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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

A COGNIZBLE SEIZURE FOR FOURTH AMENDMENT PURPOSES OCCURRED PRIOR TO MR. BENTZ BEING ASKED TO PERFORM FIELD SOBRIETY TESTS.

The State asserts in its Brief several justifications for proposing that Mr. Bentz was not seized for Fourth Amendment purposes until he was asked to perform field sobriety tests. State's Brief at 10, *et seq*. As discussed below, each of these reasons fails to "push back" the moment of Mr. Bentz' seizure from the officer's initial contact to the time of field sobriety testing.

As an initial justification for considering that Mr. Bentz was not seized at the moment of first contact, the State argues that because Mr. Bentz was "not the product of a traffic stop" wherein Mr. Bentz had been in motion, but one in which the officer was "on foot," Mr. Bentz could not have been detained because "[t]here was no infringement" on his freedom of movement. State's Brief at 10. It has long been settled that simply because an officer or a subject is on foot does not mean that the Fourth Amendment is not implicated. *See*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968). It cannot be gainsaid that if Mr. Bentz, at the moment of the officer's approach, had tried to walk away, he would have been stopped. To suggest otherwise is patently absurd because it ignores every one of the facts the State took such great pains to identify in its lengthy Statement of Facts as *justification* for the arresting officer's *investigation*. Were this not a case in which the circumstances of Mr. Bentz' being parked in a private driveway were under investigation, the details offered by the State in its brief would be surplusage.

Second, the State proffers that there was no "show of . . . authority" from the officers approaching Mr. Bentz. State's Brief at 11. This suggestion likewise ignores the reality of the situation. The mere fact that a uniformed, firearm-carrying officer has alighted from a marked squad car—regardless of how far away it may be parked, it is still visible—and walked over to speak with Mr. Bentz is itself a "show of authority." This case does not

present a set of circumstances in which an officer is strolling down a sidewalk in midday and passes Mr. Bentz while offering a "Good day" or "Hello." This is 2:17 in the morning—a time when every citizen is aware police officers are out *patrolling* and not engaging in community relations—which obviously lends itself to the notion that law enforcement is afoot on third shift to protect the community while it slumbers.

A third and patently unbelievable point the State attempts to make is that the second officer's arrival on the scene "was more innocuous" than the first. *Id*. That this suggestion is ludicrous is perhaps best demonstrated with a rhetorical question: Was Mr. Bentz to assume that a back-up officer stopped at the scene so that there could be three for tea instead of two? It should be obvious to anyone that the more officers who are called to a scene or location, the more serious the situation. If this was a "simple encounter," there would be no need for a back-up officer. It is the number of officers present which is telling in this case, and not whether they "approached on foot without displaying or handling a firearm." *Id*.

Yet another wolf-in-sheep's clothing the State offers as an argument for suggesting there was no detention in this case when Mr. Bentz was approached by multiple officers is that the officer's tone was not "aggressive, hostile, or threatening." *Id*. The State should recognize, and this Court acknowledge, that if the officer's approach had been with an aggressive, hostile, or threating tone, the officers would have been engaging in bad policing. Part of a law enforcement officer's job is to *diffuse* situations and/or keep situations from escalating. This is certainly not accomplished by rushing into those situations with aggressive or hostile tones. The "verbal judo" which law enforcement trainees learn when earning their degrees teaches them to be *authoritative* with their tone. Thus, the absence of the tone described by the State is again of no help to its cause.

The State further "shoots itself in the foot" when, as part of the same argument, it admits that the officer was *questioning* Mr. Bentz regarding his "whereabouts, activities, and establishing a time line for those events." *Id*. If that argument is not an

expressed judicial admission that an investigatory detention *was* taking place, then it is at a minimum at least a tacit admission that an investigation was underway from which Mr. Bentz would not have been free to leave.

The State attempts to recover from the idea that an investigation is not indicative of a detention because "officers engage in [investigating] relative to all their police activities, ..." State's Brief at 12. What is overlooked by the State in the very terms it uses to make its argument is the adjective "police" as it modifies the word activities. Of the three levels of encounter recognized by law, the "simple encounter" is the only one which does not implicate the Fourth Amendment because in the simple encounter, the law enforcement officer is *not* "policing." In the other two levels of encounter, namely the investigatory detention and the custodial arrest, active policing is afoot and therefore the Fourth Amendment is implicated. Contrary to the State's assertion, an officer is *not always* investigating as part and parcel of his or her job. The simple encounter of stopping to engage a citizen in a bit of public discourse regarding the weather does not involve "investigating" and therefore also does not involve the Fourth Amendment. When the officer, during the course of such an encounter, notices that the individual reeks of cannabinoids and then begins to *police* by asking questions of the individual as to where he or she has been, what s/he was doing there, why s/he smells of marijuana, *etc*., the simple encounter is transmuted into an investigatory detention.

When the State argues that officers always engage in investigation relative to their *police* activities, Mr. Bentz agrees. Contrary to the State's assumption that this makes any initial encounter free from Fourth Amendment scrutiny, Mr. Bentz disagrees once it is determined that the investigative attitude of law enforcement officers is part and parcel of their *police* activities and not part of their concern about whether it will rain tomorrow or the Packers will win.

The remainder of the State's Brief regarding whether a reasonable suspicion to detain Mr. Bentz existed, and then whether probable cause to arrest was subsequently developed, is adequately addressed by the arguments Mr. Bentz set forth in his initial brief without further repeating them here.

CONCLUSION

For the aforesaid reasons, Mr. Bentz proffers that the State has provided no justification for this Court to conclude that the initial encounter he had with law enforcement officers in this case was anything other than investigatory detention, and he respectfully requests that this Court find accordingly as well.

Dated this _____ day of November, 2017.

Respectfully submitted:

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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 1,181 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 November 21st, 2017. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this _____ day of November, 2017.

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