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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP001720
Waukesha County Circuit Court Case Nos. 2016CV000725

CITY OF WAUKESHA,

Plaintiff-Respondent,

v.

DEREK R. PIKE,

Defendant-Appellant.

AN APPEAL FROM THE DECISION AND ORDER OF THE TRIAL COURT UPHOLDING THE FINDING OF THE CITY OF WAUKESHA MUNCIPAL COURT FINDING THAT THE DEFENDANT REFUSED CHEMICAL TESTING IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL P. MAXWELL, JUDGE, PRESIDING

THE REPLY BRIEF AND OF THE DEFENDANT-APPELLANT DEREK R. PIKE

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ARGUMENT

The City primarily relies on an unpublished case ***State v. Grover,*** No. 2010AP1844-CR, unpublished, (WI App March 24, 2011), in arguing that Office Fisher had the requisite level of suspicion to continue to detain Mr. Pike for field sobriety tests. The ***Grover*** case is easily distinguishable from Mr. Pike's case, in ***Grover,*** the officer stopped the defendant for speeding. Speeding is an indication that a person might not have control of their vehicle and coupled with the odor of intoxicant and time of night might suggest someone is impaired. In Mr. Pike's case, he was stopped for not having a front license plate. There is nothing about Mr. Pike's driving that showed potential impairment.

Other unpublished cases suggest that the odor of intoxicant is insufficient evidence to stop a vehicle or to continue a detention for field sobriety tests. In, ***State v. Meye,*** No. 2010AP336-CR, unpublished slip op. (WI App July 14, 2010), the court found that an observed odor of intoxicant is not sufficient evidence to make an investigatory stop, despite the initial contact occurring near bar time, 3:23 a.m. ***Meye*** at ¶2.

Similarly, in ***State v. Gonzales,*** No.2013AP2585-CR, unpublished slip op. (WI App May 8, 2014), the court found that a stop for a defective headlight coupled with an odor of intoxicant was insufficient to detain the defendant for field sobriety tests. ***Id.*** at ¶26. In ***Gonzales,*** the court turned to WIS JI-CRIMINAL 2663, citing the language that "Not every person who has consumed alcoholic beverages is 'under the influence…" The court went on to state that "reasonable suspicion of intoxicated driving generally requires reasonable suspicion that the suspect is "under the influence of an intoxicant…to a degree that rendered him or her incapable of safely driving." ***Id.*** at ¶13. The lack of physical signs of impairment or impaired driving contributed to the court's decision that the requisite level of suspicion was lacking.

In Mr. Pike's case, the evidence articulated by the officer only showed that Mr. Pike consumed intoxicants. (An admission that he consumed two beers at a bar which created an odor of intoxicant consistent with this consumption is only an indicia of alcohol consumption.) There is absolutely no evidence in this record suggesting that Mr. Pike might be impaired. The odor of intoxicant observed by Officer Fisher simply showed Mr. Pike consumed intoxicant. Mr. Pike's driving was unimpaired, and

speech was normal. Furthermore, there was no testimony that Mr. Pike exhibited motor coordination problems or red, glassy or blood shot eyes.

Finally, the City relies on ***State v. Waldner,*** 206 Wis.2d 51, 556 N.W.2d 681 (1996), for the proposition that an officer who lacks the precise level of suspicion should not simply shrug his shoulders and let a crime go unnoticed. However, ***Waldner*** does not support the City's argument. In ***Waldner,*** there were significant observations of impairment not present in Mr. Pike's case, including unusual driving. ***Id.*** at 53-54.

CONCLUSION

Because Officer Fisher's continued detention of Mr. Pike was unreasonable, the trial court erred when it upheld the municipal court's finding that the officer had the appropriate level of suspicion to continue the detention and that the refusal was improper. The court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 6th day of February, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 10 pages. The word count is 1230.

Dated this 6th day of February, 2017.

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CERTIFICATION 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 s. 809.19(12).

I further certify that:

This electronic brief is identical in content and 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.

Dated this 6th day of February, 2017.

Respectfully submitted,

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