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COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2016AP002168

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

NEIL R. HEBERT,

Defendant-Respondent.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

THE COURT ERRONEOUSLY GRANTED HEBERT'S MOTION TO SUPPRESS WHEN IT RULED TROOPER DESPREZ LACKED REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP FOR FURTHER INVESTIGATION.

Trooper Desprez made a lawful traffic stop of a vehicle driven by Neil Hebert for speeding at approximately 2:30 a.m. on May 22, 2016. While speaking with Hebert, Trooper Desprez smelled the moderate odor of intoxicants coming from the vehicle and noticed that Hebert's eyes were glassy. Hebert admitted having "a couple of beers" at an event on Water Street. Even though there was a passenger in the vehicle, it would be reasonable for Trooper Desprez to suspect that Hebert was at least one of the sources of the moderate odor of intoxicants based on his admission of drinking. Hebert was asked to exit the vehicle to perform standard field sobriety tests to determine whether he could safely drive a

motor vehicle. His performance on the field sobriety tests demonstrated that he could not.

Hebert argues that an odor of intoxicants alone does not justify an investigatory detention. He cites *State v. Meye*, 2010 WL 2757312, 329 Wis. 2d. 272, 789 N.W. 2d 755 (cited for persuasive value under WIS. STAT. RULE 809.23(3)(b)) for that proposition. The *Meye* case is distinguishable because the traffic stop in that case was made for the sole reason that the police officer could smell a strong odor of intoxicants when Meye and her passenger walked past him **before** Meye entered the vehicle and drove. Because the officer did not know whether the odor was coming from Meye or her passenger, and the officer had no other reason for the traffic stop, the court concluded the officer did not have reasonable suspicion for the traffic stop.

In contrast, Hebert was lawfully stopped for a traffic violation, an intrusion that was justified by Hebert's driving behavior. Only after contact was made for the driving infraction did Trooper Desprez become aware of possible indicators that Hebert may be intoxicated. Hebert cites *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 695 N.W. 2d 394 (quoting *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)) for the proposition that the validity of the extension of the traffic stop is tested using the same criteria as the initial stop. The facts of the *Colstad* case were that Colstad was seized by law enforcement for striking a child while driving a vehicle. The court said that Colstad's temporary detention was proper if supported by reasonable suspicion that Colstad violated a civil traffic ordinance. Upon making a second contact with Colstad, the investigating officer could smell a **mild** odor of alcohol, but made no other observations that Colstad might have been intoxicated. The court ruled that the officer properly extended the stop to conduct field sobriety tests. Even though there may have been an innocent explanation for the driver striking the child with his vehicle, the court noted that, "[b]efore initiating a brief stop, an officer is not

required to rule out the possibility of innocent behavior. *State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W. 2d 763 (1990).” *Id.* at ¶8.

Hebert posits that the State is asking the court to analyze backwards from the alleged poor performance on the field sobriety tests to justify the extension of the traffic stop. On the contrary, the State recognizes, as does the court, that a law enforcement officer cannot be expected to know the results of standard field sobriety tests simply by looking at a driver seated in a vehicle. If that were so, there would be no need for an officer to put the driver through the multiple tests, including divided attention tasks, in order to determine whether he can exercise the clear judgment and steady hand necessary to safely operate a motor vehicle on a highway. Had Hebert passed the field sobriety tests, Trooper Desprez would have quickly satisfied himself that Hebert could safely drive away and the public would not be at risk from his driving.

Hebert argues that Trooper Desprez should have had, but did not have, information regarding when Hebert drank the beers he admitted drinking, over what length of time and when the last drink was consumed. He seems to suggest that Trooper Desprez would have been required to accept Hebert’s answers as true. Even the trial court noted “everybody says they’ve had a couple of beers. That’s the standard answer for anybody that is stopped, even though they may have had ten beers” (16:26). While Trooper Desprez admitted that information would have been relevant to making a determination of intoxication, there is no reason to expect the information would have been accurately reported to him by Hebert.

While Hebert asserts that the facts of his case are remarkably similar to the facts of the *Betow* case, his case actually is more comparable to the countless cases of traffic stops which are initiated for reasons that do not involve suspicion of intoxicated driving, but then raise that suspicion based on observations made when the driver of the vehicle has been contacted. One such case is *State v.*

Winberg, No. 2016AP108, unpublished slip op. (WI App January 10, 2017) cited for persuasive value pursuant to WIS. STAT. RULE 809.23(3)(b). In that case, the vehicle was initially stopped because the registered owner's operating privileges were revoked. Although Winberg was not the registered owner whose operating privileges were revoked, the police officer noted possible signs of intoxication upon making contact with Winberg which justified an extension of the traffic stop for further investigation of intoxicated driving. The court found that the police officer detected an odor of intoxicants emanating from the vehicle, that Winberg admitted he "had a couple of beers", and that the time of the stop was 12:50 a.m., relatively close to "bar closing time." *Id.* at ¶ 21. The court summarized its analysis at ¶ 23:

Drinking alcoholic beverages does not necessarily mean one is impermissibly intoxicated under WIS. STAT. §346.63(1)(a), but that alone does not bar an officer from investigating drunk driving on the facts of this case. The State, of course, has a strong public safety interest in enforcing drunk driving laws. See *State v. Carlson*, 2002 WI App 44, ¶23, 250 Wis. 2d 562, 641 N.W. 2d 451 ("It is clear that a serious threat to human life and well-being is posed by drunk drivers."). If Bjorkman had not continued his investigation after smelling an odor of intoxicants and Winberg's admission to drinking alcohol, he would have been placed in the intolerable position of either initiating field sobriety tests or allowing Winberg to leave and hope Winberg was not intoxicated to the point that he could not drive safely. Public safety concerns justify the limited scope of detention here since Bjorkman became aware of factors that would reasonably lead to an inference of wrongful conduct. Bjorkman's observations under the totality of the circumstances, that Winberg exhibited an odor of intoxicants and admitted to drinking alcohol near bar closing time, permitted a continued investigation into possible intoxication after the initial stop.

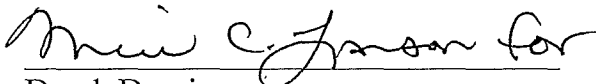
If the identical fact scenario permits a law enforcement officer to extend the traffic stop for further investigation in the *Winberg* case, but does not permit Trooper Desprez to ask Hebert to exit the vehicle to perform standard field

sobriety tests, how is a reasonable law enforcement officer expected to know how to perform his duties?

CONCLUSION

After the initial traffic stop of Hebert's vehicle for speeding, Trooper Desprez observed a moderate odor of intoxicants coming from the vehicle, that the odor of intoxicants could be identified as coming from Hebert after he was removed from the vehicle, that Hebert admitted to drinking alcohol near bar closing time on Water Street, and that his eyes were glassy. Under the totality of the circumstances, these observations permitted a continued investigation into possible intoxication of the driver. Because Trooper Desprez had reasonable suspicion to extend the traffic stop for continued investigation, the orders of the court suppressing evidence and dismissing the case should be reversed.

Dated this 18th day of August, 2017.



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cc: Attorney Sarah Harless

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is five (5) pages and 1,317 words.

Dated this 18th day of August, 2017.

A handwritten signature in cursive script, appearing to read "Derek C. Dominguez", written over a horizontal line.

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