STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2015 AP 2649

CITY OF APPLETON,

Plaintiff – Respondent,

v.

JACOB ANTHONY VANDENBERG,

Defendant – Appellant.

REPLY BRIEF 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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BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

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INTRODUCTION

In his brief-in-chief, Jacob A. Vandenberg ("Vandenberg") contends on appeal that: 1) this Court should not apply the waiver rule; and 2) the traffic stop at issue was unconstitutional. Vandenberg submits that his brief-in-chief on these particular issues sufficiently develops argument in favor of such contentions and, further, demonstrates that the relief sought is warranted. With brevity in mind, however, Vandenberg will touch on some arguments made by the City of Appleton ("the City") which call for reply.

ARGUMENT

I. The City's Argument to Apply the Waiver Rule.

The City argues that this Court should apply the waiver rule. In support of such contention, the City asserts, inter alia, that the language of the parties' written stipulation shows that Vandenberg's change of plea to no contest as to the OWI charge was made knowingly, voluntarily and intelligently and that he "was giving up his ability to present the very issue he now raises in this appeal[.]". (City's Brief, pp. 2-3). Vandenberg, however, never explicitly waived his direct appeal rights under the stipulated resolution between the parties.

As cited in both Vandenberg's brief-in-chief and the City's brief, *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 App. 1995), some language withdrawn by *Washburn County v. Smith*, 2008 WI 23, ¶ 64, 308 Wis.2d 65, 746 N.W.2d 243, stands for the proposition that this Court has the discretion to decline to apply the waiver rule and, in exercising such discretion, 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.*

The City concedes that the first and second factors under *Quelle* are satisfied. (City's Brief, p. 3). Moreover, the City unwittingly concedes the third factor, too. (City's Brief, p. 3: The City, does however, assert that Vandenberg did receive a more lenient sentence in exchange for accepting responsibility and a quick resolution of the OWI.").

Conversely, however, the City contends that the fourth factor (i.e., the nature of the potential issue) is not satisfied. In his opening brief, Vandenberg noted "that 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." (Br.-in-Ch., p. 8). The City characterizes Vandenberg's statements as "suggest[ing] that this court needs to conduct a separate analysis to determine whether Vandenberg, did in fact, violate Wisconsin's hit-and-run statute." (City's Brief, p. 3). The City further posits that such argument is "misleading" because Vandenberg was never cited for a hit-and-run violation. *Id*.

The City further writes that "the only reference to a hit-and-run violation was through the officer's testimony when he advised that one of the purposes of the stop" and the circuit court's ruling. (City's Brief, pp. 3-4). Not true. The City itself, both below and here, has too argue that a potential hit-and-run violation supported the traffic stop. See R.20:41 and City's Brief, pp. 8-9.

The City misreads Vandenberg's contention on this issue. As submitted in Vandenberg's brief-in-chief, the novelty of the issue as presented deals with the interplay between the correct interpretation of Wis. Stat. § 346.69 and

the reasonable suspicion standard for traffic stops; Vandenberg does not contend that this Court undertake an analysis to determine whether he, in fact, violated Wisconsin's hit-and-run statute. As argued by Vandenberg, quite simply, if Wis. Stat. § 346.69 requires a driver to immediately stop after striking property adjacent to a roadway, then reasonable suspicion (and likely probable cause) exists if the driver leaves the scene. Oppositely, though, if Wis. Stat. § 346.69 does not require a driver to immediately stop, simply assuming a driver has committed, is committing or about to commit a hit-and-run by leaving the scene, without more, is nothing but a hunch and therefore militates against a finding of reasonable suspicion. Contrary to the City's position, Vandenberg's argument is thus advanced under the framework of the reasonable suspicion standard for traffic stops.

Thus, in order to address the issue of reasonable suspicion to stop for a possible hit-and-run in this particular case, it necessarily requires this Court to undertake an interpretation analysis of Wis. Stat. § 346.69 in order to apply it to the facts. There is little caselaw on the interpretation of Wis. Stat. § 346.69 generally and none which address the specific issue raised in this case. An opinion from this Court would certainly assist the bench, bar and police in enforcing and litigating Wis. Stat. § 346.69. Vandenberg asks this Court to exercise its discretion and review this appeal on its merits.

II. The City's Argument as to the Traffic Stop.

The City wholly fails to address Vandenberg's contention that there is no requirement under Wis. Stat. § 346.69 that a vehicle immediately stop after striking and damaging property (unlike Wis. Stat. § 346.67 (1) and Wis. Stat. § 346.68). Arguments not refuted on appeal are deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979).

While the City argues that Officer Steinke observed damage to the sign at issue (City's Brief, pp. 8-9), it never established on the record that Steinke's observation of damage was to an apparent extent of $1,000.00 or more. In light of the City's burden of proof, this undeveloped evidentiary issue should be resolved in the favor of Vandenberg and therefore 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 Wis. Stat. § 346.70.

The City argues that Vandenberg's argument suggests that Steinke "needed to thoroughly first conduct an investigation into the damage entirely independent from Vandenberg and then evaluate whether there was sufficient probable cause to arrest for a [hit-and-run] violation. (City's Brief, p 9). This, however, is not Vandenberg's position.

Vandenberg's position is that Steinke's observations, and his inferences taken from such observations, did not amount to reasonable suspicion. On the hit-and-run issue, the only facts available to Steinke were that Vandenberg's truck may have struck the sign, but that it was not a mandatory report incident. Even if he did strike the sign, Vandenberg was not required to immediately stop. Steinke's conclusion that the sole act of driving away from a non-reportable vehicle accident site may constitute a violation of Wis. Stat. § 346.69, without more, is simply a hunch - and nothing more. The officer possessed no real basis to conclude that

Vandenberg was not going to take "reasonable steps to locate and notify the owner" subsequent to the accident (if there was one) as required by statute. A traffic stop to simply confirm that a citizen is going to follow the law is not a valid basis to stop. On this point, the City, both below and now, has never contended that an alternate purpose, such as a community caretaker purpose, existed for the traffic stop on the hit-and-run issue other than to investigate for such offense.

As stated in the brief-in-chief, 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.* (See Br.-in-Ch., pp. 13-14). The City takes issue with this proposition. (City's Brief, p 9). However, as stated, alternate means of investigation were available and would have been reasonable under the circumstances, especially since the idea that a hit-and-run violation may have occurred was based on scant facts.

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.

Next, the City argues that 1) the time of day; 2) the location of the parking-lot in downtown Appleton; and 3) Vandenberg's truck striking or rubbing against the sign in the parking-lot amounted to reasonable suspicion of OWI. This

issue was squarely addressed in his brief-in-chief and the City presents no arguments tending to materially undermine Vandenberg's position. However, Vandenberg will simply reiterate his position that 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, does not add-up to reasonable suspicion of OWI.

Lastly, the City notes that Steinke's "suspicions proved to be true" because a subsequent chemical test revealed a blood alcohol limit higher than the legal limit. (City's Brief, p 10). The fact that chemical analysis of a sample of Vandenberg's blood subsequently revealed a prohibited alcohol concentration is neither material to the legal analysis on appeal, nor is it a proper consideration for this Court. First, the analysis is limited to information within the officer's knowledge in the moment of the traffic stop. *See Welsh v. Wisconsin*, 466 U.S. 740, 747, n. 6, 104 S.Ct. 2091 (1984)(citing *Beck v. Ohio*, 379 U.S. 89, 91, 96, 85 S.Ct. 223, 225, 228, 13 L.Ed.2d 142 (1964)). The results of Vandenberg's blood test is irrelevant. Second, the City's suggestion runs afoul of constitutional principle. A search or seizure must be legally justified at it actual occurrence and cannot be retroactively justified by its fruits. *See e.g., State ex rel. Furlong v. Cnty. Court for Waukesha Cnty*., 47 Wis. 2d 515, 525-26, 177 N.W.2d 333, 339 (1970) ("The point is that the validity of the arrest must not depend upon the result of the search but the grounds of arrest must exist independently thereof.").

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 3rd day of June, 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 1,878 words.

Dated this 3rd day of June, 2016.

_____

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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 3rd day of June, 2016.

_____

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