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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2016AP908

COUNTY OF WASHINGTON,

Plaintiff-Respondent,

-vs-

DANIEL L. SCHMIDT,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully Submitted:

Melowski & Associates, LLC
524 South Pier Drive
Sheboygan, WI 53081
Telephone: (920) 208-3800
Facsimile: (920) 395-2443

By: **Matthew M. Murray**
State Bar No. 1070827
Attorneys for Defendant-Appellant

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REPLY TO COUNTY'S ARGUMENT

I. THE STOP OF MR. SCHMIDT'S VEHICLE WAS UNCONSTITUTIONAL.

A. THE COMMUNITY CARETAKER EXCEPTION DOES NOT APPLY.

Mr. Schmidt agrees that *State v. Kramer*, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598 sets forth Wisconsin's test for determining whether the community caretaker exception applies. However, Mr. Schmidt respectfully disagrees with the County's conclusion that the exception applies in the present case. As noted by the County, *Kramer* sets forth a three pronged test.

As to the first prong, the County states that "the State [sic] will assume without conceding that a seizure occurred within the meaning of the Community Caretaker exception to the Fourth Amendment for the ease of argument and brevity." *See* County's Brief p. 7. Given that the County is not refuting this point, this amounts to a concession under *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (appellant's argument not refuted is conceded).

The second prong is whether the police conduct was a bona fide community caretaker activity. *See Kramer*, 2009 WI 14, ¶ 14. While Deputy Schulz did say that their typical procedure is to stop and make sure a vehicle is not disabled as you cannot park on the side of a highway, when specifically asked if someone can park on the side of an off-ramp, Deputy Schulz could not say. (R. 23, p. 25) Deputy Schulz further testified that he was not there to check and see if Mr. Schmidt was alright. Rather, he was responding due to the caller and this was an investigative issue. (R. 23, p. 25) Given Deputy Schulz' testimony at the refusal hearing, this was not a bona fide community caretaker function. Since this was not a bona fide community caretaker investigation, we do not reach the balancing test of the third prong.

For these reasons, the community caretaker exception is inapplicable in the present case.

B. REASONABLE SUSPICION DID NOT EXIST TO AUTHORIZE THE DETENTION OF MR. SCHMIDT.

State v. Rutzinski, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, sets forth the law regarding anonymous tips and summarizes the various United States Supreme Court cases on the issue: *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990); and *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). In *Rutzinski*, an officer was dispatched to an area because an unidentified motorist called from a cell phone and reported that he or she was observing a black pickup truck weaving within its lane, varying its speed from too fast to too slow, and tailgating. 2001 WI 22, ¶ 4. Dispatch then issued another message that the motorist was still on the phone and that the vehicle now traveled to another street. *Id*., ¶ 5. Dispatch informed the officer that the caller was in the vehicle ahead of the subject vehicle and that the caller saw the police car and that the officer was following the correct truck. *Id*., ¶ 6. The officer initiated a stop without independently observing any signs of erratic driving. *Id.*, ¶ 7.

The *Rutzinski* court upheld the stop finding that the informant exposed himself to being identified by providing information as to what vehicle they were in. *Id*., ¶¶ 32, 37. The court found that the informant provided verifiable information as to contemporaneous actions, the directions of travel and the time of travel. *Id*., ¶ 33. Finally, the tip suggested the subject vehicle posed an imminent threat. *Id*.

The present case is distinguishable in that the record is devoid of any information suggesting that the anonymous caller exposed himself to being identified. The County argues that the caller remained in the area and spoke to a fellow deputy, but this is irrelevant since there is no evidence that this occurred prior to the stop. The caller here was anonymous *at the time* of the stop.

For this reason, this case is more like *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). There, an anonymous caller informed police "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id*. at 268. The court found a stop based upon this information to be unconstitutional. *Id*. at 274. The Court held that to corroborate a tip, the police must do more than verify

easily obtainable information that tends to identify the suspect. *Id*. at 271-272.

Without subjecting himself or herself to possible consequences for providing false information, there is nothing to ensure that the anonymous tip had any basis of reliability even if the location and description of Mr. Schmidt's vehicle was given. Indeed, the location and description of the defendant in *Florida v. J.L.* were given and the tip was still found to be unreliable. Moreover, a possession of a firearm is arguably more dangerous than someone weaving once on a highway. It is noteworthy that in the present case, Deputy Schulz simply testified that "[a] caller called in another vehicle swerving, almost going off the road, deviating from their lane." (R. 23, p. 13) This could simply refer to one deviation over the fog line.

For these reasons, the stop of Mr. Schmidt's vehicle was unconstitutional and Mr. Schmidt should not be convicted of the refusal charge. *See State v. Anagnos (In re Anagnos)*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675.

II. THE EVIDENCE AT THE REFUSAL HEARING DOES NOT SUPPORT PROBABLE CAUSE TO ARREST MR. SCHMIDT.

First, Deputy Schulz's conclusory assertion that he believed Mr. Schmidt was impaired based upon the field sobriety tests provides nothing of evidentiary value upon which the court may use in assessing probable cause to arrest.

It is well settled that to detain an individual, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Houghton*, 2015 WI 79, ¶ 21, 364 Wis. 2d 234; 868 N.W.2d 143 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). While this is the test for "reasonable suspicion," the requirement of specific and articulable facts would necessarily be required for a determination of probable cause as well. Indeed:

> "…[w]hether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact.

> When presented with a question of constitutional fact, this court engages in a two-step inquiry. First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts.

State v. Iverson, 2015 WI 101, ¶¶ 17-18, 365 Wis. 2d 302, 871 N.W.2d 661 (internal quotations and citations omitted). A court cannot apply constitutional principles to conclusory allegations. Here, the conclusory allegation of Deputy Schulz, that be believed Mr. Schmidt was under the influence after administering field sobriety tests, provides no facts to assess under the totality of the circumstances. As a matter of fact, the trial court agreed "that we don't have any facts on what the results of the field sobriety tests are and [the court] was kind of puzzled why [the prosecutor] didn't at least ask a couple questions." (R. 23, p. 50) Rather, the trial court ruled that there was probable cause to arrest without field sobriety tests. (R. 23, p. 51)

However, without the field sobriety tests there are insufficient facts to support probable cause that Mr. Schmidt was operating while intoxicated. We have an anonymous caller stating there was swerving but we do not know how many times. There is also Mr. Schmidt's statement to Deputy Schulz that he believed he may have touched the guard rail although no damage existed. Mr. Schmidt had no difficulties standing outside of the vehicle and no difficulties getting in or out of the vehicle. Finally, Deputy Schulz alleges that he observed an odor of intoxicants, bloodshot and glassy eyes, and slurred speech. While this may amount to reasonable suspicion, it should not be considered probable cause that someone is intoxicated.

The present facts are distinguishable from the facts in the two cases relied upon by the County: *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994) and *State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996). In *Wille*, the defendant drove his vehicle into the back of a car parked on the side of the road that had its emergency flashers on, causing injuries to two individuals standing outside of the parked vehicle on the side of the road and killing his passenger. 185 Wis. 2d at 683. Two officers and a firefighter observed the odor of intoxicants coming from Wille and Wille told the officer that he had "to quit doing this," which the

Court considered "evidence of his consciousness of guilt." *Id*. In *Kasian*, an officer came upon a one-vehicle accident and found a damaged van next to a telephone pole, and Mr. Kasian injured and lying next to the van. 207 Wis. 2d at 622. The officer also detected the strong odor of intoxicants and slurred speech. *Id*.

The defendant concedes that under *Wille*, had Mr. Schmidt made statements amounting to consciousness of guilt that there would be probable cause, but that is not the case here. *Kasian* is also distinguishable for two reasons. First, Mr. Schmidt was able to stand, walk and climb in and out of his vehicle without difficulty. Such observations weigh against a finding of impairment, which was not present in *Kasian*. Field sobriety tests were available to Deputy Schulz, which were not available to the officer in *Kasian* due to the injuries. Also, to a lesser extent, there was a serious accident in *Kasian* where here, the accident was minor if there was an accident at all.

A finding of probable cause in the present case would obviate the need for the standardized field sobriety test procedure in many situations. For example, in situations where someone is pulled over for an equipment violation and the three standard observations upon initial contact are observed (odor of intoxicants, bloodshot and glassy eyes, and alleged slurred speech), is there probable cause to arrest someone? The answer to this question may well depend on how badly the slurred speech is, which is unknown in this hypothetical and in the present case. Without knowing the level of slurred speech, one would think the answer is no. If we substitute the reason for the stop with an anonymous call regarding swerving and an admission to thinking that a guardrail was struck, does this create probable cause that this person is impaired by alcohol, a controlled substance or both? The driving behavior may very well have been caused by an inexperienced driver, a tired driver or a distracted driver. The odor, while suspicious, does nothing but to say the individual had consumed an intoxicant or been in the vicinity of intoxicants. It sheds little light on impairment. The bloodshot or glassy eyes can be caused by any number of things including dry eyes, allergies, contact lenses, pollutants, etc. Finally, the slurred speech was somewhat addressed above. While an officer can say that the subject mixed up words, slurred certain letters, slurred to the point where what they were saying could not be understood, etc., what is considered noteworthy to be qualified as slurred speech is unclear.

Adding in the fact that Mr. Schmidt was able to stand, walk and climb in and out of his truck without difficulty leads to the conclusion that there is no probable based upon the record in this case.

III. MR. SCHMIDT'S REFUSAL WAS REASONABLE.

The County's argument seems to suggest that because Mr. Schmidt initially stated "I'll do blood but only with my lawyer present" that he still would have refused despite Deputy Schulz' statements and therefore the deputy's statements do not matter. *See* County's Brief, p. 23. Yet, as also pointed out in the County's brief, after reading over the Informing the Accused form, Mr. Schmidt also stated that he did not want to submit to a breath test without a lawyer. *See* County's Brief, p. 23. It is clear that Mr. Schmidt wanted to speak with a lawyer prior to deciding whether to consent to the evidentiary chemical test.

The issue is whether Deputy Schulz explicitly assured or implicitly suggested that Mr. Schmidt had a right to consult counsel when Deputy Schulz considered Mr. Schmidt to have refused the chemical test. *State v. Verkler*, 2003 WI App 37, ¶ 19, 260 Wis. 2d 391, 659 N.W.2d 828 (1980). Mr. Schmidt's brief adequately sets forth his position on this issue and no further argument will be made.

CONCLUSION

WHEREFOR, Mr. Schmidt respectfully requests that this Court reverse the trial court's decision finding his refusal unreasonable, vacate the judgment of conviction, and dismiss the refusal charge.

Dated this __ day of October, 2016.

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

By:_____

Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant

CERTIFICATIONS

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 2,212 words.

Further, 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.

Finally, I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on October 17, 2016. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of October, 2016

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

By:_____

Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant