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**CLERK OF COURT OF APPEALS
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4
Appeal No.: 2016AP2176

MARQUETTE COUNTY,

Plaintiff-Respondent,

vs.

MATTHEW J. OWENS,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM AN ORDER ENTERED ON
DECEMBER 9, 2015 IN THE CIRCUIT COURT
FOR MARQUETTE COUNTY,
THE HON. BERNARD N. BULT PRESIDING.

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STATEMENT OF THE ISSUE

- I. DID DEPUTY NOLL HAVE REASONABLE
SUSPICION TO STOP DEFENDANT'S
VEHICLE?

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal of the denial of defendant-appellant's suppression motion decided on December 9, 2015. (R. 15 p. 1-3.)

FACTS:

On March 1, 2015, Deputy Noll was working for the Marquette County Sheriff's Office. (R. 34 p. 4.) On that date, Deputy Noll stopped defendant-appellant Matthew Owens. (R. 10.) Deputy Noll stopped Mr. Owens' vehicle for failing to yield to the right shoulder upon activation of his emergency lights. (R. 34 p. 8.) Deputy Noll did not give an audible signal at any time. (R. 34 p. 15.) At some point prior to the stop of Mr. Owens' vehicle, Officer Noll was following Mr. Owens on County Highway C, Several miles outside of Montello. (R. 34 p. 15-16.) Mr. Owens pulled to the side of the road to let the vehicle pass. (Id.) Deputy Noll pulled behind Mr. Owens' vehicle and did not activate his emergency lights. (R. 34 p. 16-17.) Mr. Owens then signaled, turned back onto the roadway and continued into town. (R. 34 p. 17.) Deputy Noll

continued to follow Mr. Owens' vehicle. (Id.) Upon entry into the City of Montello, another vehicle drew the attention of Deputy Noll. (Id.) Sometime shortly thereafter, Deputy Noll was no longer following Mr. Owens' vehicle. (Id.) Deputy Noll observed the other vehicle and was going to conduct a traffic stop on that vehicle. (R. 34 p. 5.) While catching up to that vehicle, Mr. Owens' vehicle ended up between Deputy Noll and the vehicle he was going to stop. (R. 34 p. 5.) Mr. Owens signaled and made a left onto Doty Street, and Deputy Noll continued to follow Mr. Owens onto Doty Street. (Id.) Shortly thereafter, just prior to an apartment complex on the left side of the road, Mr. Owens activated his turn signal to enter the parking lot or the apartment complex. (R. 34 p. 6.) Deputy Noll was close, within one to two car lengths of Mr. Owens' vehicle. (R. 34 p. 17.) It was snowing or had just stopped snowing. (R. 34 P. 17.) Just after activation of his turn signal, Deputy Noll activated his emergency lights. (R. 9) Deputy Noll attempted to pass Mr. Owens on the left. (R. 34 p. 6-7.) However, because Mr. Owens began negotiating the left turn, Deputy Noll had to

break to avoid a collision. (R. 34 p. 7.) Deputy Noll testified the sole basis for the stop of Mr. Owens' vehicle was his failure to yield to the right side of the road upon activation of his emergency lights. (R. 34 p. 17.) Deputy Noll stated he still could have stopped the vehicle he had originally planned to, however, he made contact with Mr. Owens for his failure to yield to the right. (R. 34 p. 19.) Deputy Noll cited Mr. Owens for a violation of Wis. Stat. § 346.19(1). (R. 10 p. 8.)

Deputy Noll subsequently arrested Mr. Owens for Operating while Intoxicated. (R. 10 p. 7.) A Suppression motion was filed in the circuit court (R. 7 R. 8.) The suppression motion was denied by the circuit court. (R. 14.) Although the State conceded, and the circuit court agreed, that there was no violation of Wis. Stat. § 346.19 (1) the court ruled that the objective conclusions of a reasonable officer would give rise to reasonable suspicion under Wis. Stat. § 346.04 (R. 14 p. 2.) Therefore, the circuit court ruled that the objective conclusion of a reasonable officer justified the traffic stop and denied Mr. Owens' suppression motion. (R. 14 p. 2-3.)

ARGUMENT

DEPUTY NOLL LACKED REASONABLE SUSPICION TO STOP DEFENDANT APPELLANT'S VEHICLE.

An investigative traffic stop is a "major interference in the lives of the [vehicle's] occupant," Coolidge v. New Hampshire, 403 U.S. 443, 479, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), which is "subject to the constitutional reasonableness requirement." Whren v. United States, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Temporarily detaining a person for a traffic stop constitutes a "seizure" under the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. State v. Gaulrapp, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). The state carries the burden of establishing that an investigative stop is justified by reasonable suspicion or probable cause. State v. Taylor, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

Deputy Noll stopped Mr. Owens' vehicle for a violation of Wis. Stat § 346.19(1)-What to do on approach of emergency vehicle:

(1) Upon the approach of any authorized emergency vehicle giving **audible** signal by siren the operator of the vehicle shall yield the right-of-way and shall immediately drive such vehicle to a position as near as possible and parallel to the right curb or the right hand edge of the shoulder of the roadway, clear of any intersection and, unless otherwise directed by a traffic officer, shall stop and remain standing in such position until the authorized emergency vehicle has passed. *Emphasis added.*

Wis. Stat. § 346.19(1) can be the basis for a traffic violation only if Deputy Noll was giving audible signal by siren as he attempted to pass Mr. Owens' vehicle.

Wis. Stat § 346.19(2) states:

This section does not relieve the operator of an authorized emergency vehicle from the duty to drive with due regard under the circumstances for the safety of all persons using the highway.

Therefore, any potential traffic violation was actually the driving of Deputy Noll. Deputy Noll was the operator of an emergency vehicle, and still had the duty to drive with due regard under the circumstances. In this case, Deputy Noll should have anticipated that Mr. Owens' vehicle may have turned into the parking lot of the apartments as signaled. Deputy Noll conceded that as the officer following, he should

be cognizant to avoid any potential collision if a vehicle doesn't immediately pull to the side of the road. (R. 34 p. 21.)

Deputy Noll is not exempt from following the rules of the road simply because he operated an emergency vehicle.

Wis. Stat § 346.03(5) states:

The exemptions granted the operator of an authorized emergency vehicle by this section do not relieve such operator from the duty to drive or ride with due regard under the circumstances for the safety of all persons nor do they protect such operator from the consequences of his or her reckless disregard for the safety of others.

Deputy Noll testified that it was either snowing or had just stopped snowing and that he was close, within several car lengths of Mr. Owens' vehicle. (R. 34 p. 17.) He did not activate his siren prior to his attempt to maneuver around Mr. Owens' vehicle on the left. (R. 34 p. 15.) Mr. Owens activated his left turn signal just prior to Deputy Noll's attempt to maneuver to the left. (R. 9.) The squad video shows that Mr. Owens activated his turn signal prior to the activation of Deputy Noll's emergency lights. (R. 9.) Deputy Noll failed to operate his emergency vehicle in conjunction with Wis. Stat. § 346.03(5).

The circuit court relied on State v. Anagnos, 341 Wis. 2d 576, 601, 815 N.W.2d 675, 2012 WI 64 (2012), in denying Mr. Owens' Suppression Motion. In that case, the Supreme Court of Wisconsin determined that in the context of refusal cases, reasonable suspicion for the stop was an issue that could be explored when determining whether a person was lawfully placed under arrest at a refusal hearing. State v. Anagnos, 341 Wis. 2d 576, 576, ¶19, 815 N.W.2d 675 (2012). That case also examined whether or not, the totality of the circumstances, gave rise to reasonable suspicion to stop the defendant's vehicle in the first place. State v. Anagnos, 341 Wis. 2d 576, 576, ¶19, 815 N.W.2d 675 (2012). In this case, the circuit court relied on the language contained in Anagnos to determine that the totality of the circumstances gave rise to an objective conclusion that reasonable suspicion was created for a violation of Wis. Stat § 346.04. (R. 14 p. 2.)

The facts of this case are distinguishable from the Court's reasoning and Anagnos. In Anagnos, the circuit court determined that the deputy did not have probable cause to

stop Anagnos because he did not observe Anagnos violate any law prior to the traffic stop. State v. Anagnos, 341 Wis. 2d 576, 576, ¶16, 815 N.W.2d 675 (2012). The Deputy testified that he stopped Anagnos vehicle because the vehicle made a left turn and crossed the highway divided by an elevated median, accelerate rapidly to a stoplight, execute a left turn without signaling, and rapidly accelerate again. State v. Anagnos, 341 Wis. 2d 576, 576, ¶6, 815 N.W.2d 675 (2012). The circuit court stated that Anagnos did not violate Wis. Stat. § 346.15 when he crossed an elevated median. Id. The Court of Appeals affirmed the circuit court. Id. at ¶18. In overturning the lower court's decisions, the Wisconsin Supreme Court stated that the totality of the circumstances presented specific and articulable facts that gave rise to reasonable suspicion for the stop. Id. at ¶13. The Supreme Court held that the series of driving behaviors exhibited by Anagnos gave rise to reasonable suspicion. Id. at ¶61. Those observations were that Anagnos drove over an elevated median that was 5 feet 8 inches in width. Id. at ¶57. The deputy testified that it was not the usual

type of barrier that a person would be expected to cross. Id. Therefore, it was objectively reasonable for the officer to conclude that the choice to cross that median raised suspicion that Anagnos was driving in an unusual manner. Id. After that, Anagnos accelerated twice rapidly and made a left hand turn without signaling. Id. at ¶58. All of these actions taken together were “building blocks” that the deputy relied upon giving rise to reasonable suspicion for the investigative stop. Id. at ¶60.

The facts of this case are distinguishable from Anagnos. Here, Deputy Noll had no other indicators creating an objectively reasonable belief there was reasonable suspicion to stop Mr. Owens’ vehicle. To the contrary, Mr. Owens did not exhibit any unusual driving behavior. Deputy Noll was following Mr. Owens’ on County Highway C, several miles outside of Montello. (R. 34 p. 15-16.) Mr. Owens pulled to the side of the road to let the vehicle pass. (Id.) Deputy Noll pulled behind Mr. Owens’ vehicle and did not activate his emergency

lights. (R. 34 p. 16-17.) Mr. Owens then signaled, turned back onto the roadway and continued into town. (R. 34 p. 17.)

After that initial encounter, Mr. Owens also did not display any unusual or suspicious driving behavior. Mr. Owens signaled both of this left hand turns, and did not violate any traffic laws. That driving is not the type of “building blocks” relied on in Anagnos. In this case, Deputy Noll’s sole basis for the stop was Mr. Owens’ failure to yield to the right upon activation of his emergency lights. (R. 34 p. 8.) Therefore, the circuit court’s use of Anagnos to find reasonable suspicion in this case was improper. Wis. Stat § 346.04 is not applicable to this case. Wis. Stat. § 346.04(2t) states:

No operator of a vehicle, after receiving a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits.

The circuit court relied on facts not in evidence. The basis for the stop was Wis. Stat. § 346.19 (1) not Wis. Stat. § 346.04. Deputy Noll mistakenly believed that Mr. Owens’ had violated Wis. Stat § 346.19. There was no violation of Wis. Stat § 346.19. As the video illustrates, Deputy Noll was following

very close to Mr. Owens' vehicle. (R. 9.) Mr. Owens signaled a left turn. (Id.) The officer activated his lights with no audible signal. (Id.) Mr. Owens completed his turn into the parking lot. (Id.) There is no violation of Wis. Stat. § 346.04 for not yielding to the right. Mr. Owens did not, "knowingly resist the traffic officer" and he did stop his vehicle "as promptly as safety reasonably permitted." *See* Wis. Stat. § 346.04(2)(t). As discussed previously, it was Deputy Noll's duty to operate his emergency vehicle in a manner consistent with the Wis. Stat. § 346.19 (2). Again, Wis. Stat. § 346.19(2) states:

This section does not relieve the operator of an authorized emergency vehicle from the duty to drive with due regard under the circumstances for the safety of all persons using the highway.

Deputy Noll was behind Mr. Owens' vehicle. He was in the position to safely maneuver around Mr. Owens' vehicle. The only logical inference is that when a person signals a left turn prior to the activation of emergency lights, that person may very well complete that left turn. Deputy Noll did not drive with due regard under the circumstances. Furthermore, as the video illustrates, the one or two seconds it would have taken

for Deputy Noll to allow Mr. Owens to complete his left turn would not have affected his ability to stop the vehicle he originally wished to. Deputy Noll stated he still could have stopped the vehicle he initially planned to. (R. 34 p. 19.)

As previously stated, Defendant-Appellant does not believe that this stop can be justified based upon a violation of Wis. Stat. § 346.04. However, if the Court believes that mistaken reliance on Wis. Stat. § 346.19 now gives rise to reasonable suspicion under Wis. Stat. § 346.04, that violation was induced by Deputy Noll himself. The law does not condone the successful prosecution of offenses that are caused by the State's agents. *See State v. Brown*, 107 Wis. 2d 44, 55, 318 N.W. 2d 370 (1982). It further states that when reasonable suspicion for a traffic stop stems from behavior caused by the State itself, through the actions of law enforcement, the public interest in allowing the violator to claim the defense outweighs the public's interest in prosecution of that individual. *See Id.*

As outlined above, the reasonable suspicion for a traffic stop cannot stem from the behavior of the State itself. *Brown*,

107 Wis. 2d 44, 55, 318, NW 2d 370 (1982). If Deputy Noll would have tried to pass Mr. Owens on the right, and Mr. Owens would have done what the Deputy believed he should do in pulling to the right, and a near collision occurred, the Deputy Noll could argue that Mr. Owens failed to complete the left turn as indicated. Following the circuit court's reasoning anything that Mr. Owens would have done, by either completing his left turn or pulling to the right, could create reasonable suspicion for the stop. That cannot be the state of the law.

CONCLUSION

Deputy Noll stopped Mr. Owens for violation of Wis. Stat. § 346.19. The Deputy did not give an audible signal. There can be no violation of Wis. Stat. § 346.19.

The circuit court's reasoning that reasonable suspicion was created under Wis. Stat. § 346.04 cannot be upheld. First, the Deputy never testified that he stopped Mr. Owens' vehicle for a violation of Wis. Stat. § 346.04. Second, even if the Deputy would have been relying on Wis. Stat. § 346.04 there was no violation of that statute.

Defendant-appellant respectfully requests that this Court reverse the decision of the circuit court.

Dated this 1 day of February, 2017.

Respectfully submitted,

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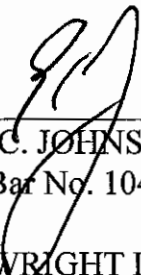
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Dated this 1 day of February, 2017.

Signed,



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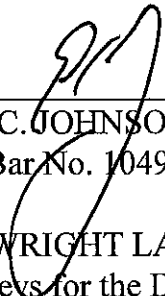
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