

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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OF WISCONSIN**

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Appeal No. 2018AP000151  
Washington County Circuit Court Case Nos.2017CV353

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**CITY OF WEST BEND,**

Plaintiff-Respondent,

v.

**ERIK J. WILLE,**

Defendant-Appellant.

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**AN APPEAL FROM THE JUDGEMENT OF  
CONVICTION AND OF THE TRIAL COURT'S RULING  
DENYING THE DEFENDANT'S MOTION FOR  
SUPPRESSION OF EVIDENCE IN THE CIRCUIT  
COURT FOR WASHINGTON COUNTY, THE  
HONORABLE TODD K. MARTENS, PRESIDING**

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**THE REPLY BRIEF AND APPENDIX OF THE  
DEFENDANT-APPELLANT ERIK J. WILLE**

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## ARGUMENT

Contrary to City's argument, the issue is not whether there was an open can in the vehicle, but rather whether Officer Behagen possessed the requisite level of suspicion to believe that Mr. Wille violated Wis. Stat. §346.935(3).

Having an open can in a vehicle is not a traffic law violation. To establish a violation of the open intoxicant law under Wis. Stat. §346.935(3), there must be evidence that the bottle or receptacle contained alcoholic beverages or the seal had been broken or the contents of the receptacle had been partially removed or released. An empty, but opened, can would not justify a charge. (When Behagen contacted Mr. Wille, he observed empty beer cans at Mr. Wille's feet.). Specifically, here, the record does not establish sufficient specific, articulable facts necessary for a violation of Wis. Stat. §346.935(3). Furthermore, there were no reports of any potential indicia of impairment (poor driving, slurred speech, odor, etc.) which suggested that Mr. Wille might have been operating his vehicle while impaired. The citizen caller made no reference to any other fact that suggested potential impairment. Thus, Behagen would not have been justified in stopping Mr. Wille based on a

suspicion that he was operating a motor vehicle while impaired. Behagen had nothing more than a hunch here. A savvy hunch is not equivalent to the requisite level of suspicion that would have justified a Terry type temporary detention. *County of Grant v. Vogt*, 2014 WI 76, at ¶29, 356 Wis.2d 343, 850 N.W.2d 253 .

Because of the above, Officer Behagen did not have the requisite level of suspicion to believe that Mr. Wille was violating the open intoxicant law.

### CONCLUSION

The Court should vacate the Judgment of Conviction and reverse the lower's court's ruling denying Mr. Wille's motion for suppression of evidence.

Dated this 25<sup>th</sup> day of June, 2018.

Respectfully Submitted

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## FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 6 pages. The word count is 896.

Dated this 25<sup>th</sup> day of June, 2018.

Respectfully Submitted

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**CERTIFICATION OF COMPLIANCE WITH RULE  
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, 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 25<sup>th</sup> day of June, 2018.

Respectfully submitted,

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