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STATE OF WISCONSIN
COURT OF APPEALS

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DISTRICT I

Appeal Case No. 2017AP000061

In the matter of the refusal of Sarah Ann Wallk:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SARAH ANN WALLK,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE JEAN M. KIES, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX
OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

1. Did officers have the requisite reasonable suspicion to request that Ms. Wallk perform Field Sobriety Tests?

State's Position on Appeal: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not believe oral argument is required in this case as the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side, so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant. Wis. Stat. § 809.22(3).

Because this case is an appeal from a misdemeanor, and therefore, subject to a one judge review pursuant to Wis. Stat. § 752.31(2) & (3), this opinion is not eligible for publication. Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE CASE

On April 16, 2016, at 2:22 a.m., Milwaukee County Sheriff's Deputy Donovan Gee, Jr. was assigned to third shift patrol near the 2600 block of I-94, in the city and county of Milwaukee. (R10:6). While Deputy Gee was traveling westbound at the General Mitchell boulevard, he observed a pack of more than three cars. *Id.* Deputy Gee observed a vehicle pull away from the rest of the cars including his marked patrol car. (R10:7).

When Deputy Gee attempted to catch up to this vehicle, he stated that he was traveling between 65 and 70mph. (R10:8). Deputy Gee was unable to do a standard pace of the vehicle because he was driving a Tahoe that did not have a certified speedometer. (R10:8). Deputy Gee testified, however, that he has conducted traffic stops numerous times on third shift by matching speed to get an approximate of how fast the vehicle is going. (R10:8-9). Deputy Gee was able to match speed with Ms. Wallk's vehicle and was able to determine that the vehicle was traveling approximately 65mph in a 50mph zone. (R10:9). Deputy Gee conducted a traffic stop based on Ms. Wallk exceeding the posted speed limit by 15mph. *Id.*

Deputy Gee approached the passenger side of the vehicle and observed that there were three occupants, with Ms. Wallk as the driver. (R10:10-11). When Deputy Gee was speaking to Ms. Wallk from the passenger side he detected the odor of alcohol from the driver side of the vehicle so he walked to that side. (R10:11). Deputy Gee then asked Ms. Wallk if she had been drinking and she stated that she had been earlier with dinner. (R10:12). Based on the odor of intoxicants coming from the driver side of the vehicle, as well as Ms. Wallk's admission to consuming alcohol earlier in the evening, Deputy Gee asked Ms. Wallk to perform field sobriety tests. *Id.*

Ms. Wallk then completed field sobriety tests where she showed six of six clues on the HGN, two of eight clues on the Walk and Turn test, and three of four clues on the One Leg Stand test. (R10:13-20). Ms. Wallk refused to do a PBT test and was subsequently arrested. (R10:21).

After filing a timely request for a refusal hearing, the hearing was held on December 21, 2016. (R10). The issues of a refusal hearing are limited to 1) whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol; 2) whether the officer read the Informing the Accused; 3) whether the person refused the test. Wis. Stat. § 343.305(9)(5). At the refusal hearing, both the County and defense stipulated that Ms. Wallk was read the informing the accused and she subsequently refused to take the intoximeter test. (R10:22). Thus, the only issue at the refusal hearing was whether Deputy Gee had probable cause to believe Ms. Wallk was operating a motor vehicle while under the influence of alcohol.

The court held that Deputy Gee had probable cause to believe that Ms. Wallk was operating a motor vehicle while intoxicated. (R10:41). The court then found that the refusal was improper. *Id.*

Ms. Wallk's argument on appeal is even narrower than the refusal hearing. Her argument is directed solely at whether Deputy Gee had the reasonable suspicion necessary to conduct field sobriety tests.

STANDARD OF REVIEW

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. A finding of constitutional fact consists of the circuit court's findings of historical fact, and its application of those historical facts to constitutional principles. *See State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). This court reviews the former under the clearly erroneous standard, and the latter, de novo. *See Id.*

ARGUMENT

I. DEPUTY GEE HAD THE REASONABLE SUSPICION NECESSARY TO ASK MS. WALLK TO PERFORM FIELD SOBRIETY TESTS

An extension of a stop to request field sobriety tests is reasonable if "the officer discovered information subsequent to the initial stop which, combined with information already acquired, provided reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant." *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. The validity of the extension is evaluated under the same criteria as the initial stop. *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

What constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable officer reasonably suspect in light of his or her training and experience. *Id.*, ¶8. Courts look to the totality of the circumstances when determining whether reasonable suspicion existed. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Reasonable suspicion is evaluated under an objective test. *Id.* at 55-56. Although an inchoate, unparticularized suspicion or hunch will not suffice, *Id.* at 56, when an officer observes lawful but suspicious conduct he or she has the right to temporarily detain the individual for the purpose of inquiry if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn. *Id.* at 60.

Furthermore, to possess the requisite reasonable suspicion, an officer must be able to point to “specific and articulable facts” and “rational inferences from those facts” to reasonably suspect the driver was impaired. *See State v. Post*, 2007 WI 60, 301 Wis. 2d 1, ¶ 10, 733 N.W.2d 634.

In *Town of Freedom v. Fellingner*, No. 2013AP614, unpublished, (WI App. August 6, 2013) (App. 101-110), the Wisconsin Court of Appeals found there was reasonable suspicion for the officer to conduct field sobriety tests based on facts nearly identical to the facts here. In *Fellinger*, the court held:

Although [Officer] Nechodom did not observe glassy eyes or slurred speech before requesting Fellingner perform field sobriety tests, there is no requirement that officers make these observations before requesting field sobriety tests. Instead, the speeding, which showed Fellingner's nonconformance with the law, combined with the odor of intoxicants, the admission of drinking, and the time of night, 1:50 a.m., around “bar time,” amounts to reasonable suspicion that Fellingner was operating his vehicle while intoxicated.

(App. 110).

Here, Deputy Gee was able to point to “specific and articulable facts” that gave rise to reasonable suspicion that Ms. Wallk was impaired, thus necessitating field sobriety tests. Although Deputy Gee did not observe glassy eyes or slurred speech before requesting Ms. Wallk perform field sobriety tests, there is no requirement that officers make these observations before requesting field sobriety tests. Instead, the speeding, which showed Wallk's nonconformance with the law, combined with the odor of intoxicants, the admission of drinking, and the time of night, 2:22 a.m., amounts to reasonable suspicion that Ms. Wallk was operating her vehicle while intoxicated. *See State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 766 N.W.2d 551 (time of night of traffic stop is relevant factor in OWI investigation); *see also County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (indicators of intoxication include odor of intoxicants and admission of drinking).

CONCLUSION

For the foregoing reasons, the State respectfully asks this court to find that Deputy Gee had reasonable suspicion to request that Ms. Wallk complete field sobriety tests.

Dated this _____ day of June, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 1,371.

Date

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**CERTIFICATE 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.

Date

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