STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2016 AP 2404-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

XAVIER GRULLON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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On appeal from the Circuit Court
of Brown County, Hon. Marc A. Hammer,
Circuit Judge, presiding.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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ARGUMENT

I. GRULLON REASONABLY BELIEVED HE WAS NOT FREE TO LEAVE WHEN A SQUAD CAR BLOCKED HIS DRIVEWAY AND TURNED ON ITS RED AND BLUE FLASHING LIGHTS.

The State argues Mahoney activated his red and blue flashing lights in Grullon's driveway merely "to get Grullon's attention" and let him know Mahoney wanted to speak with him. While acknowledging Mahoney's purpose was to "stop" Grullon from "walking away from him," the State tries to draw a distinction between "stopping" Grullon and "restraining" him. (State's Brief, pp. 4, 6). According to the State, no "reasonable person would have been so restrained or

intimidated by those lights that they would have felt they would not have been free to continue walking into their own home." (State's Brief, p. 16). The State cites no authority for this proposition.

Wisconsin cases are nearly unanimous in their view that the use of red and blue flashing lights constitutes a show of authority under the Fourth Amendment. As this Court noted in *Gottschalk*[1]:

> It is difficult to imagine a situation where a reasonable person would feel free to leave in response to an officer stopping and activating red-and-blue emergency lights behind the person's vehicle. Indeed, in *State v. Kramer*, 2008 WI App 62, ¶22, 311 Wis. 2d 468, 750 N.W.2d 941, we agreed with the defendant that an officer's activation of his red and-blue emergency lights constituted a display of authority. Further, in *State v. Truax*, 2009 WI App 60, ¶¶5, 11, 318 Wis. 2d 113, 767 N.W.2d 369, it was undisputed that an officer, who pulled behind a just-stopped vehicle and activated the emergency lights, had seized the vehicle within the meaning of the Fourth Amendment.

In fact, Wis. Stat. § 346.04(3) makes it a felony to drive off and flee a police vehicle after a driver receives "a visual signal" from a traffic officer. The State argues, without legal authority, that *Kramer*, *Truax* and similar cases are distinguishable because Grullon was no longer on the road with his vehicle, but instead walking on his own property. (State's Brief, p. 11).

As nearly all pedestrians are drivers, the response to flashing police lights is instinctive. It defies common experience to suggest a person would react differently to flashing lights just because they are walking. It seems obvious, and that may explain why the State's distinction has not been squarely addressed in Wisconsin. Nonetheless, this Court has repeatedly noted the *lack* of emergency lights as a reason for *not* finding a seizure when the suspect was in his driveway or on foot. See e.g. *State v. Mayek*, 2012 WI App 106, ¶7, 344 Wis. 2d 299, 821 N.W.2d 414 (unpublished authored opinion) (no

1 *State v. Gottschalk*, 2013 WI App 55, ¶9, 347 Wis. 2d 551, 830 N.W.2d 723 (unpublished authored opinion) (A:29-31)

seizure when police officer "did not activate his emergency lights or siren, verbally order [defendant] to stop,…display any weapons," or place his police cruiser in a position to prevent the defendant "from leaving the driveway.") (Supp. Appendix p. 3); *State v. Waldner*, 206 Wis. 2d 51, 61 n.2, 556 N.W.2d 681 (1996) (court noted that police officer had not used his flashing lights or siren when finding no show of authority); and, *State v. Friederick (In re Friederick)*, 2014 WI App 38, ¶15, 353 Wis. 2d 306, 844 N.W.2d 666 (unpublished authored opinion) (no seizure when officer approached walking defendant "without activating his squad car's emergency lights or siren.") (Supp. Appendix p. 8).

The State also cites *State v. Hogan*, 2015 WI 76, ¶¶11-19, 364 Wis.2d 167, 868 N.W.2d 124 for the proposition that emergency lights alone are not enough to "create a seizure." The facts in that case, however, are entirely distinct. Hogan had been pulled over, asked to perform sobriety tests, and then told he was free to go. *Id.* Sixteen seconds later police asked Hogan for permission to search his vehicle. One issue was whether Hogan remained "seized" or was newly "seized" at the time the search request was made because the patrol car's emergency lights had not been turned off. *Id*., at ¶70. The court found Hogan's detention had ended when he was told he was free to leave. *Id*., at 69. Police will "often leave their emergency lights on for safety reasons when they and the motorist are pulling back onto the roadway after a traffic stop." *Id.* Here, in contrast, the detention had just begun. Mahoney never told Grullon they were done and he was free to leave. Nor were there any obvious safety reasons for initiating the red and blue lights.

Second, Grullon had been driving and had just gotten off his motorcycle seconds before Mahoney, who was following him, appeared in Grullon's driveway. Not only were Mahoney's blue and reds lights flashing, he used his vehicle to block Grullon's return to the roadway. This show of authority could have only been directed towards Grullon. Mahoney's actions clearly "communicated to a reasonable person that he [or she] was not at liberty to ignore the police presence and go about his [or her] business." *Florida v. Bostick*,

501 U.S. 429, 437 (1991). Under these circumstances, no "reasonable person" would ignore a clear and universally recognized police signal to stop just because he had stepped a few feet away from his vehicle.

The State also relies on Grullon returning to his motorcycle and retrieving his keys during the encounter as evidence he was not detained. (State's Brief, p. 5). What the State fails to mention, however, is that Grullon had asked Mahoney for permission to retrieve his keys, which Mahoney "allowed him to do." (38:15). Thus, both Grullon and Mahoney believed Mahoney was controlling Grullon's movements.

II. NEITHER THE ANONYMOUS TIP NOR THE "DELAY" AT THE STOP SIGN PROVIDED REASONABLE SUSPICION FOR A SEIZURE.

The tip lacked any information with which to identify Grullon or his motorcycle. As Mahoney conceded, he was looking for "a motorcycle." (38:39). That was the only useful identifying information he had. Nonetheless, the State argues there was "little doubt that the motorcycle Mahoney located was the one his informant described" based on the time of day and the alleged lack of traffic. (State's Brief p. 23). The problem, however, is that Mahoney did not drive on Western Avenue or the streets connected to it. He therefore did not know what the traffic situation was on Western Avenue, or whether there were other motorcycles. Mahoney also agreed that a vehicle coming east on Western Avenue could have turned off on any number of streets before reaching the street Grullon was on. (38:21-22). Even after the arrest, Mahoney was not "100 percent" sure Grullon was the person the tipster saw on Western Avenue. (38:18). He did not see any of the likely damage a "dumped" motorcycle would have shown. (38:16).

In addition, the tipster did not provide any explanation for his or her belief the rider "appeared to be intoxicated" other than the

motorcycle falling on its side.[2] The tip did not allege any personal knowledge the rider had been drinking alcohol or was driving erratically or otherwise acting in an intoxicated manner. It was, at best, a guess.

The State acknowledges that neither the anonymous tip nor the alleged "prolonged" stop are, standing alone, likely to support a finding of reasonable suspicion. (State's Brief, pp. 23). It concedes the tip "might not add up to reasonable suspicion…." (State's Brief, p. 23, 27). Rather, the State argues that reasonable suspicion arises when the tip is *combined* with the "prolonged" stop.

The State's argument fails because the anonymous tip, standing alone, is insufficient, and the alleged "prolonged" stop adds nothing to the equation.

The State makes no effort to explain how Grullon's alleged "delay" at the stop sign amounts to evasive action or, as the State alternatively describes it, behavior "consistent with someone who might be nervous around the police." (State's Brief, p. 3). This Court has already concluded, moreover, that a 5-10 second delay at an intersection is not suspicious. See *State v. Fields*, 2000 WI App 218, ¶14, 239 Wis.2d 38, 44, 619 N.W.2d 279, 283. In fact, Mahoney conceded Grullon may have had obstructions blocking his view and that he wouldn't have noticed if Grullon had been inching his motorcycle forward. (38:26, 28, 29, 41, 43).

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2 The State argues the informant "saw a rider who had fallen off his bike, struggled to right it, and in doing so appeared intoxicated." (State's Brief, p. 24.) The State provides no citation for this assertion. Rather, police dispatch reported an anonymous call claiming:

> …[a] motorcycle was laying in the roadway and that there was a male that was by the motorcycle that appeared to be intoxicated. The male then picked up the motorcycle, revved the engine, and left eastbound on Western Avenue.

(38:46-47).

The more fundamental problem is that Mahoney's "police avoidance" theory makes no sense. Mahoney was traveling in the direction opposite to Grullon's turn, so the sooner Grullon turned, the more distance he would have put between them. Delay only kept them closer together for longer. In other words, Grullon would have turned quickly if his goal had been to distance himself from Mahoney.

Finally, the State fails to articulate how the anonymous tip and the delay, when considered together, are greater than the sum of their individual parts. Nor can it. The alleged "delay" and the anonymous tip have nothing to do with each other. From their first contact until Mahoney turned on his flashing lights, Grullon's observed conduct was entirely innocent.

CONCLUSION

This Court should reverse the conviction and remand to the circuit court with directions to suppress all evidence obtained during and after the stop.

Respectfully submitted this 31st day of July, 2017.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 2523 words.

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Dated this 31st day of July, 2017.

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CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on the 31st day of July, 2017. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 31st day of July, 2017.

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SUPPLEMENTAL
APPENDIX OF DEFENDANT-APPELLANT

INDEX TO SUPPLEMENTAL APPENDIX