

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2015AP001010

COUNTY OF COLUMBIA,

Plaintiff-Respondent,

vs.

BRITTANY N. KRUMBECK,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
COLUMBIA COUNTY, THE HONORABLE
ALAN J. WHITE, PRESIDING

Respectfully submitted,

BRITTANY N. KRUMBECK,
Defendant-Appellant

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ARGUMENT

I. REASONABLE SUSPICION TO STOP

In addressing this issue, the respondent correctly concedes that Ms. Krumbeck's driving conduct observed by Deputy Schultz prior to the stop of her vehicle did not constitute a violation of any statute or regulation. Nevertheless, the respondent contends that the stop was supported by reasonable suspicion of intoxicated driving. As Ms.

Krumbeck has argued extensively in her brief-in-chief, the degree of deviation from a straight line of travel alleged by Deputy Schulz was not the sort of sustained or drastic drifting or weaving which would create a reasonable belief that the vehicle's driver was likely impaired. And Wisconsin's Supreme Court has made it clear that a driver is not required to maintain a perfectly straight line of travel to avoid being subjected to a warrantless seizure. State v. Post, 301 Wis 2d 1, 733 N.W.2d 634 (2007).

The only other "factor" cited by the respondent is the time of day, in this case 3:00 a.m. While this is something the officer can consider under Wisconsin case law, this is insufficient to elevate the totality of the circumstances above the reasonable suspicion threshold. Sufficient reasonable suspicion to justify a traffic stop must be a particularized suspicion, rooted in objectively suspicious observations. State v. Washington, 2005 WI App 123, ¶ 16, 284 Wis.2d 456, 700 N.W.2d 305. The time of day is by its nature not particularized to any suspect and could be applied to any hapless innocent driver who finds herself needing to be on the road in the early morning hours. As previously stated, Ms. Krumbeck acknowledges that this is something that may be considered, but it is clearly of minimal probative value.

The totality of circumstances known to Deputy Schultz at the

time of the stop were not sufficient to rise to the level of reasonable suspicion of impaired driving. There is no dispute that Ms. Krumbeck did not commit any traffic infraction in Deputy Schultz's presence. Nor did Deputy Schultz observe the sort of constellation of factors which, while each may be lawful, taken as a whole create a reasonable suspicion of wrongdoing. State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996). Consequently, the stop of Ms. Krumbeck's vehicle was unlawful for lack of reasonable suspicion.

II. PROBABLE CAUSE TO ARREST

Ms. Krumbeck has previously pointed to the deficiencies in the field sobriety tests and the significance of those deficiencies and for the sake of efficiency will not do so again.

The other factors cited by the respondent are largely cumulative or so amorphous and vague as to add little, if anything, to the probable cause determination. Ms. Krumbeck acknowledged the consumption of alcohol. That the officer noted an odor of intoxicants is hardly surprising. But it is not unlawful to operate a motor vehicle after having consumed alcohol. The odor of alcohol would only be particularly significant if the driver denied alcohol consumption, in which case it would suggest that the driver was attempting to conceal something. The respondent suggests that the administration of a

preliminary breath test (PBT) supports Ms. Krumbeck's arrest. While the record does not reflect a numerical result for the PBT, even if one were to assume that it did indicate the presence of alcohol, this too is cumulative and adds nothing that Ms. Krumbeck hadn't already forthrightly acknowledged – that she had consumed alcohol. But impairment does not simply logically flow from that admission and other observations that simply corroborate it.

The only other observation advanced by the respondent, allegedly glassy and bloodshot eyes, is one which can best be described as inconclusive. Even if accepted as true, this is the sort of vague characterization that could be applied to any number of innocent drivers for any number of innocent reasons. While Ms. Krumbeck recognizes that this is something the officer *may* take into consideration, it should nevertheless be afforded minimal weight.

For the reasons stated above, the officer's observations did not rise to the level of probable cause to arrest for operating while intoxicated, which would require a level of proof to raise a reasonable belief "that the defendant probably committed a crime." Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175 (1964).

III. CONCLUSION

For the above-stated reasons, Krumbeck respectfully asks this Court to reverse the trial court's denial of her Motion to Suppress – Unlawful Stop, Detention and Arrest.

Dated at Middleton, Wisconsin, October 20, 2015.

Respectfully submitted,

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CERTIFICATION

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 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 728 words.

JOHN C. ORTH