

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP2363-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MATTHEW P. ELLIOTT,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
JULY 24, 2014, IN THE CIRCUIT COURT
FOR WAUKESHA COUNTY, BRANCH 9,
THE HON. MICHAEL APRAHAMIAN PRESIDING.

Respectfully submitted,

MATTHEW P. ELLIOTT,
Defendant-Appellant

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	3
Statement of the Issue	4
Statement on Publication	5
Statement on Oral Argument	5
Statement of the Case and Facts	6
<u>Argument</u>	
I. THE STOP OF THE DEFENDANT- APPELLANT’S VEHICLE WAS NOT BASED UPON AN OBJECTIVELY REASONABLE SUSPICION THAT HE COMMITTED AN OFFENSE.	9
Conclusion	11
Certification	12
<u>Appendix</u>	
Table of Contents	13
Circuit Court Decision	A1
Certification	14

TABLE OF AUTHORITIES

Cases Cited

	<u>PAGE</u>
<u>State v. Gammons</u> , 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623.	10
<u>State v. Gaulrapp</u> , 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996).	9
<u>State v. Longcore</u> , 226 Wis. 2d 1, 9, 594 N.W. 412 (Ct. App. 1999).	10
<u>State v. Young</u> , 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997).	10
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).	9
<u>Wong Sun v. U.S.</u> , 371 U.S. 471 (1963).	10

STATEMENT OF THE ISSUE

- I. WAS THE STOP OF THE DEFENDANT-
APPELLANT'S VEHICLE BASED UPON AN
OBJECTIVELY REASONABLE SUSPICION THAT HE
COMMITTED AN OFFENSE?

TRIAL COURT ANSWERED: YES

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

On April 6, 2014 at approximately 2:20 am, Officer Rob Wiercyski was on patrol in downtown Okauchee, Wisconsin. R. 41, 4. As the officer traveled eastbound on West Lake Drive, he saw a vehicle pull out from a local tavern's parking lot. *Id.* The car pulled out in front of the officer's truck. *Id.*, 5. The car did not impede the officer in any way. *Id.*, 6. The car continued to a roundabout and turned on to Wisconsin Avenue in a westward direction. Officer Wiercyski continued to follow the car. *Id.*, 4-5.

As the officer followed the car, he ran the tag number of the car. *Id.*, 6. No issues presented when he ran the tag. During this time, the officer did not observe any bad driving. *Id.*, 6, 14-15. Nor did the officer see anything unusual. *Id.*, 7. Eventually the car turned into a parking lot of a business that had been Buckey's Tavern. *Id.* The business was closed. *Id.* As the officer continued past the now parked car, he saw the reverse lights of the car come on. *Id.*

At this point the officer felt that, as yet, unidentified driver Matthew Elliot may have been trying to avoid him when the car pulled into the parking lot. *Id.* The officer acknowledged that it was okay for the driver to do so. *Id.* Despite this acknowledgement, the officer, on seeing that the car did not immediately pull out of the

parking lot decided to turn his squad car around and check on the car. *Id.*, 8.

At about seventy-five feet from the car, the officer testified that he saw the driver with his head back and to the left. *Id.* The officer then approached the car with his car. *Id.*

As the officer approached the car, he saw the lights were still on and noticed the engine running. *Id.* The officer also testified that he pulled his squad car about twenty feet behind Mr. Elliott's car. *Id.* The brake lights were on on Mr. Elliott's car. *Id.* The officer also testified that he did not believe he was blocking the ingress and egress to the parking lot. *Id.* The officer believed that, had Mr. Elliott wanted to, he could have backed around the squad car parked approximately twenty feet from his car, and with its head lights shining over the rear of his car. *Id.*, 10, 17, 23.

As the squad car came to a stop behind Mr. Elliott, Mr. Elliott got out of his car to see what the officer wanted. *Id.*, 12. The officer admitted at the suppression hearing his car lights were shining on the back of Mr. Elliott's car. The officer also testified regarding whether Mr. Elliott was free to leave when the squad car pulled in behind him that "[a]n experienced driver would have been able to back out to the right, turn the car to the left and pull straight out." *Id.*, 19.

During his testimony, Mr. Elliott stated he saw the police truck approach him through the roundabout and started following him. *Id.*, 22. Mr. Elliot also testified that he parked in the parking lot and parked his car. A minute or so later, Mr. Elliott testified that he saw the police truck's lights shining on his car. *Id.*, 23. Mr. Elliott stated he was surprised when he saw the police truck pull up perpendicular to his car and behind him. *Id.*, 23-24.

With a police car behind him and with the police car's lights shining on Mr. Elliott's car, Mr. Elliot correctly assumed the officer wanted to talk to him, so he got out of his car. *Id.*, 24.

More importantly, with a large police truck parked behind him with its lights shining on his car and it being a little after 2:20 am in the morning, Mr. Elliott correctly believed he was not able to simply maneuver his car as described by the officer and leave without speaking to the officer. *Id.*, 24-25, *See supra* regarding the officer's testimony on how the car could have backed out.

This was a stop and Mr. Elliott, despite the officer's testimony was not free to leave—and no rational individual in this situation would have thought they could just back up a couple of times and leave. Furthermore, based on the officer's testimony, there was no grounds for such a stop.

In reaching its conclusion, the circuit court relied on health and welfare grounds for the stop. *Id.*, 26. Finding that there could be no reason for a car to park in a parking lot of a closed business at 2:20 am. *Id.*

ARGUMENT

I. THE STOP OF THE DEFENDANT-APPELLANT'S VEHICLE WAS NOT BASED UPON AN OBJECTIVELY REASONABLE SUSPICION THAT HE COMMITTED AN OFFENSE.

The Fourth Amendment prohibits unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). A traffic stop is presumptively reasonable if a police officer has probable cause to believe that a traffic violation has occurred or reasonable suspicion that a violation has been or will be committed. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). Therefore, contrary to the circuit court's ruling in this case, it is not constitutionally permissible for an officer to pull into a parking lot and approach a parked car a minute after the car parked when there was nothing indicating any wrong doing. This is particularly so in this era of mobile devices and so forth; myriad reasons exist for parking a car for a short time—getting GPS information, etc. Any evidence derived from an illegal stop not based upon probable cause

or reasonable suspicion should be suppressed. *Wong Sun v. U.S.*, 371 U.S. 471, 484 (1963).

Reasonable suspicion must be based on specific articulable facts and reasonable inferences derived from those facts. *State v. Gammons*, 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623. The question of what specifically constitutes reasonable suspicion is determined by an objective test, which asks whether under the totality of the circumstances a reasonable police officer would reasonably suspect that some type of illegal activity had taken place or was taking place. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

Mr. Elliott's decision to park his car for a few minutes did not provide the officer with either probable cause or reasonable suspicion to stop his vehicle. Nor was there a public health or safety concern—certainly not in the time frame this all occurred. The officer approached the car on a hunch and a hunch only. This does not give rise to reasonable suspicion of any offense; especially because the officer did not observe any driving out of the usual. R. 41, 7. A police officer's hunch based on nothing else cannot give rise to reasonable suspicion. *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W. 412 (Ct. App. 1999).

Mr. Elliott's driving on the night in question was within the law—including pulling into a parking lot of a closed business. It is impossible to imagine how Mr. Elliott's driving and parking could give rise to reasonable suspicion of some other offense, regardless of the officer's personal opinion about why Mr. Elliott parked his car.

Additionally, the officer's time of observation was too short for him to make any reasonable determination that Mr. Elliott's health or welfare was at risk. What occurred is the officer felt Mr. Elliott had some reason to try and avoid him. It is that simple. No other facts exist to support anything but that.

CONCLUSION

For the reasons stated in this Brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court grant the defendant-appellant's motion to suppress.

Dated at Madison, Wisconsin, July 31, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 10 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,017 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: July 31, 2017.

Signed,

Reed Cornia
State Bar No. 1020766

TABLE OF CONTENTS

	<u>PAGE</u>
Suppression Hearing Transcript.	A1

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

- (1) a table of contents;
- (2) the findings or opinion of the circuit court; and
- (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: July 31, 2017.

Signed,

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