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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appellate Case No. 2015AP701

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

MANUEL TALAVERA,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

**Appealed from a Judgment of Conviction Entered in the Circuit Court for
Waukehsa, the Honorable Donald J. Hassin, Jr., Presiding
Trial Court Case Nos. 13 CT 1322**

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STATEMENT OF THE ISSUE

I. WHETHER THERE WAS SUFFICIENT EVIDENCE ESTABLISHING PROBABLE CAUSE TO DETAIN MR. TALAVERA?

Trial Court Answered: **Yes.**

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Appellant believes publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), stats., this case involves the application of well-settled rules of law to a common fact situation.

STATEMENT OF FACTS AND CASE

This case concerns what minimal articulable facts are needed to support probable cause to stop a citizen motorist for a violation of Wis. Stat. § 346.34(1)(b).

On September 15, 2013, at approximately 2:26 a.m., Deputy Knipfer observed the defendant's motor vehicle on Townline Road just north of Main Street in the Village of Sussex/Town of Lisbon. (15 at 4-5). Knipfer decided to follow the vehicle. While behind it, Knipfer performed a routine check of the vehicle's registration. (15 at 5). Knipfer failed to elaborate on whether the registration check yielded any germane information. He continued following the vehicle, which was traveling north towards the roundabout. As it approached, Knipfer alleges that it accelerated abruptly to 30 or 35 miles per hour out of the roundabout to then continue north on Townline Road. (15 at 6). However, the deputy also conceded there was no reference to the speed of the vehicle in his report. (15 at 10). In fact, he only described the vehicle as

accelerating from the roundabout "abruptly". (15 at 11). Furthermore, he did not hear the vehicle burn or spin out when it left the roundabout. (15 at 11). The speed was a visual estimation by Knipfer as he was not operating the moving laser at the time. (15 at 11). The vehicle continued northbound and eventually made a left-hand turn onto Valley View Drive. (15 at 6). The vehicle failed to signal when it executed the left-hand turn. (15 at 7). Knipfer indicates he was directly behind the vehicle approximately two car lengths. (15 at 7). Shortly thereafter, the vehicle took a right-hand turn where it also failed to signal. (15 at 7). It then took another left turn, at which point the deputy initiated the traffic stop. (15 at 7). Furthermore, during the one and a half miles the deputy followed the vehicle, he witnessed no signs of swerving, weaving, or crossing the center or fog line. (15 at 10-11). Knipfer testified that, other than his vehicle, there was no other traffic at the time he was following the vehicle. (15 at 11). He further testified that no traffic was affected other than him. (15

at 11). Knipfer testified that he initiated a stop based upon the defendant's inability to signal before executing his turns. (15 at 7). The deputy informed the trial court that state statutes prohibit turning without a signal. (15 at 7).

Based upon a subsequent investigation, the defendant was arrested for Operating While Intoxicated (OWI) – Second Offense. Following the return of the blood test results obtained through the implied consent process, Wis. Stat. § 343.305, the defendant was issued a citation for Operating with a Prohibited Alcohol Concentration (PAC) – Second Offense. On September 17, 2013, a criminal complaint was filed charging the defendant with OWI – Second Offense and PAC – Second Offense. On December 17, 2013, the defendant filed a Motion to Suppress Based upon Lack of Reasonable Suspicion to Detain the Defendant. (5). An evidentiary motion hearing was held on January 30, 2014, at which time the defendant argued both a lack of reasonable suspicion and probable cause to stop due to the officer's failure to provide

any facts that “other traffic may be affected by the movement” as required by Wis. Stat. § 346.34(1)(b). (5). The trial court ruled that the officer had probable cause to stop the defendant for a violation of that statute. The trial court denied the defendant's motion by ruling that it was not unreasonable to construe that the officer's operation of his vehicle may well have been affected by the defendant's failure to signal. (15 at 17). On September 12, 2014, the Court signed an Order officially denying the defendant’s motion. (10).

ARGUMENT

I. THE ARRESTING OFFICER DID NOT HAVE PROBABLE CAUSE TO DETAIN THE DEFENDANT.

Deputy Knipfer detained Mr. Talavera because he believed Talavera was committing a traffic violation by failing to signal before executing a turn. When the question is whether the officer believes he or she is observing a vehicle code violation, the detention by law enforcement is held to the higher standard of probable cause. *State v. Longcore*, 240 Wis. 2d 429, 623 N.W.2d 201 (Ct. App. 2000).

The issue of probable cause is based on the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. *State v. Paszek*, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971); *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). When an arrest is made without a warrant, the burden is on the State to show the existence of probable cause. *Vale v. Louisiana*, 339 U.S. 30 (1970). The Wisconsin Supreme

Court defines probable cause generally as “the quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Probable cause exists where the totality of the circumstances known to the officer would lead a reasonable officer to believe the defendant has committed an offense. *Id.* The test for probable cause is whether the officer has sufficient facts to believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). Accordingly, information which establishes probable cause must be measured by the facts of each case. *State v. Wilks*, 117 Wis. 2d 495, 502, 345 N.W.2d 498 (Ct. App. 1984).

As stated earlier, a detention for a specific traffic code violation must be supported by probable cause. *Longcore*, 240 Wis. 2d at 431-32. Presently, Talavera did not commit a traffic violation. Knipfer assumed Talavera committed a traffic violation when he believed Talavera's failure to signal prior to

executing three turns was a violation of law. Under Wisconsin law, it is unlawful to turn any vehicle without signaling *if it may affect other traffic*. Specifically, Wis. Stat. § 346.34(1)(b) provides:

In the event any other traffic may be affected by the movement, no person may turn any vehicle without giving an appropriate signal in the manner provided in s. 346.35. A person making a U-turn shall use the same signal used to indicate a left turn. When given by the operator of a vehicle other than a bicycle or electric personal assistive mobility device, the signal shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning. The operator of a bicycle or electric personal assistive mobility device shall give the signal continuously during not less than the last 50 feet traveled before turning. A signal by the hand and arm need not be given continuously if the hand is needed in the control or operation of the bicycle or electric personal assistive mobility device. (emphasis added).

The record provided to this court fails to show there was an actual violation of the above-referenced statute. It would only apply if other traffic was affected by the defendant's failure to signal. The record is barren to that fact save this exchange with

Deputy Knipfer:

Q: Was there any other traffic at that time as you were following the vehicle?

A: No, just my squad car behind him.

Q: Just your squad car. Okay. So no other traffic was affected, is that safe to say?

A: Other than me, no.

However, there is no information *how* the deputy was affected.

Did he have to brake suddenly? Was he forced to swerve? Did he have to take any type of affirmative action to avoid a collision? Was he simply inconvenienced? There is nothing in the record articulating how the other traffic (in this case, Deputy Knipfer) was affected. There is nothing in the record other than a simple, bald assertion by the deputy that he was affected. "[F]ailure to give a right-hand turn signal is not a traffic violation unless 'other traffic may be affected by such movement.'" *City of Milwaukee v. Johnson*, 21 Wis. 2d 411, 413, 124 N.W.2d 690 (1963). Despite the statute's use of the word "may," it is not enough that other traffic could have been affected; the statute requires that other traffic was actually

affected and an articulation as to how it was affected. *State v. Anagnos*, 2011 WI App 118, 337 Wis. 2d 57, 805 N.W.2d 722 (overruled on other grounds by *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675). By interpreting “may affect” as “could have affected”, the trial court's ruling allows for all unsignalled turns to be penalized regardless of the actual circumstances. Such an interpretation would render the introductory clause of the statute superfluous. In *State v. Anagnos*, the Court of Appeals interpreted *City of Milwaukee v. Johnson* to stand for the proposition that “[e]vidence in the record must support a finding that [the defendant’s] failure to use a turn signal affected other traffic.” *Anagnos*, 2012 WI 64 at ¶7. Similarly in this case, in order to have affected traffic, there would need to be articulable facts supporting a violation of Wis. Stat. § 346.34(1)(b). There are none. Because there was no effect on Deputy Knipfer when the defendant executed his turns, there was no probable cause to believe that traffic was affected. Therefore, Knipfer stopped Talavera without the

"quantum of evidence" required to show Talavera violated Wis. Stat. § 346.34(1)(b). Deputy Knipfer's error was mistake of law and therefore the stop was not lawful. The issue is then whether an officer has probable cause that a law has been broken when his interpretation of the law is incorrect." *State v. Longcore* 226 Wis. 2d 1, 8, (1999). "If the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred." *Id.* "We conclude that when an officer relates the facts to a specific offense, it must indeed be an offense; a lawful stop cannot be predicated upon a mistake of law." *Id.* While the deputy said "he" was affected, he failed to explain how and instead simply thought failing to signal was a violation even absent any effect on traffic. Because Knipfer was mistaken in his application of the law, this Court should find he did not have probable cause to believe Wis. Stat. § 346.34(1)(b) had been violated. *Longcore*, 240 Wis. 2d at 431-32.

Furthermore, there was also an insufficient basis to stop based on any speed violations observed by Knipfer. He estimated the speed of the vehicle at between 30 to 35 miles per hour as it entered the roundabout. However, this was a very brief visual estimation, unconfirmed with the assistance of radar or laser. Furthermore, the deputy conceded that he simply described the vehicle accelerating “abruptly” (15 at 11). Over the one and a half miles he followed the vehicle, Knipfer failed to observe any kind of suspicious driving, such as weaving, swerving, or additional instances of speeding. These observations fail to rise to the level of probable cause to detain the defendant on the suspicion of speeding.

CONCLUSION

WHEREFOR, Mr. Talavera respectfully requests this Court to reverse and remand the trial court's denial of his Motion to Suppress on the grounds that the officer lacked probable cause to justify detaining Mr. Talavera.

Dated this _____ day of June, 2015.

Respectfully submitted,

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**STATE OF WISCONSIN
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 1,883 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

A copy of this certificate is included in the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of June, 2015.

Respectfully submitted,

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