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.

REPLY 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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I. Courtney Carney Was Seized When Officer Goodnature Requested and Took His License

Persons are seized for Fourth Amendment purposes when their freedom of movement is restrained by either physical force or a show of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). The State argues Mr. Carney's contact with Officer Goodnature was consensual, and he was not seized until Officer Goodnature requested he remain at the scene. This is incorrect. Officer Goodnature seized Mr. Carney as soon as she was in possession of his license. The State cites *County of Grant v. Vogt*, 2014 WI 76, 356 Wis. 2d 343, 850 N.W. 253, but gives an inaccurate interpretation of *Vogt*. The facts of *Vogt* involve a car pulling into a parking lot next to a boat ramp on December 25. *Id.* ¶ 4. Due to the time of year, the boat ramp being closed and no boats being present, the officer found this suspicious. *Id.* ¶ 5. He made contact by wrapping on the driver's window, which rolled down. *Id.* ¶ 7-8. The officer acknowledged that had Vogt driven away, he would have let Vogt go because he "had nothing to stop him for." *Id.* ¶ 7. While Vogt's license was eventually confiscated, *Id.* ¶ 8, the Supreme Court explicitly acknowledged that the issue wa whether

"Vogt was seized *before* his window was rolled down." *Id.* ¶ 29. (emphasis original).

Mr. Carney is not asserting that he was seized prior to Officer Goodnature's command that he produce his driver's license, hence *Vogt* is inapplicable. The state points to no cases which indicate a person is free to reject an officer's command that the person produce his license, and the plain language of Wisconsin Statute 343.18(1) indicates otherwise, saying "Every licensee shall have his or her license document in his or her immediate possession at all times when operating a motor vehicle and shall display the license document upon demand from any … traffic officer." A person undeniably may not simply drive off without his license without violating this statute. Therefore Mr. Carney was seized when Officer Goodnature commanded that he produce his license, or at the latest when she in fact took possession of the license.

II. Regardless of When the Seizure Occurred, Officer Goodnature Lacked Reasonable Suspicion to Conduct an OWI Investigation

While the State and Mr. Carney have significant differences regarding the legal standard of seizure and when Mr. Carney was seized, it makes little difference, as Officer Goodnature lacked reasonable suspicion

to either detain or expand her detention of Mr. Carney for purposes of an OWI investigation. Mr. Carney concedes that the record is somewhat vague as to when Officer Goodnature commanded that he produce his license, however even accepting the State's theory of seizure, Officer Goodnature lacked reasonable suspicion to seize and detain Mr. Carney for the purpose of investigating whether he was operating while intoxicated.

Reasonable suspicion is "articulable suspicion that the person has committed or is about to commit [an offense]." *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). It must be particularized and objective. *Id.* at 94. 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. *Betow*, 226 Wis.2d at 94. Several unpublished cases have addressed the standard for reasonable suspicion in the context of OWI investigations in recent years.

In *State v. Meye*, No. 2010AP336-CR, unpublished slip op. (WI App July 14, 2010), an officer observed Meye and her passenger drive into the parking lot of a gas station around 3:30 AM. *Id.* ¶ 2. They parked and entered the store. *Id*. The officer testified that when they passed within

feet of him, he detected a strong odor of intoxicants. *Id.* The officer observed Meye get into the driver's side of the car, and then made contact with her. *Id.* The officer testified that his only reason for detaining Meye was the odor of intoxicants. *Id.* ¶ 3. He also stated that prior to making contact with Meye he observed nothing unusual her mannerisms, nor observed any traffic violations or mechanical defects with the car. *Id.* In holding that the officer lacked reasonable suspicion, the court stated:

> We will not cite, chapter and verse, all the many cases in this state where either we or our supreme court found facts sufficient for an investigatory stop. Suffice it to say that these decisions…include [a person] having observed traffic violations, erratic driving, mechanical defects with the vehicle, unexplained accidents or multiple indicia of physical impairment. Not one of these cases has held that reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped—and nothing else.

Id. ¶ 6.

County of Sauk v. Leon, No. 2010AP1593, unpublished slip op. (WI App Nov. 24, 2010), dealt with a situation involving an odor of intoxicants and an admission to having one drink. Officers confronted Julio Leon and his girlfriend on a frontage road after his girlfriend appeared to have nearly run onto the main roadway. *Id.* ¶ 2-3. She was upset, belligerent and

appeared intoxicated throughout the officer contact. *Id.* ¶ 6. Leon, by contrast, remained calm *Id.* ¶ 7, explaining to officers that he and his girlfriend had been out, but had headed back to their hotel. *Id.* ¶ 8. Leon could not find a parking spot, so drove back to the frontage road. *Id.* His girlfriend got out of the car, and Leon turned around and stopped to get her back into the car. *Id.* The officer testified Leon's breath gave off an odor of intoxicants. *Id.* ¶ 9. Leon explained he had consumed one beer while eating supper. *Id.* The officer did not note any outward signs that Leon was intoxicated, such as trouble with balance, bloodshot or watery eyes, or slurred speech. *Id.* ¶ 10. Leon also had no problem promptly pulling out his wallet and retrieving his identification. *Id.* The court noted the officer was not aware of any driving behavior by Leon indicative of impaired or imprudent driving. *Id.* ¶ 18. The car was parked in an unusual location, however Leon gave a plausible explanation for this. *Id.* ¶ 19. In holding that the officer lacked reasonable suspicion to continue an OWI investigation, the court stated "[w]hen an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial." *Id.* ¶ 20. In discussing Leon's admission of drinking, the court specifically noted that

> while the deputy was not required to credit Leon's claim of having had no more than one beer…the deputy was not presented with a suspiciously vague admission of "some" drinking or "a few" drinks, nor with an admission to multiple drinks….Leon consistently provided the deputy with an explanation for the smell of alcohol that would not have supported an inference of impairment, and there was no evidence to the contrary, such as a statement from another witness or empty bottles or cans."

Id. ¶ 21. The court held that under the totality of the circumstances, the officer lacked reasonable suspicion to continue his investigation. The court made note of the lack of indication of impairment, stating:

> Leon's behavior was apparently calm and not unsteady. There was no testimony of exaggerated or suspiciously slow movements. Leon complied with directions from the deputy. So far as the record reflects, he produced his identification readily, without fumbling or confusion, and spoke without slurring his speech or a "thick tongue," and without betraying excessive drinking through bloodshot or watery eyes or drooping eyelids."

Id. ¶ 26. The court did note that the facts of this case occurred at 11:00 P.M., and not "bar time," however it explicitly stated that "even if it had occurred around bar time, such a contextual fact would not have been enough to fill in the missing elements needed to support reasonable suspicion on this record." *Id.* ¶ 25. The County argued that had the officer not conducted field sobriety tests, and instead let Leon go about his business and had there been an accident, the officer would have been criticized for not properly investigating the situation. *Id.* ¶ 27. The court

forcefully rejected this argument, unequivocally stating "This is not the current legal standard in Wisconsin. Under the County's suggested standard, officers may, and perhaps should, require field sobriety tests of every motorist they encounter who smells of alcohol or admits to any drinking." *Id.* The court found that under the facts of Leon,

> there were virtually no indicia of actual impairment. Without more, an admission of having consumed one beer with an evening meal, together with an odor of unspecified intensity, are not sufficient "building blocks" representing specific and articulable facts supporting reasonable suspicion that Leon had become less able to exercise the clear judgment and steady hand necessary to control his car due to drinking….Simply put, the record does not include "facts which, taken together with rational inferences from those facts, reasonably warrant[ed] [the deputy's] intrusion."

Id. ¶ 28.

In *State v. Gonzalez*, No. 2013AP2585-CR, unpublished slip op. (WI App May 8, 2014), the court was confronted with the situation of an odor of intoxicants and a falsehood regarding the source of that odor. An officer observed Gonzalez traveling two blocks with a defective tail light, but did not observe bad driving. *Id.* ¶ 3. He stopped Gonzalez and detected an odor of intoxicants. Gonzalez was the only occupant of the vehicle and denied drinking, but claimed she had just dropped off friends who had been drinking. *Id.* ¶ 5. Gonzalez did not have red eyes or slurred speech or

"anything like that." *Id.* ¶ 4. The officer ordered Gonzalez to step out of her car, and then detected the odor of intoxicants coming from Gonzalez herself. *Id.* ¶ 6. The court held there was no reasonable suspicion to detain Gonzalez and order her from her car. The facts the court found significant were the lack of bad driving, that "apart from the odor of intoxicants, the officer observed no physical indicators of intoxication, such as slurred speech or bloodshot eyes." *Id.* ¶ 14. The court noted that the officer was "not required to accept Gonzalez's explanation for the odor…. [and in fact the court] assumes that the officer could reasonably conclude that Gonzalez's explanation for the odor was suspicious." *Id.* ¶ 15. The court referenced *Leon* and *Meye Id.* ¶ 18-20, and while it acknowledged "there is a bit more here, [the court saw] no meaningful difference between the evidence against Gonzalez and the dispositive facts in the above cases." *Id.* ¶ 21.

In its brief, the state concedes the only two facts Officer Goodnature relied upon in making her decision to investigate Mr. Carney were "Mr. Carney's breath and Mr. Carney's statement that he had been drinking at a bar." State's brief page 5. The state later argues other factors also weighed into the reasonableness of Officer Goodnature's investigation, including the

time of day, and the assertion that Mr. Carney lacked the ability to recall the name of the bar. State's brief page 13. Of the four factors the state identifies, it overstates two factors. Officer Goodnature did not testify Mr. Carney lacked the ability to recall the name of the bar where he had been. She stated that in response to her question as to what he had been doing in downtown Waukesha, Mr. Carney "said they were at a bar, possibly Nice Ash, but he wasn't certain." R. 43, p 12, 4-6. While Officer Goodnature did testify that Mr. Carney said he had been drinking, this was not some suspiciously vague admission, but rather a concrete statement that "he had one drink." R. 43, p. 11-12.

In Mr. Carney's case, the officers observed no bad driving or equipment violations, and there were no substantial factors suggesting impairment. Mr. Carney did not have red, glassy, or bloodshot eyes or slurred speech. He did not have trouble locating or handing his ID to Officer Goodnature. He was polite, calm, and answered all of Officer Goodnature's questions. While it may be unusual for a car to pull over and wait during a traffic stop, Mr. Carney provided a credible explanation. He did not lack the ability to recall the name of the bar, he simply was not certain of its name, a fact readily explainable by his out of state residence.

While Officer Goodnature was not required to credit Mr. Carney's statement that he had consumed one beverage, his statement was not suspiciously vague, nor was there any contradictory evidence, such as other witness statements or empty bottles or cans. The record is silent regarding the strength of the odor of intoxicants. R. 43, p. 11, 18-19, p. 13, 14-16, p. 14, 6-8. Under the totality of the circumstances, Officer Goodnature lacked reasonable suspicion that Mr. Carney was operating while intoxicated, and the time of day is not enough to fill in the missing elements needed to support reasonable suspicion on this record.

The state analogizes Mr. Carney's case to the facts of the unpublished *State v. Resch*, 334 Wis.2d, 147, 799 N.W.2d 929 (Ct. App. 2011), However, the facts of *Resch* are markedly different than the facts of Mr. Carney's case. In *Resch*, the defendant's car was observed at approximately 2:30 AM to be stopped in a private business parking lot at a stop sign facing a public road. *Id.* ¶ 2. The car was running, but its headlights were off. *Id*. The officer found this suspicious for a number of articulable reasons: the time of day, the unusual location of the vehicle (in the exit lane of a business' parking lot), the fact that the vehicle had its headlights off, and the possibility that the occupants of the vehicle were

engaged in criminal activity (i.e., burglary). *Id.* ¶ 2. When the officer spoke to Resch, he detected a strong odor of intoxicants. *Id.* ¶ 3. When asked whether he had been drinking that night Resch suspiciously responded "a little." *Id*. Resch claimed he was following some friends home, but had lost them. *Id*. In finding reasonable suspicion to expand the investigation, the court noted the "nonsensical" character of Resch's statements that he was following friends but had lost them, his failure to provide the officer with a clear explanation as to why he was in the parking lot, and the fact that Resch was stopped a considerable distance from where he initially indicated he had come from. *Id.* ¶ 22. The court also considered the nature in which the officer had found Resch—sitting alone in a parked vehicle, which was left running and with its headlights off at a stop sign of a private business parking lot around 2:30 in the morning. *Id*.

The only similarities between *Resch* and Mr. Carney's case are the time of day, and that the officers elected to conduct OWI investigations on them. While Resch was found in an illogical place at an illogical time with an illogical explanation, Mr. Carney's facts are the opposite. Both officers in Mr. Carney's case testified that he was pulled over legally and parked in an appropriate spot, and Officer Mullins testified that he witnessed Mr.

Carney pull over, and did not witness any traffic or equipment violations. There are no facts in Mr. Carney's case that are analogous to Resch being parked in the exit lane of a private business with his car running and headlights off. Mr. Carney gave very clear answers regarding where he was coming from and why he was in his present location. He stated that he was coming from a bar, which he named, in downtown Waukesha, that his friend was following him and had been pulled over, and he was waiting for her. The interaction between Mr. Carney and Officer Goodnature occurred near downtown Waukesha, while Officer Mullins conducted a traffic stop on another car that had pulled over at the same time as Mr. Carney. Mr. Carney's behavior is antonymous to Resch's nonsensical statements that he was following friends but had lost them, his failure to provide the officer with a clear explanation as to why he was in the parking lot, and the fact that he was stopped far away from where he indicated he had come from. Further, while Officer Mullins testified that Mr. Carney being legally parked made Mullins feel unsafe, when pressed for a reason for his feelings he did not indicate the Mr. Carney was doing anything suspicious or that he suspected Mr. Carney of any sort of foul play or criminal behavior, but rather stated "I just wondered why [Mr. Carney's car] had stopped and why

it remained there." R. 43, P 6, 3-5. Finally, where Resch's vehicle smelled strongly of intoxicants and he evasively answered that he had 'a little" to drink, the record is silent as to the strength of the odor Officer Goodnature detected, and Mr. Carney concretely answered that he had one drink. The facts of Mr. Carney's case are far more analogous to those of *Leon* than they are to those of *Resch*, and as such, the officer in Mr. Carney's case lacked reasonable suspicion to continue her investigation.

CONCLUSION

The court should find that Officer Goodnature lacked reasonable suspicion to either detain or expand her detention of Mr. Carney. There is no bad driving and no substantial factors suggesting impairment. Further, several factors weigh against impairment. The state has failed to prove by a totality of the circumstances that Officer Goodnature had reasonable suspicion to detain or expand her detention Mr. Carney to conduct an OWI investigation.

Signed and dated this _10_ day of August, 2016.

Respectfully submitted,
Mishlove & Stuckert, LLC

_____/s/_____
BY: Emily Bell
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CERTIFICATION

I certify that this reply brief and appendix conform 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 2,969 words.

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 _10_ day of August 2016.

Respectfully submitted,
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APPENDIX

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