

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP536-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

DENNIS L. ZEMANOVIC,
Defendant-Appellant.

**ON APPEAL FROM THE JUDGMENT OF CONVICTION
FILED ON SEPTEMBER 30, 2016, AND THE DECISION
DENYING THE DEFENDANT'S MOTION TO SUPPRESS,
IN THE WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MICHAEL P. MAXWELL, PRESIDING.
WAUKESHA COUNTY CASE No. 2016CT553**

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted:

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ARGUMENT

THE OFFICER LACKED AN OBJECTIVELY REASONABLE SUSPICION THAT ZEMANOVIC WAS INTOXICATED WHERE THE ONLY FACTS RELIED UPON WERE HIS OBSERVATION THAT ZEMANOVIC BRIEFLY WEAVED WITHIN HIS LANE AND TOUCHED THE FOG LINE, THE TIME, AND HIS BELIEF THAT ZEMANOVIC WAS DRIVING THE WRONG DIRECTION.

The State's brief simply reiterates the judge's findings, and gives a conclusory argument that those findings add up to reasonable suspicion. (St. Br. 5-7). In sum, the judge found that the time of the stop, Zemanovic's direction of travel, at least one veering in the lane, and crossing into the shoulder was sufficient to support a reasonable suspicion of intoxicated driving. (36:30-31; App. 35-36). But not only are the judge's factual findings not entirely supported by the record, they do not amount to reasonable suspicion. Specifically, to the extent the judge concluded that Zemanovic did not just touch the fog line, but went over it, that conclusion is not supported by the record. It is not consistent with the officer's testimony or the video. Without it, the remaining facts add up to nothing more than a hunch.

The State argues that the judge below properly found that Zemanovic entered the shoulder to justify the officer's suspicion that Zemanovic was driving while intoxicated. (St. Br. 6). The judge's ruling indicates that, although cautioning that some things were "hard to tell on the video," he saw Zemanovic "over the white line and a little bit onto the shoulder." (36:31; App. 36). The judge also stated that among the other facts there was the "final crossing over of the white line into the shoulder just briefly,

not a big amount but it's enough that I think the officer could rely upon it." (36:31; App. 36).

To the extent that the judge is making a finding that the fog line was crossed, it should not bind this court because that finding has no basis in either Officer Ortiz's testimony or the video. While Ortiz suggested initially that Zemanovic went over the fog line and into the shoulder, Ortiz made clear during cross-examination that Zemanovic never crossed the fog line. (36:6, 9, 13; App. 11, 14, 18). The portion of this hearing makes this point very clear:

Defense counsel ("Q"): At no point when you were following Mr. Zemanovic's vehicle did he cross the center line, correct?

Officer Ortiz ("A"): The yellow center line, no, on the left.

Q: And he did not cross over in the video that we just saw the right fog line, correct?

A: He was riding on what's considered the shoulder, the fog line.

Q: But at no point did he cross over that white fog line?

A: He touched it a couple of times.

Q: I understand that's your testimony that he touched it a couple of times, but he did not cross over it?

A: Yes, ma'am.

Q: And so he did not I guess cross over into any other lane of traffic, which on that road would have been into oncoming traffic, correct?

A: Correct.

Q: He stayed in his lane the entire time you were following him?

A: Yes, ma'am. (36: 13-14; App. 18-19).

Thus, when Ortiz was confronted with the specific question whether Zemanovic crossed the line, he unequivocally said no.

Likewise, the video illustrates the same fact, which is that Zemanovic did not cross the line. (34:1, 3:38:45-3:39:02). At most Zemanovic nears the fog line, but he does not cross it, contrary to the State's reliance on the judge's suggestion that Zemanovic did. Where this moment is on the video and supported by Ortiz's concession during cross-examination, a finding that Zemanovic did cross the line is entitled to no deference. *State ex rel. Sieloff v. Golz*, 80 Wis.2d 225, 241, 258 N.W.2d 700 (1977); *State v. Walli*, 2011 WI App 86, ¶17, 334 Wis.2d 402, 799 N.W.2d 898 (in cases involving video, courts apply the clearly erroneous standard instead of *de novo* where the officer's testimony is in dispute). At the very least, this finding is against the great weight and clear preponderance of the evidence about it. See *State v. Johnson*, 2007 WI 32, ¶¶16-19, 299 Wis.2d 675, 729 N.W.2d 182 (where judge's conclusion conflicted with undisputed testimony of the officer, the finding was clearly erroneous).

This distinction, whether it was over the line or not, matters because it would make the officer's decision to pull Zemanovic at least closer to justifiable if Zemanovic went over the line. It is true that reasonable suspicion does not have precise boundaries, nor does the officer have to be free of mistake about his perceptions in order for his actions to be reasonable. *State v. Houghton*, 2015 WI 79, ¶52, 364 Wis.2d 234, 868 N.W.2d 143. But the fact the

officer initially suggested Zemanovic went over the line, and the judge appeared to rely on that suggestion, is just illustrative of the larger point about this case, which is jumping to conclusions. While Ortiz was initially indicating Zemanovic went over the line, after the video was shown and he was confronted about it, he conceded Zemanovic did not. (36:6, 9, 13; App. 11, 14, 18). Like the other factors, such as weaving and the direction Zemanovic drove, they were hunches and exaggerations that cannot serve as the basis for reasonable suspicion. *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634, citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968).

The State's response makes no attempt to justify the other factors mentioned by the judge, such as the other possible weaving or the direction Zemanovic was driving. Instead, the State just makes the conclusory statement that it is enough. (St. Br. 5-7). But as Zemanovic set forth fully in the opening brief, these facts do not amount to reasonable suspicion, but a hunch instead. (Opening Br. 6-8). Any weaving was brief and occurred while on a winding road, which are factual points the State does not contest in its brief. Even the judge agreed that he only observed one instance of veering. (36:31; App. 36). Moreover, the characterization of the direction Zemanovic was driving as "weird" is rank speculation unfit for consideration of reasonable suspicion. While the time of day the stop took place is a factor that can be considered, it is not by itself enough, and where the accompanying facts are insufficient, the time is not enough to amount to a reasonable suspicion.

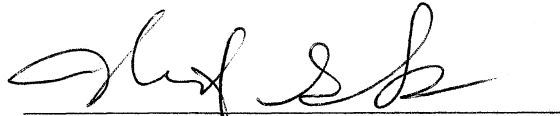
In the end, the State failed to meet its burden to show that a reasonable observation of the facts, free from speculation or exaggerating, were sufficient in this case to support the seizure of Zemanovic. Accordingly, the seizure was unreasonable, and all

the evidence flowing from it should have been suppressed.

CONCLUSION

For these reasons, Zemanovic asks this Court to reverse the denial of his motion to suppress and to remand for further proceedings consistent with so holding.

Dated this 28th day of August, 2017.

A handwritten signature in black ink, appearing to read 'Michael G. Soukup', written over a horizontal line.

Michael G. Soukup
Attorney for Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1160 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, which complies with the requirements of Section 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 28th day of August, 2017.

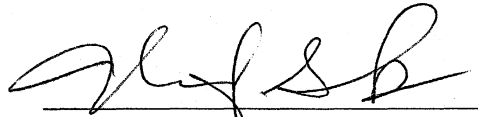
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Michael G. Soukup
Attorney for Defendant-Appellant

CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Defendant-Appellant's Reply Brief will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on the 28th day of August, 2017. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 28th day of August, 2017.

A handwritten signature in black ink, appearing to read 'M. G. Soukup', written over a horizontal line.

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