COURT OF APPEALS OF WISCONSIN
DISTRICT II

State of Wisconsin,

Plaintiff – Respondent,

Appeal No. 15-AP-239

v.

Circuit Court No. 14-CM-52

Robert Blankenheim,

Defendant – Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF FOR THE APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR OZAUKEE COUNTY, CASE NO. 14-CM-52 THE HONORABLE JOSEPH W. VOILAND, PRESIDING

REPLY BRIEF OF DEFENDANT – APPELLANT

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1. A Motion to Suppress Illegally Obtained Evidence Was Brought By the Defendant Thereby Preserving The Issue For Appeal

The State is incorrect in asserting that Robert C. Blankenheim forfeited his ability to argue for suppression on appeal by failing to raise the issue to the trial court because the defendant brought a Motion to Suppress, but the trial court never ruled upon it and the illegal stop was raised during cross examination and closing statements. As the State correctly cited, "raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal" (State's Response Brief, pg. 2, citing *State V. Erickson*, 227 Wis.2d 758, 596 N.W. 2d 749 (1999)). However, when the issue is raised, the trial court actually needs to rule upon it, otherwise the appeal becomes essential. Had the issue been properly addressed by the trial court when it was raised by motion, this appeal may not have been necessary. Unfortunately, the trial court did not issue a ruling on the Motion to Suppress.

The State admits that "defendant by his then attorney Julie J. Flessas file [sic] a Notice of Motion and Motion to Suppress for Lack of Probable Cause to Arrest on May 9, 2014." (R 9, State's Response Brief, pg. 2) Robert C. Blankenheim obtained new counsel who filed an additional Motion to Dismiss on June 23, 2014. (R 16). The State's contention that the filing of this additional motion resulted in "abandoning the previously

filed motion" is without merit. (State's Response Brief, pg. 2) The two motions did not address the same issue, the former relating to the lack of probable cause to arrest and the latter addressing the sufficiency of the criminal complaint. (R 9, R 16) These two motions addressed different issues, and to assert that a defendant cannot bring a second motion on a different issue without abandoning the first is untenable. The State has not, and cannot, point to any support, statutory or case law, that supports this contention.

In fact, during the July 10, 2014 hearing relating to the Motion to Dismiss filed by subsequent counsel, the trial court inquired about the filing of motions and was informed by defense counsel that; "I believe previous counsel was a motion to suppress. Not a motion to dismiss", thereby distinguishing the two motions from one another. (R 46, pg. 5) The Court noted that the subsequent Motion to Dismiss was cured by the amended complaint, and moved forward without addressing the original Motion to Suppress by former counsel. (R 46, pg. 6-7) The Court never ruled upon the original Motion to Suppress, which is not the equivalent of the State's assertion that the issue was never raised to the trial court, rather it is appealable error by the trial court. During a prior hearing, the trial court discussed motion deadlines, where counsel for the defendant stated "previous counsel did file a motion to suppress… as well as I'd like to file a motion to dismiss the complaint. I know Attorney Flessas did file a motion

to suppress." (R 45, pg. 3) Clearly the issue of suppression was raised to the trial court through this motion and has been preserved on appeal.

Further, Attorney Bucher specifically questioned the arresting officer and the witness, Thomas Kassouf, about how the stop was conducted, further preserving the issue for appeal. He asked the arresting officer 1) "you stated in a loud fashion, hey, you, stop. I want to talk to you. Isn't that true?", 2) "You didn't command them in a -- make a command in a loud voice for them to stop as they were heading into the house?", and 3) "was your hand on your gun?" (R 48, pg. 33-34). Then, Attorney Bucher asked witness Thomas Kassouf about the nature of the detention; 1) "did you notice did the officer have his hand on his gun?" 2) "did the officer command you or order you to stop?" and 3) "Why didn't you just keep going into the house?" (R 48, pg 64-65) How the officer initiated the stop was addressed during cross examination of both witnesses, preserving the issue for appeal. Finally, during closing argument, Attorney Bucher again preserved the issue; "the probable cause issue really concerns me greatly… We don't know what was said. Mr. Kassouf wasn't all that helpful on a three to seven on a scale of one to ten. But clearly there was some command given by this officer to cause these individuals to stop." (R 48, 74-75) The issue was preserved by motion, by cross examination of all witnesses, and in closing. The State's contention

that the issue of the illegal stop was never raised to the trial court is therefore without merit.

2. The Lack of Credibility of the Arresting Officer Is Relevant

Whether or not the stop was conducted consensually is relevant to every single element of the charge and the arresting officer provided the sole source of information to support those elements. His credibility is highly suspect, and this casts reasonable doubt onto every element that the state must prove. While deference should be shown to the trial court's determination of a witness's credibility, in this case, the great weight of the evidence demonstrates that the Officer is not credible, as explained in Defendant's Appellate Brief.

Further, the State failed to provide any discussion of the standard of review, thereby deferring to the Defendant's standard. It was explicitly noted that "the Court may reverse the judgment if there has been a miscarriage of justice" (Brief of Defendant-Appellant, pg. 16). In the present case, to allow the sole source of the essential elements of a crime to be proven by a single witness whose credibility is suspect flies in the face of the core standards of criminal conviction, namely that guilt must be proven beyond a reasonable doubt. The presumption of innocence is completely ignored if the State is able to prove elements of a crime solely based on officer's suspect testimony. The officer's credibility is relevant and does not support conviction in this case therefore the conviction should be reversed.

3. Circumstantial Evidence Was Presumed and Does Not Eliminate Reasonable Doubt of Non-Operation on a State Highway

The circumstantial evidence used to demonstrate operation on a state highway is insufficient to eliminate reasonable doubt. While circumstantial evidence may be used to convict, that evidence must be sufficient to eliminate reasonable doubt. In the present case, there is significant doubt as to the actual operation.

First, there is zero concrete evidence of operation. No one testified that they witnessed the defendant driving on a state highway. In fact, the officer responded not to a call about erratic operation, but rather to a car that was parked on private property. (R 48, pg. 6-7) The vehicle never moved from the property during the entirety of the officer's interaction with the defendant. (R 48, 19-20) Neither the defendant, nor the other person present, Thomas Kassouf, testified that operation occurred, with Mr. Kassouf stating "Q: And you didn't see Mr. Blankenheim drive the vehicle there? A: No" (R 48, 62)

In fact, the only reasonable presumption is that the vehicle arrived on the property at some point prior to the Officer's arrival. Who drove it there, or whether it was driven there or towed, is entirely presumed. It is reasonable to think that the vehicle could have been driven by any number of other individuals, as attorney Bucher noted in closing; "the other inference, which you can do, is that a third party drove him to that location." (R48, pg. 75) For the trial court to presume this essential element without any evidence beyond an officer who lacks

credibility asserting that it was his assumption that the defendant drove is clear error and a miscarriage of justice. The trial court effectively ignored an alternative reasonable explanation and presumed an essential element of the charge. The only evidence that the State can point to is that the other individual present denied driving the vehicle and that the defendant changed his demeanor when asked about the status of his license. Lack of proof from one witness, and a reluctance to provide unnecessary information to a police officer does not constitute evidence beyond a reasonable doubt of operation of a vehicle on a state highway. This Court should overturn the conviction on those grounds.

Conclusion

Therefore this Court should overturn the conviction of Robert C. Blankenheim.

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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 10 pages, 1676 words.

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

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

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

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 May, 2015.

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Affidavit of Mailing of Michael E. Crane

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

Michael E. Crane, being first duly sworn on oath, states as follows:

1. On _____, 2015 I mailed the enclosed Reply Brief of Appellate-Defendant, and Affidavit to the Court of Appeals;
2. I mailed the Reply Brief via Fed-Ex on the date identified above pursuant to the "Mailbox Rule".
3. The Reply Brief was delivered to Fed-Ex by hand delivery on the date identified above.

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Subscribed and sworn to before me
this _____ day of May, 2015.

_____
Notary Public

My Commission expires _____