STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP000888

In the matter of the refusal of Dustin R. Willette:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DUSTIN R. WILLETTE,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

On Appeal from Brown County Circuit Court,
the Honorable Thomas J. Walsh, presiding
Trial Court Case No. 16TR10066

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Did the seizing officer have cause to seize and relocate the Defendant for Standard Field Sobriety Tests without knowledge of him driving?

The Trial Court answered: Yes

The Appellant answers: No

Did the State Satisfy its burden at the refusal hearing to prove that the Defendant was the driver of the vehicle in question?

The Trial Court answered: Yes

The Appellant answers: No

Did the Trial Court commit clear error when it found the requisite causation required to arrest?

Trial Court did not address this issue.

The Appellant answers: Yes

Did the Defendant improperly refuse Chemical Testing?

Trial Court Answers: Yes

The Appellant Answers: No

STATEMENT OF THE FACTS:

On Sunday October 2nd, shortly after 5:24 a.m. Officer Hughes of the Oneida Police Department responded to a call at a gas station that "a vehicle had stopped in front of Oneida one stop, which is 3120 Parkerland drive, and a male exited the vehicle" (R. 27, 5)

Upon arrival Officer Hughes noted no driver of the vehicle in question at the scene. Hughes on a hunch apprehended a suspect walking nearly a mile away. That Suspect informed Officer Hughes of his name, address and why he was in town. Officer Hughes asked the suspect if he had been driving, which he denied. (R. 11, 5 at PICT0033_2016.10.02_05.34.54)

Regardless, of having no information indicating that the suspect she questioned was the driver, the Defendant was transported in the back of a police cruiser and brought to the scene where he was administered field sobriety testing that was improperly instructed and ultimately passed. (R. 11, 5 at PICT0033_2016.10.02_05.34.54) (R. 11 , 5 PICT0004_2016.10.02_05.50.04)

Without proof that the Defendant was the driver of the vehicle in question, and regardless of passing his field sobriety testing, Willette was placed under arrest and read the informing the accused from required under Wisconsin's Implied consent statute. (R. 11, 5- PICT0005_2016.10.02_06.02.24)When asked if he would consent to one or more chemical tests of his blood the Defendant responded he didn't understand what the right answer was and asked the officer to re-read the form. (R. 11, 5- PICT0005_2016.10.02_06.02.24) After the form was read again,

the Defendant indicated that he still did not understand what he was supposed to do. When the defendant informed the Officer a second time that he did not know the right answer and would like legal clarification the form was marked as a refusal (R. 11, 5-PICT0005_2016.10.02_06.02.24)

ARGUMENT

Did the seizing officer have cause to seize and relocate the Defendant for Field Sobriety Tests without knowledge of him driving?

Simply put at the time of relocating the defendant, the seizing officer had no idea that Mr. Willette was the driver of the vehicle in question. The Factual Findings of the Trial Court are clearly erroneous and the clear errors with legal consequence are easy to see.

In this case, Mr. Willette was seized some distance from the scene of the vehicle involved in the suspected OWI.

At the time of relocating the Defendant back to the scene via backseat of a police cruiser the officers did not have any information indicating that he was the DRIVER of the vehicle in question.

The state in response to the Defendants argument asserts the position that the Court found that Officer Hughes knew Willette was the driver of the vehicle in question prior to relocation to the vehicle for fields. The state is correct that is what the Court stated in its opinion but the basis for that opinion was the testimony of Ofc. Hughes who clearly stated under oath: "we received information that a vehicle had stopped in front of the Oneida One Stop, which is

3120 Packerland Drive, ***and a male exited the vehicle***." (R _ , 5) There was also a radio broadcast describing an occupant of the vehicle that Officer Hughes admits to not hearing. (R. 28, 3) When asked how she knew the description of the defendant Officer Hughes indicated there was a recording. But admits she never listened to it.

"Q. Okay. Do you have any statement from him at all?

A. The phone. He called on a recorded line at the Oneida police department.

Q. Okay. And have you reviewed that recording?

A. No."

Officer Hughes, also testified she could see the Defendant exiting the vehicle from the driver side on the surveillance video she watched sometime after the events of this day. The Trial court disagreed with this testimony: "Mr. Fredrickson said he really didn't see any demonstrated testimony - - or any demonstrated video of the defendant leaving the car. Quite frankly, when I viewed it, I didn't see that either." (R. 29, 3) This fact is critical as Officer Hughes during her investigation plainly says "we know you were driving the vehicle because we have video of you driving" (R. 11 , 5) PICT0004_2016.10.02_05.50.04 at timestamp :10- :31

In representing there is a video showing him driving the officer is expressly communicating a misstatement of fact that the Defendant was seen on video driving, this was her sole basis for believing he was the driver or that it was his vehicle. It is critical to realize she admits that she had not viewed the recording referenced at this point in time. (R. 11 , 5) PICT0004_2016.10.02_05.50.04 at timestamp :10- :31 Rather, the information known to her was strictly

limited to what was relied to her "we received information that a vehicle had stopped in front of the Oneida One Stop, which is 3120 Packerland Drive, ***and a male exited the vehicle***." (R 27, 5)

On this note, the State in its argument submits "These videos do corroborate the information given by the complainant who called in the suspicious vehicle: **that the driver was wearing a blue suit, a pink shirt and black pants"** States Response Page 14 para. 2

First, the caller didn't state the suspect was the *Driver* of a vehicle but rather according to Officer Hughes "we received information that a vehicle had stopped in front of the Oneida One Stop, which is 3120 Packerland Drive, ***and a male exited the vehicle***." (R 27, 5)

Second Willette was factually wearing grayish suit with a checkered shirt and gray pants. (Ex. 5). Further, the state has argued a position that is analogous to that of a simple traffic stop. That is not the fact pattern before this court. Rather; in this case the Defendant was seized some distance from the stop, the seizure was based on a hunch and bad description of a person who exited a vehicle. There is nothing in the record indicating Willette was a driver, other than the conclusions of the officer and State. These conclusions are not objective facts observed prior to relocation of Willette.

It is also error to conclude that there was an admission by the Defendant that he *drove* a similar vehicle. Specifically, the Circuit Court found in error: "He had been drinking to such a point that he had no idea where he was, that he was *driving* a vehicle that looked like that one." (R 29, 5) Factually, the defendant never once stated that he was driving at all. Rather, he states: "he is sure not driving and took a cab." (R. 11, 5 at PICT0033_2016.10.02_05.34.54 :01-

:45) The conversation continues and the Defendant denies knowing anything about the vehicle the officers are inquiring on, he denied he was there or that he had drove at all. (R. 11, 5 at PICT0033_2016.10.02_05.34.54)

The record is entirely devoid of a single fact that indicates that the Defendant was the driver prior to relocation to the vehicle from where he was walking. Without information that he was the driver the continued seizure and relocation of his person was unlawful.

The facts objectively known to the officers at the time of forcibly relocating the Defendant are merely a description of the vehicle and a man walking some distance away wearing, a "blue suit, pink shirt and black pants" See States Response page 14

Without evidence in the record to support this finding of fact it must be overturned as it is clear error. The record is devoid of an identification of a DRIVER prior to the relocation of Mr. Willette. The record is devoid of an identification of the vehicle belonging to Willette.

OFFICER HUGHES DID NOT HAVE PROBABLE CAUSE TO ARREST WILLETTE

The State asserts the position that Willette failed SFST and that the tests were administered properly. The Defendant in his opening brief argued the opposite. The Defendant submits that the Body Camera with timestamps provided in the Defendants original brief proves the tests did not amount to probable cause. Ex 5.

THE DEFENDANTS CONDUCT DOES NOT AMOUNT TO A REFUSAL

The Legislative Purpose to the Wisconsin Implied Consent statute is to require warnings be given to the Defendant as to the repercussions and rights they have under the statute and how their answer may impact the outcome of their investigation.

The State in its brief relies on the argument that Willette in continuing to ask questions pertaining the informing the accused language and it repercussions, has through his conduct revoked the consent implied by way of the statute. For support of this position the State cites *Neitzel,* 95 Wis. 2d 191, 289, directly behind citing language to support their position through case the state cites the Brar decision as overturning their precedent on other grounds.

First, we must distinguish the conduct in question from that of the authority cited by the state. In Neitzel as the state asserts "Refusing to answer an officer's repeated question, even to engage in *other* discussion, *can* rise to the level of conduct indicating a refusal. The operative words being *other* pertaining to discussions and *can* pertaining to a possibility.

In this case there was not another conversation. Rather Willette was trying to understand the nature of the warnings just given to him and his rights therein. In asking the officer questions pertaining to the warnings it was clear that Willette sought to understand the information being read, he politely requested it read another time, and indicated to the officer he did not know what the right answer was. At this point in time the officer exited the cruiser and asked her superior officer if she should just mark it as a refusal. (R 11,5: PICT0005_2016.10.02_06.02.24 at Timestamp (3:40) Wilette is clearly audible in the back ground continuing to state he doesn't understand and he doesn't know the right answer, Clearly seeking to inform himself of the information being presented prior then providing an answer.

It was clear from his conduct that Willette did not understand the information or the warnings being read or the impact the information had on his decisions. Understanding the intent of the statute and the legislature being that informing the accused statute is to inform the accused; here it is clear that seeking clarification of the rights and repercussions is not an act of conduct that can be seen as a revocation of consent already given. The precedent cited by the State in support of its position clearly states *other* conversations and *can* then amount to a refusal. *Neitzel,* 95 Wis. 2d 191, 289 Here we have no *other* conversations so the Court need not address the applicability of this authority as the facts are distinguishable from that of the authority cited.

Even under the authority cited by the state Willettes conduct does not amount to a revocation of consent, but rather a clarification of rights the legislature clearly intended he understand.

It is interesting that the States Response makes reference to the "uncontroverted evidence in the record", yet fails completely to point to one specific fact that supports the Circuit Courts finding that Willettes conduct amounted to a refusal. The Defendant asserts that in the record is the recording of him being read the informing the accused. (R 11,5: PICT0005_2016.10.02_06.02.24) The inquiry's that Willette makes pertain directly to the information being read. On the other hand rather than attempt to inform Willette or even inquire as to what he didn't understand, the officer quickly terminates the conversation around the form to go and ask a supervisor if this was a proper refusal. (R 11,5: PICT0005_2016.10.02_06.02.24 at Timestamp 3:00-4:00) With those facts preserved and established it is clear that Willettes conduct does not meet the requirement of the operative language cited by the state. Willette does not refuse, expressly or implicitly, but simply sought clarification on the warnings the legislature clearly intended he was advised of.

In no other context be it contract law, criminal or other civil arenas would Willette's conduct of quickly seeking clarification pertaining to the

facts at hand amount to a revocation of some prior consent. To construe the implied consent statute in this way goes against its legislative intent to address this "constitutionally questionable predicament" as elaborated on by the Wisconsin Supreme Courts recent decision in *Brar*. 2017 WI 73, 898 N.W.2d 499.

Finally, the State erroneously asserts "Willette does not appear to argue that these individual findings of fact are clearly erroneous". The opposite is true, contained within the record is a DVD exhibit depicting the conversation at issue. Willette urges the court to review the exhibit for the clear error that Willettes conduct amounted to that of a refusal (R 11,5: PICT0005_2016.10.02_06.02.24 at Timestamp (:00-4:00))

Again under the precedent cited by the state the operative condition of refusing to answer or seeking to engage in *other* conversations is not met. Rather, the officer is told Willette does not understand. Having been told multiple times that Willette doesn't understand, the officer herself seeks to terminate the conversation. While Officer Hughes walks away abruptly, Willette can be heard in the back ground clearly attempting to seek clarification on the information being presented to him. (:00-4:00) Rather than adequately inform or notice Willette of his rights in a manner that could be understood, the Officer terminates the conversation herself while Willette continues to inquire repeatedly "I don't know what the right answer is, does that make sense" (R 11,5: PICT0005_2016.10.02_06.02.24 at Timestamp (3:40)

It is clear through Willettes conduct that he is neither consenting nor revoking consent but rather seeking to be adequately informed of his rights and the repercussions of his decision. The officer spends less than 4 minutes with Willette regardless of his clear conduct seeking information before she unilaterally terminated the conversation to simply mark a refusal. These facts do not amount to a revocation of consent. 'Withdrawal of consent need not be effectuated through particular "magic words," but an ***intent to withdraw consent must be made by unequivocal***

act or statement.' " United States v. Sanders, 424 F.3d 768, 774 (8th Cir.2005) (quoting United States v. Gray, 369 F.3d 1024, 1026 (8th Cir.2004)); see also United States v. Alfaro, 935 F.2d 64, 67 (5th Cir.1991); Payton v. Commonwealth, 327 S.W.3d 468, 478 (Ky.2010). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Jimeno, 500 U.S. at 251, 111 S.Ct. 1801 (citing Rodriguez, 497 U.S. at 183–89, 110 S.Ct. 2793; Florida v. Royer, 460 U.S. 491, 501–02, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)).

15 ¶ 34 Unequivocal acts or statements sufficient to constitute withdrawal of consent may include slamming shut the trunk of a car during a search, see United States v. Flores, 48 F.3d 467, 468 (10th Cir.1995), grabbing back the item to be searched from the officer, see United States v. Ho, 94 F.3d 932, 934 (5th Cir.1996), and shouting "No wait" before a search could be completed, see United States v. Fuentes, 105 F.3d 487, 489 (9th Cir.1997). None of which occurred with Willette. State v. Wantland, 2014 WI 58, ¶¶ 33-34, 355 Wis. 2d 135, 152, 848 N.W.2d 810, 818

CONCLUSION

For the reasons stated in the Defendants submissions, the Circuit Courts finding of Improper Refusal must be overturned, the refusal must be vacated as the officers conducting the search did not have cause to seize or relocate him. Further, the officers failed to properly administer the field testing that Willette was subjected to improperly. Willette Passed the tests administered. Finally, Willette did not revoke his consent and did not refuse chemical testing that he had previously implicitly consented to. As such, the matter should be remitted to the Circuit Court with the instruction that the refusal be vacated.

Dated this 14th day of September, 2017

Respectfully Submitted,
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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 2,801 words.

Dated this 14th day of September, 2017

By: _____

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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 14th day of September, 2017

By:_____

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