

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
CASE NO. 2017AP1417

RECEIVED

12-08-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

FOND DU LAC COUNTY,

Plaintiff-Appellant,

vs.

ISAAC ANTHONY DAHLKE,

Defendant-Respondent.

APPEAL OF AN ORDER GRANTING A MOTION TO SUPPRESS AND
DISMISS THE CASE ENTERED IN FOND DU LAC COUNTY
CIRCUIT COURT THE HONORABLE ROBERT J. WIRTZ, PRESIDING

RESPONDENT'S BRIEF

ANTHONY L. O'MALLEY
ZACHERL, O'MALLEY & ENDEJAN, S.C.
State Bar No. 1011187
115 S. Main Street
Fond du Lac, WI 54935
(920) 922-7220
Attorney for Defendant-Respondent

TABLE OF CONTENTS

STATEMENT OF THE ISSUES.....	1
1. Did the County waive the issue of whether the park closure ordinance can support the probable cause analysis for the stop?	
2. Is turning around in a highway wayside at 12:30 a.m. sufficient probable cause for an investigatory stop?	
STATEMENT ON ORAL ARGUMENT	1
RESPONDENT'S STATEMENT OF THE CASE	1-3
ARGUMENT	3-8
CONCLUSION.....	8
APPENDIX	

TABLE OF AUTHORITIES

CASES CITED

<i>Named Individual Members of San Antonio Conservation Soc'y v. Tex. Highway Dep't</i> , 446 F.2d 1013, 1027-28 (5th Cir. 1971)	5
<i>Nickel v. United States (In re Rehab. of Segregated Account of Ambac Assurance Corp.)</i> , 2012 WI 22, 339 Wis. 2d 48, 59, 810 N.W.2d 450, 455	4
<i>State v. Anderson</i> , 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990)	4
<i>State v. Bell</i> , 2008 WI App 135, 313 Wis. 2d 832, 756 N.W.2d 810	3
<i>State v. Claude (In re Refusal of Claude)</i> , 2004 WI App 21, ¶11, 269 Wis. 2d 543, 674 N.W.2d 681	5
<i>State v. Johnson</i> , 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182	3, 4
<i>State v. Knapp</i> , 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899	3
<i>State v. Lind</i> , 2014 WI App 110, 357 Wis. 2d 723, 855 N.W.2d 905 (See Appendix, Exhibit 2)	7, 8
<i>State v. Miller</i> , 2012 WI 61, ¶35, 341 Wis. 2d 307, 815 N.W.2d 349	4
<i>State v. Patton</i> , 2006 WI App 235, ¶9, 297 Wis. 2d 415, 724 N.W.2d 347	3
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, ¶10, 733 N.W.2d 634	4

<i>State v. Williams</i> , 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106.....	3
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	3, 4
<i>Welsh v. Wisconsin</i> , 466 U.S. 740, 752 (1984).....	3

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

§84.04(c) Wis. Stats.	6
§84.04(e) Wis. Stats.	6
23 C.F.R. §752.5(d)	6

STATEMENT OF THE ISSUES

1. **Did the County waive the issue of whether the park closure ordinance can support the probable cause analysis for the stop?**

The trial court accepted the waiver at oral argument.

2. **Is turning around in a highway wayside at 12:30 a.m. sufficient probable cause for an investigatory stop?**

The trial court correctly held: No.

STATEMENT ON ORAL ARGUMENT

Dahlke is not requesting oral argument as the issues can be well presented in the parties' briefs.

RESPONDENT'S STATEMENT OF THE CASE

At approximately 12:30 a.m. on November 13, 2016, Isaac Dahlke was traveling southbound in his car on U.S. Highway 45 in Fond du Lac County. (R. 22:25, 8-10). At the same time, Fond du Lac County Deputy Sheriff Lucas Olson was on patrol in his squad car also southbound on Highway 45. (R. 22:4, 14-24). Deputy Olson was far enough behind Dahlke's car that Deputy Olson could only make out Dahlke's taillights. (R. 22:4, 25; R. 22:5, 1-12). The deputy did not observe any unlawful driving behavior. (R. 22:11, 20-22). Deputy Olson then observed Dahlke's car turn left into an area clearly marked on the highway as a wayside. (R. 22:4, 20-24; R. 22:18, 2-6; R. 7:3).

The highway wayside had two entrances that also serve as exits, a vehicle parking area and a boat launch. (R. 7, 1). Immediately adjacent to the wayside is a park area that stretches east to Lake Winnebago. (R.

7, 1). Situated at the entrance of the park¹ and east of the wayside is an unilluminated sign that posted the hours for which the park is open and some park rules. (R. 22:6, 4-6; R. 7, 1; R. 7, 4). The park sign is difficult to see at night. (R. 22:15, 19-25; 22:16, 1-3). Dahlke saw the sign for the wayside, but did not see the unilluminated park sign. (R. 22:5-11; R. 22: 27, 24-25; R. 22:28, 1-4).

At the moment that Dahlke's car turned into the wayside, Dahlke's car was far enough away that Deputy Olson could not determine whether Dahlke's car had turned into the north or south entrance to the wayside. (R. 22:14, 15-18). Deputy Olson drove to the north most entrance of the wayside and turned into the wayside where he then observed Dahlke's car make a U-turn at the southern end of the wayside near the boat launch. (R. 22:12, 10-18). Dahlke's car continued in the direction of the north most entrance toward Deputy Olson's squad car. (R. 22: 26, 17-25). As Dahlke's car approached Deputy Olson's squad car, Deputy Olson activated his emergency lights, drove past Dahlke's car and turned behind Dahlke's car. (R. 22:26, 17-25). Dahlke's car had stopped immediately upon Deputy Olson's activation of his emergency lights. (R. 22:27, 1-4).

Deputy Olson testified at the motion hearing that he had not observed the Dahlke car stop or violate any park rules in the wayside or the park. (R. 22:18, 15-25; R. 22:19, 1-24; R. 22:20, 1-3). Deputy Olson did not testify that anybody in Dahlke's car had exited the car or had actually entered the park area beyond the park sign. (R. 22:1-24).

At the hearing Deputy Olson seemed to justify his stop of the Dahlke car on two different grounds. First, Deputy Olson testified that the mere turning into the wayside was suspicious. (R. 22:5, 16-18). In his experience the park has been used in the past for "illegal drugs, drinking and suspicious activities" and that, in conjunction with the early hour of the day, made the use of the highway wayside by an automobile suspicious. (R. 22:5, 16-23). Second, although Deputy Olson was unable to identify the boundaries between the wayside and the park, he felt that using the highway wayside violated a park closure ordinance that prohibited the use of the park between the hours of 10 p.m. and 6 a.m. (R. 22:20, 14-21). However, at the hearing the County

¹ The County's statement of facts suggest that the park sign was at the entrance to the wayside. See, Appellant's Brief, p. 3, ll. 11-13. The park sign was east of the wayside parking lot. (R. 22:41, 15-25; R. 22:42, 1-5).

waived the park closure violation argument, relying instead upon the suspicion aroused in the deputy for the stop. (R. 22:35, 15-18).

ARGUMENT

I. STANDARD OF REVIEW

“Whether evidence should be suppressed is a question of constitutional fact.” *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899 (citation omitted). “A finding of constitutional fact consists of the circuit court’s findings of historical fact, and its application of these historical facts to constitutional principles. Review of the former is conducted *under the clearly erroneous standard*, and the latter independently.” *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted; emphasis added).

The question is whether the officer had reasonable suspicion to stop Dahlke. This “reasonable suspicion” standard, established in *Terry v. Ohio*, 392 U.S. 1 (1968), provides that “[a] law enforcement officer may lawfully stop an individual if, based upon the officer’s experience, she or he reasonably suspects ‘that criminal activity may be afoot.’” *State v. Williams*, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting *Terry*, 392 U.S. at 30). “A Terry stop is not an arrest, and the standard for the stop is less than probable cause.” *State v. Patton*, 2006 WI App 235, ¶9, 297 Wis. 2d 415, 724 N.W.2d 347. “Instead, the standard is reasonable suspicion, which is ‘a particularized and objective basis for suspecting the person stopped of criminal activity.’” *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (citation omitted)).

On appeal, this court reviews de novo a trial court’s determination of whether there was the requisite reasonable suspicion to justify a seizure. *Williams*, 2001 WI 21, 241 Wis. 2d 631, ¶18, 623 N.W.2d 106 (“[T]he determination of reasonable suspicion for an investigatory stop and subsequent protective search is a question of constitutional fact.”). *State v. Bell*, 2008 WI App 135, 313 Wis. 2d 832, 756 N.W.2d 810. The gravity of the offense is a consideration for the court’s constitutional analysis. *Welsh v. Wisconsin*, 466 U.S. 740, 752 (1984). “... [I]t is sufficient to note that many other lower courts have also considered the gravity of the offense an important part of their constitutional analysis.” *Welsh*, 466 U.S. at 752.

The court should examine the totality of the circumstances to determine whether the facts amount to reasonable suspicion. The totality of the circumstances test asks whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that an individual is committing, is about to commit or has committed a crime. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). The test is "naturally *highly fact specific* and [each case] must 'be decided on its own facts.'" (Emphasis added). *State v. Miller*, 2012 WI 61, ¶35, 341 Wis. 2d 307, 815 N.W.2d 349 (quoting *Terry*, 392 U.S. 1(1968)). An officer must be able to identify specific and articulable facts that warrant the intrusion of a stop; inchoate and unparticularized suspicion or hunches will not suffice. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, ¶10, 733 N.W.2d 634.

Dahlke asserts that the trial court's analysis is substantially fact based with respect to the boundaries of the wayside versus the park, the adequacy of the signage, whether park rules applied to the wayside and whether Dahlke's behavior in driving into a highway wayside without more rises above a *Terry* "hunch" and, therefore, the trial court's holding is subject to the clearly erroneous standard of review on these details. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, ¶10, 733 N.W.2d 634; *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182

II. WAIVER OF PARK ORDINANCE ARGUMENT

The supreme court has visited this issue before in *Nickel v. United States (In re Rehab. of Segregated Account of Ambac Assurance Corp.)*, 2012 WI 22, 339 Wis. 2d 48, 59, 810 N.W.2d 450, 455.

Courts have often used the words "waiver" and "forfeiture" interchangeably. However, there are cases which make a distinction between the act of failing (whether by accident or by strategic intention) to assert a right, which is characterized in those cases as "forfeiture," and the act of affirmatively and deliberately relinquishing a right, which in those cases is denominated as "waiver." See *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), *State v. Ndina*, 2009 WI 21, ¶28, 315 Wis. 2d 653, 761 N.W.2d 612.

Nickel, 2012 WI 22, ¶8 n.10, 339 Wis. 2d 48, 59, 810 N.W.2d 450, 455. At the hearing during an argument colloquy between counsel for the County and the trial court, the County waived its position that the alleged park closing hour ordinance formed a basis for the stop. After a

lengthy discussion about the difference between the wayside and the park and how a highway traveler could tell one from the other (R. 22:34, 1-25; R. 22:35, 1-18), the following colloquy occurred:

THE COURT: All right. So, it's the suspicious activity, not - - not the closed park.

MR. BORSHEIM: That's my argument.

THE COURT: All right.

(R. 22:35, 15-17). The County relinquished the park closing argument in the trial court and in so doing deprived the trial court of the opportunity to carefully consider the issue and deprived this court of the thoughtful analysis of the trial court. *State v. Claude (In re Refusal of Claude)*, 2004 WI App 21, ¶11, 269 Wis. 2d 543, 674 N.W.2d 681. The argument should not now be revived in this appeal. *Id.*

III. LAWFUL WAYSIDE TURNAROUND OR EXCURSION INTO A CLOSED PARK

At a little after midnight, as Dahlke traveled down U.S. Highway 45 looking for a place to turn around, he observed a sign directing that a highway wayside was just ahead. As Dahlke continued, another wayside sign directed Dahlke into a paved area with parking stalls and a boat ramp where Dahlke turned around and where he began to drive back to exit onto Highway 45. There was no other actions by Dahlke that were either unlawful or suspicious, other than the presence of an adjacent park that was closed at the time. Dahlke never entered the park area or stopped as though he might. The only notice to an unwary traveler was an unilluminated and difficult to see park sign that was placed, not at the entrance to the wayside, but on the boundary of the park area east of the wayside.

U.S. Highway 45 in Fond du Lac County is a part of the Wisconsin State Trunk Highway System. See, Respondent's Appendix, Exhibit 1. As such it is funded by federal highway aids. See, State Trunk Highway Program, Informational Paper 39, Wisconsin Legislative Fiscal Bureau, January, 2017, pp. 19-21. As a consequence of the state accepting that federal highway funding Wisconsin's State Trunk Highway System is subject to federal transportation regulatory control. See, *Named Individual Members of San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 446 F.2d 1013, 1027-28 (5th Cir.

1971)(acceptance of federal highway funds by state subjects state highway to federal regulatory control).

§84.04(e) Wis. Stats. defines a wayside:

“Wayside” means an area of land adjacent or in close proximity to the highway, with facilities developed for the convenience, comfort, and enjoyment of the motoring public, these developments to include parking, sanitary, cooking, and picnicking facilities, together with any other facility or improvement which the department deems desirable or necessary to accommodate travelers and provide convenient and safe access thereto by pedestrians and vehicles. “Wayside” includes rest areas. (Emphasis added).

Furthermore, federal highway regulations prohibit adjacent park areas from interfering with waysides on federal highways like U.S. Highway 45. 23 C.F.R. §752.5(d) provides:

Access from the safety rest areas to adjacent publicly owned conservation and recreation areas may be permitted if access to these areas is only available through the rest area and if these areas or their usage does not adversely affect the facilities of the safety rest area. (Emphasis added).

Consequently, the wayside used by Dahlke for his convenient and safe turn-around was indeed a wayside and not a park and Dahlke used it for the exact purpose to be expected at a wayside. 84.04(c) Wis. Stats.

The trial court explicitly found this to be true and also correctly determined that there was an insufficient showing by the County that the wayside was part of the park. (R. 22:34, 17-232; R. 22:41, 15-25; R. 22:42, 1-5). Accordingly, the trial court’s implicit finding that the park closing rules did not apply should be upheld.

Assuming, only for arguments sake, that the wayside is part of the park, Even so, Dahlke did not do any of the things listed on the park sign that could be considered unlawful use of the park after hours. There was no “destruction of property, stopping, parking, loitering, littering, disturbance or camping in park area”. (R. 7:4). Dahlke could

² The County acknowledged that the lack of notice to highway travelers by non-existent or obscured signs at the wayside raised “fundamental due process” concerns. (R. 34, 25; R. 35, 1-5).

not be said to have done anything wrong by following the wayside sign into the wayside to turn around.

IV. No Reasonable nor Articulate Suspicious Activity

The trial court correctly determined that the deputy's stop of Dahlke's car did not meet the level required for an investigatory stop. Deputy Olson first testified that the mere turning into the wayside was suspicious to him. (R. 22:5, 16-18). The late hour was the main concern of the deputy. *Id.* The deputy had observed no traffic violations. By the time the deputy arrived at the wayside, the Dahlke car had already made a u-turn and had begun traveling toward the exit in the direction of the deputy's squad car. Dahlke did not exhibit any furtive behaviors. To the contrary, he traveled in the direction of the deputy's squad car dispelling any suggestion of flight. Dahlke's driving did not indicate any intention of using the park area to the east of the wayside. Dahlke car did not stop or park. While Deputy Olson testified that he knew illegal drugs, drinking and other "suspicious" activities occurred in the park after hours, the deputy had no other articulable facts that would indicate that the inhabitants of Dahlke's car would be involved in such activities.

In a recent unpublished case heard by District III, a similar situation arose and that court held that the stop was improper. In *State v. Lind*, 2014 WI App 110, 357 Wis. 2d 723, 855 N.W.2d 905, an officer observed an unfamiliar automobile pull into the driveway of another police officer's home that he knew lived there. It was in the early morning hours and he had never seen a vehicle pull in to the driveway before. The vehicle did not immediately pull out but stayed in the driveway for "a minute or two" when the officer made his stop. In *Lind*, The trial court had based its denial of the motion to suppress on a message the patrol officer received from the homeowner that no one was at home and to "check on it". However, the Court of Appeals for District III overturned the decision because the patrol officer had made the decision to make the stop before getting the homeowner response. That court held that an unfamiliar car pulling into and acquaintances driveway at an early hour did not reach the level of reasonable and articulable suspicion necessary to disregard the 4th Amendment protections *Lind* enjoyed. *Lind*, 2014 WI App 110, ¶13-14 ("...the public must have a robust right against unreasonable intrusion."). This case is similar. As the deputy testified, he had all the suspicion he needed merely because the Dahlke car had pulled into the wayside a

short time after midnight. Unlike Lind, the trial court here agreed that the deputy had failed to show the probable cause necessary for the stop. This court should uphold the trial court's order.

CONCLUSION

The trial court found that simply traveling into the wayside was not subject to the park rules and implicitly found as a matter of fact that the park was distinct from the wayside. The evidence supported this finding since the park sign was located at the entrance to the park area and not at the entrance to the marked and signed wayside. This finding is not clearly erroneous and should be upheld.

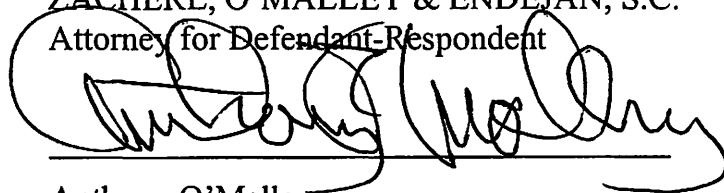
The County agreed and waived its claim that the stop was justified by the County park closure ordinance.

Finally, the trial court correctly found that simply pulling into a wayside to turn around was not enough to justify the stop. The trial court was, therefore, correct in suppressing the results of the stop. The trial court's order suppressing the stop and its fruits and dismissing the case is supported by both the facts and the law.

Dated the 30th of November, 2017.

ZACHERL, O'MALLEY & ENDEJAN, S.C.

Attorney for Defendant-Respondent

A handwritten signature in black ink, appearing to read 'Anthony O'Malley', is written over a horizontal line.

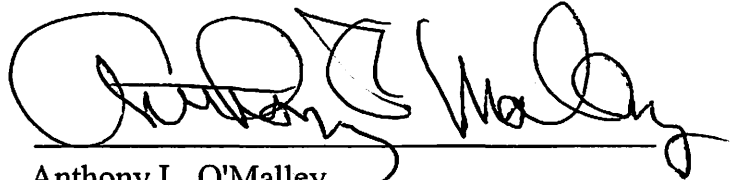
Anthony O'Malley
State Bar #1011187

115 S. Main Street
Fond du Lac, WI 54935
(920) 922-7220

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this Brief meets the form and length requirements of Rule 809.19 (8)(b) and (c) produced with a proportional font. The length of this Brief is 2877 words excluding appendixes.

By:

A handwritten signature in black ink, appearing to read "Anthony L. O'Malley", written over a horizontal line.

Anthony L. O'Malley
State Bar No. 1011187

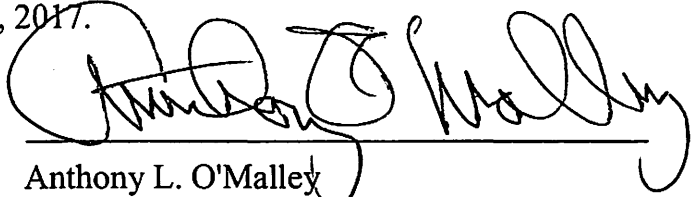
ZACHERL, O'MALLEY & ENDEJAN, S.C.
115 South Main Street
Fond du Lac, WI 54935
(920) 922-7220

CERTIFICATION AS TO E-FILING

I hereby certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the brief pursuant to 809.19 (12)(f).

Dated this 29th day of November, 2017.

By:

A handwritten signature in black ink, appearing to read "Anthony L. O'Malley", is written over a horizontal line.

Anthony L. O'Malley
State Bar No. 01011187

ZACHERL, O'MALLEY & ENDEJAN, S.C.
115 South Main Street
Fond du Lac, WI 54935
(920) 922-7220