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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP001815-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN L. ZIEGLMEIER,

Defendant-Appellant.

On Appeal from an Order Denying Suppression
Entered in the Marathon County Circuit Court,
the Honorable Gregory E. Grau presiding, and a Judgment of
Conviction entered in the Marathon County Circuit Court,
the Honorable R. Thomas Cane presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Law Enforcement Lacked Reasonable Suspicion to Compel Mr. Zieglmeier to Perform Field Sobriety Tests; therefore, Law Enforcement Violated Mr. Zieglmeier's Fourth Amendment Right to be Free from Unreasonable Seizures and the Evidence Obtained Pursuant to the Field Sobriety Tests must be Suppressed.

In the middle of the afternoon on a Sunday in December, Officer Maureen Pilsner pulled Mr. Zieglmeier over for speeding. (19:3-4). She approached the driver's side window and engaged him in conversation. After their conversation, Officer Pilsner told the other officers on the scene that there was an odor of alcohol, but that she did not believe that the odor was strong enough to warrant conducting field sobriety tests. (19:9-10). Officer Pilsner had been a police officer for twenty-five years. (19:3).

Despite Officer Pilsner's professional opinion, a different officer, Officer Albee, had Mr. Zieglmeier perform field sobriety tests. The State argues that reasonable suspicion supported this officer's action. The State notes that Mr. Zieglmeier acknowledged drinking two beers at some time previously that day. But evidence that an adult man consumed a couple of beers does not give rise to a reasonable suspicion that he is impaired to the point that he cannot safely operate a motor vehicle. The crime of operating while intoxicated requires proof that the person "has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI-CRIMINAL 2663A. (emphasis added).

The State also argues that the circuit court’s finding that Mr. Zieglmeier seemed confused when speaking to Officer Pilsner supported reasonable suspicion. (*see* 19:17-18). This finding was apparently based on the court’s independent viewing of the squad camera video, “exhibit 1”. (9). But it is either clearly erroneous or too speculative to be given probative weight. Officer Pilsner testified that Mr. Zieglmeier did *not* seem disoriented or lost. (19:8). The video does not contradict her testimony. It is not possible to hear what Mr. Zieglmeier says and his body language is not visible.¹ Thus, the court’s finding is against the great weight and clear preponderance of the evidence. *State v. Johnson*, 2007 WI 32, ¶19, 299 Wis. 2d 675, 729 N.W.2d 182.

There were none of the characteristic signs of drunk driving in this case—no swerving, no slurred speech, no red eyes, no glassy eyes, no disorientation, no stumbling. It was the middle of the day, not bar time. Mr. Zieglmeier pulled his car over immediately and appropriately when Officer Pilsner activated her emergency lights. Officer Pilsner, a 25-year veteran of the force, did not believe that the odor of alcohol was strong enough to warrant field sobriety tests. (19:3, 9-10).

An officer must have reasonable suspicion to believe that a driver is impaired before compelling field sobriety tests. *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. But drinking two beers and driving above the speed limit does not give rise to reasonable suspicion of impaired driving. Therefore, Officer Albee violated Mr. Zieglmeier’s right to be free from unreasonable seizures by compelling field sobriety tests, and the evidence therefrom

¹ Mr. Zieglmeier encourages this Court to view the video. (9). There are three videos on the disc. Clicking the “ICV” folder and then the “AVViewer” will open the relevant video.

must be suppressed. *See State v. Washington*, 2005 WI App 123, ¶19, 284 Wis. 2d 456, 700 N.W.2d 305 (evidence obtained from an illegal seizure is suppressed by virtue of the exclusionary rule).

CONCLUSION

For the reasons stated above and in Mr. Zieglmeier's brief-in-chief, Mr. Zieglmeier respectfully asks this Court to reverse the circuit court and remand with directions to allow Mr. Zieglmeier to withdraw his plea and to suppress the evidence.

Dated this 27th 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 626 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 27th day of January, 2017.

Signed:

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