STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP1933-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

THOMAS M. GIBSON,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON JUNE 23, 2016, AND THE DECISION DENYING THE DEFENDANT'S MOTION TO SUPPRESS, IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE RALPH M. RAMIREZ, PRESIDING.
WAUKESHA COUNTY CASE NO. 2015CT1284

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted:
Matthew S. Pinix, SBN 1064368
Michael G. Soukup, SBN 1089707

LAW OFFICE OF MATTHEW S. PINIX, LLC
1200 East Capitol Drive, Suite 220
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
matthew@pinixlawoffice.com
www.pinixlawoffice.com

Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

ARGUMENT

This is a case about reasonable suspicion. It asks whether it was reasonable for Sergeant Bautz to stop Gibson based exclusively on a radar gun that had not been found accurate in over twenty years. Gibson argues against reasonable suspicion for two main reasons. First, Bautz was trained to test his radar gun's accuracy before using it to conduct traffic stops, but did not do so in Gibson's case. Second, Wisconsin has long recognized the need for routine maintenance of radar guns to ensure that they are working correctly. However, Bautz's department had not tested or calibrated his radar gun in over twenty years. Gibson thus argues that two-plus decades is simply too long for the accuracy of an unmaintained radar gun to go untested and yet still serve as the exclusive basis for a constitutional stop.

I. IT WAS UNREASONABLE FOR SERGEANT BAUTZ TO RELY ON HIS RADAR GUN'S REPORT OF GIBSON'S SPEED BECAUSE HE HAD NOT TESTED ITS ACCURACY BEFORE USING IT AND IT HAD NOT BEEN MAINTAINED IN OVER TWENTY YEARS.

Thirty years ago, this Court recognized that radar guns need routine testing and servicing to ensure that they are in proper working order. *Ozaukee County v. Flessas*, 140 Wis. 2d 122, 128, 409 N.W.2d 408 (Ct. App. 1987). Consistent with that proposition, Bautz's police training instructed him that he should use tuning forks to test the accuracy of his radar gun both before and after any shift in which he used it to conduct traffic stops. (R.34:18.) But, Bautz admittedly failed to comply with that training; he did not test the radar gun's accuracy until some unknown time after he stopped Gibson. (*Id.*) And, nothing in the record shows that his radar gun has been proven accurate since its 1994 testing. Quite to the contrary, the record shows that Bautz's department had not serviced or calibrated the radar gun in the twenty-plus years

before Gibson's stop (*id.*:15), contradicting *Flessas*'s call for routine maintenance to ensure proper working order.

The question before this Court is, thus, whether it is reasonable for an officer to believe that a radar gun is accurate even though it has not been routinely tested and serviced or proven accurate for more than twenty years. Gibson says no. Bautz should have followed his training and proven the device accurate before he used it as a predicate for Gibson's stop. His department should have followed the reasoning of *Flessas* and undertaken routine testing and servicing to ensure the gun's accuracy. If either fact was different—if Bautz had tested the gun before the stop or his department had routinely tested and serviced it—Gibson agrees that this case would likely come out against him. But the absence of those facts renders unreasonable Bautz's reliance on the device as the predicate for Gibson's stop.

In its response, the State contends it had no burden to prove that the radar gun was in good working order at the time of the stop. St.'s Br. at 11. Regardless of whether that is true, the argument misses the mark. The question is not whether the radar gun was working correctly when Bautz used it; the question is whether Bautz acted reasonably in relying on it. The State noticeably avoids that argument altogether, and its avoidance is telling. It is simply not reasonable for an officer to initiate a traffic stop based on the report of untested radar gun that he knows has not been calibrated or tested in more than two decades.

The State points to *State v. Kramer*[1] to support its claim that the facts show that Bautz's radar gun was accurate. St.'s Br. at 11. But *Kramer* creates problems for the State that actually undercut the

[1] 99 Wis. 2d 700, 299 N.W.2d 882 (1981).

reason for which the State adduces it. *See* 99 Wis. 2d at 703. Namely, before a radar device can be deemed accurate pursuant to *Kramer*, there must be proof that its accuracy was tested "within a reasonable proximity following arrest." *Id.* In Gibson's case, the State failed to present evidence demonstrating the timeliness of Bautz's post-stop test, a deficiency that it recognizes but doesn't remedy in its brief. *See* St.'s Br. at 13. *Kramer* is thus inapt.

The State next turns to *State v. Hanson*[2] for support. However, as with *Kramer*, the State's reliance on *Hanson* is misplaced because the State failed to present sufficient evidence to satisfy *Hanson*'s test for accuracy. *See* 85 Wis. 2d at 245. Like *Kramer*, *Hanson* requires proof that the radar device was tested within a reasonable period of time following arrest, which, as was previously noted, is missing from Gibson's case. *Id.* Additionally, *Hanson* demands proof that the radar gun was in proper working condition at the time of arrest, which the State has not supplied. *Id.* Bautz testified that he performed the internal test, but he did not testify as to the results of that test. The State attempts to satisfy the good-working-order prong of the test by explaining that there is no evidence showing that the gun was not working properly. St.'s Br. at 12. That argument ignores the burden of proof with which the State is saddled. As the party required to prove Gibson's seizure constitutional, *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634, the State cannot rely on the absence of relevant evidence to prove a necessary fact. Thus, *Hanson*'s test hurts rather than helps the State's argument.

The State's reliance on *Kramer* and *Hanson*, as well as the other case to which it cites to establish the radar gun's accuracy[3], is misplaced for another reason: none of those cases questioned the reasonableness of

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[2] 85 Wis. 2d 233, 270 N.W.2d 212 (1978).
[3] *State v. Mills*, 99 Wis. 2d 697, 299 N.W.2d 881 (1981).

the arresting officer's suspicion. *See Kramer*, 99 Wis. 2d at 703-04, *Hanson*, 85 Wis. 2d at 234-35, *Mills*, 99 Wis. 2d at 698. Each of those cases involved a challenge to the officer's use of the radar unit in the context of a challenge to the sufficiency of the evidence of speeding. *Id.* When the sufficiency of the evidence is challenged on appeal, a reviewing court resolves all findings in favor of the verdict. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is in those circumstances that courts have recognized a presumption of accuracy in radar guns. *See Kramer*, 99 Wis. 2d at 703-04, *Hanson*, 85 Wis. 2d at 234-35, *Mills*, 99 Wis. 2d at 698.

But those issues are not involved in Gibson's case.[4] As Gibson has oft repeated, the question here is whether the officer's decision to stop him was objectively reasonable. It is not whether the State could use an old, untested radar gun that had not been calibrated in decades to prove that he was speeding, or whether at a trial the evidence provided by the radar gun should be excluded. It is, instead, whether Bautz's use of that old, untested radar gun was objectively reasonable.

The State's position, if accepted, stands for the proposition that an officer acts reasonably in relying on a radar gun that has not been routinely tested and serviced for twenty years and, contrary to police training, has not been tested to ensure its accuracy before using it to conduct traffic stops. That argument should not win the day. It would establish a rule that officers may neglect their training and rely on old,

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[4] Although *Kramer* and *Mills* are not applicable to this case because of the different legal issues involved, it is worth noting that the court found the radar gun accurate in both cases considering that the officer used two tuning forks *both before and after* the traffic stop. *Kramer*, 99 Wis. 2d at 705, *Mills*, 99 Wis. 2d at 698.

untested, uncalibrated, and un-serviced radar guns to justify infringing on people's constitutional rights.

Stop-first-and-hopefully-calibrate-later is not consistent with the Fourth Amendment. "[T]he 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno*, 500 U. S. 248, 250 (1991)). Bautz's use of the radar gun, which the circuit court referred to as the linchpin of the case, was not reasonable as detailed above and in Gibson's first brief. Gibson's stop was thus unconstitutional.

In its brief, the State lobbies for this Court to consider more than just the radar gun's report of Gibson's speed when deciding reasonable suspicion. First, the State argues that Bautz "reasonably believed" that Gibson was speeding based on his "visual calculation of [Gibson]'s speed." St.'s Br. at 9. Second, the State asserts that the post-stop determination of the radar gun's accuracy contributes to the reasonableness of Bautz's suspicion. *Id.* at 11-13. Neither argument can withstand scrutiny.

II. BAUTZ'S ESTIMATE OF GIBSON'S SPEED SHOULD PLAY NO ROLE IN THE REASONABLE SUSPICION ANALYSIS—THE CIRCUIT COURT FOUND AS A MATTER OF FACT THAT IT WAS UNRELIABLE.

On the record before this Court, it is unfair for the State to write that Bautz reasonably believed Gibson to be speeding based on his visual estimate alone. In deciding Gibson's motion to suppress, the circuit court expressly stated that Bautz's visual estimation of Gibson's speed was "not so reasonable" and "there [wa]s not much reliability" to it. (R.9:32-33, A-Ap. 11-12.) As factual findings by the circuit court, those determinations are accorded substantial deference and reversed only if clearly erroneous. But, the State never suggests that those findings are clear

error. Instead, it simply rehashes the same facts and asks for a different result.

The State's argument for incorporating Bautz's speed estimate into the reasonable suspicion analysis does nothing more than ask this Court to supplant the circuit court's factual findings with those that it rejected. As part of its argument, the State says that it is reasonable for an officer to rely on his experience and training to estimate a vehicle's speed. Gibson does not disagree with this proposition *in general*. But, the problem for the State's argument is that *in this case* the circuit court—after observing Bautz's testimony and "necessarily determin[ing] [his] credibility," *State v. Wille*, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (1994)—found as a matter of fact that his visual estimation of Gibson's speed was unreasonable and unreliable.

It is not this Court's place to overrule the circuit court's factual findings absent a showing that they are clearly erroneous. *State v. Kucharski*, 2015 WI 64, ¶ 44, 363 Wis. 2d 658, 866 N.W.2d 697. And, where credibility is concerned, those determinations are left exclusively to the circuit court. *In re Dejmal*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). This Court should defer to the circuit court's finding that Bautz was not able to accurately estimate Gibson's speed. Pursuant to that finding and as the circuit court recognized, Bautz's visual estimation must fall out of the reasonable suspicion analysis. It constitutes no more than a hunch.

When Bautz's visual estimation is removed from the calculus, only one thing remains possibly justifying the stop: the radar gun's report of Gibson's speed. In defense of Bautz's reliance on the radar gun, the State argues that his after-the-fact tuning fork test "serves as another factor in support of finding [that he] gained reasonable suspicion to perform the traffic

stop." St.'s Br. at 13. The State's reliance on Bautz's post-stop test of the radar gun is misplaced.

III. WHAT HAPPENED AFTER THE STOP DOESN'T HELP TO ESTABLISH REASONABLE SUSPICION.

The relevant focus for any reasonable suspicion analysis is what was known to the officer at the time of the stop. *State v. Young*, 2006 WI 98, ¶ 23, 294 Wis. 2d 1, 717 N.W.2d 729. One cannot use facts discerned after a seizure to justify the seizure in the first place. *Id.* Post-stop confirmation of a suspicion does not make constitutional a stop if the totality of the pre-stop circumstances do not prove those suspicions reasonable. Thus, that Bautz tested the radar gun after the stop is irrelevant to deciding whether his pre-stop reliance on it was reasonable, and this Court should pay it no heed.

But the State's argument is flawed for additional reasons. The State wants to use the post-stop tuning fork test to sustain the proposition that the radar gun was accurate when Bautz used it to determine Gibson's speed. However, as detailed above, the State failed to present relevant evidence at the motion hearing to establish that the radar gun was in fact accurate. Namely, the record does not disclose when Bautz's tuning fork tests were conducted or what were the results. The absence of such evidence impugns the State's current attempt to rely on the tests as support for Bautz's reasonable suspicion.

Additionally, that Bautz conducted the tests *after* Gibson's traffic stop shows the unreasonableness of his failure to do so *prior to* the stop. He knew, per his training, that he should have tested the radar gun before the stop; he obviously knew how to do so; and he clearly had access to the necessary implements to perform the test.

Thus, even though the post-stop testing of the radar gun is irrelevant to the issue before the Court,

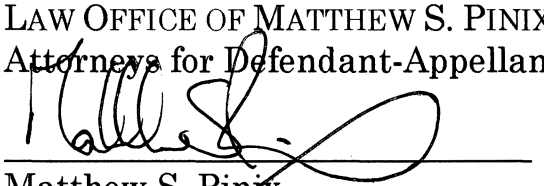
Gibson can still prevail even if it is considered. The State did not introduce sufficient evidence to prove that the radar gun was accurate, and Bautz clearly knew the need for and importance of such testing but did not do it before he stopped Gibson. In such circumstances, it is unreasonable for an officer to stop first and prove accurate later.

CONCLUSION

For those reasons and the reasons set forth more fully in his opening brief, Gibson asks this Court to conclude that his stop was unsupported by reasonable suspicion, and thus unconstitutional. Upon so holding, he asks this Court to reverse and remand to the circuit court for further proceedings.

Dated this 24th day of January, 2017.

LAW OFFICE OF MATTHEW S. PINIX, LLC
Attorneys for Defendant-Appellant



Matthew S. Pinix
Michael G. Soukup

CERTIFICATION

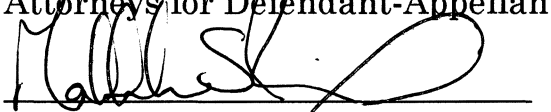
I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,313 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 24th day of January, 2017.

LAW OFFICE OF MATTHEW S. PINIX, LLC
Attorneys for Defendant-Appellant



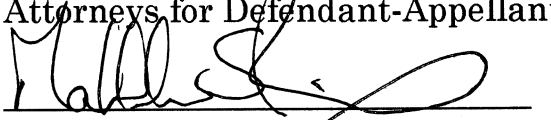
Matthew S. Pinix
Michael G. Soukup

CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Short Appendix will be delivered to a FedEx, a third-party commercial carrier, on January 24, 2017, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 24th day of January, 2017.

LAW OFFICE OF MATTHEW S. PINIX, LLC
Attorneys for Defendant-Appellant



Matthew S. Pinix
Michael G. Soukup