STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000865 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ALEJANDRO HERRERA AYALA,

Defendant-Respondent.

On Review of an Order Suppressing Evidence Entered in Brown County, the Honorable Marc A. Hammer Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Respondent

TABLE OF CONTENTS

Page

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Constitution

Wisconsin Statutes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under WIS. STAT. RULE 752.31(2) and (3), and therefore it will not be published. WIS. STAT. RULE 809.23(1)(b)4. Mr. Herrera Ayala anticipates that the issues will be fully presented in the briefs, but would welcome oral argument if the court would find it helpful to resolving the case.

STATEMENT OF THE CASE AND FACTS

The following is a brief summary of the events leading to Alejandro Herrera Ayala's arrest in this case. Additional facts will be included in the argument section as necessary.

Officer Asplund testified that at 12:42 a.m. on November 16, 2013, he observed a white Blazer and began following it for no particular reason other than he was "looking for possible intoxicated drivers or other violations." (50:8-9; 41:2). According to the officer's own testimony, "nothing in particular" drew his attention to the vehicle when he began to follow it. (50:9; 41:2).

Soon after the officer began following it, the Blazer made a left turn and then "immediately took a right-hand turn into the very first driveway." (50:9; 41:2). The officer testified that turn signals were used, but it was a "pretty quick turn." (50:33; 41:2). The officer also testified that as the Blazer turned into the driveway, its right-side tires "kind of hit the raised level" of the curb alongside the driveway. (50:32).

After one or two minutes, the Blazer began moving again. (50:10-11; 41:2). The officer observed the vehicle continue down the road and then turn left. (50:11; 41:2). Again, the Blazer's signal was activated for the turn but the officer testified that the turn was sharp and that normally people would signal or brake for the turn more in advance. (50:11, 36; 41:2).

At that point, after observing a second sharp turn, the officer turned on his headlights and made a U-turn to get to the vehicle. (50:11; 41:3). He testified that he saw Herrera Ayala park, exit the vehicle and begin walking on the other side of the road. (50:12; 41:3). He did not observe Herrera Ayala hitting the curb or otherwise parking improperly. (50:39-40). He then activated his emergency lights and approached Herrera Ayala. (50:13).

When the officer approached, Herrera Ayala denied driving the vehicle. (50:14). The video of the stop shows the officer and Herrera Ayala communicating in a mixture of Spanish and English, with both of them needing to repeat themselves multiple times in order to be understood. (18:00:00-09:00). Eventually, standardized field sobriety tests (SFSTs) were administered with the help of an officer who spoke some Spanish. That officer told the arresting officer that he was not qualified to translate instructions for the SFSTs because he was not fluent in Spanish. (18:15:00-16:00).

The majority of the instructions for the SFSTs were given in English without being translated literally into Spanish. (51:124, 127; 50:20, 22, 65). Herrera Ayala exhibited multiple clues for intoxication based on his failure to follow the instructions precisely but did not lose his

balance, stumble, or otherwise exhibit visually obvious signs of intoxication during the tests. (18:20:00-25:30; 41:5; 50:20-21; 51:107).

The trial court ultimately found that the results of the SFSTs were not reliable as indicia of intoxication because of the language barrier between the officers and Herrera Ayala. (41:12-13). Based on that, it found that the officers lacked probable cause to arrest Herrera Ayala for operating while intoxicated and granted his motion to suppress evidence. (Id.).

This appeal follows.

ARGUMENT

The primary question on appeal is whether the trial court correctly concluded that Officer Asplund lacked probable cause to arrest Herrera Ayala. Herrera Ayala also argues that this court may alternatively affirm the trial court because the officer lacked reasonable suspicion to stop him. Both are questions of constitutional fact.

On review, an appellate court "accept[s] the circuit court's findings of fact unless they are clearly erroneous." ***State v. Kennedy***, 2014 WI 132, ¶16, 359 Wis. 2d 454, 856 N.W.2d 834. When, as here, evidence in the record consists of disputed testimony and a video recording, this court applies the clearly erroneous standard of review when reviewing the trial court's findings of fact based on that recording. ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. The application of facts to constitutional principles is a question of law that is reviewed *de novo*. ***Kennedy***, 359 Wis. 2d 454, ¶16. Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof in a motion

to suppress is upon the state**.** ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

I. There Was No Probable Cause to Arrest Herrera Ayala.

Probable cause to arrest is required by the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. Probable cause to arrest "exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Based on Herrera Ayala's limited English and the officers' failure to ensure he understood instructions or take extra precautions to accommodate the language barrier, the trial court determined that a reasonable officer could not rely on the SFSTs as evidence of intoxication for the purpose of determining probable cause. (41:12-13, 15-16). Based on that, the trial court found there was not probable cause to arrest Herrera Ayala for operating while intoxicated at the time of his arrest and suppressed the evidence derived from his arrest. (*Id.*).

A. The trial court's finding that Herrera Ayala did not understand the instructions for the SFSTs is supported by the record and should not be disturbed.

In its eighteen-page written decision, the trial court noted that it had reviewed the video of the stop and that communication difficulties between the arresting officer and Herrera Ayala were apparent throughout:

> The video of the traffic stop is clear that there were significant communication issues between Officer Asplund and Herrera Ayala throughout the administration of the SFSTs….
>
> Furthermore, even with Officer Brann's assistance it is clear in the video that Herrera Ayala had issues understanding the SFST instructions given to him by Officer Asplund.

(41:13). The trial court went on to note specific details from the video leading it to conclude that Herrera Ayala could not understand the instructions given. The trial court's observations included the following: (1) Herrera Ayala moved throughout the administration of the HGN test despite instructions to stand still; (2) During the walk-and-turn tests, Herrera Ayala turned toward Officer Brann on several occasions when asked if he understood instructions but was not given meaningful clarification or further instruction from either officer; and (3) Although Officer Asplund demonstrated the tests, he did not demonstrate them fully.

The trial court concluded:

> [I]t was unreasonable for Officer Asplund to assume that Herrera Ayala understood the instructions just because he failed to assert otherwise. Herrera Ayala's body language should have been a clear indicat[or] to Officer Asplund to modify his instructions, to speak more slowly, or to take extra precautions to clarify that Herrera Ayala understood.

(41:15).

The state contends that the trial court's findings of fact regarding Herrera Ayala's level of understanding of English are not supported by the record. (State's Brief at 15, 17-18). That is simply not the case. The video shows communication

problems between the officer and Herrera Ayala from the moment he was stopped. For example, Officer Asplund had difficulty taking down Herrera Ayala's name and other basic information in English. (18:00:45-04:15). In addition, Officer Asplund testified that he could not tell whether Herrera Ayala's speech was slurred because his accent was so thick. (50:13). The fact that Officer Asplund called a Spanish-speaking officer is also strong evidence that there was a language barrier and that Officer Asplund was aware of it. (50:16).

The state specifically complains about the trial court's reliance on Herrera Ayala's body language as evidence of his lack of understanding, arguing that Herrera Ayala's lack of testimony means that there is no evidence in the record regarding his level of understanding of the instructions.[1] (State's Brief at 15-16). The burden was on the state at the suppression hearing, and Herrera Ayala was free to rely on the video and other testimony rather than testify about his level of understanding. *See* ***Taylor***, 60 Wis. 2d at 519. Similarly, the trial court can use all evidence before it, including Herrera Ayala's body language in the video, to

[1] At the end of the November 14, 2014, hearing the parties scheduled a third hearing because at that time, Herrera Ayala's attorney intended to call him to testify about his understanding. (51:138-40). No transcript from that hearing is in the record. However, defense counsel wrote a letter to the court explaining that she and her client had made the decision that no further testimony was necessary. (33).

decide the motion.[2] *See* ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989). Indeed, even if this court watches the video and comes to a different conclusion about Herrera Ayala's body language, the trial court's findings based on the video are reviewed under the clearly erroneous standard. *See* ***Walli***, 334 Wis. 2d 402, ¶17.

This court should not accept the state's or the officers' reasoning that because Herrera Ayala can be seen speaking some English, he could understand enough to perform SFSTs. First, as noted, the trial court's finding that Herrera Ayala had trouble understanding instructions given in English is supported by the record and should not be disturbed. Second, as a matter of common sense, the ability to respond to basic questions in a language does not equal the ability to understand a native speaker's instructions for SFSTs in a stressful situation.

Furthermore, because the record supports the trial court's findings regarding Herrera Ayala's language abilities, the state's reliance on the officers' testimony about their subjective beliefs regarding his language abilities is misplaced. (State's Brief at 17). The trial court was free to accept that testimony as credible or to disregard it.

---

[2] The state also implies that the trial court drew unreasonable inferences based on Herrera Ayala looking off-camera at various points but that is not the case. (State's Brief at 17-18). Careful review of the video shows exactly what the trial court said it observed—at various points during the administration of the SFSTs, Herrera Ayala looks off-camera. At times, the Spanish-speaking officer can be heard responding verbally. In addition, the Spanish-speaking officer testified that Herrera Ayala looked back toward him on several occasions during the SFSTs and that he responded by clarifying the instructions as much as he could. (51:121). Under the circumstances, the trial court's inferences are reasonable and supported by the record.

See ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. Using evidence from Herrera Ayala's body language in the video along with other evidence, the trial court rejected the officers' assertions that they believed Herrera Ayala understood the instructions as unreasonable. (41:15-16). That finding of fact is not clearly erroneous.

B. The trial court's finding that the results of the SFSTs were unreliable indicators of his intoxication is supported by the record.

HGN test results

Officer Asplund testified that he observed six out of six clues of intoxication during the administration of the HGN test. (50:19). The state argues that the HGN test "is not instruction-dependent" because it measures "an involuntary physiological response." (State's Brief at 15). Based on that, the state argues that the results from the HGN test are reliable.

The state's assertion that "[n]othing in the record demonstrates" that the Spanish instructions for the HGN test were flawed is simply not true. (State's Brief at 15). The standardized instructions for the HGN test call for telling suspects to "[k]eep your head still and follow this stimulus with your eyes only" and to "[k]eep following the stimulus with your eyes until I tell you to stop." (35:8). Officer Asplund testified that he generally instructs suspects to keep their arms down to the side, keep their heads facing forward and follow the tip of his pen with their eyes only. (50:17-18).

Officer Brann—the Spanish-speaking officer called to help—testified that what he told Herrera Ayala was to "hold his head still." (51:127). This is significant because, as the trial court noted, Herrera Ayala continued to move his body throughout the test. (18:19:15-21:00; 41:13).

There is no indication that Herrera Ayala was instructed to keep his body still or to follow the stimulus with his eyes only. As the trial court noted, no testimony addressed how this swaying impacted the results of the SFST. (41:13-14). In addition to that, the officer can be seen shining a flashlight into Herrera Ayala's eyes during the test. (18:19:15-21:00; 50:55-56). The testimony and NHSTA manual do not address what impact, if any, the flashlight may have had. Finally, the NHTSA manual lists multiple medical conditions and minor testing errors that can lead to clues being observed for reasons unrelated to intoxication. (35:5-10). Under the circumstances, the trial court's finding that the results could not be reliably attributed to intoxication is not clearly erroneous.

Walk-and turn test results

Officer Asplund described the clues he observed during the walk-and-turn test as follows:

> [H]e kept a couple inches between his steps. He did more than the number of steps he was supposed to do. And I'm pretty sure he might have started early also on that, that he did an improper turn at the end of the steps, and then I actually had to physically tell him to start walking again and then he walked. He did too many steps again. I had to tell him to stop.

(50:20-21). He also mentioned that Herrera Ayala failed to count out loud. (50:20). On cross examination,

Officer Asplund acknowledged that Herrera Ayala did not lose his balance or sway in any way that he considered to be a clue. (51:107).

Put another way, all of the clues Officer Asplund testified he observed in the walk-and-turn test could be attributed to Herrera Ayala's failure to understand the specific instructions of the test because of the language barrier between him and the officers administering the test. More objective clues that would indicate intoxication regardless of one's understanding of the instructions—such as swaying or stumbling—were not present. Thus, the trial court's finding that these test results could not be attributed to intoxication is not clearly erroneous.

One-leg stand test results

Officer Asplund described Herrera Ayala's performance on the one-leg stand test as follows: "He did lift his arms up in the air and he lost his balance and put his—and put his foot down approximately 10 seconds into the step. He was pretty unsteady so at that point I terminated the test." (50:22).

The video adds context to that description. At first, Herrera Ayala stood on one leg but failed to count out loud. (18:25:00-25:30; 41:6). Officer Asplund told him again to count out loud and began counting for him. (*Id.*). He then asked Herrera Ayala "Can you count?" (*Id.*). After that, Herrera Ayala began to count out loud in Spanish. (*Id.*). At that point, Officer Asplund and other officers reacted verbally to Herrera Ayala's counting. (*Id.*). When they reacted, Herrera Ayala lost his balance somewhere between 20 and 25 seconds into a 30-second test. (*Id.*). In other words, Herrera Ayala was able to maintain his balance until the officers mocked his counting out loud. Again, the trial court's

finding that the clues observed were not reliable indicators of intoxication was not clearly erroneous.

The trial court's decision

The trial court concluded that the officers in this case failed to take reasonable steps to ensure Herrera Ayala knew what was expected of him during the SFSTs. (41:15). Because of that failure, it determined that the clues observed could not reasonably be attributed to intoxication as opposed to Herrera Ayala's failure to understand the instructions for the test. (41:15-16).

The state relies heavily on the fact that the officers administered the SFSTs in a standardized manner consistent with a National Highway Traffic Safety Administration (NHTSA) training manual to support its contention that the results were valid and reliable. Indeed, the state complains about the trial court's suggestions for accommodating Herrera Ayala's language difficulties by repeating instructions or giving a more complete demonstration of the test in part because doing so would be inconsistent with the standardized administration of tests as laid out in the NHTSA manual. (State's Brief at 16, 17). That argument puts form over substance.

The standardized instructions presume that a suspect can understand them (or that if they cannot, it is because of intoxication rather than a language barrier). Indeed, many of the clues, including those observed in this case, are based on a suspect's failure to follow the instructions given. Certainly, the results are more reliable if a suspect understands the instructions than if the instructions are given in a standardized manner but not understood.

The state's argument on this point also ignores case law rejecting defendants' attempts to challenge the results of SFSTs based on an officer's failure to follow standardized procedure to the letter. In ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶¶19-20, 278 Wis. 2d 643, 693 N.W.2d 324, this court has rejected the notion that SFSTs must be performed in a standardized manner in order to give rise to reliable indicators of intoxication and declined to treat SFSTs as scientific. Instead the ***Wilkens*** court treated the officers' observations from the SFSTs are similar to other subjective observations made by officers. ***Id.***

That is precisely what the trial court did here. It looked at behaviors observed by Officer Asplund during the SFSTs and found that those behaviors would not lead a reasonable police officer to believe that the defendant probably operated a vehicle while intoxicated. *See* ***Koch***, 175 Wis. 2d at 701 (1993). It therefore excluded those behaviors from its consideration as to whether probable cause existed to arrest Herrera Ayala.

C. The trial court's decision is consistent with case law addressing officers' responsibilities when conveying implied consent warnings to suspects who have language barriers.

The state argues that two cases addressing what is required of officers when conveying implied consent warnings support its position that the trial court erred. (State's Brief at 14); *see also* ***State v. Begicevic***, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293; ***State v. Piddington***, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528. ***Begicevic*** and ***Piddington*** both address the legal sufficiency of officers' communication of information that is statutorily required to be given to defendants—implied consent warnings. Thus, the

focus is on "the objective conduct of the law enforcement officer or officers involved." ***Piddington***, 241 Wis. 2d 754, ¶¶22-23; 32 n.19.

Here, the issue is not whether statutorily required information was conveyed to Herrera Ayala in a reasonable manner; the issue is whether the results of the field sobriety tests support probable cause to arrest Herrera Ayala for operating while intoxicated. Field sobriety tests were performed in both ***Piddington*** and ***Begicevic*** but neither case addressed the impact of the language barrier on the determination of probable cause. In fact, neither court addressed the impact of the language barrier on the test results in detail.[3] Thus, the state's observation that the court "upheld" the administration of the SFSTs in both cases is insignificant, as is the state's speculation that the language barrier in this case was not as severe as the ones in ***Piddington*** and ***Begicevic***. (State's Brief at 14).

To the extent that ***Begicevic*** and ***Piddington*** are relevant, it is because they are instructive as to what sorts of reasonable accommodations can be made when officers encounter suspects with whom there is a language barrier. In ***Piddington***, the arresting officer was able to communicate with Piddington through notes, gestures and some speaking. ***Piddington***, 241 Wis. 2d 754, ¶3. The trooper also handcuffed Piddington in the front so that he could communicate through notes. ***Id.***, ¶5. The trooper made sure that Piddington understood what was being said and did not

[3] In ***State v. Piddington***, 2001 WI 24, ¶47, 241 Wis. 2d 754, 623 N.W.2d 528, the supreme court succinctly notes only that "Review of the notes and the videotape reveals that Piddington obviously failed the field sobriety tests not due to a communication error, but because he was impaired." The trial court found exactly the opposite in this case.

proceed with any step in the process until Piddington indicated that he understood. ***Id.***, ¶6. Under the circumstances, the ***Piddington*** court held that there was substantial compliance with the implied consent law. ***Id.***, ¶33.

By contrast, the officer in ***Begicevic*** did not attempt to obtain an interpreter. ***Begicevic***, 270 Wis. 2d 675, ¶18. Instead, an officer with about five years of schooling in German (a language spoken by Begicevic) volunteered to help. ***Id.*** That officer did not provide a verbatim translation of the Informing the Accused form or explain the rights on the form to Begicevic. ***Id.***, ¶19. The court concluded that the officer's attempt to inform Begicevic of the implied consent warnings was "manifestly unreasonable" and fell "woefully short of the standard set by the trooper in ***Piddington***." ***Id.***, ¶¶21, 25.

In this case, the efforts made by Officer Asplund much more closely resemble those deemed inadequate in ***Begicevic*** than those deemed adequate in ***Piddington***. As in ***Begicevic***, the only translation was done by another officer who was not fluent in Spanish. There was no verbatim translation provided for the tests and for two out of three of the tests, instructions were only provided in English. Officer Asplund, unlike the officer in ***Piddington***, did not take steps to ensure the instructions were understood with each step of the process. Indeed, when Herrera Ayala looked to Officer Brann for help with the instructions, neither officer took steps to explain the instructions again or otherwise help Herrera Ayala.

D. The totality of the circumstances do not support probable cause to arrest Herrera Ayala for operating while intoxicated.

The state accurately points out that field sobriety tests are not required to establish probable cause if the totality of the circumstances give rise to probable cause without them. ***Kennedy***, 359 Wis. 2d 454, ¶21. However, other than the inconclusive results of the SFSTs, Officer Asplund had little evidence to support probable cause to arrest Herrera Ayala. He pulled Herrera Ayala over after observing him make a quick turn into a driveway and another quick turn onto a road. (50:9-11). Other than being quick, both of the turns were legal and appropriate. (*Id.*). Herrera Ayala then parked and got out of the car. (50:12). When approached, he denied he was the driver. (50:13). Officer Asplund testified that he could smell alcohol on Herrera Ayala's breath and that Herrera Ayala admitted to drinking some alcohol.[4] (50:13-14). He knew Herrera Ayala had one prior OWI. (18:07:45). Officer Asplund also testified that Herrera Ayala's speech may have been slurred but he could not be certain because of Herrera Ayala's thick accent. (50:13).

Thus, prior to administering SFSTs, Officer Asplund observed (1) legal driving that he interpreted to be possibly evasive, (2) a driver denying driving the car, (3) the odor of alcohol and the defendant's admission that he had been drinking, and (4) a prior OWI conviction. In addition to that, the stop occurred between midnight and 1:00 a.m. on a Friday night. Of those observations, only the odor of alcohol on

[4] As the trial court noted, given the language barrier between Herrera Ayala and the officers, this admission and the denial of driving are somewhat dubious as evidence for probable cause. (41:11).

Herrera Ayala's breath and his admission are specifically indicative of intoxication.

In at least one unpublished decision, the court of appeals has held that odor of intoxicants alone is insufficient to establish even reasonable suspicion to stop for operating while intoxicated. *See* ***State v. Gonzalez***, 2014 WI App 71, ¶¶17-20, No. 2013AP2585, *unpublished slip op* (Ct. App. May 8, 2014); (Resp. App. 103).[5] Part of the rationale for this is that it is not illegal to drink *any amount* of alcohol and then drive; it is illegal to drive while intoxicated and/or with a prohibited blood alcohol concentration. *See* ***id.***, ¶¶18 n.3, 24; (Resp. App. 103; 104-105).

Although Officer Asplund also made other observations, they do not rise to the level of probable cause to arrest for operating while intoxicated. Notably, Officer Asplund did not testify that Herrera Ayala's eyes were bloodshot or glassy, that he stumbled or lost his balance, or that he exhibited any other behaviors that are typically associated with intoxication. He also did not testify that Herrera Ayala was speeding, swerving or otherwise driving unsafely; his only complaint was about the speed of the turns. In other words, the officer's belief that Herrera Ayala was intoxicated was largely based on Herrera Ayala's failure to adequately follow the instructions from the SFSTs. The trial court properly concluded that Officer Asplund lacked probable cause to arrest Herrera Ayala for operating while intoxicated.

[5] Authored unpublished opinions issued on or after July 1, 2009, may be cited for persuasive value. WIS. STAT. RULE 809.23(3)(b).

E. Despite the known language barrier and ensuing difficulty in interpreting the results of the SFSTs, Officer Asplund failed to administer a PBT prior to arresting Herrera Ayala.

As the trial court pointed out, "[t]his case presents the very kind of situation for which the PBT was intended" because it could have "aided [the officer] in determining whether probable cause to arrest existed. ***Begicevic***, 270 Wis. 2d 675, ¶10. An officer may make a stop if he or she "reasonably suspects" that a person committed or is about to commit a crime. ***Id.*** (citing ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). If, after stopping the vehicle and contacting the driver, the officer suspects the driver of operating while intoxicated but lacks probable cause to arrest for an OWI violation, the officer may ask the driver to perform field sobriety tests. ***Renz***, 231 Wis. 2d at 310. If those tests do not produce enough evidence for an arrest, an officer may request a PBT if there is "probable cause to believe" that the person has been violating OWI laws. ***Id.*** at 310-11. Nonetheless, Herrera Ayala was not asked about a PBT and none was administered on him until after he was arrested. (51:76). The trial court in this case found that Officer Asplund could have requested a PBT and that if he had done so, the results would have been part of the probable cause determination.[6]

[6] This assumes that there was reasonable suspicion to stop Herrera Ayala in the first place. Herrera Ayala does not concede that point.

II. Alternatively, This Court Should Affirm the Trial Court's Ruling Because There Was No Reasonable Suspicion to Stop Herrera Ayala.

If a trial court reaches the proper result for the wrong reason, it will be affirmed. ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*. If this court concludes that the decision to arrest Herrera Ayala was supported by probable cause, it should nonetheless affirm the trial court's decision because the officer lacked reasonable suspicion for the initial stop.

In order to execute a valid investigatory stop, a police officer must *reasonably* suspect, under the totality of the circumstances, that some kind of criminal activity or traffic violation has taken or is taking place.[7] *See* ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Here, the trial court found that there was reasonable suspicion to stop Herrera Ayala but emphasized that it was a "very close case." (41:8).

Reasonable suspicion requires that a police officer be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant" the intrusion. ***Id.*** (citation omitted). An officer's

[7] The state argues that the trial court "improperly applied the standard for a traffic stop to the investigative detention in this case" because Herrera Ayala was walking down the street by the time the officer made contact with him. (State's Brief at 10). The standard is the same whether Herrera Ayala was in his car or walking down the street when approached; both traffic and non-traffic investigatory detentions must be justified by reasonable suspicion. *See* ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569; ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990).

"inchoate or unparticularized suspicion or hunch" will not give rise to reasonable suspicion. ***Id.*** (citation omitted).

Here, all Officer Asplund had was a hunch. Before stopping Herrera Ayala, he observed two legal turns that he believed were a little quick and possibly evasive. In addition to that, on one occasion, he saw the driver's right side tires go over the raised part of a driveway as he turned right into it. Then, Herrera Ayala parked legally and got out of his car. (50:39-40). The officer did not observe enough to conclude that the driving was suspicious or illegal. He testified that at the time, he had "kind of the impression" that the driver may have been avoiding him. (50:37). That is merely a hunch.

Officer Asplund testified that he believed that hitting the curb on the way into the driveway was "a deviation from designated traffic lane," which the state contends is a traffic violation. (50:33-34; State's Brief at 10-11). The state did not cite to a statute making this behavior illegal and undersigned counsel is not aware of one. In fact, according to Wis. Stat. § 346.31(2), "[b]oth the approach for a right turn and the right turn shall be made as closely as practicable to the right-hand edge or curb of the roadway." A prudent driver obeying that statute is going to run the risk of having tires go over the raised part of a driveway when turning right into a driveway.

Moreover, Officer Asplund testified that even though he was "looking for any kind of violation," he chose not to stop the vehicle after it turned into the driveway. (50:33). Under the circumstances, the officer's testimony that he believed there was a traffic violation is not credible. This court should reject any argument that the officer had reasonable suspicion to stop Herrera Ayala based on his testimony that he subjectively believed that there was a traffic violation.

CONCLUSION

For the reasons stated above, Mr. Herrera Ayala asks this court to affirm the circuit court's order granting his motion to suppress evidence.

Dated this 30th day of October, 2015.

Respectfully submitted,

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Respondent

CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,071 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 30th day of October, 2015.

Signed:

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Respondent

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(3)(b) and that contains: (1) a table of contents; (2) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 30th day of October, 2015.

Signed:

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Respondent