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WISCONSIN COURT OF APPEALS
District I

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Circuit Court Case No.: 2015-CT-000113

 Appeal No.: 2016-AP-000913-CR

MARIE A. MARTIN,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION
DENYING MOTION TO SUPPRESS ENTERED BY THE CIRCUIT COURT
FOR MILWAUKEE COUNTY,
THE HONORABLE T. CHRISTOPHER DEE PRESIDING

BRIEF OF DEFENDANT-APPELLANT MARIE A. MARTIN

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 Marie A. Martin

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STATEMENT OF THE ISSUE

1. Did the trial court err in denying Ms. Martin's Motion to Suppress by determining that there was reason to believe Ms. Martin was about to commit a traffic offense?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In this decision, oral argument is not necessary because the parties' briefs and the record presented will fully develop the issues to be decided by the Court. Oral arguments would be duplicitious and unnecessary.

In this decision, publication is not warranted because the factual circumstances of this case are not significantly different from that in other published opinions or established case law.

STATEMENT OF THE CASE

On December 18, 2014, at approximately 2:00 a.m., City of Franklin Police Officer Anne Aide was on patrol in the area of South 76th and Rawson Avenue. (R.27:5, A-Ap. at A5). Officer Aide observed a Honda enter the George Webb parking lot and let two female passengers out of the vehicle. (Id.). Officer Aide observed one of the women get into a sport utility vehicle and drive away, while the other woman, later identified as the Defendant, Marie A. Martin, got into a black Chevy Lumina. (Id.).

Officer Aide decided to run records checks of the vehicles. (R.27:6, A-Ap. at A6). While doing the check, Officer Aide drove around the parking lot to check on a sleeping employee at George Webb's Restaurant. (Id.).

On the way out of the George Webb's parking lot, Officer Aide specifically ran a check on Ms. Martin's Lumina. (Id.). While driving, Officer Aide's mobile digital communicator in her police vehicle indicated that the vehicle's owner had revoked operating privileges. (R.27:6-7, A-Ap. at A6-7).

After approximately five minutes, and Officer Aide returned to the George Webb's parking lot and "decided to go back and check on [Ms. Martin's] welfare." (R.27:7-8, A-Ap. at A7-8). Officer Aide observed that the vehicle was

running because she saw exhaust coming out of the vehicle's tail pipe. (Id.). Officer Aide confirmed that it is "not uncommon" for vehicles to warm up before driving away due to frost or fog on the windows. (R.27:14-15, A-Ap. at A14-15). However, she believed it was odd that a person would remain in the vehicle without it moving for more than five minutes. (R.27:16, A-Ap. at A16). She did not observe any signs of distress, concern, or emergency about the occupant before making contact with her. (R.27:16-17, A-Ap. at A16-17). She made it clear that her intention was to check on Ms. Martin's welfare, "to see if there was a problem, as she was there for an extended period of time." (R.27:25, A-Ap. at A25).

Officer Aide moved her squad behind the defendant, and parked at an angle to the rear driver's side quarter panel of the Lumina. (R.27:8, A-Ap. at A8). At that time the squad was fully marked, equipped with a light bar, and the officer was in full uniform with Franklin Police markings, with a firearm in her holster. (R.27:18-19, A-Ap. at A18-19).

Officer Aide did not activate her emergency lights, but made contact with Ms. Martin by walking up to her driver's side window. (R.27:9, A-Ap. at A9). As Officer Aide approached the vehicle, Ms. Martin turned the car off

and placed her keys on the passenger seat. (Id.). At some point during the initial encounter, the door was opened, however Officer Aide could not recall if she was the one to open the door or if Ms. Martin opened the door.

(R.27:21&29, A-Ap. at A21 and A29). Officer Aide was also unable to recall if the window was up or down. (R.27:30, A-Ap. at A30). However, once the door was opened, Officer Aide moved within the area of the open door and positioned herself right within a foot or two of Ms. Martin's body. (R.27:31-32, A-Ap. at A31-32).

Officer Aide initially testified that Ms. Martin was free to leave up until the point in time that she smelled an odor of intoxicants on her breath. (R.27:12, A-Ap. at A12). She stated that "I didn't have a reason to detain her, until I observed some signs of intoxication."

(R.27:32, A-Ap. at A32). She stated that Ms. Martin could have chosen to drive away, even though her license was revoked. (R.27:22, A-Ap. at A22). She confirmed that it would not have been illegal for Ms. Martin to operate a car in the parking lot with a revoked license, but it would have been illegal for her to drive on a road. (Id.).

Officer Aide also testified that had Ms. Martin tried to walk away, she would have followed her and asked her

questions, but did not believe she had a reason to detain her. (R.27:31-32, A-Ap. at A31-32).

The State argued that this was a "community caretaker" stop and was "a welfare check." (R.27:33, A-Ap. at A33). Then, the State argued the contradictory position that there was no stop. (R.27:40-41, A-Ap. at A40-41). Ms. Martin argued that there was no reasonable suspicion for a seizure due to the nature of the confrontation with Ms. Martin. (R.27:35-36, A-Ap. at A35-36). Ms. Martin also argued that when Officer Aide positioned herself inside the doorway of the vehicle, Ms. Martin was not free to leave because no reasonable person would have felt free to walk or drive away at that point. (Id.). Ms. Martin further argued that there was no justification for a "community caretaker" stop because the record was devoid of any information showing that there was a need to actually do a welfare check on Ms. Martin. (R.27:37-39, A-Ap. at A37-39).

After letter briefing (R:12 & 13), the Court rejected the State's contention that this was a welfare check or community caretaker function case. (R.28:2-3, A-Ap. at A47-48). The Court further concluded that Officer Aide had certainly stopped Ms. Martin, stating "her approach to Ms. Martin, it's a stop; it is." (R.28:3, A-Ap. at A48). The Court agreed that a person cannot commit the offense of

Operating After Revocation in a parking lot. (R.28:4, A-Ap. at A49). The Court then determined that, Officer Aide had reasonable suspicion to believe that Ms. Martin was about to commit an offense and indicated "I think the officer could reasonably expect that this registered owner of the car was driving at the time and was revoked and would be driving on the city streets in a short - - in short order." (R.28:5, A-Ap. at A50). The Court indicated that the stop was justified under Terry v. Ohio. (R.28:6, A-Ap. at A51). The Defendant now appeals this ruling.

STANDARD OF REVIEW

When the Appellate Court reviews a trial court's decision to deny a motion to suppress evidence, the Court accepts the circuit court's findings of fact unless they are clearly erroneous, and determines the application of constitutional principles to those facts independently of the circuit court, but benefitting from their analysis.

State v. Popenhagen, 2008 WI 55, ¶ 31, 309 Wis. 2d 601, 749 N.W.2d 611.

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS DECISION THAT THERE WAS REASONABLE SUSPICION TO SEIZE THE DEFENDANT.

A. Introduction.

The trial court erred in determining that Officer Aide was justified in seizing Ms. Martin for a potential traffic violation. The record is devoid of any proper justification for a belief that Ms. Martin was about to commit any kind of traffic offense, specifically Operating After Revocation or Operating While Intoxicated.

B. Standard of Review.

The stop of a vehicle must be based on more than an officer's "inchoate and unparticularized suspicion or hunch," but instead must be grounded upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." State v. Post, 301 Wis. 2d 1, 8, 733 N.W. 2d 634 (2007); Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868 (1968). Reasonable suspicion exists under the totality of the circumstances 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." Post, 301 Wis. 2d at 9. An investigatory

stop may be made when an officer observes wholly lawful conduct, "so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." State v. Waldner, 206 Wis. 2d 51, 57, 556 N.W. 2d 681 (1996).

C. The Trial Court Erred in Denying the Defendant's Motion to Suppress Evidence.

The Circuit Court correctly determined that Ms. Martin was seized by Officer Aide but erred in finding that it was reasonable to believe that Ms. Martin was about to commit a crime. Even the officer herself testified consistently that she was not investigating an Operating After Revocation matter and that her sole function was to check Ms. Martin's welfare. The Court's determination that Officer Aide could have reasonably expected that Ms. Martin would have been driving on city streets in a short order is not supported by the record. The record is devoid of any indication that Ms. Martin was about to be driving her vehicle on city streets. Officer Aide testified that another vehicle left the scene, and Ms. Martin's stayed for a longer period of time. (R.27:5, A-Ap. at A5). Officer Aide testified that she found it odd that a vehicle was still warming up for that amount of time and had not yet left the parking lot. (R.27:17, A-Ap. at A17). This

supports the opposite of the Circuit Court's conclusion. Ms. Martin was simply trying to keep warm in her vehicle while waiting for a ride. The fact that the vehicle did not leave as the other did, supports that fact that Ms. Martin was not about to commit a crime. Officer Aide testified that she was not investigating any concern that Ms. Martin was operating a vehicle after revocation or that she was about to drive the vehicle but rather she was "checking on her welfare, to see if there was a problem" (R.27:7-8, A-Ap. at A7-8). According to Officer Aide, the fact that Ms. Martin's license was revoked had "no bearing" on the reason she approached Ms. Martin. (R.27:25, A-Ap. at A25). In fact, the State chose not to even argue that Ms. Martin was about to commit a crime, presumably because the record did not support such an argument.

Officer Aide testified that she "didn't have a reason to detain her until I observed some signs of intoxication". (R.27:32, A-Ap. at A32). She did not observe any indicia of intoxication or signs that she was preparing to drive away. She also knew that Ms. Martin sitting in a running vehicle, even though her license was revoked, did not violate the law. (R.27:22, A-Ap. at A22). Those facts, coupled with the Court's determination that there was, in fact, a seizure at the point of contact, shows that there

was not reasonable suspicion to believe that Ms. Martin was committing, or was about to commit, any offense. The Court fashioned a ruling that Officer Aide reasonable could have found that a crime was about to be committed even though the Officer testified and the State argued that the sole basis for the stop is welfare and not investigation of a potential driving offense. On the record before this Court, there is not a sufficient basis to show reasonable suspicion for a seizure.

As a result of the Circuit Court's erroneous application of the law to the facts in this case, the Court erred in denying Ms. Martin's Motion to Suppress.

CONCLUSION

Accordingly, based on the arguments above, case precedent, and the record before this Court, Ms. Martin respectfully requests that this Court reverse the findings of the Circuit Court and find that the trial court erroneously exercised its discretion in denying the defendant's Motion to Suppress Evidence. As a result, this Court should reverse the decision of the Circuit Court to deny the Defendant's Motion to Suppress and remand to the Circuit Court consistent with this Court's Order, granting Ms. Martin's Motion to Suppress.

Dated in Brookfield, Wisconsin this 2nd day of
September, 2016.

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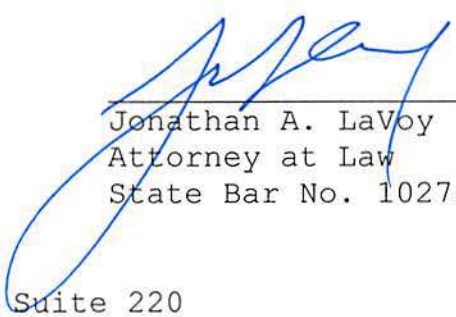
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and Wis. Stat. § 809.19(8)(c) for a brief produced with a monospace font. The length of this brief is four (5) pages.

Dated in Brookfield, Wisconsin this 2nd day of
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

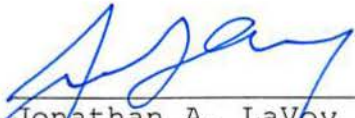
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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated in Brookfield, Wisconsin this 2nd day of
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CERTIFICATE OF MAILING

I hereby certify that this brief and all accompanying certifications were 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 September 2, 2016.

I further certify that the brief and all accompanying certifications were correctly addressed and postage was pre-paid.

Dated in Brookfield, Wisconsin this 2nd day of
September, 2016.

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