STATE OF WISCONSIN

C O U R T O F A P P E A L S

District II

Case No. 16-AP000455-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MARY G. ZINDA,
Defendant-Appellant.

On Appeal From a Judgment of Conviction and Order Denying Defendant's Motion to Suppress Evidence Entered by the Honorable Lloyd V. Carter, Circuit Judge, Branch 4, Waukesha County

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY CONSIDERED THE 9-1-1 RECORDING WITHOUT PROVIDING THE DEFENDANT-APPELLANT AN OPPORTUNITY TO CROSS-EXAMINE CHIEF WALLIS AS TO ITS CONTENTS

On June 1, 2015, Judge Carter heard a Motion to Suppress Evidence brought by Ms. Zinda, based on the circumstances of Ms. Zinda's stop. After the hearing concluded, and outside of both the state and Ms. Zinda's presence, Judge Carter listened

to the 911 call, and thus violated Ms. Zinda's constitutional rights.

The Plaintiff-Respondent argues that the Confrontation Clause does not apply to pretrial hearings, citing State v. Zamzow, 366 Wis. 2d 562, 570, 874 N.W.2d 328 (2015). (Plaintiff-Respondent's brief at page 7). However, the case at hand is very different than Zamzow. In Zamzow, there was an evidentiary hearing to Suppress Evidence obtained pursuant to an OWI, just as there was in the present case. However, unlike the case at hand, the officer who had stopped the man in Zamzow had passed away prior to the evidentiary hearing. At the hearing, the man in Zamzow objected to the admission of the deceased officer's squad video based on the confrontation clause.

The Plaintiff-Respondent further argues that in addition to Zamzow, there is an overwhelming amount of precedent from both The Supreme Court of the United States and The Supreme Court of Wisconsin, indicating the confrontation right does not apply to pretrial hearings. (Plaintiff-Respondent's brief at 7). For instance, the Plaintiff-Respondent cites, State v. Frambs, 167 Wis. 2d 700, 704.460 N.W.2d 811 (1990) and State v. Matlock, 415 U.S. 164, 94 S. Ct. 989 (1974), among others. (Id.)

However, the cases cited by the Plaintiff-Respondent address the scope of the confrontation clause through the reliability of evidence presented through an unavailable witness or through testimonial hearsay. While hearsay and the confrontation clause "stem from the same roots," they are not the same. See Dutton v. Evans, 400 U.S. 74, 86, 91 S. Ct. 210, 218, 27 L. Ed. 2d 213 (1970).

The present case does not have an issue with regard to the witness's availability. In the case at hand, Ms. Zinda's rights were violated because the judge considered evidence that neither party could either elicit testimony, nor cross-examine a witness on.

The potential consequences of the Plaintiff-Respondent's argument that there is no absolute right to confrontation in these types of circumstances are deeply concerning. The Supreme Court has held that there are certain stages of the criminal process considered "critical," like Preliminary Hearings, Entrapment Hearings, and Suppression Hearings. See e.g McMillian v. State, 83 Wis. 2d 239, 244, 265 N.W.2d 553, 556 (1978). These critical stages allow those charged with a crime the opportunity to have an attorney present and allow the accused to cross examine witnesses. Id. By claiming that the right to confrontation does not apply to pre-trial hearings in any context, essentially renders the entire set of

hearings to merely a formality. By admitting evidence outside the presence of the hearing, Ms. Zinda was not able to put on a proper defense, and thus if her right to confront witnesses was not violated, her due process rights certainly were violated.

II. THE CIRCUIT COURT ERRED IN ITS DECISION FINDING THAT THE DEFENDANT-APPELLANT WAS SEIZED AFTER CHIEF WALLIS SMELLED ALCOHOL ON HER BREATH BECAUSE MS. ZINDA WAS SEIZED WHEN SHE ARRIVED HOME BECAUSE SHE WAS NOT FREE TO LEAVE WHEN OFFICERS WERE ON HER PROPERTY, AND OFFICERS DID NOT HAVE REASONABLE SUSPICION TO SEIZE HER.

As previously indicated, the court heard a Motion to Suppress Evidence based on the circumstances surrounding the incident with Chief Wallis and Ms. Zinda. A brief synopsis of the facts presented at the motion hearing show that on the date of the incident, Ms. Zinda was returning home from an earlier errand, being followed by a police officer in squad. Earlier, a 9-1-1 caller had reported a vehicle driving erratically and described the vehicle as Ms. Zinda's. Chief Wallis responded to Ms. Zinda's home in a marked squad, and parked in Ms. Zinda's driveway. After no response to knocking on the door, he instructed an officer to follow her and to make note of any erratic driving. The officer did not observe any.

Ms. Zinda pulled into her driveway around 3:00 p.m. and was surprised to find a police car parked in her driveway,

combined with another officer driving behind her. Confused, she exited her vehicle. As she did, so did Chief Wallis, whose squad was to her left, and he immediately confronted her, smelling alcohol on her breath. She challenged the stop in court and her motion was denied.

The Plaintiff-Respondent cites United States v. Mendhall, 446 U.S. 544, 554, 100 S. Ct. 1870 (1980), noting that a seizure occurs only when the officer, by means of a physical force or show of authority, has in some way restrained the liberty of a citizen. (Plaintiff-Respondent's brief at 7). The Plaintiff-Respondent further cites I.N.S v. Delgado, 466 U.S. 210, 216 (1984), pointing out that the court in its adoption of Mendenhall, held that law enforcement has not seized a person unless "the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave. (Plaintiff-Respondent's brief at 10-11).

In the case at hand, no reasonable person would have felt free to leave. Ms. Zinda was being followed by an officer and she returned home to see another officer in her driveway. The officer already on her property was not just any officer, but was the chief of police. Furthermore, both were in marked uniforms.

To further the feeling of uneasiness, Chief Wallis exited his squad at the same time as Ms. Zinda, and immediately confronts her. The Plaintiff-Respondent cites State v. Harris, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996), claiming that Harris held that there is no yield to authority when an officer approaches a parked vehicle. (Plaintiff-Respondent's brief at 11). However, no such language exists in Harris that would suggest that there is no yield to authority when an officer simply approaches a vehicle.

Even if this language did exist, Ms. Zinda was not parked in a public area, she was parked at her own residence in her own driveway. These officers were on private property, pursuing Ms. Zinda for alleged erratic driving that neither officer was able to observe to be true.

In sum, Ms. Zinda came home to the Chief of police waiting for her in her driveway, another police officer who had been following her for some time, and was confronted by them as soon as she exited her vehicle. Based on these facts, Ms. Zinda was seized, as she could not have left her driver's side door without passing Chief Wallis. Moreover, this seizure lacked reasonable suspicion, because the officer following her for some time did not perceive any erratic driving, nor did Chief Wallis see any erratic driving.

CONCLUSION

Based on the arguments above, case precedent, and the record before this Court, Ms. Zinda respectfully requests this Court to find that the Circuit Court's findings were erroneous, reverse the Circuit Court's order denying the defendant's motion to suppress, and remand to the Circuit Court consistent with this Court's order.

Dated in Brookfield, Wisconsin this 28th day of July, 2016.

KIM & LAVOY, S.C.

By: _____

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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.

Dated in Brookfield, Wisconsin this 28th day of July, 2016.

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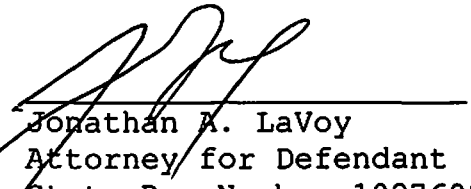
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hearby certify that I have submitted an electronic copy of this appendix that complies with Wis. Stats. § 809.19(13).

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

Dated in Brookfield, Wisconsin this 28th day of July, 2016.

KIM & LAVOY, S.C.

By: 

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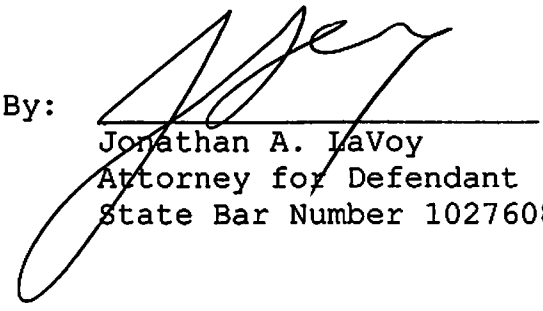
CERTIFICATE OF MAILING

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 July 28, 2016.

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

Dated in Brookfield, Wisconsin this 28th day of July, 2016.

KIM & LAVOY, S.C.

By: 

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