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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I**

Appellate Case No. 2017AP296

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

TRACY D. MARTIN,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

**Appealed From a Judgment of Conviction Entered in the Circuit Court for
Milwaukee County, the Honorable Jean Marie Kies Presiding,
Trial Court Case No. 15 CT 1041**

Respectfully Submitted:

Melowski & Associates, LLC
524 South Pier Drive
Sheboygan, WI 53081
Telephone: (920) 208-3800
Facsimile: (920) 395-2443

By: **Sarvan Singh, Jr.**
State Bar No. 1049920
Attorneys for Mr. Martin

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REPLY TO STATE'S ARGUMENT

I. THE STATE HAS NOT MET ITS BURDEN OF PROVING THERE WAS REASONABLE SUSPICION WARRANTING THE SEIZURE OF MR. MARTIN.

The parties appear to agree on the facts and legal standards to be applied. The State also agrees that the anonymous call fails constitutional scrutiny because it lacks the necessary reliability to support a seizure by itself. See State's Brief p. 6 ("Martin argues that that [sic] the anonymous call fails constitutional scrutiny, because it lacks the necessary reliability to support a seizure by itself ... The State would agree with that assertion, if that were the only information available to the officer, and the officer hadn't made his own observations.") Thus, the issue here is whether the limited value of the anonymous call, combined with the limited observations of the officers prior to the seizure, provide reasonable suspicion that the occupant of the vehicle was committing a traffic or criminal offense. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959).

At the outset, it is important to note that the prosecution has the burden of proving that a warrantless search or seizure was reasonable and in conformity with the Fourth Amendment. See *State v. Quartana*, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997). The limited facts put forth by the State are:

1. At approximately 12:30 a.m., an anonymous caller informed law enforcement that there was a male sleeping in a vehicle in a Taco Bell parking lot and that the caller believed the individual asleep was intoxicated. However,

importantly, the caller did not provide any further support for such an assertion. (R. 35, pp. 2-5, 17);

2. Upon arrival, Officer Foy observed a male sleeping, with his head back against the head rest, in a vehicle in the Taco Bell parking lot. (R. 35, p. 7);
3. The male occupant had a taco in his hand, but how he was holding the taco was never discussed. (R. 35, p. 7.) For example, the taco in Martin's hand could have simply been on Martin's lap and still in a wrapper. Certainly, a description of a taco being half-eaten, held out over the center console, with the contents of the taco spilling into the crevasses of the vehicle, would paint a different picture;
4. The vehicle was parked at about a forty-five degree angle to any actual parking spot and the vehicle was occupying about four different spots. (R. 35, p. 7.) How far into the other spots was never discussed. However, it was a "very empty parking lot" and there was plenty of room to park (R. 35, p. 18.);
5. Finally, the officers knew the owner of the vehicle, who had not yet been identified, had a .02 blood-alcohol restriction due to having three prior drunk driving offenses. (R. 35, p. 7)

It is Martin's position that the officers may have had a hunch worthy of additional investigation, such as by speaking with employees of the Taco Bell or other witnesses, attempting to identify or speak with the anonymous caller further, or simply knocking on Martin's window and speaking with him. However, as noted above, a seizure, whether it be by opening the door to a vehicle and taking property, or by activating emergency lights and detaining a person, requires

reasonable suspicion that a traffic or criminal violation was being committed. *State v. Popke*, 2009 WI 37, ¶¶ 13 and 23, 317 Wis. 2d 118, 765 N.W.2d 569.

In this case, the crime suspected was Operating While Intoxicated. Yet, other than a bald assertion from an anonymous caller, there was nothing to suggest that the male occupant had even been drinking. Again, the State appears to agree with Martin that as far as anonymous tips go, this one fell very low on reliability grounds and would be insufficient to support an independent seizure of the occupant. *See* State's Brief p. 6; *c.f.* *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. The remaining "building blocks" do not provide any basis to support the contention that the occupant had been drinking, let alone that he was intoxicated. *See* State's Brief p. 7, *citing* *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996) ("The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. These facts gave rise to a reasonable suspicion that something unlawful might well be afoot.")

The fact that an individual is sleeping in a vehicle, especially where it appears their body is in a normal position such as their head being against the head rest, adds nothing of value. Motorists should be encouraged to pull over and rest their eyes in an empty parking lot instead of driving tired. There should not be a fear that doing so will result in officers entering your vehicle without so much as a knock on the window. The State also failed to provide any evidence as to how the taco was being held as discussed above. If it was simply held on the person's lap while still wrapped, there is very little that can be gleaned from such an observation. The same goes for the manner in which the vehicle was parked. Certainly, a vehicle blocking the majority of spots in small or

full parking lot may add some indication that the individual who parked the vehicle was not thinking clearly, it is much different where it was a “very empty parking lot” and plenty of room to park. (R. 35, p. 18). To a lesser point, it is unclear by how much the vehicle was over the other spaces. For example, one can envision a vehicle that takes up four different parking spots at a 45 degree angle, but is barely over the parking space line of two or even three of the spots. Regardless, the State has not proven that this was inappropriate given the testimony that there was plenty of room to park and that it was an empty parking lot. Finally, the .02 blood-alcohol restriction was of minimal value as it was unclear if the driver was the registered owner. These are the facts and it is Martin’s position the State has not met its burden of proving there was reasonable suspicion warranting the seizure of Martin.

Lastly, the tipster’s report failed to carry any urgency justifying the immediate seizure. Nor does the State allege any community caretaker exception to the Fourth Amendment’s warrant requirement as the vehicle was not running and Martin was not a danger to the public. Under the circumstances, immediately initiating a seizure was objectively unreasonable. *See State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(the test for determining the constitutionality of an investigative detention is an objective test of reasonableness).

CONCLUSION

WHEREFORE, for the reasons discussed above and in Martin’s original brief, the defendant respectfully requests this Court reverse the decision of the circuit court.

Dated this ____ day of June, 2017.

Respectfully submitted,

MELOWSKI & ASSOCIATES LLC

By: _____
Sarvan Singh, Jr.
State Bar No. 1049920
Attorneys for Mr. Martin

CERTIFICATIONS

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 1,196 words.

Further, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

Finally, 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, or other class of mail that is at least as expeditious, on June 15, 2017. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of June, 2017

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

By: _____

Sarvan Singh, Jr.
State Bar No. 1049920
Attorneys for Mr. Martin