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WISCONSIN COURT OF APPEALS
District II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Circuit Court Case No.: 2014-CT-001570

Appeal No.: 2016-AP-000455-CR

MARY G. ZINDA,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION
DENYING MOTION TO SUPPRESS ENTERED BY THE
CIRCUIT COURT FOR WAUKESHA COUNTY,
THE HONORABLE LLOYD V. CARTER PRESIDING

BRIEF OF DEFENDANT-APPELLANT MARY G. ZINDA

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STATEMENT OF THE ISSUE

1. Did the trial court err by admitting into evidence a 9-1-1 recording and police dispatch communication without giving the Defendant an opportunity to cross-examine Chief Wallis with regards to the recording?

2. Did the trial court err in making its determination that the Defendant was not seized at the time she exited her vehicle, but instead after Chief Wallis confronted her and smelled her breath and was there reasonable suspicion to seize Ms. Zinda at that time?

POSITION ON ORAL ARGUMENT AND PUBLICATION

In this decision, oral argument is not necessary because the parties' briefs and the record presented will fully develop the issues to be decided by the Court. Oral arguments would be duplicitous and unnecessary.

In this decision, publication is not warranted because the factual circumstances of this case are not significantly different from that in other published opinions or established case law.

STATEMENT OF THE CASE

The Defendant filed a Motion to Suppress Evidence on March 16, 2015. (R.16). The Court, presided over by Judge Lloyd V. Carter, conducted an evidentiary hearing on June 1, 2015. (R.35) The Court issued an oral decision denying the Defendant's Motion on July 9, 2015. (R.36). The Defendant now appeals this decision.

The relevant facts are as follows: On October 14, 2014, at approximately 2:50 p.m., Town of Oconomowoc Chief of Police James Wallis was on patrol. (R.35:6, A-Ap. at A6). Chief Wallis was contacted by Oconomowoc dispatch that they had a 911 caller, later identified as Catherine MacDonald, on the line regarding a possible drunk driver and erratic driving. (Id. at 6-7; A-Ap. at A6-7). Dispatch advised Chief Wallis "that the driver had either gone off the road or nearly gone off the road, and that basically the driving was erratic." (Id.). Dispatch provided a plate number as well as a location of the vehicle, traveling on Highway 16. (Id.). Chief Wallis identified the address of the vehicle based on the plate information, attempted to locate the vehicle, but lost it, and headed to the residence. (Id. at 7-8, A-Ap. at A7-8).

Chief Wallis pulled into the driveway of the residence, backed his squad vehicle into a turn-around

parking stall type portion of the driveway, and unsuccessfully attempted to make contact with anybody at the residence. (R.35:9 and 11; A-Ap. at A9 and A11). Chief Wallis returned to his squad and informed dispatch that he did not make contact with anyone. (R.35:9; A-Ap. at A9). He then overheard that a City of Oconomowoc Officer had located the vehicle. (R.35:10; A-Ap. at A10). Chief Wallis informed the officer "if you see anything that's erratic, go ahead and stop it, or, I said, just follow within - or wait until it gets to the driveway and I'll make contact at the residence." (Id.). City of Oconomowoc Officer Adam Parkhurst followed Ms. Zinda's vehicle and parked his squad car at the end of the driveway. (R.35:41; A-Ap. at A41). Had Ms. Zinda tried to leave, she would not have been able to get out of the driveway onto the road. (R.35:43; A-Ap. at A43). As he followed the vehicle, he did not observe any driving that would cause him to perform a traffic stop. (Id.). He also served as a backup officer to Chief Wallis during the duration of the stop. (R.35:42; A-Ap. at A42).

Chief Wallis saw a vehicle matching the description pull into the driveway. (R.35:11; A-Ap. at A11). At no point in time did Chief Wallis observe the vehicle before it pulled into the driveway. (R.35:22; A-Ap. at A22). Chief Wallis then "made contact with a female subject" who was

the driver of the vehicle. (Id.). Chief Wallis testified he did not have his emergency lights on, he did not order her out of the vehicle, he did not command her to do anything, and he did not draw his weapon; he simply "walked up and made contact with her and advised her as to the reason that we were there, or I was there, was in reference to an erratic driving." (R.35:12-13; A-Ap. at A12-12). Ms. Zinda responded to the allegation of erratic driving by saying "no," and appeared to Chief Wallis that she was confused as to his presence. (Id.). Chief Wallis stated that he smelled an odor of intoxicants coming from her and then he advised her that he wanted to proceed with some testing. (Id.).

The Court listened to the 9-1-1 audio over the objection of the Defendant for lack of authentication. (R.35:17-21; A-Ap. at A17-21). Due to scheduling issues, the Court stated it would take the matter "under advisement so [it] can listen to the recording." (R.35:37; A-Ap. at A37). The Court listened to the recording outside of the hearing. (R.36:4-5; A-Ap. at A53-54). The Court "did take an opportunity to listen to [the recording] and review that dispatched recording. The Court did not do that in open court but did that after the testimony had concluded." (R.36:5; A-Ap. at A54).

The Court determined that Chief Wallis parked in the Defendant's driveway with no emergency lights or sirens activated. (R.36:7; A-Ap. at A56). The Court concluded that the vehicle entered the driveway, and Chief Wallis made contact with Ms. Zinda. (R.36:8; A-Ap. at A57). The Court found it significant that "no commands were given by Chief Wallis, no emergency lights were displayed, no show of authority occurred by way of either display or a weapon or other exercise by Chief Wallis;" although "he was in full uniform, operating a marked squad car." (Id.). The Court determined that Chief Wallis walked up to Ms. Zinda and "advised for his reason for being there," and only after speaking with Ms. Zinda "observed an odor of intoxicants coming from her person." (R.36:8-9; A-Ap. at A57-58). It was then that he told her that he wanted to submit to field sobriety tests. (Id.).

In reviewing the evidence, the Court determined that the communication from dispatch to Chief Wallis identifying erratic driving and a vehicle led to Chief Wallis' communication with Ms. Zinda. (R.36:12; A-Ap. at A61). The State did not argue that there was no seizure, but instead "it was a question of when the seizure occurred." (Id.). The Court identified the "point of seizure" as "the moment when Chief Wallis confronted Ms. Zinda in her driveway and

stated to her that he wanted her to perform field sobriety tests. (R.36:13; A-Ap. at A62). This Court does not believe that a seizure occurred prior to that." (Id.). The Court stated that "there was no emergency light, there was no siren, and there was no display of force by the officer. (R.36:14; A-Ap. at A63). He simply walked up to her vehicle as she exited it, spoke with her at the side of her vehicle." (Id.). The Court then stated that what Chief Wallis knew at that time supported reasonable suspicion: the odor of intoxicants, the information supplied by dispatch through the 9-1-1 caller, and a description of the vehicle and its driving. (R.36:18; A-Ap. at A67).

STANDARD OF REVIEW

Reviewing allegations of denial of a right to confront the defendant's accusers is a question of law that the Appellate Court reviews de novo. State v. Weed, 2003 WI 85, ¶ 10, 263 Wis. 2d 434, 666 N.W.2d 485.

When the Appellate Court reviews a trial court's decision to deny a motion to suppress evidence, the Court accepts the circuit court's findings of fact unless they are clearly erroneous, and determines the application of constitutional principles to those facts independently of the circuit court, but benefitting from their analysis. State v. Popenhagen, 2008 WI 55, ¶ 31, 309 Wis. 2d 601, 749 N.W.2d 611.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONSIDERING THE 9-1-1 AUDIO RECORDING WITHOUT PROVIDING THE DEFENDANT AN OPPORTUNITY TO CROSS EXAMINE CHIEF WALLIS AS TO THE CONTENTS OF THE RECORDING.

A. Introduction.

The trial court erred by listening to the 9-1-1 audio call in camera and without providing Ms. Zinda an opportunity to cross-examine Chief Wallis as to the specific content of the recording that factored into his decision to seize Ms. Zinda in this case. Because that recording was not excised to include only portions of which Chief Wallis was a party, and because Ms. Zinda was not permitted to cross-examine Chief Wallis as to the contents of the recording he did or did not hear, admitting the recording into evidence was in error.

B. Standard of Review.

The Court will review a violation of due process as a question of law and review it de novo. State v. Weed, 2003 WI 85, ¶ 10, 263 Wis. 2d 434, 666 N.W.2d 485. These requirements are satisfied if the witness is present and subject to cross-examination. State v. Beauchamp, 2011 WI 27, ¶ 40, 333 Wis. 2d 1, 796 N.W.2d 780.

C. The Trial Court Erred in considering the 9-1-1 audio recording without providing Ms. Zinda an opportunity to cross-examine Chief Wallis as to the contents of the recording.

The right to cross-examine is the cornerstone of the right to confrontation. State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976). The defendant must have a meaningful right to cross-examine witnesses. State v. Thomas, 144 Wis. 2d 876, 425 N.W.2d 641 (1988). In this case, the Court listened to the audio recording after the close of testimony. Ms. Zinda did not have an opportunity to cross-examine Chief Wallis as to the content of the recording, or the content of the recording which he actually listened to.

By depriving Ms. Zinda of that opportunity, the Circuit Court prevented her from being able to determine the limits of his basis of knowledge. This is especially true in light of the Court's ruling that the communication between the caller and dispatch was not relevant, but that the communication between dispatch and Chief Wallis was relevant. (App. at A9-10). Ms. Zinda was not given the opportunity to cross-examine Chief Wallis as to what portions he actually heard and what portions he did not hear.

As a result of the trial court's error, Ms. Zinda was denied an opportunity for meaningful cross-examination about the crux of the issue in this matter, whether there was reasonable suspicion to seize Ms. Zinda. It was error to deny Ms. Zinda that right.

II. THE TRIAL COURT ERRED IN ITS DECISION THAT THE DEFENDANT WAS NOT SEIZED UNTIL AFTER SPEAKING WITH CHIEF WALLIS AND IN DETERMINING THAT THERE WAS REASONABLE SUSPICION TO SEIZE THE DEFENDANT.

A. Introduction.

The trial court erred in determining that Ms. Zinda was not seized until after Chief Wallis smelled her breath. Chief Wallis parked in Ms. Zinda's driveway. Officer Parkhurst followed her into the driveway, blocking her exit. Ms. Zinda exited her vehicle and was immediately confronted by Chief Wallis. She did not have an opportunity to avoid contact with him. The initial seizure took place prior to Chief Wallis detecting any odor from Ms. Zinda.

B. Standard of Review.

A person is seized for Fourth Amendment purposes when a reasonable person would have believed that he or she was not free to leave. County of Grant v. Vogt, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253). However, the seizure of a person must be based on more than an officer's "inchoate and unparticularized suspicion or hunch," but instead must

be grounded upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." State v. Post, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. An investigatory stop may be made when an officer observes wholly lawful conduct, "so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." State v. Waldner, 206 Wis. 2d 51, 57, 556 N.W. 2d 681 (1996).

C. The Trial Court erred in denying the Defendant's Motion to Suppress Evidence.

A seizure took place in this case after Ms. Zinda exited her vehicle, when Chief Wallis told her that he wanted to talk to her. This incident did not take place in a public space, but instead in Ms. Zinda's driveway. Chief Wallis waited for her to arrive home, and Officer Parkhurst blocked her in the driveway. Unlike in Vogt, Ms. Zinda would not have been able to drive away and to get to her front door she would have had to squeeze between her car and the garage door in order to avoid speaking with Chief Wallis. Chief Wallis' request to speak with her was the seizure in this case.

Here, there was insufficient evidence upon which to seize Ms. Zinda. There was a 9-1-1 caller who provided a

statement to dispatch. Dispatch then provided Chief Wallis with a description of 'erratic driving.' The phrase erratic driving alone has little meaning unless it is followed by descriptions of particular driving that makes it erratic. The information supplied to Chief Wallis at that point was only of erratic driving, nothing specific.

Chief Wallis instructed Officer Parkhurst to perform a traffic stop only if he independently observed any bad driving, which Officer Parkhurst did not observe. Chief Wallis could have simply told him to pull her over and effectuated a traffic stop if he had reasonable suspicion to do so. Knowing he did not have reasonable suspicion at that point, Chief Wallis instead instructed Officer Parkhurst to perform the stop if he would have had an independent basis to do so, which he did not.

Chief Wallis waited in the driveway for Ms. Zinda to return to her home. Immediately upon her exiting the vehicle he confronted her and said he wanted to talk to her about her alleged driving. It is not unusual that Ms. Zinda would act surprised at that sequence of events. To say there was no seizure until he requested field sobriety tests undermines the long history of cases describing the sequence of an OWI arrest: reasonable suspicion for seizure, reasonable suspicion for field sobriety tests,

probable cause to administer a preliminary breath test, and probable cause to arrest. County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541 (1999).

As a result of the trial court's erroneous review of the facts and application of the law to the facts in this case, the Court erred in denying Ms. Zinda's motion.

CONCLUSION

Therefore, based on the arguments above, case precedent, and the record before this Court, Ms. Zinda respectfully requests that this Court reverse the findings of the Circuit Court and find that the trial court erroneously exercised its discretion in denying the defendant's motion to suppress evidence. As a result, we are asking that this Court reverse the decision of the Circuit Court to deny the Defendant's motion to suppress and remand to the Circuit Court consistent with this Court's Order.

Dated in Brookfield, Wisconsin this 16th day of May, 2016.

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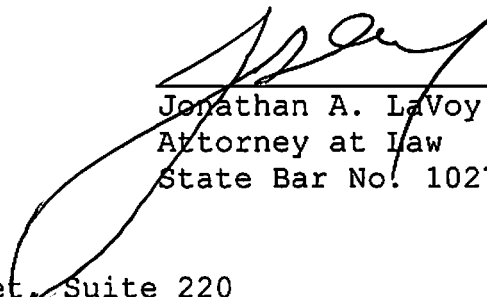
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and Wis. Stat. § 809.19(8)(c) for a brief produced with a monospace font. The length of this brief is seven (7) pages.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Section 809.12(12).

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Dated in Brookfield, Wisconsin this 16th day of May,
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).


I further certify that this 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.

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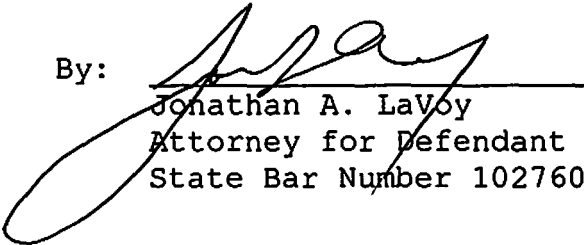
I hereby certify that this brief and all accompanying certifications were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious on May 16, 2016.

I further certify that the brief and all accompanying certifications were correctly addressed and postage was pre-paid.

Dated in Brookfield, Wisconsin this 16th day of May, 2016.

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