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COURT OF APPEALS  
District III  
Appeal No.: 2016AP001427 CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRENCE L. PERKINS,

Defendant-Appellant.

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**DEFENDANT-APPELLANT'S BRIEF  
AND APPENDIX**

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On Appeal From Decisions Entered  
on March 12, 2015, and September 3, 2015, in the Marathon  
County Circuit Court, the Honorable Michael K. Moran,  
Presiding,  
Case No. 2014 CM 1589

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## **STATEMENT OF THE ISSUE PRESENTED**

Whether the detention of the driver of a vehicle violates the United States and Wisconsin Constitutions when the State fails to prove the driver violated any traffic laws or engaged in any suspicious behavior prior to the seizure?

Trial Court Answer: No.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The Defendant-Appellant does not request oral argument because the briefs of the parties will adequately address the issues raised on appeal. Publication is not warranted because the issues presented are case specific and not likely to recur with the kind of frequency that would warrant publication.

## **STANDARD OF REVIEW**

Review of an order denying a motion to suppress evidence presents a question of constitutional fact that the Court of Appeals is to review under two different standards. *State v. Bunten*, 664 N.W.2d 683, 265 Wis. 2d 938 (Ct. App. 2003). First, this court should reject the Circuit Court's findings of fact if they are clearly erroneous. *Id.*; *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d

830 (1990). A finding is clearly erroneous if "it is against the great weight and clear preponderance of the evidence." *State v. Sykes*, 2005 WI 48, 21 n. 8, 279 Wis. 2d 742, 695 N.W.2d 277 (2005); *State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386 (1989). Second, the Court is then to independently apply the law to those facts. *Bunten*, 265 Wis. 2d at 4. Whether a traffic stop is constitutional under a given set of facts is a question of law that an appellate court reviews *de novo*. *State v. King*, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993).

### **STATEMENT OF THE CASE**

On August 10, 2014, Terrence L. Perkins was arrested by Officer Nathaniel Stetzer of the Wausau Police Department and issued citations charging Operating While Intoxicated and Operating with a Prohibited Alcohol Content as second offenses. Mr. Perkins entered pleas of not guilty to both citations at his initial appearance on September 24, 2014. On February 12, 2015, Mr. Perkins filed a Motion to Suppress (R:14)<sup>1</sup>. An evidentiary hearing on that motion was conducted on March 12, 2015. The testimony at that hearing established that Officer Stetzer's squad was equipped with a dashcam video device that had captured some of the driving leading to

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<sup>1</sup> Throughout this brief, references to the record will take the following form: (R:\_\_:\_\_), with R \_\_ denoting the Circuit Court document number followed by the page number if applicable. When the referenced material is also contained in the Appendix, it will be further identified as (App:\_\_: \_\_).



the stop of Mr. Perkins' vehicle. The State did not introduce the video as evidence, though Officer Stetzer did testify that he had reviewed the video and that it would have corroborated different portions of his testimony. The court was advised that the video had been damaged and was unplayable. (R:22:13)(App:1:13). The court denied the Motion to Suppress by way of an oral decision that date.

Mr. Perkins subsequently retained new counsel and when he discovered that the squad video was available and playable he filed a Motion to Reconsider Defendant's Motion to Suppress and provided the court with a copy of the squad cam video which captured portions of the traffic stop. (R:35). Counsel for Mr. Perkins asked for an evidentiary hearing arguing that new testimony would be necessary given the new evidence. The court denied the request for additional testimony but indicated that it had viewed the video. (R:58:2)(App:2:2). The court issued an oral decision again denying the Motion to Suppress without hearing argument on September 3, 2015. (R:58)(App:2). A written order denying both the Motion to Suppress and Motion to Reconsider Motion to Suppress was signed by the court on May 2, 2016. (R:57)(App:3).

On March 18, 2016, Mr. Perkins was found guilty after a jury trial and was sentenced by the court on that date. Mr. Perkins subsequently filed this appeal of Judge Moran's decision on the Motion to Suppress Evidence and Motion for Reconsideration of Motion to Suppress.

## **STATEMENT OF FACTS**

On August 10, 2014, at approximately 2:32 am, Officer Nathaniel Stetzer of the Wausau Police Department was in his squad car traveling westbound on Sherman Street. Officer Stetzer testified that he had turned onto Sherman Street from Third Ave and that while he was traveling the block distance between Third and Fourth Avenues he observed Mr. Perkins' vehicle approaching the intersection of Fourth Avenue and Sherman. (R:22:4,7,9)(App:1:4,7,9). Officer Stetzer testified that he observed the vehicle proceed through the stop sign controlling the intersection without stopping, passing the crosswalk and traveling into the middle of the intersection, then back up to allow a car to pass before turning right onto Sherman Street heading eastbound toward him. (R:22:4)(App:1:4). Officer Stetzer testified that he never stopped his squad car while driving the one block distance between Third and Fourth Avenues. (R:22:9)(App:1:9). Officer Stetzer testified that he turned his squad around and when he approached the intersection at Third Avenue and Sherman Street he activated his lights and pulled Mr. Perkins's vehicle over on Third Avenue. (R:22:6)(App:1:6). Officer Stetzer's testimony was as follows:

Q. And all of this is taking place during the time when you turned off of Third Avenue and onto Sherman Street; is that correct?

A. That is correct.

Q. Your vehicle was continuing to move up traveling westbound on Sherman Street, was it?

A. Correct.

Q. You didn't come to a stop?

A, No.

Q. It's your testimony that all of this is taking place - - you make the first observation of Mr. Perkins not stopping at the stop sign, proceeding into the middle of the intersection, reversing it, going back to the stop sign, allowing the vehicle to pass, and all during the time you are proceeding up - perhaps you are still proceeding westbound on Sherman Street; is that Correct?

A. Correct. I passed Fourth Avenue and Sherman and had to turn around to go and conduct the traffic stop.

Q. But all of that took place in the one block that you say that you were traveling westbound on Sherman?

A. Correct.

(R:22:9)(App:1:9). Officer Stetzer testified that he stopped the vehicle for violating Wis. Stats. Sec 346.46, which requires vehicles to stop prior to a crosswalk at a stop sign. (R:22:5,8)(App:1:5,8). There was no testimony or evidence introduced at the hearing of any other violations of the law or of any other suspicious driving or behavior that contributed to Officer Stetzer's decision to stop the vehicle.

Officer Stetzer testified that his squad was equipped with a video recording device that is engaged when he turns on his red and blue lights and that it digitally records events beginning thirty seconds prior to the activation of the device. (R:22:6)(App:1:6). The State did not introduce the video of the stop in their case and did not advise the court playable copies

of the video existed when the court was advised by counsel for Mr. Perkins that the video was damaged and unplayable. (R:22:14)(App:1:14). The court was advised that virtually all of the behavior that constituted the basis for the traffic stop was not depicted on the video because it happened more than thirty seconds prior to activation of the lights. (R:22:9-10)(App:1:9-10). Officer Stetzer testified as follows:

Q. And you are testifying that the violation that you cited him for is not depicted on the squad video, the initial failing to stop at the stop sign, proceeding into the intersection; is that correct?

A. Correct.

Q. Because your squad video doesn't – the beginning of it is when he is stopped at the stop sign; is that correct?

A. He backs up to get to the stop sign, stops, and allows the car to pass, and then continues through the intersection.

Q So your video does not depict the stop sign violation that you cited hi for?

A. Correct.

(R:22:9-10)(App:1:9-10). In deciding the motion, the court was seemingly troubled by the absence of the video and the fact that it had not evidently captured the violation that supported the legality of the traffic stop. In referring to the testimony regarding the violation, the court stated:

So the lights must have went on 30 seconds afterwards, and that's the only thing I can determine from the testimony, that the lights were on 30 seconds after he observed the activity.

... I mean it seems like a long time; 30 seconds seems like a long time if its backing up 30 seconds to see what happens. The officer testified that this is what he observed, and I have not heard any evidence that refutes that. So I am going to take the officer's testimony for what it is. There is not –there is nothing that refutes that testimony.

...It's possible that could have occurred, although the timing seems awfully odd. But I have not heard anything otherwise. Based upon that, I have to deny the motion to suppress. That's the order of the court.

(R:22:14-15)(App:1:14-15).

After the motion hearing Mr. Perkins retained new counsel who discovered that, contrary to what the court had been led to believe at the motion hearing, Officer Stetzer's squad video was playable and could have been admitted into evidence at the previous hearing. Mr. Perkins then filed his Motion for Reconsideration of the Motion to Suppress and attached the video for the court to review. Mr. Perkins requested the opportunity to introduce evidence established by the video that would undermine the credibility of Officer Stetzer's testimony at the original hearing. Mr. Perkins made an offer of proof in his motion detailing the evidence established by the video which undermined the credibility and plausibility of the testimony Officer Stetzer's presented at motion hearing on March 12, 2015. (R:35:2-6)). Judge Moran advised the parties that he had viewed the video a number of times and that he did not believe additional testimony or argument was needed. (R:58:2)(App:2:2).

The court again denied Mr. Perkins's challenge to the stop. Judge Moran made it very clear that he did not believe Officer Stetzer's testimony that Mr. Perkins had traveled without stopping at the stop sign into the middle of the intersection.

I find it hard to believe Mr. Perkins was in the middle of the street. I don't think that happened. I think that is pretty clear.

(R:58:4)(App:2:4). But the court stated that at the very beginning of the video he could see Mr. Perkins's vehicle backing up – that it was not stopped at the stop sign. The court indicated that was troubling to him and stated that Mr. Perkins must have failed to stop prior to the crosswalk to have been seen backing up. The court stated:

When I watch the tape, it's very clear to me that Mr. Perkins is backing up. I don't think that's a stretch to see that because –and I say that because I can see the car backing up, and I can see the car, when it backs up it shakes a little bit and pulls forward. I think that's pretty clear to me.

(R:58:4)(App:2:4). The court then goes on to state:

...I don't agree in the motion that at the time of the stop Mr. Perkins was at a complete stop, and a legal complete stop. I don't think it bears with the video itself, and I have watched it...

I have to find Mr. Perkins was at least to some point into the intersection. How far, I don't know, and realizing that backed up into an area that would have been legal. An officer seeing that could have found or did find that there was a potential violation that I think he was cited for, the stop itself would be a legal stop; and therefore, the motion to reconsider is denied.

(R:58:6)(App:2:6).

## **ARGUMENT**

### **I. INTRODUCTION**

The court first decided the case against Mr. Perkins at the motion hearing without the video evidence, having been inaccurately told that the video had been damaged and was no longer playable. After it was determined that the video was still available and not damaged, the court viewed it and concluded that Officer Stetzer had clearly lied as to a most critical fact at the evidentiary hearing – that Mr. Perkins had proceeded into the middle of the intersection. The court then issued a second oral ruling which erroneously found the video evidence was insufficient to change his previous ruling denying the Motion to Suppress. The court based its decision on clearly erroneous findings of fact and failed to hold the State to its burden of proof on the issue.

### **II. OFFICER STETZER SEIZED MR. PERKINS WITHOUT A REASONABLE SUSPICION OR PROBABLE CAUSE IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS**

#### **A. Statement of The Law On Reasonable Suspicion and Probable Cause to Stop for a Traffic Violation.**

The right of individuals to be free from unreasonable detentions, seizures and arrests is protected by the Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution. The Fourth Amendment's purpose is to prevent arbitrary and oppressive

interference by law enforcement officials with the privacy and personal security of individuals. *State v. Reichl*, 114 Wis. 2d 511, 339 N.W.2d 127 (Ct. App. 1983).

In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that police officers may conduct investigatory stops which constitute seizures within the meaning of the Fourth Amendment under certain circumstances when there is no probable cause to make an arrest. *Id.* at 22. Wisconsin adopted the *Terry* standard for investigative stops in *State v. Chambers*, 55 Wis.2d 289, 294, 198 N.W.2d 377 (1972). The Wisconsin legislature codified the *Terry* standard in Wis. Stat. § 968.24. Wis. Stat. § 968.24 provides:

**Temporary questioning without arrest.** After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such a person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity of where the person was stopped.

In interpreting § 968.24, Wisconsin courts are to apply *Terry* and cases following *Terry*. *State v. Post*, 301 Wis. 2d at 8.

To execute a lawful investigatory stop that conforms with the Fourth Amendment prohibition against unreasonable seizures, *Terry* and its progeny require that a law enforcement officer must reasonably conclude, in light of his experience, that some sort of criminal activity has either taken place or is



taking place, or that the person's conduct constitutes a civil forfeiture. *Terry v. Ohio*, 392 U.S. at 22; *State v. Richardson*, 156 Wis. 2d 128, 139; 456 N.W.2d 830 (1990); *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W. 2d 63 (Ct. App. 1991); *State v. Jackson*, 147 Wis. 2d 824, 833-34, 434 N.W.2d 386, 390 (1989). A court reviewing the constitutionality of a traffic stop must consider the totality of the circumstances known to the officer at the time the stop occurred. The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that at the time of the stop criminal activity is afoot. *Terry*, 392 U.S. at 22-24, *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987), *State v. Dunn*, 158, Wis. 2d 138, 146, 462 N.W. 2d 538 (Ct. App. 1990). More than a mere hunch that the suspect is about to or has engaged in criminal activity is necessary to establish reasonable suspicion. An officer's "inchoate" and "unparticularized suspicion" will not suffice. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996); *State v. Post*, 301 Wis. 2d at 7, citing *Terry*, 392 U.S. at 27.

Officer Stetzer testified that the only reason he stopped Mr. Perkins's vehicle was due to the failure to stop at the stop sign controlling the intersection at Fourth Avenue and Sherman Street. He testified that he issued a warning to Mr. Perkins for that violation of Wis. Stats. Sec. 346.46. (R:22:4)(App:1:4). A traffic stop for a particular traffic

violation is reasonable when an officer has probable cause to believe that a traffic violation has occurred or has grounds to reasonably suspect a violation has been or will be committed. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996); *See Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3149–50, 82 L.Ed.2d 317 (1984), *citing Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that a traffic violation has occurred." *State v. Popke*, 2009 WI 37, ~ 14, 317 Wis. 2d 118, 765 N.W.2d 569 (2009).

A traffic stop passes constitutional muster only when reasonable suspicion or probable cause objectively exists. *Wren v. U.S.*, 517 U.S. 806, 811-13 (1996). The subjective intentions and beliefs of a law enforcement officer are irrelevant to a determination of the constitutionality of a seizure under the Fourth Amendment. *Id.* The determination of reasonableness is a common sense test based on the totality of the facts and circumstances known to the officer at the time of the stop. *State v. Richardson*, 156 Wis.2d at 139-40; *see also State v. Post*, 301 Wis. 2d at 9. This common sense approach balances the rights of individuals to be free from unreasonable intrusions and the interests of a community like the City of Wausau to effectively prevent, detect and investigate crimes. *Id.* ; *State v. Rutzinski*, 241 Wis. 2d 729, 623 N.W.2d 516 (2001).

**B. Mr. Perkins Was Seized by Officer Stetzer When He Performed the Traffic Stop.**

A seizure has occurred under the Fourth Amendment when an officer by means of physical force or show of authority has in some way restrained the liberty of a citizen. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Harris*, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). In order to effect a seizure, an officer must make a show of authority and the citizen must actually yield to that show of authority. *In re Kelsey C. R.*, 243 Wis.2d 422, 444, 626 N.W.2d 777, 789 (2001). A seizure occurs when a reasonable person would not feel free to ignore the police presence and go about their business. *Kaup v. Texas*, 538 U.S. 626, 630 (2003). The detention of a motorist by a law enforcement officer resulting from a traffic stop constitutes a “seizure” within the meaning of the Fourth Amendment. *Berkemer v. McCarty*, 486 U.S. 420, 436-437 (1984).

Officer Stetzer clearly seized Mr. Perkins at the moment he activated his squad lights and Mr. Perkins acquiesced to those lights and pulled his vehicle to the curb on Third Avenue.

**C. The State Failed to Meet its Burden of Proof to Establish the Traffic Stop Was Supported by Probable Cause.**

When a defendant challenges the constitutionality of a warrantless seizure or detention under the Fourth Amendment, the prosecution bears the burden of proving the officer’s

conduct was reasonable and lawful. *McDonald v. United States*, 335 U.S. 451, 456 (1984). The evidence introduced in this case established that Officer Stetzer's seizure of Mr. Perkins violated the Fourth Amendment prohibition against unreasonable seizures because he did not reasonably conclude, in light of his experience, that a violation of traffic law had been committed by Mr. Perkins. Wis. Stat. Sec. 968.24. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990); *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W. 2d 63 (Ct. App. 1991

Officer Stetzer repeatedly testified at the motion hearing on March 12, 2015, that he observed Mr. Perkins' automobile proceed through the stop sign at Fourth Avenue and Sherman Street without stopping and travel into the middle of the intersection. Officer Stetzer testified:

I observed the vehicle proceeded through the stop sign without stopping, passed the crosswalk, and approximately the middle of the intersection, and backed up to allow a car to pass, and the continued through the intersection.

(R:22:4)(App:1:4). Officer Stetzer further testified that the video did capture Mr. Perkins' vehicle backing up from the intersection to allow a car traveling eastbound on Sherman to pass.

Judge Moran made it very clear in his ruling after viewing the video that he did not believe the testimony of Officer Stetzer as to Mr. Perkins traveling into the middle of the intersection, presumably because it is very clear from the video that could not have occurred. The court stated:

I find it hard to believe Mr. Perkins was in the middle of the street. I don't think that happened. I think that is pretty clear..

(R:58:4)(App:2:4). Having found Officer Stetzer had testified inaccurately, the court could not make a finding as to how far into or beyond the crosswalk Mr. Perkins' vehicle traveled because there was no credible evidence in the record to establish that fact. Instead, the court stated:

I have to find Mr. Perkins was at least to some point into the intersection. How far, I don't know, and realizing that backed up into an area that would have been legal.

(R:58:6)(App:2:6).

In deciding the motion, the court clearly engaged in speculation and arrived at hunches based on the testimony of someone he had found to have testified untruthfully. To make that finding that Mr. Perkins could have committed the stop sign violation, Judge Moran did no more than articulate a hunch as to the one essential element of the one and only violation that formed the basis for the stop. For a stop to be found constitutional, the court must be able to point to the same specific and articulable facts which objectively warrant a reasonable officer to believe that the traffic violation had occurred. No reasonable person could believe that the State had met its burden to establish by a preponderance of the evidence that a violation occurred based on what had been determined to be untruthful testimony by Officer Stetzer and a video of the events which should – but does not – show any violation of the law.

Even though the court had found Officer Stetzer's testimony that Mr. Perkins' vehicle crossed into the middle of the intersection "clearly" unsupported by the evidence, the court did conclude that an officer "could have found" that there was a "potential violation" by the vehicle proceeding into the crosswalk, "how far, I don't know". (R:58:6)(App:2:6). This kind of speculation does not satisfy the Fourth Amendment's particularized standard requiring specific and articulated evidence which establishes probable cause that a traffic violation occurred. The court essentially denied the Motion to Suppress because Mr. Perkins "could have" or "potentially" entered only a matter of inches into the crosswalk.

The record here clearly establishes that the court failed to hold the State to its burden of proof to establish the probable cause necessary to uphold the traffic stop. The evidence in the record fails to support a finding based on clear and articulate testimony and credible evidence that probable cause existed to support a violation of Wis. Stats. Sec. 346.46.

**D. The Video Evidence Establishes That Mr. Perkins Committed No Traffic Violation Prior to the Stop.**

The court's decision denying the Motion to Suppress was based on findings of fact that are clearly erroneous. The evidence fails to support the court's hunch that Mr. Perkins' vehicle entered into the crosswalk without stopping. The State did not introduce the video into evidence at the motion hearing. Instead, the State relied solely on the sworn testimony of

Officer Stetzer, significant parts of which the court found to be untruthful. Furthermore, by standing silent when the court was advised the video was unplayable, the State allowed the court to presumably believe the video was not being played because it was damaged and no longer available. (R:22:14)(App:1:14). Once the court did have the opportunity to review the video, Judge Moran obviously believed the video evidence clearly undermined the accuracy and credibility of Officer Stetzer's testimony. While the video caused Judge Moran to conclude the most pertinent aspects of Officer Stetzer's testimony were false, i.e. Mr. Perkins' vehicle traveled into the middle of the intersection, the court did thereafter erroneously rely on certain portions of it to make the hunches he cited to uphold the traffic stop.

At the foundation of the court's decision is the court's finding of fact that the start of video shows Mr. Perkins' vehicle backing up from the stop sign, not that he was legally stopped at the stop sign as was argued by Mr. Perkins' counsel.

When I watch the tape, it's very clear to me that Mr. Perkins is backing up. I don't think that's a stretch to see that because –and I say that because I can see the car backing up, and I can see the car, when it backs up it shakes a little bit and pulls forward. I think that's pretty clear to me.

(R:58:4)(App:2:4). The court then goes on to state:

...I don't agree in the motion that at the time of the stop Mr. Perkins was at a complete stop, and a legal complete stop. I don't think it bears with the video itself, and I have watched it...

(R:58:6)(App:2:6).

The court's finding that the start of the video clearly established that Mr. Perkins' vehicle had backed up is not supported by that evidence. The video provided to Mr. Perkins' counsel on this appeal does not show Mr. Perkins' vehicle backing up from the stop sign. The video begins with Mr. Perkins' vehicle stopped at the stop sign. As the squad car approaches Fourth Avenue the angle of the camera alters the view of Mr. Perkins' vehicle but the video does not in any way make it "clear" that Mr. Perkins backed up from an illegal position. The video clearly does not support officer Stetzer's testimony at the motion hearing that the video showed Mr. Perkins' vehicle backing up to allow a car traveling eastbound on Sherman to pass. When the video starts the vehicle is already passing the intersection. The court's finding that the video establishes that Mr. Perkins backed up consistent with Officer Stetzer's testimony was clearly erroneous.

Officer Stetzer testified that his squad video recorded events beginning thirty seconds before his lights were activated. He testified that the video did not capture most of what he testified to because it must have occurred more than thirty seconds before he turned on his lights. The court intuitively had some concerns about the plausibility of that testimony before it saw the video:

So the lights must have went on 30 seconds afterwards, and that's the only thing I can determine from the testimony, that the lights were on 30 seconds after he observed the activity. So I can assume the officer's squad



went past it, and then turned the lights on at some point, and then stopped the vehicle.

...We are looking at 30 seconds of time. Admittedly, that is a long period of time.

(R:22:14)(App:1:14).

Officer Stetzer testified that he first observed Mr. Perkins' vehicle after turning onto Sherman from Fourth Avenue. He testified that he observed the violation while he drove without stopping between Third Avenue and Fourth Stereet before turning around to stop Mr. Perkins's vehicle.

Q. And all of this is taking place during the time when you turned off of Third Avenue and onto Sherman Street; is that correct?

A. That is correct.

Q. Your vehicle was continuing to move up traveling westbound on Sherman Street, was it?

A. Correct.

Q. You didn't come to a stop?

A, No.

Q. It's your testimony that all of this is taking place - - you make the first observation of Mr. Perkins not stopping at the stop sign, proceeding into the middle of the intersection, reversing it, going back to the stop sign, allowing the vehicle to pass, and all during the time you are proceeding up - perhaps you are still proceeding westbound on Sherman Street; is that Correct?

A. Correct. I passed Fourth Avenue and Sherman and had to turn around to go and conduct the traffic stop.

Q. But all of that took place in the one block that you say that you were traveling westbound on Sherman?

A. Correct.

(R:22:9)(App:1:9).

The video clearly establishes that the block between Third and Fourth Avenues is a very short and that it took both Officer Stetzer and Mr. Perkins a matter of some 8 seconds to cover the entirety of the distance. When the video is activated the officer has just made the turn onto Sherman Street from Third Avenue and the camera therefore necessarily would have caught virtually everything the officer would have been able observe from the moment Mr. Perkins vehicle would be in his view. There is simply no way to conclude based on the video evidence that Mr. Perkins could have been observed doing anything not captured by the video given Officer Stetzer's testimony that he first had sight of Mr. Perkin's vehicle after he turned onto Sherman from Third Avenue.

There could have been few if any seconds the video would have missed from the time he was in a position to view Mr. Perkins' vehicle once on Sherman Street and when the recording started with the squad car just having made the turn onto Sherman Street almost the entire block away from Fourth Avenue. What is not on the video could not have been observed by Officer Stetzer given his testimony at the motion hearing. The only finding supported by the record in this case is that Officer Stetzer's testimony is inconsistent with the video and all reasonable inferences that can be drawn from that evidence.

Counsel made the following offer of proof which further highlights the implausibility of Officer Stetzer's testimony and the clearly erroneous findings of fact made by

the court in support of its decision. Counsel for Mr. Perkins made the following offer of proof in his Motion for Reconsideration of Motion to Suppress regarding what was observed in the video;

When the video starts, it appears the squad car is located on Sherman St. next to the back driveway for the building at 840 South 3<sup>rd</sup>. Ave., which building houses Floral Magic. This would place the squad car about 75 feet west of 3<sup>rd</sup>. Avenue. (See Exhibit A). The Floral Magic Building at the Northwest corner of South 3<sup>rd</sup> Ave and Sherman Street until they are already Sherman St. (See Exhibit B.) The officer testified that he saw the defendant's vehicle go past the stop sign, and allow a vehicle to pass all before the squad video turned on. To be accurate, this would have to happen with the squad car travelling only 75 feet if it is not shown on the video. That timing is implausible.

The squad car is traveling at a regular speed on Sherman when the video is turned on. ...If the squad car was traveling at 25 MPH, it would cover the estimated 75 feet in 2.0 seconds. Even if the squad was going 15 MPH, the 75 feet would be covered in 3.4 seconds. That is not enough time for the officer to observe the defendant's vehicle go past the stop sign, come to a complete stop in the middle of the intersection, reverse back to the stop sign, and stop again (as the video shows the defendant's car stopped at first).2-3

(R:35:2-3). The video establishes that officer Stetzer could not possibly have observed what he testified to at the motion hearing. The court's finding that "it makes perfect sense" that the video would not have caught the traffic violation is clearly erroneous.

## **CONCLUSION**

The seizure of Mr. Perkins by Officer Stetzer cannot be justified as a valid stop based on an observed traffic violation. The video evidence and the totality of the record in this case establishes that the court's findings of fact were clearly erroneous and the State did not meet their burden of proof to establish that Officer Stetzer had grounds to believe a traffic violation had occurred prior to stopping Mr. Perkins's vehicle. The stop of the vehicle, the seizure and arrest of Mr. Perkins were all illegal and all evidence obtained as a result of that illegality should have been suppressed.

Dated this 31<sup>st</sup> day of October, 2016.

Respectfully submitted,

BUTING, WILLIAMS & STILLING, S.C.

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

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### **CERTIFICATION**

I hereby certify that this document conforms to the rules contained in '809.19(8), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this document is 5,205 words.

I further certify that the text of the electronic copy of this document is identical to the text of the paper copy.

Dated this 31<sup>st</sup> day of October, 2016.

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Dudley A. Williams  
State Bar No.: 1005730

COURT OF APPEALS  
District III  
Appeal No.: 2016001427 CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRENCE L. PERKINS,

Defendant-Appellant.

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**CERTIFICATION OF MAILING**

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Pursuant to Wis. Stat. ' 809.80(3)(b), I hereby certify that on the 31st day of October, 2016, I mailed in a properly enclosed postage-paid box the original and nine copies of the Defendant-Appellant's Brief and Appendix addressed to the following named person(s) at the proper post office address, to-wit:

Clerk  
Court of Appeals, District III  
110 East Main Street, Suite 215  
P.O. Box 1688  
Madison, Wisconsin 53701-1688

Dated this 31<sup>st</sup> day of October, 2016

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Dudley A. Williams  
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COURT OF APPEALS  
District III  
Appeal No.: 2016AP0014277 CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRENCE L. PERKINS,

Defendant-Appellant.

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**APPENDIX CERTIFICATION**

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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(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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.

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.

Dated this 31st day of October, 2016.

Respectfully submitted,

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

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- B. Transcript from September 3, 2015 – Court Decision on Motion for Reconsideration.....1-8**
- C. Written Order Denying Motion to Suppress Statements and Evidence Due To Unlawful Seizure, Detention And Arrest dated May 2, 2016.....1**