (R 48, page 84-85, App. 31-32) Mr. Blankenheim was then arrested. (R 48, page 85, App. 32)

Hurda testified that he noticed the smell of marijuana on Mr. Blankenheim's person during the second stop but after Robert was arrested and being escorted to the squad car, which resulted in a Trial Court finding that the officer had probable cause to believe that the he was intoxicated and was therefore justified in mandating the field sobriety tests and subsequent blood draw which formed the basis for the charges in the derivative case of 14-TR-324. (R 48, page 87-88, App. 34-35) The Trial Court agreed with the officer that Mr. Blankenheim refused to take the field sobriety tests at the Port Washington Police Department, and was read the Informing the Accused form. (R 48, page 85-86, App. 32-33)

The Trial Court found Mr. Blankenheim guilty of Operating After Revocation and Refusal to Submit to a Blood Test. (R 48, page 89) The Trial Court sentenced him under the framework of *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. (R 49, page 12) The Honorable Judge Voiland determined that based on the gravity of the offense, being parked in a private driveway, and

the character of Mr. Blankenheim, specifically the existence of prior convictions, he would impart sixty (60) days in jail, with a one (1) day credit, a $50 fine, court costs of $50, for a total assessment of $316.00, and was given sixty (60) days to pay. (R 49, page 14-15) Mr. Blankenheim was authorized to participate in the HUBER program for work release, and his license would be suspended for an additional year as a result of the Refusal charge. (R 49, page 15)

Statement of Facts

On January 29, 2014, Mr. Blankenheim was sitting in a newly purchased vehicle, parked on private property, with his friend Thomas Kassouf ("Thomas") enjoying a cigarette. (R 48, page 60, App. 27) A nearby neighbor called to report that an unknown car was parked in the driveway, and Officer Ryan Hurda ("Hurda") was dispatched to Thomas' home. (R 48, page 6, App. 10) Hurda parked in the driveway, illuminated the vehicle and approached, knocking on the driver side window. (R 48, page 7-8, App. 11) After a brief exchange, in which Hurda neither saw, heard, smelled, or otherwise identified any suspicious activity, nor requested any identification or other documentation, Hurda recognized the passenger as Thomas from their prior dealings. (R48, 9-10) Hurda noticed nothing amiss and therefore, having his suspicions dispelled, he ended the stop and

exited the private property by driving his vehicle away. (R 48, page 9-10, App. 12-13)

Then Hurda proceeded to develop a case against the two men by checking the license plates of the vehicle against the registration, where he and found the vehicle was registered to a female. (R 48, page 10-11, App. 13-14) Presuming criminal activity, he returned to and entered the private property and witnessed the two men moving on foot toward Thomas' home through the back yard, where the car was constantly parked. (R 48, page 11-12, App. 14-15) It was disputed at trial how the officer engaged the two men and initiated this second stop, specifically, whether the officer obtained consent from the men to begin a conversation, or if he commanded them to stop. (R 48, page 12, App. 15) (R 48, page 64-65, App. 28-29) Hurda testified that he spoke to the men from fifty feet or more away; "Q: And you just indicated you were 50 feet away, correct? A: Yes. If not more", and thereby obtained their consent to speak to the men. (R 48, page 13, App. 16)

During the course of the second stop, Hurda obtained Mr. Blankenheim's driver's license and asked about arrests, warrants, and if his license was suspended. (R 48, page 15) Mr. Blankenheim declined to answer. (*Id*.) During the second stop, Hurda testified at trial that Mr. Blankenheim, who only a short time before was

without suspicion, now appeared nervous, agitated, paced back and forth, his speech was slow and metered, and that his eyes appeared dilated, all things he failed to notice during the first stop, just minutes before. (R 48, page 14, App. 17) After a check over his radio Hurda verified that Mr. Blankenheim's license was revoked. (R 48, page 45) Hurda placed Mr. Blankenheim into handcuffs and escorted him back to the police car. (R 48, page 18-19, App. 18)

While escorting Mr. Blankenheim, Hurda testified that he noticed the smell of marijuana emanating from Mr. Blankenheim's person. (R 48, page 19, App. 18) He questioned Mr. Blankenheim about the smell and received an ambiguous response; "yeah, that's the whole thing." (R 48, page 19, App. 18) Hurda failed to locate contraband on Mr. Blankenheim's person or in the vehicle, but Thomas was not searched, and even more curiously, no mention of the smell was identified during the first stop, in the vehicle, or on Thomas, and no marijuana was found. (R 48, page 19, App. 18) (R 48, page 21, App. 20)

Thomas and Hurda arranged to have Mr. Blankenheim's newly purchased vehicle moved from the private property and Hurda questioned Thomas about whether or not he saw Mr. Blankenheim drive at any point, which he denied, as his testimony at trial

confirmed. (R 48, page 19-20, App. 20-21) (R 48, page 58-60, App. 25-27)

Mr. Blankenheim was taken to the Port Washington Police Department. (R 48, page 20, App. 19) Mr. Blankenheim asked several questions about the field sobriety tests he was requested to take, and the officers refused to provide answers. (R 48, page 23, App. 22) The officers then placed him back into the police car and took him to the hospital to have a blood test performed. (R 48, page 22, App. 21) Mr. Blankenheim did not consent to the blood draw. (R 48, page 23, App. 22) At the hospital Mr. Blankenheim did not resist having his blood drawn. (*Id*.)

Argument

This Court should overturn the conviction of Robert C. Blankenheim due to the illegal nature of the second stop, the lack of credibility of the arresting officer in how the stop was initiated, and the lack of any evidence to support operation on a state highway, which the Trial Court presumed, in clear error.

Standard of Review

This Court reviews decisions of the trial court in conformity with Wisconsin Statutes section 752.35. That section holds that reversal of a trial court decision is discretionary. This Court of Appeals may order a reversal of a conviction and remand for a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried" (§ 752.35). Further, the statue makes it clear that regardless of whether the proper motion or objection appears in the record the Court may reverse the judgment if there has been a miscarriage of justice. This Court should act in any and all ways necessary to accomplish the ends of justice.

Appellate review of the sufficiency of the facts to support a conviction does not require proof beyond a reasonable doubt:

> The burden of proof is upon the state to prove every essential element of the crime charged beyond reasonable doubt. The test

> is not whether this court or any of the members thereof are convinced beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. A criminal conviction can stand based in whole or in part upon circumstantial evidence. The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted. Our review of the record in response to a challenge to the sufficiency of the evidence is so limited by these rules.
>
> *Johnson v. State,* 55 Wis.2d 144, 148, 197 N.W.2d 760 (1972).

Questions of law, like the constitutional rights question that is at issue in this appeal, are reviewed *de novo*, with no weight being given to the trial court's decision. "The application of constitutional principles to a particular case is a question of constitutional fact. We accept the circuit court's findings of fact unless they are clearly erroneous. The application of constitutional principles to those facts is a question of law that we review *de novo*. " *State v. Dearborn*, 2010 WI 84, ¶ 14, 327 Wis.2d 252, 786 N.W.2d 97, *citing; State v. Pallone*, 2000 WI 77, ¶ 26, 236 Wis.2d 162, 613 N.W.2d 568 (internal citations omitted). Therefore, the application and preservation of the defendant's constitutional rights are reviewed by this Court on a *de novo* standard with no deference

shown to the trial court's decision while deference is shown to the Trial Court's findings of fact.

1. **The Second Stop was Conducted Illegally Which Requires Suppression and Dismissal of This and the Underlying Case**

The Officer's presence on the property was not based on consent, as Hurda asserted at trial, but rather on a command to stop and other show of authority, rendering the detention illegal. A show of authority elevates a conversation to a detention, which can be done by voice, uniform, or with a firearm, usually in combination. For example, displaying a weapon can distinguish an arrest from a mere investigatory detention. *See United States v. Serna-Barreto*, 842 F2d 965 (7th Cir. 1998)

The Wisconsin Supreme Court has held that "police-citizen contact becomes a seizure within the meaning of the Fourth Amendment when an officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen.... " *State v. Young*, 2006 W.I. 98, 717 N.W.2d 729, 294 Wis. 2d 1 (2006); *quoting State v. Williams*, 2002 WI 94, 255 Wis. 2d 1, ¶ 20, 646 N.W.2d 834 (*quoting United States v. Mendenhall*, 446 U.S. at 552, 100 S.Ct. 1870) (internal quotations omitted). When an officer approaches an individual and commands them to stop with a show of

authority such as placing their hand on their gun it places that individual into custody, even if there was another recent legal traffic stop:

> Pounds was initially told that he was free to leave the scene of what appeared to be a routine traffic stop. However, a short time later a state trooper located him and ordered him to the floor at gunpoint. The trooper frisked and handcuffed Pounds and Brown and transported them in a state patrol car back to the scene of the traffic stop. A reasonable person in Pounds' position would not have believed that he was free to leave the patrol car under these circumstances. This is the only relevant inquiry.

State v. Pounds, 176 Wis. 2d 315, 500 N.W.2d 373(Ct. App. 1993); *See also, Village of Menomonee Falls v. Kunz*, 126 Wis. 2d 143, 150, 376 N.W.2d 359, 363 (Ct. App. 1985). Therefore, when Hurda displayed his authority by means of the command and badge, and perhaps a gun, Mr. Blankenheim was placed under arrest. It is well established that when an officer exerts authority and that authority is abided by such that a reasonable person would not believe they are free to leave they have been arrested.

The fact that the stop was performed by a show of authority means the detention was initiated improperly at the moment of that show of authority under the framework provided in *Young*. As a result of the stop being conducted illegally, the evidence subsequently obtained must be suppressed pursuant to the exclusionary rule. See *State v. Knapp*, 2005 WI 127, ¶ 56, 285 Wis. 2d 86, 700 N.W.2d 899 (interpreting Article I, § 8 more broadly than

the United States Supreme Court has interpreted the Fifth Amendment); *See also*, *Nix v. Williams*, 467 U.S. 431, 444 (1984). The exclusionary rule is premised on suppressing evidence that "is in some sense the product of illegal governmental activity."; *State v. Loeffler*, 60 Wis. 2d 556, 561, 211 N.W.2d 1 (1973), "Evidence obtained as a direct result of a violation of a constitutional right . . . is inadmissible upon proper objection."; *United States v. Calandra*, 414 U.S. 338, 347 (1974). The purpose of the exclusionary rule "is to deter future unlawful police conduct...."; *Conrad v. State*, 63 Wis. 2d 616, 636, 218 N.W.2d 252 (1974), "[t]he exclusionary rule is a judge-made one in furtherance of conduct that courts have considered to be in the public interest and to suppress conduct that is not"; *State v. Eason*, 2001 WI 98, ¶ 43, 245 Wis. 2d 206, 629 N.W.2d 625.

Thus, the exclusionary rule is not absolute, but rather is connected to the public interest, which requires a balancing of the relevant interests. *Wong Sun v. United States*, 371 U.S. 471, 485-88 (1963); *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970). The exclusionary rule applies to both tangible and intangible evidence and also excludes derivative evidence under certain circumstances, via the fruit of the poisonous tree doctrine, if such evidence is obtained "by exploitation of that illegality"; *State*

v. Schlise, 86 Wis. 2d 26, 45, 271 N.W.2d 619 (1978), "[I]n its broadest sense, the [fruit of the poisonous tree doctrine] can be regarded... as a device to prohibit the use of any secondary evidence which is the product of or which owes its discovery to illegal government activity." Therefore, if the stop was conducted illegally all subsequent evidence derived therefrom would be excluded.

The second stop was conducted with a show of authority and devoid of any reasonable suspicion, let alone probable cause. The illegal nature of the stop mandates that this case be reversed. This illegal stop also invalidates the derivative Refusal charge, 12-TR-324, the evidence of which was derived after the arrest of Mr. Blankenheim. That conviction should also be overturned for the same reasons, as all of the evidenced used to convict Mr. Blankenheim of the refusal was obtained after the illegal stop.

2. The Trial Court Committed Clear Error in Finding the Second Stop was Consensual by Relying Upon Officer Hurda as a Credible Witness

It was clear error for the Trial Court to rely upon Hurda's testimony as the sole evidence of the legal nature of the second stop because no reasonable trier of fact would have found Hurda credible. Hurda is not a credible source for the evidence that the second stop was initiated based on consent. It was disputed at trial how the

second stop was initiated, and Hurda was taken at his word despite evidence indicating a contrary occurrence.

First, Hurda initiated the second stop on private property after he had all his reasonable suspicions dispelled during the first encounter. His testimony about the second stop undermines his credibility. Hurda claimed that he requested that the individuals speak with him, "I then asked the individual if I may speak with him regarding his registration", "may I speak with you regarding your vehicle registration, sir", "excuse me sir, may I speak with you about your vehicle's registration". (R 48, page 12, App. 15) (R 48, page 32, App. 23) (R 48, page 34, App. 24) He did so from "50 feet away, correct? A: Yes. If not more." (R 48, page 13, App. 16)

The distance alone indicates that the initial stop was both commanding and authoritative, and the number of different ways that Hurda claims to have addressed the two men further undermines his assertion of a consensual stop. It is clearly erroneous to presume that an officer could speak politely from fifty feet or more away and receive consent, and much more reasonable to presume that a yell from an officer quickly advancing and posturing with his hand near his equipment would mandate compliance, especially given the rash of police violence that has plagued the media over the past months, a reasonable person would have felt they were being detained.

Second, the purported consent by Mr. Blankenheim and Thomas formed the basis for the officer's intrusion onto the private property and with that consent the Trial Court found that the officer was properly on the private property. (R48, page 84) Without consent, there was no basis for the second stop, and it was therefore illegal. In fact, Thomas was unable to verify how the officer initiated this conversation, "he must have said something like, hey, or stop, or you guys. But I don't remember". (R 48, page 65, App. 29) Had the officer issued a command to stop he would not have obtained consent and his basis for being on the property, the source of all subsequent evidence used in the trial to produce a conviction, is absent. *See United States v. Serna-Barreto,* 842 F2d 965 (7th Cir. 1998). The Trial Court noted that "there was some issue about where the officer had his hand, was the flashlight under his arm, or was his hand on a gun and so forth. That I don't think is all that important." (R 48, page 84, App. 31).

Respectfully, the Trial Court is incorrect about the importance of that information. The State relied entirely upon Hurda's assertion that he obtained consent to initiate the stop. (R 48, page 84, App. 31) The Trial Court determined that the stop was conducted through consent "I am inclined to find, and I do find that the two individuals, Mr. Kassouf and Mr. Blankenheim, then did just voluntarily engage

in a conversation with the officer" purely on the basis of Hurda's testimony. (R 48, pages 19-23, App. 18-22) (R 48, page 84, App. 31) The commanding nature of his language and the placement of his hand goes directly to whether the officer engaged in a mandatory commanded stop or obtained consent. Hurda's reliability and credibility are undermined by a variety of his statements and actions that call into question the Trial Court's reliance upon his assertion of a consensual stop, especially due to his complete disregard of the show of force.

Hurda's reliability, credibility, and truthfulness is impeached because Hurda asserts that he requested the men to speak with him, from fifty feet or more away, which would obviously have required more than a simple conversational tone and likely carried significant authority given his police vehicle, clothing, and recent interaction with the two men. Taking Hurda at is word alone to determine how the stop occurred was clear error given the questionable credibility he demonstrated in the majority of his testimony. In fact, this was not a consensual conversation, but a mandatory stop. A reasonable person, having just been detained by an officer, would believe that the return of that same officer mere minutes later was also a mandatory detention.

Hurda's decision to return to the property is questionable as well. He chose to end the first stop, after having his suspicions dispelled. (R 48, page 9-10, App. 12-13) Yet he still conducted a further investigation into the vehicle parked on private property. (R 48, page 10-11, App. 13-14) For what reason?

The best explanation is that he was looking for a way to arrest the out of town friend of a man with 16 prior convictions smoking a cigarette in a beat up old car on private property. So he continued to investigate the two individuals and the vehicle after having all reasonable suspicions dispelled. He found a pre-text to conduct another stop and search for more evidence of criminal activity, so he returned to the property. (R 48, page 11-12, App. 14-15) When he returned to the property he noticed that he was about to lose his targets, so he acted to insure they would not leave by yelling out and posturing to show authority. (*Id*.)

The Trial Court finds that Hurda "later learned that the plates on the vehicle didn't match up. And so he decided to go back." (R 48, page 84, App. 31) There is no further discussion of the reason, assuredly no one believes that a vehicle parked on private property requires any sort of registered plates, and it was not identified as stolen. So Hurda's return to the property has no rational basis, he is not investigating any illegal activity, he is stopping the men on

private property after having just had all reasonable suspicions dispelled under a pre-text in order to fish for criminal activity, this places his credibility into question.

It is only during the second stop that Hurda engages Mr. Blankenheim, out in the cold, and demands identification. (R 48, page 13-14, App. 16-17) No request for such identification was made when Hurda had a reasonable basis for being on the private property during the first stop when he was at the driver's side window of the vehicle mere feet from Mr. Blankenheim; only during the second stop when they are outside the vehicle does he notice these indications of intoxication, when he has no other justifiable reason for conducting a stop on the private property. It is curious how Hurda had his reasonable suspicions dispelled when he was next to Mr. Blankenheim during the first stop only to have a laundry list of suspicious behavior develop during the second illegal stop mere minutes later. His credibility is dramatically undermined by this inconsistency. The Trial Court committed clear error by refusing to consider or address this inconsistency in Hurda's testimony and instead finding him credible because of his badge.

Hurda offers vague, non-specific, and un-verifiable information to describe Mr. Blankenheim, like "nervous. And a little bit agitated. He paced back and forth a little bit… his eyes appeared

dilated." (R 48, page 14, App. 17) All of which is behavior that would be expected if you were confronted for a second time by an officer late at night with a show of authority and were forced to stand in the cold and justify what you were doing while on private property. Further, at night, it is common for eyes to adjust to be able to see in the dark; notably Hurda does not assert the classic glassy and bloodshot eyes that are cornerstones of police testimony regarding indications of intoxication, instead he talks about dilation.

Yet Hurda uses this information to justify placing Mr. Blankenheim under arrest after presuming that he drove without any evidence of operation of the vehicle. The timing of Hurda's actions and the vague and atypical descriptions of what he presumed indicated intoxication all demonstrate that he is not a credible witness. Further, his presumption of operation on a state highway by Mr. Blankenheim is never justified nor supported, Hurda has jumped the gun by arresting and then back filling to satisfy the elements of any crime he can dream up.

Hurda then goes on to justify his arrest further, and again after the fact, by claiming he smelled marijuana. (R 48, page 19, App. 18) He has already placed Mr. Blankenheim in handcuffs and is in the process of escorting him to the squad car, for doing an action no one saw, when he claims to notice the smell. (*Id*.) It is

questionable how Hurda could smell marijuana from a person that did not possess any, when the two of them were standing outside in a January evening, and when he did not notice it during the first investigation when he was a mere foot from Mr. Blankenheim. He failed to note any smell during his initial stop where he approached the men in the vehicle. (R 48, page 8-10, App. 11-13) Notably, no marijuana was ever located in the possession of either man or in the vehicle that Hurda searched, again fishing for criminal activity without reasonable suspicion and outside the bounds of a search incident to arrest. Finally, no result from any test was provided to the court to demonstrate intoxication by any individual present, which begs the question, where did this supposed smell come from? This also negatively impacts Hurda's credibility and was ignored by the Trial Court.

In fact, the original assertion that additional charges would be filed, presumably for an OWI, never came to fruition. Hurda's assertion of a marijuana smell is dubious at best, and further undercuts his credibility. If anything, it shows his overzealous desire to pin Mr. Blankenheim for any crime he could fabricate under any circumstances he could create. The credibility of Hurda is dramatically undermined by his actions outside the scope of his initial traffic stop. Rather than leave two men on private property

who were doing nothing illegal, Hurda decided to return, detain, arrest, and then back fill his investigation to presume actions by Mr. Blankenheim that he had no evidence to support. For the Trial Court to take Hurda at his word without any further corroboration as to the consensual nature of the second stop was clear error.

3. There is No Evidence of Operation of a Vehicle on a State Highway and Therefore the Trial Court's Presumption was in Clear Error

The Trial Court committed clear error by presuming operation on a state highway without any evidence other than Hurda's unreliable testimony, to do so was clear error and mandates a reversal of the conviction. First, the Trial Court asserts that Hurda was dispatched to a "car parked in a driveway that wasn't usually there." (R 48, page 83, App. 30) In fact, the dispatch was to investigate a call from a neighbor about "a vehicle parked in a driveway that is not normally used." (R 48, page 6, App. 10) The evidence given at trial clearly demonstrates that the vehicle was parked, not being operated, and was located on private property, not a state highway. There is never any testimony of operation by any individual, and no testimony that the vehicle ever moved.

The Trial Court asserts that "[Mr. Blankenheim] drove that vehicle on a public highway" without any testimony or evidence

which would allow the trier of fact to reasonably conclude that the element of operation on a state highway had been proven beyond a reasonable doubt. (R 48, page 87-88, App. 34-35) The circumstances that led him to believe this operation occurred is a lack of evidence to the contrary. Again, this flies in the face of our core judicial principles as it demands that Mr. Blankenheim demonstrate his innocence rather than placing the burden on the state to prove his guilt.

Finally, the Trial Court makes the determination that Robert drove to the property based on "the evidence was that the passenger had not driven the vehicle there" and "[Mr. Blankenheim] didn't really want to talk about how he had got there." (R 48, page 85, App. 32) The results of these overreaching findings of fact that are not based on hard evidence but rather on the assertions Hurda, who has dubious credibility. Hurda's assertions have been demonstrated to be faulty on numerous fronts, and therefore the trier of fact was not justified to take his assertions at face value. To do so does not constitute proof beyond a reasonable doubt. If we were to extend the Trial Court's logic, any situation in which a defendant chose to stay silent, and a third party denies knowledge of a specific criminal act by that defendant, an inference of action would be presumed by the trier of fact and thereby a conviction obtained. Such a situation

makes it highly "probable that justice has [been]… miscarried." (§ 752.35)

And yet, in this case, lack of knowledge by a third party that the accused took an action, and a desire not to speak to the police by the accused, is the same as guilt. Hurda saw two men on private property and assumed that one of them drove a vehicle to the property without any support. The Trial Court assumed the same. Such findings are clearly erroneous and are plainly shocking. Mr. Blankenheim has no obligation to provide information to the police, and taking his right to silence and non-incrimination does not permit an inference or finding of guilt. To hold that Mr. Blankenheim's refusal to provide information and the statement by Thomas that he did not know how Mr. Blankenheim got to the property as equivalent to evidence of operation is clearly erroneous. The silence of Mr. Blankenheim and lack of incriminating testimony by Thomas is not proof beyond a reasonable doubt, it is no proof at all.

Conclusion

Therefore this Court should overturn the conviction of Robert C. Blankenheim, as well as all derivative convictions based on the same traffic stops because the second stop was conducted illegally and therefore all subsequent evidence should be suppressed, the credibility of Hurda is unreliable and formed the basis for the only

evidence against Mr. Blankenheim, and there was no evidence of operation on a state highway, an essential element of the charge.

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Certification

I 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 32 pages, 6573 words.

Dated at Ozaukee, Wisconsin, this _____ day of April, 2015.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

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, with the addition of this certification only.

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 at Ozaukee, Wisconsin, this _____ day of April, 2015.

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