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.

REPLY BRIEF 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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ARGUMENT

I. Anonymous Tipster

In his brief-in-chief, Bouchette contended that any information from the anonymous tipster in this case had no legal value whatsoever and should not be given any consideration. The State did not refute this argument and therefore it is deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979).

II. The State's Position on Applicable Quantum of Proof in Fresh Pursuit" Cases

In its response brief, the State applies the fresh pursuit factors set-out in *City of Brookfield v. Collar*, 148 Wis. 2d. 839, 842 (Wis. Ct. App., 1989). (State's Brief, pp. 1-8). However, as pointed-out in Bouchette's brief-in-chief, *Collar* does not answer the questions presented in this case. That is, the specific issue of whether "fresh pursuit" must be premised upon probable cause; that issue was not expressly addressed by the *Collar* court (Brief-in-Chief, pp. 15-16). The *Collar* factors focus on the *pursuit* component of the fresh pursuit doctrine, and not the quantum of proof on which the pursuit must be based.

The State argues that probable cause is not required under the statute in order for an officer to exercise fresh pursuit. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.' " *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 110. Plain meaning may be ascertained not only from the words employed in the statute, but from the context. Id., ¶ 46.

It is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis.2d 56, 74, 307 N.W.2d 256, 266 (1981); *NBZ, Inc. v. Pilarski*, 185 Wis.2d 827, 836, 520 N.W.2d 93 (Ct.App.1994). A statute does not change the

common law unless the legislative purpose to do so is clearly expressed in the language of the statute. *Id*. To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory. *Id*. When a statute merely codifies common law, cases interpreting the common law are persuasive in interpreting that section. See *Reilly v. City of Racine,* 51 Wis. 526, 8 N.W. 417 (1881). However, statutes in derogation of the common law are strictly construed. *Maxey v. Redev. Auth. of Racine*, 94 Wis.2d 375, 399, 288 N.W.2d 794 (1980).

Generally speaking, Wis. Stat. § 175.40 (2) is a codification of common law. The doctrine of "fresh pursuit" at common law 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). There is no legislative signal within Wis. Stat. § 175.40 (2) (and its predecessor sec. 66.31) to remotely suggest that the legislature intended to alter the underlying standard that the pursuit must be actuated and premised upon probable cause or a warrant to arrest. The only derogating effect that Wis. Stat. § 175.40 (2) had on the common law's "fresh pursuit" doctrine relates to the *kinds* of offenses for which can justify its invocation. The legislature simply expanded the fresh pursuit doctrine to include arrest for "any law or ordinance" contra only felony crimes under common law.

The State's relies on *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143. Its reliance misses the mark for various reasons. Two of those reasons are as follows. First, the issue before the *Houghton* court did not pertain to the issue now before this Court. As it relates to the language relied upon by the State in its brief, specifically on paragraph 30 in *Houghton*, the court was simply putting to rest a line of caselaw that existed theretofore that held that a duel standard applied to traffic stops and the determination of the appropriate standard (probable cause vs. reasonable suspicion) depended on the purpose of the traffic stop. *Id*. ¶¶27-30. The *Houghton* court ruled, in the context of that issue, that reasonable suspicion is the appropriate standard. *Id*. The *Houghton* court did specifically contemplate or address the appropriate standard in fresh pursuit cases, and

the State is plain wrong to suggest that it somehow unwittingly did so.

Secondly, the ruling in *Houghton* that reasonable suspicion applied to traffic stops was based in standards set by the Fourth Amendment to the U.S. Constitution. *Houghton*, ¶¶20-30. Here, this particular issue is based on statutory interpretation, specifically whether probable cause is required under Wisconsin's fresh pursuit statute.[1] The Fourth Amendment sets the floor and legislature is free to set the ceiling. And it has done so by requiring that a police officer may only act in fresh pursuit and cross jurisdictional lines to effectuate an "arrest."

The State's advanced interpretation commits brutal violence against the plain language of Wis. Stat. § 175.40 (2). The State writes:

> The statute authorizes an officer to cross the sometimes invisible county, or municipality lines to stop a suspect who the officer reasonably believed committed a law violation in that officer's territory, and to make an arrest if the situation calls for that.

State's Brief, p. 10.

The plain and unambiguous language of the statute. 175.40 (2) allows an officer to pursue a person outside his jurisdictional boundaries to only "arrest"– *not* to conduct an investigatory detention that *may or may not* lead to an arrest as the State asserts. "All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in

[1] Though this particular issue is one of statutory interpretation, the ultimate issue for this Court is one of constitutional magnitude. The touchstone of the Fourth Amendment is reasonableness, *State v. Weber*, 2016 WI 96, ¶34, 372 Wis. 2d 202, 225, 887 N.W.2d 554, 565, and all traffic stops must be reasonable under the circumstances. *Houghton*, 2015 WI 79, ¶29. When a police officer exceeds his authority to act, and does so under the color of law, the resulting "seizure" of a person is unlawful and consequently unreasonable. Therefore, the Fourth Amendment's prohibition against unreasonable search and seizures in violated. Moreover, the State of Wisconsin has not contended or otherwise asserted that the remedy would not be suppression if ruled that Anderson was lawfully engaged in fresh pursuit under statute when he seized Bouchette.

the law shall be construed according to such meaning." Wis. Stat. § 990.01 (1). The word "arrest" is a legally technical word and means "the taking or keeping of person in custody by legal authority[.]" Black's Law Dictionary, Third Pocket Edition. It is axiomatic that an "arrest" does not mean an investigatory detention. Indeed, by its very definition an investigatory detention, or a "Terry-stop," does not encompass an arrest. Wis. Stat. § 968.24; and e.g. *State v. Patton*, 2006 WI App 235, ¶9, 297 Wis. 2d 415, 422, 724 N.W.2d 347, 350 ("A Terry stop is not an arrest[.]"). It is further axiomatic that an "arrest" (in non-warrant cases) must be supported by probable cause. Wis. Stat § 968.07 (1); and e.g. *State v. Secrist*, 224 Wis.2d 201, 209, 212, 589 N.W.2d 387 (1999) ("Probable cause is the sine qua non of a lawful arrest.") and also *State v. Taylor*, 60 Wis. 2d 506, 512, 210 N.W.2d 873, 877 (1973) ("While an arrest without a warrant is lawful in some instances, ... probable cause must be established as the basis for such an arrest.").

In order to accept the State's interpretation, essentially, it requires that this Court abandon the well-understood legal meaning of the word "arrest" and replace it with a varied definition to encompass police' authority to cross jurisdictional boundaries if "the officer reasonably believe[s] [a person] committed a law violation in that officer's territory, and *to make an arrest if the situation calls for that*." State's Brief, p. 13 (emphasis added). Put differently, the State asserts that the term "arrest" within Wis. Stat. § 175.40 (2) does not actually mean an "arrest" as the word is ordinarily and technically understood and defined throughout centuries of caselaw and statutes; rather, "arrest" really means reasonable suspicion of wrongdoing and then to arrest but only "if the situation calls for that." Such interpretation is patently unreasonable. If the legislature intended to create authority for a police officer to cross jurisdictional lines to detain for investigative purposes, it would have said so. The legislature certainly knows how to distinguish between an investigatory detention and an arrest. Compare Wis. Stat. § 968.24 ("Temporary questioning without arrest.") to Wis. Stat. § 968.07 ("Arrest by a law enforcement officer.").

Lastly, the State suggests it would be absurd to hold that the fresh pursuit statute requires probable cause. Not true. The rationale behind the higher standard is both reasonable

and sensible and, moreover, congruent with the common law doctrine of "fresh pursuit." Wisconsin police officers generally have no authority beyond their own jurisdiction. *State v. Haynes*, 2001 WI App 266, ¶13, 248 Wis. 2d 724, 733, 638 N.W.2d 82, 86 (citation omitted). Thus, it makes perfect sense why an officer may only act on probable cause to arrest (or a warrant to arrest) if he or she wishes to break that general rule. Were it otherwise, police officers would often engage in extra-jurisdictional stops (traffic or otherwise) to perform investigatory detentions in other police or law enforcement territories, effectively blurring those jurisdictional lines and effectively causing the general rule that police officers have no authority beyond their own jurisdictions to be swallowed by the exception. The legislature's decision to keep in place the common law element of arrest, which must be supported by probable cause or a warrant, in fresh pursuit cases is not absurd whatsoever.

III. State's Position on Alleged Traffic Code Violations.

a. Speeding

The State places significant emphasis on Anderson's training in detecting speeding violations in an effort to advance its argument that he had the sufficient quantum of proof to stop Bouchette for speeding. State's Brief, pp. 11-12. However, the State ignores Anderson's own admission that he was unable to use his actual police training under the circumstance to determine whether Bouchette was speeding or not. The State similarly ignores Anderson's admission that his belief that Bouchette was speeding was based on a "gut feeling" and a "hunch." Anderson was unable to articulate, in an objective manner, why he believed Bouchette's vehicle was speeding. This evidence falls well short of both the reasonable suspicion and probable cause standards.

b. Cross-of-Centerline

The State writes "Officer Anderson clearly and unequivocally told the court that this violation occurred prior to the stop sign at 80th street on Washington Street." State's Brief, p. 13. Not true. Perhaps if review of his testimony was limited to his testimony on direct examination, the State's representation to this Court may have merit. Instead, the State

ignores other parts of Anderson's testimony that discredit its claim. Anderson estimated Bouchette to be as close at three-quarters of mile, but that he "could have been" 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. It is clear that from Anderson's overall testimony that he did not actually say he observed an alleged cross-of-centerline violation occur in Wood County. Rather, he testified that he believed he observed an alleged cross-of-centerline violation that could have occurred in either of Wood or Portage counties.

The State is essentially requesting that this Court assign weight only to Anderson's testimony that supports its contention, but ignore his other testimony that it deems unhelpful.

If the violation occurred outside of Anderson's territorial jurisdiction, he was not acting in fresh pursuit when he traveled into Portage County. 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). *Also see* 61 Op. Att'y Gen. 419, 421 (1972)(attorney general opining that the fresh pursuit statute contemplates that the violation for which the pursuit is necessary occurred within the limits of the officer's municipality).

Thus, it was, at best, only a *possibility* that any cross-of-center violation occurred in Anderson's jurisdiction. Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime or law violation. *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387, 392 (1999). There must be more than a possibility or suspicion that the defendant committed an offense. *Id*.

c. Fail to Stop at Stop Sign

The State writes "Officer Anderson continued following the defendant-appellant's vehicle, and when this vehicle came to the stop sign at 80th Street, Officer Anderson did not see the vehicle's brake lights illuminate, which would have occurred if the defendant did in fact stop for this stop sign." State's Brief, pp. 13-14. This statement is a misrepresentation of Anderson's actual testimony. Anderson never testified that he, in fact, observed Bouchette's vehicle approach the stop sign situated at 80th Street. Bouchette points to the following exchanges:

(Defense Atty.) Question:	And your testimony just a little earlier after you turned the intersection of 64th and Washington going eastbound, you were driving to intercept Mr. Bouchette's vehicle, correct?
(Anderson) Answer:	Correct.
Question:	So it's entirely possible that Mr. Bouchette's vehicle was further than a mile when you were at the intersection of 64 and Washington, correct?
Answer:	Possibility he could have been.
Question:	Now, when you were behind Mr. Boucehtte's vehicle traveling eastbound on Washington, you stated that you didn't notice any brake light illumination off in the distance, correct?
Answer:	Correct.
Question:	But you also can't say for certainty that Mr. Bouchette's vehicle did not stop at an intersection, correct?
Answer:	Correct.

R.22:17-18

(Prosecutor) Question:	Okay. You said that you could not tell for certainty that the vehicle did not stop at the Washington and 84th, correct?
(Anderson) Answer:	Correct.
Question:	Well, are you guessing that he did not stop?
Answer:	No. I just – I believe that he did not stop.
Question:	What do you base your belief that he did not stop on?
Answer:	Being I didn't see any brake lights or taillight illuminate when I turned onto Washington.

R.22:20-21.

As evidenced by record, Anderson did not testify, as the State represents, that he personally observed Bouchette's "vehicle c[o]me to the stop sign at 80th Street." 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. Moreover, Anderson candidly admitted that it was entirely possible that Bouchette's vehicle was more than a mile away from him (Anderson) when he turned from the intersection of 64th and Washington streets onto Washington Street and, therefore, Bouchette would have *already* passed the stop sign at that point. This would explain (assuming arguendo it's even humanly possible to see brake lights from as much as more than a mile away) why Anderson observed no brake lights and why it would not be suggestive of a traffic code violation.

Per Anderson's testimony, he presented two existing, competing possibilities: 1) Bouchette was less than a mile in distance away from him when he turned onto Washington Street and, therefore, Bouchette would have not yet reached the stop sign on 84th Street; **or** 2) Bouchette was more than a

mile in distance away from him when he turned onto Washington Street and, therefore, Bouchette would have already passed the stop sign on 84th Street.

If the first alternative was true, and Anderson did not see brake lights, it may suggest a failure to stop. However, if the second alternative was true, the absence of brake lights is expected because there would be no stop sign to stop at. Under either alternative, though, the inference that Bouchette failed to stop at the stop sign are grounded on the absence of information (or negative evidence). Anderson presented no affirmative or positive evidence of an actual failure to stop at a stop sign violation. In the face of two existing, competing possibilities -- when each possibility means the difference between an event in fact occurring or not occurring – it is patently absurd to conclude that the absence of information or negative evidence can add up probable cause. Rather, under those circumstances, only affirmative or positive evidence, based in fact, is sufficient to supply the foundational evidence needed to create reasonable inference of a failure-to-yield violation.

A deficit of factual evidence cannot somehow churn out positive evidence. At best, it was only a *possibility* that Bouchette failed to stop at the stop sign. A possibility does not create probable cause. *Secrist*, 224 Wis. at 212. Anderson did not have probable cause to believe that Bouchette failed to yield at the stop sign.

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 8th day of September, 2017.

Respectfully Submitted,

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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 2,989 words.

Dated this 8th day of September, 2017.

_____

Attorney Chadwick J. Kaehne
State Bar No.: 1045611

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 8th day of September, 2017.

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_____

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AFFIDAVIT OF MAILING

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 September 8, 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 *Reply Brief 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 *Reply Brief of the Defendant-Appellant* to the Wood County District Attorney's Office.

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

_____
Jason Masterson
Paralegal

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