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**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II**

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**Appellate Case No. 2016AP908**

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**COUNTY OF WASHINGTON,**

Plaintiff-Respondent,

**-vs-**

**DANIEL L. SCHMIDT,**

Defendant-Appellant.

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**BRIEF AND APPENDIX OF DEFENDANT-APPELLANT**

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**Appealed from a Judgment of Conviction Entered in the Circuit Court for  
Washington County, the Honorable James K. Muehlbauer Presiding  
Trial Court Case No. 16 TR 685**

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## **STATEMENT OF THE ISSUE**

- I. WAS THERE REASONABLE SUSPICION  
TO STOP MR. SCHMIDT'S VEHICLE?

Trial Court Answered: Yes.

- II. WAS THERE PROBABLE CAUSE TO  
ARREST MR. SCHMIDT?

Trial Court Answered: Yes.

- III. WAS MR. SCHMIDT'S REFUSAL  
UNREASONABLE GIVEN THE  
DEPUTY'S IMPLICATION THAT MR.  
SCHMIDT HAD A RIGHT TO A  
LAWYER WHEN REQUESTING AN  
EVIDENTIARY CHEMICAL TEST?

Trial Court Answered: Yes.

## **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 ON PUBLICATION**

Defendant-Appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

## STATEMENT OF FACTS AND CASE

On February 26, 2016, at approximately 2:52 AM, Deputy Peter Schultz of the Washington County Sheriff's Office responded to the area of Interstate 41 and Highway 33 as a caller alleged to have observed a vehicle swerving and deviating from its lane. (R. 23, p. 13) Deputy Schultz was advised that the suspect vehicle was a blue Ford F-150, that it had exited onto Highway K from Interstate 41 southbound, and that it had parked on the off ramp. (R. 23, pp. 15-16) Deputy Schultz then located the vehicle parked on the off ramp, activated the emergency lights of his vehicle and pulled up behind the Ford-F150. (R. 23, pp. 15-16, 25-26)<sup>1</sup>

As Deputy Schultz was pulling up, he observed Mr. Schmidt standing in front of his vehicle and that he appeared to be checking out the front or side of the Ford F-150. (R. 23, p. 17) As Deputy Schultz approached, Mr. Schmidt returned to the driver's seat. (R. 23, pp. 17-18) Deputy Schultz then asked Mr. Schmidt several questions including why he was parked on the side of the road, whether his vehicle was okay, and whether he struck anything. (R. 23, p. 18) Deputy Schultz alleged that Mr. Schmidt responded that he had struck a guardrail. (R. 23, p. 18) Deputy Schultz further alleged that there was an odor of intoxicants, that Mr. Schmidt's eyes were bloodshot and glassy, and that he had slurred speech. (R. 23, pp. 18-19)

Deputy Schultz then administered the following field sobriety tests: the Horizontal Gaze Nystagmus test, the Walk

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<sup>1</sup> While Deputy Schultz testified that the caller continued off the off ramp and turned right going westbound and parked within eye contact, the record is devoid of any indication that the deputy knew the caller was identified, available, or whether the caller was anonymous prior to or during the stop. (R. 23, pp. 18-20)

and Turn test and the One Leg Stand test. (R. 23, p. 19-20) No details were provided as to how Mr. Schmidt performed on the tests. Rather, Deputy Schultz simply asserted that based upon those tests that he believed Mr. Schmidt was impaired. (R. 23, p. 20) It is unclear from the testimony, but either before or after arresting Mr. Schmidt, Deputy Schultz asked Mr. Schmidt to provide a preliminary breath test (PBT) sample. (R. 23, pp. 20, 26) Deputy Schultz also informed Mr. Schmidt, prior to Mr. Schmidt's decision to decline the PBT, that the PBT would have no bearing on the case. (R. 23, p. 26)

After placing Mr. Schmidt under arrest, Deputy Schultz transported him to the Slinger Police Department for a breath test. (R. 23, pp. 20-21) At the department, Deputy Schultz read the Informing the Accused form to Mr. Schmidt and asked him to submit to an evidentiary chemical test of his breath. (R. 23, pp. 21-22) Mr. Schmidt responded: "I'll do blood but only with my lawyer present." (R. 23, pp. 22, 32) Mr. Schmidt indicated his lawyer was in Kaukauna, Wisconsin. (R. 23, p. 23) Deputy Schultz testified at the refusal hearing that he informed Mr. Schmidt that he:

would not be, one, waiting around for his lawyer and if he will not consent to the breath, and I believe my supervisor said we would do blood if he would consent to it, but since he said only with his lawyer present, it was considered a refusal. So he refused again after I made that clarification.

(R. 23, p. 23) Deputy Schultz also stated that it was possible that Mr. Schmidt also said something to the effect of, "wait a minute. You said earlier that it was breath, blood or urine," referring to the language in the Informing the Accused form. *See Wis. Stat. § 343.305(4)*. (R. 23, p. 31) Moreover, Deputy

Schultz' supervisor said a blood test could be conducted, but that they were not going to wait for his lawyer. (R. 23, p. 32) Deputy Schultz also never told Mr. Schmidt that he did not have the right to his lawyer. (R. 23, p. 32) Mr. Schmidt was cooperative throughout the entire incident and he was not rude or argumentative at any point. (R. 23, pp. 25-26)

A Notice of Intent to Revoke was filed and Mr. Schmidt timely requested a refusal hearing. (R. 1, 2) A refusal hearing was held before the Honorable James K. Muehlbauer on April 20, 2016. (R. 23) Deputy Peter Schultz was the sole witness at that hearing. (R. 23)

At the conclusion of evidence, the defense presented three arguments: (1) that Deputy Schultz lacked reasonable suspicion to conduct a traffic stop; (2) that the evidence admitted at the hearing was insufficient to establish probable cause to arrest; and (3) that Mr. Schmidt's refusal was reasonable because Deputy Schultz's actions and statements suggested that Mr. Schmidt had a right to a lawyer. (R. 23, pp. 40-47)

While acknowledging that the County failed to establish any evidence regarding Mr. Schmidt's performance of the field sobriety tests, the court rejected each of Mr. Schmidt's arguments and found that his refusal was unreasonable. (R. 23, pp. 47-55) Mr. Schmidt raises the same issues now on appeal.



## ARGUMENT

### I. THE CIRCUIT COURT ERRED IN FINDING THAT DEPUTY SCHULTZ HAD REASONABLE SUSPICION TO STOP MR. SCHMIDT'S VEHICLE.

“Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact,” which presents “a mixed question of fact and law requiring a two-step standard of review.” *State v. Brown*, 2014 WI 69, ¶ 17, 355 Wis. 2d 668, 850 N.W.2d 66 (citing *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 and *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634; overruled on other grounds in *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143). “The court reviews the circuit court’s findings of fact under the clearly erroneous standard, and reviews independently the application of those facts to constitutional principles.” *Id.* (citing *State v. Post*, 2007 WI 60, ¶ 8).

The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution establish the right of persons to be secure from unreasonable searches and seizures. “Traffic stops are considered seizures and thus must be reasonable to pass constitutional muster.” *State v. Brown*, 2014 WI 69, ¶ 19; *see also Brendlin v. California*, 551 U.S. 249, 251, 127 S.Ct. 2400 (2007) “The burden is on the State to prove that a stop meets the constitutional reasonableness requirement.” *Brown*, 2014 WI 69, ¶ 19.

To be valid, investigatory traffic stops must be predicated upon either reasonable suspicion or probable cause. *See Id.*, ¶ 20. Reasonable suspicion exists if “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.” *Id.*, ¶ 20. The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts in light of the officer’s training and experience, reasonably warrant the traffic stop. *State v. Anagnos*, 2012 WI 64, ¶ 48, 341 Wis. 2d 576, 815 N.W.2d 675 (citing *State v. Post*, 2007 WI 60 ¶ 10). “The officer must have more than an ‘inchoate and unparticularized hunch.’” *Id.*

The culmination of the evidence available to Deputy Schultz at the time he effectuated the traffic stop came from a single individual who contacted dispatch to report a vehicle swerving and deviating from its lane of travel. (R. 23, p. 13) While the license plate, description and the location of the vehicle were given to law enforcement, there is no evidence that law enforcement knew the identity or whether the caller wished to remain anonymous. (R. 23, pp. 13-16) Likewise, there is no evidence that law enforcement attempted to obtain this information prior to or during the traffic stop.

Moreover, this was not a community caretaker situation. Upon observing Mr. Schmidt’s vehicle, Deputy Schultz activated his emergency lights and further testified that he was not there to check and see if the driver was okay. (R. 23, p. 25) Rather, he was responding due to the caller that made the complaint about the driving and that this was an investigative issue. (R. 23, p. 25) Finally, his questions when he approached the vehicle were directed towards the vehicle and not to whether Mr. Schmidt was okay or in any distress. (R. 23, p. 18)

The information available to Deputy Schultz was simply insufficient to establish reasonable suspicion that Mr. Schmidt was committing a violation of the law. As this Court

and the Supreme Court have made clear, a mere hunch of wrongdoing is not enough to justify the intrusion of a traffic stop. *See supra*. Accordingly, Deputy Schultz lacked reasonable suspicion to stop Mr. Schmidt's vehicle.

## **II. THE CIRCUIT COURT ERRED IN FINDING THAT DEPUTY SCHULTZ HAD PROBABLE CAUSE TO ARREST MR. SCHMIDT**

Whether probable cause to arrest exists in a given case is a question of law that this Court determines independently of the circuit court. *County of Washburn v. Smith*, 2008 WI 23, ¶ 16, 308 Wis. 2d 65, 746 N.W.2d 243.

“In the context of a refusal hearing following an arrest for operating a motor vehicle while intoxicated, ‘probable cause’ refers generally to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Smith*, 2008 WI 23, ¶ 16. The County bears the burden of presenting “evidence sufficient to establish the officer’s probable cause to believe the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.* “A circuit court may not revoke a defendant’s operating privileges based on the defendant’s refusal to submit to chemical testing unless the defendant’s arrest was based on probable cause.” *Id.* at ¶ 14, *citing* Wis. Stat. § 343.305(9)(a)5.a.

Deputy Schultz allegedly observed the odor of intoxicants, glassy, bloodshot eyes and slurred speech. (R. 23, pp. 18-19) Deputy Schultz failed to explain how the field sobriety tests were administered, how Mr. Schmidt performed them and how this lead to the conclusion that Mr. Schmidt was impaired. He simply asserted, *ipse dixit*, that he administered three field sobriety tests and that following

those tests, he believed Mr. Schmidt to be impaired.

As for the PBT, it is not clear if this was conducted before or after Mr. Schmidt's arrest. (R. 23, p. 20) However, even if it were conducted before the arrest, Mr. Schmidt choice to decline the PBT adds nothing to the analysis as it was after Deputy Schultz told him it would have no bearing on the case. (R. 23, p. 26). Thus, it is not demonstrative of consciousness of guilt. Finally, even if it did, the testimony adduced at the motion hearing was so bare that there was insufficient probable cause to request a PBT. *See County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) ("probable cause to believe" refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the "reason to believe" that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest.)

In light of the County's failure to present sufficient evidence to meet its burden, this Court should reverse the circuit court's finding that probable cause existed to warrant Mr. Schmidt's arrest.

**III. THE CIRCUIT COURT ERRED IN FINDING MR. SCHMIDT'S REFUSAL UNREASONABLE GIVEN THE DEPUTY'S IMPLICATION THAT MR. SCHMIDT HAD A RIGHT TO A LAWYER WHEN REQUESTING AN EVIDENTIARY CHEMICAL TEST.**

"Whether a refusal to take a chemical test to determine alcohol concentration in a driver's body is reasonable is a question of law which [this court] reviews de novo." *State v. Ludwigson*, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997).

Under Wisconsin Statute § 343.305(2), any person licensed to operate a motor vehicle upon the public roadways of the state has impliedly consented to one or more tests of his breath, blood, or urine for the purpose of determining the presence and concentration of alcohol and other intoxicants in the person's system. When an officer requires that a driver decide whether to give consent to a primary chemical test, the driver may either choose to consent or refuse. *State v. Padley*, 2014 WI App 65, ¶¶ 25-28, 354 Wis. 2d 545, 849 N.W.2d 867. A driver who refuses to consent to chemical testing suffers automatic driver's license revocation unless a circuit court finds that the driver's refusal was reasonable. *See Padley*, ¶¶ 27, 31 and Wis. Stat. § 343.305(9)(a).

Generally, "wanting to first consult with counsel before deciding whether to submit to a [chemical] test is not a valid reason to refuse...." *State v. Verkler*, 2003 WI App 37, ¶8, 260 Wis. 2d 391, 659 N.W.2d 137 *citing State v. Neitzel*, 95 Wis. 2d 191, 204, 289 N.W.2d 828 (1980). However, "if the officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult counsel, that officer may not thereafter pull the rug out from under the defendant if he or she thereafter reasonably relies on this assurance or suggestion." *Id.* (citing *State v. Reitter*, 227 Wis. 2d 213, 240-242, 595 N.W.2d 646 (1999)).

Mr. Schmidt responded to the Informing the Accused form by *agreeing to submit* to a chemical blood test if he could have his lawyer present. (R. 23, pp. 22, 32) Deputy Schultz asked Mr. Schmidt where his lawyer would be coming from. (R. 23, pp. 22-24, 32) Upon learning that he would be traveling from the Kaukauna, Wisconsin area, Deputy Schultz told Mr. Schmidt that he was not willing to wait around. (R. 23, pp. 23-24) Implicit is the assertion that

Mr. Schmidt had a right to a lawyer, but that the officers were simply unwilling to wait. (R. 23, pp. 23-24, 32) The waters were so muddled that a reasonable person under those circumstances would have believed they were being denied their right to an attorney simply because the officers did not wish to wait for an attorney to come from Kaukauna to Slinger. An officer could have told Mr. Schmidt that he did not have the right to counsel, yet this never occurred. (R. 23, p. 32) Accordingly, this Court should reverse the circuit court's finding and hold that Mr. Schmidt's refusal was the product of Deputy Schultz's implication that Mr. Schmidt had a right to an attorney. Whether the statements were intentional or not, Deputy Schultz was under a duty to correct the misleading situation.

### **CONCLUSION**

**WHEREFOR**, for the reasons discussed above, the defendant respectfully requests this Court reverse the decision of the circuit court.

Dated this \_\_\_\_ day of July, 2016.

Respectfully submitted,

**MELOWSKI & ASSOCIATES L.L.C.**

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**STATE OF WISCONSIN  
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**APPENDIX**

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## CERTIFICATION

I hereby 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. The text is 13 point type and the length of the brief is 2,512 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

A copy of this certificate is included in the paper copies of this brief filed with the court and served on all opposing parties.

Dated this \_\_\_\_ day of July, 2016.

Respectfully submitted,

**MELOWSKI & ASSOCIATES L.L.C.**

By: \_\_\_\_\_

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