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WISCONSIN COURT OF APPEALS
District I

CITY OF WEST ALLIS,
Plaintiff-Appellant,

v. Circuit Court Case Nos.: 2014-TR-005851 and
2014-TR-005852

Appeal Nos.: 2015-AP-001688 and
2015-AP-01689

TERESA A. MICHALS,
Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

ON APPEAL FROM A JUDGMENT OF DISMISSAL ENTERED BY THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE MICHAEL D. GUOLEE PRESIDING

BRIEF OF DEFENDANT-RESPONDENT TERESA A. MICHALS

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STATEMENT OF THE ISSUE

1. Did the trial court erroneously exercise its discretion by granting the defendant's motion to suppress evidence on the grounds that there was no reasonable suspicion to stop the Defendant's vehicle?

POSITION ON ORAL ARGUMENT AND PUBLICATION

In this decision, oral argument is not necessary because the parties' briefs and the record presented will fully develop the issues to be decided by the Court. Oral arguments would be duplicitious and unnecessary.

In this decision, publication is not warranted because the factual circumstances of this case are not significantly different from that in other published opinions or established case law.

STATEMENT OF THE CASE

The testimony of City of West Allis Police Officer Komorowski sets forth the following relevant facts as they relate to the Court's decision in this matter. These facts supplement the factual record provided by the Appellant.

At 9:11 p.m. on Sunday March 16, 2014 West Allis police officer Jason Komorowski was travelling westbound on Greenfield Avenue at 70th street. (R12 p. 4-5). He was stopped at the stop light and observed a vehicle that was traveling eastbound on Greenfield Avenue stopped at the red traffic signal at 73rd Street. (Id. at 5). Officer Komorowski stated that when the light turned green the he observed the "vehicle accelerate quickly from the stoplight at 73rd and Greenfield" and it "abruptly swerved three times in its lane as it was accelerating." (Id.). Based on these observations, Officer Komorowski stated he believed "this person was either intoxicated or operating their vehicle in a disorderly manner." (Id. at 7).

Regarding the speed of the vehicle, Officer Komorowski was not able to determine the speed of the vehicle, but did not testify that she was over the speed limit. (R12 at 8). He also testified that the vehicle did not squeal its tires, put any wheels off the ground, or emit any unusually loud noises. (Id. at 18). The vehicle did not leave its

lane into the parking lane, nor did it hit any curbs.
(Id.).

Officer Komorowski described the vehicle's swerving as the driver "jerked the wheel to each side three times." (R12 at 8). He then followed the vehicle, which made a right turn onto 68th Street,¹ and then signaled a turn to a parking and receiving area behind a senior center. (Id. at 8-9). Officer Komorowski stated he believed that the vehicle was avoiding him because it turned into an area that was different than its listed address. (Id. at 10-11). However, he did not know her destination or her business in that area. (Id. at 19-20). The City stipulated that Ms. Michals signaled her turns. (Id. at 21). Officer Komorowski activated his emergency lights after she signaled the turn, but prior to Ms. Michals actually making the turn into the parking area behind the senior center. (Id. at 22).²

Both Officer Komorowski and Ms. Michals testified about the conditions of the road. Officer Komorowski acknowledged that Wisconsin winters can take a toll on the

¹ Officer Komorowski originally testified that the vehicle made a left turn onto 68th, but after cross-examination and review of the squad video, he acknowledged that the vehicle made a right hand turn. (R12 at 21).

² Officer Komorowski originally testified that he activated his emergency lights after Ms. Michals made her turn into the rear of the senior center, but after cross-examination and review of the squad video, he acknowledged that he activated his lights prior to her making the turn.

roads. (R12 at 12). He also testified that there is a manhole cover in the eastbound lane of travel at 73rd and Greenfield as well as some road repair marks. (Id. at 14-17). However, he did not recall any potholes. (Id.).

Ms. Michals testified that photo exhibits were taken by her sometime after the incident. (Id. at 26). One exhibit was a Google Maps image of the intersection of 73rd and Greenfield. (Id. at 37). She stated that she drives a stick shift Mini Cooper S, which has a small wheelbase which can easily be damaged by potholes or indentations in the road. (Id. at 27-28). She maneuvered her vehicle to avoid "potholes and construction." (Id.).

Judge Guolee assessed the credibility of Ms. Michals and deemed her a credible witness. (R12 at 47-48). He stated that there was no indication that Ms. Michals had violated any part of the ordinance for disorderly conduct with a motor vehicle. (Id. at 43-48). Judge Guolee also stated that the operator of the vehicle swerved in its lane two to three times to avoid potholes is credible and reasonable under the facts and circumstances of this case. (Id.) Finally, Judge Guolee found that there was no evidence that Ms. Michals was attempting to avoid the officer because she signaled her turns. (Id. at 46-47 & 49). Accordingly, Judge Guolee found "that based on the

totality of the circumstances and articulable facts, that what he saw, the deviating to allegedly avoid potholes in March, is sufficient for her to do that and not suspicious enough for him to do the stop." (Id. at 48-49).

STANDARD OF REVIEW

When the Appellate Court reviews a trial court's decision to grant a motion to suppress evidence, the Court accepts the circuit court's findings of fact unless they are clearly erroneous, and determines the application of constitutional principles to those facts independently of the circuit court, but benefitting from their analysis.

State v. Popenhagen, 2008 WI 55, ¶ 31, 309 Wis. 2d 601, 749 N.W.2d 611, *citing* State v. Drew, 2007 WI App 213, ¶ 11, 305 Wis. 2d 641, 740 N.W.2d 404.

ARGUMENT

I. THE TRIAL COURT DID NOT CLEARLY ERR IN FINDING THAT OFFICER KOMOROWSKI DID NOT HAVE REASONABLE SUSPICION TO INITIATE A TRAFFIC STOP ON THE DEFENDANT.

A. Introduction.

The trial court did not err in granting the defendant's motion to suppress evidence based on the unlawful stop of the defendant's vehicle in this case. The trial court properly evaluated the testimony, credibility of the witnesses, and exhibits when it issued its oral decision, noting that the circumstances as they existed in this case, under the totality of the circumstances, did not warrant a traffic stop.

B. The Trial Court Did Not Err in Granting the Defendant's Motion to Suppress Evidence.

The stop of a vehicle must be based on more than an officer's "inchoate and unparticularized suspicion or hunch," but instead must be grounded upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." State v. Post, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. An investigatory stop may be made when an officer observes wholly lawful conduct, "so long as the reasonable inferences drawn from the lawful

conduct are that criminal activity is afoot." State v. Waldner, 206 Wis. 2d 51, 57, 556 N.W. 2d 681 (1996).

The following facts were observed in Officer Komorowski's allegation of suspicious driving: it was a Sunday night at 9:11 p.m.; the time of year meant increased distress in the road with potholes; Officer Komorowski observed a vehicle stopped at a red light; when the light turned green, the vehicle 'accelerated quickly,' but not over the speed limit, and swerved within its lane three times; the vehicle did not cross into the parking lane; the driver avoided potholes in the road; the driver traveled at a proper speed; the driver was traveling in the proper lane of travel and did not deviate from the lane of travel; the driver signaled all of its turns. Officer Komorowski did not specify as to why 9:11 p.m. on a Sunday night is suspicious time for potentially intoxicated drivers.

The Court noted that the use of the West Allis ordinance against disorderly conduct with a motor vehicle to justify the stop was inappropriate. There was no indication by Officer Komorowski's testimony that she had engaged in any conduct contrary to the ordinance, which prohibits:

"violent, dangerous, abusive, unreasonably loud, or otherwise disorderly conduct, including, but not limited to unnecessary, deliberate, or

intentional: spinning of wheels, squealing of tires, revving of the engine, blowing of the horn, causing the engine to backfire, causing the vehicle in motion to raise one or more of its wheels off the ground or causing the vehicle to otherwise be operated in an erratic or dangerous manner under circumstances which tend to cause or provoke a disturbance." (Pet. App. at A53)

Further, the Court determined that there was no evidence of eluding, as Ms. Michals signaled her turns and maintained the speed limit, clearly indicating where she was traveling.

The City cites to State v. Post, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, State v. Anagnos, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675, and State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996) as factually similar for suspicion of impairment. Although these cases are instructive on the law, they are factually distinguishable from the present case.

In Post, 2007 WI 60, ¶ 29, 301 Wis. 2d 1, 733 N.W.2d 634, the driver appeared to be "moving between the roadway centerline and parking lane," which "is not slight deviation within one's own lane." There was also evidence of the vehicles "drifting and unusual driving." Id. In the present case, Ms. Michals maintained a single lane of travel, and never deviated into the parking lane.

In Anagnos, 2012 WI 64, ¶¶ 57-58, 341 Wis. 2d 576, 815 N.W.2d 675, the driver crossed an elevated median, twice accelerated rapidly, and executed a left turn without signaling. In this case, Ms. Michals never hit a curb or median, maintained her lane of travel, and signaled all of her turns.

Finally, in Waldner, 206 Wis. 2d 51, 60-61, 556 N.W.2d 681 (Wis. 1996), the driver travelled at a slow rate of speed, stopped at an uncontrolled intersection, accelerated at a high rate of speed, and once he stopped the vehicle, poured a liquid and ice onto the ground. In this case, Ms. Michals is alleged to have accelerated quickly after a light turned from red to green and swerved within her lane.

In this case, there is not that something extra as in Post, where the driver was weaving between the lane of travel into an unmarked parking lane; or Anagnos where the driver drove over a three to four inch curb and failed to signal a turn; or Waldner, where the driver drove slowly, then stopped at an uncontrolled intersection, then accelerated rapidly. The facts and circumstances of this case, as determined by the Circuit Court, show that there was no reasonable basis for Officer Komorowski to make a traffic stop of Ms. Michals' vehicle.

As a result of the trial court's reasonable analysis of the facts on the record before it, the court did not err in granting the Defendant's motion to suppress evidence. The court's conclusion was that there was no reasonable inference that any criminal activity, drunk driving, disorderly conduct with a motor vehicle, or eluding occurred based solely on the record before it. It was not clear error to apply the law to these facts and deem there was no reasonable suspicion to stop the Defendant's vehicle.

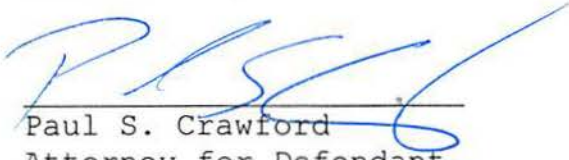
CONCLUSION

Therefore, based on the arguments above, case precedent, and the record before this Court, Ms. Michals respectfully requests that this Court affirm the findings of the Circuit Court and find that the trial court did not erroneously exercise its discretion in granting the defendant's motion to suppress evidence. As a result, we are asking that this Court affirm the decision of the Circuit Court to grant the Defendant's motion to suppress and the trial court's dismissal of the citations.

Dated in Brookfield, Wisconsin this 18th day of November, 2015.

KIM & LAVOY, S.C.

By:

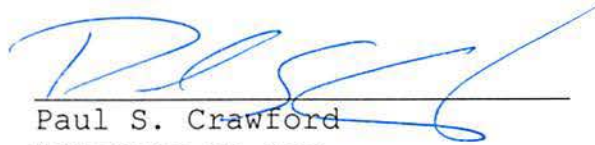

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and Wis. Stat. § 809.19(8)(c) for a brief produced with a monospace font. The length of this brief is six (6) pages.

Dated in Brookfield, Wisconsin this 18th day of
November, 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 which complies with the requirements of Wis. Stat. § 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 in Brookfield, Wisconsin this 18th day of
November, 2015.

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CERTIFICATE OF MAILING

I hereby certify that this brief and all accompanying certifications were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious on November 18th, 2015.

I further certify that the brief and all accompanying certifications were correctly addressed and postage was pre-paid.

Dated in Brookfield, Wisconsin this 18th day of March,
2015.

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