STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP000456-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY M. PAULSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Suppression entered in the Calumet County Circuit Court, the Honorable Jeffrey S. Froehlich Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Mr. Paulson's Vehicle was Unreasonably Seized at the Time Police Conducted a Dog Sniff; Therefore, the Dog Sniff cannot Provide Probable Cause to Justify the Subsequent Search of the Vehicle, and the Evidence Obtained Therefrom must be Suppressed.

The State's response brief is divided into two substantive argument sections, B and C.

The State's first argument, B, is that Deputy Coleman had reasonable suspicion to prolong the seizure of Mr. Paulson's vehicle. (State's response at 3-5). However, the State's argument is undermined by its failure to even identify *what* criminal activity Deputy Coleman had reasonable suspicion to believe Mr. Paulson was committing or about to commit. The State further argues that Deputy Coleman "diligently pursued his investigation to confirm or dispel his suspicion." (State's response at 5). To dispel his suspicion of *what*? The State never answers this critical question.

"Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or 'hunch' ... will not suffice.'" ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996) (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). The State's inability to even identify *what* illicit behavior there was reasonable suspicion of demonstrates that the prolonged seizure of Mr. Paulson was not supported by the existence of "specific, articulable facts" and reasonable

inferences therefrom; rather, Deputy Coleman acted upon an "unparticularized suspicion" or "hunch."

The State also misstates a key fact. The State asserts that Deputy Coleman based his decision to call for a drug dog, in part, on Mr. Paulson's prior drug offenses. (State's response at 4-5). But actually, Deputy Coleman testified that he called for the dog *before* learning about Mr. Paulson's history. When defense counsel asked Deputy Coleman whether he'd "had a chance to look up the defendant's criminal history" when he called for the drug dog, Deputy Coleman testified that, "I don't believe I had a chance to run him prior to calling the canine." (68:19; App. 119).

The circuit court suggested that there was reasonable suspicion of two possible categories of criminal activity—illicit substances (drugs or alcohol) and "sexual exploitation." (68:44; App. 144). The court relied on the fact that the female passenger was a minor, both parties seemed nervous,[1] Mr. Paulson had a history of drug offenses, the possibility of something concealed in the backseat underneath the tucked in coat, the somewhat secluded area, and the time of night. (68:44-45; App. 144-45).

[1] While undue nervousness may be a factor in the reasonable suspicion calculus, *see* ***State v. Sumner***, 2008 WI 94, ¶¶ 37-41, 312 Wis. 2d 292, 752 N.W.2d 783, caution must be taken against overemphasis. Nervousness is a "common and entirely natural reaction to police presence…" ***United States v. McKoy***, 428 F.3d 38, 40 (1st Cir. 2005); *see also*, ***United States v. Richardson***, 385 F.3d 625, 630–31 (6th Cir. 2004) (nervousness "is an unreliable indicator, especially in the context of a traffic stop. Many citizens become nervous during a traffic stop, even when they have nothing to hide or fear.") (internal citations omitted).

However, Deputy Coleman testified that he did not detect the odor of alcohol or marijuana. (68:19-20, 31; App. 119-20, 131). Nor did he detect the odor of tobacco. (86:19-20; App. 119-20). He denied observing any suggestion of sexual behavior. (68:17; App. 117). He denied that either Mr. Paulson or the female passenger made any movements to conceal anything. (68:19; App. 119). He agreed that the coat may have been placed as it was simply as a security precaution. (68:12; App. 112).

Mr. Paulson and his passenger explained that they were coworkers and had gotten off work. (68:20; App. 120). It was a warm, summer night, and they were parked facing the lake "in a way that they could kind of look at the lake through the front window." (68:20, 25; App. 120, 125). The reasonable inference is that Mr. Paulson and his passenger were decompressing after work, chatting, and enjoying the view. The circuit court stated that "nothing good ever happens after midnight." (68:44; App. 144). This statement ignores the reality that not everyone works a 9-5 job. Millions of Americans are awake after midnight at work or having just gotten off work.[2] Any suspicion of sexual exploitation or drug and alcohol use under these circumstances would be based on speculation, not reasonable inferences from particularized, objective factors, as required by the Fourth Amendment. ***State v. Gammons***, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623.

The State's second argument heading (C) states that "[t]here was no delay in the seizure of the defendant to accommodate the arrival of the dog to perform the sniff." Yet,

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[2] Three million Americans work graveyards and another four million work evening shifts (U.S. Bureau of Labor Statistics). *Available at*, http://www.pbs.org/livelyhood/nightshift/changing.html.

the body of the argument does not fit with this heading. (State's response at 6-8). The State does not argue that Deputy Coleman was still addressing the reason for the initial stop (a suspected parking violation) 27 minutes after the initial stop when the drug dog arrived. Thus, it appears that the State is actually only advancing one argument—that Deputy Coleman had reasonable suspicion or probable cause to extend the stop to investigate some unnamed criminal activity. As explained above, this argument is unavailing.

In sum, while the initial stop of Mr. Paulson's vehicle was lawful, the stop became an unconstitutional seizure once the purpose for the initial stop was resolved. By the time the drug dog arrived on scene, 27 minutes after the initial stop, there was neither probable cause nor reasonable suspicion to detain Mr. Paulson. Thus, the dog sniff occurred during an unconstitutional seizure, and the evidence obtained therefrom must be suppressed. *See* ***Gammons***, 241 Wis. 2d, ¶25.

CONCLUSION

For the reasons stated above and in Mr. Paulson's brief-in-chief, Mr. Paulson respectfully asks this Court to reverse the circuit court, vacate the judgment of conviction, and remand to the circuit court with directions to suppress the evidence found in Mr. Paulson's vehicle.

Dated this 20th day of July, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,039 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 20th day of July, 2016.

Signed:

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