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STATE OF WISCONSIN **07-13-2017**

COURT OF APPEALS

DISTRICT III

Case No. 2016AP002168

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Eau Claire County Case Nos: 16-TR-4784

STATE OF WISCONSIN

Plaintiff-Appellant

vs.

NEIL R. HEBERT

Defendant-Respondent

RESPONSIVE BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM AN ORDER GRANTING SUPPRESSION OF EVIDENCE
AND DISMISSAL IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY
THE HONORABLE WILLIAM M. GABLER, SR., PRESIDING

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TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	ii
II.	STATEMENT OF THE ISSUES	1
	A. Whether the officer had reasonable suspicion that defendant was operating while intoxicated necessary to extend the traffic stop	1
III.	STATEMENT ON PUBLICATION	1
IV.	STATEMENT ON ORAL ARGUMENT	1
V.	COMBINED STATEMENT OF THE CASE AND STATEMENT OF THE FACTS	1
VI.	ARGUMENT	5
	A. Standard of Review	5
	B. Discussion	5
VII.	CONCLUSION	11
	Certification of Form/Length and Compliance with Rule 809.19(12)	12

I. TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>State v. Betow</i> , 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)	6, 7, 8, 9
<i>State v. Colstad</i> , 2003 WI App 25, ¶19, 260 Wis. 2d 406, 695 N.W.2d 394 ...	5, 6, 10
<i>State v. Felix</i> , 2012 WI 36, ¶22, 339 Wis. 2d 670, 811 N.W.2d 775	5
<i>State v. Malone</i> , 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1	5
<i>State v. Meye</i> , 2010 WL 2757312, 329 Wis. 2d 272, 789 N.W.2d 755	5, 6, 9, 10
<i>State v. Post</i> , 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634	6, 10
<i>State v. Young</i> , 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997)	8
<i>United States v. Perez</i> , 37 F.3d 510, 513 (9th Cir. 1994)	7
 <u>Wisconsin Statutes</u>	
Wis. Stat. Rule 809.23(3)(b)	5

II. STATEMENT OF THE ISSUES

A. Whether the officer had reasonable suspicion that the defendant was operating while intoxicated necessary to extend the traffic stop to an operating while intoxicated investigation.

Trial Court's Answer: The trial court determined that the officer did not have reasonable suspicion to extend the traffic stop to an operating while intoxicated investigation.

III. STATEMENT ON PUBLICATION

Hebert does not believe the Court's opinion in the instant case will meet the criteria for publication as resolution of the issue presented requires only the application of well-established principles to the facts of this case.

IV. STATEMENT ON ORAL ARGUMENT

Hebert does not believe oral argument will be necessary in the instant appeal, as the briefs should sufficiently apprise the Court of the facts and law necessary for this Court to reach a decision.

V. COMBINED STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On Sunday, May 22, 2016, State Trooper Joseph Desprez stopped Neil Hebert for speeding. (16:5:8-10; App. 105, 16:7:15-17; App. 107). Trooper Desprez subsequently arrested Hebert for Operating While Under the Influence of an Intoxicant as a first offense. (2:1, App. 100). Defense filed a motion

challenging the extension of the stop, and the arrest. (9:1, App. 101-102). The Court held a hearing on October 25, 2016. (16:1, App. 104). On direct examination, Trooper Desprez testified that he observed Hebert's vehicle traveling at thirty-seven miles per hour in a thirty mile per hour zone. (16:6:8-12, App. 106). Trooper Desprez stated that after he stopped the vehicle he approached the driver, observed glassy eyes and a mild odor of intoxicants coming from the vehicle. (16:8:10-14, App. 108). He further noted that there was a passenger in the front passenger seat. (16:8:20-25; 16:9:1-2, App. 108, 109). Trooper Desprez stated that Hebert indicated that he consumed a couple of beers. (16:10:10-13, App. 110). Trooper Desprez stated that he then asked Hebert to exit the vehicle to perform field sobriety tests. (16:10:18-23, App. 110). Trooper Desprez then described the field sobriety tests. (16:11-15, App. 111-115).

On cross examination, Trooper Desprez admitted that speeding is not an uncommon traffic problem, and that many sober people speed. (16:15:11-13, App. 115). He further stated that he did not note any other traffic infractions or any indications of intoxication with Hebert's driving. (16:15:17-19, App. 115). He indicated that while Hebert's eyes appeared glassy, they were not bloodshot. (16:15:20-24, App. 115). Trooper Desprez admitted that while he had detected a mild odor of intoxicants coming from the car, there was also a passenger in the

car, and he did not determine where the odor was coming from. (16:16:1-10, App. 116). Trooper Desprez stated that he did not believe he had asked Hebert over what length of time he had consumed the couple of drinks, and did not ask when he had started or stopped drinking. (16:16:11-17, App. 116). Desprez admitted that the length of time from when a person stopped drinking, and the period of time over which the person consumed intoxicants were relevant factors in making a determination of intoxication. (16:16:18-25, App. 116). Desprez further admitted that he did not note in his report any fumbling when Hebert retrieved his driver's license, and that he wrote his report to include any important information. (16:17:1-11, App. 117). At that point in the hearing, the Court stopped defense counsel and noted that it wanted to address whether there was reasonable suspicion to extend the stop before moving on to probable cause to arrest. (16:19: 6-16, App. 119).

After reviewing the brief and listening to the arguments of the parties, the Court addressed the evidence in the case. The Court noted that Hebert was traveling on a road where the speed limit changed from thirty-five to thirty miles per hour, and that he was observed by the officer going thirty-seven miles per hour in a thirty-mile per hour zone. (16:24:1-17, App. 120). The Court noted that Trooper Desprez observed a mild odor of intoxicants coming from the vehicle, that Hebert had glassy eyes, and had admitted to having a couple of

drinks. (16:25:15-22, App. 121). The Court noted that there had been no clarification regarding the exact number of drinks consumed and that Hebert produced his driver's license without fumbling. (16:26:1-8, App. 122). The Court then stated that after the field sobriety tests, the Officer did have probable cause to arrest, despite the fact that the Court had not allowed cross-examination on that point and had specifically said that point would not be addressed. (16:26:15-23, App. 122; 16:19:6-20, App. 119; 16:18:3-7, App. 118). The Court then noted that probable cause to arrest was not the focal point and turned to the issue of the extension of the stop. (16:26-27, App. 122-123). The Court reviewed case law and noted that Trooper Desprez needed "additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the investigation in the first place..." (16:28:15-22, App. 124). The Court further stated that Trooper Desprez needed some articulable reason to change the traffic stop into an OWI investigation. (16:29:2-7, App. 125). The Court noted the scant facts in the case and stated, "then anybody that's had a beer or two that's driving on the road at any time of day when spotted by a law enforcement officer, if there's a moderate smell of alcohol, with glassy eyes, and an admission that a person has had a couple beers, then everybody that fits that description would be subject to having to get out of the car and do field sobriety tests. That's not the law." (16:29:16-25, App. 125).

VI. ARGUMENT

A. Standard of Review

The granting of a motion to suppress evidence based on alleged violations of the Fourth Amendment is reviewed under two prongs. *State v. Felix*, 2012 WI 36, ¶22, 339 Wis. 2d 670, 811 N.W.2d 775. The appellate Court will uphold a circuit court's findings of fact unless they are clearly erroneous. *Id.* The Court independently reviews whether those facts establish that police conduct violated a defendant's Fourth Amendment rights. *Id.*

B. Discussion

A traffic stop is a seizure within the meaning of the Fourth Amendment. *State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. In order to satisfy the Fourth Amendment, the stop must be justified at its inception and reasonably related in scope to the circumstances that justified the stop. *Id.* In order to lawfully extend a traffic stop to request field sobriety tests, an officer must discover information "which, when combined with information already acquired, provide[s] reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant." *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 695 N.W.2d 394.

In *State v. Meye*, the Court addressed the use of the odor of intoxicants to justify a stop. 2010 WL 2757312, 329 Wis. 2d 272, 789 N.W.2d 755. (Pursuant to Wis. Stat. Rule 809.23(3)(b), unpublished cases issued after 2009 may be cited

as persuasive authority.) In *Meye*, the officer observed Meye and her passenger pull into a gas station parking lot and exit the vehicle. *Id.* at ¶2. The officer observed a strong odor of intoxicants but could not tell whether the odor emanated from Meye or the passenger. *Id.* When Meye re-entered the vehicle, the officer approached Meye and subsequently arrested her for OWI. *Id.* The Court noted that although unwise, it is not against the law to drink and drive. *Id.* at ¶1. The Court held that an odor of intoxicants alone does not justify an investigatory detention. *Id.*

The validity of the extension is tested using the same criteria as the initial stop. *Colstad* at ¶19. To extend the stop, the officer “must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts,” that the driver is operating while under the influence of an intoxicant. *Id.* at ¶¶8, 19 (internal citations omitted). Reasonable suspicion exists where, under the totality of the circumstances, “the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. It “must be based on more than an officer’s ‘inchoate and unparticularized suspicion or hunch.’” *Id.*, ¶10 (internal citations omitted).

The Wisconsin Court of Appeals addressed a similar situation in *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d499 (Ct. App. 1999). Betow was stopped for

driving sixty-nine miles per hour in a fifty-five mile per hour zone. *Id.* at 92.

The time of the stop was late at night, and Betow appeared nervous when approached. *Id.* at 96. The officer then observed a wallet with a picture of a mushroom on it and asked Betow about the wallet. *Id.* at 92. Betow indicated that he purchased the wallet because he thought it “looked neat.” *Id.* The officer did not note any physical signs of intoxication, or evidence of drugs. *Id.* at 92-93. However, the officer believed that mushrooms were a symbol of drug use and detained Betow until a drug-sniffing dog arrived. *Id.* The Court noted:

Once a justifiable stop is made as is the case here the scope of the officer’s inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer’s attention keeping in mind that these factors, like the factors justifying the stop in the first place, must be “particularized” and “objective.” *United States v. Perez*, 37 F.3d 510, 513 (9th Cir. 1994). If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id. at 94-95. The State argued that a number of factors justified the extension of the stop, including Betow’s nervousness, the lateness of the hour, and the State’s belief that Betow’s story about coming from Madison after dropping off a friend

seemed implausible. *Id.* at 97-98. The Court noted that while an implausible story may be a basis for reasonable suspicion, the State had not elicited sufficient facts to show that Betow's explanation was indeed implausible. *Id.* The Court examined the weight given to an officer's training and experience and noted:

Because, as we have noted above, the decision to extend a stop is subject to the same criteria as the initial stop, we think *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997), is instructive. In that case, the defendant was stopped and detained by police based on: (1) his presence in "a high drug-trafficking area"; (2) his brief meeting with another individual in that area; and (3) the officer's "experience that drug transactions in this neighborhood take place on the street and involve brief meetings." *Id.* at 433, 569 N.W.2d at 92. We held that these observations were insufficient to justify an investigatory stop. *Id.* In so holding, we recognized in *Young*, as we do here, that conduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity, and that, in assessing the officer's actions, we should give weight to his or her training and experience, and the knowledge acquired on the job. *Id.* at 430, 569 N.W.2d at 91. Doing so here, as we did in *Young*, we are similarly unable to discern the required "reasonable suspicion" from "so spare a record." *Id.* at 430-31, 569 N.W.2d at 91.

Id. at 98-99.

This case is remarkably similar to *Betow*. In this case, while the officer did observe Hebert speeding, he did not observe any driving behavior indicative of intoxication. Despite the State's argument that Hebert's speed was a sign of

impaired driving, the Officer did not testify to that. In fact, Trooper Desprez admitted that speeding is not an uncommon traffic problem, and further admitted that he did not note any signs of intoxication in Hebert's driving behavior. (16:15:11-13, 17-19, App. 115). Hebert's admission of drinking is similar to Betow's story about where he was coming from. While each may under some circumstances lead to a reasonable suspicion of criminal activity, the record is too sparse to find such reasonable suspicion. Though Hebert admitted drinking, Deputy Desprez did not have any information regarding when the drinks were consumed, over what length of time, or when the last drink was consumed. Deputy Desprez himself admitted that information would have been relevant to making a determination of intoxication. (16:16:18-25, App. 116). Hebert's speech was clear and coherent, he retrieved his driver's license without fumbling. As noted in *Meye*, it is not against the law to drink and drive, it is against the law to operate while under the influence of an intoxicant. 329 Wis. 2d ¶1. Deputy Desprez did not gather enough information to justify an extension of the stop.

The State invites the Court to analyze backwards from the alleged poor performance on the field sobriety tests to find justification for the extension of the stop.¹

¹ While the State's brief argues that Hebert failed the field sobriety tests, and the trial court did seem to note the same, the issue of probable cause was not in fact ever addressed during the trial court's motion hearing. The Court stopped the defense just prior to asking any cross-examination questions regarding probable cause.

“Had Trooper Desprez discontinued his investigation, and been unable to ask Hebert to step out of the vehicle to separate him from his passenger, after having smelled the moderate odor of intoxicants and observed that Hebert’s eyes were glassy, and after he heard Hebert admit to drinking alcohol, Trooper Desprez would have been placed in the difficult position of permitting Hebert to drive away, hoping that Hebert was not intoxicated to the extent that he could not operate safely. Concerns for public safety justified the limited scope of the stop since Trooper Desprez became aware of factors that would reasonably lead to an inference of wrongful conduct. Had Hebert passed the field sobriety tests, Trooper Desprez would have quickly satisfied himself that Hebert could safely drive away, and that the public would not be at risk from his driving.”

(State’s Brief at 7-8). The State invites the Court to engage in guesswork and speculation. An officer’s reasonable suspicion “must be based on more than an officer’s ‘inchoate and unparticularized suspicion or hunch.’” *Post*, 301 Wis. 2d at ¶10 (internal citations omitted). Further, the reasonable suspicion must be based on “specific articulable facts and reasonable inferences from those facts,” *Colstad* at ¶¶8, 19 (internal citations omitted). At no point while on the stand did the officer articulate why, or even that he did in fact suspect Hebert was operating while intoxicated, prior to asking Hebert to step out of his vehicle. The officer simply asked Hebert to step out of the vehicle after having ascertained that Hebert consumed two beverages at some point in the evening. As noted in *Meye*, drinking prior to driving is not against the law. The officer needed to have

reasonable suspicion to believe that Hebert was operating his vehicle while under the influence of an intoxicant in order to extend the stop. None of the facts generally present in an OWI stop are present in this case. Hebert did not cross the centerline, weave, or otherwise commit any traffic infractions aside from speeding. Hebert's eyes were not red and bloodshot. His speech was not slow or slurred, and he did not stumble over his words. He had no difficulty in providing his license and did so without fumbling. The State has pointed to no cases where a Court has found reasonable suspicion that a defendant was operating while under the influence of an intoxicant on such sparse facts.

VII. CONCLUSION

For the reasons stated above, Neil Hebert, by his attorney, respectfully requests that the Court uphold the trial court's decision granting Defendant's motion to suppress.

Respectfully submitted this 11th day of July, 2017.

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**CERTIFICATION OF FORM, LENGTH,
AND COMPLIANCE WITH RULE
WIS. STATS.809.19 (12)**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,268 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. 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 11th day of July, 2017.

HERTEL LAW, S.C.
Attorneys for the Defendant-Respondent

SARAH M. HARLESS
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Subscribed and sworn to before me
this 11th day of July, 2017.

Notary Public, Brenda Squires
My Commission Expires: 12/18/20