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**CLERK OF COURT OF APPEALS
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Appeal No. 2016 AP 0001471-CR
Marathon County Circuit Court Case 2015 TR 005650

COUNTY OF MARATHON,

Plaintiff-Respondent,

vs.

ARMIN JAMES BALZAR,

Defendant-Appellant.

ON APPEAL FROM AN ORDER ENTERED IN MARATHON COUNTY CIRCUIT
COURT, THE HONORABLE GREG HUBER, PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATUTES CITED

§ 346.63(1)(A), Wis. Stats.	2
§ 809.22(2)(b), Wis. Stat.1

STATEMENT OF THE ISSUES

1. Whether the trial court's denial of Balzar's motion to suppress was clearly erroneous as the trial court found that the officer's contact with Balzar's vehicle was supported by reasonable suspicion.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The County does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22 (2) (b) (2013-14). Publication is not necessary.

STATEMENT OF THE CASE

On March 11, 2016 a suppression hearing was held before the Honorable Greg Huber in the Branch II court room. (R.Doc, 23. ps.1-3)

At that hearing, Deputy Cassandra Bean of the Marathon County Sheriff's Department testified about the facts leading up to her contact with Balzar's vehicle. (R.Doc, 23. ps.4-5)

Subsequently, after hearing the evidence and ordering briefs, the trial court denied Balzar's motion. (R. Doc, 24. Ps.1-6) Balzar was convicted by a jury of a §346.63(1)(a)violation on June 15, 2016 and asked that the sentence be stayed to allow an appeal. (R.Doc, 22. pg.1 and R.Doc, 10. pg.1) That appeal is now before this court.

STATEMENT OF THE FACTS

On November 11, 2015 at approximately 1:23 a.m. Deputy Cassandra Bean of the Marathon County Sheriff's Department was on duty in a fully marked squad car, travelling northbound on rural State road 13 in the County of Marathon when she observed a southbound vehicle swerve over the fog line after passing her vehicle. Deputy Bean then turned her squad car around and proceeded to follow the suspect in

order to further observe the vehicle's driving. (R.Doc, 23. ps.4-5)

After following the suspect vehicle for a short period, Bean observed the vehicle in question turning into the parking lot of a closed business. Deputy Bean testified that the vehicle then parked in the front parking lot of the closed business. Furthermore, Deputy Bean testified that the vehicle was already parked when she pulled into the parking lot. (R.Doc, 23. Ps.5-6)

Deputy Bean then turned on her overhead lights and made contact with the vehicle and identified the driver as Mr. Balzar. Deputy Bean testified that she found it suspicious that Balzar would pull into a closed business at 1:30 in the morning considering the fact that there was a fully marked squad car right behind him. (R.Doc, 23. ps.6-7)

On June 9, 2016 the trial court rendered an oral ruling denying Balzar's request for suppression. The trial court found that Deputy Bean had made a valid *Terry Stop*. (*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868) The facts that the trial considered germane were that Deputy Bean was in a fully marked squad car behind Balzar's vehicle at 1:23 in the morning, in a rural setting, at which time Balzar

pulled into a closed business and parked his vehicle.

(R.Doc, 24. Ps.2-3)

The trial court also reviewed the unpublished Rule 809.23(3) case *City of Mequon v. Cooley*, 2011 WI APP 244,332 Wis.2d 318 (attached) which it found persuasive in making its ruling. (R.Doc, 24. Ps.2-3)

ARGUMENT

I. BALZAR'S MOTION WAS CORRECTLY DENIED BY THE TRIAL COURT AFTER A HEARING BECAUSE THE DEPUTY DID HAVE REASONABLE SUSPICION FOR A TERRY STOP BASED UPON THE TOTALITY OF THE CIRCUMSTANCES.

A. Standard of Review.

On appeal, the circuit court's factual findings are reviewed pursuant to the clearly erroneous standard. The appellate court will uphold those factual findings unless they are clearly erroneous. *State v. Popke*, 317 wis.2d 118, 765 N.W.2d 569. However, applying those facts to constitutional principles is a question of law that is reviewed *de novo*. *Id.*

B. BALZAR'S ARGUMENT

Balzar argues that Deputy Bean only had an inchoate and un-particularized hunch when she made contact with Balzar's vehicle. Furthermore, Balzar tries to distinguish

the present case from *City of Mequon v. Cooley* by saying that Deputy Bean turned her squad lights on at the same time as Balzar parked his vehicle, as opposed to Cooley's vehicle already being parked. (See appellant's Brief at p. 7) Clearly this not what Deputy Bean testified to. Deputy Bean unambiguously testified that Balzar's vehicle was already parked when she entered the parking and initiated contact. (R.Doc, 23, p. 6)

C. STATE'S ARGUMENT

Deputy Bean had reasonable suspicion to conduct a *Terry* stop with Balzar and the trial court's rationale for denying Balzar's motion was clearly not erroneous.

Deputy Bean testified to more than just stopping Balzar's vehicle in the parking lot of a closed business. The factors that Deputy Bean took into consideration before making contact with Balzar were that she was in a fully marked squad car and behind Balzar's vehicle before it turned into the parking lot of the closed business, it was 1:23 in the morning, it was in a rural area, and Balzar's vehicle parked in the front of the parking lot. (R.Doc. 23, ps.4-7)

Specifically, Deputy Bean testified that she took into account that she was right behind Balzar's vehicle in a

fully marked squad car. A reasonable officer would suspect that the vehicle in question was trying evade a law enforcement official.

Furthermore, Balzar misstates the evidence before the trial court when attempting to distinguish *City of Mequon v. Cooley* from the present case.

The facts in *City of Maquon v. Cooley*, 332 Wis.2d 318 are identical to the facts in the present case. In that case, the officer was behind a vehicle at 2:20 a.m. and the vehicle turned into a movie theatre parking lot and parked. The officer found this suspicious as the theatre was closed and there were no other vehicles around. The Court of Appeals in that case found that "Wisconsin law also recognizes that a law enforcement officer may make an investigatory stop based solely on observations of lawful conduct, although such a seizure must be premised on reasonable inferences drawn from lawful conduct". Id at §6. The Court went on to find that Cooley was lawfully stopped. Id. at §7.

Furthermore, there is actually one more fact here that was not present in the *City of Mequon* case. Deputy Bean was on heightened alert as she witnessed some bad driving as

Balzar's vehicle swerved over the fog line. That unlike the case in *Cooley*, where there was no bad driving witnessed, was the reason for Deputy Bean to be behind Balzar in the first place.

Finally, the Supreme Court of Wisconsin in *State v. Waldner*, 206 Wis.2d 51, 556 N.W.2d 681 found a valid *Terry* stop under similar circumstances. There the officer saw a vehicle traveling on a city street at a slow rate of speed before stopping at an intersection and then accelerating to a lawful but high rate of speed. The officer then saw the vehicle pull into a legal parking spot and pour out some liquid from a plastic glass on to the roadway. This all happened at 12:30 a.m.. Subsequently, the officer the officer conducted a *Terry* stop.

The Court found that the officer in *Waldner* had much more than a "hunch" when he stopped Waldner. His suspicion was based upon specific, articulable facts and the reasonable inferences drawn from those facts. *Id.* at 685.

Furthermore, the *Waldner* Court found that "Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. *Id.* at 686. (Internal cite omitted)

The Court then found that the officer under the totality of the circumstances had a reasonable reason to stop Waldner. Id. at 686.

In the present case, Deputy Bean gave specific, and articulable facts which under the totality of the circumstances would allow a reasonable officer to conclude that something suspicious was going on. The trial court then provided reasoning for its evidentiary decision that comported with Wisconsin's accepted legal standards and in accordance with the facts. (R.Doc, 24, Ps.5-7)

CONCLUSION

Based on the above analysis, this court should uphold the trial court's denial of Balzar's motion to suppress.

Dated this 22 day of December, 2016, at Wausau, WI.

Respectfully submitted:

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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Signed,

Attorney Sidney A. Brubacher
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CERTIFICATION OF MAILING

I certify that on this 22nd day of December, 2016, pursuant to sec. 809.80(3)(b) and (4), the original and nine copies of the Brief of Plaintiff-Respondent were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Defendant-Appellant via United States

first-class mail in properly addressed, postage paid envelopes.

Signed,

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CERTIFICATION OF ELECTRONIC BRIEF

I certify that on this 22nd day of December, 2016, I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of sec. 809.19(12) of the Wisconsin Statutes. I further certify that this electronic brief is identical in content and in format to the printed form of the brief filed as of this date. 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.

Signed,

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