STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2017 AP 820 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

CHRISTOPHER C. BOUCHETTE,

Defendant – Appellant.

BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A POST-CONVICTION MOTION

ENTERED IN THE CIRCUIT COURT FOR WOOD COUNTY
THE HONORABLE GREGORY J. POTTER PRESIDING

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ISSUES PRESENTED FOR REVIEW

Was the arresting police officer acting in "fresh pursuit" when he pursued the outside of his own geographical jurisdiction to detain the Defendant-Appellant?

The Circuit Court answered: Yes.

Suggested Answer on Appeal: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Pursuant to Wis. Stat. §752.31, this appeal is to be decided by one court of appeals judge and, therefore, is ineligible for publication per Wis. Stat. § 809.23 (1)(b)4.

STATEMENT OF THE CASE

This is an appeal from an order denying the Defendant-Appellant's, Christopher C. Bouchette ("Bouchette"), motion to suppress evidence, in Wood County Circuit Court, the Honorable Gregory J. Potter, presiding.

On March 9, 2016, Plaintiff-Respondent, the State of Wisconsin ("the State") filed a *Criminal Complaint* was filed in the Wood County Circuit Court charging Bouchette with: Count 1: Operating Motor Vehicle While Intoxicated (2nd Offense), in violation of Wis. Stat. § 346.63 (1)(a) ("OWI"); and Count 2: Operating Motor Vehicle Under the Influence (2nd Offense), in violation of Wis. Stat. § 346.63 (1)(a) ("OWPAC"). (R. 3). Ultimately, Bouchette entered not guilty pleas to both counts (R.. 21:2).

On October 17, 2016, Mr. Bouchette was found guilty of Count 2 of the *Criminal Complaint*, to wit, Operating a Motor Vehicle With a Prohibited Alcohol Concentration (2nd Offense), contrary to Wis. Stat. 346.63 (1)(b). Count 1 of the *Criminal Complaint* was dismissed. (R. 23:2, 7; R. 11)

Before conviction, on or about May 31, 2016, Mr. Bouchette, by counsel, filed a *Motion to Suppress Evidence: Illegal Stop and Detention*. (R.8). A Motion Hearing was held July 14, 2016. (R.22). Ultimately, the circuit court denied Bouchette's motion to suppress orally and on the record. (R.22:30).

A *Judgment of Conviction* was entered in the Wood County Clerk's Office on October 20, 2016.

A *Notice of Intent to Pursue Post-Conviction for Relief* was filed on November 7, 2016 (R. 12) and, on January 30, 2017, a Motion for Post-Conviction was filed (R. 14). The clerk of court's office entered an order denying such post-conviction motion on April 12, 2017. (R. 17).

Bouchette timely filed a Notice of Appeal on May 1, 2017 (R. 14). This appeal follows.

STATEMENT OF THE FACTS

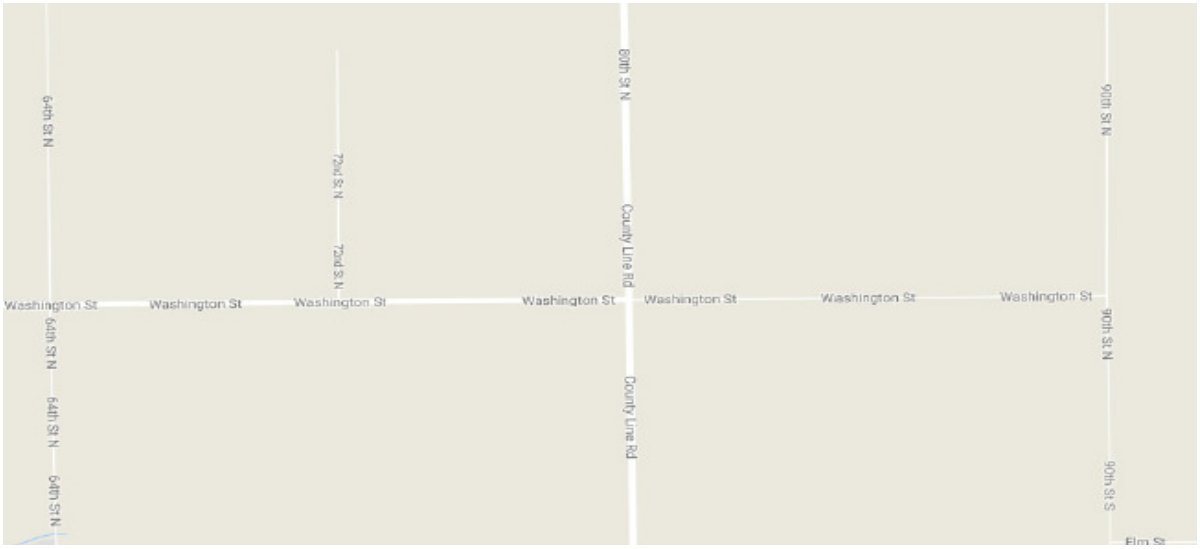
A. Motion to Suppress Evidence

As stated, Bouchette filed a *Motion to Suppress Evidence* before conviction, on or about May 31, 2016. (R. 8). Said motion requested an for an "order excluding all evidence obtained in a violation of his constitutional rights, including but not limited to all evidence obtained as a result of the illegal stop and illegal detention.." (R. 8:1).

The motion alleged that a police officer of the Grand Rapids Police Department left his territorial jurisdiction and detained Bouchette in a neighboring county under the guise of alleged traffic code violations. (R. 8:2). The motion further alleged that when the police officer crossed into the neighboring county "he was not in fresh pursuit of [] Bouchette." (R. 8:3). It was therefore contended that the officer "lacked authority to stop and detain [Bouchette] for the alleged traffic violation observed in the Town of Grand Rapids." (R. 8:3).

B. Map and Layout of Area

As an initiatory matter, undersigned-counsel advises this Court that a significant component of the factual background to the issues in this appeal focuses on the layout of certain roadways located within both Wood County and Portage County. To assist this Court with quick and easy understanding of such layout, below is an imposed map snapshot from Google Maps of the area at issue:



This map snapshot is presented for demonstrative purposes to the assist the Court in understanding the factual background of this case. The Court may take judicial notice of the layout of the above roadways because it is a fact "not subject to reasonable dispute" in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01.

As the Court will note, Washington Street runs in an east-west direction. 64th Street, 72nd, 80th and 90th streets, which are all parallel to each other, cross or intersect with Washington Street and run in north-south direction. As it will be addressed below, additional noteworthy points are:

- Washington Street runs through the Town of Grand Rapids in Wood County and then east into Portage County;

- 64th and 72nd streets are located within the Town of Grand Rapids, Wood County;
- 80th Street (also named County Line Road) serves as a divider roadway between Wood and Portage counties; and
- 90th Street, at and near Washington Street, is located with Portage Count.

C. Motion Hearing

On July 14, 2016, a Motion Hearing was held on Bouchette's *Motion to Suppress Evidence*. (R. 22:1). The State presented only a single witness and the defense presented none. The testimony presented at the motion hearing is as follows.

On January 28, 2016, during hours of darkness, Police Officer Jeremiah Anderson (Anderson) of the Grand Rapid Police Department was performing patrol duties during his work shift. (R. 22:3-4, 10).

While on duty, via the Wood County Communications Center, Anderson was advised that an anonymous source reported a motor vehicle driven eastbound on Washington Street, and heading towards the cross street of 48th Street, was "traveling at a higher rate of speed." (R. 22:5). At that time, Anderson was located at the intersection of 64th Street South and Kellner Road. (R. 22:5-6). Anderson estimated he was approximately 1.5 to 2 miles from Washington Street. (R. 22:6, 13-14). Anderson drove his squad car northbound on 64th Street towards Washington Street. (R. 22:6). Anderson stated he drove his squad at the set speed limit or a couple of miles per hour over. (R. 22:14).

As Anderson approached the intersection of Washington and 64th streets, he claimed to observe a motor vehicle, ultimately determined to be driven by Bouchette,[1] traveling eastbound on Washington Street "at what I believed was at a higher rate of speed." (R. 22: 6). He estimated that

[1] Identification of Bouchette was stipulated to by the defense and received by the circuit court for the purpose the evidentiary motion hearing. (R. 22:4).

Bouchette's vehicle was traveling "approximately 10, 15 miles an hour over the speed limit of Washington Street," which is a forty-five MPH speed zone. (R. 22:6). Anderson explained that he was not immediately present at the intersection when Bouchette's vehicle passed through it, but rather was “couple hundred feet” away. (R. 22:7, 14). Anderson did not contend at any point in his testimony that he believed Bouchette’s vehicle was speeding at any other time other than his observation at this intersection.

However, in later testimony, Anderson, admitted the following:

- That his observation was visual only, and he did not use any speed detecting device (R. 22:15, 21);

- That he was unable to apply any other common methods of speed estimation that he learned in training as a police officer, such as speed comparison to other vehicles, pacing with his own squad, and scaling. (R. 22: 16, 19);

- That That the intersection Washington and 64th streets contains foliage and trees on all four (4) corners of the intersection (R. 22:15);

- That based on the distance in which he made the observation of Bouchette’s vehicle drive through the intersection, he agreed that it would was “rather short as far as timing or seeing the vehicle.” (R. 22: 15-16);

- That based on his training for visual clues for speeding detection, a reduced view would affect the accuracy in detecting speeding violations (R. 22:19).

- That he candidly agreed that his belief that Bouchette’s vehicle may have been speeding was premised on a “gut feeling” and a “hunch,” and that he did base that belief on any scientific principle. (R. 22:21).

Upon arrival at the intersection of Washington and 64th streets, Anderson stopped at the intersection "for maybe a couple of seconds, three, four, five seconds" and looked both left and right; when he look right he observed taillights on Bouchette's vehicle in the distance. (R. 22: 14-15).[2] While at the intersection, Anderson claimed to observe the taillights of Bouchette's vehicle "in the westbound lane of Washington and it was still traveling eastbound," which suggested to the officer that Bouchette's vehicle "drifted out his direct lane of travel." (R. 22:7). When asked about the location of where this alleged cross-of-centerline violation occurred, Anderson originally stated he "believed [Mr. Bouchette] was at 72nd Street[.]" (R. 22:9) (which would be next cross street east of 64th Street on Washington Street; see map on page 3, supra). Anderson estimated that the distance between 64th Street to 72nd Street was approximately three-quarters of mile. (R. 22:15). Later in testimony, though, Anderson stated, that when he was at the intersection of Washington and 64th streets, it was "possible [Bouchette] could have been" further than a mile away from his squad. (R. 22:17, 22).

When this testimony is viewed in totality, it appears that Anderson contended that he was able to observe Mr. Bouchette commit a cross-of-centerline violation during hours of darkness, from a vantage point of anywhere from about three-quarters of a mile to about a mile.

Anderson turned his squad onto Washington Street and started to travel eastbound in an effort to catch up to Bouchette's vehicle. (R. 22:7-8, 15). The next cross street east of 72nd Street on Washington Street is 80th Street, which is also the county line between Wood and Portage counties (R. 22: 8-9) and where Anderson's jurisdiction ends. There is a stop sign at 80th Street to which driver's traveling on Washington Street must yield. (R. 22:8). Anderson initially claimed that he did not observe any illumination of brake lights at or near the Washington and 80th streets intersection from Bouchette's vehicle, which led him to believe that

[2] It should be noted that Anderson, in testimony on this particular point, references "80th," and not 64th Street. However, it is clear from the context of the examination that the officer misspoke and likely intended to say 64th Street. See R. 22 at 14-15.

Bouchette did not stop or yield at for the stop sign. (R. 22:8-9).

However, in later testimony, Anderson, admitted the following:

- That Anderson's belief that Bouchette's vehicle did not stop or yield to the stop sign, essentially and quite simply, premised on the notion that Anderson did not observe any brake lights (R. 22:21);

- That the distance between 64th Street to 80th Street is approximately one (1) mile and that when Anderson was at the intersection of Washington and 64th streets, it was "possible [Bouchette] could have been" further than a mile away from his squad (R. 22:16-17, 22) (thus, it is a reasonable possibility that Bouchette would have already stopped at the stop sign and cleared it at the Washington St./80th St. intersection by the time Anderson made an observation of his vehicle from 64th Street);

- Anderson further admitted he could not say with certainty whether Bouchette failed to yield to the stop sign at 80th Street. (R. 22: 17-18, 21).

Still following Bouchette's vehicle, once Anderson arrived at the intersection of Washington and 80th streets, he stopped his squad at the stop sign, cleared the intersection and then drove through. (R. 22:10). When doing so, Anderson stated he activated his squad's emergency lights "right on the [county] line" as he traveled through the intersection; Bouchette was already been in Portage County at the time the lights were activated. (R. 22:10). Anderson continued eastbound on Washington Street into Portage County. (R. 22:10-11). Bouchette's vehicle was about a mile ahead of Anderson at this point. (R. 22:17).

Washington Street ends at 90th Street with a "T-intersection." (R. 22:11). At this T-intersection, Bouchette took a left turn onto 90th Street and was thus northbound. (R. 22:11). Following this turn, Anderson lost sight of Bouchette

for an approximate period of ten seconds. (R. 22:11). Anderson followed suit at the T-intersection and made a left turn onto 90th Street. (R. 22:11). Upon turning, Anderson was able to reinitiate visual observation of Bouchette's vehicle. (R. 22:11). While at the 90th Street T-intersection, Anderson activated his squad's siren. (R. 22:11-12).

Anderson continued to follow Bouchette's vehicle with activated lights and siren. *Id*. Ultimately, Bouchette's vehicle traveled into a ditch. (R. 22:12). Thereafter, it is undisputed by the parties that Anderson detained Bouchette and ultimately arrested him for the charges in this matter.

Anderson estimated that the entire pursuit lasted "approximately five minutes on a long end" (R. 22:12) and spanned over a distance of approximately 2.5 to 3 miles (R. 22:21).

During testimony, Anderson explained the reason he did not activate his squad emergency lights until he was at the intersection of Washington and 80th streets. (R. 22:8). He stated, based on his past training and experience and "what one of my FTO's had advised me," he did want activate his lights "too far back" and possibly of give the "suspect vehicle or the person you're trying to stop a head start[.]". (R22:8).

Anderson candidly acknowledged that based on the distance between his squad and Bouchette's vehicle, it was entirely possible Bouchette would not have observed or seen the squad's emergency lights. (R. 22:18-19).

The alleged incident in this matter was not captured by a police-squad vehicle camera (i.e., "dash cam"). (R. 22:13).

D. The Circuit Court's Ruling

The circuit court denied the motion to suppress evidence at the July 14, 2016 Motion Hearing. On the speeding issue, the circuit court found that "based upon his observations, [Anderson] felt the vehicle was speeding" which provided "a reasonable suspicion that a violation had occurred in his presence at that point in time." (R. 22:28). On the cross-of-centerline and failure to yield at stop sign issues,

the circuit court observed that Anderson observed lights from Bouchette's vehicle in the wrong lane of traffic and that Anderson did not observe any brake lights activate on Bouchette's vehicle at the intersection of Washington and 80th streets. (R. 22: 28-29).

In making these rulings, the circuit court completely ignored some of Anderson's contradictory testimony in its ruling. For example, aside from the basic improbability that the officer could make observations from three-quarters of a mile to a mile away with any reasonable degree of accuracy, the circuit court failed to address the following points contained within Anderson's testimony:

- Anderson's admission that he based his belief of speeding on a gut feeling and hunch (and not on his actual police training or some scientific method);

- Anderson's admission that the cross-of-centerline violation, if any, possibly could have occurred as much as a mile or so away from the Washington Street/64th Street intersection which would place any such violation outside of Wood County (as Anderson testified that distance between the intersection and the county line was about one (1) mile); and

- Similarly, Anderson's admission that the failure to yield to stop sign violation possibly could have occurred as much as a mile or so away from the Washington Street/64th Street intersection (which would place any such violation outside of Wood County), or his concession that it might not have occurred at all.

The circuit court ultimately concluded and ruled:

> So we have three offenses that occurred within Wood County that the officer observed and had reasonable suspicion to make a stop.

(R. 22:29).

From this, the circuit court ruled that Anderson acted in fresh pursuit when he traveled from Grand Rapids, Wood County, into Portage County to ultimately conduct stop of Bouchette. (R. 22:29-30).

E. Post-Conviction Motion

On January 30, 2017, Bouchette filed a *Motion for Post-Conviction Relief* in the circuit court. In essence, Bouchette contended that the doctrine of " 'fresh pursuit,' among other elements, must be based on probable cause, and not a lesser standard such as reasonable suspicion," (R. 14:2) and that the circuit court applied the wrong standard of law in its ruling (R. 14:4). It was further contended that the police officer lacked probable cause to believe Bouchette committed a traffic code violation and, consequently, was not in fresh pursuit and lacked lawful authority to leave his territorial boundary to subject Mr. Bouchette to an extrajurisdictional detention. (R. 14:4).

The circuit court did not hold a hearing on the motion or otherwise issue a written decision within sixty (60) days. By operation of statute, it was considered denied. Wis. Stat. § 809.30 (2)(i). For this reason, the Wood County Clerk of Court's Office entered an order denying the post-conviction motion on April 12, 2017. (R. 17).

STANDARD OF REVIEW

The question of whether a search or seizure is reasonable is a question of constitutional fact. *State v. Post,* 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. "A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles." *Id.*

ARGUMENT

I. APPLICABLE BURDEN OF PROOF.

In the face of a challenge to an unlawful traffic stop, the onus probandi rests entirely with the prosecution. See *State v. Taylor*, 60 Wis.2d 506, 519, 210 N.W.2d 873, 880 (1973)("Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state.").

Just as in the circuit court, this standard is important during the appellate review process. Based on such standard, any undeveloped or equivocal evidentiary issues should be resolved in favor of Bouchette.

II. THE POLICE OFFICER WAS NOT ACTING IN FRESH PURSUIT WHEN HE LEFT HIS TERRITORIAL BOUNDARY AND DETAINED BOUCHETTE.

A. The Anonymous Tipster

At the outset, Bouchette will briefly address what actuated the chain of events that ultimately led to his detention and arrest by Anderson; that is, the anonymous complainant.

In terms of tipsters or informants, Wisconsin caselaw has seemingly carved-out two separate and distinct categories: non-anonymous versus anonymous. See *State v. Kolk*, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 109–10, 726 N.W.2d 337, 342. On one hand, in the non-anonymous category, there exist two sub-categories: confidential informants and citizen informants. First, confidential informants, are persons "often with a criminal past him- or herself, who assists the police in identifying and catching criminals." *Id*. Second, a citizen informant is "someone who happens upon a crime or suspicious activity and reports it to police." *Id*.

On the other hand, in the anonymous category, caselaw creates a distinction between both the confidential or citizen informer from that of the anonymous informer. *Kolk*, ¶12 (citing *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). An anonymous informer or tipster is "one whose identity is unknown even to the police and whose veracity must therefore be assessed by other means, particularly police corroboration." *Id.*

Additionally, there is variation "within the realm of informants who wish to remain anonymous depending upon whether the informant risked disclosing his or her identity to police." *State v. Miller*, 2012 WI 61, ¶33, 341 Wis. 2d 307, 815 N.W.2d 349. An informant "who reveals some self-identifying information is likely more reliable than an [entirely] anonymous informant because '[r]isking one's identification intimates that, more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster.'" *Id.* (citing *State v. Williams*, 2001 WI 21, ¶35, 241 Wis. 2d 631, 623 N.W.2d 106). As observed in *Miller*:

> The key to this analysis is the informant's knowledge or presumed knowledge that a consequence of disclosing his or her identity is accountability for providing a false tip. Stated differently, police may infer that an informant who risks disclosing his or her identity is more likely to be providing truthful information because the informant knows that police can hold him or her accountable for providing false information.

Id., ¶ 34. Consequently, an entirely anonymous informant is subject to the most stringent test of reliability. See *Miller,* ¶37 ("Where an investigatory stop is based on an entirely anonymous tip, it is critical that the informant provide significant, specific details and future predictions that police are able to corroborate.").

Anderson was contacted by the Wood County Communications Center and advised that an anonymous source reported a vehicle driven eastbound on Washington Street, heading towards the cross street of 48th Street, was "traveling at a higher rate of speed." There is no evidence in

the record to reveal the means of communication between the anonymous tipster and the Wood County Communications Center, such as whether it was done personally or via third-party, and whether a call was placed to the 911 emergency line or a non-emergency line. Furthermore, Anderson did not provide any information (if any) about whether or not the anonymous tipster revealed any self-identifying information. In light of the applicable burden of proof, this evidentiary deficiency should be resolved in favor of Bouchette and this Court must assume that the anonymous tipster was entirely anonymous. Thus, the information allegedly provided by this tipster is subject to most stringent test of reliability.

Anderson offered no additional information as to the substance of the anonymous tipster's communication (if any), such as a description of the vehicle, the tipster's basis of knowledge for such information, or the tipster's qualifications, if any, to conclude that another vehicle is "traveling at a higher rate of speed." This information is completely devoid of any significant or specific details to create any degree of reliability whatsoever.

The State may now argue that Anderson's observation of Bouchette's vehicle at the Washington St./64th St. intersection served as corroboration. However, that argument, if made, is a non-starter. There is no basis within this record to conclude, aside from pure guesswork and speculation, that Bouchette's vehicle was the same vehicle reported by the anonymous tipster. The anonymous tipster's original report placed the suspect vehicle between 32nd Street and 48th Street on Washington Street. That location is a significant distance from where Anderson ultimately observed Bouchette's vehicle. Any number of motor vehicles could have been on the roadway at the time of the anonymous tipster's report. The anonymous tipster's report did not offer up a description of the vehicle to put Anderson in a position to identify the suspect vehicle. It does not automatically follow that the first eastbound vehicle seen by Anderson on Washington Street was necessarily the same vehicle subject to the anonymous tipster's report.

Moreover, the so-called tip that another vehicle is "traveling at a higher rate of speed" is in and of itself an

conclusory, equivocal, and cryptic term and provides little to no basis to conclude a driver is speeding or otherwise violating the traffic code. A "higher rate of speed," while perhaps suggestive of speeding, does not necessarily mean so. For example, it could mean the tipster believed another driver was driving too fast for conditions (which is a highly subjective determination) in the event of inclement weather conditions such as falling snow, or a the tipster thinks another driver is accelerating too fast from a controlled intersection (which may run afoul of good and accepted driving practices, but is not necessarily a violation of the traffic code). Point being, the nature of the anonymous tipster's report does not even concretely establish an allegation that another driver on roadway was speeding or otherwise breaking the traffic code.

Neither the circuit court nor the State relied on the anonymous tip in any substantive way in the proceedings below. The State did not advance any argument that the anonymous tip was a real factor in the analysis in this matter or otherwise created reasonable suspicion or probable cause of a traffic code violation as to Bouchette. The substance of the anonymous tipster's report, or – more appropriately – lack thereof, is equivocal and wholly bare-boned. For this reason, this Court should not consider it at all. Cf. *State v. Pickens*, 2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1 (a reasonable suspicion case, the court held that that "bare fact" supplied from one officer to another may be not be considered in the analysis).

For these reasons, the anonymous tipster's report has no legal value whatsoever in this matter and it should not be given any consideration whatsoever.

B. "Fresh Pursuit" May Only Be Premised Upon Probable Cause to Arrest and Not a Lesser Standard of Proof

"Generally, Wisconsin police officers have no authority outside of the political subdivision in which they are officers." *State v. Haynes*, 2001 WI App 266, ¶13, 248 Wis. 2d 724, 733, 638 N.W.2d 82, 86 (citing *United States v. Mattes*, 687 F.2d 1039, 1041 (7th Cir.1982)). One exception to this general rule is the "fresh pursuit" doctrine.

As to the "fresh pursuit" doctrine, Wis. Stat. § 175.40 (2) reads:

> For purposes of civil and criminal liability, any peace officer may, when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance the officer is authorized to enforce.

A handful of Wisconsin cases have addressed the "fresh pursuit" doctrine," such as *City of Brookfield v. Collar*, 148 Wis.2d 839, 841, 436 N.W.2d 911 (Ct.App.1989) and *Haynes*, supra. However, none of these cases have squarely addressed on what quantum of proof fresh pursuit must be premised. Bouchette contends that "fresh pursuit," among other elements, must be based on probable cause, and not a lesser standard such as reasonable suspicion.

At common law, the term "fresh pursuit" referred to the right of a police officer to cross jurisdictional lines in order to arrest a fleeing felon. See *Carson v. Pape*, 15 Wis. 2d 300, 308, 112 N.W.2d 693, 697 (1961). However, the legislature expanded the "fresh pursuit" doctrine beyond felonious crimes by its creation of Wis. Stat. § 175.40 (2), whereby a police officer may, "when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance the officer is authorized to enforce."

The case of *Collar*, supra, is essentially the first Wisconsin case to substantively address the standards for "fresh pursuit." Prior to *Collar*, Wisconsin courts had not developed specific standards defining "fresh pursuit." *Id*, 148 Wis.2d at 842, 436 N.W.2d 911. For this reason, the *Collar* court adopted the three criteria set-forth in a Colorado case, *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979), which were commonly utilized in determining fresh pursuit. *Id*. Those criteria are: first, the officer must act without unnecessary delay; second, the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect; and, finally, the relationship in time between the commission of the offense, the commencement of the pursuit and the apprehension of the suspect is important (the greater the length of time, the less

likely it is that the circumstances under which the police act are sufficiently exigent to justify an extrajurisdictional arrest). *Collar*, 148 Wis.2d at 842–43, 436 N.W.2d 911.

The specific issue of whether "fresh pursuit" must be premised upon probable cause was not expressly addressed by the *Collar* court as it was assumedly undisputed that the officer had probable cause of a traffic violation in that case. Moreover, the three (3) criteria set-forth under *Collar* focus on an officer's act of actual "pursuit" of a person to determine whether the officer was in fresh pursuit. The issue of whether probable cause existed to actuate such pursuit is both an initial and a separate inquiry. This contention is supported by both the language in the statute itself and *Collar*'s third factor.

As the plain language of Wis. Stat. § 175.40 (2) provides, an officer may only follow a person outside his or her primary jurisdiction to “arrest." Use of the words “follow and arrest” in Section 175.40 (2) is clearly intended to mean that the officer must possess a quantum of proof sufficient to justify an arrest of the person before he or she may follow that person outside of his or her territorial jurisdiction. It is elementary that a warrantless arrest must be supported by probable cause, and not the lesser standard of reasonable suspicion. See Wis. Stat. § 968.07. If the legislature intended to allow a police officer to pursue a person outside his or her own territorial jurisdiction to conduct an investigatory detention under Wis. Stat. § 968.24, it would have expressly said so. Considering the common law doctrine of "fresh pursuit" required probable cause that a person committed a felony crime, it is likely that the legislature intended to codify the common law requirement that probable cause of a law violation exist before an officer can engage in fresh pursuit.

Under *Collar*'s third factor, the term "commission of the offense" clearly implies a completed offense for which probable cause exists and not merely reason to stop to conduct an investigation. Moreover, the *Collar* court relied upon and adopted the standards set-forth in the Colorado case of *Charnes v. Arnold*, supra, in fresh pursuit cases. For this reason, it is worth noting that in the Colorado case *People v. McKay*, 10 P.3d 704, 706 (Colo.Ct.App.2000), it was held under that state’s fresh pursuit statue that fresh pursuit must

be based on probable cause that a law violation was committed.

Most persuasively, the Wisconsin Department of Justice (DOJ) has declared that in order for an officer to lawfully engage in fresh pursuit, probable cause must exist. The DOJ routinely releases a publication entitled Wisconsin Law Enforcement Officers Criminal Law Handbook.[3] In the revised 2008-09 version, it provides the following guidance on "fresh pursuit:"

> Fresh pursuit means the pursuit by a law enforcement officer of someone he/she has **probable cause to believe** has violated any law or ordinance the officer is authorized to enforce. This means that the infraction took place within the officer's and fresh pursuit allows the officer to follow that person outside of what normally would be his/her geographical limits. An officer now may, when in fresh pursuit, follow anywhere in the state and arrest any person for violation of any law or ordinance the officer is authorized to enforce.

Id., pp. 18-19 (emphasis supplied).

For these reasons, the correct standard for fresh pursuit is probable cause, and not a lesser standard such as reasonable suspicion.

C. The Police Officer Lacked Probable Cause To Believe That Bouchette Committed A Traffic Code Violation or That Such Any Violation Was Committed Within His Jurisdiction

"Probable cause refers to the 'quantum of evidence which would lead a reasonable police officer to believe' that a traffic violation has occurred." *State v. Popke*, 2009 WI 37, ¶14, 317 Wis. 2d 118, 765 N.W.2d 569 (*quoting Johnson v. State*, 75 Wis.2d 344, 348, 249 N.W.2d 593 (1977)). "The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather,

[3] Available at: http://instructor.mstc.edu/instructor/mbessett/criminallaw_files/Criminal%20Law%20Officers%20Handbook%202009.pdf (last viewed: 07/19/2017).

probable cause requires that 'the information lead a reasonable officer to believe that guilt is more than a possibility.' " *Id*. (quoting *Johnson*, 75 Wis.2d at 348–49, 249 N.W.2d 593).

Anderson asserted three (3) possible traffic code violations that he suspected Bouchette of committing: 1) speeding; 2) crossing the centerline; and 3) failure to yield. Each will be addressed in turn.

i. Speeding.

Anderson testified that he saw Bouchette's vehicle drive through the Washington St./64th St. intersection as he was approaching it from a "couple hundred" feet. He stated that he believed the vehicle may have been speeding. This belief was based only on Anderson's brief, short and distant observation of the vehicle as it passed through an intersection that contained foliage and trees on all corners and thus would have obstructed any additional views.

Anderson conceded that he was unable apply any of the common methods and techniques that police officers often use to determine speeding violations without the aid of a speed detecting device. He further admitted that based on a limited and brief observation, that his police training method and technique of scaling vehicles against other objects would directly affect the accuracy of his conclusion. Lastly, Anderson candidly agreed that the belief that Bouchette's vehicle may have been speeding was premised on a "gut feeling" and a "hunch." The State may argue that this constitutes a legal conclusion, but it is not. Anderson simply confirmed that, even in light of his training and experience, that he did not have solid factual belief that Bouchette was speeding and that his belief falls short of the probable cause standard (if not the reason suspicion standard, too).

For the purposes of this appeal, Bouchette contends that Anderson's observation did not even rise to the level of a reasonable suspicion. In any event, though, Anderson's observations did not create probable cause for a speeding violation.

ii. Cross of Center Line.

Anderson testified that it was dark outside. Upon his arrival at the intersection of Washington and 64th streets, he ultimately looked to his right and saw taillights of Bouchette's vehicle in the distance. Anderson claimed that he saw the taillights on Bouchette's vehicle in the wrong lane of traffic or otherwise cross the centerline. He also testified that when he made this observation, the distance between himself and Bouchette's vehicle would have been anywhere from approximately three-quarters of mile to over a mile away.

Firstly, Mr. Bouchette contends that a naked-eye observation of an alleged cross-of-centerline violation made from the distance of three-quarters of mile to a mile, during nighttime hours, is completely dubious and incredible. It simply defies ordinary human ocular abilities and capacities.

Anderson admitted that Washington Street, like most roadways over a distance, has its ups and downs and ebbs and flows. (R. 22:18). From the distance of three-quarters of mile to a mile during the hours of darkness, it would be near impossible for the human eye to clearly define and perceive the edges of the roadway and the centerline. The slightest curvature or change in elevation within the roadway could certainly cause the appearance to an observer at that distance that the vehicle committed a significant or substantial side to side movement when in fact it did not.

Application of basic principles of logic exposes one of the many problems with Anderson's testimony on this point. His ability to perceive Bouchette's distance varied from three-quarters of mile to over a mile. Thus, he conceded that his margin of error is up to a quarter-mile or more in one direction. Under such a substantial margin of error, it is incredible to accept Anderson's simultaneous claim that he was able to determine precisely and accurately a deviation from lane assignment consisting of only a matter of several feet.

Bouchette contends that Anderson's assertion that he observed, during hours of darkness and on roadway that has ups/downs and ebbs/flows, a cross-of-centerline violation

from the distance of three-quarters of mile to a mile away is incredible as a matter of law. "Incredible as a matter of law means inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts." *State v. King*, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994).

Secondly, though it is true that Anderson did state he estimated Bouchette to be as close at three-quarters of mile, he also admitted it was "possible [Bouchette] could have been"[4] further than a mile away from him when he observed the alleged cross-of-centerline violation. Anderson estimated that the distance between 64th Street to 80th Street (county line) was one mile. Mathematically then, by Anderson's own admission, it is a completely and equally reasonable possibility that Bouchette would have been outside of Wood County at the moment he allegedly crossed the centerline.

Wis. Stat. § 175.40 (2) only permits a police officer to pursue a person outside of his or her territorial jurisdiction to make an arrest for "violation of any law or ordinance the officer is **authorized to enforce**." (bolding supplied for emphasis). As is clear from the plain language of the statute, the ability of the officer to enforce a particular law or ordinance is a necessary element to fresh pursuit. An officer lacks the authority to enforce the traffic code of another municipality or jurisdiction. See *Haynes*, supra, ("Wisconsin police officers have no authority outside of the political subdivision in which they are officers.); also see Wisconsin Law Enforcement Officers Criminal Law Handbood, 2008-09 ("Fresh pursuit means the pursuit by a law enforcement officer of someone he/she has probable cause to believe has violated any law or ordinance the officer is authorized to enforce. **This means that the infraction took place within the officer's geographical jurisdiction** and fresh pursuit allows the officer to follow that person outside of what normally would be his/her geographical limits.")(emphasis supplied).

[4]R. 22:17.

For these reasons, Anderson lacked probable cause to believe that Bouchette committed a cross-of-centerline violation either at all or within his jurisdiction, or both.

iii. Failure to Yield.

Anderson lastly asserted Bouchette did not stop or yield at for the stop sign at the intersection of Washington and 80th streets. Anderson's belief that Bouchette's vehicle did not stop or yield to the stop sign, essentially, really premised on the notion that Anderson did not observe any brake lights; not that he actually observed Bouchette fail to stop at the stop sign. Anderson did not have probable cause to believe that Bouchette failed to yield at the stop sign.

‘

Firstly, Anderson admitted it was a possibility that Bouchette could have been more than a mile ahead of his squad at the point he reached the intersection of 64th Street and 80th Street. For similar reasons as noted above, Bouchette contends, based on the basic limitations of the human naked-eye, the notion that Anderson may not have observed the activation of brake lights (which is nothing more than an increased intensity of light within or around a vehicle's taillight) is not evidence that he did not stop at a stop sign. From the distance of a mile or so, it is neither surprising nor significant that a person would *not* observe the activation of brake lights. The absence of brake lights does not, by itself, create probable cause to believe Bouchette failed to yield at the stop sign. Indeed, even Anderson conceded he could not say with certainty whether Bouchette failed to yield to the stop sign. Anderson's comments are nothing short of a concession that he lacked probable cause on this issue.

Secondly, based on Anderson's concession that Bouchette possibly was a mile or more ahead of him and in conjunction with his testimony that the distance between 64th Street to 80th Street is approximately one (1) mile, it is a reasonable possibility that Bouchette may had already stopped at the stop sign and cleared it by the time Anderson made an observation of his vehicle from the Washington Street and 64th Street intersection. Thus, Bouchette

committed no violation whatsoever, either within or outside of Grand Rapids.

For these reasons, Anderson lacked probable cause to believe that Bouchette committed a failure to yield to stop sign violation.

III. NO OTHER LEGAL AUTHORITY EXISTED TO ALLOW THE POLICE OFFICER TO ACT OUTSIDE OF HIS JURISDICTION

In addition to the "fresh pursuit" doctrine, two other exceptions exist to the general rule that police officers have no authority outside of their own territorial jurisdiction: 1) mutual aid or assistance upon request; and 2) aid or assistance upon written policy. Each will be briefly addressed in turn.

i. Mutual Aid or Assistance.

As to the mutual aid or assistance upon request exception, Wis. Stat. § 66.0313, in relevant part, reads:

> "[U]pon the request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28(2), the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision."

The exception does not apply. There is no evidence contained within this record to conclude otherwise.

ii. Aid or Assistance upon Written Policy.

The aid or assistance upon written policy exception is found under Wis. Stat. § 175.40 (5) and (6) and requires a written policy between law enforcement agencies to allow police, peace or law enforcement officers to act outside their territorial jurisdiction. The extent of authority that may be exercised by police, peace or law enforcement officer to act outside their territorial jurisdiction depends on the population of the county in which the law enforcement agency is situated.

The exception does not apply. There is no evidence contained within this record to conclude otherwise.

CONCLUSION

It is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress in this matter and remand with directions that the circuit court issue an order suppressing all evidence gained consequent to the unlawful detention by police of the Defendant-Appellant.

Dated this 19th day of July, 2017.

Respectfully Submitted,

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By: _____

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FORM AND LENGTH CERTIFICATION

I, Chadwick J. Kaehne, hereby certify that this portion of the brief (respondent portion) 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 6,936 words.

Dated this 19th day of July, 2017.

_____

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ELECTRONIC BRIEF CERTIFICATION

I, Chadwick J. Kaehne, 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 19th day of July, 2017.

_____

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017 AP 820 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

CHRISTOPHER C. BOUCHETTE,

Defendant – Appellant.

BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

STATE OF WISCONSIN)
)ss
WINNEBAGO COUNTY)

I, Jason Masterson, being first duly sworn, under oath, states:

1. That I am a Paralegal at Kaehne, Cottle, Pasquale & Associates, S.C.
2. That on July 20, 2017, I did deposit in a mail receptacle for the United States Postal Service, in a sealed package, correctly addressed for delivery to the Wisconsin Clerk of Court of Appeals, with postage pre-paid for first class mail, ten (10) copies the *Brief and Appendix of the Defendant- Appellant*, relative to the above-entitled matter.
3. That on the same day, I also sent via U.S. Mail, first class, three (3) service copies of the *Brief and Appendix of the Defendant-Appellant* to the Wood County District Attorney's Office, Attn.: Asst. District Attorney Craig S. Lambert.

Subscribed and sworn to before me this ____ July, 2017:

_____
Jason Masterson
Paralegal

_____
Alison Spradling, Notary Public
Winnebago County, State of Wisconsin
My Commission Expires: _____.