

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No.: 2016AP001808 CR

-vs-

Circuit Court Case No: 15-CT-1080

BRANDON SWIECICHOWSKI,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT ENTERED IN THE CIRCUIT COURT FOR RACINE
COUNTY, BRANCH 6, THE HONORABLE DAVID W. PAULSON, PRESIDING

Respectfully submitted,

BRANDON SWIECICHOWSKI
Defendant-Appellant

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STATEMENT OF THE ISSUES

DID THE TRIAL COURT ERR IN DENYING THE APPELLANT’S MOTION TO SUPPRESS FRUITS OF AN ILLEGAL STOP AND MOTION TO RECONSIDER THE DENIAL OF THAT MOTION ALLEGING THE TRAFFIC STOP OF THE APPELLANT’S MOTOR VEHICLE WAS AN ILLEGAL STOP AND SEIZURE.

STATEMENT OF PUBLICATION

Mr. Swiecichowski does not request publication of the opinion in this case because this is an appeal within Section 752.31(2), Wis. Stats., and therefore is not subject to publication.

STATEMENT ON ORAL ARGUMENT

Oral argument in this case would only be necessary if the Court concludes that the briefs have not fully presented and argued the issues on appeal.

STATEMENT OF THE CASE

On Saturday, September 12, 2015, the Defendant/Appellant, Brandon M. Swiecichowski, was arrested by Officer Jacob D. Buer of the Village of Caledonia Police Department. Subsequently, Mr. Swiecichowski was charged by way of Criminal Complaint with Operating a Motor Vehicle While Intoxicated - 2nd Offense and Operating a Motor Vehicle With Prohibited Alcohol Concentration - 2nd Offense, filed in Racine County Circuit Court on October 9, 2015. The Appellant subsequently filed a Motion to Suppress Fruits of an Illegal Stop (Record 2) and an evidentiary hearing was held on that Motion on February 16, 2016. The Honorable Judge David W. Paulsen, Racine Circuit Court Branch 6, presided over the motion and entered an order denying it. On May 9, 2016, the Appellant filed a Motion to Reconsider the denial of

his original Motion (R . 5) and the State filed a written response. (R. 6). On May 18, 2016, Judge Paulsen denied the Appellant’s Motion to Reconsider. (R. 12). Subsequently, the Appellant entered a guilty plea and a sentencing hearing was held on June 24, 2016. The sentence was stayed pending the outcome of this Appeal.

STATEMENT OF THE FACTS

Officer Jacob Buer of the Village of Caledonia Police Department testified on direct exam that on September 12, 2015 he was on duty on third shift and was parked on Nicholson Road just South of Dunkelow Road in Caledonia. Dunkelow Road was closed both East and West of Nicholson Road. (R. 11, P. 6; App. 115). Buer testified the roads were closed by virtue of a sign that stated “Road Closed to Through Traffic”, and that he believed the Village DPW (Department of Public Works) had put up the signs. (R. 11, P. 7; App. 116). Buel indicated he was present there because citizens were complaining about people violating the road closed signs, that vehicles were traveling too fast, and also that construction companies were complaining that vehicles were driving past them while they were trying to pave the road and doing the construction. (R. 11, P. 7,8; App. 116-17). Officer Beur also testified that the signs in question were not lighted, they may have had blinking lights, but he couldn’t be positive to answer that, but that he could testify with certainty that they were reflective. (R. 11, P. 14; App. 123).

At 12:49 a.m., Officer Buer observed a vehicle being operated by the Defendant/Appellant, Brandon Swiecichowski, traveling down the road. Buer ran the registration of the vehicle and found it was registered to the address of 1304 Arthur Street in Racine, which was 7 or 8 miles from the location of the stop. (R. 11, P. 8- 9; App. 117-18).

Officer Buer testified that he thought it was “suspicious” that a vehicle from the city was driving through a road closed sign in that stretch of roadway, and since it wasn’t from the area, it was in violation of the road closed sign. (R. 11, P. 8-9; App. 117-18). Buer initiated a traffic stop and the vehicle stopped right away; the driver was identified as the Appellant. (R. 11, P. 10).

On cross-examination, Buel testified that the vehicle Mr. Swiecichowski was operating belonged to Swiecichowski’s Fiancee’ and was registered to her address in Racine. (R. 11, P. 11). The area that was closed off was part residential and part industrial, and there were numerous residences on these closed roads with their driveways accessing these closed roads, and anyone living or staying in those residences would have to access them by way of this closed road. (R. 11, P. 11; App. 120). Officer Buer conceded that that anyone borrowing a car as the Appellant had, or who had a relative or friend in this area, would have to drive through the road closed to local traffic signs to get to those homes. (R. 11, P. 11-12; App. 120-21). Buel also testified that the Mr. Swiecicowski in fact lived on one of the roads that were closed or an offshoot of one of the closed roads; Buel did not know at the time he stopped the vehicle whether the vehicle was passing through the road closed area on to roads that were open again, or was the vehicle was stopping at a house and pulling into a house in the road closed area. (R. 11, P. 13-14; App. 122-23)

Officer Buer also could not testify with any certainty who actually placed the “Road Closed to Through Traffic” signs. He testified he “believed” the “DPW” (Department of Public Works) had placed the signs but would have to verify with the DPW to be one hundred percent certain, and he wasn’t sure if it was the municipality or construction people who had put the signs up; Buer testified he knew it was a State-funded project so he assumed that because they

were doing patrols there it was put up by the DPW but that is was an assumption he could not testify to as fact. (R. 11, P. 14-15; App. 123-24).

On redirect and re-cross exam, Buer testified the closed roads under construction were pretty much all grave, were bumpy and in a state of disrepair. Although Mr. Swiecichowski's road wasn't on the closed the roads that led up to his home was. (R. 11, P 15-17; App. 124-26).

Subsequent to the traffic stop in this case, Mr. Swiecichowski cooperated in performing Field Sobriety Testing and was arrested for Operating While Intoxicated. He then consented to a legal sample of his blood. The WSLH tested the sample and reported a value of 0.088 g/100 ml. (R. 1).

ARGUMENT

I. THE TRAFFIC STOP OF DEFENDANT-APPELLANT'S VEHICLE WAS NOT SUPPORTED BY PROBABLE CAUSE OR REASONABLE SUSPICION THAT HE HAD COMMITTED A TRAFFIC OFFENSE.

A. Standard of Review

An investigative stop or detention of a vehicle is a seizure under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-10 (1996). The temporary detention of individuals during the stop of an automobile by police, even if it is only for a brief period and for a limited purpose, constitutes a "seizure of 'persons' within the meaning of the Fourth Amendment". State v. Gaulrapp, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (citing Whren, 517 U.S. 806, 809-10 (1996)). The Constitutional standard of the 4th Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution requires that before an officer makes an investigative traffic stop, he must have reasonable suspicion. State v Rutzinski, 2001Wis.2d 729, 623 N.W.2d 516. (2001). Under certain circumstances, police may detain an

individual upon less than probable cause for arrest. State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681, 684 (1996). A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed. State v. Gaulrapp, 207 Wis.2d 600, 558 N.W.2d 696, 698–9 (Ct. App. 1996). To satisfy constitutional requirements for a traffic stop, an officer’s suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. A stop may not be based on an officer’s inchoate hunch. Terry v. Ohio, 392 U.S. 1, 27 (1968). “As a general matter, the decision to stop a motor vehicle is reasonable when the police have probable cause to believe that a traffic violation has occurred”. Whren 517 U.S. at 810. Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed. Gaulrapp, 207 Wis.2d at 605. The officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop”. State v. Post, 301 Wis.2d 1, 733 N.W.2d 634 (2007). The validity of a stop based on reasonable suspicion is determined by the totality of the facts and circumstances. State v. Williams, 241 Wis. 2d 631, 623 N.W.2d 106 (2001).

Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. Williams, 241 Wis.2d at 642. Reviewing courts apply a two part standard of review to questions of constitutional fact. First, the trial court’s findings of historical fact are upheld unless clearly erroraneous. Williams at 642. Second, determining whether reasonable suspicion exists, based upon those historical facts, is reviewed de novo. Id. at 642. At a motion

hearing to suppress evidence the burden of proof is on the State, to prove that a traffic stop meets the reasonableness requirement. State v. Post, 301 Wis.2d 1 (1995).

B. Argument

It does not appear that there is a significant factual dispute in this case; the issue in this case hinges on the legality of the sign itself and Officer Buer's interpretation and application of the law used to justify the traffic stop of Mr. Swiecichowski. The alleged violation Mr. Swiecicowksi was committing was driving on a road that was posted by a sign that said "closed to through traffic." Officer Buer testified he was parked where he was for the express purpose of looking for vehicles driving past the "road closed for through traffic" signs onto a road that was under construction at the time.

Although the Appellant was never cited under either State Statute or Local Ordinance in this case, the applicable local ordinance would have been Village of Caledonia Ordinance Section 10-1-23, "HIGHWAYS CLOSED FOR TRAVEL". The Ordinance states:

"Whenever any highway is impassable or unsafe for travel during the construction or repair of any such highway and until it is ready for traffic, the authorities in charge of maintenance or construction thereof may keep it closed by maintaining barriers at each end of the closed portion. The barriers shall be of such material and construction that they indicate the highway is closed and shall be lighted at night".

In this case, the signs "closing" the road by their explicit wording did not close the road completely for all vehicular traffic, but rather only for vehicles passing through the closed portion of the road. Wisconsin Statute Section 86.06 mirrors the language of the Caledonia Ordinance Section 10-1-23, except that in 2011, the Legislature amended the State Statute by Wisconsin Act 246, which removed the requirement that this type of sign be lighted at night.

This creates a threshold issue as to whether the road was legally closed by the signs that were erected there. The roads involved here, Dunkelow and Nicholson Road, appear to be local roadways that were under the jurisdiction and control of the Village of Caledonia. Officer Buer's testimony that the Caledonia "DPW" (assuming Department of Public Works) had erected and placed the signs and that Buer's supervisors assigned officers to do patrols there. (R. 11, P. 13-14; App. 122-23). Local roads, local signs and specialized local enforcement would come under the jurisdiction and are controlled by local traffic ordinances. Wisconsin Statute Section 349.05, "Uniform traffic control devices", states:

"Local authorities shall place and maintain traffic control devices upon highways under their jurisdiction to regulate, warn, guide or inform traffic. The design, installation and operation or use of new traffic control devices placed and maintained by local authorities after the adoption of the uniform traffic control devices manual under Section 84.02(4)(e) shall conform to this manual."

The Caledonia Ordinance would control the road and sign in this case and Section 10-1-23 explicitly requires that a road closed sign be lighted at night. The undisputed testimony of Officer Buer was that the signs were not lighted in this case. The Appellant would submit the road in question was not closed legally per the requirements of Caledonia Ordinances.

If this Court finds the signs erected legally closed the road, the next issue is what the "Closed to Through Traffic" qualifier means in assessing whether Officer Beur had probable cause or reasonable suspicion to stop Mr. Swiecichowski's motor vehicle. The sign's language on it's face did not totally close the road, but only closed it to "through traffic". There were homes and businesses both on the closed road themselves, as well as on roads that could only be

accessed by use of the roads that were closed. Citizens living or working on these roads had no choice but to drive on them to access their homes and businesses. Citizens visiting other citizens residing there or staying with others residing there, or employees working in the industrial sites also had no choice but to drive on these roads. This was not a situation where there were no driveways, businesses or residences in the construction zone, citizens lived and worked there.

Officer Buer was sitting in the construction zone for the particular reason of stopping vehicles violating the erected signs, based on complaints his Department had received. Although he testified that some of the complaints were for vehicles driving on the roads during active work by the construction companies, that clearly was not the case at the time of this stop. Another concern apparently expressed to his Department was vehicles speeding through the construction zone, although there was no testimony that Mr. Swiecichowski was speeding in this case. (R. 11, P. 7-8; App. 116-17). Officer Buer stated that when he observed Mr. Swiecichowski's vehicle his attention was drawn to it because at the time of the stop there wasn't a lot of traffic present. He then ran the registration on the vehicle and it came back registered to an address in the City of Racine on Arthur Drive. It appears that he stopped the vehicle right after receiving that information. There is no other reason given by Buer for the traffic stop. Apparently, Buer made no attempt to follow Mr. Swiechicowki to see what his destination was or if he was in fact driving through the construction zone.

The State failed to meet it's burden and establish in this case evidence or testimony that Officer Buer had probable cause or reasonable suspicion to believe that Mr. Swiecichowski was "through traffic" as prohibited by the sign posted. There was no testimony that he exited or had any intention of passing through, or exiting the construction zone. It is not disputed that the

roadway was not closed to all traffic, but in fact was open, but only to local traffic. The fact that a vehicle was registered to an address outside of the construction area does not equate to probable cause or reasonable suspicion that Mr. Swiecicowski had committed, was committing or was about to commit a crime or forfeiture offense. Any of the employees of the industrial locations located within the construction zone most likely would not have had vehicles registered to the company they worked for located within the construction zone. Any citizens visiting other citizens or relatives who resided in the construction zone would not have vehicles registered to addresses there. Anyone residing in the construction zone who borrowed a car from another person who did not live within that zone would not have that vehicle registered to an address there, which is the factual scenario here, Mr. Swiecichowski had borrowed the subject vehicle from his Fiance.

Although motorists may violate “closed to through traffic” or “local traffic only” signs, the mere registration of a vehicle to an address outside the construction zone is a classic example of a stop based on a “suspicion or hunch” that is condemned in Terry. Such generalized suspicion should not, and does not, translate into unbridled authority for police to stop and detain vehicles entering into such areas. The Appellant would submit that police officers in that situation must accumulate additional facts and information to transform this hunch into a reasonable suspicion that would allow a permissible Terry Stop. Officer Buer simply could have continued to observe Mr. Swiecichowski’s vehicle to see if it was in fact driving through the closed road to an open road or if it’s destination was within the construction zone. There is nothing in the record to indicate anything that would have prevented Buer from doing so. He could have easily acquired additional information to justify the stop, or he may have discovered that Mr. Swiecicowski was

indeed, local traffic. Buer was under no time or geographic constraints, no exigencies existed. He was sitting idle on a closed road with little traffic to concern him. It is not unreasonable to expect him to perform the very simple function of investigating where Mr. Swiecichowski's vehicle was heading to.

If the road was not closed legally per Village of Caledonia Ordinance Section 10-1-23 due to the lack of lighting of the signs, then that ordinance could not provide a basis for probable cause or reasonable suspicion for the stop. This should not fall under the "Good Faith" exception to the law. The good faith exception applies in limited circumstances where the police have relied on either a warrant issued by a detached and neutral magistrate or on a well settled law that was subsequently overturned. State v. Dearborn, 327 Wis.2d 252, 786 N.W.2d 97 (2010). In this case Officer Buer was specifically stationed for the purpose of stopping individuals driving in the construction zone, under orders of his superiors to enforce the signs posted there. Yet the Ordinance specifically requires the signs be lit at night. Not knowing or failing to check the requirements is not a "good faith" reliance on a well settled law that was subsequently overturned, it is a failure of a police officer to know the requirements of a specific ordinance he is on special assignment to enforce. Citizen's are held accountable for knowledge of existing laws and are held responsible for obeying them, there is no reason the same principle should not apply to those enforcing them.

In the trial court the State argued Officer Buer had probable cause or reasonable suspicion that Mr. Swiecichowski violated Wis. Stat. Section 346.04(2). 346.04(2) reads:

"No operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer".
Section 340.01(38) defines the term "official traffic sign":

“Official traffic control device means all signs, signals, markings and devices, not inconsistent with chs 341 to 349, placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning, or guiding traffic; and includes the terms “official traffic sign” and “official traffic signal.”

The evidence presented to in this case failed to establish that the sign at issue “was erected by a public body or official having jurisdiction to regulate traffic”. Buer testified that he did not know if the municipality or the construction company but the signs up (R11. P 14; App. 123), and could not testify as a certainty who in fact did so.`` (R11. P 14-15; App. 123-24). There is no evidence Buer made any attempt to find out who placed the signs prior to stopping the Defendant, despite the fact that he was specifically sitting in the construction zone looking for citizens violating them.

The State of Wisconsin has the burden of proof and failed to establish whether the signs were placed by the proper authority. Since enforcement of the road closed signs was the reason Officer Buer was stationed where he was, it is unreasonable that he did not have knowledge of the law or made a mistake of law in this case. If ignorance of the law is not a defense to a citizen accused of violating it, how can it be a defense or an excuse to a police officer enforcing it?

Prior to the Wisconsin Supreme Court decision in State v. Houghton, 364 Wis.2d 234, 868 N.W.2d 143 (2015), the established case law in Wisconsin was that a mistake of law could not be probable cause for a traffic stop. Houghton reversed the established cases of State v Longcore, 226 Wis.2d 1, 594 N.W.2d 412 (Ct. App. 1999) and State v. Brown, 355 Wis.2d 668, 850 N.W.2d 66 (2014), which had previously held a mistake of law could not form probable cause for a traffic stop. Houghton also expanded the law concerning traffic stops to allow an officer’s reasonable suspicion that a traffic law was being violated to form the basis for all traffic stops.

Concerning the mistake of law issue, the issue the Court took up was whether a “reasonable” mistake of law violated constitutional protections against unreasonable searches and seizures. The Court went on to hold that an “objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a traffic stop”. The Court then considered the statute that formed the basis for the Officer’s stop in that case beginning by considering the meaning of the statute.

Houghton involved Wisconsin Statute Section 346.88, Obstructed Windshield. The Court looked to the statute’s plain meaning, beginning with the language of the statute, giving words their “common, ordinary, and accepted meaning”. The Officer in that case mistakenly believed that the law prohibited drivers from attaching any non exempt item to windshields or dangling objects from rear view mirrors. The Court held that the Officer’s interpretation that the statute prohibited the placement of any object in the front windshield was objectively reasonable. The Court quoted language from the US Supreme Court case North Carolina v Heien, 574 123 S.Ct 530 (2014)

“A court tasked with deciding whether an officer’s mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such as the overturning of the officer’s judgment requires hard interpretative work, then the officer has made a reasonable mistake. But if not, not”.

In this case, Caledonia Ordinance Section 10-1-23 has clear and plain meaning. It mandates a sign closing a road has to be lighted at night. There is no ambiguity or interpretative work that needs to be done. It is an explicit requirement of the ordinance for a road to be closed. Officer Buer testified he was parked at his location due to complaints about individuals driving on the “closed” road, and was there for that express purpose . There can be little argument made that

the officer made a “reasonable” mistake of law here. There is nothing to interpret in the plain meaning of the statute. Effectuating traffic stops without knowledge of the statute’s requirements is not reasonable or excusable.

In addition, Officer Buer did not follow Mr. Swiecichowski through the construction area to see if his vehicle was “through traffic” or not. Instead, Buer pulled over the vehicle once he determined the vehicle was not registered to a residence in the area. It is not unusual or illegal for individuals to borrow vehicles or to visit individuals who may live in residential areas under construction. This is exactly what happened here; where Mr. Swiecichowski resided in the area but was borrowing his fiancée’s car. We are a mobile society and should be able to move freely about without governmental interference. Officer Buer did not make any attempt to determine if Mr. Swiecichowski was stopping locally or proceeding through the construction area to determine whether he was “local traffic” or not. He made an assumption based on the registration of the vehicle which turned out in fact to be not true. Mr. Swiecichowski was in fact living in the construction zone. Officer Buer did not have probable cause or reasonable suspicion to believe that Mr. Swiecichowski had violated, was violating, or was about to violate a criminal statute or local traffic ordinance under the totality of the circumstances in this case.

CONCLUSION

For all of the reasons stated above, the Appellant, Brandon Swiecichowski, hereby submits that the trial court’s finding that Officer Buer of the Caledonia Police Department had probable cause or reasonable suspicion to stop his motor vehicle was in error and the trial court erred in denying his Motion to Suppress. Mr. Swiecichowski respectfully requests this court vacate the Judgment of Conviction and reverse the trial court’s order in this case.

Dated this _____ day of November, 2016.

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CERTIFICATION ON FORMAT

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

Mono spaced font: Times New Roman at 12 point font, which is 10 characters per inch; double
spaced; 1.5 inch margins on left side and 1.0 inch margins on other 3 sides.

The length of the brief is 5243 word count and 15 pages.

Dated this _____ day of _____, 2016.

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CERTIFICATION OF MAILING

I, _____, hereby certify that pursuant to section 809.80(3), Stats., that I deposited in the United States mail for delivery to the Clerk, by first class mail, postage prepaid the Brief and Appendix of Defendant-Appellant, address to:

Clerk of the Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

I have enclosed ten (10) copies of this document to the Court of Appeals. I have also served by U.S. Mail three (3) copies of the said document upon the Wisconsin Attorney General at the following address:

Attorney General J.B. Von Hollen
PO Box 7857
Madison, WI 53707

I certify that the packages containing the said documents postage prepaid were deposited in the U.S. postal receptacle on this _____ day of _____, 2016.

Theodore B. Kmiec III

CERTIFICATION OF APPENDIX

I hereby certify that filed with his brief, either as a separate document or as part of this brief, is an appendix that complies with section 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial courts 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 or 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 _____ day of _____, 2016.

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this BRIEF OF APPELLANT-DEFENDANT, excluding the appendix, if any, which complies with the requirements of section 809.19(12).

I further certify that this electronic petition is identical in content and format to the printed form of the petition for review filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the Court and served on all opposing parties.

Dated this _____ day of _____, 2016.

By:

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No.: 2016AP001808 CR

-vs-

Circuit Court Case No: 15-CT-1080

BRANDON SWIECICHOWSKI,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

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