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COURT OF APPEALS

DISTRICT II

Appeal No. 2017AP002236

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

Calumet County  
Case No: 2016-CF-226

**NICHOLAS C. WEGNER,**

Defendant-Appellant.

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BRIEF OF DEFENDANT – APPELLANT

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APPEAL FROM THE CIRCUIT COURT FOR CALUMET COUNTY  
THE HONORABLE JEFFERY S. FROEHLICH PRESIDING

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JOHN MILLER CARROLL LAW OFFICE  
Attorney for Defendant – Appellant

John Miller Carroll  
State Bar. No. 1010478

226 S. State St.  
Appleton WI 54911  
(920) 734-4878

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## **ISSUES PRESENTED FOR REVIEW**

Did the trial court err in denying the Defendants Motion to Suppress?

Trial Court: No

The Appellant answers: Yes

In Wisconsin does a driver forfeit the right of way when in a roundabout at a speed above the posted signage?

Trial Court Answered: No

The Appellant Answers: Yes

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is requested so that both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is suggested in order to give needed guidance to the bench and bar in this state as to the interpretation of Wisconsin Statute §346.18(1) and the affect violating the speed posted before a roundabout.

### STATEMENT OF CASE:

On Tuesday, December 13, 2016, at HWY 10 near HWY 55, in the Village of Harrison, Calumet County, Wisconsin, the Defendants vehicle was seized for “failing to yield the right of way” to Deputy Coleman of the Calumet County Sheriff’s Department. (R. 1)

On May 5<sup>th</sup> 2017 the Defendant through counsel filed a motion for suppression challenging the reasonable suspicion to seize the defendant.

On July 6<sup>th</sup>, 2017 a Motion hearing was conducted where after taking testimony and hearing argument, the Court ultimately denied the Defendants motions.

On July 12<sup>th</sup>, 2017 the Defendant through counsel filed his motion for reconsideration, highlighting the acceleration of Deputy Coleman through the round a about and the violation of the posted speed when entering the round a bout in question as well as the application of these facts under Wisconsin Statute §346.18(1). Specifically the Defense challenged that **The operator of any vehicle driving at an unlawful speed forfeits any right-of-way** in a roundabout.

On August 31<sup>st</sup> , 2017 the Defendants motion for reconsideration was denied. This appeal follows.

### **STATEMENT OF THE FACTS:**

On Tuesday, December 13, 2016, at HWY 10 near HWY 55, in the Village of Harrison, Calumet County, Wisconsin, the Defendants vehicle was seized for “failing to yield the right of way” to Deputy Coleman of the Calumet County Sheriff’s Department. (R. 1)

On July 6<sup>th</sup>, 2017 Deputy Coleman testified that as he approached the intersection in question he was going 32 miles an hour. (R. 63; 17) Similarly the Deputy testified that as he navigated the roundabout he did not brake but rather increased his speed (R. 63; 17-18)

The Court ultimately found that although the Deputy was violating the posted signage he was not driving imprudent or too fast for conditions and denied the Defendants motion. (R. 65; 6)

### **STANDARD OF REVIEW**

“The temporary detention of individuals during the stop of an automobile by the police constitutes a seizure within the meaning of the Fourth Amendment. State v. Popke, 2009 WI 37, ¶ 11, 317 Wis.2d 118, 765 N.W.2d 569. Whether an officer has probable cause or reasonable suspicion to make an investigatory stop presents a question of constitutional fact.

Id., ¶ 10. As such, we will uphold the circuit court's findings of historical fact unless clearly erroneous; however, we review de novo the application of constitutional principles to these historical facts. See id.

When an officer is acting upon an observation of a traffic violation committed in his or her presence and is not acting upon a suspicion warranting further investigation, the appropriate test is whether the officer had probable cause to believe that a law has been broken. *State v. Longcore*, 226 Wis.2d 1, 8–9, 594 N.W.2d 412 (Ct.App.1999), *aff'd* by an equally divided court, 2000 WI 23, 233 Wis.2d 278, 607 N.W.2d 620. Because Deputy Coleman stopped Wegner's vehicle based on his belief that Wegner had committed a traffic violation, the question is whether the facts observed by Deputy Coleman constituted probable cause that Wegner violated Wis. Stat. § 346.18(1). *Cty. of Sheboygan v. Lane*, 2011 WI App 244, ¶ 5, 332 Wis. 2d 318, 797 N.W.2d 935, (Cited for Persuasive value only)

## **ARGUMENT**

### *THE CIRCUIT COURT ERRD IN ITS APPLICATION OF WISCONSIN STATUTE §346.18 (1)*

1. On Tuesday, December 13, 2016, at HWY 10 near HWY 55, in the Village of Harrison, Calumet County, Wisconsin, the Defendants vehicle was seized for “failing to yield the right of way” to Deputy Coleman of the Calumet County Sheriff’s Department. (R. 1)
2. On May 5th 2017 the Defendant through counsel filed a motion for suppression challenging the cause to seize the defendant.
3. On July 6th, 2017 a Motion hearing was conducted where after taking testimony and hearing argument, the Court ultimately denied the Defendants motions.
4. On July 12th, 2017 the Defendant through counsel filed his motion for reconsideration, highlighting the acceleration of Deputy Coleman through the round a about and the violation of the posted speed when entering the round a bout in question as well as the application of these facts under



Wisconsin Statute §346.18(1). Specifically the Defense challenged that The operator of any vehicle driving at an unlawful speed forfeits any right-of-way in a roundabout.

5. On August 31st , 2017 the Defendants motion for reconsideration was denied.
6. Although the Court found the Deputy to be exceeding the posted speed before the intersection in question he concluded that the speed traveled by the deputy was not imprudent or too fast for conditions and denied the Defendants motion. (R. 65; 6)
7. The Court applied the wrong standard of cause to the stop concluding: “and again, I mean, this is not a criminal violation where the court has to find beyond a reasonable doubt that there was a traffic violation here. “Its was there reasonable suspicion that the officer had at the time that he made these obeservations that there was a violation of §346.18”, the general rules of right-of-way, and reasonable suspicion is a fairly low standard.

8. Again, “When an officer is acting upon an observation of a traffic violation committed in his or her presence and is not acting upon a suspicion warranting further investigation, the appropriate test is whether the officer had probable cause to believe that a law has been broken.” *State v. Longcore*, 226 Wis.2d 1, 8–9, 594 N.W.2d 412 (Ct.App.1999), *aff’d by an equally divided court*, 2000 WI 23, 233 Wis.2d 278, 607 N.W.2d 620. Cty. of Sheboygan v. Lane, 2011 WI App 244, ¶ 6, 332 Wis. 2d 318, 797 N.W.2d 935 (Cited for Persuasive value only)

*In Wisconsin a driver forfeits the right of way when in a roundabout at a speed above the posted signage; therefore Deputy Coleman did not have probable cause to believe a traffic violation had been committed.*

9. Wisconsin Statute §346.18(1) General rule at intersections. Except as otherwise expressly provided in this section or in s. 346.19, 346.20, 346.215, or 346.46 (1), when 2 vehicles approach or enter an intersection at approximately the same time, the operator of the vehicle on the left shall yield the

right-of-way to the vehicle on the right. **The operator of any vehicle driving at an unlawful speed forfeits any right-of-way which he or she would otherwise have under this subsection.**

10. Deputy Coleman testified that he was going 18-20 miles an hour while in the roundabout at issue which has a sign posted indicating 15 m.p.h. (R. 63; 17-18) (R. 23)
11. Deputy Coleman testified he was increasing speed through the roundabout. (R. 63; 17-18)
12. The Defendant was seized for failing to yield the right of way to Deputy Coleman who under §346.18(1) forfeited the right of way.
13. “the “Rules for Driving Roundabouts” brochure issued by the Wisconsin Department of Transportation. *See Rules for Driving Roundabouts*, Wis.Dot, <http://www.dot.state.wi.us/safety/motorist/roaddesign/roundabouts/docs/rab-brochure.pdf> (last visited Jan. 8, 2011). According to the brochure, the **first step for driving a roundabout** is to “[s]low down”; the fifth

step is to “[k]eep your speed low within the roundabout.” *Id.* The DOT's Web site indicates that the smaller circle and sharper curves of modern roundabouts are **designed to slow traffic and that “[i]n urban settings, entering vehicles negotiate a curve sharp enough to slow speeds to about 15–20 mph**; in rural settings, entering vehicles may be held to somewhat higher speeds (25–30 mph).” *Roundabouts—Frequently asked questions*, Wis. Dot, <http://www.dot.wisconsin.gov/safety/motorist/roaddesign/roundabouts/faq.htm> (last visited Jan. 8, 2011). Wimmer testified that the speed limit sign preceding entry to the roundabout advises drivers to travel at fifteen miles per hour. Cty. of Sheboygan v. Lane, 2011 WI App 244, ¶ 9, 332 Wis. 2d 318, 797 N.W.2d 935 (Cited for persuasive value only)

14. Deputy Coleman seized the vehicle of the defendant for failing to yield the right of way (R. 63)
15. Deputy Coleman admits to exceeding the posted 15 mph signage and after the Defendant entered the roundabout admits to speeding up. (R. 63; 17-18)

16. The actions of the officer are nearly identical to the actions of the defendant in Cty. of Sheboygan v. Lane a 2011 Wisconsin Court of Appeals unpublished decision. There the Defendant in question was seized due to the fact that he violated the postage signage preceding a roundabout. There the Court upheld a suspicion of a traffic violation occurring for conduct of the defendant speeding through the roundabout. The conduct of the defendant in Cty. of Sheboygan v. Lane is very similar to that of the officer in the instant case. As such this court should find that prior to entering the roundabout at issue the officer committed a traffic violation in exceeding the speed plaques and therefore under §346.18(1) he forfeited the right-of-way. Further, this court should consider the actions of the officer in speeding up after the defendant entered the roundabout and find that there was not probable cause to conduct this seizure. Cty. of Sheboygan v. Lane, 2011 WI App 244, ¶ 9, 332 Wis. 2d 318, 797 N.W.2d 935 (Cited for persuasive value only)

WHEREFORE, the Defendant, by his attorney, respectfully requests that this Court overturns the Order of the Calumet County Circuit Court and remand the case with further instruction that due to the officers conduct the right-of-way was forfeited prior to the seizure of the defendant, as such there was not cause to seize the defendant.

DATED at Appleton, Wisconsin this 24th day of January, 2018.

Respectfully Submitted,

**JOHN MILLER CARROLL  
LAW OFFICE**

By: \_\_\_\_\_  
John Miller Carroll  
State Bar #0101047

PREPARED BY:  
John Miller Carroll Law Office  
226 S. State Street  
Appleton, WI 54911  
Phone: (920) 734-4878

## FORM AND LENGTH CERTIFICATION

I, John M. Carroll, 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 a proportional serif font. The length of this brief is 2,190 words.

Dated this 24<sup>th</sup> day of January, 2018.

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John Miller Carroll  
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 24<sup>th</sup> day of January, 2018.

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John Miller Carroll  
State Bar #01010478