STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2018AP000174-CR

State of Wisconsin

Plaintiff-Respondent,

v.

Brady R. Adams

Defendant-Appellant

On Appeal From A Judgment of the Circuit Court
For Forest County, Case No. 17-CM-68
Honorable Leon D. Stenz, Presiding

Brief of Appellant

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STATEMENT OF ISSUES PRESENTED

I. Was reasonable suspicion a s.347.39(1) violation occurred determined only upon prior records which were not in evidence at the suppression hearing?

Not answered by the Circuit Court.

II. Did the indecisive driving in the context of the time and location of the flight on foot by the fugitive constitute particularized facts that fugitive boarded that vehicle?

Answered "Yes" by the Circuit Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not necessary.

STATEMENT OF THE CASE

NATURE OF APPEAL

This is an appeal from the final judgment of the Circuit Court of Forest County, Hon. Leon D. Stenz, presiding, which entered a judgment of conviction for operating while intoxicated as a second offense and possession of a firearm while intoxicated. These are misdemeanor convictions obtained through a no contest plea entered with reservation of tights to appeal the suppression decision. s.971.31(10). If successful, the judgment of conviction must be reversed with directions to exclude all evidence obtained subsequent to initial activation of the overhead lights.

Mr. Adams will first show the sua sponte consideration of prior records did not constitute evidence of a muffler violation. With no evidence of any substandard driving or traffic infraction, the State must rely on a different basis to stop Adams.

The Circuit Court related the suspicious nature of Adams's driving to the vicinity of a search for a fugitive who fled law enforcement on foot. Reliance on a potential cell phone relationship between the fugitive and the Adams vehicle was a contributing factor to the presence of reasonable suspicion the fugitive was picked up by the Adams vehicle.

Adams obtained further records after the suppression hearing indicating the fugitive left his cell phone prior to fleeing. Upon reconsideration, the original ruling was maintained. The evidence in this case is essentially undisputed. Adams contends any relationship between his

driving and the search for the fugitive is speculative and not based upon specific and articulable facts as to him only.

SEARCH FOR FUGITIVE TYLAR STATEZNY

Dispatch received a call at 11:42:30 P.M. on March 3, 2017 from Deputy James Jezeski (31-2). Jezeski had been travelling southbound on Highway 55 (31-6). In the opposite direction a vehicle was travelling 72 mph in a 55 mph zone (31-2) Jezeski stopped the vehicle for speeding. A white male jumped out and ran into the woods as the vehicle was coming to a stop (31-2). The vehicle pulled over at the T-intersection of Highway 55 and County S.

There were originally four occupants, one of the passengers being Tylar Statezny (31-6,7). There was an outstanding arrest warrant for Tylar Statezny out of Forest County (31-2).

The T-intersection of State Highway 55 and County Road S is located in Section 11 on Page 16 of the Forest County Plat Book (13-4). Tylar Statezny started running towards the tree line (31-6). Front passenger Dustin Whitefish attempted to call Tylar, then handed Jezeski Tylar's cell phone left in the back seat. This cell phone was placed in evidence (31-9).

The description on file for Tylar was age 19, 185 pounds, height 5 foot 9 inches, white male, blonde hair, hazel eyes (31-4).

Jezeski radioed for assistance and Deputy Craig Justice and Officer Wilson responded (31-7). Jezeski was not involved in the search for Statezny. Later that day Jezeski advised Tylar's mother Tylar should turn himself in (31-10). Statezny would have entered the woods on the east

right of way of Highway 55.

Sergeant Darrell Wilson was unable to locate Statezny (31-11). Officer Ryan Wilson followed tracks in the snow heading north on the east side of Highway 55 (31-23). Deputy Jezeski advised the suspect was headed north in the ditch line going in and out of the woods (61-20:1-7). The weather was cloudy (6).

Officer Ryan Wilson searched a couple of houses without result (31-23). An unknown caller said a male was in the woods by the Doug Hayes house (31-23).

The Doug Hayes house in relation to the traffic stop would be about one mile up Highway 55 and then south on Airport Road. Airport Road is on the common boundary between pages 16 and 18 (13-4,5). At 12:30 A.M. March 4, 2017, Deputy William Hujet began his shift (31-12). It should be noted the correct spelling is Hujet, as the record contains a different spelling.

Upon joining the search of a wooded area between Hwy 55 and Airport Road Deputy Huject stopped a vehicle leaving Airport Road (31-12). Instead of Tylar Statezny this vehicle had a different fugitive, Harley Stands (31-12). Stands was taken to the Forest County Jail (31-2) and Deputy Hujet returned to continue the search (31-12). Stands was taken to jail by Deputy Craig Justice (31-23).

ADAMS VEHICLE STOP

Brady Adams was driving a 2006 white Chevrolet pickup. His description would be age 24, white male 6 foot 2 inches 200 pounds brown hair and blue eyes (6).

Adams was first spotted by Sergeant Wilson as Adams turned off of County S left onto Highway 55 (61-21:23). The Adams vehicle would have been travelling northeasterly from the same intersection where the Tylar Statezny vehicle

stop occurred. The exact time Adams reached that intersection is not in the record.

Deputy Hujet began following Adams on Highway 55 heading northeasterly toward Airport Road. (61-21:24-25). Adams turned south from Highway 55 on Airport Road (61-22:1-2). This is close to where the Doug Hayes house would be.

Hujet continued to follow Adams south on Airport Road past Lemke Road until Adams turned off east on Plank Road. The distance travelled on Airport Road is about 1 ½ miles (13-5). The distance in a straight line between the intersection of County S and Highway 55 and Plank Road is about 1 mile. Walking along Highway 55 to Lemke Road (1/4 mile) down Lemke Road to Airport Road (1 1/8 mile); down Airport Road to Plank Road (3/8 mile) is about 1 and ¾ miles (13-4,5).

Hujet drove south past Plank Road but kept watching in the rear view mirror. The brake lights went on, and Adams backed onto Airport Road. Adams then turned around and drove north on Airport Road (61-22:25-23:5).

Deputy Hujet considered where the vehicle stopped as significant. One side was wooded the other kind of open. **"They went to somebody's house or something like that. That's what really brought my attention to the vehicle."** (56-23:17-24).

Adams turned west on Lemke Road, which was returning toward the beginning of Statezny's flight (61-24:4-2). Hujet stopped the vehicle on Lemke Road 1300 feet west of Airport Road (6); and explained the vehicle was stopped for the reason maybe he was in the area to pick up the fugitive (61-24:16-20).

One reason Adams could be in a position to pick up Statezny was cell phone contact (61-23:11-15).

There were two occupants in the Adams vehicle. The passenger was a female (61-25:1-5), Bobbi Jo Lewis (21-1) and the driver, Brady Adams. Brady Adams had been drinking (61-25:9-12).

There was nothing wrong with Adams's driving (61-26:14-16). There was no other basis for the stop (61-27:21-22). The time of the stop was 1:16 A.M. (6).

THE INITIAL COURT PROCEEDINGS

The state filed a four count criminal complaint against Adams on April 18, 2017(5). He was charged with OWI 2d; BAC 2d; carrying a concealed weapon contrary to s.941.23(2); and possession of a firearm while intoxicated contrary to s.941.20(1)(b). Adams filed a suppression motion (12) alleging it was unreasonable to consider him a conspirator with the fleeing suspect (13-1). Adams further objected to a muffler violation as a substitute for reasonable suspicion based upon subjectivity and incomplete documentation (13-2).

Adams also moved to dismiss counts 3 and 4, the weapons charges (15). Without the pistol being concealed or loaded there was no violation as a matter of law (16).

The State subpoenaed Deputy James Jezeski for the suppression hearing (17), however he did not testify. Deputy William Hujet was subpoenaed (19) and he did testify. The defense subpoenaed the Forest County Sheriff seeking records of who the fleeing suspect was (18).

The Sheriff provided records in response to the subpoena (27-1). The next day defense counsel complained no records were furnished as to the incident involving the

unknown fugitive (27-5,8). The suppression hearing was scheduled for June 26, 2017. No further records were provided prior to the suppression hearing.

THE SUPPRESSION HEARING

The Court began consideration of the defense Fourth Amendment motion (61-15:7-9). The motion challenged the stop (61-16:5-6). Defense counsel pointed out a subpoena to the sheriff seeking records identifying the unknown fugitive was not complied with (61-15:10-16). The Court ruled the sought after records were unnecessary (61-17:22-23) (61-27:3-8). The defense request to make a record on that point was denied (61-18:2-4).

The State's only witness was Deputy Williams Hujet (61-18:5-7). Hujet was assisting a search for the person who fled (61-19:21-22).

When Deputy Hujet saw the Adams vehicle back onto Airport Road from Plank Road, his attention to the vehicle increased. Cell phones could enable the suspect to call the Adams vehicle and be picked up (61-23:9-24).

The reason for the stop, looking for a person that ran from a traffic stop, was the reason given to the driver for being stopped (61-24:16:20). The Deputy said **"I thought maybe he was in the area to pick up the person."**

Deputy Hujet confirmed there was nothing wrong with Mr. Adams's driving (61-26:14-16). Questioning by the Court as to any further basis for the stop would only be **"suspicious vehicle in the area"** (61-27:21-24).

The Court further questioned Hujet about a muffler, but the Deputy recalled nothing about a muffler (61-27:25-28:2).

Defense counsel continued to emphasize the records

provided by the Sheriff did not comply with the subpoena. An attempt to mark documents as an offer of proof was not allowed (61-28:11-31:1). The Court viewed the unobtained records as collateral and not relevant to impeaching credibility, however Deputy Hujet was recalled to the stand concerning the missing records(61-31:3-32:23).

Further testimony by Hujet indicated he did not recall the name of the suspect (61-33:12) and had no reason to review the records concerning that suspect (61-34:5). The reason for stopping Adams was to search for the person who ran (61-34:23-24), and it was possible Adams was a friend of the suspect and there to pick him up (61-34:25-35:4).

Defense counsel asked for a continuance to get records from the Sheriff, and the request for continuance was denied (61-36:5-37:7). The Court ruled the existence of a suspect was established to a degree further records on that point are irrelevant (61-38:17-39:11).

The State argued the stop was constitutional, relying heavily on the cell phone giving rise to a potential for the suspect to arrange being picked up (61-40:3-41:15). Defense counsel questioned how someone, at night through woods and swamps, could have found the exact location on Plank Road to be picked up (61-41:17-42:8), considering night navigation to Plank Road **"speculative"** (61-43:16-19).

The Court issued an oral ruling denying the motion (61-43:20-21). The suspect was in the vicinity of the Adams vehicle (61-45:3-9). Although a vehicle that backed up may appear lost, law enforcement had the right to freeze the situation to find out if the suspect was with Adams (61-10-46:4). Adams could have gotten a call to pick up the

suspect without actually knowing law enforcement was searching (61-46:15-19). The travel of the vehicle suggested it could have happened (61-46:19-21).

The oral decision concluded **"It's reasonable to conclude that he must have been there, and stopped the vehicle for a temporary moment to see if he was in the vehicle** …" (61-46:21-25).

THE RECONSIDERATION HEARING

Promptly after the suppression hearing defense counsel resubmitted the request for records (27-9-14). This records request was satisfied on June 29, 2017 (27-15). Certain aspects of these records explained the suspect was Tylar Statezny. Statezny had left his cell phone behind (27-2,3).

Adams moved for reconsideration, based upon newly discovered evidence Tylar Statezny did not have a cell phone (28). As to the Fourth Amendment significance of the cell phone, Adams filed a Florida decision exactly on point (30). The records obtained from the Sheriff concerning Tylar Statezny are in the record (31). The reconsideration hearing was scheduled for August 21, 2017 (58).

The additional records (31) would be admitted (58-11:3-4). The Court would not reconsider its previous decision for several reasons. Whether the suspect did, or did not, have a cell phone was deemed irrelevant (58-5:22). The reason for this position would be Deputy Hujet did not know the cell phone had already been placed in evidence (58-5:23-6:3).

The Court ruled a loud muffler was probable cause for the stop (58-6:8-11). Defense counsel pointed out the muffler issue was raised at the last hearing and law enforcement said it was not a problem (58-11:9-14).

The final additional issue, the relevance of the Florida decision, was discounted by the Court as not binding (58-8:22-9:2). The motion for reconsideration was denied (58-11:17). The new factor, the suspect not having a cell phone, is not material (58-13:5-8).

The Court maintained its position as follows: **"I think in this case there was reasonable suspicion to stop the vehicle based upon the testimony of the officer. He seen suspicious action, conduct by stopping in inappropriate places on the road and not heavily travelled. And that was consistent with someone trying to pick up an individual on the run."** (58-11:23-12:3).

SENTENCING

Sentencing took place November 11, 2017 (60). An accompanying traffic ticket case no. 17-TR-160 (60-2:3) was dismissed (60-2:24-25). Count Two, the PAC charge and Count Three, carrying a concealed weapon, were dismissed (60-2:16-18). Adams plead to Count One, OWI second at .12 BAC, and Count Four, possession of a firearm while intoxicated. Defendant was eligible for expunction on Count Four (60-2:7-23).

The sentence was five days in jail, 12 month license revocation plus one year IDD, alcohol assessment, and $1,629 fine. On Count Four, defendant was fined $1,083 (39).

The defense reserved its rights to appeal pursuant to s.971.31(10) (60-3:15-18) ,and moved for a stay pending appeal (60-13:12-14) which was denied (60-17:16-24) .

ARGUMENT

I. THE SUA SPONTE DETERMINATION OF REASONABLE SUSPICION OF A MUFFLER VIOLATION WAS NOT BASED UPON EVIDENCE AT THE SUPPRESSION HEARING OR WHICH CAN BE CONSIDERED ON APPEAL.

One basis upon which the Court denied suppression was a reasonable suspicion to stop the defendant for violating s.347.39(1). This issue was not raised by the State at the evidentiary hearing of June 26, 2017. Instead, the Court sua sponte asked Deputy Hujet about the muffler (61-27:25-28:2).

THE COURT: Okay. I saw something about a muffler, you don't recall that? A. I don't recall that.

No further reference to the muffler was made during that hearing. When suppression was denied the muffler was not mentioned in the decision.

During the reconsideration hearing of August 4, 2017 the Court expanded the basis to deny suppression to include the muffler. Again the Court raised the muffler issue sua sponte ruling as follows (58-6:7-11).

I also, there was some testimony - Or I don't know if it was testimony, but in the Complaint, maybe about a loud muffler, which may have been a traffic violation. And that alone is probable cause to stop much less reasonable suspicion.

At no time was any exhibit marked into evidence referring to the muffler, as pointed out by defense counsel (58-11:9-14).

Um, again, actually the muffler issue did come up at the last hearing. The Court asked about the muffler. Law enforcement didn't think it was a problem.

THE COURT: All right.

MR. KENNEDY: We will have to go back on the transcript bit that was brought up.

Consideration of a muffler violation was not based upon evidence at the suppression hearing. Normally reliance solely upon an unsworn police report, which was not moved into evidence, will not satisfy the State's burden at a suppression hearing. State v. Jiles, 262 Wis 2d 457, 478-479, 663 NW 2d 798, 2003 WI 66 ¶ 35, 40.

The record at the suppression hearing can be supplemented upon review only with records of the trial, preliminary hearing and search warrant applications. State v. Gaines, 197 Wis. 2d 102, 107 n1, 539 NW 2d 723 (Ct. App. 1995). Here the references in the record to the muffler did not come within Gaines.

Even if the entire record can be used to supplement the suppression hearing, the State still fails in its burden of proof of a muffler violation. These are the record references to comments by law enforcement about the muffler: probable cause statement (1-1); sworn aspect of the complaint (5-2); and unsworn police report attached to the complaint (5-5,9).

There is no evidence the muffler on the 2006 pickup Adams was driving had been modified since that muffler was originally installed. The only portion of the statute Adams could have violated would be s.347.39(1) which reads as follows:

347.39 Mufflers.

(1) No person shall operate on a highway any motor vehicle subject to registration unless such motor vehicle is equipped with an adequate muffler in constant operation

and properly maintained to prevent any excessive or unusual noise or annoying smoke. This subsection also applies to motor bicycles.

A comparison of noise levels must be made between the present muffler when originally legally installed on the pickup with the muffler noise level on the date of arrest. County of Jefferson v. Renz, 222 Wis. 2d 424, 436, 588 NW 2d 267 (Ct. App. 1988).

The record does not show this comparison was made. That crucial aspect will not be implied where the testifying officer does not even describe information on the muffler known by another officer. State v. Pickens 323 Wis.2d 226, 235, 779 NW2nd 1, 2010 WI App. 5 ¶ 13. Reasonable suspicion cannot be based on the record entries as officer Wilson must be qualified on the record to be able to distinguish excessive noise from the noise level of that muffler as originally legally installed. State v. Conaway, 323 Wis. 2d 250, 255-256, 779 NW 2d 182, 2010 WI App 7¶9-13. Knowledge of the original noise level of the muffler is required to be established on the record to be competent to allege a muffler violation.

Another basis to support a muffler violation would be if the defendant agreed the muffler was loud (5-9). County of Jefferson v. Renz, 222 Wis. 2d 424, 437, 588 NW 2d 267 (Ct. App. 1988). Had this issue been litigated at the suppression hearing it would have turned out Adams was handcuffed prior to discussion about the muffler. After he was under arrest for OWI 2d and handcuffed, Adams was entitled to a Miranda warning. State v. Pounds, 176 Wis 2d 315, 322, 500 NW 2d 373 (Ct. App. 1993).

No Miranda warnings were given; therefore the

discussion about the muffler must be suppressed. Id. The standard of review if there was reasonable suspicion of a violation of S.347.39(1) is a question of law since the background is undisputed. State v. Conaway, 323 Wis. 2d 250, 254, 779 NW 2d 182, 2010 WI App. 7¶5.

This stop cannot be predicated upon the violation of any other traffic regulation as there was nothing wrong with Adams's driving (61-26:14-16).

Q. Was there anything wrong with Mr. Adams driving before you stopped him?

A. Not that I recall.

The standard of review of a determination reasonable suspicion or probable cause exists (58-6:7-11) is a two step process. State v. Powers, 275 Wis.2d 456, 461-462, 685 NW 2d 869, 2004 WI. App. 143 ¶6. The finding of fact as to the muffler noise level is clear error since there was no evidence to support that finding. The suppression decision can be sustained if based upon special needs of law enforcement, rather than a Terry stop for traffic enforcement. State v. Scott, 378 Wis. 2d 578, 904 NW 2d 125, 2017 WI App 74 ¶16.

II. WITHOUT A GENERAL CHECKPOINT THE FOURTH AMENDMENT REQUIRES A PARTICULARIZED SUSPICION THIS MOTORIST, UNLIKE OTHERS, WAS THERE TO PICK UP STATENZY.

Had there been a checkpoint Adams could have been stopped. Id ¶20. There was no checkpoint in this case. When law enforcement stopped Adams, or any other vehicle, for the purpose of searching for Tylar Statezny, there must be reasonable suspicion Tylar Statezny was in the vehicle. State v. Williams, 258 Wis.2d 395, 404, 655 NW2d 462, 2002 WI. App. 306 ¶14.

The trial court observed the pickup truck could have appeared to have been lost. (61-45:10-12). This stop cannot be sustained as a community caretaker function, rather than for law enforcement purposes. United States v. Dunbar, 470 F Supp 704, 708 (D. Conn. 1979).

Adam's driving was not evaluated under community caretaker and instead was found to be **"suspicious action, conduct, by stopping in inappropriate places on the road not heavily traveled"** (58-11:25-12:1). What Adams did was turn off Airport Road east (left) onto Plank Road. He then used his brakes close enough to Airport Road Deputy Hujet saw those lights. Adams then backed up onto Airport Road. Then, he returned the same direction and turned west (left) onto Lemke Road and drove 1300 feet before being stopped.

Once the overhead lights are activated the motorist is seized. State v. Kramer, 311 Wis. 2d 468, 478, 750 NW2d 941, 2008 WI.App. 62 ¶22. The constitutionality of this stop must be determined only by facts which exist on or before the initial activation of the overhead lights.

There is nothing inappropriate about Adams's driving. This momentary deviation can be explained by being lost or changing direction. At a minimum, there must be knowledge of being scrutinized by law enforcement for suspicious driving to be motivated by a guilty mind. The events at night in this case do not support an inference the driver knew of the presence of law enforcement. State v. Fields, 239 Wis.2d 38, 44, 619 NW 2d 279, 2000 WI. App. 218 ¶14.

Driving can be suspicious to the point where there is ongoing criminal activity when the driver is unaware of law

enforcement. Id. ¶17. Whoever was driving the pickup could be considered a total stranger having no bona fide reason to be on Plank Road. The act of a stranger using a driveway to turn around, when previous driveways could have been used, was insufficient to constitute suspicious driving in United States v. Neff, 681 F3d 1134 (10th Cir. 2012).

In Neff, a drug ruse checkpoint in Kansas was placed beyond an exit on I-70 in Kansas. Neff used the exist, and later briefly used a private driveway to turn around. The Kansas State Patrol stopped Neff's vehicle in part because **"pulling into a driveway where I don't think the vehicle belonged."** Id. 1136. The District Court ruled as an alternative basis for the stop Neff " . . .**pulled into a private drive where it apparently had no legitimate business."** Id. 1137.

The Tenth Circuit reversed the denial of the suppression motion. As to one of the factors involving driveway use, the Tenth Circuit said ". . . **without some evidence Neff was even aware of the trooper's presence, his turning around in the driveway provides minimal support to justify the stop."** Id. 1142. The facts in Neff, involving a drug ruse checkpoint, impute a reason to evade the checkpoint for vehicles containing drugs. In the case at bar the scenario of randomly picking up Tylar Statezny at night, on Plank Road, is far less likely than some vehicles on I-70 having drugs and taking the exit.

The Tenth Circuit determined **"[t]he articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied."** Id. 1142.

The Tenth Circuit's conclusion evaluated the use of the driveway as **"contributed only marginally to reasonable suspicion."** Id. 1143. Overall in the Neff case, the Tenth Circuit concluded **"the facts presented here do not amount to a "particularized and objective basis for suspecting legal wrongdoing."** Id. 1143.

The Circuit Court ruled the need for particularized facts was satisfied through **"He was in the area where the guy could have been."** (61-45:4-5); **". . .he could have been picking up the person that was running from law enforcement."** (61-45:18-20); **"Could have gotten a call from somebody, come pick me up."** (61-46:15-17).

The reconsideration hearing, after taking into account the cell phone was already seized, addressed the cell phone issue as follows: **". . .he could have called with another phone or someone else could have called for him."** (58-12:5-6); **"It still is there is no information the officer who heard that knew that he didn't have a phone."** (58-6:1-3).

The relevance of the cell phone could be entirely discounted and the ruling remained the same: **"I don't know if they even had to call."** (58-12:11-12). The substitute method of contacting Statenzy is described as **"They could have been following the other vehicle and seen him run. They could have decided to circle around the other road to pick him up."** (58-12:8-10).

There were two occupants of the pickup truck before entering Plank Road, and two occupants left. Passenger Bobbi Jo Lewis cannot reasonably be thought to be the male suspect. State v. Newer, 306 Wis.2d 193, 198-199, 742 NW2d

923, 2007 WI.App. 236 ¶8-9. The stop can only be sustained through concepts of the temporal proximity and/or conspiracy between Adams and Statezny.

III. ANY PRIOR RELATIONSHIP BETWEEN ADMAS AND STATEZNY IS BASED UPON SHEER SPECULATION.

Reliance on temporal proximity, here one hour, 24 minutes and walking distance of one and three quarters miles, constitutes a fact upon which the Court based reasonable suspicion. Stopping any vehicle in the vicinity of criminal activity is the functional equivalent of a checkpoint. There still must be particular suspicion about the vehicle actually stopped. United States v. Bohman, 683 F3d 861, 865 (7th Cir. 2012).

The fact the officers were searching for someone with an arrest warrant is not a factor in determining reasonable suspicion. United States v. Hudson, 405 F3d. 425, 428 n1 (6th Cir. 2005). The **"bare hope"** of finding the suspect in the vehicle, Id. 439, is the same level of confidence Deputy Hujet had (61-24:20) **". . . maybe he was in the area to pick up the person."** This is a hunch, and not a particularized fact about this vehicle. Any vehicle stopping on Plank Road would have been stopped for the same reason. This is to broad a class of motorist to constitute particular, articulable facts on which to base reasonable suspicion. Id. 439.

Potential use of a cell phone was considered by the Florida decision provided by the defense. (30-6-9). On April 17, 2006 a decision was entered in the case of State of Florida v. Linda Quinn, Case No. CRC05-54-APANO, Circuit Court of the Sixth Judicial Circuit, Pinellas County. The

Florida Court was presented with a similar situation. A thief was fleeing on foot since 1:30AM and it appeared to law enforcement defendant was in the area to assist the suspect.

The deputy testified the only reason for the stop was that the suspect may have had a cell phone on him, had called the defendant, and the defendant was in the area to pick him up.

The Florida Court ordered suppression by concluding **"It is, however, pure speculation that the defendant was summoned via a cell phone by the suspect to assist in his escape. There is no evidence that the suspect had a cell phone or called anyone-let alone the defendant-asking them to drive to the area to assist on his escape from the police. The police had no information whatsoever to link the defendant with the suspect."** The suppression ruling cannot be sustained under the theory the defendant called Brady Adams and arranged for a pickup on Plank Road.

The first reason is Tylar Statezny left his cell phone behind and Dustin Whitefish was unable to call Tylar Statezny. At about midnight it was established Tylar Statezny could not be reached by cell phone.

There is a common law presumption once a condition is proven, that condition is presumed to continue . Bruss v. Milwaukee Sporting Goods Co., 34 Wis.2d 688, 695, 150 NW2d 337 (1967). The presumption Statezny had no access to a phone applied at 1:16 AM. There is no reasonable inference Statezny had access to a phone as long as that presumption applies.

The Circuit Court did not consider the lack of a cell phone as a factor in the reasonable suspicion formed by a

deputy who did not in fact know the phone was already seized. Knowledge among officers engaged in a common investigation is imputed among all officers. Illinois v. Andreas, 463 US 765, 771 n5, 103 S.Ct. 3319 (1983).

Wisconsin has not yet developed precedent as to imputed knowledge applying to the benefit of the defendant. State v. Alexander, 287 Wis.2d 645, 652, 706 NW2d 191, 2005 WI.App. 231 ¶15. Brady Adams contends the reasonableness of Deputy Hujet's suspicion must be determined under the parameter there is a presumption of no cell phone involvement. Knowledge is not something that is imputed only for selective purposes.

The Circuit Court upheld the decision without the need for any contact between Statezny and Adams after 11:42 AM. The Circuit Court advanced the theory Adams could have been following the subject vehicle, saw the suspect run, and decided to try and find him. (58-12:8-10). A review of the police reports (31) contains no evidence whatsoever Brady Adams was following the subject vehicle and saw Deputy Jezeski pull the vehicle over. The vehicle was pulled over at 11:42 PM.

The Court apparently referred to the Adams vehicle driving by the scene of that stop. (5-5). This description refers to a time where the subject vehicle had just been released to a valid driver. Eugene L. Whitefish removed the vehicle from the side of the road. (31-2) (31-11) . Deputy Hujet was present when Eugene Whitefish removed the vehicle. Since Deputy Hujet did not start his shift until 12:30 AM the reference at (5-5) could not have been prior to 12:30 AM. Tylar Statezny fled at 11:42 PM.

This is a forty-eight (48) minute difference. There is no evidence to place Brady Adams at the scene when Tylar Statezny fled. The theory Brady Adams could have seen Tylar Statezny run (58-12:8-10) is clear error for lack of evidence.

The Circuit Court in effect relies upon a conspiracy between Adams and Statezny based upon it being possible Adams could have picked him up. It is also reasonable to infer Adams was lost. There is a common law presumption the inference to be drawn from Adams being on Plank Road is against a conspiracy. Norton v. Kearney, 10 Wis. 443, 451, (1860). This presumption remains in effect. Harrigan v. Gilchrist, 121 Wis. 127, 313, 99 NW 909 (1904).

The factual basis for a suppression decision, Adams having seen Statezny flee or having received a phone call to pick him up, is clear error based upon lack of evidence to support such an inference. The Court erred as a matter of Constitutional law in not applying imputed knowledge of the seized cell phone to evaluation of Deputy Hujet's actions. The suppression motion should have been granted pursuant to the Fourth Amendment of the United States Constitution, and also Article I Section 11 of the Wisconsin Constitution for the reason the stop was unlawful. State v. Fields, 239 Wis.2d 38, 48, 619, NW2d 279 2000 WI. App. 218 ¶23.

CONCLUSION

The appellant respectfully requests this Court vacate the judgment and conviction and remand this matter with directions to grant the suppression motion.

Respectfully submitted this 9th day of April, 2018.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is twenty (22) pages.
Dated: April 9, 2018

/s/ Robert A. Kennedy, Jr.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of §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: April 9, 2018

Kennedy Law Office

/s/ Robert A. Kennedy, Jr.
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CERTIFICATE OF MAILING

I certify that this brief together with a separate appendix, was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this day 9th of April, 2018. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

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Dated: April 9, 2018

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