STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2017AP1436-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ROBERT L. BENTZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH II, THE HONORABLE JAMES K. MUEHLBAUER PRESIDING,
TRIAL COURT CASE NO. 2016-CM-596

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

MELOWSKI & ASSOCIATES, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Wisconsin Constitution

Wisconsin Statutes

United States Supreme Court Cases

Federal Courts of Appeal Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

STATEMENT OF THE ISSUES

I. WHETHER MR. BENTZ WAS DETAINED FOR FOURTH AMENDMENT PURPOSES WHEN HE WAS FIRST APPROACHED AND QUESTIONED BY CITY OF WEST BEND POLICE OFFICER OTTE?

Trial Court Answered: NO. Mr. Bentz was not detained for Fourth Amendment purposes until such time as Officer Otte confronted Mr. Benz with the alleged inconsistencies in his story. R23 at 10.

II. WHETHER OFFICER OTTE HAD A CONSTITUTIONALLY VALID REASONABLE SUSPICION TO DETAIN MR. BENTZ?

Trial Court Answered: YES. Given the alleged inconsistencies in Mr. Bentz' answers to Officer Otte's questions, Officer Otte could permissibly detain Mr. Bentz to investigate why Mr. Bentz' answers were not consistent. R23 at 10.

III. WHETHER THERE WAS PROBABLE CAUSE TO ARREST MR. BENTZ FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT?

Trial Court Answered: YES. Under the totality of the circumstances test, Officer Otte's observations of Mr. Bentz' demeanor and appearance, his ostensibly contradictory answers to questions, and his refusal to perform field sobriety tests, Officer Otte had sufficient facts upon which to base a belief that it was more likely than not that Mr. Bentz was operating while intoxicated. R23 at 11.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents questions of law based upon a set

of uncontroverted facts. The issues presented herein are of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the law at issue herein is fully developed, and therefore, publication would do little, if anything, to enhance the relevant body of law.

STATEMENT OF THE CASE

On June 27, 2016, a two-count Amended Criminal Complaint was filed in the above-referenced matter alleging that the Defendant-Appellant, Robert L. Bentz, Operated a Motor Vehicle While Under the Influence of an Intoxicant as a Third Offense, contrary to Wis. Stat. 346.63(1)(a), and Operated a Motor Vehicle With a Prohibited Alcohol Concentration as a Third Offense, contrary to Wis. Stat. § 346.63(1)(b). R11. Mr. Bentz entered a plea of Not Guilty to both counts. R4.

Mr. Bentz retained private counsel, Melowski & Associates, LLC, to represent him. R6; R8. Thereafter, Attorney Dennis Melowski filed a Demand for Discovery and Inspection. R13. Upon receipt and review of the State's discovery materials, Attorney Melowski filed a Notice of Motion and Motion to Suppress Based Upon Lack of Reasonable Suspicion to Detain and Probable Cause to Arrest. R15.

An evidentiary hearing was held on Mr. Bentz' motion on December 2, 2016, at which the arresting officer in the instant matter, Officer John Otte of the City of West Bend Police Department, testified. R40. At the close of the evidentiary portion of the hearing, Attorney Melowski requested that the issues presented at the hearing be further briefed. R40 at 61:1-2. The court consented to Attorney Melowski's request. R40 at 61:3.

After submitting supplemental briefs, the parties received a written decision from the court denying Mr. Bentz' motion on all grounds proffered by the defense. R23; D-App. 103-114. Thereafter, Mr. Bentz changed his plea to No Contest to the charge of Operating a Motor Vehicle While Intoxicated—Third Offense, and was adjudicated guilty of the same. R32; D-App. 101-02.

Upon entry of the Judgment of Conviction on June 14, 2017, Mr. Bentz filed a Notice of Intent to Pursue Post-Conviction Relief on June 15, 2017. R29.

STATEMENT OF FACTS

On June 5, 2016, at approximately 2:14 a.m., Officer John Otte of the City of West Bend Police Department, followed a vehicle on North Main Street in the City of West Bend which "appeared to engage in driving behavior in an effort to avoid said officer." R11 at 1-2. The vehicle the officer observed pulled into the driveway of a private residence on Harrison Street and parked there. *Id*. at 2. Officer Otte watched the vehicle for approximately five minutes, whereupon it pulled out of the driveway and drove to another private residence on Jefferson Street and parked in the driveway of that residence. *Id*. Officer Otte drove to a parking lot in the vicinity and waited approximately ten minutes before returning to the residence on Jefferson Street where the vehicle had parked in the second instance. *Id*.; R40 at 14:24 to 15:3.

During the entire time he observed the aforementioned vehicle, Officer Otte was never able to identify any characteristics of the driver. R40 at 34:25 to 35:3. He could not discern whether it was a male or female operating the car. R40 at 35:4-6. Likewise, he could not identify the race of the driver. R40 at 35:7-8. Officer Otte's inability to ascertain any characteristics relating to the vehicle's operator remained true for all instances in which he followed the vehicle, from the initial observation to the first driveway in which it parked; for the duration of the time he watched the vehicle parked there; for the second time it was driven to the next driveway and parked; and for the time he watched it

parked in the second driveway before leaving the area and returning ten minutes later. R40 at 36:11-14.

Upon his return to the area in which the vehicle had parked, Officer Otte observed a male subject sitting on the driveway outside of the vehicle. *Id.*; R40 at 14:4-7. At this time, Officer Otte elected to park his squad car in the street and approach Mr. Bentz to investigate why he was there. R40 at 16:6-8; 39:23 to 40:1. According to Officer Otte, Mr. Bentz replied that he was "just chilling," and further indicated that because he did not want to drive for the remainder of that night he was trying to call his son to pick him up. R40 at 16:9-13.

Officer Otte continued his interrogation of Mr. Bentz by asking him whether he resided at the residence at which he parked his vehicle, and he replied that he did not. R40 at 16:14-18. Officer Otte further inquired of Mr. Bentz whether he knew the individual who resided at the address at which he stopped, to which Mr. Bentz responded that he did not. R40 at 16:16-18. Officer Otte continued by asking Mr. Bentz where he was coming from, to which Mr. Bentz responded that he "wasn't coming from anywhere." R40 at 16:19-21.

During the course of this initial conversation, Officer Otte made additional observations of Mr. Bentz which ostensibly included noticing that Mr. Bentz had an odor of intoxicants emanating from his person; had slurred speech; and had glossy, bloodshot eyes. R40 at 16:22 to 17:1. Based upon these observations, Officer Otte concluded that Mr. Bentz had been consuming intoxicants. R40 at 17:2-7. It is important to note that at the motion hearing held in the instant matter, Officer Otte admitted that another officer, identified as Officer Doleschy, was already on the scene when Officer Otte initially questioned Mr. Bentz. R40 at 28:8-25; 29:11-14.

Officer Otte spent the next part of his interrogation of Mr. Bentz attempting to construct a timeline of where Mr. Bentz had been earlier that evening. R40 at 17:8-14. During the course of the initial interrogation, Mr. Bentz never admitted to driving the

vehicle. R40 at 40:25 to 41:4. To the contrary, Mr. Bentz informed Officer Otte that a female had driven and parked the car there. R40 at 19:16-18. In fact, Mr. Bentz offered his phone to Officer Otte so that he could call the female to confirm that she had been the operator. R40 at 41:8-11; 45:6-8. Despite this offer, Otte refused to make the call or to have Mr. Bentz make the call. R40 at 45:9-22.

Based upon his observations of Mr. Bentz, Officer Otte decided to ask Mr. Bentz to submit to a battery of field sobriety tests which prompted Mr. Bentz to request to speak with an attorney. R40 at 41:21-24. Officer Otte allowed Mr. Bentz to make a telephone call to his attorneys, and after he completed his call, Mr. Bentz declined to submit to field sobriety testing. R40 at 42:9-20. Based upon his refusal, Officer Otte arrested Mr. Bentz for operating a motor vehicle while intoxicated. R40 at 42:21-22.

STANDARD OF REVIEW ON APPEAL

This appeal presents questions of law related to the application of the Fourth Amendment to the U.S. Constitution and Article I, § 11 of the Wisconsin Constitution to an undisputed set of facts. As such, this Court applies constitutional principles to the facts of the case, and in so doing, reviews the facts below independent of the circuit court. *See State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997); *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984).

ARGUMENT

I. BASED UPON THE OFFICERS' DISPLAY OF AUTHORITY AND THE RESTRICTION OF DEFENDANT'S FREEDOM TO LEAVE, A LEGALLY COGNIZABLE DETENTION OCCURRED IN THIS CASE AT THE TIME OFFICER OTTE FIRST APPROACHED AND QUESTIONED MR. BENTZ.

A. Statement of the Law.

In order to be afforded the protections inherent in the Fourth Amendment to the United States Constitution, an individual must be "seized." U.S. Const. amend IV. The question of when, precisely, a seizure occurs within the meaning of the Fourth Amendment is a fluid, but well-settled, one. The seminal proclamation on seizure can be found within *United States v. Mendenhall*, 446 U.S. 544 (1980), in which Justice Stewart wrote that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554; *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 491, 497, 502-04, (1983).

After articulating the test for determining when a seizure takes place, Justice Stewart went on to list some examples of circumstances that might suggest a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554.

The foregoing standard gives rise to a question as to whether the facts and circumstances surrounding the moment of seizure should be viewed from the subjective viewpoint of the defendant, and whether he was acting as a "reasonable person" when he believed he was not free to leave, or alternatively, whether the test for determining when a seizure occurs is a purely objective one without regard to the defendant's subjective belief. This question was addressed by the Supreme Court in *California v. Hodari D.*, 499 U.S. 621 (1991), when it held that *Mendenhall* " . . . establishes that the test for existence of a 'show of authority' is an objective one; . . . [based upon] whether the officer's words and actions would have conveyed that [movement was restricted] to a reasonable person."

The objective test regarding detention was further refined by the Supreme Court in other cases, such as *United States v. Drayton*, 536 U.S. 194 (2002), in which the Court held that the notion of

whether a suspect's movement was restricted must be based upon whether the person would objectively feel free to disregard the police and go about their business. *Id.* at 201. This test must presuppose an innocent person. *Id.* at 202; *Florida v. Bostick*, 501 U.S. 429, 434-36 (1991).

Wisconsin has adopted without modification the *Mendenhall* test. *See, e.g., State v. Stout*, 2002 WI App. 41, 250 Wis. 2d 768, 641 N.W.2d 474. Settling the question of when a seizure occurs is paramount "because the moment of a seizure limits what facts a court may consider in determining the existence of reasonable suspicion for that seizure." *State v. Young*, 2006 WI 98, ¶ 39, 277 Wis. 2d 715, 690 N.W.2d 866. The Wisconsin Supreme Court observed in *Young* that when a person " . . . acquiesce[s to] a police show of authority, . . . the Fourth Amendment applies and the exclusionary rule will exclude any evidence obtained in the absence of reasonable suspicion." *Id.* at ¶48, (citations omitted).

While acquiescence to a "show of authority" is part of the trigger for determining the point at which a cognizable Fourth Amendment seizure has occurred, it is not the only relevant consideration. In addition to the restriction of movement, a law enforcement officer's intentions play a role. If the law enforcement officer intends "to restrain the person" the court may take that into consideration as part of the calculus for determining the point at which detention occurs. *State v. Hoffman*, 163 Wis. 2d 752, 761, 472 N.W.2d 558 (Ct. App. 1991), citing *State v. Adams*, 152 Wis. 2d 68, 75 n.2, 447 N.W.2d 90 (Ct. App. 1989).

B. Application of the Law to the Facts of the Case.

This case presents a telling, and objectively ascertainable, set of circumstances with regard to whether Mr. Bentz would have felt free to leave and whether he submitted to the officers' authority as required by the Fourth Amendment and the foregoing case law. It is perhaps easiest to first address the second part of the test to determine whether there has been a seizure in this case because there is no allegation that Mr. Bentz did not submit to authority. He is not alleged to have fled, attempted to walk away from the

officers, or otherwise asked to leave. Thus, there is no question that there is a submission to authority. The question which remains, however, is when a reasonable person in Mr. Bentz' situation would have objectively believed under the totality of the circumstances that he was not free to leave, and at what moment that would have occurred.

It is Mr. Bentz' contention that a reasonable person would not have felt he was free to leave the moment the second officer arrived on the scene and began his investigation. Before further expounding upon the reasoning underlying Mr. Bentz' position, it is worth noting the following factual circumstances attendant to this case which were considered by the courts above as lending toward a belief that there has been a "detention" on the part of law enforcement.

First, under *Hoffman*, it is a relevant consideration that Officer Otte intended to "investigate why [Mr. Bentz] was [at the second residence]." R40 at 39:23 to 40:1. Officer Otte at no point testified that he was attempting to determine whether Mr. Bentz was injured or otherwise in need of assistance, such as he might have if he was operating under a community caretaker theory. Officer Otte considered Mr. Bentz behavior that evening as evasive,[1] hence he wanted to "investigate," and that would effectively characterize his approaching Mr. Bentz as an investigatory detention.

Second, consistent with one of the criteria considered relevant under *Mendenhall*, not one, but two, officers arrived nearly simultaneously on the scene to investigate.

Third, all the officers involved in this case were uniformed, including the presence of a sidearm as well. R40 at 15:10-15.

Fourth, both officers arrived at the scene in marked squad cars. R40 at 15:10-13; 23:6-8.

[1] R11 at 2.

Fifth, in order to videotape the encounter, the second officer parked in the driveway in which Mr. Bentz was parked, thereby blocking his egress. R40 at 24:14-18 (Mr. Bentz's vehicle would not have been able to pull out of the driveway).

Sixth, the questioning of Mr. Bentz bore the indicia not of a simple encounter, in which Fourth Amendment protections do not attach, but rather, questioning was, to say the least, intended to incriminate Mr. Bentz. In a telling admission, Officer Otte acknowledged that he was familiar with an event taking place in Regner Park that night, otherwise known as Riverfest. R40 at 21:8-10; 21:22-25. On direct examination, Officer Otte averred that he knew beer and wine were served at Riverfest. R40 at 22:8-10. In an ostensible effort to place Mr. Bentz at Riverfest, and therefore at a location at which alcohol was being served, he inquired of Mr. Bentz where he had come from that evening. R40 at 16:19-20. Likewise, had this been a simple encounter, incriminating questions such as asking Mr. Bentz whether he "had consumed alcohol or where he had consumed alcohol" would not have been asked. R40 at 21:5-8.

Seventh, and most importantly, the second officer's arrival and immediate investigation of the circumstances surrounding both why and how Mr. Bentz arrived at his location on the night in question is most telling. Officer Otte admitted at the evidentiary hearing in this case that the assisting officer, Doleschy, "was already on the scene when [Otte] initially questioned Mr. Bentz . . . . " R40 at 28:20-24; 29:11-14.[2]

A person viewing the circumstances objectively would recognize that the two officers at the scene did not arrive in the same car. The presence of the second officer cannot be explained objectively under the guise of his merely being a "ride along." The only conclusion which can be drawn from his presence is that he had been called as "back up" by the first officer, or alternatively, that when the first officer arrived and described the situation to his

[2] Notably, this is inapposite to the lower court's belief that Doleschy arrived later. R23 at 3; D-App 105. To the contrary, Officer Otte made it clear on the record that "Doleschy's already there when [I] first speak to Mr. Bentz, ..." R40 at 29:11-14.

dispatcher, dispatch felt the circumstances warranted a back-up officer. Under either circumstance, no reasonably objective person would conclude that the first officer felt he was merely going to engage in a simple encounter with his person. Objectively reasonable persons understand that multiple officers are called to a scene only when the first officer feels his safety may be in question because he suspects the individual with whom he is making contact is a potential threat, or when the first officer believes that the suspect may be a threat to flee the scene. If a person objectively recognizes that he is perceived as a threat to himself or others, or is a threat to flee, he knows with certainty that no law enforcement officer would allow him to leave the scene without first determining that he is not a threat to himself or to the public, or to flee. Such a determination requires an investigatory detention, removing any possibility that the engagement was a "simple encounter" which did not require constitutional protection.

There are facts equally as telling which involve Officer Doleschy's conduct upon arriving at the scene regarding whether this was an investigatory detention or a simple encounter. For example, in a simple encounter, Officer Doleschy would not have been undertaking a physical examination of Mr. Bentz' vehicle while Officer Otte engaged Mr. Bentz in conversation—there simply would have been no need to do so. Officer Otte admitted that Doleschy went to feel the hood of Mr. Bentz' vehicle to determine whether it had recently been driven. R40 at 27:9-19. There is no statement by Otte that Doleschy simply stood by and listened to the conversation between him and Mr. Bentz; or that Doleschy remained next to his squad car while he and Mr. Bentz spoke; or that Doleschy also participated in the conversation between himself and Mr. Bentz. What there is, in fact, is an admission by Otte that two officers arrived at the scene where Mr. Bentz was; that they were uniformed; that any vehicular egress by Mr. Bentz was blocked; and that Otte began questioning Mr. Bentz for the purpose of investigating suspicious behavior (*see, infra*) **while the second officer physically investigated Mr. Bentz vehicle**. These circumstances definitely make Mr. Bentz' encounter with the officers an investigatory detention from the moment of their near simultaneous arrival, which encounter would

require a reasonable suspicion to detain Mr. Bentz in order to be constitutionally viable.

II. THE OFFICERS IN THIS CASE LACKED A REASONABLE SUSPICION TO DETAIN THE DEFENDANT.

A. Statement of the Law.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Within the ambit of the Fourth Amendment, there are recognized three levels of encounter, namely (1) the "simple encounter" for which the individual is afforded no constitutional protection because his or her movement is not restricted; (2) the investigatory detention, or *Terry* stop, for which the officer must have a reasonable suspicion to detain the person, *see Terry v. Ohio*, 392 U.S. 1 (1968); and (3) the custodial arrest which requires probable cause. *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982); *Henry v. United States*, 361 U.S. 98 (1959).

For purposes of determining whether Officer Otte's actions constituted an investigatory detention of Mr. Bentz' person under the Fourth Amendment, the inquiry involves ascertaining whether they were reasonable under the circumstances. The test for determining the constitutionality of an investigative stop is an objective test of reasonableness. *Terry*, 392 U.S. at 20-21. Wisconsin courts have formulated the test thusly:

> The test is an objective test. Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. An "inchoate and ***unparticularized*** suspicion or 'hunch'". . . will not suffice.

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(*emphasis added*); *United States v. Pavelski*, 789 F.2d 485, 489 (7th Cir. 1986).

> It is well-settled law that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, ***particularized*** suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000); . . . (emphasis added).
>
> . . .
>
> More than mere presence (i.e., hanging out) in a public place is required for reasonable suspicion that criminal activity is afoot. (Citation omitted). Hanging out in a high crime neighborhood for approximately five minutes, at night, while dressed in dark clothing, is not enough for reasonable suspicion. *See State v. Young*, 212 Wis. 2d 417, 429-30, 569 N.W.2d 84 (Ct. App. 1997)(acknowledging that while some seemingly innocent conduct may also give rise to reasonable suspicion, "conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in . . . neighborhoods where drug trafficking occurs" is insufficient for finding reasonable suspicion of criminal activity). Nor is hanging out at a place where other arrests have been made sometime in the past, without more, enough for reasonable suspicion of a particular person's involvement in criminal activity. (Citation omitted.)

State v. Diggins, 2013 WI App. 105, 349 Wis. 2d 787, 837 N.W.2d. 177.

The standard for determining whether an investigatory detention is constitutionally reasonable is made upon "'a ***particularized*** and objective basis' for suspecting the person stopped [is engaged in] criminal activity. *Ornelas v. United States*, 517 U.S. 690, 696, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996)(citation omitted; emphasis added). When determining if the standard of reasonable suspicion [is] met, those facts known to the officer must be considered together as a totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990)." *State v. Powers*, 2004 WI App. 143, ¶7, 275 Wis. 2d 456, 685 N.W.2d 869.

Throughout the entire body of Wisconsin and Federal case law is woven the common thread of "***particularized*** suspicion." As indicated below, this case presents anything but a *particularized* suspicion.

B. Application of the Law to the Facts of the Case.

There are three important factors, above all others, to be considered in this case which mitigate *against* a finding of a *particularized* and reasonable suspicion to detain Mr. Bentz under the totality of the circumstances. First, there is simply no objective evidence whatsoever linking Mr. Bentz to the operation of the vehicle Officer Otte observed. If the foregoing cases make any point of law clear, it is this: any suspicion of illegal activity must be "*particularized*." Webster's Encyclopedic Unabridged Dictionary of the English language defines "particularized" as "to make particular." Webster's Encyclopedic Unabridged Dictionary of the English Language, at 1415 (1996). Webster then goes on to define "particular" as "of or pertaining to a *single* or *specific* person, ... " *Id.* at 1414. No transcript could be more devoid of evidence which specifies or singles out Mr. Bentz as the operator of the vehicle in question than that in this case.

Throughout the entire examination of Officer Otte at the evidentiary hearing, he repeatedly admitted and maintained that he could not identify the operator of the vehicle he followed. Officer Otte admitted that he never saw anybody exit the vehicle. R40 at 14:12-14; 37:17-19. He admitted that he never observed any characteristics of the operator. R40 at 35:1-3; 41:17-20. He stated that he could not even tell whether the driver was a female of male. R40 at 35:4-6. He could not ascertain the race of the driver either. R40 at 35:7-8. Officer Otte repeatedly admitted that he was never able, at any point, to identify anything about the driver of the vehicle. R40 at 36:11-14. Officer Otte also admitted on cross-examination that Mr. Bentz never admitted "to being the person who parked the vehicle at the location [where he] observed it parked . . . . " R40 at 41:2-4; 41:12-16. Based upon all of the foregoing, it is evident that there was no *particularized* suspicion that Mr. Bentz was the operator of the vehicle Officer Otte followed. There is nothing in the record which, according the

common definition of the legal requirement, made Mr. Bentz the "single or specific[ally]" identifiable person who was, in fact, behind the wheel of the vehicle as it was moving through West Bend. In the absence of objective, *particularized* evidence that Mr. Bentz operated the vehicle, there cannot exist a "reasonable suspicion" to believe under the Fourth Amendment that Mr. Bentz was involved in any illegal activity.

A second, equally important, factor to be considered is that Officer Otte undertook no effort to engage in the kind of investigation which could have easily settled the question regarding who was operating the vehicle. Officer Otte admitted that Mr. Bentz told him a woman had been operating the vehicle, and he even handed Officer Otte his telephone and told the officer that he could call her to confirm this. R40 at 19:17-18; 45:6-8. Rather than simply making this one telephone call, Officer Otte elected not to undertake any investigation. R40 at 41:8-11; 45:9-10. Such conduct, or more appropriately, the absence of such conduct, is entirely inappropriate for an officer who should be determining whether the individual he is questioning had anything to do with the operation of the vehicle at issue. This point is best understood by analogy. If Officer Otte had arrived on the scene and observed five people milling around outside of the vehicle, he obviously—and without hesitation—would have questioned the people present to ascertain who had been operating the vehicle. This investigative conduct would be considered perfectly reasonable. No officer, acting reasonably, would simply have ignored four of the five individuals, honed in on one at random, and assumed him or her to be the driver.

Unlike the foregoing example, however, Officer Otte did not have to deal with four other individuals; he merely had to make contact with one and only one, which he chose *not* to do. *Id.* More importantly, had Officer Otte engaged in the minimal effort to make contact with the female identified by Mr. Bentz, the information he would have received would have been inherently credible and trustworthy for one very notable reason, namely: Officer Otte examined Mr. Bentz' call log and noted that Mr. Bentz had only attempted to contact his son by phone, and that this

contact was made several hours prior to his encounter with Mr. Bentz. R40 at 19:3-18. If Mr. Bentz had attempted to arrange for someone to "cover" for him, there would have been an intervening call noted within the prior few minutes on the call log. The log clearly established that there was no other call made to a woman in which Mr. Bentz could have made arrangements to "get a fabricated story straight." Thus, if Officer Otte had simply placed the call he was asked to place, he could have very easily relied on the information as credible given the absence of any evidence of prior telephonic arrangements being made.

The Court below inherently recognized the reasonableness of further telephonic investigation when it, *sua sponte*, questioned Officer Otte at the motion hearing in an effort to ascertain why he did not place a telephone call to the operator Mr. Bentz identified. R40 at 46-47. Further emphasizing the point of just how reasonable it would have been to attempt to make contact with the unnamed female is Officer Otte's admission to the lower court under its examination that if he had made the call to the unnamed female, he "would have essentially questioned her as to her validity as to if she was truly driving." R40 at 46:7-9.

Finally, the other factors considered by Officer Otte as meriting further investigation were, in fact, innocent and indicative of purely legal behavior. Officer Otte noted that the driver of the vehicle went through multiple intersections while being followed, but there is no allegation whatsoever that the driver of the vehicle failed to execute any turns legally. R40 at 31-34. There is no allegation that the driver failed to signal. *Id.* There is no allegation that the driver was speeding or, for that matter, obstructing traffic by operating too slowly. R40 at 34:14. There is no allegation that the driver of the vehicle attempted to flee. R40 at 34:15-17. There is no allegation that the driver failed to properly yield to other traffic. R40 at 31-34. There is no allegation that the driver operated the vehicle in any lane other than his or her own. *Id*. There is no allegation that the driver failed to operate the vehicle with its headlamps properly lit. *Id.* There is no allegation that the vehicle weaved within its lane. *Id*. There is no allegation that the vehicle was parked in any illegal fashion. R40 at 11:1-4; 35:9-12.

There is no allegation that when the vehicle backed up it had any problem doing so. R40 at 16:18. Utterly absent from the entire record is any behavior which could be considered illegal or in violation of Wisconsin's traffic code. Interestingly, even though the vehicle was searched *after* Mr. Bentz was detained for constitutional purposes (*see* Section I., *supra*), Officer Otte admitted that no alcoholic beverages were found anywhere within the vehicle. R40 at 21:11-21.

In fact, the behavior of the driver of the vehicle has a purely innocent explanation if one considers that the operator could merely have been searching for the address of a friend or relative's house. As the court observed in *Diggins*, innocent individuals could be engaged in wholly innocent behavior in neighborhoods in which drug trafficking or other crimes takes place. *Diggins*, 2013 WI App. at ¶ 15. By analogy, innocent drivers could be engaged in wholly innocent driving behaviors in neighborhoods with which they might not be entirely familiar. Merely because a person stops in a neighborhood in which drugs are being sold does not mean the individual is there to buy drugs. *Id.* Again, by analogy, merely because a driver pulls into a driveway and pulls out again later does not mean the individual is there to commit a crime as much as it may simply mean the individual is lost. "More than mere presence (*i.e.*, hanging out) in a public place is required for reasonable suspicion that criminal activity is afoot." *Id.* Substituting a few words in the *Diggins* Court's pronouncement makes it just as certain in this case that there was no reasonable suspicion to detain Mr. Bentz: "More than mere presence (*i.e.*, [parking]) in a [private] place is required for reasonable suspicion that criminal activity is afoot."

Based upon the foregoing, therefore, the lower court erred when it concluded that Mr. Bentz was not seized upon Officer Otte's approach because if it had, that seizure would have been in violation of the Fourth Amendment's requirement that the officers have a particularized suspicion that a crime is afoot. The lower court should have made a finding of seizure immediately upon the officers' approach, in which case, Mr. Bentz' Fourth Amendment rights were violated under the totality of the circumstances test.

III. THE OFFICERS LACKED PROBABLE CAUSE TO ARREST THE DEFENDANT BASED UPON THE TOTALITY OF THE OBJECTIVE CIRCUMSTANCES KNOWN TO THEM.

A. Statement of the Law.

According to the Wisconsin Supreme Court in *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982):

> The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense. The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Paszek*, 50 Wis. 2d at 624-25. In *State v. Paszek*, 50 Wis. 2d at 624-25, we described probable cause as follows:
>
> "Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. Probable cause is defined in *Draper v. United States, supra*, p. 313, as:
>
> 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.' Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132.'" *State v. Paszek*, 50 Wis. 2d at 624-25. (Citations omitted.)

Welsh, 108 Wis. 2d at 329-30. Notably, the probable cause test requires more than mere possibilities or suspicions, it requires an objective determination by a "reasonable police officer" that the facts and circumstances of the case are trustworthy enough to lead one to believe that the accused "probably committed a crime."

B. Application of the Law to the Facts of the Case.

Incorporated by reference here are all of the facts and circumstances described by Mr. Bentz above because these facts, or more correctly, the absence of many facts relating to Mr. Bentz operating a motor vehicle while intoxicated, are just as relevant to the probable cause inquiry as they are to the reasonable suspicion inquiry.

In addition to Officer Otte's failure to be able to specifically and particularly identify Mr. Bentz as the operator (*see* Section II.B., *supra*), and in addition to Officer Otte failing to observe any legally cognizable violation of Wisconsin's traffic code (*id*.), Mr. Bentz would add the following salient point: Officer Otte failed to maintain continuous and uninterrupted contact with the vehicle he suspected of illegal activity.

On both direct and cross-examination, Officer Otte stated that he was *not* in constant contact with the suspect vehicle. There was some period of time, at least ten minutes and perhaps longer, during which he was not in visual contact with the vehicle in question, and even more significantly, was not even within the same vicinity of the suspect vehicle. Officer Otte admitted that he "left the area" in which the vehicle was located (R40 at 14:13; 14:21-23), and was gone for at least ten minutes. R40 at 15:3; 37:22-25 to 38:1-4.

During the period in which he was absent, Officer Otte acknowledged that he did not know what happened to the vehicle, whether it had left the scene and returned, whether it had remained, or who may have been operating it, among other things. R40 at 38:5-12. Upon his return and ultimate questioning and observations of Mr. Bentz, there is no objective way of positing that a prudent officer, acting reasonably under the totality of the circumstances, could believe it more likely than not—that is to say,

"probable"—that Mr. Bentz had been operating a motor vehicle while intoxicated. There was no observation of Mr. Bentz as the driver (R40 at 35-37); there was no observation of any traffic violations (R40 at 31-35); and notably, there was no continuous accounting of what happened to the vehicle or the driver while Officer Otte was absent from the scene. R40 at 15:3; 37:22-25 to 38:1-4.

Further removing the facts of this case from being able to justify the probability that Mr. Bentz was involved in criminal activity under the totality of the circumstances is the absence of any keys in Mr. Bentz' possession which could have been used to start the motor vehicle. Unless Mr. Bentz was operating a steam-driven motor vehicle, or an early Model T Ford which required physical cranking of the fly wheel, possession of a motor vehicle's ignition key is a necessary precursor to operation. Despite this fact, when questioned, Officer Otte could not recall where any keys to the vehicle were located. R40 at 40:2-3. The transcript in this matter is devoid of any testimony that keys were found on Mr. Bentz' person, thereby lending at least some credibility to Mr. Bentz' assertion that a woman had been operating the vehicle because, if she had, it is likely she would have walked away with the keys in her possession.

Doubtless, the State will likely attempt to "hang its hat" regarding the probable cause issue on the fact that, at some point, Mr. Bentz admitted that he drove the motor vehicle. Notably absent from this claim will be any admission on Mr. Bentz' part that he did so while intoxicated, or even that he clearly meant he drove the vehicle to its final location. Tellingly, Officer Otte admitted that the closest he came to obtaining any kind of timeline regarding when Mr. Bentz might have driven the vehicle was somewhere within a range of 90 to 240 minutes prior to his encounter with Officer Otte. R40 at 40:12-17. When asked whether he was "ever able to pin down a time from [Mr. Bentz] regarding when he parked the vehicle . . ." in its final location, Officer Otte admitted he could not. R40 at 40:18-20. Officer Otte went so far as to acknowledge that Mr. Bentz never "admitted to being the person who parked [the vehicle] at the location [where

Officer Otte] observed it . . . . " R40 at 41:1-4. Any assertions by the State, therefore, that Mr. Bentz made an admission that he drove the motor vehicle which *could be used to support a finding of probable cause* must fail on the basis that there is no nexus between Mr. Bentz alleged intoxication and the operation of the vehicle during the period in which Officer Otte made observations of it. Given these circumstances, probable cause to arrest Mr. Bentz does not exist in this case.

IV. THE REMEDY FOR A VIOLATION OF A DEFENDANT'S FOURTH AMENDMENT RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES IS SUPPRESSION OF THE ILL-GOTTEN EVIDENCE AND ANY ADDITIONAL EVIDENCE FOLLOWING THEREFROM.

When an individual is unreasonably searched or seized in violation of the Fourth Amendment, the well-settled and long-standing remedy for the violation is suppression of the ill-gotten evidence under the "exclusionary rule." *Mapp v. Ohio*, 367 U.S. 643 (1961). Notably, in *Hoyer v. State*, 180 Wis. 407, 193 N.W.2d 89 (1923), the Wisconsin Constitution countenanced an exclusionary remedy in the face of an unconstitutional search or seizure thirty-eight years *prior to* the U.S. Supreme Court's *Mapp* decision. The seemingly prescient Wisconsin Constitutional protections are afforded to protect personal privacy, preserve judicial integrity, and deter police misconduct. *Conrad v. State*, 63 Wis. 2d 616, 635, 218 N.W.2d 252 (1974).

Not only are the direct products of an illegal search or seizure excluded from evidence, but the indirect or secondary products of a Fourth Amendment violation are excluded as well in order to prevent police exploitation of such violations. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991). In what has famously become known as the "fruit of the poisonous tree" doctrine, evidence which comes to light as a result of exploiting the benefit of an unconstitutional initial search or seizure must be suppressed as well because the taint from the initial violation flows downstream to all of the subsequently gathered evidence. *State v. Schneidewind*, 47

Wis. 2d 110, 118, 176 N.W.2d 303 (1970); *Anderson*, 165 Wis. 2d 441; *see also*, *Browne v. State*, 24 Wis. 2d 491, 129 N.W.2d 175 (1964); *State ex rel. White Simpson*, 28 Wis. 2d 590, 594, 137 N.W.2d 391 (1965).

CONCLUSION

Mr. Bentz has established, *supra*, that the precise moment of a constitutionally cognizable—and therefore protected—encounter in this case occurred at the moment the arresting officers simultaneously arrived in uniforms and marked squad cars to *investigate* Mr. Bentz' allegedly "suspicious" driving. Because Mr. Bentz alleges that this detention occurred without a reasonable suspicion to detain him, he respectfully requests that this Court issue an order vacating the judgment entered against him and suppressing for use as evidence any and all statements taken from the him at the scene of his detention and arrest; any and all observations made of him at the scene of his detention and arrest; any and all physical test results taken from him after his detention and arrest; and any other evidence procured by the State of Wisconsin following his detention.

Dated this _____ day of October, 2017.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 7,168 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, 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 and appendix 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 6, 2017. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of October, 2017.

MELOWSKI & ASSOCIATES, LLC

_____

Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP1436-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ROBERT L. BENTZ,

Defendant-Appellant.

APPENDIX

Table of Contents