STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 18 AP 1167

COUNTY OF DUNN,

Plaintiff-Respondent,

vs.

CASHE L. NEWVILLE,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR DUNN COUNTY, CASE NO. 17TR1318
THE HONORABLE ROD W. SMELTZER PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. DEPUTY SCOTT DID NOT HAVE REASONABLE SUSPICION TO CONDUCT AN IMPAIRED DRIVING INVESTIGATION ON THE BASIS OF NEWVILLE'S DRIVING.

Scott's stop of Newville was justified based on the equipment violation, i.e. the registration lamp outage. (App. 1); *See also State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143 (explaining that reasonable suspicion exists where the officer observes a traffic law has been or is being violated.). As the circuit court reasoned, at the very most, Newville's slowed speed and driving on 690th Avenue was suspicious. (R. 42:44; App. 47.) But suspicions alone without observations of actual indicators of impairment do not warrant an impaired driving investigation. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W. 2d 634. In order to conduct an impaired driving investigation, the officer must have observed additional facts (aside from those observed before the stop) to indicate the driver may be impaired. *See State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis. 2d 406, 659 N.W. 2d 394.

A. Deputy Scott did not have reasonable suspicion to conduct an impaired driving investigation on the basis of the alleged crossing of the center of 690th Avenue.

The State argues that Scott did not need additional facts to expand the scope of the stop from a traffic violation because the officer had reasonable suspicion to conduct an impaired driving investigation at the time Newville was first pulled over. The State cites to *State v. Popke* for the proposition that operating left of the center of a roadway gives a police officer probable cause to believe a defendant is operating

a motor vehicle while intoxicated. *See State v. Popke*, 2009 WI 37, ¶ 26, 317 Wis. 2d 118, 133, 765 N.W.2d 569, 577. *Popke* is not analogous to the case at hand. The officer in *Popke* observed Popke swerve three-quarters of his vehicle into the left lane of traffic on a marked roadway, then over-correct in an attempt to move back into the proper lane, almost striking the right-hand curb, and then drift back towards the middle of the road and nearly strike the center median, all in the course of just one city block, or approximately a tenth of a mile. *Id.* at ¶¶ 4, 26. The Court described the defendant's driving as "erratic." *Id.* at ¶ 27. The driving conduct in Popke was indeed dangerous, as Popke could not keep his vehicle within his lane, barely avoiding collisions with medians and curbs. *Id.* at ¶¶ 4, 26.

Newville did not operate his vehicle in an erratic or dangerous manner. Newville was not having trouble staying on the road, making abrupt movements, having difficulty keeping his vehicle within his lane, or barely avoiding curbs or medians. At no time while Scott was following Newville on Highway 12, which Scott estimated to be over a mile, did Scott observe Newville swerving, abruptly stopping or accelerating, deviating from his lane, or failing to keep his vehicle under control. (R. 42:19-20; App. 22-23.) According to Scott, it was not until Newville turned onto 690th Avenue that Scott observed Newville crossing what Scott estimated to be the center of the road occurred. (*Id.*) Unlike the roadway Popke was travelling on, 690th Avenue is unmarked by lane markers. (*Id.*) In addition, the video footage of the stop does not clearly show Newville crossing the center of 690th Avenue, and certainly not in such a manner that indicated impairment. (R. 24.) The

dangerous and erratic driving observed in *Popke* simply was not present here, and thus that case is inapplicable.

Because Newville's driving is in no way comparable to the erratic and dangerous driving that occurred in *Popke*, Scott was required to have additional facts, aside from the traffic violation that prompted the initial stop, that indicated impairment in order to begin an impaired driving investigation. *Colstad*, 2003 WI App 25 at ¶ 19.

II. AFTER OBSERVING THE INITIAL TRAFFIC VIOLATION, DEPUTY SCOTT GATHERED NO ADDITIONAL FACTS THAT JUSTIFIED EXPANDING THE SCOPE OF THE STOP INTO AN IMPAIRED DRIVING INVESTIGATION.

The State argues that after stopping Newville, Scott observed a lighter in Newville's car and thought Newville might not be travelling the most direct route home, and therefore suspected methamphetamine impairment. It is almost difficult to form a response to the unsoundness of this conclusion. There is no logical connection between the premise that Newville had a lighter and may or may not have been traveling the most direct route home and the conclusion that he was therefore impaired by methamphetamine. Possession of an item that could have a perfectly innocent use is not evidence of impairment. Of course, if Scott observed a clear plastic baggie containing a white powdery substance, or a glass pipe in Newville's car, that likely would constitute an additional fact sufficient to justify an impaired driving investigation. On the other hand, if an officer observes a can of soda, he cannot just assume the soda was used to make an alcoholic drink. Similarly,

he cannot assume the lighter is evidence of drug use. Indeed, the State cites no authority and points to no source whatsoever that states a lighter alone is sufficient evidence of impairment such that impaired driving investigation is permitted.

Newville was honest, cooperative, and friendly to the officer. (R. 42:22; App. 25.) He was not having trouble balancing, fumbling with his license or vehicle controls, or exhibiting any behavior indicative of drug use, such as dilated pupils, abnormal breathing, excessive nervousness, jaw clenching, heavy sweating, or any other unusual behavior. (R.42:22-23; App. 25-26.) Scott did not detect an odor of alcohol on him, nor did he detect the odor of any drug or see any evidence of alcohol or drug use in the Newville vehicle. (*Id.*) Scott simply made no observations of requisite additional facts justifying an expansion of the scope of the stop into an impaired driving offense. Nonetheless, after observing the lighter, Scott began to question Newville about drug use. (R. 42:8; App. 11.)

Scott's questioning of Newville about drug use marks the beginning of his impaired driving investigation. Because Scott began questioning Newville about drugs without the requisite reasonable suspicion, all evidence gathered after said questioning – including Newville's responses that he had used methamphetamine in the previous months and that he would soon be reporting to jail for past methamphetamine use[1] – must be suppressed from evidence. *See State v. Knapp*,

[1] Aside from being incredibly unfair, the assumption that people who have struggled with drug use in the past must be actively using is not grounds for additional investigation without evidence of current use/impairment. Knowledge of completed prior criminal activity alone is insufficient to provide the requisite reasonable suspicion to stop and detain. *State v. Betow*, 226

2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899 (citing *Wong Sun v. United States*, 371 U.S. 471, 485-488 (1963)).

III. THE RESULTS OF THE SEARCH OF NEWVILLE'S TONGUE MUST BE IGNORED.

A. Any evidence gathered from the search of Newville's tongue does not indicate whether Newville was under the influence.

Even if the officer was permitted to search Newville's mouth in the way he did, there is no basis to believe what the officer saw was actually evidence of a crime. Deputy Scott was not trained as a drug recognition expert, and had no qualifications to evaluate persons for being under the influence of drugs other than alcohol. (R. 42:24; App. 27.) The State has cited no source – case law, field sobriety training manuals, or otherwise – that indicates a yellow film on one's tongue is indicative of methamphetamine use. Such a conclusory allegation without evidentiary or scientific support is the type of hunch or guess that is prohibited from being used as reasonable suspicion in an impaired driving investigation. *See Post*, 2007 WI 60 at ¶ 10. Accordingly, the yellow film observed by the officer cannot be used to justify the administration of field sobriety tests, the arrest, or the preliminary breath test.

Wis. 2d 90, 95, n. 2, 593 N.W.2d 499, 502 (Ct. App. 1999). There must be some showing that there is ***ongoing*** criminal activity in order to justify further investigation.

Moreover, the State cannot rely on Newville's responses to Scott's questions to justify the administration of field sobriety tests/preliminary breath test, or the arrest, when the questions were being asked illegally in the first place. *Knapp*, 2005 WI 127 at ¶ 24; *Wong Sun*, 371 U.S. at 485-488.

B. Deputy Scott was not permitted to conduct a search of Newville's tongue.

1. A person's tongue is not an open and obvious outward physical characteristic such that it is without an expectation of privacy.

The State is unable to cite any authority upholding a search of a person's mouth and tongue in the context of a stop for a traffic violation. The best the State is able to do is point the Court to a handful of cases that held that one does not have a reasonable expectation of privacy in their outward physical characteristics, such as their voice or facial expressions, and that a person can be compelled to submit to a jury showing of their facial characteristics without violating their Fifth Amendment Rights. The distinctions between the cases cited by the State and this case abound.

First, many of the cases cited by the State concern Fifth Amendment self-incrimination issues regarding the right to remain silent at trial. The case at hand involves the Fourth Amendment right to be free from unreasonable searches and seizures. The liberties and precedent governing the two rights are too distinctive to compare.

Second, the area Scott inspected, the back of Newville's tongue, is not an outward physical characteristic readily visible upon interacting with Newville. The tongue, and certainly the back of the tongue, is concealed in every day interactions, and must be opened and shown to the observer in order for its characteristics to be observed. A police officer would only be in a position to observe this area of a person's body upon compelling a subject to submit to his search. Thus, this search

is different from the observation of slurred speech or bloodshot eyes, which are readily apparent upon initial contact with a suspect in a traffic stop, and is more akin to a search of a person's blood, breath, or urine. *See Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (explaining that "a compelled physical intrusion beneath [a drunk driving suspect's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation" is not only "an invasion of bodily integrity," but "implicates an individual's 'most personal and deep-rooted expectations of privacy.'"). Accordingly, the search of Newville's tongue was not parallel to a mere observation of an outward physical characteristic, and the case law cited by the State is inapposite.

2. Deputy Scott had not gathered sufficient evidence to justify a search of Newville's tongue.

The State misses the principle issue: the search of Newville's tongue was done without sufficient evidence to indicate that his mouth may contain evidence of a crime in the first place. An officer is not permitted to seize a suspect and start searching their person without reasonable articulable suspicion that they are in possession of something illegal and dangerous. *See State v. McGill*, 2000 WI 38, ¶ 21, 234 Wis. 2d 560, 569, 609 N.W.2d 795, 801 (citing *Terry V. Ohio*, 392 U.S. 1, 30-31(1968). Again, even if a yellow film on one's tongue was in fact evidence of methamphetamine use, the officer made no observations that would have justified said search in the first place. Newville was stopped for an equipment violation. Upon approaching Newville, the officer detected no odor of alcohol or any other

drug, no slurred speech, no dilated pupils, no fast speech, no shaky hands, no abnormal breathing, no heavy sweating, no abrupt mood changes, no jaw clenching, nor any other suspicious behavior. (R. 42:38, App. 41.) Newville was honest, cooperative, and friendly to the officer throughout the entire interaction. (R. 42:22; App. 25.) He had no trouble keeping his balance or standing in an appropriate manner. (R. 42:22-23; App. 25-26.) That Newville possessed a lighter does not warrant the conclusion that his mouth must contain evidence of a crime. Because Scott compelled Newville to submit to a search of his mouth and tongue without the requisite justification that his mouth or tongue contained evidence of a crime, and without a warrant, the search was unlawful. As such, all evidence gathered as a result of the search must be suppressed. *See Knapp*, 2005 WI 127 at ¶ 24; *Wong Sun*, 371 U.S. at 485-488.

IV. DEPUTY SCOTT DID NOT HAVE PROBABLE CAUSE TO CONDUCT A PRELIMINARY BREATH TEST.

Aside from Scott lacking reasonable suspicion to justify administration of standardized field sobriety testing in the first place, any results gathered therefrom did not justify administration of the preliminary breath test. Scott was not trained on how to administer any of the field sobriety tests used for drug detection, and as such he did not know what behaviors were important to look for and record. Any testimony he gave concerning the results of those tests is without foundation and cannot be relied upon.

The State argues Scott's determination that Newville failed the Romberg test,

a test used to detect drug use, can be used in establishing probable cause to administer the preliminary breath test/arrest, even though Scott was not trained to perform the test. This argument is without merit. The standardized field sobriety tests are not so simple that any untrained lay person could perform them. While one does not have to be professionally trained to observe that an impaired person is falling over, slurring their words, or smells of alcohol, in order to properly administer and record indicators of impairment on the field sobriety tests, one must be properly trained and certified. The tests do not consist solely of observations of behaviors that are easily identifiable by lay persons as attributable to alcohol impairment (such as slurred speech and trouble maintaining balance) or drug use (such as the smell of marijuana or bloodshot eyes), but instead measure for technical and specific behaviors that are not commonly recognizable, and which require specialized training to detect, such as "nystagmus at maximum deviation," and "lack of convergence." Evidence concerning the results of the tests therefore requires qualified expert testimony. *See State v. Zivcic*, 229 Wis.2d 119, 598 N.W.2d 565 (Ct. App.1999). No matter how simple the State alleges the Romberg test is to perform, if Scott was not trained on what to measure for or detect, his observations are useless to the probable cause analysis. *Zivcic*, 229 Wis. 2d at 128.

Because Scott was not trained or certified to perform the Romberg test, or any field sobriety test designed to detect drug impairment, his observations of Newville during the field sobriety tests are of no consequence. Scott's administration of the field sobriety tests used to detect alcohol consumption are

similarly irrelevant. Scott did not suspect Newville of being under the influence of alcohol, and at any rate, Newville performed relatively well on those tests. Accordingly, any evidence gathered during the field sobriety tests did not render probable cause to conduct a preliminary breath test.

V. DEPUTY SCOTT DID NOT HAVE PROBABLE CAUSE TO ARREST.

The State argues that Newville's statements regarding recent methamphetamine use justify the arrest in this case. First, those statements were gathered via an improperly conducted investigation, which was done in violation of Newville's constitutional rights. For all the reasons stated herein, those statements cannot be used to support a probable cause determination and must be suppressed. *Knapp*, 2005 WI 127, ¶ 24; *Wong Sun*, 371 U.S. at 485-488.

Even if the statements could be used in forming probable cause, at the point of arrest, Scott had observed the following: Newville was in possession of a lighter; had a yellow film on his tongue; had used methamphetamine in the past; had performed reasonably well on the field sobriety tests Scott knew how to administer; had yielded a 0.00 result on the preliminary breath test; was having no trouble balancing or walking; was cooperative, friendly, and honest with the officer; and was not shaking, sweating, clenching his jaw, acting nervous, or displaying any other unusual or suspicious physical behavior. Even taking all of that evidence together, there was not probable cause to believe Newville had just committed or was committing a crime at the time of arrest. Accordingly, there was no probable cause to arrest him and the warrantless arrest was done unconstitutionally. All

results gathered therefrom must therefore be suppressed. *Id.*

CONCLUSION

For all of the foregoing reasons, the Court must reverse the circuit Court's oral order denying Newville's motion to suppress, and order that all evidence gathered as a result of (1) the illegal expansion of the scope of the traffic stop, (2) the illegal administration of field sobriety tests, (3) the unlawful administration of the preliminary breath test, and (4) the unlawful arrest, including any statements made by Newville and any blood sample results gathered from Newville, must be suppressed from evidence.

Dated: December 31, 2018.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,865 words.

I further 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 the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: December 31, 2018.

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