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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.

REPLY 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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Defendant-Appellant

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ARGUMENT

I. THE STATE'S CONCESSIONS.

A. Factual Concessions

Respondent adopts Valenti's Statement of the Case, eliminating factual disputes between the parties. (Res. Br. 1). Both parties agree Valenti was stopped for speeding, driving behavior that is not, in and of itself, indicative of impaired driving. (33:11) Inspector Hlinak detected a strong odor of intoxicants coming from the vehicle while standing at the passenger side window, and the passenger, Valenti's wife, admitted to drinking wine earlier in the day. (33:6-7) He later clarified that it was "difficult to quantify" the odor from outside the vehicle. (33:9) The Inspector could not tell who, if anyone, the odor of intoxicants was coming from. (33:6) He did not observe any signs that Valenti was under the influence of an intoxicant. (33:13) (Res. Br. 1). Based on the generalized odor of intoxicants, Valenti was ordered to pull his vehicle further to the side of the road and to exit his vehicle. (33:12)

B. Legal Concessions

Respondent concedes there was no reasonable suspicion justifying an operating while intoxicated investigation based on the reason for the stop. The sole reason for the stop was speeding, and

speeding alone is not indicative of impaired driving. Respondent does not argue that the reason for the stop established reasonable suspicion justifying an operating while intoxicated investigation and, thus, concedes the argument. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp***., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct.App.1979) *citing* **State ex rel. Blank v. Gramling**, 219 Wis. 196, 262 N.W. 614, 615 (1935).

Respondent concedes there was no reasonable suspicion justifying an operating while intoxicated investigation based on Valenti's behavior after the stop because, again, Respondent presented no argument to the contrary. ***Id.***

Respondent expressly admits that the stop exceeded the scope of a speeding investigation as Valenti was removed from the car. (Res. Br. 5). The purpose of the stop, speeding, was satisfied upon Inspector Hlinak's return to Valenti's vehicle. The speeding ticket was completed. (33:12) But, instead of providing Valenti with the citation, Inspector Hlinak asked Valenti to pull his vehicle further to the side of the road, functionally creating a new stop. (Id.)

Respondent concedes the Court of Appeals has already decided a case with parallel facts against the State. (App. Br. 3-4). *See* ***State v. Meye***, 2010 WI App 120, 329 Wis. 2d 272, 789 N.W.2d

755 (unpublished but citable as persuasive authority) (finding an investigatory detention based on the odor of alcohol alone was illegal). So, the sole issue Respondent suggests this Court decide is whether it should overrule the ***Meye*** holding that an expansion of the scope of the stop based on the odor of alcohol alone violated the Fourth Amendment.

II. A SEIZURE BASED ON THE ODOR OF ALCOHOL ALONE VIOLATES THE FOURTH AMENDMENT IN THIS CONTEXT.

Respondent's reasoning rests squarely on a single principle: that the strong odor of intoxicants on Valenti's breath, detected after Valenti was removed from his vehicle, established reasonable suspicion to justify field sobriety testing. However, the seizure became illegal when Valenti complied with the order to move his vehicle further to the side of the road. The original purpose of the stop, speeding, was satisfied and the investigation then morphed. (Res. Br. 5). The extension transformed a reasonable seizure into an unreasonable one, as the stop extended beyond the time necessary to fulfill the original 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). Inspector Hlinak lacked the requisite specific and articulable facts to establish

a reasonable basis for the second stop. *See* ***Dunway v. New York****,* 442. U.S. 200, 209 (1979). Inspector Hlinak removed Valenti from his vehicle based solely on the odor of intoxicants.

Although Respondent recognizes the previous holding that the odor of intoxicants alone does not give rise to reasonable suspicion, it asks the Court to overrule that prior decision. ***State v. Meye***, 2010 WI App. 120, ¶ 2, 329 Wis. 2d. 272, 789 N.W.2d 755, (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Respondent provides no fact-specific analysis as to why an alternative conclusion is appropriate or why this Court should overrule ***Meye***. It is well established that arguments not fully explained in a brief are not to be addressed by courts of appeal. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. app. 1992). The State's brief has multiple instances where it simply adopts the circuit court's findings without explaining why the court was correct. Moreover, the failure to respond to the argument that this case must be reversed because of its parallels to ***Meye*** must be deemed a concession. Arguments which are not refuted are deemed conceded. *See* ***State v. Finley***, 2016 WI 63, ¶ 24 (The Court of Appeals found it "had no choice to reverse" after the State did not respond directly the Appellant's argument); ***State v. Anker***, 2014 WI App 107, ¶ 2, 357 Wis. 2d 565,

570, 855 N.W.2d 483, 485 (Concluding the State conceded an issue on appeal for failing to defend the circuit court's findings).

The conclusion in ***Meye*** is valid, and applies to Valenti's case. Odor alone does not give rise to reasonable suspicion because an odor of intoxicants will exist after a driver consumes alcohol, period. Consuming alcohol and driving is not illegal. Rather, consuming alcohol to the point where the driver becomes impaired is illegal. Unless the driver is at a 0.02 limit, reasonable suspicion must hinge on alcohol plus indicators of impairment. No indicators of impairment existed here.

In place of analysis, Respondent supplants hyperbole, drawing a "more clear cut example than the instant case." (Res. Br. 4). The example of the suspected jewel thief next to a broken window is certainly more clear cut than the present case. It is also irrelevant. A man with his hand stuck through the broken glass window of a jewelry store with the alarm blaring, justifies a different reaction than a reasonably explained odor of intoxicants emanating from a motor vehicle containing multiple passengers on a Sunday afternoon. Rare is the scenario where an individual slips on ice, punches his hand through a jewelry store window, and keeps his hand inside the broken glass as the police approach and the alarm sounds. However,

every adult citizen in the state of Wisconsin has personal, anecdotal experience with someone riding in or driving a motor vehicle after that individual has consumed a beverage with alcohol. The Court is to determine the reasonableness of a stop based on the totality of the circumstances. ***State v. Post***, 2007 WI 60, 301 Wis. 2d 1, 22, 733 N.W. 2d 634 (2007).

Moreover, the State's analogy asks the Court to conclude that the decision to detain Valenti was made instantaneously and absent opportunity for investigation. That is not the case. Inspector Hlinak had ample time to investigate Valenti for intoxicated driving. He observed Valenti's driving while completing a traffic stop, identified Valenti, inquired about whether there were open intoxicants in the vehicle, learned that Valenti's wife had been consuming alcohol, and completed the steps necessary to write Valenti a ticket for speeding. (App. Br. 8-12).

There were other less-invasive investigation techniques that Inspector Hlinak could have used that would not have expanded the scope of the stop. Ignored by the State, those are: ask Valenti whether he had been consuming alcohol; ask Valenti's wife whether Valenti had been consuming alcohol; approach the driver side of the vehicle to determine if the odor of intoxicants was connected to

Valenti; ask Valenti to remove his sunglasses to determine if his eyes were bloodshot or glassy; inquire about where Valenti was coming from; inquire about where Valenti was going. Respondent fails to address Valenti's argument that Inspector Hlinak could have, and should have, done more before expanding the scope of the stop, thus conceding the argument. ***Charlois, supra***.

Assuming, arguendo, that Inspector Hlinak possessed authority to remove Valenti from his vehicle, he still lacked a factual basis to require Valenti perform field sobriety tests. Drinking and driving is not unlawful. Not only does this reality exist in the pattern jury instruction - "not every person who has consumed an alcoholic beverage is 'under the influence' as that term is used here," WIS JI-CRIMINAL, no. 2663 - it is clear in the terminology of the statute itself. Wisconsin does not prohibit driving after consuming intoxicants. Again, fields were administered on the basis of odor alone, and not every person that has consumed alcohol is intoxicated. ***State v. Gonzalez,*** 2014 WI App 71, ¶13, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. 2014) (unpublished but citable pursuant to Wis. Stat. 809.23(3)). There were no observed problems exiting the car or following directions. ***State v. Colstad*** establishes that an officer needs to be aware of additional suspicious factors that

establish reasonable suspicion that Valenti was operating under the influence in order to extend his detention. 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 418-19, 659 N.W.2d 394, 400.

Valenti's ultimate guilt or innocence should have no bearing on whether the extension of the scope of the stop was lawful. The Fourth Amendment requires that the legality of the stop be based on the facts known to the officer. The Constitution protects both innocent and guilty parties from hunches. Were the Court to adopt the logic used by the State, there would be no need for constitutional application of the law in criminal cases whatsoever.

CONCLUSION

Based alone on the odor of intoxicants emanating from his vehicle, reasonably explained by the passenger's confirmation of consuming alcohol, Valenti was subjected to a search in violation of his Constitutional rights. Inspector Hlinak escalated the invasiveness of the search long before exhausting preferred, readily available, and less intrusive investigatory techniques. Recognizing that the Court of Appeals has previously ruled on this very issue, the State asks the Court to overrule existing case law from this very District to excuse the violation of Valenti's rights. The Court got it right in ***State v. Meye*** and should not take the State up on its offer to reverse that

decision. All evidence obtained in violation of Valenti's Constitutional rights must be suppressed.

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 1,713 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: ___________________, ________.

Signed,

BY: ____________________________

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(4)(b) and that contains a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b).

Dated: ____________________, 2016

Signed,

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