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WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF DANE COUNTY
HONORABLE JOSANN REYNOLDS

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
BRIANNA L. FLAHAVAN,
DEFENDANT-APPELLANT.

REPLY BRIEF AND ARGUMENT OF APPELLANT

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ARGUMENT

1. Ms. Flahavan respectfully disagrees with the State's argument that law enforcement had reasonable suspicion to support the investigatory stop of her vehicle.

Ms. Flahavan disagrees with the State's argument that law enforcement's inference that she was involved with Mr. Lehr's criminal activity by actively removing drugs from the residence was reasonable. (Brief of Respondent, p.4).

In order for an inference to be reasonable, there must be some likelihood that it is true. That a particular speculation is possible does not necessarily make it a reasonable inference.

At the time law enforcement stopped Ms. Flahavan's vehicle, it was not reasonable to infer that she was removing drugs from the residence. At the time of the stop, law enforcement had no objective reason to believe that Ms. Flahavan was aware of the recent arrest of Mr. Lehr. Although law enforcement observed video cameras at Mr. Lehr's business at the time of the arrest,

law enforcement testified at the preliminary hearing that at the time of the arrest of Mr. Lehr they "didn't realize" that those cameras were being remotely monitored at the Herndon residence. (DOC 27:10; Appendix A:10). As an objective matter, law enforcement had no reason to believe that the temporal proximity of Ms. Flahavan's departure from the Herndon residence was anything other than coincidence.

Without that linkage, there was no reasonable basis to think Ms. Flahavan was removing drugs or other evidence from the residence. Law enforcement had uncovered a fair amount of information regarding Mr. Lehr's alleged criminal activity, but none of it had ever implicated Ms. Flahavan. The idea that Mr. Lehr would be storing drugs in Ms. Flahavan's vehicle, thereby putting himself and his investment at risk, seems farfetched. And regardless of their personal relationship or association, it provided no reason to suspect that Ms. Flahavan was removing drugs/evidence

from the residence because law enforcement had no reasonable objective basis to think she was aware of what had just happened with Mr. Lehr. Mr. Lehr himself certainly did not have an opportunity to alert Ms. Flahavan.

The mere possibility of criminal conduct does not satisfy the reasonable suspicion standard. Ms. Flahavan would submit that at the time she was seized by law enforcement, all they really had was speculation based on her association with Mr. Lehr that she might possibly be involved.

The reasonable suspicion standard functions to balance the state's interest against the privacy of the individual. See for example, State v. Amos, 220 Wis.2d 793, 799, 584 N.W.2d 170 (Ct.App.1998). To reduce the reasonable suspicion standard down to *possibility* of criminal activity (rather than an objectively reasonable inference that suggests a degree of probability or

likelihood less than probable cause), would result in a tilting of the balance away from individual privacy.

2. The caselaw discussed by the State in its brief is not persuasive.

The State submits in its brief that State v. Limon, 2008 WI App. 77, 312 Wis.2d 174, 751 N.W.2d 877 (Ct.App.2008) supports a finding of reasonable suspicion in this case. (Brief of Respondent, p.4). Ms. Flahavan disagrees.

The totality of facts known to the officers in Limon were of a fairly different character than those known to law enforcement in this case. In Limon, law enforcement actually observed the defendant engaging in behavior that was inherently suspicious, such as loitering in an area suspected of drug activity with no explanation. A marijuana blunt was observed in the area.

In contrast, Ms. Flahavan was not observed to be behaving suspiciously when she was pulled over. None of the informants who provided information about Mr.

Lehr ever implicated Ms. Flahavan. None of them said she was present during or aware of any drug transactions at the Herndon residence.

Ms. Flahavan's association with the Herndon residence was not suspicious – it was her place of residence. In contrast, the Limon defendant's loitering at a known drug location that was not her residence and without explanation was suspicious.

Ms. Flahavan would submit that the facts known to the officers in Limon reasonably suggested some degree of probability or likelihood that the defendant herself was engaged in criminal activity. No such inference could reasonably be drawn from the facts know to law enforcement in this case.

Ms. Flahavan would further submit that law enforcement did not have adequate reasonable suspicion that would allow them to interfere with her liberty for the purpose of freezing the situation. (See Brief of Respondent, p.3). In State v. Krier, 165 Wis.2d 673, 478

N.W.2d 63 (Ct.App.1991), law enforcement initiated an investigatory stop of an individual whom they believed (based on a reliable tip) to be driving illegally (without a valid license). The court of appeals noted that although first offense driving without a license is not a criminal offense, subsequent violations are criminal. The court of appeals concluded that law enforcement had the right to temporarily freeze the situation and investigate further. State v. Krier, 165 Wis.2d 673, 678, 478 N.W.2d 63 (Ct.App.1991).

Ms. Flahavan would agree with the court's conclusion in Krier. In that case, there was an objective basis from which to reasonably infer that the driver was engaging in criminal behavior. In contrast to Ms. Flahavan, law enforcement in Krier had a reliable and specific basis to believe that the driver was acting illegally. A reliable informant had said so. It was accordingly reasonable to allow a brief interference with

his personal liberty to determine whether the illegal conduct was criminal in nature.

The difference between these cases and Ms. Flahavan is that in each of them law enforcement had an objective basis – illegal or inherently suspicious conduct – to justify the Fourth Amendment seizure. Prior to being stopped, Ms. Flahavan was never observed engaging in illegal behavior related to this case. During the investigation of Mr. Lehr, no one had ever accused Ms. Flahavan of being involved in his activities. No one ever said she was present during any of the alleged drug transactions. No one ever said she was even aware of them.

There was nothing suspicious about her leaving her residence in her own vehicle, and law enforcement testified at the preliminary hearing that they were unaware that she was monitoring the situation from home. There was no rational basis to think that Mr. Lehr would risk storing drugs in a vehicle that was often out

and about in public, and over which he had little or no control.

Ms. Flahavan would respectfully submit that the caselaw does not support a finding that law enforcement had reasonable suspicion in this case.

3. The reasonable suspicion standard requires more than a belief that the individual seized has information to give that is relevant to a criminal investigation.

One of the arguments raised in Ms. Flahavan's pretrial motion and subsequent appeal brief was that reasonable suspicion for an investigatory stop must be based on suspected criminal activity by the individual being stopped, and is not satisfied merely when the individual has relevant information about a criminal investigation. (Brief and Argument of Appellant, pp.24-25).

The state did not address this argument in its reply. A respondent's failure to refute the appellant's propositions amounts to a confession that they are

sound. See for example, Kolpin v. Pioneer Power & Light, 154 Wis.2d 487, 501, 453 N.W.2d 214 (Ct.App.1990).

Accordingly, to the extent that the court found reasonable suspicion to be satisfied when the person has relevant "information to give," (DOC 28:78), the court erred in denying Ms. Flahavan's pretrial suppression motion.

CONCLUSION TO REPLY BRIEF AND ARGUMENT

Ms. Flahavan respectfully requests that this court reverse the denial of her motion to suppress, vacate the judgment of conviction, and remand for further proceedings.

Dated this 28th day of November, 2016.

Respectfully submitted,

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Certification of Brief Complaince with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1275 words.

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Certification of Appendix Complaince with Wis. Stats. § Wis. Stats. 809.19(2)(a).

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 Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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