STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001024

DANE COUNTY,

Plaintiff-Respondent,

vs.

BRENNA N. WEBER,

Defendant-Appellant.

REPLY BRIEF 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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ARGUMENT

I. THE OFFICER DID NOT HAVE SUFFICIENT FACTS TO EXPAND THE STOP INTO AN OWI INVESTIGATION

The State agrees with the facts as stated and with the law as laid out in the Appellant's initial brief. The only disagreement between the parties is whether application of the facts to the law in this matter leads to the conclusion that the officer had sufficient facts to have Ms. Weber exit her vehicle and perform field sobriety tests. This is so even though the facts themselves are extremely limited in scope.

Here, Ms. Weber was operating her vehicle at about bar time, and she was stopped for speeding. R.23:5. She pulled over properly and the officer made contact with her. R.23:14-15. Upon being asked about an odor of intoxicants and where she was coming from, Ms. Weber responded that she had been working at O'Grady's Irish Pub and that she had consumed one beer after work there. R.23:8; 23:20. The officer then asked Ms. Weber to exit her vehicle and perform field sobriety tests. R.23:8-9.

The remaining facts are not in question here, nor is there is a dispute on the applicable law. The trial court found the officer had sufficient legal justification to have Ms. Weber exit her vehicle. The

parties agree that the standard of review is *de novo*. Appellant Br. 10, Respondent Br. 1. The parties agree that Fourth Amendment jurisprudence, including ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 449 (Ct. App. 1999), ***State v. Colstad,*** 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394, and ***Terry v. Ohio,*** 392 U.S. 1 (1968) are the cases governing this issue. The State argues that the touchstone of these cases, as often stated in Fourth Amendment analysis, is reasonableness. Respondent's Br. 1-2. The Appellant agrees – the question is indeed whether the facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion. ***State v. Young***, 2006 WI 98, ¶ 58, 294 Wis. 2d 1, 717 N.W. 2d 729.

However, as much as the Respondent attempts to stretch the facts as observed by the officer, it all really boils down to one thing – the officer observed indicia that Ms. Weber had consumed alcohol. That indicia consisted solely of the odor of alcohol. Although the Respondent attempts to stretch this into meaning more, there really is no indicia that Ms. Weber was impaired in any manner. The officer did not observe red, bloodshot, glossy, or watery eyes. The officer did not observe slurred speech. The officer did not observe any difficulty in driving or correctly pulling over her vehicle. The officer

did not observe confusion, delayed responses, difficulty providing information, or any other indications of impairment during his contact with Ms. Weber.

On page 6 of its brief, Respondent lists five points – speeding, the smell of alcohol, consumption of alcohol, coming from a bar, and it was "bar time." None of these is an indicator of impairment by alcohol. In fact, Ms. Weber appropriately responded to questions and indicated that she *works* at the bar and she consumed one beer. R. 23:8, 23:20. The officer reported nothing that would belie those statements. The State's attempt to spin the facts into more is akin to a defendant arguing that she exhibited no slurred speech, no mixing up of words, no mumbling, and no otherwise inarticulate speech as four separate indicators of sobriety – even though all are merely indicia that her speech was normal.

Ultimately, the trial court found that the facts as stated were sufficient for the officer to investigate an OWI violation. The standard both for the trial court and on review is clear and not in dispute – Whether the officer discovered information after the original stop which provided reasonable suspicion that the subject was driving while under the influence of an intoxicant. ***State v. Colstad***, 2003 Wis. App 25, ¶ 19, 260 Wis. 2d 406, 659 N.W.2d 394.

The Court must look to 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. The request for a driver to perform field sobriety tests must be separately justified, as it is a greater invasion of liberty than the original detention. ***Colstad***, 2003 WI App ¶ 19. There must be sufficient articulable facts which rise to the level to believe that Ms. Weber was possibly impaired by alcohol before that investigation can begin. ***Id***. Under the totality of the facts in this case, there is no articulable reasonable suspicion that Ms. Weber was impaired.

Driving at around bar time is not illegal. It can be considered as part of the totality of the circumstances. Here, another part of the totality of the circumstances the officer must take into consideration is Ms. Weber's statement that she had been working at a bar, providing a good reason for her to be operating a vehicle shortly after bar time. There was no indication the officer did not believe Ms. Weber's explanation of driving around bar time. Ms. Weber was also speeding. As the officer testified, speeding itself is not an indicator of impairment by alcohol. R.23:15. In addition, the officer noted an odor of alcohol. Ms. Weber indicated she had a beer. Yet one beer would not cause impairment. It is not illegal to consume

alcohol and then drive – what is illegal is to be impaired by alcohol when driving. R:23:33. The totality of the circumstances, in this case, does not raise the inference that Ms. Weber was impaired.

CONCLUSION

For the reasons stated in this and defendant's original 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, _____, 2017.

Respectfully submitted,

BRENNA N. WEBER,
Defendant-Appellant

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1315 words.

I further certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

Dated: December 18, 2017.

Signed,

_____

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