STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2015 AP 1965

State of Wisconsin,

Plaintiff-Respondent,

v.

Darren Wade Caster,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

An appeal of a judgment by the Saint Croix County Circuit Court,
Honorable Scott R. Needham, presiding.
Trial court case no. 14 CT 183.

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SUMMARY OF ARGUMENT

The State of Wisconsin has presented an argument to this court that relies, primarily, on a finding that it is lawful for a law enforcement officer to execute a traffic stop based on the officer's belief to reasonably suspect that a ***traffic*** violation has occurred or ***would be committed***. This, of course, is a completely absurd stretching of the 4th Amendment and is, of course, without any basis in law in Wisconsin. Specifically, the state either inadvertently or purposely misstates the caselaw to make it appear as though this court actually held that crimes and traffic offenses were one in the same, even though the case law is explicitly clear in the delineation between the two.

Next, the state argues that this court should essentially turn *City of Brookfield v. Collar*, 148 Wis.2d 839 (Ct. App. 1989), right on its ear. No longer should it be required that the commission of an offense come before the pursuit of a suspect outside the jurisdiction. Now, apparently, the rule should be "as long as the stop was objectively reasonable, then it doesn't matter when or where along the space time continuum the actual offence was committed". This, of course, is contrary to *City of Brookfield* and its progeny as well as Wis. Stats. § 175.40. further, if this court doesn't buy any of the above, then the State believes that we should, now, after the fact, find the Officer de la Cruz did, in fact, have the reasonable suspicion to execute a traffic stop within the City of New Richmond

and he was, actually, engaged in fresh pursuit.

Finally, the state, failing all other recourse, argues that Caster has failed to allege a violation of a constitutional right in his motion. This is simply not accurate. Caster has argued since his first motion was filed, that the officer lacked lawful authority to execute a traffic stop outside his jurisdiction and that doing so constituted an unlawful seizure in violation of the 4th Amendment to the United States Constitution.

REPLY ARGUMENT

I THE DOCTRINE OF FRESH PURSUIT DOES NOT ALLOW FOR THE DECISION TO STOP TO BE BASED ON A BELIEF THAT A TRAFFIC OFFENSE WILL OCCUR SOMETIME IN THE FUTURE

A. REASONABLE SUSPICION TO STOP FOR A TRAFFIC OFFENSE CANNOT LAWFULLY BE BASED ON THE OFFICER'S BELIEF THAT A SUSPECT "WOULD COMMITT" A TRAFFIC OFFENSE.

Arguing that the officer was allowed to make a traffic stop based on the belief that Caster "would commit" a traffic offense at some point in the future, forces this court to engage in verbal gymnastics to justify such a conclusion. In its responsive brief, the state makes the following assertion: "[i]n Wisconsin, a traffic stop is reasonable if officers '…have grounds to reasonably suspect a violation has occurred or will be committed.'" Responsive Brief, Pg. 5, citing *State v. Gaulrapp,* 207Wis.2d 600, 605 (Ct. App. 1996) citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) and *Terry v. Ohio,* 392 U.S. 1 (1968). While it is really quite tempting to cherry-pick

those terms and phrases that bolster your argument, the full quote from *Gaulrapp* is really, quite different and tells a much more complete and complex story that, in fact, completely refutes the state's position: "A traffic stop is generally reasonable if the officers have ***probable cause to believe that a traffic violation*** has occurred*,* ***or*** have grounds to reasonably suspect a ***violation*** has been or ***will be*** committed." *Gaulrapp*, 207 Wis.2d. 600 at 605 (Ct. App. 1996), emphasis added, original citations omitted. As indicated previously, *Gaulrapp* is citing to *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), which in turn is citing to *Terry v. Ohio*, 392 U.S. 1 (1968).

Once you review the chain of citations, the context of the full cite in *Gaulrapp* becomes clear: in order for a traffic stop to be reasonable in Wisconsin, an officer must have either A) probable cause to believe that a traffic violation ***has occurred***, or B) reasonable suspicion that a ***criminal violation*** has been or ***will be*** committed. This is why *Berkemer* specifically cites to *Terry*, which only references an officer's reasonable suspicion "that a particular person has committed, is committing, or is **about to commit a crime**." *Berkemer* at 439, emphasis added. In short, there is no reasonable basis to conduct a traffic stop based on the officer's belief that a traffic offense is about to be committed. Such an analysis would produce an absolutely absurd result. Imagine officers conducting traffic stops, with the belief that the driver was "about to speed" or "possibly cross the center line", yet this is exactly what the state is asking this court to do.

Since the state cannot establish that Officer de la Cruz actually had the probable cause or reasonable suspicion to conduct a traffic stop, based on a fear that Caster "would commit traffic violations", they turn next to a little bit of revisionist history. The state next argues that Officer de la Crus DID have actual reasonable suspicion to stop Caster within the City of New Richmond, but that he now apparently simply chose to exercise his discretion and made a conscious decision to NOT stop the vehicle within the city limits. See Responsive Brief, Pg. 5. This new argument, of course, is completely contrary to the Officer's own testimony in that he specifically lacked enough evidence to support the reasonable suspicion that Caster committed an actual traffic offense necessary to stop his vehicle within the City of New Richmond. See (R. 26:8, 12,15).

B. SINCE REASONABLE SUSPICTION TO STOP A VEHICLE CANNOT BE BASED ON A FUTURE TRAFFIC OFFENSE, THE OFFICER WAS MOST CERTAINLY NOT ENGAGED IN FRESH PURUIT

The state next argues that Officer de la Cruz was actually engaged in fresh pursuit and attempts to compare these facts as favorable to some of the better known cases regarding the same as previously cited by the Appellant. First, the state tries to compare this situation as that found in *State v. Haynes*, 248 Wis.2d 724 (Ct. App. 2001). As indicated, the *Haynes* court found it appropriate that the officer properly conducted a traffic stop after seeing *Haynes* **run a red light within the officer's jurisdiction.** Unlike in the present case, the officer observed the commission of the

offense in *Haynes* within his own jurisdiction, not outside of it. Officer de la Cruz was not exercising his discretion by waiting to pull Caster over; if he were, that's exactly what he would have testified to! Instead, he made it clear: "if he (Caster) would have crossed the center line in the city, I would have been comfortable with that to stop him, but I did not". (R. 26:12).

Next, the state tries yet again to turn *Collar* on its ear. This time, the state argues that since in *Collar*, the officer was found to have acted reasonably by waiting to get through a construction area (thus passing into the neighboring jurisdiction) before initiating a traffic stop, that it is somehow analogous to the present case. It is not. Again, the *Collar* court found that the probable cause necessary to stop the car arose in the ***officer's home jurisdiction*** (expired tabs and speeding) and that public safety was a good, discretionary reason for deciding when exactly to turn on the squad's emergency lights to actually stop the vehicle. *City of Brookfield v. Collar*, 148 Wis.2d 839, 843 (Ct. App. 1989). Using this public safety reference, the state could have tried to apply *Collar* to the present case by arguing that there was a public safety reason for the officer to NOT conduct a traffic stop within the City of New Richmond, yet no argument was proffered to that effect.

II A STOP OF A SUSPECT WHEN NO AUTHORITY TO EXISTS TO DO SO IS A VIOLATION OF THE DEFENDANT'S 4TH AMENDMENT RIGHTS, AMONG OTHERS, AS CLAIMED IN THE DEFENDANT'S ORIGINAL MOTION TO THE TRIAL COURT

The matter brought before the trial court alleged violations of the U.S. and Wisconsin State Constitutions. This is distinguished from *State v. Keith*, 260 Wis. 2d 592 Ct. App. 2003), which the state argues, for the first time on appeal, applies. It does not. In *Keith*, the defendant failed to raise violations of constitutional law in his request for suppression of evidence. Caster has not failed in this regard. (R. 7:1). Illegal stops by police are violations of the 4th Amendment. "[T]he stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the [Fourth Amendment]." *State v. Harris*, 206 Wis.2d 243, 253-58 (1996), *citing Whren v. United States*, 517 U.S. 806, ——, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996).

Further, suppression is appropriate if this court were to find that the stop was, in fact, unlawful. See *State v. Fields*, 2000 WI App, ¶23, 239 Wis. 2d 38. Additionally, suppression is appropriate in order to achieve the objective of the statute.

> [E]vidence obtained in violation of a statute (or not in accordance with the statute) may be suppressed under the statute to achieve the objectives of the statute, even though the statute does not expressly provide for the suppression or exclusion of the evidence.

State v. Popenhagen, 2008 WI 55, ¶ 62, 309 Wis. 2d 601, 631.

CONCLUSION

Officer de la Cruz was not engaged in fresh pursuit when he stopped Caster. Since he was not engaged in fresh pursuit, there was no lawful authority for the

officer to stop him, making the stop and detention unconstitutionally and statutorily impermissible. As such, the proper remedy is suppression and ultimately dismissal of this action.

Mr. Castor respectfully requests that this honorable Court enter an order directing that the Circuit Court properly suppress any evidence obtained as a result of his unlawful stop and arrest.

Dated: February 29, 2016

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CERTIFICATIONS

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using a proportional serif font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 2,015 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 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.

I further certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix (if one is attached or filed) that complies with s. 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 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 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.

Dated: February 29, 2016

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