STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 17AP1024

DANE COUNTY,

Plaintiff-Respondent,

vs.

BRENNA N WEBER,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 7, THE HONORABLE William Hanrahan, PRESIDING

William L. Brown
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1085130

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The issues presented in this case are not novel, yet, present the application of well-established law to a set of facts. Publication is not requested by the County. Dane County does not request oral argument. Briefing in this case appears to be sufficient for the Court to decide the limited issues presented.

STATEMENT OF THE ISSUE

Did the officer have sufficient legal basis to require the defendant to perform field sobriety tests given the fact she was speeding, smelled like alcohol, was coming from a bar, and driving during "bar time."

TRIAL COURT ANSWERED: Yes.

STATEMENT OF THE CASE

As the Plaintiff-Respondent, the County exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] The County will supplement the statement of the facts and case as appropriate in its argument.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2015-16 edition.

ARGUMENT

Weber argues the police officer did not have reasonable suspicion to extend his valid traffic stop (a fact not challenged in this appeal) into an OWI investigation. Weber's analysis of this record is simply wrong. The case law clearly supports that the officer acted well within the bounds of the Constitution and applicable case law when he extended his traffic stop into an investigation that Weber was operating under the influence of alcohol.

A. Standard of Review

The Defendant's recitation of the applicable standard of review is accurate. The trial court's determinations are subject to a *de novo* review in this matter. *State v. Sisk,* 2001 WI App 182, p.7, 247 Wis. 2d 443, 634 N.W.2d 877.

B. The Circuit Court properly denied Weber's Motion to Suppress

1. The touchstone of a Fourth Amendment claim is reasonableness.

The Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution, protect "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. I, § 11. This Court has generally conformed its "interpretation of Article I, Section 11 and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment." *See State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis. 2d 729, 623 N.W.2d 516.

"The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted). While a warrantless search is presumptively unreasonable, a court will uphold the search if it falls within an exception to the warrant requirement. *Id*. ¶ 30.

2. Investigatory stops based on reasonable suspicion.

An officer may lawfully stop an individual if, based upon the officer's experience, he or she reasonably suspects that criminal activity may be afoot. *Terry v. Ohio*, 392

U.S. 1, 30 (1968); *see also* Wis. Stat. § 968.24. An officer must base his or her reasonable suspicion upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21–22. An officer need not rule out the possibility of innocent behavior before initiating an investigatory stop. *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729.

The ultimate constitutional standard for an investigative stop is reasonableness under the totality of the circumstances known to the officer. *State v. Williams*, 2001 WI 21, ¶ 23, 241 Wis. 2d 631, 623 N.W.2d 106. Thus, to determine whether reasonable suspicion supports a stop, this Court examines the totality of the circumstances surrounding the stop. *Id.* ¶ 22. A reviewing court must "examine the facts leading up to the stop to determine whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion." *Young*, 294 Wis. 2d. 98, ¶ 58.

3. Prolonging an investigatory stop.

An officer may not unreasonably prolong a seizure, including an investigatory stop, any longer than necessary

to satisfy the original concern that prompted the stop. *See State v. Arias*, 2008 WI 84, ¶ 38, 311 Wis. 2d 358, 752 N.W.2d 748. But an officer may expand the scope of an investigatory stop and extend the time longer than otherwise needed to complete the original stop if additional suspicious information comes to the officer's attention. *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124. The additional information must give "rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place . . . ." *State v. Betow*, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999).

4. Extension of traffic stops for field sobriety tests.

An officer may extend an investigatory stop for the purpose of conducting field sobriety tests based on reasonable suspicion that the driver was operating under the influence. *State v. Colstad*, 2003 WI App 25, ¶ 21, 260 Wis. 2d 406, 659 N.W.2d 394. The legality of the extension of the traffic stop "turns on the presence of factors which, in the aggregate, amount to reasonable suspicion that [the driver] committed a crime the investigation of

which would be furthered by the [driver]'s performance of field sobriety tests." *Hogan*, 364 Wis. 2d 167, ¶ 37.

What constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable officer reasonably suspect in light of his or her training and experience. *Id.,* ¶8. Courts look to the totality of the circumstances when determining whether reasonable suspicion existed. *State v. Waldner,* 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Reasonable suspicion is evaluated under an objective test. *Id.* at 55–56. Although an inchoate, unparticularized suspicion or hunch will not suffice, *id.* at 56, when an officer observes lawful but suspicious conduct he or she has the right to temporarily detain the individual for the purpose of inquiry if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn. *Id.* at 60.

When reviewing a circuit court's decision on a motion to suppress, an appellate court accepts the circuit court's findings of fact unless they are clearly erroneous. *State v. Drew,* 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. The application of constitutional principles to those

facts presents a question of law that is reviewed de novo. *Id*.

5. The law applied to the present case

In the present case, the officer was not acting on a mere hunch or unparticularized facts. He was acting on five clearly articulated facts.

1. Weber was speeding (R:21:5)
2. Weber smelled of alcohol (R:21:7)
3. Weber admitted she had consumed alcohol (R:21:8)
4. Weber was coming from a bar (R:21:8)
5. Weber was stopped at “bar time” (R:21:7)

All of these points, absent the fifth point, were discovered by the officer following the traffic stop. These points raised a suspicion and that officer chose to investigate. (R:21:8). The law supports this decision. *State v. Colstad,* 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

CONCLUSION

It is difficult to imagine a more clear case of "reasonable suspicion" being raised during a traffic stop. The defendant was speeding. The defendant smelled of alcohol. The defendant admitted to drinking. The defendant admitted that she was coming from a bar. The defendant was pulled over at bar time. The defense points to no case to support their position. That failure is without doubt not because of lack of diligence by counsel. That failure is because there is no case. There is no law to support the defense position that officers must believe everything a defendant says and, essentially, require a full confession of criminal behavior to meet the defense's skewed interpretation of the reasonable suspicion standard.

Dane County urges the Court to affirm the Circuit Court's decision.

William L. Brown
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1085130

CERTIFICATION

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

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 7 pages.

Dated: November 16, 2017.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of November, 2017.

_____

William L. Brown
Assistant District Attorney
Dane County, Wisconsin