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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appellate Case No. 2017AP1417

FOND DU LAC COUNTY,
Plaintiff-Appellant,
vs.

ISAAC ANTHONY DAHLKE,
Defendant-Respondent.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT,
FOND DU LAC COUNTY

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ARGUMENT

I. Fond du Lac County did not waive its argument that the violation of the county's ordinance justified the traffic stop of Dahlke's vehicle.

The county did not waive its argument that the traffic stop was justified by the violation of the county's ordinance. The following is a colloquy between the trial court and the county's attorney from the motion hearing transcript: (23: 31 15- 21)

"THE COURT: So, you're not so bothered about the --
MR. BORSHEIM: Innocent nature of the behavior, because it is potentially suspicious.

THE COURT: Yeah, you're not bothered by the afterhours business, you're bothered by this is where kids go to do drugs –

MR. BORSHEIM: Both.

THE COURT: -- and somebody pulls in at 12:26 a.m. and--

MR. BORSHEIM: Right.

THE COURT: — what are they going to do?

MR. BORSHEIM: Well, I'm bothered, a little bit by both. I mean, inherent is the fact that the park is closed. In conjunction with that, it's a place where people go to be secluded and do whatever it is they do when you go to secluded places when you're his age or an age where that's necessary, as opposed to going home.”

The respondent’s argument that the county waived its argument supporting the traffic stop due to a violation of the county’s ordinance is supported by a quote from the transcript (23), that is taken out of context.

As the hearing progressed, the Court made its feelings clear that it did not believe that the violation of the county’s ordinance was a sufficient basis for the traffic stop.

What the county was left with, then, was the suspicious nature of the behavior of Dahlke as observed by Deputy Olson. That is the context within which the cited response was made. (23: 35: 15-18)

The trial court’s ruling further demonstrates that it did not sense a waiver of the county’s ordinance violation basis for the traffic stop during its ruling, (23: 41: 15-25—42: 1-5)

“THE COURT: Well, I just -- I can't get over, I can't get past the idea that somehow there's a — this sense that it's a park. I've already made my point about that. I don't even know how somebody would know it's a county park.

based on the signage coming into these signs, coming into the area. As best they know, it's a wayside. They wouldn't even know it's a park until they see a sign that's already to the east side of the — you know, to the east side of the parking lot. And -- and in the context of other county park cases that I've had, I think Hobbs Woods might be one or other ones, there are — there are other signs that indicate whether something's a county park. The interesting thing about this place is it's advertised as a wayside and then. when you get in, you find out that perhaps it's a county park with restricted hours, although even Mr. Dahlke says he didn't get it, didn't get the sign.”

In addition, on March 30, 2017, the county submitted a letter brief in support of its motion for reconsideration. R: 10

The following are excerpts from that document:

“The county submits this letter brief in support of its motion for reconsideration of the court's decision to suppress the traffic stop by Deputy Olson upon the Dahlke's vehicle for the lack of a reasonable suspicion to do so.

Applicable Fond du Lac County Ordinance provisions:

Sec. 42-31. – Application

This article shall apply to the grounds, buildings thereon, and waters therein for each park, trail, and outdoor recreation area or facility owned or managed by Fond du Lac County which is under the jurisdiction of the Fond du Lac County Parks and Development Committee or its successor committee.

The parks, trails and outdoor recreation areas or facilities governed by this Article include, but are not limited to, ...Highway 45 Wayside Park,

Sec. 42-32. - Definitions

... Park, trail or outdoor recreation area means any park, trail or outdoor recreation area owned or managed by Fond du Lac County which is under the jurisdiction of the committee or its successor committee, including the grounds, buildings thereon and waters therein.

Sec. 42-34. - Enforcement.

(a)

Any law enforcement officer may issue a citation or arrest any offender who is in violation of any provision of this article. ... This article provides special authority to any municipal, county or state officer to act as agent of the county in inspection or investigation of disturbances.

Sec. 42-35 - Hours of use.

The hours of use by the public for any park, trail or outdoor recreation area shall be from 6:00 a.m. to 10:00 p.m. It shall be unlawful for any person to be in any park, trail or outdoor recreation area except registered campers in designated campgrounds, outside the established hours.

Sec. 42-61. - Prohibited activities on county property governed by this article.

(14)

Consumption of alcohol beverages in a park between 11 p.m. and 6 a.m.

In addition, all State criminal and traffic laws apply.

Sec. 42-61 of the Fond du Lac County Ordinances provides that: "The hours of use by the public for any park, trail or outdoor recreation area shall be from 6:00 a.m. to 10:00 p.m. It shall be unlawful for any person to be in any park, trail or outdoor recreation area except registered campers in designated campgrounds, outside the established hours."

Based upon the definitions contained in the Fond du Lac County Ordinance provisions noted above, it remains the county's assertion that the entire area of the Highway 45 Wayside Park was and is governed by the same, including the entrance/exit areas.”

Fond du Lac County sought the court’s reconsideration of its decision based upon a more complete record and re-asserted that Dahlke drove his motor vehicle into a closed park after the hours of use permitted.

Based upon the holding, found in paragraph 5, of the decision in *State v. Houghton, Jr.*, 868 NW 2d 143,364 Wis. 2d 234,2015 WI 79 – Wisconsin Supreme Court, Deputy Olson's reasonable suspicion that Dahlke had violated the Fond du Lac County Ordinance reference the hours of use noted above, was sufficient for him to initiate a stop of the offending vehicle.

In addition, the county asserted that if the court found that Deputy Olson's interpretation that the County ordinances was incorrect, the county asked the court to find that Deputy Olson's interpretation was objectively reasonable.

The holding of the Wisconsin Supreme Court in *Houghton*, in paragraph 5, adopts the United States Supreme Court decision in *Heien v. North Carolina*, 574 U.S. __, 135 S. Ct. 530, 190 L.Ed.2d 475 (2014), which permits this court to find that any mistake by Deputy Olson was objectively reasonable and further that Deputy Olson had reasonable suspicion to stop Dahlke's vehicle.

The trial court responded to the county’s motion for reconsideration as follows from the transcript of the oral ruling: (24: 6-8)

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“THE COURT: Well, I think the case law cited by Mr. Borsheim as to an officer's objectively reasonable belief about the applicable

law is probably a correct statement of the law. I'm not persuaded to change my decision for the following reasons:

For the reason that I don't think the car-driving public, or even people walking over there, would know, absent some kind of knowledge of the -- the county ordinance -- and I appreciate we're all supposed to know, we're all presumed to know what the law is, however, it -- to me, it seems a bit deceptive that you have a wayside; which I think people would, in its ordinary meaning, understand to be a place for people to go to with their vehicles to -- for rest or what have you; the County has this ordinance which, interestingly, I'm still not convinced covers the wayside. Because the ordinance says it covers the parks, trails and outdoor recreation areas or facilities governed by this article and it goes on to say the Highway 45 Wayside Park.

Is that the part of that area where the signage indicates that this park is open or closed and it -- it encompasses what I would think to be a park; which is the trail, the outdoor recreation i.e. the water, the trees, the lawn or facilities? I think there's some outhouses there or some kind of toilets or something. Does it also include the part that's not signed, which is the parking lot area?

Maybe it does, maybe it doesn't. Even -- even the County's own ordinance, to me, doesn't sufficiently apprise either the traveling public or the officer as to what the coverage of the hours are for. Is it the entire premises from the center line of Highway 45 to the waters of Lake Winnebago?

Or is it just the part of the park that's signed? And my sense is still that the person who is traveling on 45 and sees a wayside would think that it's a place to be able to go into and use as -- as a -- as just that, a wayside.

Interestingly, the hours of use under the county ordinance say the areas of use are from 6:00 a.m. to 10:00 p.m. It's unlawful for any person to be in any park, trail, or outdoor recreation area, except registered campers, etc. Question whether he was in a park, on a trail or an outdoor recreation area.

I'm not convinced that the ordinance convinces me that the parking lot is part of the park. If it was, why didn't the county put signage at the entrance to the wayside; where automobiles, other motor vehicles would be entering or exiting; saying, essentially, closed from 10:00 a.m. to 6:00 -- excuse me, closed from 10:00 p.m. to 6:00 a.m.?

And to the extent that the officer had a reasonable belief about the use of the park during the times as I've indicated, maybe that is a reasonable -- in his idea, a reasonable view of the use of the park. I'm still not convinced that we're still talking about the park when it's the parking lot. Anyway, I don't -- on reconsideration, I don't change my opinion. The matter's dismissed."

Implicit in the court's reconsideration of the county's position is the acceptance of the county's argument that the violation of the county ordinance was a basis for the traffic stop of Dahlke and further that the county had not waived such argument.

II. Fond du Lac County's Wayside Park is not a wayside, as defined in Chapter 84 of the Wisconsin Statutes, and therefore Chapter 84 does not apply to the facts of this case.

Chapter 84 of the Wisconsin Statutes is entitled STATE TRUNK HIGHWAYS; FEDERAL AID.

§84.04, Wis. Stats., is entitled ROADSIDE IMPROVEMENT, and authorizes the Wisconsin Department of Transportation to construct and maintain ... waysides, ... along or in close proximity with state trunk highways.

Fond du Lac County's Wayside Park is not adjacent to a "state trunk highway." U.S. Highway 45 is not part of the state trunk highway system, but rather is a U.S. Highway, as it is referred to in §84.104, Wis. Stats., such that Chapter 84 is inapplicable to Fond du Lac County's Wayside Park.

There is no evidence in this appellate record that the State Department of Transportation constructed or maintained Wayside Park in Fond du Lac County, Wisconsin. The only evidence in the appellate record is that the location is a county park, subject to its ordinances as set forth in this appellate record.

III. “Probable cause” and “reasonable suspicion” support Deputy Olson’s traffic stop of the Dahlke’s vehicle.

A. A law enforcement officer may lawfully seize a person without a warrant for a civil non-traffic forfeiture offense if (1) the violation occurs in the officer’s presence, and (2) the statute authorized the officer to do so. *State v. Iverson*, 365 2d 302, 871 N.W.2d 661 (2015).

Fond du Lac County Ordinance Sec. 42.35 provides that the hours of use by the public for any park, trail, or outdoor recreation area shall be from 6:00 a.m. to 10:00 p.m., and that it is unlawful for any person to be in any park, trail or outdoor recreation area ... outside of the established hours.

Fond du Lac County Ordinance Sec. 42.34 (a) provides that any law enforcement officer may issue a citation or arrest any offender who is in violation of any provision of this article.

The county ordinance violation occurred in the presence of Deputy Olson and the county ordinance authorized an a citation or arrest of Dahlke under the circumstances, justifying the traffic stop.

B. Wisconsin courts have upheld the temporary seizure of an automobile’s driver based solely upon an officer’s reasonable suspicion that the driver had violated a noncriminal traffic regulation. In *State v. Griffin*, 183 Wis. 2d 327, 330-31, 515 N.W.2d 535 (Ct. App. 1994), the court held that an officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. Relying on *Griffin*, this Court subsequently explained: “[A]n officer may make an investigative stop if the officer ‘reasonably suspects’ that a person

has committed or is about to commit a crime, . . . or reasonably suspects that a person is violating the non-criminal traffic laws.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (quoted source omitted) (footnote omitted). In several cases decided after *Renz*, the court of appeals has upheld stops based solely upon an officer’s reasonable suspicion that a vehicle’s operator had committed a non-criminal traffic offense.

The decision in *State v. Lind*, 2014 WI App 110, 357 Wis. 2d 723, 855 N.W.2d 905, unpublished, is inapposite. The pulling partway into a driveway and temporarily stopping the vehicle is not congruent with driving into a closed county park at 12:20 a.m., an area known to the deputy based upon his personal experience, as an area frequented by persons using illegal drugs, drinking and suspicious activity. Thus, the case is not persuasive.

CONCLUSION

The State respectfully requests this Court to reverse the circuit court’s decision granting Dahlke’s motion to suppress evidence and the Order (14) dismissing this case.

Dated this 22nd day of December, 2017.

Respectfully submitted,

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CERTIFICATION TO FORM AND LENGTH

I hereby certify that this brief confirms to the rule contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with proportional and serif font. The length of this brief's body is 2,996 words.

Dated this 22nd of December, 2017.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §

(RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this reply brief 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 22nd day of December, 2017.

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