STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001024

DANE COUNTY,

Plaintiff-Respondent,

vs.

BRENNA N. WEBER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM DECISION AND ORDER ENTERED ON MAY 2, 2017, IN THE CIRCUIT COURT FOR DANE COUNTY, BRANCH 7, THE HON. WILLIAM E. HANRAHAN, PRESIDING

Respectfully submitted,

BRENNA N. WEBER,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

I. DID THE OFFICER HAVE A SUFFICIENT LEGAL BASIS TO REQUIRE MS. WEBER TO PERFORM FIELD SOBRIETY TESTS WHEN SHE HAD BEEN STOPPED FOR SPEEDING?

TRIAL COURT ANSWERED: YES

A. Standard of review.

B. The Facts Were Not Sufficient for the Officer to Require Ms. Weber to Exit the Vehicle and Perform Field Sobriety Tests.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of defendant's motion to suppress. R.12; 23. On November 27, 2016, just after 3.a.m., Officer Schneider stopped a vehicle for speeding R.23:5. Ms. Weber, the driver of the vehicle, was traveling at about 60 m.p.h. in a 45 m.p.h. zone. Id. The officer was traveling in the opposite direction from Ms. Weber in her vehicle. R.23:6. The officer turned around, followed Ms. Weber, then stopped her for the speeding violation. Id.

The officer observed that Ms. Weber's vehicle did not swerve, did not cross the center line, and was not otherwise operated in any way that was indicative of impairment. R.23:14– 15. The officer did testify at the motion hearing held in the matter that Ms. Weber was slow to stop after he activated his lights. R.23:15. After viewing the video showing the stop of Ms. Weber's vehicle obtained from his own squad car from the night of the incident, the officer admitted that Ms. Weber stopped as soon as there was a safe place on the side of the road. R.23:18. The officer further testified that Ms. Weber did not pull over in a way that was suspicious. Id.

After Ms. Weber stopped her vehicle, the officer approached, had contact with her, and identified her with her driver's license. R.23:7. The officer noted a medium odor of intoxicants and noted the time was after bar time. Id. The officer asked Ms. Weber about her

speed and she indicated she had been on the phone with a friend getting directions. R.23:8. Upon being questioned by the officer, Ms. Weber stated she had one beer and had just come from work at O'Grady's Irish Pub. R.23:8, 23:20. The officer did not observe any slurred speech, bloodshot eyes, fumbling, or lack of coordination. R.23:18– 19. The officer returned to his squad vehicle and determined that Ms. Weber had a valid license and no outstanding warrants. R.23:21. Based on the odor of alcohol, admission to drinking one beer, and the time of night, the officer had Ms. Weber exit her vehicle to perform field sobriety tests. R.23:8– 9.

Ms. Weber was ultimately ticketed for operating while intoxicated and operating with a prohibited alcohol concentration. R.1 and 2. Before trial, she filed a motion challenging the expansion of the scope of the stop from that for a speeding violation into an investigation for driving while impaired by alcohol. The Court held a hearing on the motion at which Officer Schneider testified, the beginning of the squad video was played, and both sides argued. R.23. Officer Schneider testified that while he had been employed by the Dane County Sheriff's Department for several years, he had been employed in the capacity of a jailer and had only been a patrol officer for approximately three months when he stopped Ms. Weber. R.23:10.

After hearing the facts and arguments, the trial court discussed the caselaw around expanding the scope of a stop. R.23:28– 33. The trial court discussed several unpublished cases. In one, the fact pattern was that the time was after bar time, the defendant gave a friend a ride, there was a moderate to strong odor of intoxicants, and bloodshot or glassy eyes. R.23:29. In another, there was no odor of alcohol but there was an empty shot glass observed in the vehicle which led to further investigation. R.23:30.

The trial court then made factual findings that the officer in Ms. Weber's case indicated there was a medium odor of alcohol, that it was after bar time, that there was an admission of drinking at a bar where Ms. Weber was employed, and that Ms. Weber had been speeding. R.23:32. The trial court also referenced ***Cnty. of Sauk v. Leon,*** 2011 WI App 1, ¶ 20, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)) and ***State v. Colstad,*** 2003 WI App 25, ¶ 19, 260 Wis. 2d 406, 659 N.W.2d 394**.**

Ultimately the trial court held:

> The extension of the traffic stop, the officer I think has an obligation as a police officer to resolve ambiguity. Here he said that he prolonged the stop because he wanted to resolve that ambiguity of whether or not the defendant was telling the truth, and indeed it's not illegal to drink and drive, but given the circumstances as described, the lateness of the hour, the admission

> of drinking, the odor of intoxicants, and the speeding, I think the officer was privileged to inquire further and quickly resolve it. So this roadside questioning I find does not run afoul of the Constitution.

R.23:33.

Thus, the motion was denied.

After a trial on stipulated facts, reserving her right to appeal the denial of the suppression motion, Ms. Weber was convicted and timely filed her Notice of Appeal to this Court. R.17, 19, 21.

ARGUMENT

I. THE OFFICER DID NOT HAVE SUFFICIENT REASON TO EXPAND THE STOP FROM SPEEDING INTO AN OWI INVESTIGATION.

A. Standard of review.

The trial court's determination of whether undisputed facts establish reasonable suspicion presents a question of constitutional fact, subject to *de novo* review. ***State v. Sisk***, 2001WI App 182, ¶ 7, 247 Wis. 2d 443, 634 N.W.2d 877. If an officer becomes aware of additional suspicious factors which give rise to an articulable suspicion that the person is committing an offense separate from the initial one, the stop may be extended and a new investigation begun. ***State v. Betow***, 226 Wis. 2d 90, 94– 95, 593 N.W. 2d 449 (Ct. App. 1999). In a case where an officer has contact with a person for an investigation into a separate issue and then investigates an OWI, the Court must determine whether the officer discovered information after the initial stop which provided reasonable suspicion that the subject was driving while under the influence of an intoxicant. ***State v. Colstad***, 2003 WI App 25, ¶ 19, 260 Wis. 2d 406, 659 N.W.2d 394.

B. The Facts Were Not Sufficient for the Officer to Require Ms. Weber to Exit the Vehicle and Perform Field Sobriety Tests.

Under both the United States and Wisconsin Constitutions, an investigatory detention must be supported by reasonable suspicion that a person is or was violating the law. ***State v. Colstad***, 2003 WI App ¶ 8, *citing* ***State v. Gammons***, 2001 WI App 36, 241 Wis.2d 296, 625 N.W. 2d. 623. Further, "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." ***United States v. Brignoni-Ponce***, 422 U.S. 873, 881–82, (1975); ***Adams v. Williams***, 407 U.S. 143, 146 (1997). It is the State's burden to demonstrate that the seizure was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. ***Florida v. Royer***, 460 U.S. 491, 500 (1983).

Although a traffic stop may begin as a lawful seizure, if that seizure is prolonged beyond the time necessary to issue a citation for the traffic offense, the seizure may become unlawful. ***Rodriguez v. United States,*** 135 S. Ct. 1609, 1612 (2015). In determining whether the prolonged detention is lawful, the Court must consider whether separate reasonable suspicion exists to justify the additional seizure.

Id. at 1615. If the officer becomes aware of additional suspicious factors which give rise to an articulable suspicion that the person has committed a separate and distinct offense, the stop may be extended for the new investigation. ***Betow***, 226 Wis. 2d at 94– 95. That investigation must be based upon objective and particularized factors which give rise to a reasonable belief that a crime is being committed. ***Id.*** *citing* ***United States v. Perez***, 37 F.3d 510 (1994). The request for a driver to perform field sobriety tests must be separately justified by articulable facts showing a reasonable basis for the request, as it is a greater invasion of liberty than the initial detention. ***Colstad*** 2003 WI App ¶ 19.

When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial. ***Cnty. of Sauk v. Leon***, 2011 WI App 1, ¶ 20, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). In the ***Leon*** case, the officer noted the odor of intoxicants, and the driver admitted to drinking a beer at dinner. ***Id.*** ¶ 28 Here, Deputy Schneider also noticed an odor of intoxicants. Moreover, similar to the defendant in ***Leon***, Ms. Weber confirmed that she had in fact consumed alcohol. The defendant in ***Leon*** admitted to having only one drink, as did Ms. Weber. The ***Leon*** court concluded: "Without more, an admission of having consumed one beer with an evening meal, together with an

odor of unspecified intensity, are not sufficient 'building blocks' representing specific and articulable facts supporting reasonable suspicion." ***Id.*** The trial court distinguished ***Leon*** by stating that there had been no observations of driving in that case. R.23:32. The trial further stated that there was no admission in ***Leon***, apparently referring to an admission of drinking. R.23:32.

However, as noted above, the driver in ***Leon*** did admit to consuming a beer. And while the officer in this matter did observe Ms. Weber's driving, none of those observations raise an inference that Ms. Weber was intoxicated. In fact, just the opposite is true.

Ms. Weber was speeding, but that did not indicate alcohol impairment. R.23:15. She did not swerve, deviate from her lane, or have any issues with control of her vehicle. Id. She pulled over properly when there was a safe place to do so. R.23:17– 18. Consequently, the officer's observations of Ms. Weber's driving behavior do not raise any inference of alcohol impairment. Other than the speeding ticket for which she was pulled over, no problematic driving issues of any kind were observed.

Upon making contact with Ms. Weber, the officer observed a moderate odor of alcohol. Ms. Weber explained that she worked at an Irish Pub, that she had just gotten off work, and that she had one beer while at work. R.23:8, 20– 21. To the extent that any concern with

possible alcohol impairment was raised by the moderate odor of alcohol, Ms. Weber's explanation could only dispel the concern. The officer is not required to accept Ms. Weber's explanation as the only possibility. ***State v. Colstad,*** 2003 WI App ¶21. However, neither the officer nor the State in its argument indicated any specific reason to believe that Ms. Weber was not truthful.

The trial court did not find Ms. Weber's statement to be untruthful. While the officer is not required to dispel every possible innocent explanation, there is no reason to ignore or doubt the reasonable responses given by Ms. Weber. While some individuals may not be completely forthcoming with law enforcement about alcohol consumption, the officer must point to sufficient articulable facts which rise to the level of a reason to believe Ms. Weber was impaired by alcohol. ***Colstad***, 2003 WI App ¶ 19. In ***Colstad***, the driver had been involved in a fatal accident and the police were investigating to determine the cause. ***Id***. Here, there was no accident to investigate, and there was only a speeding violation.

Further, the officer observed that Ms. Weber did not have slurred speech, she did not have bloodshot eyes, and she did not fumble or have any lack of coordination. R.23:18– 19. These are common signs that police note in investigations into impaired operation to support the inference that an individual is operating while

under the influence. Working at an Irish Pub which serves alcohol and consuming a beer is a reasonable explanation for the moderate odor of alcohol the officer noted. No specific, articulable fact in this case leads to a reasonable suspicion that Ms. Weber was impaired by alcohol while driving. As noted by the trial court, it is not illegal to consume alcohol and drive. R.23:33. What is illegal is to be impaired while driving. Because that was the violation the officer extended the stop to investigate, there must be articulable facts to support a suspicion of impaired driving.

The officer and the State, as well as the trial court in its ruling, relied on the facts that it was late at night, that Ms. Weber was speeding, that there was an odor of alcohol, and that Ms. Weber stated she consumed one beer. Ms. Weber's statements that she served alcohol and drank one beer at work simply explain the odor of alcohol. They do not raise an inference of impairment.

Additionally, the officer's questions of Ms. Weber dispelled any potential concerns. Ms. Weber had reason to be out late at night, as she had been working. Nor does her speeding indicate she was impaired. The officer did not testify that speeding is an indicator of alcohol impairment, whether it occurs late at night or not. There must be additional facts which can be pointed to which raise a reasonable inference of impaired driving. Working at a bar and having consumed

one beer are not sufficient to believe Ms. Weber may have been driving while impaired. At most, the officer had a hunch or unsupported suspicion that Ms. Weber had consumed more alcohol than she admitted. Yet a hunch cannot establish the requisite reasonable suspicion of a crime. ***Terry v. Ohio***, 392 U.S. 1 (1968). Indeed, the officer had no facts to support that hunch – the facts actually weighed against that hunch. Specifically, the driving behavior when pulling over safely and appropriately, as well as the lack of any indicators of alcohol impairment such as slurred speech, bloodshot and glassy eyes, or fumbling with the driver's license indicate there was no alcohol impairment.

Based on the facts observed by the officer, it was not reasonable to conclude that Ms. Weber was likely operating while impaired. A hunch or unsupported suspicion on the part of the officer is not sufficient. In order to expand the stop for speeding into a stop for impaired driving, the officer must be able to point to additional articulable facts which give rise to a reasonable belief that that particular crime is being committed. ***Colstad, supra***. Such facts do not exist in this case. Thus, the appellant's motion to suppress should have been granted.

CONCLUSION

For the reasons stated in this brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court grant the defendant-appellant's motion to suppress.

Dated at Madison, Wisconsin, September 6, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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Dated: September 6, 2017.

Signed,

BY:

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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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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.

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Dated: September 6, 2017.

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I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

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TABLE OF CONTENTS