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STATE OF WISCONSIN

COURT OF APPEALS

12-28-2016 DISTRICT II

STATE OF WISCONSIN,

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Plaintiff-Respondent,

Appeal No.: 2016AP001808 CR

-vs-

Circuit Court Case No: 15-CT-1080

BRANDON SWIECICHOWSKI,

Defendant-Appellant.

REPLY 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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ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT/APPELLANT’S MOTION TO SUPPRESS EVIDENCE AND FINDING THAT THE TRAFFIC STOP IN THIS CASE WAS SUPPORTED BY PROBABLE CAUSE OR REASONABLE SUSPICION.

In it’s Brief, the State argues that the traffic stop in this case was valid under Wisconsin Statute 346.04(2), which states: “No operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer”. The State goes on to quote The United States Department of Transportation Manual on Uniform Traffic Control Devices which states that “Road Closed to Through Traffic” signs “should be used where through traffic is not permitted, or for a closure of some distance beyond the sign, but where the highway is open for local traffic up to the point of closure”. (Respondent’s Brief, Page 3). The State’s Brief further references the Wisconsin Manual on Uniform Traffic Control Devices, Section 6F.09, “Local Traffic Only Signs”, which indicates that local traffic only signs may be used to the point of closure if access beyond the closure is allowed for traffic originating within, or having destination on, the portion of the road closed to traffic. (Respondent’s Brief, P. 3).

The Petitioner submits at that the initial motion hearing, the State of Wisconsin never met it’s burden to establish that the sign in question was in fact an “Official” traffic sign. Officer Buer was unable to testify with any certainty who erected the signs and under whose authority the signs were erected. Buer testified that he was not sure if the municipality or construction company put the signs up and could not testify to a certainty who in fact did so. (Record 11, P 14-15). This issue was not addressed by the Respondent in it’s Brief and is therefore waived by the State.

The Respondent also did not address the Petitioner's threshold argument that the sign itself was not a legal sign. Mr. Swiecichowski was never issued a citation under either Wisconsin Statutes or Town of Caledonia Ordinances for violating a Road Closed or Disobeying an Official Traffic sign. Prior to 2011, Wisconsin Statutes Section 86.06 required signs closing roads to be lighted at night; in 2011, the Wisconsin Legislature amended the statute through Wisconsin Act 246 which removed the requirement that such signs be lighted at night. However, the roadway here was a local road under local jurisdiction and Village of Caledonia Ordinance 10-1-23 clearly still required the sign to be lighted at night. Mr. Swiecichowski argued this point in his Brief (Petitioner's Brief, Pages 6-7), yet the Respondent did not refute or even address it in their Brief. Mr. Swiecichowski would submit that by failing to address and refute this issue and argument in its Brief, the Respondent admitted it. Issues not refuted on Appeal are deemed admitted. See *Charolais Breeding Ranches Ltd v FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Concerning the probable cause/reasonable suspicion issue, the thrust of the Respondent's argument is that a police officer has probable cause or reasonable suspicion to stop a vehicle on a road "closed to through traffic" based solely on the fact that the vehicle is registered to an address several miles away. Mr. Swiecichowski would urge this court to reject this argument.

The issue in this situation is whether a vehicle is local traffic or not. The Wisconsin Manual on Uniform Traffic Section referenced by the Respondent's brief indicates the question is whether the traffic originated within, or had a destination on, the portion of the closed roadway (Respondent's Brief P. 3). This cannot be determined by an officer by simply checking the registration address of a vehicle in question. In this particular case there were businesses and

residences located on the closed roads in question. Citizens employed by businesses on that road, or who visit those businesses for business purposes, citizens who visit friends or relatives at residences on those roads or who bring items of need to those living there would all be subject to being seized by agents of the government simply because their vehicles are not registered to a business or residence located within that construction zone. This is unreasonable and an “arbitrary interference by law enforcement officers” *State v. Iverson* 365 Wis.2d 302, 333, 871 N.W.2d 661, 674 (2015).

Officer Buer testified he was sitting in the construction monitoring vehicles driving through it. It was in the early morning hours, there was not a lot of traffic on the road. (R11, P. 8). There was nothing in his observations of Mr. Swiecichowski’s vehicle that led Buer to believe the operator was dangerous, intoxicated, speeding or posed any threat to public safety. There existed no exigency, time or geographic constraints that required Buer to take immediate action to pull over the vehicle. All he had to do is what a reasonable officer would have done; continue to investigate by further observation of Mr. Swiecichowski’s vehicle to determine if his destination was local and he was not “through traffic” as prohibited by the signs in question.

CONCLUSION

For the foregoing reasons, this court should reverse the Circuit Court’s decision denying the Defendant-Appellant’s Motion to Suppress in this case and remand the case back to Circuit Court for further proceedings.

Dated this _____ day of December, 2016.

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1223 words and 4 pages.

Dated this _____ day of December, 2016.

By:

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this REPLY BRIEF OF DEFENDANT-APPELLANT, 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.

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