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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 16AP662

v.

JOHN J. VALENTI
Defendant-Appellant.

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE FINAL ORDER ENTERED ON
FEBRUARY 10, 2016 IN THE
WINNEBAGO COUNTY CIRCUIT COURT
THE HONORABLE THOMAS GRITTON, PRESIDING

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I. Statement of Issue Presented for Review

Whether the smell of alcohol alone on a driver's breath is sufficient to detain a driver for field sobriety testing. The trial court held the traffic officer articulated reasonable suspicion to detain Mr. Valenti.

II. Statement on Oral Argument and Publication

The State is requesting publication of this decision, as this matter involves a type of driver/traffic officer contact that occurs daily on the roads of Wisconsin, and there is not a published opinion clearly stating the rule for such an encounter. The State believes the law and facts are simple enough that oral argument is not necessary.

III. Statement of the Case

The State believes Mr. Valenti's recitation of the facts of the case to be sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

Inspector Hlinak articulated reasonable suspicion to detain Mr. Valenti for field sobriety testing. As such, his continued detention was lawful, and evidence gathered pursuant to the detention is not subject to the exclusionary rule.

“The Fourth Amendment to the United States Constitution provides that ‘[t]he 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....’ In *Terry v. Ohio*, the U.S. Supreme Court allowed that, although investigative stops are seizures within the meaning of the Fourth Amendment, in some circumstances police officers may conduct such stops even where there is no probable cause to make an arrest. Such a stop must be based on more than an officer’s “inchoate and unparticularized suspicion or ‘hunch.’ ” Rather, the officer “must be able to point to 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, internal citations omitted.

“Investigative traffic stops are subject to the constitutional reasonableness requirement. The burden of establishing that an investigative stop is reasonable falls on the state.” *Post*, at ¶12, internal citations omitted.

“The determination of reasonableness is a common sense test. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that

the individual has committed, was committing, or is about to commit a crime. This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions. The reasonableness of a stop is determined based on the totality of the facts and circumstances.” *Post*, at ¶13, internal citations omitted.

A court reviewing a stop and detention must first determine whether the initial interference with an individual's liberty was justified, and then consider whether subsequent police conduct was reasonably related in scope to the circumstances that justified the initial interference. *State v. Griffith*, 2000 WI 72, ¶26.

Mr. Valenti agrees the initial stop in this case was lawful. 15 Br. of Defendant-Appellant.

As a logical proposition, all (alcohol involved) drunk drivers will smell of alcohol, though not all drivers who smell of alcohol will be drunk. This case directs the Court to decide what a traffic officer is to do if he encounters a driver who smells of alcohol (in a 0.08 standard case – the analysis would be different if this were a 0.02 standard case) where the officer observed no “bad” driving. The defense aptly cites the unpublished

State v. Meye, 2010 WI App 120 as being parallel to the instant case. In that case, an officer observed the odor of alcohol from a driver, no bad driving, detained her, and found her to be intoxicated. The unpublished decision held that detention was illegal. The State asks this Court to consider the facts of this case and come to a different, published decision, so Wisconsin law enforcement may act lawfully following this Court's direction.

A *Terry* detention is lawful even when the defendant's actions do not necessarily imply wrongful conduct, and the record allows other equally reasonable inferences of an innocent nature. *State v. Jackson*, 147 Wis. 2d 824, 835 (1989). Even if many innocent explanations for a defendant's conduct could be hypothesized, suspicious activity by its very nature is ambiguous. *Id.* Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal. *Id.*

As a more clear cut example than the instant case, an officer could observe a man with his hand through a broken jewelry store window, the store alarm blaring, and detain that man on suspicion of burglary, even if in fact the man had slipped on ice and his hand broke through the plate glass

of the store. Every “smash and grab” burglary involves smashing and grabbing, but not every smashed window with an arm through it is a smash and grab burglary.

In this case Inspector Hlinak smelled a strong odor of alcohol coming from the car in his initial contact. R33:P6. After writing the speeding citation, but before sending Mr. Valenti on his way, Hlinak continued his investigation of the source of the alcohol smell by having Mr. Valenti exit his car and be separate from the other occupant and the interior smells. R33:PP7-8. In that environment Hlinak smelled the strong odor of intoxicants from Mr. Valenti, R33:8, and then conducted field sobriety tests, which led to Mr. Valenti’s arrest for OWI 1.

The State adopts the trial court’s reasoning on this question.

“I think [Hlinak] does a reasonable thing to have the individual who was driving get out of the vehicle to determine whether or not he is safe to drive ... and then he makes face-to-face contact and the smell of intoxicants comes into play directly from Mr. Valenti.... I think [the traffic officer] had the opportunity to remove the driver from the car just to make sure that he was safe [to continue to drive.]” R33:PP20-21.

In a parallel universe, where a traffic officer is prohibited from further investigating Mr. Valenti, the driver leaves this encounter free to drunk drive without interference from police. The Constitution does not require a traffic officer to disregard the obvious, articulable signals that criminal activity might be afoot, and send Mr. Valenti on his way. Common sense requires, and the Constitution does not prohibit, further investigation. The detention in this case was reasonable, based on articulable facts, and a possible innocent explanation (strong odor of alcohol on breath and not impaired to drive) does not defeat this lawful *Terry* detention.

V. Conclusion

For the reasons set forth above, Inspector Hlinak's investigative detention was lawful, and evidence subsequently gathered is not subject to the exclusionary rule.

Dated at Oshkosh, Wisconsin this __ day of July, 2016

By: _____
Adam J. Levin
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1126 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that on the date of signature I routed the enclosed briefs to our office station for first class US Mail Postage to be affixed and mailed to:

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Dated this ___ day of July, 2016 at Oshkosh, Wisconsin by:

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