STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1671-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENTON RICARDO EWERS,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction
Entered in the Pepin County Circuit Court,
the Honorable James J. Duvall, Presiding

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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### The Stop of Mr. Ewer's Vehicle Was Not Supported by Reasonable Suspicion Where It Was Based Exclusively on an Unnamed Clerk's Report That a Customer Seemed Dazed and Confused and, More Than Two Hours Earlier, Had Smelled of Intoxicants.

#### A. Because the quality of the tip is best viewed as moderately reliable, the quantity of information required to provide reasonable suspicion is greater.

Both the state and Mr. Ewers recognize that a tip about a possible drunk driver may provide reasonable suspicion for an investigatory stop even though the officer did not actually observe behavior indicative of driving under the influence. *See* ***Navarette v. California***, 572 U.S. ___, 134 S.Ct. 1683, 1688 (2014); ***State v. Rutzinski***, 2001 WI 22, ¶¶7, 16-17, 241 Wis. 2d 729, 623 N.W.2d 516. But both the state and Mr. Ewers also recognize that not every tip about a possible drunk driver will provide reasonable suspicion. Rather, whether reasonable suspicion exists depends upon both the quantity and quality of the tip, that is, the content of the information provided and the degree of its reliability.

As to quality – the reliability of the tipster – the state concedes that Mr. Ewers "has a point" that the clerk whose tip the officer relied upon exclusively to justify the stop remained somewhat anonymous. (State's brief at 4). Indeed, there is no indication that the clerk gave her name or that the officer attempted to speak with the clerk at any time,

including during the two-hour lag between the first and second call. Yet, the state argues that the unnamed clerk should be considered "among the most reliable informants." (*Id*.). Mr. Ewers submits that more legally and factually accurate is his characterization of this tipster as having a moderate level of reliability.

The supreme court has described the potential types of tips as spanning a spectrum where the most reliable are informants who are personally known to the officer and who have previously provided reliable information and citizen informants who identify themselves and provide information that the police independently verify before the stop. ***Rutzinski***, 241 Wis. 2d 729, ¶¶18-21. Least reliable are "totally anonymous" informants. ***Id***. at ¶22. Mr. Ewers recognizes that the Family Dollar clerk was not totally anonymous and that her identity likely could have been discovered by the officer, but wasn't. To afford this somewhat anonymous tipster the level of reliability equivalent to a person whose identity is actually known to the police is not appropriate. Even among the cases the state cites from other jurisdictions is the recognition that "[s]econd on the scale of reliability are those tips in which, although the informant does not identify himself or herself, the informant gives enough information that his or her identity may be ascertained." ***State v. Slater***, 986 P.2d 1038, 1043 (Kan. 1999). Such tipsters, like the Family Dollar clerk, are not considered as having the highest level of reliability.

Recognizing that the source of the tip is at best viewed as moderately reliable, rather than highly reliable, is not mere hair splitting. It is significant because the lower the degree of reliability the more information that is required "'to establish the requisite quantum of suspicion than would be required if the tip were more reliable.'" ***Rutzinski***, 241 Wis. 2d 729,

¶23, *quoting* ***Alabama v. White***, 496 U.S. 325, 330 (1990). Here, the somewhat anonymous tipster provided ambiguous information – and in one critical respect stale information – that was largely unverified by the officer. As argued below, more information was needed to provide reasonable suspicion that Mr. Ewers was driving under the influence.

B. The content of the tip, of which only the description and location of the vehicle were verified, did not provide reasonable suspicion that Mr. Ewers was operating under the influence.

The state claims that Mr. Ewers "wants to limit reasonable suspicion to cases in which the informant expressly opines that the person is 'drunk' or 'intoxicated.'" (State's brief at 8). The state mischaracterizes Mr. Ewers' argument. He does not contend that reasonable suspicion hinges upon the use of magic words. To the contrary, far more informative than the tipster's characterization of an individual's condition – *e.g.*, intoxicated or dazed and confused – are descriptions of the individual's behavior – *e.g.*, stumbling or slurred speech – that might support or explain the characterization. Here, the clerk's tip contains a characterization of dazed and confused, but lacks facts to support that final conclusion.

The state concedes that no one – not the clerk, not the officer – observed any erratic driving. Rather, the stop was based upon the clerk's report that the customer appeared dazed and confused and smelled of intoxicants but only the first time he was in the store, which was more than two hours before the stop. None of that information was verified by the officer before he made the stop.

As argued in Mr. Ewers' brief-in-chief (p. 9), this is not a case where the tipster reported erratic driving. *Contrast, e.g.*, ***Navarette***, 134 S.Ct. at 1689; ***Rutzinski***, 241 Wis. 2d 729, ¶¶3-4, 34. Nor is this a case, such as ***State v. Powers***, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869, where a clerk's tip of an intoxicated customer was verified by the officer before the stop was made. (Ewer's brief at 10-11). In ***Powers***, unlike here, the officer verified the clerk's characterization when, before the stop, he saw the customer "walking unsteadily" to his truck carrying a case of beer. ***Id***. at ¶14. The state has not cited a single case from this state where a clerk's tip of an intoxicated customer justified a stop without the officer observing any behavior consistent with the clerk's characterization.

Here, the information possessed by the officer before the stop consisted of only the following:

- The Family Dollar clerk at 5:30 p.m. and 7:55 p.m. reported that a male customer appeared dazed and confused. (53:6).

- In the first call the clerk said he smelled of intoxicants. No such information was conveyed in the second call. (53:10).

- The man left in a gold Ford Focus traveling in a particular direction, although it was unclear whether the man was the driver or a passenger.[1] (53:6-7, 26-27).

[1] The State repeatedly writes that the clerk also provided the license plate of the vehicle. (State's brief at 1, 6, 8). There was no testimony at the suppression hearing about the officer receiving information about or verifying the license plate before the stop (53:5-34),

Although the officer did not find a vehicle matching that description after the first call, he did after the second. But before making the stop, the officer did not observe any behavior suggesting that the driver was dazed and confused, much less intoxicated.

It is beyond dispute that reasonable suspicion must be based on "specific and articulable facts." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). An "inchoate and unparticularized suspicion or 'hunch'" is not enough. ***Id***. at 27. Here, the only specific fact – that the man smelled of intoxicants more than two hours before the stop – was stale and of little value. The tip is devoid of any other facts about the man's conduct or appearance that would support the characterization of the man, an apparent stranger to the clerk, as dazed and confused.

Contrary to the state's contention, the information provided by the clerk did not present competing *reasonable* inferences. The "facts" contained in the tip are so skeletal regarding the customer's conduct and appearance as to provide nothing more than a hunch or guess that the customer was intoxicated. As ***Terry*** instructs, even a hunch or guess made in good faith does not amount to reasonable suspicion. ***Id***. at 22. The information provided to the officer, of which only the description and location of the vehicle were verified, did not provide reasonable suspicion that the driver of the vehicle was intoxicated.

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although at the preliminary hearing the officer testified that the license plate was conveyed to him by dispatch. (7:6-7).

## CONCLUSION

For the reasons set forth above and in his brief-in-chief, Mr. Ewers respectfully requests that the court reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence derived from the stop.

Dated this 20th day of January, 2017.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,361 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 20th day of January, 2017.

Signed:

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