STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP000431

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

CYNTHIA J. POPP,

Defendant-Respondent.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY, BRANCH 15, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

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ISSUE PRESENTED FOR REVIEW

Did the Circuit Court erroneously conclude that no reasonable suspicion existed to warrant the administration of field sobriety tests ("FSTs") where it found that the police were simply acting on a hunch and that nothing in the record otherwise tipped the balance of the evidence from equipoise towards reasonable suspicion?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Popp would request the opportunity to present oral argument in this case if the Court feels that it would be appropriate to help further define the issues and to clear up any questions that the Court may have. Popp does not request publication because she believes that the Circuit Court correctly applied existing precedent which controls the issue at hand.

STATEMENT OF THE CASE

The State appeals the Circuit Court's decision to grant Popp's motion to suppress any and all evidence seized from her on June 11, 2015, on the grounds that she was arrested in violation of the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution, in that the arrest was premised on the results of field sobriety tests ("FSTs") that were improperly requested and otherwise unsupported by probable cause or reasonable suspicion.

As the State notes, the facts are essentially undisputed. (R. 25:3). On June 11, 2015, at around 8:25 p.m., Officer John

Ballard of the Wisconsin State Capitol Police Department executed a traffic stop of Popp on Park Street in Madison, Wisconsin. (R.24:6). At the hearing on Popp's motion to suppress, Officer Ballard explained that he initiated the stop after noticing Popp's "poor driving behavior," i.e. swerving within her lane and straddling the lane boundaries. (R.24:7). He indicated that he intended to investigate the reason for this erratic driving. (R.24:16). After Ballard activated both his emergency lights and siren, Popp stopped her vehicle in a left turn lane on Park Street. (R.24:8). When Ballard made contact with Popp, he noticed that she appeared to have been crying and she subsequently told him that she was en route to the hospital to see her husband, who was suffering "a life-or-death type situation." (R. 24:10). Popp told Ballard that she had consumed one glass of wine "within one to three hours" of the time of the stop, though Ballard acknowledged that he did not notice or smell the odor of intoxicants on her. (R.24: 10-12).

Ballard also acknowledged that Popp did not have slurred speech and that he did not notice any other specific indicators of impairment other than the erratic driving. (R. 24:19). In fact, he explicitly told his dispatch that Popp "does not seem [impaired]." (R.24:21). He reiterated as much to his sergeant, telling him that he "[did not] think Popp was intoxicated," that he "didn't detect any alcohol on her," and that he "could take her out and do the field tests, but I know she'll probably pass." (R.24: 23-24). Ballard admitted that he believed what Popp had represented to him throughout the course of the stop to that point. (R.24:28).

Despite all of these circumstances, Ballard elected to administer FSTs anyway, as a matter of protocol and due in large part to the fact that he had learned that Popp was subject

to a 0.02% blood alcohol content ("BAC") restriction after running her information. (R.24:11-12). This led to Popp's arrest and the issuance of criminal charges for operating while intoxicated.[1]

During its Oral Ruling on February 1, 2016, the Circuit Court noted that while Ballard had indeed indicated that Popp was "a bit slow to stop" and that "it was a little unusual" for her to stop in the left-hand turn lane as she did, Ballard did not seem to find it exceedingly abnormal. (R.25:4-5).The Court indicated that the record was unclear as to whether traffic in the area presented an exigent circumstance rendering the stop in the turn lane necessary. (R.25:5). Regardless, after reiterating much of Ballard's own testimony with respect to his observations of Popp and reciting the controlling case law, the Court ultimately found that Ballard had improperly extended the length of the stop to administer FSTs, stating that

> at the point when the officer is asking Ms. Popp to be detained further or asking for the field tests to be performed, the evidence is in equipoise. There is nothing objectively in the record that would tip it towards saying that she's under the influence versus something else. She provided an explanation which would appear to, you know, be consistent with some poor driving. There was no odor of alcohol. There was no time of night, like bar time. It wasn't, you know, July 4th. It

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[1] Ms. Popp's last OWI conviction was on April 30, 1998, for an incident that occurred on August 30, 1997.

> wasn't a Friday or a Saturday night. She didn't have bloodshot eyes. There was an admission of driving, I mean, of drinking, rather, one glass of wine. But in my view, there would need to be something else to tip this from that equipoise, if I can use that term, to one where the officer is justified to ask her to remain further on the scene and perform the field sobriety tests.
>
> Without anything else, I believe this was simply a hunch.

(R.25:7-8).

Accordingly, the Court granted Popp's motion to suppress evidence.(R.25:9). The State now appeals on the grounds that this factual finding was erroneous and that controlling precedent otherwise dictates that the requisite "reasonable suspicion" to administer FSTs was present in this case.

ARGUMENT

THE CIRCUIT COURT FOUND THAT THE OFFICER IN QUESTION WAS SIMPLY ACTING ON A "HUNCH" IN ADMINISTERING FIELD SOBRIETY TESTS, WHICH WAS INSUFFICIENT JUSTIFICATION FOR DOING SO PURSUANT TO WELL-ESTABLISHED LEGAL PRECEDENT, AND SO THE COURT'S DECISION TO GRANT POPP'S MOTION TO SUPPRESS SHOULD BE AFFIRMED.

A. Standard of Review

When reviewing a Circuit Court's decision with respect to a motion to suppress, a reviewing Court should uphold the Circuit Court's findings of fact unless it is "clearly erroneous" or "against the great weight and clear preponderance of the evidence." State v. Popke, 2009 WI 37, ¶ 10, 20, 317 Wis.2d 118, 764 N.W.2d 569. Whether those findings of fact amount to reasonable suspicion is a question of law subject to de novo review. Id. at ¶ 10.

B. The Circuit Court Correctly Applied the Appropriate Legal Precedent to Reasonable Factual Findings, and so its Decision Should be Affirmed.

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Supreme Court explained police may stop and

briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause. Such a stop must be based on more than an officer's "inchoate and unparticularized suspicion or hunch." United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); State v. Guzy, 139 Wis.2d 663, 664, 407 N.W.2d 548 (1987). This stop must be predicated on a suspicion grounded in specific, articulable facts and reasonable inferences drawn from those facts, that the individual is or was violating the law. State v. Colstad, 2003 WI App 25, ¶ 8, 260 Wis.2d 406, 659 N.W.2d 394.

Wis. Stat. § 968.24 codifies the Terry standard for investigative stops in Wisconsin. This standard applies to a stop of a vehicle for non-criminal traffic violations. State v. Post, 2007 WI 60, ¶ 12, 301 Wis.2d 1, 733 N.W.2d 634. An officer may conduct "an investigatory stop if the officer 'reasonably suspects' that a person has committed or is about to commit a crime, [citation omitted] or reasonably suspects that a person is violating the non-criminal traffic laws." County of Jefferson v. Renz, 231 Wis.2d 293, 603 N.W.2d 541 (1999). See also State v. Houghton, 2015 WI 79, ¶ 29-30, 364 Wis.2d 234. The focus of the investigatory stop is on reasonableness, and the determination of whether a stop is reasonable depends on the totality of the circumstances and is a common sense test—whether the facts would warrant a reasonable police officer, in light of his or her experience, to suspect that the individual has or is about to commit a violation. Post, 2007 WI 60, ¶ 13. Furthermore, it should be noted that reasonable suspicion validating a seizure for one offense does not constitute validating reasonable suspicion with respect to a separate

violation as a matter of course:

> [i]f, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

State v. Colstad, 2003 WI App 25, ¶ 19, 260 Wis.2d 406 (quoting State v. Betow, 226 Wis.2d 90, 94-5, 593 N.W.2d 499 (Ct. App. 1999)).

As noted by the Circuit Court, Popp did not dispute that there was reasonable suspicion to initially stop her vehicle. She conceded that Ballard was entitled to initiate the traffic stop, as "if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." State v. Waldner, 206 Wis.2d 51, 60, 556 N.W.2d 681 (1996). Popp acknowledges that Ballard was thus entitled to "obtain information confirming or dispelling [his] suspicions." State v. Quartana, 213 Wis.2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). That being said, she submits that Ballard's suspicions were dispelled upon effectuating that inquiry and that no additional information gleaned during the course of the stop

was sufficient to justify further extension of the stop or interference with Popp's liberty on "reasonable suspicion" grounds. See State v. Gammons, 2001 WI App 36, 241 Wis.2d 296, 625 N.W.2d 623 (citing State v. Betow, 226 Wis.2d 90, 593 N.W.2d 499 (1999))("no additional suspicious factors...developed...[t]herefore [there was] no basis to continue to detain"); Rodriguez v. United States, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015)(quoting Illinois v. Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed2d 843 (2005)("[i]f an officer can complete traffic-based inquiries expeditiously, then [the reasonable duration of the stop] is the amount of 'time reasonably required to complete [the stop's] mission"); State v. Blatterman, 2015 WI 46, ¶ 20, 362 Wis.2d 138, 864 N.W.2d 26 (citing Florida v. Royer, 460 U.S. 491, 499, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)) ("detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"). The Circuit Court agreed with this proposition based on the presented evidence.[2]

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[2] The Circuit Court, while making its finding based on the objective facts, alluded to the notion that Officer Ballard's subjective beliefs, while not dispositive, may inform the analysis. (R.25:8-9). Popp would reiterate her general argument to the Circuit Court that Ballard's opinions may indeed be considered as part of the totality of the circumstances in determining whether "reasonable suspicion" exists pursuant to State v. Kyles, 2004 WI 15, ¶ 37, 269 Wis.2d 1, 675 N.W.2d 449: "although an officer's perception is not determinative in determining the reasonableness of [a *Terry* frisk], it may be of some assistance to a court in weighing the totality of the factors." See also footnote no. 27 at ¶ 37, quoting State v. Warren, 78 P.3d 590, 596 (Utah 2003): "to completely disregard an officer's subjective belief excludes a potentially important

Popp herein renews her argument that Officer Ballard's eventual decision to request FSTs was unsupported by the necessary probable cause or reasonable suspicion to render the request constitutionally permissible. She bases this contention on the aforementioned Fourth Amendment jurisprudence and its progeny— and in particular upon her reading of County of Jefferson v. Renz, 231 Wis.2d 293 (1999), and Village of Little Chute v. Rosin, 2014 WI App 38, 353 Wis.2d 306, 844 N.W.2d 667 (Table) (unpublished decision). Popp notes that the Circuit Court explicitly cited Renz as controlling the analysis here, which she submits is accurate.

In Renz, the Supreme Court discussed the quantum of proof necessary to legitimize a request to submit to a preliminary breath test ("PBT") during the course of a traffic stop. Referring to the relevant statutory language in that context, the Court found that the "probable cause" justifying a request for a PBT "refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop...but less than the level of proof required to establish probable cause for arrest." Renz, 231 Wis.2d at 316.

Popp submits that FSTs share a conceptual kinship with

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element of the analysis."Moreover, as a matter of general logic, Popp would again submit that any incidence of "dispelled" suspicion— which, along with the obverse outcome,"confirmed" suspicion, comprises one of only two possible consequences of every *Terry* stop— would be theoretically impossible in this context if subjective estimations are entirely ignored. If dispelled suspicion may *ever* be achieved under the presented circumstances, then some measure of subjectivity— where there is no indication that the officer in question presents as a patently unreasonable person— must feature in the ultimate analysis.

PBTs, and therein that the request for their performance may also only be justified where the quantum of proof specifically supports reasonable suspicion or probable cause to believe that a driver is impaired. In Rosin, the Court of Appeals explicitly concluded as much, holding that "an officer may not conduct field sobriety tests merely because the officer's traffic stop was supported by reasonable suspicion. To lawfully request a driver perform field sobriety tests, an officer must have some evidence of impairment." 2014 WI App 38, ¶ 16. Hearkening back to Renz, the Court found that "to justify the intrusion of a field sobriety test, an officer must have reasonable suspicion that the driver is impaired before requesting field sobriety tests." Id. at ¶ 17.

Popp submits that the Circuit Court correctly held that there was no such justification for the intrusion in the instant case: Ballard categorically admitted that he did not suspect impairment after making the stop and the Circuit Court accordingly found that, given the totality of the circumstances at the time that Ballard requested FSTs, he was simply acting on a "hunch." By the explicit language of Terry and decades of Wisconsin jurisprudence adopting and affirming the same lines of reasoning, a "hunch" does not provide the necessary reasonable suspicion to justify a seizure or further detention of an individual. If the request for FSTs, which is tantamount to an extension of a Terry stop (i.e. further detention), must be based on "reasonable suspicion," and reasonable suspicion unequivocally cannot be provided by a "hunch," it logically follows that any extension of detention and/or the request for FSTs on the basis of a mere hunch is constitutionally infirm. Thus, Popp submits that the Circuit Court was correct in its ultimate determination.

C. State v. Blatterman does not support reversal of the Circuit Court's decision in this case.

The Circuit Court found that State v. Blatterman, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26, was inapposite on its facts with respect to the present case. (R.25:6-7). Regardless, the State appears to continue to try to transmogrify the Blatterman case into an absolute decree with respect to drivers subject to a .02 BAC threshold— it essentially suggests that Blatterman dictates that *any* evidence of alcohol consumption, coupled with a .02 restriction, renders the administration of FSTs reasonable per se. The Blatterman Court made no such holding. Rather, in a situation where corroborative evidence suggesting impairment was overwhelming— in stark contrast to the situation presented here— the Court found that police *may* consider prior convictions in a probable cause determinations and that they were relevant there because they reduced the threshold to .02. Id. at ¶¶36-38. The Court did not hold that the mere fact of the lower threshold was a dispositive issue, and the concurrence, which did advocate for a bright-line rule with respect to establishing probable cause, suggested that the analysis turn on the fact of whether the odor of intoxicants is present. Id. at ¶¶ 60, 61-80. Again, in Popp's case, there was no odor of intoxicants nor any other indicia of impairment analogous to the litany of suggestive information in Blatterman. Thus, even according to the extremely broad propositions of the non-controlling Blatterman concurrence, the continuation of the stop and the administration of FSTs in Popp's case do not pass muster.

CONCLUSION

Popp submits that the Circuit Court's factual finding that Officer Ballard was merely acting on a "hunch" in requesting FSTs was not clearly erroneous and that its application of law to that factual finding was sound. Accordingly, she respectfully requests the Appellate Court to affirm the Circuit Court's decision.

Dated this 2nd day of June, 2016.

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,913 words.

Dated this 2nd day of June, 2016.

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CERTIFICATION OF COMPLIANCE WITH
§ 809.19(12), WIS. STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Wis. Stats.

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 2nd day of June, 2016.

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CERTIFICATION OF APPENDIX

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 § 809.19(2)(a) and that contains: (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.

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