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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.: 16 AP 662

JOHN J. VALENTI,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON FEBRUARY 10, 2016 IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, BRANCH I, THE HONORABLE THOMAS GRITTON PRESIDING.

Respectfully submitted,

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STATEMENT ON PUBLICATION

Defendant-appellant does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On May 31, 2015, Inspector Scott Hlinak, of the Wisconsin State Patrol, was traveling southbound on Highway 41 in the Township of Nekimi when he passed a slow moving farm vehicle pulling a gravity box. (33:3-4) It was approximately 5:00 p.m. on a Sunday. (33:10) The farm vehicle took up part of the right-hand lane. (Id.) After Inspector Hlinak passed the slow moving farm vehicle, he observed a vehicle traveling in the right lane pass the same slow moving farm vehicle. (33:5) Inspector Hlinak estimated there was half to three quarters of the right hand lane available when the vehicle passed. (Id.) After passing the slow moving farm vehicle, the passing vehicle used the right hand lane to pass Inspector Hlinak, who was traveling in the left hand lane. (33:5) Inspector Hlinak was operating an unmarked Chevy Tahoe truck. (33:11)

Inspector Hlinak conducted a traffic stop on the vehicle for traveling 81-82 miles per hour in a 65 mph zone. (33:6) Initially Inspector Hlinak testified that speeding is a possible indicator of impairment, but when pressed on cross examination, he confirmed "the act of speeding itself" is not a possible indicator of impairment. (33:11) The vehicle safely yielded to Inspector Hlinak's overhead

lights. (Id.) As the vehicle pulled over, Inspect Hlinak did not observe anything that would indicate the driver was impaired. (Id).

Inspector Hlinak approached the passenger side of the vehicle. (33:6) The vehicle contained two occupants. John Valenti was in the driver's seat, and his wife was in the passenger seat. (Id.)

The sole indicator Inspector Hlinak detected, potentially indicative, but not determinative of impaired driving, was the generalized odor of intoxicants. Even then, Inspector Hlinak wavered, when describing his observation. Initially, the inspector testified that he detected a strong odor of intoxicants coming from inside the vehicle. (Id.) However, the inspector later seemed to retreat from that description:

> But in a situation where you are outside and there is moving air, the ability to detect odor coming from inside of the vehicle, it is very difficult to quantify to put any type of level on it so I guess being on the safe side, just making sure, I had him step out of the vehicle.

(33:10) Inspector Hlinak admitted he could not identify which occupant smelled like alcohol. (Id.) The record is devoid of any description of Inspector Hlinak asking Valenti, or his wife, whether either had consumed alcohol.

Inspector Hlinak's questioning failed to garner evidence suggesting the driver, Valenti, had consumed alcohol. Inspector

Hlinak asked whether there were any open intoxicants in the vehicle. (33:7) Valenti and his wife denied having open intoxicants in the vehicle. (Id.) Inspector Hlinak did not locate any open intoxicants in the vehicle. (Id.) Valenti did not admit to consuming alcohol, and the record does not reflect him being asked whether he consumed alcohol that day. (33:9) Valenti's wife stated she had been drinking wine earlier in the day. (Id.) Inspector Hlinak admitted it was possible Valenti's wife was the only person drinking based on the odor of intoxicants. (Id.)

Inspector Hlinak admitted he did not observe any signs that Valenti was under the influence of an intoxicant. (33:13) The stop occurred at 5:00 p.m. (33:10) Valenti provided his identification and insurance. He did not struggle to find either document and he retrieved each document without fumbling. (33:13) The inspector did not observe Valenti's speech to be slurred. (33:12) He did not observe Valenti's eyes to be red, bloodshot, or glassy. (Id.) Valenti was wearing sunglasses at the time of the traffic stop, but Inspector Hlinak did not ask Valenti to remove the sunglasses. (Id.)

Gaining no additional evidence of impaired driving, the inspector returned to his car and wrote Valenti a citation for speeding. (Id.) He printed the completed citation and returned to

Valenti's vehicle. (Id.) But, before sending Valenti on his way, Inspector Hlinak asked Valenti to move his vehicle further to the right-hand shoulder. (Id.) Inspector Hlinak then ordered Valenti out of his vehicle, just to "be on the safe side", to further investigate whether Valenti was impaired. (33:10) Inspector Hlinak never gave Valenti the speeding citation, nor did he tell Valenti that he was free to leave.

Valenti was cited for Operating a Motor Vehicle While Under the Influence as a first offense. (1)

A motion hearing was held wherein Valenti asked the trial court to suppress all evidence obtained as a consequence of his unlawful detention. (15) After testimony from Inspector Hlinak and argument from both parties, the trial court denied Valenti's motion. (Id.) The court concluded there was reasonable suspicion to remove Valenti from his vehicle based on the following findings: 1) Inspector Hlinak's attention was initially drawn to Valenti's vehicle as it passed the slow moving agricultural vehicle taking up enough of the lane that there was half or three quarters of the lane available for the vehicle to pass; 2) a traffic stop was performed for speeding; 3) there was no testimony on the matter, but common sense told the court the inspector approached the passenger side of the vehicle for

safety purposes; 4) there was an odor of intoxicants coming from the vehicle; 5) that the passenger had been drinking earlier in the day but the inspector believed the odor was inconsistent with only one of the two occupants consuming alcohol. (33:19-21)

The case proceeded to stipulated trial on February 8, 2016. (16) The trial court found Valenti guilty of Operating Under the Influence, as a first offense, contrary to Wis. Stat. § 346.63(1)(a). The court imposed, but stayed, a forfeiture of $325.00, a six-month revocation of operating privileges, and a 12-month order for an ignition interlock device. (18) As part of the stipulation, Valenti reserved his right to appeal the trial court's denial of his suppression motion. (16) Valenti now appeals. (27)

Standard of Review

The Fourth Amendment to the United States Constitution and the Wisconsin Constitution art. I § 11 guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." A temporary detention of an individual, even for a brief period of time and for a specific, limited purpose, constitutes a seizure under the Fourth Amendment. ***Whren v. United States***, 517 U.S. 806, 809-810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996). Review of a warrantless search

implicates these constitutional provisions. ***State v. Williams***, 241 Wis.2d 631, 641, 623 N.W.2d 106, 112 (2001).

Whether there is reasonable suspicion to detain an individual for investigatory purposes is a question of constitutional fact. ***State v. Martwick***, 231 Wis. 2d 801, 811, 604 N.W.2d 552, 556 (2000). A finding of constitutional fact consists of both the circuit court's findings of historical fact and their application to constitutional principles. ***State v. Popke***, 317 Wis.2d 118, 126, 765 N.W.2d 569, 573 (2009). Appellate courts undergo a two-step analysis. First, this Court reviews the lower court's findings of historical fact and corrects those that are clearly erroneous. ***Williams***, 241 Wis. 2d at 643. Second, this Court reviews the determination of reasonable suspicion *de novo*. ***Id***. Under a *de novo* standard of review, this Court owes no deference to the lower court's legal conclusions. ***Id***.

ARGUMENT

I. REMOVING VALENTI FROM HIS VEHICLE FOR INVESTIGATORY PURPOSES WAS NOT REASONABLY RELATED TO THE CIRCUMSTANCES THAT GAVE RISE TO THE ORIGINAL SEIZURE.

An investigatory seizure must be supported by reasonable suspicion, "grounded in specific, articulable facts and reasonable inferences from those facts, that a person is or was violating the law." ***State v. Colstad***, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 418-19, 659 N.W.2d 394, 400, quoting, ***State v. Gammons***, 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623. To request a driver perform standardized field sobriety tests (SFSTs) constitutes a greater invasion of liberty than a traffic stop and must be separately justified by specific and articulable facts showing a reasonable basis for the request. ***Id***. at ¶ 19. Detention for SFSTs is not a *de minimis* intrusion. *See* ***Dunaway v. New York***, 442 U.S. 200, 209 (1979) (reiterating that even brief on-the-spot detentions constitute a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.") (Brennan, J.) (quoting ***Terry v. Ohio***, 392 U.S. 1, 20 (1968)).

To analyze the constitutionality of Valenti's seizure, this Court must first determine whether the seizure was justified at its

inception. ***Terry***, 392 U.S. at 19-20. If the seizure was justified, this Court must decide whether the inspector's actions were reasonably related to, and justified by, the circumstances that gave rise to the seizure. ***Terry***, 392 U.S. at 19-20; ***State v. Arias***, 311 Wis. 2d 358, 378, 752 N.W.2d 748, 757 (2008). For a search to be considered reasonable, "[t]he scope of the search must 'be strictly tied to and justified by' the circumstances which rendered [the search's] initiation permissible." ***Id****. quoting,* ***Terry****,* 392 U.S. at 29.

To determine what constitutes reasonable suspicion, courts apply a common sense test: considering all facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his training and experience? ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

A. The initial seizure of Valenti was justified.

Valenti does not dispute whether Inspector Hlinak had probable cause to stop him for speeding. He did. Valenti does, however, dispute whether there were specific and articulable facts to justify expanding the purpose of the stop from a speeding investigation to one focused on operating while under the influence.

B. Inspector Hlinak unreasonably seized Valenti for investigatory purposes absent a factual basis to conclude Valenti was operating under the influence of an intoxicant.

a. Valenti's driving did not create reasonable suspicion that he was under the influence.

The reason for Valenti's initial seizure, speeding, did not establish reasonable suspicion that Valenti was operating under the influence. Valenti was lawfully stopped after Inspector Hlinak obtained a radar reading that indicated Valenti's vehicle was traveling faster than the posted speed limit. The scope of the stop, at the moment of the seizure, was limited to speeding. Significantly, when asked whether the act of speeding is an indicator of impairment, Inspector Hlinak answered, "Not the act of speeding itself." (33:11)

Examining the totality of the circumstances, then, other factors must have existed giving rise to reasonable suspicion of impaired driving. Although Inspector Hlinak's first approach to the vehicle was legally based on the speeding investigation, he gained no additional facts to justify expanding the scope of the seizure to an impaired driving investigation.

Prior to the stop, other driving behavior observed by Inspector Hlinak did not create a sufficient factual basis to support reasonable

suspicion of intoxicated driving. Valenti passed a slow moving farm vehicle that was taking up part of the right hand lane. Inspector Hlinak testified that moving to the left-hand lane was "probably" the only safe option for passing the farm vehicle. (33:5) That said, the record is devoid of any description of either Valenti or the farm vehicle changing direction in order to accommodate one another. The record does not describe the distance between Valenti's vehicle and the farm vehicle. The record does not include any mention of Inspector Hlinak conducting a traffic stop on Valenti's vehicle for the way it passed the farm vehicle. There is no reason to believe a traffic stop would have occurred were it not for the speeding violation. Indeed, the act of passing the farm vehicle was so insignificant that the inspector could not recall whether he even discussed it with Valenti. (33:7).

b. Other observations made by Inspector Hlinak do not support reasonable suspicion that Valenti was operating under the influence.

On the totality of the circumstances – prior to the stop – no other factors pointed to impaired driving. The stop occurred at approximately 5:00 p.m. on a Sunday. (33:10) The time of day, seven hours before bar time, is not consistent with intoxicated driving. *See* ***State v. Post***, 301 Wis. 2d 1, 22, 733 N.W.2d 634 (2007) (driving

deviations that occur at "bar time" can lend credence to a suspicion that a driver is under the influence). The record does, however, indicate that Valenti yielded appropriately to Inspector Hlinak's overhead lights and pulled over. There was "nothing that would indicate impairment" in the way Valenti pulled over during the traffic stop. (33:11)

Once Inspector Hlinak reached Valenti's car, during the initial and legal portion of the seizure to investigate speeding, the Inspector gained no additional facts that would support the extension of the scope of the seizure. Unlike the defendant in ***State v. Krause***, where the Court of Appeals found reasonable suspicion existed, Valenti's speech was not slurred, his eyes were not observed to be bloodshot, and the record does not contain descriptions of inappropriate behavior. (33:12) 168 Wis. 2d 578, 587-588, 484 N.W.2d 347 (Ct. App. 1992). There were no open intoxicants in the vehicle. (33:7) When asked for identification and proof of insurance, Valenti provided both to Inspector Hlinak without any "indicators of impairment." (33:13) There is nothing in the record establishing Valenti's point of departure (for example a bar/restaurant), or his destination, as suspicious. Finally, it is worth reminding the Court that after making all of the observations he relied upon to establish

reasonable suspicion to perform SFSTs, Inspector Hlinak instructed Valenti to further operate his vehicle on the side of a busy highway. (33:12) Were there true concern that Valenti was under the influence, the Inspector would not have ordered Valenti to again drive his vehicle.

The generalized odor of intoxicants was the sole fact gained after the lawful seizure of Valenti but prior to his illegal removal from the vehicle. And that in and of itself was not sufficient. An odor of intoxicants that is difficult to quantify, alone, does not create an objectively reasonable suspicion of operating while intoxicated because not every person that has consumed alcohol is intoxicated. ***State v. Gonzalez***, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. 2014) ("I begin my analysis by repeating the point made by a standard jury instruction: 'Not every person who has consumed alcoholic beverages is under the influence.'") (internal quotation omitted) (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Importantly, there was a reasonable explanation for the odor, inconsistent with Valenti's guilt. His wife, who was much closer to Inspector Hlinak than Valenti, stated she consumed alcohol earlier in the day. But, the mere fact that Valenti's wife was drinking does not constitute evidence of Valenti drinking. ***State v.***

Seibel, 163 Wis. 2d 164, 182, 471 N.W.2d 226, 234 (1991). During the motion hearing, Inspector Hlinak confirmed that he did not believe the odor was likely to have been as strong if only Valenti's wife consumed alcohol. (33:9-10) There is no explanation for the basis of this conclusion. Inspector Hlinak knew only that the passenger had consumed wine earlier in the day. (33:7) The record does not support Inspector Hlinak asking Valenti's wife when she had last consumed wine, over what period of time she consumed the wine, or even how much wine she consumed. Inspector Hlinak simply did not have enough information to form conclusions about whether it was likely that one or both passengers were contributing to the odor of intoxicants. Moreover, he never asked Valenti, the operator of the vehicle, whether he consumed any alcohol.

When Inspector Hlinak approached Valenti's vehicle the second time, he had the speeding ticket completed. Continued investigation can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. ***State v. Malone***, 2004 WI 108, ¶ 45, 274 Wis. 2d 540, 566, 683 N.W.2d 1, 14, *citing* ***State v. Griffith***, 236 Wis. 2d 48, ¶ 54, 613 N.W.2d 72 (2000). *See also* ***Florida v. Royer***, 406 U.S. 491, 499, 103 S.Ct. 1319 (1983) (detention "must be temporary and

last no longer than is necessary to effectuate the purpose of the stop.") At the point that Inspector Hlinak re-approached the vehicle, he needed to have reasonable suspicion of another offense to prolong the extension. But, he did not have it.

c. Inspector Hlinak failed to take investigatory measures to quickly confirm or dispel his hunch that Valenti was under the influence.

Inspector Hlinak extended the detention longer than was necessary to complete the investigation. To pass constitutional muster, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. ***Colstad***, 260 Wis. 2d. 418-19, citing to ***State v. Wilkens***, 159 Wis. 2d 618, 626, 465 N.W.2d 206, 210 (Ct. App. 1990). The speeding investigation was completed at the point that the citation was printed and ready to be given Valenti. Yet, Valenti was ordered to remain on scene for a secondary investigation.

Inspector Hlinak impermissibly removed Valenti from his vehicle based on nothing more than a hunch. An intrusion upon constitutionally guaranteed rights must be based on more than an inarticulate hunch. ***Terry***, 392 U.S. 22. A hunch is not reasonable suspicion and does not authorize a police seizure. ***State v. Guy***, 172 Wis. 2d 86, 94, 492 N.W.2d 311 (1992). After confirming that it was

difficult to detect the odor of intoxicants coming from inside the vehicle, that it was difficult to quantify the level of the odor of intoxicants, and recognizing that it was possible that the passenger was the only source of the odor of intoxicants, Inspector Hlinak testified that he nevertheless removed Valenti from the vehicle to be "on the safe side." (33:10) Simple *good faith* on an officer's part is not enough to justify a search. ***Terry***, 392 U.S. 22, (emphasis added) *See also* ***Beck v. State of Ohio***, 379 U.S. 89, 97, 85 S. Ct. 223, 229, 13 L. Ed. 2d 142 (1964) ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."); ***Henry v. United States***, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 2d 134 (1959) (confirming "good faith on the part of the arresting officers is not enough" to establish probable cause).

Compare the present case to ***State v. Betow***. The defendant in ***Betow***, like Valenti, was stopped for speeding. ***State v. Betow***, 226 Wis. 2d 90, 92, 593 N.W.2d 499 (Ct. App. 1999). A record check revealed Betow possessed a valid driver's license. ***Id***. Valenti also possessed a valid driver's license. While interacting with Betow, the officer observed Betow "appeared nervous" and that he had a picture

of a mushroom sewn onto his wallet. ***Id.*** The officer, based on experience, interpreted the mushroom to be a symbol of drug use. ***Id.*** The officer then detained Betow so that a drug dog could search his vehicle, and eventually a bag of marijuana was found. ***Id.*** The Court of Appeals found the drug dog search expanded the scope of the investigation beyond its original purpose, speeding, and concluded that the above described facts did not justify the expansion and continued detention. ***Id.*** at 98. Here too, the circumstances relied upon by Inspector Hlinak are too thin to justify expanding the stop for speeding into an OWI investigation. Just like the officer in ***Betow***, Inspector Hlinak made a single observation that was insufficient to justify the continued detention of Valenti.

The present case is also aptly compared to ***State v. Meye***, 2010 WI App. 120, 329 Wis. 2d 272, 789 N.W.2d 755, (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). In ***Meye***, an officer observed Meye and her passenger pull into a gas station parking lot, exit the vehicle, and enter the store. 2010 WI App. 120, ¶ 2. The officer testified that when Meye and her passenger were within a couple of feet from him, he detected the strong odor of intoxicants. ***Id.*** He could not determine whether the odor was from Meye or her passenger. ***Id.*** The officer testified that prior to contact

with Meye, he did not observe any behavior that would indicate impairment. ***Id.*** at ¶ 3. He confirmed that the sole reason he detained Meye was for the odor of intoxicants. ***Id.*** The State argued that the odor of intoxicants, combined with Meye getting into the driver's seat, established reasonable suspicion. ***Id*** at ¶ 7.

The Court of Appeals disagreed. After noting that the odor of intoxicants does not, in and of itself, give rise to reasonable suspicion the Court went further, stating, "The weakness of this seizure is exacerbated by the fact that the officer was not sure from which person the odor of alcohol was coming from or if it was coming from both persons." ***Id.*** at ¶ 6 and ¶ 9. The Court continued, "When the odor cannot be linked to one person in particular, it is not within the officer's knowledge that the evidence is connected to the defendant." ***Id.*** at ¶ 9.

Here, like in ***Meye***, it was exclusively the odor of intoxicants that resulted in Valenti's detention. Here too, the odor was not attributable to one person in particular, exacerbating the weakness of the detention. And, here too, this Court should reverse and remand because the detention occurred without reasonable suspicion and in violation of Valenti's constitutional rights.

The Court must consider whether Inspector Hlinak diligently pursued investigative techniques likely to confirm or dispel his suspicions quickly. ***Colstad***, 260 Wis. 2d 418-19. "The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *See* ***State v. Wilkens***, 159 Wis. 2d 618, 626, 465 N.W.2d 206, 210 (Ct. App. 1990) citing to ***Florida v. Royer***, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983).

Inspector Hlinak possessed more reasonable alternatives to confirm or dispel suspicion that would not have resulted in Valenti's removal from the vehicle. But he failed to apply even the most basic of investigative methods to determine whether reasonable suspicion existed to justify removing Valenti from his vehicle. Upon noticing what he believed to be an odor of intoxicants coming from the vehicle, Inspector Hlinak should have inquired whether Valenti consumed any alcohol. Inspector Hlinak asked if there were open intoxicants in the vehicle; there were not. But he never asked Valenti, "Have you been drinking?" before escalating the intrusiveness of the stop and removing Valenti from the vehicle. By asking this simple question, Inspector Hlinak would have

appropriately pursued the least intrusive and quickest investigatory step to determine whether Valenti might be under the influence.

Inspector Hlinak should have attempted to determine whether the odor of intoxicants was coming from Valenti by approaching the driver's side window. However, Inspector Hlinak admits he did not approach the driver side window during his initial interaction. (33:12) Instead, in his second approach he ordered Valenti to pull his vehicle further to the side of the road and exit his vehicle. The record does not describe Inspector Hlinak making any attempt to approach the driver's side window to investigate the odor of alcohol. Again, had Inspector Hlinak pursued the most basic of investigatory measures, like approaching the driver's side window, it would have afforded Inspector Hlinak the opportunity to attempt to isolate the odor of alcohol without violating Valenti's constitutional rights.

In denying Valenti's motion, the circuit court concluded that "even though there is no testimony to this . . . common sense tells me that the trooper addresses the vehicle from that side for his safety concern." (33:20) Common sense might suggest officer safety is one potential explanation for Inspector Hlinak approaching the passenger side of the vehicle, but it is not known to be *the* reason Inspector Hlinak approached the passenger side of Valenti's vehicle. To find

that Inspector Hlinak approached the passenger side of the vehicle for officer safety purposes, while acknowledging that the record says no such thing, is an erroneous finding of fact this Court need not uphold. Common sense experiences suggest it is standard practice for law enforcement to approach the driver's side of a vehicle during a traffic stop. Additionally, the court's conclusion does not explain why Inspector Hlinak could not have approached the driver's side of the vehicle after he instructed Valenti to move the vehicle even further to the right and away from traffic. The State had the burden to establish a factual explanation for why Inspector Hlinak failed to approach the driver's side window. The State failed to do that, and the trial court erroneously relieved the State of that burden by making factual assumptions that were known to not be in the record.

C. Even if Inspector Hlinak detected an odor of intoxicants coming from Valenti, he still lacked the reasonable suspicion necessary to complete standardized field sobriety tests.

Even if Inspector Hlinak was able to confirm an odor of intoxicants was coming from Valenti, without more, there was not reasonable suspicion to support conducting SFSTs. ***Colstad***, 2003 WI App 25, ¶ 19. It is unknown whether Inspector Hlinak believed there was a strong, moderate or light odor of intoxicants emanating from Valenti's person after he was removed from his vehicle. The

record includes no such description. An unspecified odor of intoxicants, without additional indicators of impairment, does not constitute specific and articulable facts supporting reasonable suspicion for SFSTs. ***Cty. of Sauk v. Leon***, 2011 WI App 1, ¶ 25, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). In ***Leon*** the court did note that speeding might be an indicator of impaired driving based on the training and experience of the officer. ***Leon***, ¶ 19. However, in the case at bar, the record establishes that Inspector Hlinak specifically testified that according to his training and experience, the act of speeding itself is not an indicator of impairment. (33:11)

Even after he removed Valenti from his vehicle, and subjected him to an unlawful detention, Inspector Hlinak still failed to ask the simple question: "Have you had anything to drink today?" Valenti never made a statement regarding alcohol consumption because he was never asked to do so. Inspector Hlinak failed to take the most basic, minimally intrusive steps to dispel or confirm whether Valenti was committing a crime as required by ***Wilkens***. 159 Wis. 2d 618, 626.

D. All evidence obtained in violation of Valenti's constitutional rights must be suppressed.

Valenti was removed from his vehicle in violation of his constitutional rights. All derivative evidence obtained as a result of this violation should have been suppressed; and Valenti's conviction should now be reversed. ***Wong Sun v. United States***, 371 U.S. 471, 484–85 (1963).

CONCLUSION

Inspector Hlinak conducted a legal traffic stop on Valenti for speeding. But, that legal traffic stop evolved into the continued detention of Valenti based solely on hunch. Rather than take basic steps to quickly and constitutionally determine whether reasonable suspicion existed to expand the scope of the investigation, Inspector Hlinak removed Valenti from his vehicle in violation of his constitutional rights. All evidence obtained as a result of this unlawful seizure must be suppressed. Therefore, Valenti respectfully requests this Court reverse.

Dated at Madison, Wisconsin, _____, 2016.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,558 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: _____, 2016.

Signed,

_____
SEAN DRURY
State Bar No.: 1085040

CERTIFICATION

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, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) 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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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