

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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**STATE OF WISCONSIN,**

Plaintiff-Respondent

V.

**DAVID L. MILLER,**

Defendant-Appellant

**Case No. 2017AP000685-CR  
Court Case No. 2016CT76**

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**REPLY BRIEF OF DEFENDANT APPELLANT**

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**Appeal from a Judgment of Conviction Entered  
In the Circuit Court for Waupaca County  
The Honorable Vicki L. Clussman Presiding  
Trial Court Case No. 2016CT76**

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## **SUPPLEMENTAL AUTHORITY**

Generally in a suppression hearing, the state bears the burden to show that the evidence was obtained in conformity with the constitutional standards. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998)

The legality of temporary detention is governed by section 968.24, which codifies the standard of *Terry v. Ohio*, 392 U.S. 1 (1968), into Wisconsin Law [states]:

“After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the persons conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.”

A seizure has occurred when a person complies with a show of police authority, under circumstances in which a reasonable person would not have felt that he or she was free to leave or to disregard a police request. *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991); *State v. Young*, 2006 WI 98, ¶26, 294 Wis. 2d 1, 717 N.E.2d 729; *State v. Williams*, 2002 WI 94, ¶23, 255 Wis. 2d 1, 646 N.W.2d 834.

A stop of a car constitutes a seizure of the car’s passengers, well as the driver. *Brendin v. California*, 551 U.S. 249, 256-57 (2007)

The state’s failure to satisfy the judge by specific articulable, objective facts that there was a reasonable basis for suspicion should result in the suppression of the evidence. See e.g. *State v. Fields*, 2000 WI App 218, ¶23, 239 Wis. 2d 38, 619 N.W.2d 279

## ARGUMENT

### **I. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANTS MOTION FOR THE SUPPRESSION OF EVIDENCE BECAUSE AT THE TIME OF COMENSING THE SEIZURE THE OFFICER LACKED REASONABLE SUSPICION TO STOP THE DEFENDANT.**

A. *A review of the record in this case illustrates an error in a finding of fact based nearly exclusively on objective, authenticated and memorialized evidence.*

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. The detention of a motorist by a law enforcement officer constitutes a "seizure" within the context of the Fourth Amendment, Berkemer v. McCarty , 468 U.S. 420, 436 (1984). If a detention is illegal and violative of the Fourth Amendment, all statements given and items seized during this detention are inadmissible. Florida v. Royer , 460 U.S. 491, 501 (1983). An investigative detention is not unreasonable if it is brief in nature and justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. Berkemer , 468 U.S. at 439; see also Wis. Stat. § 968.24. According to Terry v. Ohio , 392 U.S. 1, 21-22 (1968), the reasonable suspicion necessary to detain a suspect for

investigative questioning must be premised on specific facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be in the works and that action is appropriate. *Id.* "The question of what constitutes reasonable suspicion is a common sense test. Under all facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Jackson* , 147 Wis.2d 824, 834, 434 N.W.2d 386 (1989). This test is designed to balance the personal intrusion into a suspect's privacy generated by the stop against the societal interests in solving crime and bringing offenders to justice. *State v. Guzy* , 139 Wis.2d 663, 680, 407 N.W.2d 548 (1987)

*I. The Video Does not Support a finding of Crossing the Centerline Prior to Seizure*

Here, the Trial Court admitted into evidence and reviewed a video of the stop. (R. 43) After reviewing the video, Judge Clussman found:

“THE COURT: Well, I am prepared today to make a decision. I did - - I was obviously present for the motion hearing. Deputy Whitaker testified, he indicated that he stopped the defendant vehicle at on February 22 at 3:16 in the morning. He indicated that he observed the vehicle making choppy movements through a curve, and also testified to weaving within Mr. Millers lane.

I did observe the videotape and saw - - I could observe, by watching the videotape, weaving within the lane,

That Mr. Miller was traveling on whats frequently referred to as the fog line, and also traveling **on** or over the centerline.

I belive base on the testimony that was presented at the motion hearing, as well as the observations on the videotape - - and I take into account not just the driving behavior that was observed, but also the time of day being 3:16 in the morning, which I think is significant as well. I will find that the Officer did have reasonable suspicion to stop Mr. Millers vehicle, so I will deny the motion.” (R. 40; 3-4)

In reviewing the video it is clear that there are no lane deviations. (R. 43, Exhibit I, DVD of Stop) Therefore, the

totality of the circumstances do not support a finding of Reasonable Suspicion.

In a similar case the Supreme Court of Wisconsin took up the issue of Reasonable Suspicion for a traffic stop. In State v. Popke, the seizing officer made the following observations: “over the course of approximately one block at 1:30 a.m.: The defendant was driving with three-quarters of the vehicle left of the center of the road; the vehicle then moved back into the proper lane but almost hit the curb; the defendant's vehicle then faded back towards the middle of the road and nearly struck the median.” There the Supreme Court of Wisconsin Concluded: “Under the totality of the circumstances, we conclude that the accumulation of these facts gives rise to a reasonable suspicion that the defendant was operating a motor vehicle while intoxicated.” State v. Popke, 2009 WI 37, ¶ 26, 317 Wis. 2d 118, 133-34, 765 N.W.2d 569, 577

Unlike the Popke case, the facts of Millers stop are: a shift within a lane not crossing center with no lengthy observation or multiple deviations. As evidenced by the video that according to the arresting officer accurately depicts the



stop. (R. 43, R. 39 page 7 at lines 8 -11) Weaving within a lane does not arise to reasonable suspicion.

In U.S. v. Lyons, a police officer made an investigatory stop after observing the defendant's vehicle weave three to four times within a single lane. U.S. v. Lyons, 7 F.3d 973, 974 (10th Cir.1993). The court recognized “the universality of drivers' ‘weaving’ in their lanes.” *Id.* at 976. It therefore cautioned that allowing weaving to justify a vehicle stop may subject many innocent people to an investigation. “Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy.” *Id.*; United States v. Colin, 314 F.3d 439, 446 (9th Cir.2002). State v. Post, 2007 WI 60, ¶ 20, 301 Wis. 2d 1, 12, 733 N.W.2d 634, 639-40

Having concluded that the determination of whether weaving within a single lane gives rise to reasonable suspicion requires an examination of the totality of the circumstances, we turn to the particular facts of this case. The question we must answer is whether the State has shown that

there were “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion of the stop. *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. *State v. Post*, 2007 WI 60, ¶ 27, 301 Wis. 2d 1, 16, 733 N.W.2d 634, 641-42

The facts of Millers stop do not justify a stop. The video of the stop clearly shows a minor deviation left of the center of a lane while still within a lane, not crossing either the center or fog lines. (R. 43) Further, there is no lengthy observation of multiple deviations crossing the centerline like in *Post. Id.* (R. 43) finally, and perhaps most importantly the seizing officer testified that the seizure occurred prior to an observation of a law violation. (R. 39 Page 7 lines 8-11) *Emphasis added on “When it hit the centerline I activated my emergency lights”*

## ***II. THE SEIZURE OCCURRED BEFORE ANY ALLEGED LANE VIOLATION.***

The Officers Testimony that he activated his lights prior to the crossing of the centerline is important because the test to justify the seizure uses the facts that occurred prior to the seizure to determine whether or not there was Reasonable

Suspicion to seize a defendant. Because the officers seized the Defendant prior to the law violation that the Circuit Court used in its decisions justifying the reasonableness of the stop, there is clear error in this record.

Simply put, the seizing officer lacked Reasonable Suspicion that criminal activity was afoot *prior* to commencing a seizure. The seizure is commenced the moment the reasonable person would not feel free to leave. In activating his emergency lights and siren prior to observing a lane violation the Officer improperly seized the defendant. The totality of these circumstances; weaving within and line and seizure prior to a lane violation do not support Reasonable Suspicion.

*“allowing weaving to justify a vehicle stop may subject many innocent people to an investigation. “Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy.”* *Id.*; United States v. Colin, 314 F.3d 439, 446 (9th Cir.2002).

State v. Post, 2007 WI 60, ¶ 20, 301 Wis. 2d 1, 12, 733  
N.W.2d 634, 639-40

### **CONCLUSION**

For the foregoing reasons, it is respectfully requested that the Court of Appeals apply the Documentary Evidence Exception, review the record and reverse decision of the Waupaca County Circuit Court denying Miller's motion to suppress.

Dated this \_\_\_ day of August, 2017.

Respectfully Submitted,

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LAW OFFICE

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### **FORM AND LENGTH CERTIFICATION**

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,143 words.

Dated this \_\_\_\_ day of August, 2017.

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John Miller Carroll  
State Bar #1010478

### **ELECTRONIC BRIEF CERTIFICATION**

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this \_\_\_\_ day of August, 2017.

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John Miller Carroll  
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