

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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Appeal No. 2015AP000298  
Ozaukee County Circuit Court Case Nos. 2014CV000307

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**VILLAGE OF FREDONIA,**

Plaintiff-Respondent,

v.

**BRUCE A. GOSSETT,**

Defendant-Appellant.

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**AN APPEAL FROM THE JUDGEMENT OF  
CONVICTION AND THE DECISION OF THE TRIAL  
COURT DENYING THE DEFENDANT-APPELLANT'S  
MOTION FOR SUPPRESSION OF EVIDENCE IN THE  
CIRCUIT COURT FOR OZAUKEE COUNTY, THE  
HONORABLE PAUL V. MALLOY, JUDGE, PRESIDING**

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**THE REPLY BRIEF OF THE DEFENDANT-APPELLANT  
BRUCE A. GOSSETT**

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## ARGUMENT

Despite observing no odor of intoxicant, no slurred speech and no impairment with Mr. Gossett's eyes, the Village essentially suggests that the driving behavior coupled with the fact that Mr. Gossett put his hand on his truck after he exited the vehicle sufficiently justified requesting Mr. Gossett provide a preliminary breath sample under Wis. Stat. §343.303.

The Village agrees that under two circumstances §343.303 permits an officer to request a PBT of a commercial driver. First, when the officer detects any presence of alcohol or second, when the officer has reason to believe that the driver is operating a motor vehicle while intoxicated. The Village offered no evidence suggesting that Officer Erickson observed a presence of alcohol. Thus, the sole issue is whether Officer Erickson had reason to believe that Mr. Gossett was operating a motor vehicle while intoxicated. In determining whether an officer had the requisite level of suspicion, the court looks at the totality of the circumstances, in light of the officer's training and experience. See *State v. Kutz*, 2003 WI App. 2005, ¶¶11-12, 267 Wis.2d 531, 671 N.W.2d 660 and *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct.App. 1994). In interpreting Wis. Stat. §343.303, the Court in *County of Jefferson v. Renz*, 231

Wis.2d 293, 310-311, 603 N.W.2d 541 (1999) stated that “if the person stopped is a commercial driver, the officer may request a PBT upon detection of “any presence” of an intoxicant or if the officer has “reason to believe” the driver had been operating the vehicle while intoxicated.” “If either the “any presence” or the “reason to believe” standard is satisfied, the officer may request a PBT breath sample from a commercial driver.” *State v. Goss*, 2011 WI 104, at ¶12, 338 Wis.2d 72, 806 N.W.2d 918. .

The reason to believe standard is lower than the “probable cause to believe” necessary to request a non-commercial motor vehicle driver to submit to a PBT but higher than the reasonable suspicion justifying an investigatory stop. See *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999).

Here, the argument advanced by the Village is that the threshold for the “reason to believe” standard is very low. However, even under this low standard, the explained erratic driving (Both Mr. Gossett and Officer Erickson agreed it was extremely windy on that date) coupled with the fact that Mr. Gossett placed his hand on the vehicle when exiting were alone insufficient to support the request for a PBT. The stop occurred at 3:30 p.m., not around bar time, Officer Erickson did not

observe any presence of alcohol on Mr. Gossett, and aside from Mr. Gossett putting his hand on the vehicle, made no other observations of potential impairment following the stop. The evidence did not support a reason to believe that Mr. Gossett was operating his commercial motor vehicle while he was impaired thus justifying the request for a PBT.

Finally, the Village contends for the first time on appeal that even without the PBT result, the officer was justified in continuing the detention for field sobriety tests, and that based on those tests Officer Erickson was justified in arresting Mr. Gossett.

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996), *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under the Fourth Amendment. *Id.* at 810. If an officer has probable cause to believe a traffic violation has occurred, an officer may conduct a traffic stop. *State v. Gaulrapp*, 207

Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). An investigative detention must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. An inchoate and unparticularized hunch will not suffice. *State v. Guzy*, 139 Wis.2d 663, 675, 407 N.W.2d 548 (1987).

Initially, the Court must determine if the initial stop of Mr. Gossett's vehicle was justified. If so, the court must determine whether during the stop, Officer Erickson became aware of additional "suspicious factors or additional information that would give rise to, an objective, articulable suspicion that" Mr. Gossett was committing an offense..." *State v. Malone*, 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (citing *State v. Betow*, 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)).

The additional observations made by Officer Erickson following the stop did not provided sufficient articulable suspicion that Mr. Gossett was operating a motor vehicle while impaired thus justifying the request for the PBT and the continued detention for field sobriety testing. In *Betow*, the court held that "[i]f, during a valid traffic stop, the officer



becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun." *Id.* at 94-95.

"The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Young*, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997). To meet this test, the officer must show specific and articulable facts, which taken together with rationale inferences from those facts, reasonably warrant the officer's continued intrusion. *Terry v. Ohio*, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968).

Here, the continued detention of Mr. Gossett was based in large part on the fact that Officer Erickson knew that the PBT came back positive for alcohol. Without knowledge that the PBT came back as positive, Officer Erickson would not have had sufficient reason to extend the stop for field sobriety testing. As argued *supra*, aside from the explained driving behavior and Mr. Gossett putting his hand on the vehicle when he exited,

Officer Erickson made no observations suggesting that Mr. Gossett was impaired. Thus, the Village's argument that the continued detention was justified fails.

### **CONCLUSION**

Because Officer Erickson did not possess the requisite level of suspicion to request Mr. Gossett provide a PBT sample, the court erred in denying Mr. Gossett's motion for suppression of the evidence. This Court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 27<sup>th</sup> day of June, 2015.

Respectfully Submitted

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## FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 14pages. The word count is 2591.

Dated this 29<sup>th</sup> day of June, 2015.

Respectfully Submitted

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**CERTIFICATION 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 this 29<sup>th</sup> day of June, 2015.

Respectfully submitted,

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