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STATE OF WISCONSIN **06-12-2018**

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2018AP000174CR

STATE OF WISCONSIN,
Plaintiff – Respondent,

v.

Brady R. Adams
Defendant – Appellant,

ON APPEAL FROM A CONVICTION BEFORE THE CIRCUIT COURT
OF FOREST COUNTY, CASE NUMBER 2017-CM-68
THE HONORABLE LEON D. STENZ., PRESIDING

RESPONSE BRIEF AND APPENDIX OF
PLAINTIFF – RESPONDENT

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**RESPONSE BRIEF AND APPENDIX OF
PLAINTIFF – RESPONDENT**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established principles to undisputed facts.

STATEMENT OF THE CASE

1. The Defendant was originally charged in Forest County Case 2017-CM-68 for the offense of Operating a Motor Vehicle While Intoxicated 2nd Offense contrary to Wisconsin Statute § 346.63(1)(am); Operating with a Prohibited Alcohol Concentration contrary to Wisconsin Statute §346.63(1)(b); Carrying a Concealed Weapon contrary to Wisconsin Statute §941.23(2); and Possession of a Firearm While Intoxicated contrary to Wisconsin Statute § 941.20(1)(b)
2. An initial appearance was held on May 3, 2017 at which time the defendant's attorney Robert A. Kennedy appeared with an authorization to appear and act. Defense Attorney Robert A. Kennedy entered a not-guilty plea and the matter was scheduled for a final pretrial on June 28, 2017.
3. On or about May 15, 2017 a motion to dismiss was filed by the defendant to which a hearing was ultimately scheduled for June 26, 2017.
4. On June 26, 2017 the defendant's motion hearing was held. The defendant appeared via telephone with his attorney present in the courtroom. The motion was challenging the stop of the defendant. The Circuit Court denied the motion. The case was scheduled for a Jury Trial on August 21, 2017.
5. On August 21, 2017 the Jury Trial was adjourned with a date yet to be determined.
6. On November 30, 2017 the defendant entered a no-contest plea to the Operating While Intoxicated 2nd Offense and also to Possessing a Firearm While Intoxicated. The other counts were dismissed and read-in.
7. The Defendant now appeals challenging the Circuit Court's ruling stemming from the defendant's June 26, 2017 motion hearing.

STATEMENT OF FACTS

According to the testimony given by Deputy William Hujet on June 26, 2017 at the defendant's Suppression Hearing, he was working on March 4, 2017 and was called to assist Deputy Jezeski. (18: 23-25). The basis for the assist stemmed from Deputy Jezeski having performed a traffic stop on Hwy 55 and the Lemke Road area in Forest County (19: 1-6). According to Deputy Hujet, he was advised that Deputy Jezeski was out with several individuals in the stopped vehicle and that it was late at night when Deputy Jezeski reported that one of the subjects took off running. (19: 8-10). Deputy Hujet testified that several officers, including himself, worked towards the Deputy Jezeski location in an effort to assist in locating the subject that fled on foot. Deputy Hujet further stated that he is a canine officer and will, if needed, put the dog on the track of a person that fled from the car. (19: 18-23). Deputy Hujet indicated that it was not out of the ordinary for someone to run from a traffic stop and that other officers typically respond to assist as was done on March 4, 2017. (19: 13-19).

Deputy Hujet indicated that he was of the understanding on that night that Deputy Jezeski made the traffic stop on Hwy 55 and the Lemke Road and that the fleeing subject was headed north from the traffic stop. (19 and 20: 1-4). Deputy Hujet agreed that running from a traffic stop could be a crime of Obstructing. (20: 22-25 and 21: 1-7). Deputy Hujet testified that he was informed by Deputy Jezeski that he had yelled at the person to stop but the person continued running. (21: 5-7).

Deputy Hujet confirmed that the traffic stop and search for the fleeing subject occurred around midnight and that he was conducting his search north of the traffic stop in the direction that the subject fled. (20:1-4 and 21: 8-14). Deputy Hujet was asked if he came across anything suspicious to which he stated that Sergeant Wilson radioed him that there was a vehicle coming which was of interest because it was late at night and it was the only vehicle in the area at that

time. (21: 15-24). Deputy Hujet continued by advising that he observed the vehicle come off of County Hwy S, turn onto Hwy 55. (21: 22-24). Deputy Hujet stated that he stayed a distance behind the vehicle following it to the north end of Airport Road and watched it take a left onto Plank Road. (21: 24-25 and 22:1-5). Deputy Hujet confirmed that the area in which he was currently located at Plank Road and Airport road was less than one mile from the Deputy Jezeski traffic stop (22:6-19). Deputy Hujet testified that approximately 30 minutes had elapsed from the time he first learned of the fleeing subject and the time he stopped Brady Adams on Plank Road. (27: 14-18). Deputy Hujet continued by stating that the fleeing subject, having left on foot going north on Hwy 55 could easily go east and cut through the woods and come out on Plank Road. (22: 6-13). Deputy Hujet affirmed that the observed vehicle was in the same area where the fleeing subject was being searched for. (22: 20-22).

Deputy Hujet further testified that he continued on Airport road when the lone vehicle turned onto Plank Road. Deputy Hujet indicated that he was watching the vehicle in his rear view mirror and could see that it applied its brakes as the brake lights illuminated and the vehicle came to a stop. The vehicle then backed up onto Airport road and started heading north on Airport Road. (22:23-25 and 23:1-5). Deputy Hujet testified that the vehicle was travelling back in the direction that it had come from. (23: 3 – 8). Deputy Hujet stated that from his prior experiences in today's age with people and cell phones and stuff coupled with someone running from a traffic stop that they would call someone to come get them so he has learned to watch for vehicles in the area when they have such incidents. (23: 11-15).

Deputy Hujet admitted that he did not know if Plank road continued through but that he thought it dead ends on Lake Metonga. However, he continued by stating what really caught his attention was that area where the vehicle stopped there are no houses as one side is open and the other side is

wooded. (23:16-21). Deputy Hujet added that the location where the vehicle stopped there was no light. (23: 21-22).

Deputy Hujet then made a traffic stop on the vehicle after he followed it back on Airport Road, turning left onto Lemke road. Deputy Hujet noted that the vehicle was headed directly towards the location of the Deputy Jezeski traffic stop which started his involvement. (23: 25 and 24:1-14).

Deputy Hujet, having stopped the vehicle, made contact with the driver and advised that law enforcement was looking for somebody that ran from a different traffic stop and thought that the driver may have been there to pick up the person. (24: 15-20). Deputy Hujet observed two occupants in the vehicle, being the male driver and a female passenger. (25: 1-2). Deputy Hujet, upon his initial contact with the vehicle, detected an odor of intoxicants coming from the vehicle and that the driver's speech was slow and slurred. (25:6-12). Deputy Hujet received specific training in detecting impaired drivers, particularly with alcohol and other substances, while he was at the academy and also in an advanced roadside sobriety. (25: 13-20).

ARGUMENT

I. Under Wisconsin Law and Statute §968.24, Law Enforcement Was Permitted to Conduct An Investigatory Stop on Brady Adams.

Under Wisconsin Law the courts have recognized two types of seizures by law enforcement: an investigatory or Terry stop and an arrest. State v. Young, 2006 WI 98, 20, 24, 294 Wis.2d 1, 717 N.W.2d 729: see also Wis. Stat. §968.24.

An investigatory stop that involves temporary questioning is a minor infringement on personal liberty, and is constitutional if supported by reasonable suspicion that a crime has been committed. State v. Young, 2006 WI 98, 20, 24, 294 Wis.2d 1, 20, 717 N.W.2d 729: see also Wis. Stat. §968.24. "Reasonable suspicion requires

that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. Id. at 21. Whether the reasonable suspicion standard is met is determined by considering the facts known to the officer at the time the stop occurred, together with rational inferences and inferences drawn by officers in light of policing experience and training. See State v. Washington, 2005 WI App 123, 16, 284 Wis.2d 456, 700 N.W.2d 305; see also State v. Seibel, 163 Wis.2d 164, 183, 471 N.W.2d 226 (1991).

Police are also allowed to make “Terry Stops,” which are investigatory stops limited in scope and executed through the least restrictive means reasonable. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). For an investigatory stop, police officers do not need probable cause. They need only have reasonable suspicion supported by articulable facts that criminal activity is afoot. Id. Reasonable suspicion is “some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.” United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). It is something less than probable cause and more than a hunch. United States v. Tipton, 3 F.3d 1119 (7th Cir. 1993).

In evaluating the reasonableness of an investigatory stop, we look first to see whether the officers' actions were justified at the inception of the stop and next to see whether the stop was reasonably related in scope to the circumstances which justified the stop in the first place. United States v. Smith, 3 F.3d 1088 (7th Cir. 1993). We must not be overly focused on any one factor. The proper analysis involves a consideration of “the totality of circumstances known to the officers at the time of the stop.” United States v. Quinn, 83 F.3d 917 (7th Cir. 1996). The totality of the circumstances includes “the experience of the law enforcement agent and the behavior and characteristics of the suspect.” U.S. v. Odum, 72 F.3d 1279 (7th Cir. 1995).

Under certain investigative stops that are prompted by an officer’s suspicion that

the occupants have committed a crime are constitutionally permissible even though the officer lacks probable cause to arrest. State v. Guzy, 139 Wis.2d 663, 675, 407 N.W.2d 548 (1987) citing United States v. Hensley 469 U.S. 221, 226, 105 S.Ct. 675, 679 (1985). The test is an objective test. Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. Id.,

This test focuses on the reasonableness of the governmental intrusion. It “balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.” State v. Guzy, 139 Wis.2d 663, 675, 407 N.W.2d 548 (1987) citing United States v. Hensley 469 U.S. 221, 226, 105 S.Ct. 675, 679 (1985). The societal interest implicated is the ability of law enforcement officers to make an investigative stop when a crime has been recently committed which thereby promotes the strong societal interest in “solving crimes and bring offenders to justice.”Id.

A formal arrest, in contrast, “is a more permanent detention that typically leads to ‘a trip to the station house and prosecution for crime,’ ” and requires probable cause to suspect that a crime has been committed. State v. Young, 294 Wis.2d 1, 20, 717 N.W.2d 729. We determine whether a person has been arrested by questioning whether a “reasonable person in the defendant's position would have considered himself or herself to be ‘in custody,’ given the degree of restraint under the circumstances.” State v. Swanson, 164 Wis.2d 437, 447, 475 N.W.2d 148 (1991)

Wisconsin Statute §968.24 Temporary Questioning Without Arrest

The Wisconsin Statute §968.24 allowing for stop and frisk states as follows:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

The facts under the current appeal are not in dispute with regards to the fact that Brady Adams was in an isolated area of Forest County late at night. That Brady Adams, aside from the recently stopped vehicle in which someone fled from law enforcement on foot, was the sole vehicle on the road. The testimony is clear that the fleeing subject was reported to be headed in the direction in which Brady Adams had travelled into as that was the area being actively searched by multiple Forest County deputies. That based on the time of the night, the past experiences of deputy Hujet, he knew that in the modern era of cellphones that such a fleeing subject could and have easily telephoned for help to have someone pick them up when in trouble and fleeing or hiding from law enforcement. Deputy Hujet, based in part on his experiences and his observations of the Brady Adams vehicle stopping on a dark road and then backing up and returning in the direction from which it came was consistent with someone being picked up that would be running or hiding from law enforcement. Deputy Hujet, initiated an investigatory stop from the totality of the circumstances in which were present, including but not limited to the time of the night, the direction of the fleeing subject on foot, the concurrent location of the Brady Adams vehicle to that of the person being sought, and the vehicle stopping and then reversing directions.

The investigatory stop was based on the conduct of the person being sought that fled on foot from a nearby vehicle stop and the further informed belief that said

person had committed a crime and could easily be in the Brady Adams vehicle. Deputy Hujet testified that he immediately advised Brady Adams and his one occupant as to the reason for the stop and detected the smell of alcohol at that time which ultimately lead to Brady Adams being arrested for operating while intoxicated.

CONCLUSION

The State respectfully submits to the Court a request, based on the above document, that the holdings of the trial court were within its proper discretion and that the defendant was lawfully detained by way of an investigatory stop conducted by the Forest County Deputy and in doing so was properly denied in his motion to suppress evidence.

Dated this 8th day of June, 2018

Respectfully submitted,

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CERTIFICATION

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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, with a notation that the portions of the record have been so reproduces to preserve confidentially and with appropriate references to the record.

Dated the 8th day of June 2018.

CHARLES J. SIMONO

CERTIFICATION UNDER RULE 809.19(13)

I have not submitted an electronic copy of this appendix, which complies the requirements of Rule 809.19(13).

I further certify that:

This electronic appendix, if filed is identical in content and format to the printed form of the appendix filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated the 8th day of June 2018.

CHARLES J. SIMONO

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that the 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.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19 (8)(b) and (c) Stats. for a brief produced with proportional serif font, double spaced; 1.5 margin on the left side and 1 inch margins on the other three sides. The length of this brief is 2,546 words on nine (9) pages.

Dated this 8th day of June 2018

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