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C O U R T O F A P P E A L S **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2015AP2183-CR

v.

Sabrina Marie Hebert,

Brown County Case

No. 14CT1413

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION
AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED
AND ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH I, THE
HONORABLE DONALD R. ZUIDMULDER PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The defendant-appellant, Sabrina Marie Hebert (hereinafter, "Hebert"), relies on all the authority and reasoning set forth in his original brief-in-chief and incorporates that submission into this reply brief. In addition, he submits the following responses to the arguments in the brief of the Plaintiff-Respondent.

ARGUMENT

I. DEPUTY SHIELD LACKED REASONABLE SUSPICION TO CONDUCT A TRAFFIC STOP.

While the state is correct that the traffic stop in Post was upheld as valid, the court reached that ruling based on the totality of the circumstances. State v. Post, 2007 WI 60, ¶38, 301 Wis.2d 1, 733 N.W.2d 634. Specifically, the court noted a number of factors that were present in that case, while simultaneously noting that those factors, standing alone, would likely be insufficient to uphold the validity of the stop. Id., ¶37. In Post, the officer observed the defendant weaving in a discernible S-type pattern for two blocks in an abnormally wide lane. Id., ¶36. The vehicle also was observed crossing out of the driving lane and into the parking lane. Id.

The state also relies on two other cases, both of which are distinguishable from the present case. First, the state cites to State v. Waldner, 206 Wis.2d 51, 556 N.W.2d 681 (1996). In Waldner the defendant was observed driving at an unusually slow speed, stopping at an intersection for no discernable reason, and

aggressively accelerating into a turn. Waldner, 206 Wis.2d at 53.

The state also relies on In re Refusal of Anagnos, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675. In Anagnos, the driver was observed rapidly accelerating, making a left turn over an elevated median, and making another turn without using a turn signal. Anagnos, 2012 WI at ¶16.

Here, Hebert was observed weaving only slightly within a standard sized lane. Deputy Shield offered no testimony suggesting that she was speeding or violating any other articulable traffic law. He also did not report any other erratic driving behavior. Additionally, the squad camera video does not unequivocally show that Hebert's vehicle either touches or crosses the center line, even the trial court concedes this point. (R. 50:21).

Unlike Post, Waldner, and Anagnos, there was no accumulation of articulable facts to give Deputy Shield reasonable suspicion to conduct a traffic stop of Hebert's vehicle. The trial court's ruling was based solely on Hebert's weaving with the lane. (R. 50:21).

II. THIS COURT SHOULD NOT CONSIDER ISSUES RAISED FOR THE FIRST TIME ON APPEAL.

One argument raised by the state is that Hebert's driving could fall under Brown County Ordinance § 340.0011, Disorderly Conduct With A Motor Vehicle, or Wis. Stat. § 346.13(3), Deviation From Designated Lane. (Resp. Brief: 7). This argument is problematic for a few reasons. First, it was not an argument raised before the trial court, but instead is being raised for the first time on appeal. As a general rule, this court will not address issues raised for the first time on appeal. State v. Van Camp, 213 Wis.2d 131, 144, 569 N.W.2d 577 (1997). Further, in making this argument, the state is assuming that Hebert actually did cross or touch the centerline. That question, and whether it is clear from the record that she did touch the centerline, is the entire underlying basis for this appeal.

The second reason this is a problematic argument is that Deputy Shield offered absolutely no testimony suggesting that he conducted the traffic stop for the purpose of issuing a citation under either of these

statutes. For a court to make a determination of whether reasonable suspicion exists, an officer must have specific and articulable facts. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968). These potential citations were not specific and articulable facts that Deputy Shield testified to at the motion hearing, but rather, are hypotheticals that the state is now raising on appeal. And as a general rule, this court does not make decisions based upon hypothetical facts. Dunn County v. Wis. Empl. Rels. Comm'n, 2006 WI App 120, ¶20, 293 Wis. 2d 637, 718 N.W.2d 138.

CONCLUSION

Because the video shows that Hebert did not violate a traffic law, Deputy Shield did not have reasonable suspicion to affect a traffic stop of her vehicle. The court's findings that probable cause existed were clearly erroneous as weaving within a lane cannot form the basis for a stop. Additionally, by the court's own admission, the video was not clear enough to determine that Shield's testimony that Hebert crossed the center line was credible in light of the

video evidence. The trial court erred in denying Hebert's suppression motion. This Court should vacate the judgment of conviction and reverse the trial court's order.

Dated this _____ day of May, 2016.

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CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the

circuit 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 or 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 _____ day of May, 2016.

Jaymes K. Fenton

CERTIFICATION

I hereby certify that this brief conforms to the

rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has six (6) pages.

Dated this _____ day of May, 2016.

Jaymes K. Fenton

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, 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 this _____ day of May, 2016.

Jaymes K. Fenton

CERTIFICATION OF MAILING

I hereby certify that: This brief was, on May 19, 2016, delivered to USPS for delivery to the Clerk of Court of Appeals within three calendar days pursuant to Wis. Stat. § 809.80 (3)(b). I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this ____ day of May, 2016.

Jaymes K. Fenton

