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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP000061
Milwaukee County Circuit Court Case Nos. 2016TR009717

In the matter of the refusal of Sarah Ann Wallk;

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SARAH ANN WALLK,

Defendant-Appellant.

AN APPEAL FROM THE DECISION AND ORDER OF THE TRIAL COURT FINDING THAT THE DEFENDNAT REFUSED CHEMICAL TESTING IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEAN M. KIES, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT SARAH ANN WALLK

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STATEMENT OF THE ISSUES

Did the testimony adduced at the refusal hearing establish that Deputy Gee had the requisite level of suspicion to stop Ms. Wallk for speeding, and subsequently continue the detention for field sobriety testing?

Answer: The trial court answered yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Sarah Ann Wallk (Ms. Wallk) was charged with operating a motor vehicle while under the influence of an intoxicant, a violation of Wis. Stat. § 346.63 (1)(a) and refusing to submit to a chemical test, a violation of Wis. Stat. §343.305(9), stemming from an offense allegedly occurring on April 16, 2016. Ms. Wallk timely filed a written request for refusal hearing on April 22, 2016. On December 21, 2016, a refusal hearing was held, the Honorable Jean M. Kies, presiding. The trial court found that Ms. Wallk refused to submit to chemical testing in violation of Wis. Stat. §343.305(9). An Order was signed by the court on March 8, 2017. (R.15:1/ A.App. 1)

Ms. Wallk by counsel timely filed a Notice of Appeal on January 9, 2017.

The appeal herein stems from the circuit court ruling that Deputy Gee had reasonable suspicion to stop Ms. Wallk's vehicle, and the requisite level of suspicion to continue to detain Ms. Wallk for field sobriety testing, and ultimately that Ms. Wallk improperly refused to submit to a chemical test under Wis. Stat. §343.305(9). The facts that are pertinent to this

appeal were received through the testimony of Deputy Gee at the refusal hearing on December 21, 2016.

Deputy Gee testified that he was employed as a Milwaukee County Sheriff Deputy on April 16, 2016. Gee testified that at that time he had been an officer for one year and four months (R.10:5/ A.App. 2), and that he was on duty on the above date at approximately 2:22 a.m. (R.10:6/ A.App. 3). At that time, Gee was patrolling Interstate 94 westbound in Milwaukee County. ***Id.*** While doing so, he observed a vehicle on the roadway pull away from others that had formed a "pack" on the highway. (R.10:7/ A.App. 4). Gee pursued the vehicle as it pulled away from the pack. However, Gee testified that he did not obtain a radar reading of the vehicle, or perform a pace of the vehicle. (R.10:8/ A.App. 5). Evidently, the vehicle that Gee was operating did not have a certified speedometer. ***Id.*** Despite not having a certified speedometer, Gee positioned his vehicle behind Ms. Wallk's, and looked at his speedometer, which indicated "approximately 65" miles per hour. (R.10:9/ A.App. 6). For this reason alone, Gee conducted a traffic stop on Ms. Wallk's vehicle. (R.10:25/ A.App. 11)

Deputy Gee approached on the passenger side of the vehicle to make the initial contact. (R.10:10/ A.App. 7). Gee

observed three occupants in the vehicle (R.10:27/ A.App. 12). As he stood by the passenger side of the vehicle, he observed an odor of intoxicant's coming from the vehicle. Due to observing the odor on the passenger side of the vehicle, Deputy Gee moved to the driver's side to discuss his observation with Ms. Wallk. (R.10:11/ A.App. 8). There, Gee asked Ms. Wallk if she had consumed alcohol. (R.10:11-12/ A.App. 8-9). Ms. Wallk indicated that she had consumed two apple cider beers several hours earlier with dinner around 9:00-9:30 p.m. (R.10:12,21/ A.App. 9,10). Deputy Gee provided no testimony that he specifically observed an odor of intoxicant coming from Ms. Wallk. In fact, Gee testified that he did not know from who the odor was coming. (R.10:27/ A.App. 12). He indicated only that he observed the odor coming from the vehicle. However, the record is unclear if Deputy Gee even observed an odor of intoxicant on the driver's side. When he moved from the passenger side of the vehicle he did so to discuss the odor he observed coming from the vehicle as he stood on the passenger side. ***Id.*** Gee did not testify that he observed the odor from the driver's side when he stood on the driver's side of the vehicle.

Furthermore, Gee made no observations that Ms. Wallk was impaired as she sat in the vehicle. According to Gee, Ms.

Wallk's demeanor appeared calm ***Id.,*** and Gee observed nothing about her speech or motor coordination that led him to suspect that she was impaired. (R.10:28-29/ A.App. 13-14). However, based on the odor coming from the vehicle and Ms. Wallk stating she had consumed alcohol with dinner earlier, Gee asked Ms. Wallk to exit the vehicle for field sobriety testing. ***Id.***

After performing the field sobriety tests, Deputy Gee arrested Ms. Wallk for operating a motor vehicle while under the influence of an intoxicant, and transported her for a blood test. The parties stipulated that Deputy Gee read the Informing the Accused form, and Ms. Wallk refused the officer's request for her to submit to chemical testing.

The trial court specifically found that Deputy Gee had reasonable suspicion to stop Ms. Wallk's vehicle for speeding. (R.10:39/ A.App. 15). Furthermore, because Ms. Wallk admitted to consuming an intoxicants, the trial court found that the continued detention for field sobriety tests was reasonable. (R.10:40/ A.App. 16). The court found that Deputy Gee specifically observed the odor of intoxicant coming from Ms. Wallk. ***Id.*** However, that factual finding is not supported by the record. Gee testified that he could not determine from whom the odor was coming. (R.10:27/ A.App. 12). The factual finding is

clearly erroneous. Subsequently, the court found the refusal improper, and revoked Ms. Wallk's license. (R.10:40-41/ A.App. 16-17). The defendant timely filed a Notice of Appeal on January 9, 2017.

STANDARD OF REVIEW

In determining whether there is sufficient suspicion to continue a detention, an appellate court accepts the circuit court's factual determinations unless clearly erroneous, but application of those facts to constitutional principles is a question of law that is reviewed de novo. ***State v. Secrist,*** 224 Wis.2d 201, 207-208, 589 N.W.2d 387 (1999) see also ***State v. Post,*** 2007 WI 60, ¶8, 301 Wis.2d 1, 733 N.W.2d 634, ***State v. Johnson,*** 2007 WI 32, ¶13, 299 Wis.2d 675, 729 N.W.2d 182.

ARGUMENT

DEPUTY GEE DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO CONTINUE THE DETENTION OF MS. WALLK FOR FIELD SOBRIETY TESTING

Pursuant to Wis. Stat. §343.305(9) the issues at a refusal hearing are limited to (a) whether the officer had probable cause to believe that the defendant was operating or driving a motor vehicle while under the influence of an intoxicant, (b) whether the officer complied with the provisions of Wis. Stat.

§343.305(4), and (c) whether the defendant refused to submit to chemical testing. In the instant case, the first issue- probable cause, is the only contested issue. The probable cause determination under Wis.Stat. §343.305(9) encompasses reasonable suspicion for the traffic stop and for the continued detention. see ***In re Refusal of Anagnos,*** 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675.

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. ***Whren v. United States,*** 517 U.S. 806, 809-10 (1996), ***State v. Post***, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under Fourth Amendment jurisprudence. ***Id.*** at 810. If an officer has probable cause to believe a traffic violation has occurred, an officer may conduct a traffic stop. ***State v. Gaulrapp,*** 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). An investigative detention must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating

the law. ***State v. Colstad,*** 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394.

The analysis begins with a determination of the justification for the initial stop. If the stop is supported by a reasonable suspicion, the court must then determine whether during the stop, the deputy became aware of sufficient additional "suspicious factors or additional information that would give rise to, an objective, articulable suspicion that criminal activity is afoot…" ***State v. Malone,*** 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (**citing *State v. Betow,*** 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)) "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." ***Id.*** at 94-95.

"The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young,*** 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997).

To meet this test, the officer must show specific and articulable facts, which taken together with rationale inferences from those facts, reasonably warrant the officer's continued intrusion. ***Terry v. Ohio***, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968). To extend the stop, the officer must base that decision on something more than "an officer's inchoate and unpartularized suspicion or hunch." ***Id.*** Here, to pass constitutional muster, the additional information discovered by Deputy Gee, subsequent to the initial stop which, when combined with the information already acquired, must provide reasonable suspicion that Ms. Wallk was driving while under the influence. ***State v. Colstad,*** 2003 WI App 25, ¶19, 260 Wis.2d 406, 659 N.W.2d 394.

The record established at the refusal hearing failed to meet this standard. Deputy Gee articulated that he stopped Ms. Wallk for speeding. By his own testimony, there was no other reason to stop her vehicle. More importantly, the information Gee acquired after the stop would not have led a reasonable officer to conclude that Ms. Wallk was driving her vehicle while under the influence of an intoxicant. The information gained after the stop provided Gee with nothing more than an inchoate and unparticularized suspicion or hunch that Ms. Wallk operated her motor vehicle while impaired.

First, Gee observed nothing about Ms. Wallk's driving that suggested she was operating her vehicle while impaired. (While speeding at bar time may support reasonable suspicion, ***County of Sauk v. Leon,*** No.2010AP1593, unpublished slip op. ¶20 (WI App Nov. 24, 2010), here, the officer did not radar or even pace Ms. Wallk's vehicle. The only evidence of Ms. Wallk's speed was that from an uncertified speedometer.). There was no evidence that she was driving erratically or in an unsafe manner.

Second, Gee did not observed an odor of intoxicant coming from Ms. Wallk. Obviously, an odor of intoxicant coming from a suspect might be a potential indicator of alcohol consumption. However, here, the odor was never attributed to Ms. Wallk. There were three passengers in the vehicle, and Deputy Gee could not determine that the odor was coming from Ms. Wallk. The only specific fact that Deputy Gee possessed regarding Ms. Wallk's alcohol consumption was that she had consumed two drinks with dinner hours earlier. While it is true that Gee did not have to believe Ms. Wallk's statement regarding consumption, there was nothing in the record suggesting otherwise. To assume she had consumed more would

simply be a hunch which was unsupported by any specific and articulable fact.

Finally, prior to requesting that Ms. Wallk exit the vehicle for field sobriety test, there were absolutely no other indicators of impairment observed by Deputy Gee. Ms. Wallk's speech, eyes, demeanor and motor coordination all appeared unimpaired. Thus, when he asked Ms. Wallk to exit the vehicle, the additional information possessed by Deputy Gee was that there was an odor of intoxicant on the passenger side of the vehicle, and that Ms. Wallk had consumed two apple cider beers with dinner approximately 5 hours earlier.

In determining whether the continued detention and request to perform field sobriety tests was justified, the State must establish that Deputy Gee possessed additional information sufficient to support an objective and articulable suspicion that Ms. Wallk operated her vehicle while impaired. ***Colstad*** at ¶19.

But for an admission that she had consumed two drinks hours earlier with dinner, there were no additional suspicion factors (the odor was never attributed to Ms. Wallk) that would have led a reasonable officer in Deputy Gee's position to believe that Ms. Wallk operated her vehicle while impaired. The fact that she admitted consuming two beers with dinner, without

more would not justify the continued detention. Thus, the continued detention of Ms. Wallk for field sobriety testing was not justified, unreasonable and violated both the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

Because the continued detention of Ms. Wallk was unreasonable, the trial court erred when it found that Deputy Gee possessed the appropriate level of suspicion to continue to detain Ms. Wallk, and further erred when it found that her refusal to submit to chemical testing was improper. The court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 1st day of May, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIF-ICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 19 pages. The word count is 3897.

Dated this 1st day of May, 2017.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 1st day of May, 2017.

Respectfully submitted,

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APPENDIX 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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 this 1st day of December, 2017.

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APPENDIX