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**CLERK OF COURT OF APPEALS
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Court of Appeals case nos.:
2016AP000175

COURTNEY L. CARNEY,

Defendant-Appellant.

In the matter of the refusal of Courtney L. Carney:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Court of Appeals case nos.:
2016AP000176

COURTNEY L. CARNEY,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION OF THE
CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH 8,
THE HONORABLE MICHAEL P. MAXWELL PRESIDING

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TABLE OF CONTENTS

ISSUES PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE CASE AND STATEMENT OF FACTS.....	1
STATEMENT OF FACTS	2
ARGUMENT	5
I. OFFICER GOODNATURE LACKED REASONABLE SUSPICION FOR MR. CARNEY’S INITIAL DETENTION, AND DID NOT CONDUCT THE DETENTION IN THE LEAST INTRUSIVE MANNER	5
II. OFFICER GOODNATURE LACKED REASONABLE SUSPICION TO EXPAND MR. CARNEY’S DETENTION.....	7
CONCLUSION.....	9
CERTIFICATION	10
APPENDIX CERTIFICATION.....	12

TABLE OF AUTHORITIES

Cases

<i>Florida v. Royer</i> , 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).....	5
<i>State v. Betow</i> , 226 Wis. 2d 90, 94, 98, 593 N.W.2d 499 (Ct. App. 1999)...	7
<i>State v. Post</i> , 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634	2
<i>State v. Young</i> , 212 Wis. 2d 417, 430 569 N.W.2d 84 (1997)	7
<i>United States v. Mendenhall</i> , 446 U.S. 544, 550(1980)	5

Statutes

Wis. Stat. §343.305(9).....	1
Wis. Stat. §346.63(1)(a)	1, 2

ISSUES PRESENTED

1. Did the trial court err in denying Defendant's motion to suppress evidence derived from an unlawful seizure and detention?
 - a. The trial court answered no, and allowed evidence derived from the seizure of the Defendant.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant requests neither oral argument nor publication.

STATEMENT OF THE CASE

Courtney Carney was charged with operating a motor vehicle under the influence of an intoxicant (OWI), second offense, contrary to Wis. Stat. §346.63(1)(a), and wrongfully refusing a chemical test of his blood contrary to Wis. Stat. §343.305(9).

Mr. Carney's motion to suppress evidence based on unlawful detention was heard before the Waukesha County Court, the Honorable Neal Nettisheim presiding. R.43. The circuit court denied the motion, R. 43, p. 31, and the OWI was subsequently tried to a jury, while the refusal action was tried to Judge Michael Maxwell, who also presided over the trial. R. 45. This is an appeal of the circuit court's denial of the motion to suppress evidence based on unlawful detention.

Courtney Carney asserts that the holding of the circuit court was erroneous. It was unlawful for the police officer to seize and detain Mr. Carney, as seizure was unnecessary to ensure officer safety, and there was no reasonable suspicion that he was under the influence of an intoxicant, contrary to Wis. Stat. §346.63(1)(a), nor that he had disobeyed any law.

Whether reasonable suspicion exists is a question of constitutional fact. A question of constitutional fact is a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. The court should apply a two-step standard of review to this type of question. *Id.* First, the court reviews the circuit court's findings of fact under the clearly erroneous standard, and second, it reviews de novo the application of those facts to constitutional principles. *Id.* In the present case, there is no real dispute of fact, and thus the Court should concentrate its efforts on the de novo review of the application of constitutional principles.

STATEMENT OF FACTS

On February 14, 2015, Courtney Carney was seized by the Waukesha Police Department. R. 43. At approximately 3:00 AM, Mr. Carney and a friend were driving in separate vehicles, with the friend

following Carney. R. 43, p. 4-6, 11. Officer Roosevelt Mullins made a traffic stop on the friend, the vehicle not driven by Mr. Carney, for an alleged defective registration light. R. 43, p. 4-5. Mr. Carney pulled his car over to the side of the road in a safe, appropriate and legal manner, and parked it in a safe, appropriate, and legal location to wait for his friend. R. 43, p. 8, 11, 17. Mr. Carney was not observed to make any traffic or equipment violations of any kind, nor was he observed to engage in any suspicious driving. R. 43 p. 8, 16-17. Mr. Carney stayed in his car and did not attempt to interfere in Officer Mullins' traffic stop, or in any way make contact with Officer Mullins. R. 43, p. 8.

Officer Brenna Goodnature¹ arrived on the scene as back-up officer for the traffic stop Officer Mullins was conducting. R. 43, p.6, 10. Despite no action on the part of Mr. Carney other than pulling over safely and legally, Officer Mullins directed Officer Goodnature to investigate Mr. Carney and the reason for his stop, ostensibly for officer safety. R. 43, p. 6-7. No testimony or evidence was presented to explain why a parked car was cause for a safety concern. R. 43.

¹ The transcripts in this case erroneously identify the witness as Brenda Goodnature.

Mr. Carney stayed in his car as Officer Goodnature approached him, and throughout all times relevant to this appeal. R. 43, p. 10, 13. When Officer Goodnature requested his ID, he handed her his valid Illinois drivers license with no difficulty. R. 43, p. 17. He did not have trouble locating it, he did not fumble with it, and he did not hand her the wrong document, such as a credit card. See R. 43, p. 17. Mr. Carney was able to answer all of Officer Goodnature's questions, explaining to her that he and a friend were coming from a downtown bar, that his friend was following him, and that he had pulled over to wait for her. R. 43, p. 11-12. Officer Goodnature noted the smell of alcohol, and Mr. Carney informed her that he had had one drink. R. 43, p. 11-12. Officer Goodnature did not note any additional indicia of impairment. R. 43, p. 16-17. In addition to Mr. Carney's appropriate driving and fine motor coordination, his eyes were not alleged to be red, glassy, or bloodshot, and his speech was normal. R. 43, p. 16-17. Despite the lack of any indicia of impairment, Officer Goodnature did not return Mr. Carney's license, and instead ordered him to wait in his car until she and the other officers were finished with the original traffic stop so she could conduct an OWI investigation. R. 43, p. 13, 17. Mr. Carney was eventually arrested for OWI. R. 43, p.15.

ARGUMENT

I. OFFICER GOODNATURE LACKED REASONABLE SUSPICION FOR MR. CARNEY'S INITIAL DETENTION, AND DID NOT CONDUCT THE DETENTION IN THE LEAST INTRUSIVE MANNER

Courtney Carney was seized for fourth amendment purposes when Officer Goodnature took and retained his license without any indication that he was free to leave. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Seizures of persons, including even brief detentions that fall short of an arrest, must conform to objective standards of reasonableness. *United States v. Mendenhall*, 446 U.S. 544, 550 (1980). Persons are seized for Fourth Amendment purposes when their freedom of movement is restrained by either physical force or a show of authority. *Id.* at 553. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. *Royer*, 460 U.S. at 500. “[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Id.* Where a driver’s license is confiscated, it should be returned and the person told they are free to go if they so desire as soon as possible see *Id.* at 504 (“by returning

[Royer's] ticket and driver's license, and informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish.'')

Here, the proffered reasoning for Officer Goodnature's initial contact with Courtney Carney was for officer safety. No explanation was ever given for why officers felt Mr. Carney potentially posed a risk to their safety, nor why seizing his driver's license would alleviate any danger to officers. Regardless, Officer Goodnature demonstrated her authority by demanding Carney's license, keeping possession of it, and telling him he was not free to leave the scene of a traffic stop that he was not involved in.

Mr. Carney did not display any unsafe behavior. There is no evidence of any illegal or unsafe driving behavior, nor did he park in an illegal or unsafe place. Mr. Carney was not interfering in Officer Mullins' traffic stop, or in any way making contact with officers, much less dangerous, threatening, or otherwise disruptive contact. To the extent officer safety was implicated by his legal parking behavior and a reason for his presence needed to be discerned, Officer Goodnature could have discerned that Carney was waiting for his friend without ever seizing him or legally restricting his movement. It was certainly reasonably possible for

her to ask Carney the reason he had legally pulled over without ever taking and keeping his license. To the extent it was reasonable for her to take his license, once she had ascertained his reason for pulling over and the potential officer safety issue was resolved, the purpose for her contact was complete, and Mr. Carney's license should have been returned to him and he should have been told he was free to go, thus ending his seizure.

II. OFFICER GOODNATURE LACKED REASONABLE SUSPICION TO EXPAND MR. CARNEY'S DETENTION

Once the initial purpose of a seizure is complete, an officer may extend or expand the scope of the detention to conduct an investigation into impaired driving *only if* the officer has a reasonable suspicion to believe that the person is in fact driving while impaired. *State v. Betow*, 226 Wis. 2d 90, 94, 98, 593 N.W.2d 499 (Ct. App. 1999). Reasonable suspicion is "articulable suspicion that the person has committed or is about to commit [an offense]." *Id.* at 93. It must be particularized and objective. *Id.* at 94. "Conduct which has [an] innocent explanation may...give rise to a reasonable suspicionBut the inference of unlawful conduct must be a reasonable one." *State v. Young*, 212 Wis. 2d 417, 430 569 N.W.2d 84 (1997). The court must examine the totality of the circumstances. *Id.* at 429. In *Young*, a possession of THC case where the Court found that the

State lacked reasonable suspicion, the State alleged three things: (1) Young was present in "a high drug-trafficking area"; (2) he had a brief meeting with another individual in that area; and (3) the officer had experience that drug transactions in this neighborhood take place on the street and involve brief meetings. *Id.* at 433. The court held that this did not rise to the level of reasonable suspicion, as it was not a reasonable inference that behavior which "describes the conduct of large numbers of law abiding citizens in a residential neighborhood, even in a residential neighborhood that has a high incidence of drug trafficking," was criminally suspicious. *Id.* at 430.

Here, Officer Goodnature lacked reasonable suspicion to continue her seizure and detention of Carney. To the extent her initial seizure is justified by a concern for officer safety, that concern was reasonably assuaged once she ascertained the reason for Carney's presence. There is no evidence in the record that any of her actions beyond ascertaining the reason for Carney's presence were related to officer safety. Her continued detention of Carney was based upon her suspicion that he may have been operating while intoxicated. When viewed in totality, the facts do not lead to a reasonable conclusion that Carney was impaired. There was no illegal or suspicious driving. Carney parked in a legal and safe way. He did not

interfere with any officer action. He was alert, had rational answers to the officer's questions, had good fine motor coordination while handing the officer the document she requested. He did not have other indicia of impairment such as red glassy eyes or slurred speech. Even looking solely at the facts the officer found suspicious, no reasonable inference of criminal activity can be drawn. Mr. Carney was coming from a bar, after having one drink, and smelling as if he had had a drink. This describes the conduct of large numbers of law abiding citizens, even late at night.

CONCLUSION

The defendant-appellant respectfully prays that the matter be reversed and remanded for actions consistent with such reversal. Defendant states that the facts of this case demonstrate that there was no reasonable suspicion to seize and detain him, and no reasonable suspicion to expand that detention.

Signed and dated this _18_ day of May, 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 1,905 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.

Signed and dated this _18_ day of May 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

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

APPENDIX 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: (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.

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Respectfully submitted,
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APPENDIX

INDEX TO APPENDIX

Judgment of Conviction – 2015CT000681	A
Judgment of Conviction – 2015TR001863	B
Transcript of Motion Hearing held August 4, 2015	C