

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2017 AP 000724 CR
Fond du Lac County Circuit Court Case Nos. 2015CT000064**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SARAH A. SCHMIDT,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT-APPELLANT
MOTION FOR SUPPRSSION OF EVIDENCE, IN FOND
DU LAC COUNTY, THE HONORABLE DALE L.
ENGLISH, JUDGE, PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT SARAH A. SCHMIDT**

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ARGUMENT

The State suggests that the driving witnessed by Officer Metzger amounted to impaired driving. (Brief of Plaintiff-Respondent page 6.). Metzger testified that he followed Ms. Schmidt for several miles (he testified that he followed her for more than 3 but less than 10 miles) and only stopped her after he observed her traveling 5 miles per hour over the speed limit. (R.32:22/ ReplyApp. 1). Metzger conceded that Ms. Schmidt had no delay in responding to his lights, and no difficulty pulling to the side of the road. (R.32:23/ Reply App. 2).

In *State v. Post*, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634, the Wisconsin Supreme Court grappled with whether weaving within a single lane “gave rise to the reasonable suspicion necessary to conduct an investigative stop of the vehicle.” *Id.* at ¶38. While the Court concluded that weaving within a single lane did not rise to the requisite level of suspicion to stop a vehicle, the Court found that the nature of the driving in *Post* (weaving across travel and parking lanes, weaving in a discernable S-type pattern, and that Post’s vehicle was canted into the parking lane) rose to the level of reasonable suspicion to stop Post’s vehicle. *Id.* at 37. The *Post* court found that “the rule that weaving within a single lane may alone give

rise to reasonable suspicion fails to strike the appropriate balance between the State's interest in detecting, preventing and investigating crimes with the individual's interest in being free from unreasonable intrusions." *Id.* at ¶20.

An application of *Post* to Ms. Schmidt's case makes it apparent that had Officer Metzger stopped Ms. Schmidt solely for the driving behavior, the stop would have been an unreasonable intrusion on her liberty. Ms. Schmidt's weaving occurred within a single lane. Furthermore, unlike the record in *Post*, the record here provides little detail as to how her vehicle moved within her lane. (In *Post* there was detailed testimony as to how the vehicle was being operated). Consequently, and contrary to the State's contention (that the driving showed impairment), the driving observed by Metzger would not have even risen to the low level of reasonable suspicion necessary to stop Ms. Schmidt's vehicle. Metzger's stop of Ms. Schmidt's vehicle was justified solely on the ground that she was traveling 5 miles per hour over the speed limit.

Finally, the State argues that the post-stop observations, justified Metzger arresting Ms. Schmidt for operating while under the influence of an intoxicant. The state glosses over the fact that Ms. Schmidt's speech was normal, and her motor

coordination and balance were normal. Furthermore, Ms. Schmidt requested to perform the field sobriety tests at the scene, but Metzger would not allow her to do so citing the weather conditions. Because Ms. Schmidt did not want to be transported for the field sobriety testing, Metzger abandoned his request to have her perform the tests.

The observations made by Deputy Metzger were insufficient to justify the arrest of Ms. Schmidt.

CONCLUSION

Because of the above, the trial court erred in finding that Deputy Metzger had probable cause to arrest Ms. Schmidt. The Court should vacate the Judgment of Conviction and reverse the trial court's ruling.

Dated this 1st day of September, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

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 9 pages. The word count is 1429.

Dated this 1st day of September, 2017.

Respectfully Submitted

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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 September, 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 September, 2017.

Respectfully submitted,

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APPENDIX