

**RECEIVED**

**07-12-2016**

**COURT OF APPEALS OF WISCONSIN**

**DISTRICT III**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

---

VILLAGE OF ASHWAUBENON,

Plaintiff-Respondent,

v.

Appeal No. 16 AP 594

Case No. 15 CV 1436

MARK J. BOWE,

Defendant-Appellant.

---

**BRIEF OF PLAINTIFF-RESPONDENT**

---

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED  
IN THE CIRCUIT COURT FOR BROWN COUNTY  
THE HONORABLE TAMMY JO HOCK PRESIDING

---

CALEWARTS, DUFFY & ERDMAN, ASSOCIATED ATTORNEYS  
Attorneys for Plaintiff-Respondent  
Eric R. Erdman  
State Bar No. 1085832

ADDRESS:  
716 Pine Street  
Green Bay, WI 54301  
(920) 432-4391

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	iii
ISSUES PRESENTED FOR REVIEW.....	iv
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	iv
STATEMENT OF FACTS.....	1
ARGUMENT.....	3
<b>I. WISCONSIN COURTS HAVE CONSISTENTLY HELD THAT REASONABLE SUSPICION, BUT NOT PROBABLE CAUSE, IS REQUIRED FOR A LAW ENFORCEMENT OFFICER TO DETAIN A DEFENDANT FOR THE PURPOSE OF CONDUCTING FIELD SOBRIETY TESTS.....</b>	<b>3</b>
a. A police officer can make an investigative stop if the officer reasonably suspects that a person is violating the non-criminal traffic laws.....	3
b. A police officer can extend an investigative stop to request a person to perform field sobriety testing if the officer finds information subsequent to the initial stop which, when combined with information already-acquired, provides reasonable suspicion that a person was driving while under the influence of an intoxicant....	4
c. Officer Sands had specific and articulable facts to reasonably suspect that Bowe was driving while under the influence of an intoxicant.....	6

d. Unremarkable results on preliminary  
field assessments cannot successfully  
overcome a requisite showing that a  
person is driving while under the  
influence of an intoxicant.....7

CONCLUSION.....8

CERTIFICATION OF FORM AND LENGTH.....10

CERTIFICATION OF ELECTRONIC BRIEF.....11

## **TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

### **Cases**

<i>County of Jefferson v. Renz</i> , 231 Wis.2d 293, 310, 603 N.W.2d 541 (1999).....	4
<i>State v. Chambers</i> , 55 Wis.2d 289, 294, 198 N.W.2d 377 (1972).....	3
<i>State v. Colstad</i> , 2003 WI App. 25 , ¶19, 260 Wis.2d 406, 420, 659 N.W.2d 394.....	4
<i>State v. Griffin</i> , 183 Wis.2d 327, 333-34, 515 N.W.2d 535 (Ct.App.1994).....	3-4
<i>State v. Post</i> , 2007 WI 60, ¶10, 301 Wis.2d 1, 8, 16 733 N.W.2d 634.....	4-5
<i>State v. Young</i> , 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).....	5
<i>Terry v. Ohio</i> , 392 U.S. 1, 9, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	3

### **Statutes**

346.63(1) (a) .....	3
346.63(1) (b) .....	3
968.24.....	3
4th Amendment.....	3

### **ISSUES PRESENTED FOR REVIEW**

May a law enforcement officer request that a person perform field sobriety tests when the officer reasonably suspects the person is under the influence of an intoxicant, or must the law enforcement officer wait until he or she has probable cause?

Did the officer have the requisite level of suspicion to request the field sobriety tests?

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is not requested. Publication is neither appropriate nor requested, as Wisconsin Statutes §809.23 states, in part, "an opinion should not be published when....the decision is by one court of appeals judge under s.752.31(2) and (3)." §752.31(2) indicates that municipal ordinance violation cases, cases involving violations of traffic regulations, and cases involving civil forfeitures shall be decided by one court of appeals judge. The present matter falls in all three of those categories. To this party's knowledge, a three-judge panel has not been requested by Defendant-Appellant.

### **STATEMENT OF THE FACTS**

Mark J. Bowe was charged with OWI (1<sup>st</sup>) and PAC (1<sup>st</sup>). Officer Christopher Sands testified for the Village of Ashwaubenon (hereinafter the "Village"). R.19-3. Officer Sands is a patrol and public safety officer for Village of Ashwaubenon Public Safety. R.19-4. Officer Sands went through training at Fox Valley Tech Police Academy. R.19-4. Officer Sands is certified to perform field sobriety tests. R.19-15. On or around midnight on Sunday, January 18, 2015, Officer Sands was on duty and observed Mark Bowe's car traveling northbound on South Ashland Avenue. R.19-5. Officer Sands observed the vehicle being operated without a passenger side head light. *Id.* Sands ran a DOT check on the vehicle, and it returned with a canceled registration. *Id.* Sands then initiated a traffic stop. *Id.* Upon making contact with Defendant, Sands noticed that Bowe had glossy eyes, slurred speech, and an opened 24-pack of Bud Light that was partially covered up by a blanket. R.19-6. Sands also noted that Bowe's face was flush in color. R.19-11. Sands asked Bowe if he had been drinking, and Bowe admitted to consuming alcohol that evening. R.19-6. Sands issued written warnings to Bowe for the headlight being out and also for the canceled registration. R.19-20.

Sands detected a light odor of intoxicants emitting from inside the vehicle. R.19-12. Sands noted that the light odor of intoxicants moved from inside the vehicle to outside the vehicle when Bowe stepped out of the car, indicating that the odor was coming from the Defendant. *Id.* Sands noted that the pack of beer was opened; however, there were no open containers of intoxicants inside the vehicle. R.19-6.

Sands then asked Bowe to perform some preliminary tests. *Id.* Sands had Bowe count from 71-59 backwards. *Id.* He performed the test with unremarkable results. *Id.* Sands then asked Bowe to perform the alphabet test going from J to T. *Id.* He again performed the test with unremarkable results. R.19-7. Sands also asked Bowe to perform a fingertip dexterity test. *Id.* Bowe performed with unremarkable results. *Id.*

Based on Bowe's admission to consuming alcohol, his slurred speech, and his red, glossy eyes, Sands asked Bowe if he was willing to step out of the vehicle to perform standardized field sobriety testing, and Bowe agreed to do so. *Id.*

After performance of the standardized field sobriety tests (hereinafter "sfst's"), Bowe was informed that he was being placed under arrest for operating a motor vehicle

under the influence of intoxicants. Bowe was issued citations for operating while under the influence of intoxicants (1<sup>st</sup>), contrary to Wis. Stat. §346.63(1)(a) and prohibited alcohol concentration (1<sup>st</sup>), contrary to Wis. Stat. §346.63(1)(b).

### **ARGUMENT**

**I. WISCONSIN COURTS HAVE CONSISTENTLY HELD THAT REASONABLE SUSPICION, BUT NOT PROBABLE CAUSE, IS REQUIRED FOR A LAW ENFORCEMENT OFFICER TO DETAIN A DEFENDANT FOR THE PURPOSE OF CONDUCTING FIELD SOBRIETY TESTS.**

**a. A police officer can make an investigative stop if the officer reasonably suspects that a person is violating the non-criminal traffic laws.**

The Fourth Amendment to the United States Constitution provides that, "The right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause..." U.S. Const. Amend. IV.

"First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime, Wis. Stat. §968.24<sup>1</sup> or reasonably suspects that a person is violating the non-criminal traffic laws, *State v. Griffin*, 183 Wis.2d 327,

---

<sup>1</sup> Wis. Stat. §968.24 codifies the "reasonable suspicion" standard articulated by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968) and adopted by the Wisconsin Supreme Court in *State v. Chambers*, 55 Wis.2d 289, 294, 198 N.W.2d 377 (1972). (citation omitted). *Terry* and *Chambers* hold that "a police officer may in appropriate circumstances temporarily stop an individual when, at the time of the stop, he or she possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." *Id.*



333-34, 515 N.W.2d 535 (Ct.App.1994). "(The court) maintains the well-established principle that reviewing courts must determine whether there was reasonable suspicion for an investigative stop based on the totality of the circumstances." *State v. Post*, 2007 WI 60, ¶26, 301 Wis.2d 1, 16, 733 N.W.2d 634.

**b. A police officer can extend an investigative stop to request a person to perform field sobriety testing if the officer finds information subsequent to the initial stop which, when combined with information already acquired, provides reasonable suspicion that a person was driving while under the influence of an intoxicant.**

After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. *County of Jefferson v. Renz*, 231 Wis.2d 293, 310, 603 N.W.2d 541 (1999). This passage establishes that particular observations of impairment allow an officer to request field sobriety tests.

An extension of a stop to request field sobriety tests is reasonable if, "The officer described information subsequent to the initial stop which, when combined with

information already acquired, provided reasonable suspicion that (the defendant) was driving while under the influence of an intoxicant". *State v. Colstad*, 2003 WI App. 25, ¶ 19, 260 Wis.2d 406, 420, 659 N.W.2d 394.

An officer has reasonable suspicion that an individual is impaired if he or she is, "able to point to specific and articulable facts which, taken together with rational inferences from those facts," suggest impairment. See *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 8, 733 N.W.2d 634 (quoted source omitted).

"What constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Young*, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App.1997) (quoted source omitted). "An investigative stop must be based on more than a police officer's inchoate and unparticularized suspicion or hunch". *Post*, ¶10, 301 Wis.2d 1, 8, 733 N.W.2d 634.

What must be determined then is whether the officer discovered sufficient articulable information after the stop which, after stopping the car and contacting the driver, the officer's observations of the driver may cause

the officer to reasonably suspect the driver of operating the vehicle under the influence of an intoxicant.

**c. Officer Sands had specific and articulable facts to reasonably suspect that Bowe was driving under the influence of an intoxicant.**

At around midnight, Sands observed Bowe's vehicle being operated without a passenger side head light. R19-5. The vehicle had a canceled registration. *Id.* Based on the foregoing circumstances, Sands reasonably suspected that Bowe was in violation of non-criminal traffic laws.

After conducting a traffic stop and upon making contact with Bowe, Sands noticed that Bowe was flush in color, and that Bowe's eyes were glossy. Bowe's speech was slurred, and Sands detected a light odor of intoxicants emitting from inside the vehicle. R19-5. Sands noted that the light odor of intoxicants moved from inside the vehicle to outside the vehicle when Bowe stepped out of the car, indicating that the odor was coming from Bowe. R19-12. Sands also noticed on the rear seat that there was a 24 pack of Bud Light partially covered by blankets. R19-10. Sands noted that the pack of beer was opened; however, there were no open containers of intoxicants inside the vehicle. R19-6. Sands asked Bowe if he had been drinking on the date in question, and Bowe responded, "Yes, I'm not going to lie to you". R19-10.

Based on the post-investigatory stop indicators of:

- 1) Bowe's admission to drinking;
- 2) Bowe's flush skin tone;
- 3) His glossy, blood shot eyes;
- 4) His slurred speech;
- 5) Light odor of intoxicants emitting from him; and
- 6) The opened 24 pack of beer in the car,

Sands reasonably suspected that Bowe was operating while impaired.

**d. Unremarkable results on preliminary field assessments cannot successfully overcome a requisite showing that a person is driving while under the influence of an intoxicant.**

Sands testified that Bowe performed three preliminary assessments. He had Bowe:

- 1) Count from 71-59 backwards;
- 2) Recite the letters J-T;
- 3) Touch his fingertips. R-19-6-7.

Sands also testified that Bowe performed each preliminary assessment with unremarkable results. R-19-6-7. Bowe argues that his "flawless performance" on the pre-field sobriety testing alleviated Sands's articulable suspicion of any illegal activity. See App. Br. p. 5.

There is no law cited in the record that unremarkable results on three preliminary assessments should be utilized

to combat a showing of reasonable suspicion or probable cause to perform sfst's. Therefore, the objective clues of impairment that led to the sfst's can and should be given far greater weight than three nondescript preliminary assessments.

Sands then asked Bowe if he was willing to step out of the vehicle to perform standardized field sobriety testing, and Bowe explicitly and without coercion agreed to do so. R19-7. Sands had the requisite reasonable suspicion to conduct the sfst's.

### **CONCLUSION**

Sands conducted sfst's in accordance with reasonable suspicion in this matter. Based on specific and articulable facts, Sands drew reasonable inferences suggesting Bowe's impairment. His specific observations of impairment led him to request sfst's. The missing headlight, the canceled registration, glossy eyes, flush skin tone, the odor of intoxicants, the presence of alcohol in the vehicle, and the admission of drinking together establish reasonable suspicion and probable cause. Therefore, Plaintiff-Respondent respectfully requests this Court to issue an Order affirming the Circuit Court's Ruling Denying Defendant's Motion for Suppression. This would effectively result in affirming the circuit court's

entire Order, including Bowe's adjudication of guilt on the OWI and PAC charges.

Dated this 12th day of July, 2016.

Calewarts, Duffy & Erdman  
Attorneys for Plaintiff-Respondent

Eric R. Erdman  
Eric R. Erdman  
State Bar No. 1085832  
716 Pine Street  
P.O. Box 488  
Green Bay, WI 54305-0488

**CERTIFICATION**

I hereby certify that this Brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b) and 809.19(8)(c) for a brief produced using the following font:

Monospaced font: double-spaced, 1.5 inch margin on the left side and 1-inch margin on all other sides. The length of this brief is 9 pages and contains 1,780 words.

Dated this 12th day of July, 2016.

Calewatts, Duffy & Erdman  
Attorneys for Plaintiff-Respondent

Eric R. Erdman

Eric R. Erdman  
State Bar No. 1085832  
716 Pine Street  
P.O. Box 488  
Green Bay, WI 54305-0488  
(920) 432-4391

**ELECTRONIC BRIEF CERTIFICATION**

As required by Wisconsin Statutes Section  
809.19(12)(f), I certify that the text of the electronic  
copy of this Brief is identical to the text paper copy of  
the brief.

Respectfully signed this 12th day of July, 2016.

Calewarts, Duffy & Erdman  
Attorneys for Plaintiff-Respondent

Eric R. Erdman

Eric R. Erdman  
State Bar No. 1085832  
716 Pine Street  
P.O. Box 488  
Green Bay, WI 54305-0488  
(920) 432-4391



**CERTIFICATION OF MAILING**

I certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on July 12, 2016. I further certify that this brief was correctly addressed and postage was prepaid.

Dated this 12th day of July, 2016.

By: Eric R. Erdman  
Eric R. Erdman  
Calewarts, Duffy & Erdman  
Attorneys for Plaintiff-Respondent,  
Village of Ashwaubenon  
716 Pine Street  
P.O. Box 488  
Green Bay, WI 54305-0488  
(920) 432-4391  
State Bar No. 1085832