STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

ONEIDA COUNTY,

Plaintiff-Respondent,

v.

Court of Appeals case no.: 2015AP002612

JOSEPH A. RAVEN,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A GUILTY VERDICT IN THE
CIRCUIT COURT FOR ONEIDA COUNTY, BRANCH 1,
THE HONORABLE PATRICK F. O'MELIA PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

Reasonable suspicion must be both particularized and objective. *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999). "An inchoate and unparticularized suspicion or hunch will not suffice." *State v. Fields*, 619 N.W.2d 279, 2000 WI App 218, ¶ 10, 239 Wis. 2d 38 (Wis. App., 2000). The prosecution cites to both *State v. Waldner*, 206 Wis. 2d 51, 556 N.W. 2d 681 (1996) and *State v. Post*, 2007 WI 60, for the proposition that specific traffic violations are not necessary for reasonable suspicion, and that the totality of accumulated facts can give rise to reasonable suspicion. They specifically cite the language in *Post* that driving does not need to be erratic, illegal, or unsafe to justify an investigatory stop. State's Response Brief, p. 5. However, in both *Waldner* and *Post*, the particular and articulable offense of operating while intoxicated was reasonably suspected, even if no *other* illegal driving was suspected. This is what the language of *Post* references, not the idea that no specific violation of any kind must be articulated and particular. Here, officer Young did not testify that Mr. Raven's driving caused him to suspect that Mr. Raven was operating while under the influence, nor did the court find that there was reasonable suspicion for such. On appeal the

prosecution has not developed any argument that the totality of the driving circumstances would lead to a reasonable suspicion that Mr. Raven was operating while intoxicated.

In both *Waldner* and *Post*, a number of facts, each of which is insufficient by itself, when combined give reasonable suspicion that the defendant in each case was committing the specific violation of operating while under the influence of an intoxicant. Here, the prosecution is not layering insufficient facts to build toward a sufficient finding of reasonable suspicion that any one specific violation occurred, but rather is attempting to use individual insufficient and unlayered facts to claim sufficient facts for one of three separate conclusions. The evidence is not cumulative, but rather fractured. In essence the prosecution is arguing that it has one-third of three separate and distinct jigsaw puzzles, and thus it has one complete jigsaw puzzle. This is not the way puzzles or particularized and objective suspicion work. The prosecution must demonstrate that it has particular, articulable, and objective suspicion that a person has committed or is about to commit an offense, and that particularity includes articulating which offense the person is reasonably suspected of committing.

The prosecution relies heavily on officer Young's experience in arguing that review of the reasonableness of his perception is simply "unrealistic second guessing." (State's Response Brief, p. 4). However, "the fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean that an [officer's] perceptions are justified by the objective facts." *State v. Young*, 569 N.W.2d 84, 212 Wis.2d 417 (Wis. App., 1997). Further, "[t]he basis of the police action must be such that it can be reviewed judicially by an objective standard. *Id*. Thus, officer Young's experience does not overcome objective facts, which must be measured by an objective standard. Officer Young testified that the reason he pulled Mr. Raven over was because of "the red light violation." R 36, p. 43, 64. This was disputed by both Mr. Raven and his passenger, and undercut by officer Young's own testimony on cross examination that he was not looking at the light when Mr. Raven's car entered the intersection. R 36, p. 43, 57-64. The trial court specifically stated that it could not tell, based on the evidence presented, whether the light had turned red prior to Mr. Raven entering the intersection. R. 36, p. 89 ("when [the light] turned [from yellow to red], I'm not sure"). Therefore, when measured by an objective standard, officer

Young's perception was not found to be justified by objective facts. Officer Young never testified to any other reason for stopping Mr. Raven. He never offered testimony that he suspected Mr. Raven was traveling too fast for conditions, nor that he suspected Mr. Raven had violated any law when he stopped in the intersection. As stated above, officer Young did not testify that Mr. Raven's driving caused him to suspect that Mr. Raven was operating while under the influence, nor did the court hold as such. The prosecution acknowledges that "it may be unclear what traffic violation which traffic violation [Mr.] Raven committed," State's Response Brief, p. 3, and as stated above, does not develop any argument that the totality of the driving circumstances would lead to a reasonable suspicion that he was operating while intoxicated. The lack of clarity as to which traffic violation was reasonably suspected demonstrates that Officer Young's suspicion was inchoate and unparticularized, and his hunch that some traffic violation may have been committed will not suffice.

CONCLUSION

Because the prosecution was unable to establish objective and particularized suspicion of a particular traffic offense, including operating while under the influence of an intoxicant, the court should find that the

prosecution did not demonstrate the reasonable suspicion necessary to justify a traffic stop. Therefore the defendant-appellant respectfully prays that the matter be reversed and remanded for actions consistent with such reversal.

Signed and dated this _4th_ day of November 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 873 words.

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. Stats. §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 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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Finally, I affirm and certify that on November 4, 2016, ten copies of the Reply Brief of Defendant-Appellant were mailed to the Court of Appeals ant three copies were mailed to counsel for the Plaintiff-Respondent.

Signed and dated this _4th_ day of November 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

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