STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP002000 CR
Milwaukee Circuit Court Case No. 16CT000525

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MISTY D. DONOUGH,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPELLANT, MISTY D. DONOUGH'S
BRIEF OF
A FINAL ORDER OF THE
CIRCUIT COURT FOR MILWAUKEE
COUNTY,
JUDGE MICHELLE ACKERMAN HAVAS

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WHETHER AN OFFICER, AFTER CONCLUDING AN ASSIST TO A DISABLED MOTORIST'S VEHICLE, WHICH INCLUDED:

- **SPEAKING TO THE MOTORIST MORE THAN ONCE,**
- **LISTENING AS THE MOTORIST CALLED FOR A TOW TRUCK,**
- **INSTRUCTING THE MOTORIST TO STEER HER VEHICLE THROUGH A CONTROLLED INTERSECTION WHILE THE OFFICER PUSHED THE VEHICLE WITH THE SQUAD CAR,**
- **WATCHED AS THE MOTORIST PERFECTLY PERFORMED THE OFFICER'S INSTRUCTIONS ON EXACTLY WHERE TO PARK HER DISABLED VEHICLE OUT OF TRAFFIC,**
- **AND THEN WISHING THE MOTORIST TO "HAVE A GOOD ONE" BEFORE RETURNING TO THE SQUAD CAR;**

MAY LATER RE-APPROACH THE VEHICLE AND ASK THE MOTORIST TO PERFORM FIELD SOBRIETY TESTS BASED ONLY ON THE ODOR OF AN INTOXICANT EMANATING FROM THE INTERIOR OF THE VEHICLE WHERE THE MOTORIST'S PASSENGER ALSO SAT THROUGHOUT THE DURATION OF THE OFFICER'S ASSISTANCE?

TRIAL COURT ANSWERED: YES

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Appellant submits that although the legal issues are clearly set forth in the brief, and the factual situation is adequately presented in the statement of facts, oral argument may serve to clarify and perhaps answer any additional questions the Court might have after reviewing the record and the brief.

Given that the present case is very fact specific it would be of little precedential value and thus publication is not being requested.

STATEMENT OF THE CASE

On March 10, 2016, the Defendant-Appellant, Misty D. Donough, was charged in a criminal complaint alleging 2 Counts. The first count was Operating a Motor Vehicle While Intoxicated- 2nd Offense, and the second count, was Operating with a Prohibited Alcohol Concentration above a .08% or more- 2nd Offense. (R-1)

The Complaint was filed on March 13, 2016 and Ms. Donough made her initial appearance on March 18, 2016. The case was initially tabbed to Circuit Court Judge Cynthia M. Davis. On April 8, 2016 a pretrial conference was held, discovery was received, and an offer extended by the State.

After review of the discovery, including the video footage of the interaction between the Defendant and the Officer, the Defense decided to draft a suppression motion. On June 2, 2016, the defendant by counsel filed her Motion to Suppress for Lack of Reasonable Suspicion to further detain and request the Defendant to perform Field Sobriety Tests. The State filed their response to Defendant's motion on June 14, 2016. It is this motion that is now the subject of the Defendant-Appellant's appeal.

On August 1, 2016 there was a judicial rotation and the case was transferred to Circuit Court Judge Michael J. Hanrahan. The case was then scheduled for a hearing on the motion for September 16, 2016. At that time testimony was taken from the arresting Officer, Jennifer

Moldenhauer, and both the State and Defense were given the opportunity of a full evidentiary hearing. (R-24)

At the conclusion of the hearing both sides argued their respective positions for the Court's consideration. In an oral ruling, the Court rendered its decision on that same date denying the Defendant-Appellant's motion.

Subsequently, on January 4, 2017, the Appellant with counsel, and having preserved the issue for appeal, entered a plea to Count 1 of the Criminal Complaint-Operating While Intoxicated 2nd Offense. Count 2 was dismissed by the Court by operation of law.

The Court rescheduled the matter for sentencing to take place on April 11, 2017. However, on April 10, 2017 the matter was yet again judicially transferred to Circuit Court Judge Michelle A. Havas.

Sentencing proceeded on April 11, 2017 and the Appellant, Ms. Donough, was ordered to serve 50 days in the House of Corrections with Huber privileges for work and treatment. Additionally, the Court ordered a 16-month driver's license revocation, and ignition interlock, AODA assessment, and a fine of $350 plus costs. (R-17)

Counsel for the Appellant moved the Court to stay the sentence pending appeal, which the Court granted orally on the record. Subsequently, the Judgement of Conviction was entered on April 14, 2017.

On April 25, 2017 the Court signed and filed the written order staying the above sentence pending appeal and on that same date Counsel filed the Notice of Intent to Seek Post-Conviction Relief. (R-18,19)

STATEMENT OF THE FACTS

Monday, February 15, 2016, at 1:33 p.m., Misty Donough and her passenger, Jennifer Teuscher, were coming from downtown Milwaukee, heading south on I-43/94, when Ms. Donough's vehicle became disabled on the southbound I-43 Howard Avenue off-ramp.

A Milwaukee County Sheriff's deputy, Jennifer Moldenhauer, and her training officer, was positioned on patrol a short distance away at the southbound I-43 Howard Avenue on-ramp. Upon Moldenhauer, and her training officer, seeing the vehicle disabled on the off-ramp near the controlled intersection; they proceeded to drive over the median and position the squad behind Ms. Donough's vehicle.

The squad video reveals that Ms. Donough exited her vehicle and was standing outside the driver's door on her cellphone. As the Deputy approached Ms. Donough, she spoke directly to Donough- face to face as Donough spoke on her cellphone to a towing company about her vehicle. At one point, they spoke outside the vehicle and minutes later while Donough sat in the vehicle, the deputy spoke to Donough while she (the deputy) held the door open by leaning on it with her arm.

While the deputy rested her arm on the open door of Ms. Donough's vehicle, she gave Donough directions to put the car in neutral, so the deputies could use their vehicle to push her out of the intersection and traffic.

Specifically, the deputy instructed Donough to turn left onto Howard Ave. and then right onto 5th Street. While this discussion was taking place, the video clearly captures Ms. Donough's speech and her replies to Deputy Moldenhauer's instructions. No slurred speech can be detected, nor does Deputy Moldenhauer make any comment to her training deputy about Donough having slurred speech, glassy or blood shot eyes, or smelling of alcohol.

All the while this conversation is taking place between Donough and the deputy; Donough's passenger- Jennifer Teuscher, exits the vehicle from her passenger side door on two occasions, despite the deputy's instruction for her to stay in the vehicle. Additionally, the video shows Ms. Teuscher exhibiting difficulty in exiting and walking around the vehicle.

Deputy Moldenhauer then goes back to her squad car where the training deputy then begins to instruct Moldenhauer on how to slowly move the squad car up to the bumper of Ms. Donough's vehicle, and how to slowly push the vehicle through the intersection.

The video reveals that Ms. Donough followed all of Deputy Moldenhauer's instructions. As the deputies began to push her vehicle,

Donough made the left turn onto Howard Avenue, turned right onto 5th Street and parked her vehicle appropriately and without incident next to the curb on 5th Street, all the while the vehicle was disabled and without power steering.

Conversation is caught on audio between the two deputies while pushing Ms. Donough's vehicle. They both comment on the passenger as appearing to be intoxicated. It is not until that conversation takes place that Deputy Moldenhauer then says she thinks she smells alcohol and wants to talk further with Ms. Donough.

When Deputy Moldenhauer approaches Ms. Donough, now for the third time, she asks for her driver's license and proof of insurance. In doing so, the deputy opens the driver's side door and puts her head into the vehicle over the steering wheel. Ms. Donough provides her license and insurance information to the deputy without difficulty.

However, by this time, it must be noted the Appellant's passenger has been sitting in the vehicle for 11 minutes and 37 seconds with the windows up and the car off.

Deputy Moldenhauer reports back to her training deputy that now she believes she smells an odor of alcohol. The training deputy suggests that she then goes back to Donough's vehicle and ask, "Who was driving when the vehicle stopped." As Donough replies that she was driving, the deputy asks her to step out to do some field sobriety tests.

ARGUMENT

WHETHER AN OFFICER, AFTER CONCLUDING AN ASSIST TO A DISABLED MOTORIST'S VEHICLE, WHICH INCLUDED:

- **SPEAKING TO THE MOTORIST MORE THAN ONCE,**
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The legal analysis of this case falls within that murky blend between an officer's duties acting in the capacity of a community caretaker function versus a law enforcement investigator.

There is no dispute over the fact that this officer came upon the Appellant, Donough, acting in the capacity of a community caretaker function to assist her with her disabled vehicle on an off ramp of the interstate. Thus, that initial encounter while police assistance is taking place is not one within a stop and/or seizure under the 4th amendment.

However, at one point the encounter with law enforcement for Ms. Donough, which originated outside the bounds of the 4th Amendment, took a turn to the protections afforded by 4th Amendment standards.

> "The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution offer protection against unreasonable searches and seizures.[3] " 'The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.'" *Popke,* 317 Wis.2d 118, ¶ 11 (quoted source omitted). Therefore, the "stop must not be unreasonable under the circumstances." *Id.* A traffic stop is reasonable if supported by reasonable suspicion that a traffic violation has been or will be committed. ***State v. Houghton,***2015 WI 79, ¶ 30, —— Wis.2d ——, —— N.W.2d ——–."
>
> "[O]nce stopped, the driver may be asked questions reasonably related to the nature of the stop...." ***State v. Betow,*** 226 Wis.2d 90, 93, 593 N.W.2d 499 (Ct.App.1999). "If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended, and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria as the initial stop." *Id.* at 94–95."
>
> "The question of what constitutes reasonableness is a common-sense test. What would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Waldner,*** 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996) (citations omitted). "The reasonableness of a stop is determined based on the totality of the facts and circumstances." ***State v. Post,*** 2007 WI 60, ¶ 13, 301 Wis.2d 1, 733 N.W.2d 634."

The totality of the facts and circumstances consist of that,

> "which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended, and a new investigation begun." ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999); *see also* ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. ***State v. Meye***, No. 2010AP336-CR, unpublished slip op. (WI App July 14, 2010)."

> "Whether police conduct violated this constitutional guarantee is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. This Court reviews the circuit court's findings of historical or evidentiary facts under a clearly erroneous standard, but the circuit court's determination of constitutional fact is reviewed de novo. ***State v. Sisk***, 2001 WI App 182, ¶7, 247 Wis. 2d 443, 634 N.W.2d 877; ***State v. Hajicek***, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781."

> "A law enforcement officer may stop a vehicle when he or she reasonably believes the driver is violating, or has violated, a traffic law. *E.g.* ***State v. Hogan***, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124; ***State v. Betow***, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). A law enforcement officer may extend the stop if he or she becomes aware of additional factors which "give rise to an articulable suspicion that the person has committed or is committing an offense or offenses" separate from the violation that prompted the officer's initial investigation. ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoting ***Betow***, 226 Wis. 2d at 94-95). This extended inquiry must be supported by reasonable suspicion. ***Hogan***, 364 Wis. 2d 167."

> "A determination of whether an officer had reasonable suspicion depends on the totality of the circumstances. ***Id.***, ¶36. It is a "common sense test: under all the facts and circumstances present[ed], what would

a reasonable police officer reasonably suspect in light of his or her training and experience." ***Colstad***, 260 Wis. 2d 406, ¶8 (quoting ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997)). "Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion." ***Hogan***, 364 Wis. 2d 167, ¶36.

In ***State v. Swanson***, the Court was specific in its analysis and indicated,

"the odor of intoxicants from Laufenberg's breath, ... is not enough to constitute "reasonable suspicion". ***State v. Swanson***, 164 Wis.2d 437, 453 n. 6, 475 N.W.2d 148, 155 (1991). In ***Swanson***, the Supreme Court cited three indicia of defendant's behavior which justified a reasonable suspicion that the defendant was operating under the influence of an intoxicant: first, erratic driving; second, the odor of intoxicants; and third, the approximate time of the incident. Id. The court said: "Taken together, these indicia form a basis for a reasonable suspicion that Swanson was driving while intoxicated." Id. (emphasis added). See ***State v. Seibel***, 163 Wis.2d 164, 183, 471 N.W.2d 226, 235 (1991), where we held that similar factors add up to a reasonable suspicion but not probable cause."

Furthermore, drinking and driving are not unlawful. Not only does this reality exist in the pattern jury instruction - *"not every person who has consumed an alcoholic beverage is 'under the influence' as that term is used here,"* ***WIS JI-CRIMINAL****, no. 2663* – but it is clear in the terminology of the statute itself. Wisconsin has not prohibited driving after consuming intoxicants.

Unlike ***Swanson*** and ***Seibel***, in this case the video exhibit (Exhibit 2) clearly shows that this Deputy had ample time to not only converse with Donough, but examine her speech patterns, gait and ability to multi-task while on the phone. Additionally, this deputy certainly felt Donough was capable of handling her motor vehicle to instruct her to guide the vehicle in neutral two blocks away from where the vehicle was found disabled. The time of day in the afternoon certainly lent daylight clarity to take a good look at Ms. Donough. Equally, the afternoon hours do not lend an additional clue to tack onto reasonable suspicion.

At one point, the Deputy testified she was not in a position close enough to Ms. Donough to smell the odor of intoxicants and that's why she wanted to go back and speak again to Ms. Donough. However, likewise the deputy also testified that she was face to face with Ms. Donough and did not detect an odor of intoxicants. (App. 107 P. 15)

"Reasonable suspicion" in all cases develop upon meeting the driver, whether the stop was under an investigative law enforcement - 4th Am protected stop, or an encounter under a community caretake function. When one approaches a vehicle and its driver, an immediate initial assessment is made about the driver and the circumstances, whether you're a police officer, a tow truck driver, or a citizen helping another citizen. As a police officer, the greater the experience, the easier to make a more accurate assessment. But this was this officer's first OWI case.

It is disingenuous for the deputy to later type a report stating that a Strong odor of intoxicants were present, glassy eyes and slurred speech. If this Deputy truly smelled an intoxicant coming from Donough's breath and saw glassy eyes- it would have happened 1 of the first 2 times they spoke. As Deputy Moldenhauer's first OWI stop, she is with a training officer. That training officer did not step out of the squad to meet Ms. Donough. (App. 108, R- 24, pps. 29-32).

It simply is not credible after speaking with Ms. Donough and asking her to perform additional tasks in the operation, control and handling of her vehicle to then claim an odor of intoxicant is present therefore reasonable suspicion is present to request field sobriety tests.

Furthermore, if any of that really existed as claimed by the officer- hopefully that deputy would notice that prior to allow Donough back behind the wheel; let alone use her squad car to push Donough through the intersection. That would be putting the community at risk, especially since it is much more difficult to maneuver a vehicle when the power steering and power brakes are no longer functioning.

At no time was there a suggestion by these deputies of Ms. Donough not having complete control over the situation. In fact, we submit the thought didn't enter their minds until they saw the passenger exit the vehicle.

This case simply does not involve any impaired driving or common indicia of intoxication. To say that an odor of intoxicant was

present, and the driver's eyes appear glassy after 13 minutes of talking, walking and driving at the instruction of the deputy, does not fit within the standards demanded by Wisconsin statutes or case law.

We know from the video those facts did not exist nor were apparent at the time the deputies were involved in a community caretaker function. The standard is based upon the totality of the circumstances. And the circumstances here do not add up to reasonable suspicion to request field sobriety testing without something more; especially given that the community caretaker function, (i.e. basis for the contact), concluded and the officer wished Ms. Donough, "to have a good one." Thus, concluding the function for which contact was made to begin with between the driver and officer.

At that point under ordinary circumstances the driver would be free to leave and drive away. However, since Ms. Donough's vehicle was disabled she couldn't just drive away. Had Ms. Donough's vehicle not been disabled and she then left the scene, the officers would have to find reasonable suspicion to constitutionally conduct a stop. We know from all prior case law that the odor of intoxicant is insufficient.

If the facts and circumstances of this case were such that the officer testified she became suspicious when seeing the exiting passenger stumble, appearing unsteady walking and at the time noted her inability to follow instructions - as the basis to investigate further as to whether the

driver might be impaired- then perhaps sufficient factors may be said to have existed for reasonable suspicion. (App. 112, R-24, pp. 35-48)

But then it should have been further investigated at that time- prior to making her maneuver her vehicle through a controlled intersection. And even then, the proper method would have been to isolate the driver and make that determination as opposed to just smelling the interior of the vehicle.

These are the kinds of additional factors which give rise to valid reasonable suspicion as outlined in the ***Truax*** case. In ***State v. Truax***, 2009 WI App 60, 767 N.W.2d 369 (2009), the Court reiterates what a community caretaker function is and the 3 criteria to make that determination. Although there is no dispute in Ms. Donough's case that the officer was acting in the capacity of a community caretaker function, the question is whether after concluding that function and based only on an odor of alcohol- is that sufficient reasonable suspicion to further detain Ms. Donough.

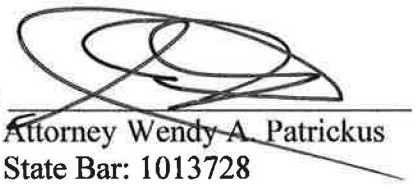
CONCLUSION

In sum, two facets of this case are in issue. First, an odor of alcohol in the interior of a vehicle, and later reporting after prompting that Ms. Donough's eyes were glassy, is simply not sufficient for reasonable suspicion of being "under the influence." This is especially true in light of all the multi-tasking- calling a tow truck, speaking to the Deputy, and manipulating the controls of the vehicle without power

steering or brakes, through a controlled intersection and parking perfectly next to the curb where the deputy instructed.

Secondly, after the deputy concluded the community caretaker function and essentially sent Ms. Donough on her way, there is no reason for additional contact. However, the deputy then extends the contact beyond that which is necessary. In the video exhibit it is audible that the training officer suggests Deputy Moldenhauer make up something to ask Ms. Donough so she can go back and talk to her again. We submit that had Donough's vehicle not been disabled she would have left the scene and the deputies would've had to find reasonable suspicion if they wanted to effectuate a stop of her. Since we already know that just an odor of alcohol is not enough, and nothing further occurred in that original encounter to suggest intoxication, something new would have to be found before a stop would be reasonable. Thus, the trial court's decision must be overturned.

Respectfully Submitted, this 9th day of February 2018.

By: 
Attorney Wendy A. Patrickus
State Bar: 1013728

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s 809.19(8) (b) and (c) for a brief and appendix produced with proportional font. The length of this brief is 3688 words from Statement of the Case through Conclusion without counting Certifications.

By: _____

Wendy A. Patrickus
Attorney for the Defendant-Appellant
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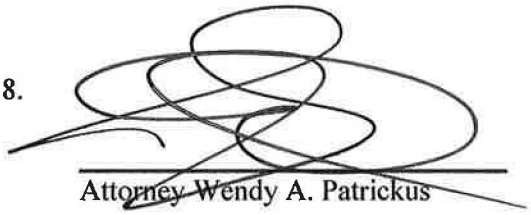
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of the brief-in-chief and appendix in ***State of Wisconsin v. Misty Donough***, Appeal No. 2017AP002000CR, which complies with the requirements of s. 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 9th day of February 2018.



Attorney Wendy A. Patrickus

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if that 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, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of February 2018.

By: _____
Attorney Wendy A. Patrickus