STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2015 AP 2649

CITY OF APPLETON,

Plaintiff – Respondent,

v.

JACOB ANTHONY VANDENBERG,

Defendant – Appellant.

BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE

ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE MARK J. MCGINNIS PRESIDING

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ISSUES PRESENTED FOR REVIEW

Was the traffic stop of the Defendant-Appellant by police lawful?

The Circuit Court answered: Yes.

Suggested Answer on Appeal: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Defendant-Appellant takes no position on publication.

STATEMENT OF THE CASE

This is an appeal from an order denying the Defendant-Appellant's, Jacob Anthony Vandenberg (“Vandenberg”), motion to suppress evidence, in Outagamie County Circuit Court, the Honorable Mark J. McGinnis, presiding.

On February 16, 2014, the City of Appleton ("the City") a Wisconsin Uniform Traffic Citation was filed in the circuit court charging Vandenberg with: Operating Motor Vehicle Under the Influence (1st Offense), in violation of Wis. Stat. § 346.63 (1)(a) ("OWI"). Thereafter, the City filed an additional citation charging Vandenberg with Operating Motor Vehicle Under the Influence (1st Offense), in violation of Wis. Stat. § 346.63 (1)(a) ("OWPAC"). Ultimately, Vandenberg, by counsel, submitted written not guilty pleas to both charges (R. 3; R. 7) and, as well, a written jury demand. (R.4).

Vandenberg filed on May 15, 2015, a *Motion to Suppress Evidence*, (R. 12). A Motion Hearing was held on the evidence suppression motion on August 8, 2015. (R.20).

Ultimately, the circuit court, orally and on the record, denied Vandenberg's motion to suppress. (R20:42-27).

A pre-trial conference remained scheduled for October 13, 2015. The jury trial remained scheduled for October 22, 2015. (R. 20:48).

Consequent to the circuit court's ruling, Vandenberg entered into a written stipulation with the City and changed his not guilty plea to no contest as to the OWI charge. (R.13). He was thus found guilty of the OWI. (R.13; R. 14). The OWPAC was dismissed. (R.15).

A Judgment of Conviction was entered in the Outagamie County Clerk's Office on October 12, 2015. Vandenberg filed a Notice of Appeal on December 21, 2015 (R. 14). This appeal follows.

STATEMENT OF THE FACTS

A. Motion to Suppress Evidence

As stated, Vandenberg filed a *Motion to Suppress Evidence* on May 15, 2015. The motion requested that the "police officer's observations, which include results of field sobriety tests; statements of the Defendant; administration of a preliminary breath test (and results thereof); the collection the Defendant's blood (and chemical test results thereof); and any and all other, direct or indirect, derivative evidence from the Defendant" be suppressed because the evidence was obtained from an "unconstitutional traffic stop, detention, and arrest of the defendant by police[.]" (R.12:).

B. Motion Hearing

On August 8, 2015, a Motion Hearing was held on Vandenberg's *Motion to Suppress Evidence*. (R. 20:1). The following facts were adduced at this hearing.

On Sunday, February 8, 2015, at approximately 2:30 a.m., Lt. Jay Steinke (Steinke) of the Appleton Police Department was, inter alia, performing general patrol during his work shift. (R. 20:8). At that time, he was in a parking-lot in the downtown Appleton area located in 300 block of West Washington Street. (R. 20:8; 18, Exhibit 1). Steinke testified that the parking-lot is a location in where people whom are patronizing downtown bars often park. (R. 20:8-9). Steinke further testified that it is also a location where drug activity, "other disorderly natures," and "potentially drunk driving" occurs. (R. 20:9). However, aside from a statement of general reference, Steinke did not specify the frequency or extent of such activity.

While in the parking-lot, Steinke observed a truck operated by a person ultimately identified as Vandenberg. (R. 20:8). He observed the truck exit the parking-lot via a designated entry/exit-way onto Washington Street. (R. 20:10, 13; R. 18, Exhibit 1). Running parallel to the entry/exit-way, in a north-and-south direction, is an elevated concrete median approximately six (6) inches above the parking-lot ground. (R. 20:10; R. 18, Exhibits 1 and 2). Directly north, and within inches, of the concrete median, there is a metal sign affixed to the ground. (R. 20:10-11; R. 18, Exhibits 1 and 2).

According to the Steinke:

> I observed a truck traveling towards the southeast corner of that parking lot where there's an entrance and an exit. When the truck tried to navigate the exit, the right rear wheel and right rear quarter panel struck the concrete, and potentially a sign that's located at that exit.

R. 20:10. Exhibit 1 demonstrates where the officer was located in proximity to the entry/exit way of the parking-lot and general area of Vandenberg's vehicular exit. See R. 20: 20-21. Steinke testified he made this observation from approximately thirty (30) yards away. (R. 20:13, 21). Later in

testimony, Steinke stated he was "sure" Vandenberg hit the curb, but not sure whether he hit the sign. (R. 20:25).

Following this alleged observation, Steinke decided to conduct a traffic stop. (R. 20:13). Steinke stated his decision to perform a traffic stop was to investigate a possible hit-and-run and possibly OWI. (R. 20:13, 26).

The location of the traffic stop was near the intersection of Franklin and Division streets in Appleton. (R. 20:28). After exiting the parking-lot, Vandenberg drove onto Washington Street and headed westbound to Division Street. (R. 20:13). He turned right onto Division Street, thus headed north, where he was pulled-over by Steinke in the 200 block of North Division Street (R. 20:13). Steinke activated his squad vehicle lights to effectuate the stop. (R. 20:14). While behind Vandenberg prior to initiating the traffic stop, Steinke did not observe any erratic or bad driving, weaving in lane of traffic or any other indicia of unsafe driving. (R. 20:23, 27). The traffic stop ultimately led to the arrest of Vandenberg for OWI (1st Offense).

The alleged incident in this matter was not captured by a police-squad vehicle camera (i.e., "dash cam"). (R. 20:11-12).

Following Vandenberg's arrest, Steinke returned to the parking-lot inspect the sign. (R. 20:15). Such inspection revealed that that sign had been damaged "obviously previously." (R. 20:16).

Vandenberg testified, too. Among other things, he stated he did not strike either the curb or sign when exiting the parking-lot. (R. 20:34-35). :

C. The Circuit Court's Ruling

The circuit court denied the motion to suppress evidence at the August 8th Motion Hearing. The circuit court found Steinke's version of events credible. (R. 20:44-45). While the court did not specifically rule on the credibility of the testimony provided by Vandenberg, it is assumed for this appeal that Steinke's testimony constitute the court's factual-findings on points of dispute between the two witnesses' testimonies based on the court's comments and ultimate ruling. The circuit court made a factual-finding that Vandenberg's truck made "contact with something in that area -- either the concrete, or the sign, or both -- causing that vehicle to sort of tip up or deviate from what a normal vehicle would do, as it's exiting that area." (R. 20:46). The circuit court ruled:

> That [Steinke] had reasonable suspicion that the driver of the vehicle was either violating or had violated a traffic law. I think the stop was reasonable under all the circumstances. It was a brief detention that would allow him to further investigate either a potential of driving while intoxicated, or the potential of a hit-and-run.

(R.46-47).

STANDARD OF REVIEW

The question of whether a traffic stop is reasonable is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. "A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles." *Id*.

ARGUMENT

I. The Court Should Not Apply the Waiver Rule.

This Court issued an Order on January 25, 2016, directing the parties to brief the issue of what is commonly called the "guilty plea waiver rule." Vandenberg submits the below argument as to such order.

Vandenberg recognizes and respects the rule of law as stated in *County of Racine vs. Smith*, 122 Wis. 2d 431 (Ct. App. 1984). The *Smith* court ruled a no contest plea is the equivalent of a guilty plea, and waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *Id*. at 434. The case goes on to distinguish between criminal cases and civil cases, such as the case at hand, by acknowledging in criminal cases, an exception exists for orders denying motions to suppress evidence of a defendant per Wis. Stat. § 971.31 (10). *Id*. That exception, however, does not apply to traffic regulation cases in which the penalty is a civil forfeiture. *Id*. at 436-37.

It is on the basis of *County. of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), some language withdrawn by *Washburn County v. Smith*, 2008 WI 23, ¶ 64, 308 Wis.2d 65, 746 N.W.2d 243, that Vandenberg respectfully brings this appeal in that waiver is not a jurisdictional bar to an appeal, but rather a principle of judicial administration. 198 Wis. 2d at 275-76. Therefore, this Court has the discretion to decline to apply the waiver rule. *Id*. In deciding whether or not to apply the waiver rule, this Court may consider four factors: (1) the administrative efficiencies resulting from the plea, (2) whether an adequate record has been developed, (3) whether the appeal appears motivated by the severity of the sentence, and (4) the nature of the potential issue. *Id.*

In this case, the only worthy defense to bring under the circumstances was the motion to suppress evidence based on legal issues. Factual issues for trial were unremarkable in light of the existing evidence, which included a chemical test result revealing a prohibited alcohol concentration.

As noted above, and similar to *Quelle*, following the motion hearing on August 8, 2015, a jury trial remained scheduled on the court's calendar. (R. 20:48). It would be futile to proceed to trial and effectively waste the time of the judge, the prosecutor, the defendant, defense counsel, court clerk, court reporter, the bailiff, and six (6) citizens acting as jurors, all in the case of simply preserving a legal issue unrelated to trial. Like *Quelle*, "the no contest plea saved administrative costs and time" and, as further observed by this Court, "it often improves the administration of justice to avoid an unnecessary and protracted trial when the sole issue is a review of a suppression motion." 198 Wis. 2d at. 275.

Next, a full record on the suppression issue is before this Court for review. A written motion was filed with the circuit court and a motion hearing devoted entirely to such motion was held. Indeed, a forty-nine page transcript exists from this hearing. Witnesses were called and provided testimony relevant to the issues raised on appeal and the circuit court placed its ruling, and its rationale therefor, on the record. Just like *Quelle*, the "issue raised on appeal was squarely presented before the trial court and testimony was taken regarding the issue, [and] we have an adequate record." 198 Wis. 2d at. 275.

This case, like *Quelle*, is not a case "where the defendant took a chance on a more lenient sentence and then brought this appeal when the sentence was more severe than hoped." It was resolved entirely by written stipulation (R. 13) and, thus, Vandenberg was aware of the penalties he was likely to (and in fact did) receive.

Lastly, in the context of whether reasonable suspicion existed for police to conduct a traffic stop for OWI, this issue concededly deals with well-settled law. However, as to the other issue, this case does require interpretation and application of the hit-and-run/property damage statute (Wis. Stat. § 346.69) to the facts, which is a statute for which minimal caselaw exists. Therefore, this case does present an issue for which an opinion from this Court could provide some guidance to the bench and bar on similar issues involving such statute.

For the above reasons, Vandenberg requests this Court to exercise its discretion and review this appeal on its merits.

II. Factual Issues.

While Vandenberg, respectfully, does not agree with the circuit court's factual findings on many points, he nonetheless concedes that no factual finding made by the court is contrary to the great weight and clear preponderance of the evidence contained within the record. Therefore, Vandenberg's appeal relates to the circuit court's application of law to the facts.

III. The Circuit Court Erred in Ruling Reasonable Suspicion Existed for the Traffic Stop.

A. *Introduction*.

Two (2) theories were advanced by the City to justify the traffic stop: a) reasonable of a hit-and-run; and b) reasonable suspicion of possible OWI. To be explained, both arguments fail. Both theories will be address in turn.

B. *Applicable Burden of Proof.*

In the face of a challenge to an unlawful traffic stop, the *onus probandi* rests entirely with the prosecution. *See State v. Taylor*, 60 Wis.2d 506, 519, 210 N.W.2d 873, 880 (1973)("Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state.").

This standard is important during the appellate review process. Based on such standard, any undeveloped or equivocal evidentiary issues should be resolved in favor of Vandenberg.

C. *Applicable Legal Standards for Traffic Stop.*

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amend. IV., U.S. Const. For the purposes of this appeal, as he did in his motion in the circuit court, Vandenberg also relies upon the Fourth Amendment's counterpart under the Wisconsin Constitution, Article I, Section 11.

The test for determining whether reasonable suspicion exists is based on an objective standard and takes into account the totality of the circumstances. *State v. Williams*, 2001 WI 21, ¶ 22, 241 Wis.2d 631, 623 N.W.2d 106. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *Post*, 301

Wis.2d 1, ¶ 10, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968)). "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *Post*, 301 Wis.2d 1, ¶ 13, 733 N.W.2d 634. That commonsense approach "balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions." *Id.*

D. *Argument: The Traffic Stop was Unlawful.*

i. Basis for Traffic Stop: Possible Hit-and-Run.

Steinke testified that part of the reason for the stop was to investigate a possible hit-and-run. With this theory in mind, Vandenberg starts with the applicable hit-and-run statute based on the facts of this case. Wis. Stat. § 346.69 provides:

> The operator of any vehicle involved in an accident resulting only in damage to fixtures or other property legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the operator's name and address and of the registration number of the vehicle the operator is driving and shall upon request and if available exhibit his or her operator's license and shall make report of such accident when and as required in s. 346.70.

A violation of Wis. Stat. § 346.69 carries a maximum civil forfeiture of $200.00. Wis. Stat. § 346.74 (3). The statute creates two separate ways in which it can be violated. First, after the occurrence of an accident which causes damage to property upon or adjacent to a highway, a person is required to take reasonable steps to locate and notify the owner (or person in charge of the property) and to provide him or her with certain information. Second, the other way to violate the statute, is by a failure to make a report when required under Wis. Stat. § 346.70. Under sec. 346.70 (1), a

person is only required, as relevant here, to make such a report when a vehicle involved in an accident caused damage to the "apparent extent" of "$1,000 or more."

Here, Steinke did not testify, nor did the City produce sufficient evidence, to demonstrate that the damage to the sign as observed by Steinke before the traffic stop was damage to the apparent extent of $1,000 or more. Considering the City's burden of proof, this undeveloped and equivocal evidentiary issue should be resolved in the favor of Vandenberg. For this exact reason, it should be assumed by this Court that the damage alleged to have been observed by Steinke did not rise to the level to invoke the reporting requirement under § 346.70.[1]

Wis. Stat. § 346.69 is unambiguous and, also, is distinct from other Wisconsin hit-and-run statutes, as there is no duty that a person involved in an accident which caused damage "immediately stop." See Wis. Stat. § 346.67 (1)("The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person **shall immediately stop** such vehicle at the scene of the accident….") (bolding supplied); and Wis. Stat. § 346.68 ("The operator of any vehicle which collides with any vehicle which is unattended **shall immediately stop**….") (bolding supplied). In fact, unless the damage is - to an apparent extent- a $1,000.00 or more, there is no requirement that a person undertake any act <u>immediately</u> following the accident. All that is required is that the person "take reasonable steps to locate and notify the owner" subsequent to the accident. If the

[1] Vandenberg acknowledges that Exhibit 2, which was admitted by the defense, shows the sign and that it had previously sustained significant damage. Steinke did review Exhibit 2 and acknowledged that it was the sign at issue in this case. However, Steinke did not specifically and clearly testify that the condition of the sign in Exhibit 1 was the same condition of the sign on night of February 8, 2015. R. 20:29. Moreover, Steinke testified that the he was previously familiar with the sign and that it was damaged prior to February 8, 2015. R. 20:20, 27.

legislature intended to create a duty that a person immediately stop, it would have said so. The legislature has shown its ability to create such a duty by its enactment of secs. 346.67 (1) and 346.68 and, therefore, the omission of a reference to an "immediately stop" requirement in Wis. Stat. § 346.69 must be presumed an intentional and purposeful exclusion. See e.g., *Responsible Use of Rural & Agric. Land v. PSC*, 2000 WI 129, ¶39, 239 Wis.2d 660, 619 N.W.2d 888 (when the legislature uses words in one section of statute but not in another, it is said the legislature has specifically intended a different meaning.). Quite simply, Wis. Stat. § 346.69's requirement that an operator take "reasonable steps" to locate and notify an owner does not mandatorily require that a vehicle immediately stop. The legislature's use of different language in 346.69 than that of 346.67 and 346.68 demonstrates beyond debate that the legislature meant to create a different standard.

Vandenberg's decision to drive away and leave the parking-lot was entirely appropriate and within the bounds of the traffic code. Context is critical. The incident occurred in a downtown parking-lot during the early morning hours of Sunday. Firstly, there is no evidence in the record to suggest that this particular parking-lot was under the charge of some person then and there present, such as a parking-lot security guard or other attendee, to immediately locate and notify of any accident and possible damages. Secondly, common-sense indicates that the business associated with this parking-lot, or any parking-lot in a downtown setting for that matter, would likely be closed during the earlier morning hours of a Sunday. For these precise reasons, it would have proved both absolutely redundant and futile for Vandenberg to immediately stop in or near the parking-lot, as there was nothing he could have done at that time to locate an owner or person in charge to notify of the accident and possible damage.

It is neither surprising nor significant, and certainly not suggestive of the commission of a traffic violation, that Vandenberg failed to stop and left the scene after possibly striking or rubbing against the sign. It's reasonable to assume, perhaps, that a driver wishes to return to the scene during daylight hours to inspect for any damage or to look for markings or other signs identifying the owner of the property. Or, even, the driver wishes to research city tax records (which are routinely accessible by internet connection from a computer) to determine the owner of the property. However, simply assuming a person, who is under no duty to "immediately stop," is not going to "take reasonable steps" to locate and notify an owner at a subsequent point, without some evidence to suggest so, is nothing more than a "hunch" or unparticularized suspicion. Thus, a driver's failure to immediately stop does not provide, under an objective standard, the specific and articulable facts, along with rational inferences from those facts, that are necessary to reasonably warrant the belief that an individual has committed, was committing, or is about to commit a violation of the traffic code.

Furthermore, this Court must consider not only the facts of this case, but also the circumstances which are relevant in order to give weight to such facts in the determination of the reasonableness of the traffic stop. *State v. Guzy*, 139 Wis. 2d 663, 678, 407 N.W.2d 548, 555 (1987). In reaching this determination, the Court should consider whether alternate means of investigation were available because, if yes, the "reasonableness of the stop based on scant facts may well be questionable." *Id*.

Here, alternate means of investigation were available and would have been reasonable under the circumstances. Steinke could have conducted a registration check on the vehicle to determine the owner's identity. Steinke testified that he followed Vandenberg for a short distance and

therefore he was certainly in a position to do so. From an investigative standpoint, this approach would have been both reasonable and sufficient under the circumstances. This is especially true in light of Wis. Stat. § 346.675, under which an owner of a vehicle is presumed liable for a hit-and-run violation. Steinke's decision to perform a traffic stop, however, was unreasonable.

In summary, Vandenberg committed no traffic violation by not stopping and leaving the area after allegedly striking or rubbing his vehicle against the sign in the parking-lot. Steinke's assumption that Vandenberg may not "take reasonable steps" to locate and notify the owner of the parking-lot, without any evidence to suggest otherwise, was merely a hunch or unparticularized suspicion and falls short of the reasonable suspicion standard.

ii. Basis for Traffic Stop: Possible OWI.

Three (3) factors are relevant to the reasonable suspicion for OWI analysis: 1) time of day; 2) location of the parking-lot in downtown Appleton; and 3) Vandenberg's truck striking or rubbing against the sign in the parking-lot.

These factors do not add up to reasonable suspicion. As explained above, Vandenberg did not commit a traffic violation by hitting or rubbing against either the curb or the sign and then not stopping and leaving the area.

Vandenberg acknowledges that the absence of a traffic violation is not dispositive, as the Wisconsin Supreme Court has explained that "driving need not be illegal in order to give rise to reasonable suspicion." *Post*, 2007 WI 60, ¶24. However, the traffic code does not necessarily require a perfect driving performance, especially driving behaviors of the kind that expand to many innocent drivers. *Id*. at ¶¶20-21.

Exhibit 1 contains an arrow, drawn by Steinke,[2] which demonstrates Vandenberg's vehicle path while he approached the entry/exit way of the parking-lot. It shows that Vandenberg was traveling in an eastbound direction in the southern portion of the parking-lot and, upon his approach, would have had to take a hard right turn into the designated lane of the exit-way. Under these circumstances, striking or rubbing against the curb or sign with his tire, while not perfect driving, is a driving performance that regularly expands to many innocent drivers. Driving performance of this nature is not exclusively limited to intoxicated or erratic drivers and its occurrence is a commonplace driving aberration when exiting parking-lots and even bank and fast-food drive-thru lanes.

After all, Steinke continued to follow Vandenberg for a few blocks and observed no other driving errors or other bad driving behaviors. While this fact does not negate the officer's observations, it is still a factor that need be taken into account under the totality of the circumstances. As much as bad driving would suggest impairment, good driving would suggest no impairment.

The other factors of time of day and location of the parking-lot are better viewed as overlapping factors, insomuch that these two factors are really used to advance the same proposition of fact. The materiality of both factors are proffered to show that it was likely that Vandenberg was patronizing a bar or other establishment that serves alcohol. One relates to temporal proximity to "bar time" while the other to a parking-lot often used for bar patrons in downtown Appleton. Again, both factors speak to the same inference: a person was at a bar or drinking establishment.

Simply showing the increased possibility that a person recently patronized a bar or similar establishment does not

[2] R. 20:21

equate to a reasonable inference that a person is impaired by alcohol consumption. In Wisconsin, drinking and driving is not against the law; driving while impaired, on the other hand, is. The use of alcohol is illegal only if used to the point of intoxication and/or in excess of the legal limit coupled with operating a motor vehicle. Not only is this reality evinced by the plain language of the statute itself (Wis. Stat. § 346.63), but is also made clear by the pattern jury instructions: "not every person who has consumed an alcoholic beverage is 'under the influence' as that term is used here." (WIS JI-CRIMINAL 2663). Not every person that goes to a bar or similar establishment consumes alcohol or otherwise consumes it to a point of intoxication.

The above three factors (which as explained, are effectively two), when combined with each another, do not rise to the level of reasonable suspicion. While the factors are articulable in the strictest sense of the word, the rational inferences that nonetheless attach do not reasonably warrant the belief that Vandenberg was driving while impaired by alcohol. A commonplace driving error (that doesn't rise to the level of a traffic code violation), coupled with an increased chance a driver was at a bar, simply cannot justify the traffic stop here. When there is an increased possibility that a person was recently present at a bar or similar establishment, reasonable suspicion is not created just because a person, without violating the traffic code, doesn't exhibit a flawless or perfect driving performance.

CONCLUSION

First, it is respectfully requested that this Court not apply the waiver rule and decide this appeal on its merits.

Second, it is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress in this matter and remand with directions that the circuit court issue an order suppressing all evidence gained consequent to the unlawful traffic stop.

Dated this 16th day of March, 2016.

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

I, Chadwick J. Kaehne, hereby certify that this portion of the brief (respondent portion) conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,746 words.

Dated this 16th day of March, 2016.

_____

Attorney Chadwick J. Kaehne
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ELECTRONIC BRIEF CERTIFICATION

I, Chadwick J. Kaehne, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 16th day of March, 2016.

_____

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