STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appellate Case No. 2017-AP1048

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

-vs-

NICHOLAS O. MORAN,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, BRANCH XLV, THE HONORABLE MICHELLE A. HAVAS PRESIDING, TRIAL COURT CASE NOS. 15-TR-7965, 15-TR-7966 & 15-TR-7967

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

DESPITE ITS PROTESTATIONS TO THE CONTRARY, THE COUNTY FAILS TO ESTABLISH THAT THE FACTS IN THIS CASE RISE TO THE LEVEL OF ESTABLISHING A REASONABLE SUSPICION TO DETAIN MR. MORAN.

The County contends that the facts in this case cumulatively add up to establishing that a reasonable suspicion to detain Mr. Moran existed in this matter. Yet, when reviewing these same facts, the County completely overlooks and does not address several points raised by Mr. Moran in his initial brief. Perhaps the following points were not addressed by the County because it recognized that a concession had to be made for their veracity and incontestability.

First, the County offers no explanation regarding how seemingly miraculous it is that after the passage of a considerable amount of time between Mr. Moran's arrest and the time Deputy Kellner testified at the motion hearing, Deputy Kellner was suddenly and conveniently able to rehabilitate his memory to the point where he recalled several facts *which do not appear in his narrative report* but which nevertheless support his position that Mr. Moran exhibited indicia of being under the influence of an intoxicant. The entire explanation of how Mr. Moran's "looking away" was so suspicious it formed the principal basis for the officer believing he had a reason to further detain Mr. Moran is *utterly absent* from Kellner's report.[1] (R28 at 13:25 to 14:8.) The absence of so important a fact from the officer's narrative is the equivalent of an officer in a burglary case failing to note that when he stopped a suspect in the neighborhood where the robbery occurred he had burglarious tools on his person.

[1] So as to avoid repetitive argument, Mr. Moran would simply remind the Court of his citation to the decision in *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), in his initial brief. The *Betow* court found that "nervous" behavior in the presence of law enforcement officers was insufficient to enlarge the scope of Betow's detention under the Fourth Amendment.

The astonishing appearance of this fact at the hearing, however, was not the only instance of suspiciously opportune testimony on the part of Kellner. Kellner just as suddenly recalled that Mr. Moran's answers to some of the questions put to him were "vague." As with the foregoing convenient apparition of "fact" suddenly materializing out of the ether, the County fails to acknowledge or explain this "fact's" concomitant manifestation.

Another point regarding the problematic veracity of the foregoing is a fact also avoided by the County in its brief despite its being proffered in Mr. Moran's. The County did not—perhaps because it could not—formulate a reasonable explanation for Deputy Kellner's admission on cross examination at the hearing below why none of the observations which were so intrinsic to Kellner's suspicion that Mr. Moran may be under the influence were never relayed to his partner on the scene. The only reason Deputy Kellner offered his partner for detaining Mr. Moran was that he was "going to check him out [is] because of the other driver's concerns." (R28 at 14:16-23.) Nothing in this comment is revelatory regarding the aforesaid observations which, had they actually occurred, certainly would have been worth mention to his partner.

In an effort to make a comparative point which seemingly supports its argument that a reasonable suspicion to detain Mr. Moran existed in this case, the County relies upon *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551. The County posits that if the Wisconsin Supreme Court found that probable cause to arrest existed under the facts of *Lange*, which it argued were minimal, then surely it must follow that the lesser standard of reasonable suspicion is met here. County's Brief at 7. One very important fact which the County neglected to mention regarding Lange's arrest, and which makes *Lange* distinguishable from the present case, is that Lange was not only involved in a motor vehicle accident, but Lange's driving was characterized as "extremely wild and dangerous . . . prior to his crash; . . . ." *Id.* ¶ 39. This latter description was left out of the County's comparison with the facts of the instant case.

The County makes another comparison to the facts of *Lange* which it believes bolster its argument. The County compares Deputy Kellner's experience in this case to that of an officer in *Lange*, namely a Maple Bluff Police Officer identified as Officer Penly, who participated in *over* 100 operating while intoxicated [hereinafter "OWI"] investigations in eight years. *Id*. ¶ 31; County's Brief at 7. Such a comparison is not, however, favorable for the County. Officer Penly averaged investigating approximately thirteen (13) OWI cases a year, or a little more than one per month. Deputy Kellner, however, participated in thirty-five to forty OWI investigations in fifteen years. Comparatively, this means Deputy Kellner averaged two-and-one-third drunk driving investigations *per year*, or approximately *one every four months*. This comparison falls flat on its face for the County.

The County also alludes to Mr. Moran's admitted consumption of alcoholic beverages at the Brewer game as further establishing that Deputy Kellner had a reasonable suspicion to detain Mr. Moran for the purpose of investigating whether he was operating while under the influence of an intoxicant. Mr. Moran cannot plausibly argue that an admission to the consumption of alcoholic beverages is not relevant when determining whether a detention under the Fourth Amendment is reasonable, and he does not do so here. Nevertheless, since it is *not* illegal to consume intoxicants and drive a motor vehicle—it is only illegal to consume intoxicants and operate a vehicle if that consumption impairs one's ability to safely operate—Mr. Moran's admission must be taken *in context* which was not done here. The admission ostensibly made by Mr. Moran was to consuming four beers over five hours, or *less than* one beer per hour.

Finally, the County, just as it had in the lower court, makes much of a wholly innocuous fact: Mr. Moran's gum chewing. If the County's position was a Shakespearean play it would be "Much Ado About Nothing." It is patently unfair to indict all late-night gum chewers as drunk drivers attempting to disguise their tell-tale breath which is precisely what would happen if this Court gives quarter to the County's argument. The common sense rebuttal to the County's position regarding Mr. Moran's gum chewing is best

summarized as: "So what?" People have the freedom to chew gum whenever and wherever they so choose, regardless of the hour of the day or the activity in which they are engaged (with the possible exception of a visit to the dentist or major surgery involving a general anesthetic). This observation adds nothing to the reasonable suspicion calculus.

Ultimately, Mr. Moran's point is best made by referring to the authority he cited in his initial brief. If the officers in *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), lacked a reasonable suspicion to detain a nervous individual who had a psilocybin-containing mushroom sewn onto wallet, there likewise cannot be a reasonable suspicion to detain Mr. Moran here. This is made all the more true under the *totality* of the circumstances test which the County and Mr. Moran agree is the appropriate test to employ in his case. The problem with the County's position, however, is that instead of examining the *totality* of the circumstances in the case at bar, it "cherry-picks" its facts.

The County neglects to admit that the *totality* of Mr. Moran's circumstances includes a record devoid of any mention that Mr. Moran's speech was slurred, (R28 at 18:6-8); of any observation by the deputy of bloodshot and/or glassy eyes, (R28 at 18:14-17); of any notation that Mr. Moran had difficulty producing his driver's license when instructed to do so, or that he fumbled with his wallet, (R28 at 17:20 to 18:1); of any discernment that Mr. Moran had difficulty with his mentation, (R21:10-12); and of any observation that Mr. Moran had difficulty maintaining his balance (recall Deputy Kellner's admission that "I wouldn't say he had problems with his coordination"), (R28 at 19:9-12).[2]

[2] Again, in an effort to avoid repeating arguments made in his initial brief, Mr. Moran would simply remind the Court that regarding the minor "fender bender" in this case, Deputy Kellner admitted: (1) a person who is involved in a motor vehicle accident is not always impaired, (R28 at 10:13-15); and (2) at the time of Mr. Moran's detention, traffic was "very heavy" and minor accidents such as that which occurred in this case "are pretty common under those types of traffic conditions," (R28 at 22:3-9).

In summary, the County's position that the totality of the circumstances balances in favor of the conclusion that Mr. Moran's detention was reasonable under the Fourth Amendment must fail. There was no cause on the part of Deputy Kellner to detain someone for the purpose of investigating an OWI offense simply because he was involved in a minor fender bender and happened to be chewing gum after leaving a Brewer game, especially when all other indicia of impairment are either (1) absent, or (2) are the product of a conveniently fabricated recollection of "facts" which were so endemic and important to the deputy's determination to detain that he elected *not* to include them in his report of the incident or mention them to his back-up officer.

CONCLUSION

The County has not provided this Court with any further enlightenment or revelation on the issue of why the arresting officer's memory in the instant matter was suddenly "enhanced" when he was made aware of the defendant's challenge to the lawfulness of Mr. Moran arrest. Nor has the County provided, *inter alia*, any further explanation as to how certain facts in this case, such as the chewing of gum or the subjective assessment of an explanation being "weird," meet the *objective* reasonableness standard imposed by the Fourth Amendment upon law enforcement actions. Because of these failures, Mr. Moran respectfully requests that this Court reverse the decision of the court below and remand the case with further directions not inconsistent therewith.

Dated this _____ day of October, 2017.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(c)2. in that it is proportional serif font; the text is 13 point type; and the length of the brief is 1,694 words.

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on October 16, 2017. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this _____ day of October, 2017.

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_____

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