STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018AP001673-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

YUNUS E. TURKMEN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Dunn County Circuit Court,
Judge James M. Peterson, Presiding

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

The police officer did not have sufficient specific, articulable facts to believe Yunus Turkmen was operating while intoxicated, so extending the stop to have Turkmen perform field sobriety tests was improper.

The test for reasonable suspicion justifying a police officer in making a traffic stop is whether, under the totality of the circumstances, "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634; *see also* Wis. Stat. § 968.24. The validity of an extension of a traffic stop is tested using the same standard applied to the initial stop. ***State v. Betow***, 226 Wis. 2d 90, 95, 593 N.W.2d 499 (Ct. App. 1999); ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. Thus, extension of the stop "must be based on more than an officer's 'inchoate and unparticularized suspicion or 'hunch.'" ***Post***, 301 Wis. 2d 1, ¶10 (*quoting* ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). "Rather, the officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop"—or, with respect to an extension of a stop, the continued intrusion of the stop. ***Post***, 301 Wis. 2d 1, ¶10 (*quoting* ***Terry***, 392 U.S. at 21).

As Yunus Turkmen said in his brief-in-chief (at 6-7), he does not dispute that Officer Wade Schlichting had reasonable suspicion to initiate a traffic stop based on Turkmen's brief spurt of excessive speed in making a U-turn. But as he also explained, the initial stop cannot be justified on the ground that Turkmen made an illegal U-turn, as Schlichting claimed. (20:6; A-Ap. 106). Turkmen set out in detail why there is no evidence his U-turn was illegal. (Brief-in-chief at 6-7 & nn. 2 and 3). Although the state asserts the U-turn was "illegal" (state's brief at 4, 6), it fails to respond to Turkmen's argument to the contrary.

The state's failure to respond to Turkmen's argument should be deemed a concession. ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). In addition, although the state asserts the U-turn was illegal, it fails to develop an argument or cite legal authority in support of this assertion. Thus, this court should not consider the state's assertion. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to consider undeveloped arguments and arguments unsupported by references to legal authority). Accordingly, the purported illegality of Turkmen's U-turn is not a proper factor to consider in determining whether Schlichting had reasonable suspicion to extend the traffic stop.

Given that Schlichting validly stopped Turkmen for the brief episode of speeding during the U-turn, the issue for this court is whether Schlichting "discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion" that Turkmen was driving under the influence. ***Colstad***, 260 Wis. 2d 406, ¶19. Turkmen acknowledged in his brief-in-chief (at 7-8) that some of the facts support a suspicion he was operating while intoxicated, and not unexpectedly the state's argument goes through those facts in seriatim fashion. (State's brief at 6-8). But other information Schlichting had undermines a reasonable suspicion that Turkmen was impaired, making the *totality* of the facts equivocal at best and therefore not enough to support an extension of the stop.

The state (brief at 6) first cites to Turkmen's "illegal" driving, by which it is clear the state means the purportedly "illegal" U-turn. Again, for the reasons just noted, there is no evidence on which to conclude the U-turn was illegal, so reliance on a belief that it was illegal is misplaced.

However, the state also argues (brief at 6) that Turkmen's turn was, according to the circuit court, "in that place at that time … a fairly dangerous driving maneuver potentially." (20:22; A-Ap. 122). The context in which the circuit court made this remark shows its characterization was based on the court's belief the U-turn was an "illegal maneuver." (*Id.*) Believing a maneuver is illegal naturally leads

one to infer it is illegal *because* it is potentially dangerous. Again, however, Turkmen's U-turn was not illegal. Further, Schlichting did not testify to any observations that support the conclusion Turkmen's turn was dangerous because of specific traffic or other conditions "in that place at that time"—for instance, because there were other vehicles or pedestrians present and they were placed in potential danger by the U-turn. Thus, there is no reasonable basis to conclude Turkmen's turn was "a fairly dangerous driving maneuver potentially."

While it is correct that erratic driving is not a requisite of reasonable suspicion (state's brief at 6), as a matter of logic the *absence* of erratic driving is a telling fact that weighs against reasonable suspicion. Here the only incident of erratic driving was the brief episode of imprudent speed during the U-turn turn itself, which the circuit court described as "a little extra acceleration and squealing of the tires." (20:22; A-Ap. 122). Schlichting did not describe any other erratic or unsafe driving—and in particular no further speeding, no weaving, no other traffic violations—while he was following Turkmen before initiating the stop. Thus, Turkmen's brief acceleration during a legal U-turn with no other erratic driving provides only scant support for continuing the traffic stop to investigate whether Turkmen was operating while intoxicated.

The state next cites to the time of the stop—around 2:38 a.m. on a Saturday. (State's brief at 6-7). This time lends some credence to a suspicion of

operating while intoxicated, as Turkmen noted in his brief-in-chief (at 8). But the scant amount of credence it lends is evident when this case is compared to ***State v. Glover***, No. 2010AP1844-CR, unpublished slip op. (WI App March 24, 2011) (Respondent's App. 4-7; Reply App. 101-04), the unpublished decision the state relies on to try to bolster the factor. (State's brief at 6).

The stop in ***Glover*** occurred at 1:19 a.m. ***Id.***, ¶¶2, 18 (Respondent's App. 4, 6; Reply App. 101, 103). But the defendant in that case exhibited worse driving, for he was stopped for speeding 9 miles per hour over the limit, which almost certainly means the defendant was engaged in a longer course of erratic driving than Turkmen exhibited. Further, in addition to admitting he had consumed alcohol, the defendant emitted a slight odor of alcohol and told the officer he was coming from a bar, facts which support an inference he had been drinking recently. ***Id.***, ¶¶2-3, 18 (Respondent's App. 4, 6; Reply App. 101, 103).

These additional facts—a longer course of bad driving; an odor of alcohol; an admittedly recent visit to a bar—were enough to construct reasonable suspicion for field sobriety tests in ***Glover***. By contrast, Schlichting did not testify that he noted any of the common physical indicators of intoxication while speaking with Turkmen: no odor of alcohol, no bloodshot or glassy eyes, no slurred speech. While Schlichting saw Turkmen on the street outside bars in the area about a half hour earlier (20:8; A-Ap. 108), there is no evidence Turkmen was *in* one of the

bars recently, and the complete absence of the common indicators of alcohol consumption suggests otherwise. Accordingly, the fact the stop occurred around bar time also provides only scant support for reasonable suspicion to investigate impaired driving.

The absence of these common indicators is also significant for considering the next factor the state cites, Turkmen's admission he had consumed alcohol. (State's brief at 7). In support of this factor the state cites to ***Dane County v. Weber***, No. 2017AP1024, unpublished slip op. (WI App Jan. 11, 2018) (Respondent's App. 1-3; Reply App. 105-07). But the officer in ***Weber*** (who stopped the defendant for speeding 20 miles per hour over the speed limit) detected a "medium" odor of alcohol, and the defendant admitted she had just finished work at a tavern and had consumed alcohol. ***Id.***, ¶3 (Respondent's App. 1; Reply App. 105). Again, the odor of alcohol (or any other common indicator of alcohol consumption) is conspicuously absent here, as is any information Turkmen was recently in a tavern and the dangerous and illegal driving like that exhibited in ***Weber***.

As the state notes (brief at 7), Schlichting was not required to accept at face value Turkmen's statement that he had consumed one shot. But as Turkmen pointed out in his brief-in-chief (at 9), it is also true that "[n]ot every person who has consumed alcoholic beverages is 'under the influence' ….What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to

be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." ***Wis. J.I.—Criminal*** 2663 (2006) at 2. *Cf.* Wis. Stat. § 346.63(1)(a) (operating while intoxicated requires the person to be "under the influence of an intoxicant … to a degree which renders him or her incapable of safely driving."). Thus, there must be reasonable suspicion of consumption of a sufficient amount of alcohol to produce the prohibited level of impairment. The lack of any odor of alcohol and of glassy or bloodshot eyes and slurred speech bolsters Turkmen's statement that he had little to drink and therefore makes his admission of having consumed alcohol a very weak basis for concluding he has consumed enough to be intoxicated.

The state next cites Schlichting's observation of an air duster can in Turkmen's glove box, as air duster cans may be used for "huffing," which can severely impair a driver. (State's brief at 8). But the basis for believing Turkmen was impaired because he was "huffing" is even weaker than the basis for believing Turkmen was intoxicated by alcohol. Turkmen made no admission of "huffing" and Schlichting did not say he saw such activity. Schlichting made no observations as to whether the can had been used, and did not testify that he saw the typically obvious effects associated with the abuse of inhalants—*e.g.*, slurred speech, unsteadiness, dizziness, disorientation, short-term memory loss, and even loss of consciousness. *See* ***Castaneda v. State***, 664 S.E.2d 803, 805-06 (Ga. Ct. App. 2008) (discussing evidence supporting probable cause to

arrest and conviction for operating under the influence of an intoxicating substance based on use of cans of "Dust-Off"). Finally, the absence of improper or imprudent driving other than the speed during the U-turn militate against a belief that Turkmen was impaired in the way that one would expect given the effects of inhalant use. Thus, the air duster can adds virtually nothing to the equation here.

Finally, the state cites Turkmen's putative "confusion" about where his driver's license was located. (State's brief at 8). In making this argument the state cites ***State v. Grimh***, Nos. 2015AP1401-CRNM & 2015AP1402-CRNM, unpublished summary disposition (WI App Feb. 25, 2016) (Respondent's App. 8-10), for the proposition that a driver's "fumbling" with his driver's license, smelling faintly of beer, and admitting to drinking were "probably sufficient" to extend the stop. The state's citation to and reliance on ***Grimh*** is improper. ***Grimh*** is a summary disposition and thus is not citable for persuasive value. Wis. Stat. § (Rule) 809.23(3)(b). Thus, the state's citation to and reliance on the reasoning of ***Grimh*** must be disregarded.*

In addition, the conclusion that Turkmen was "confused" is belied by the evidence. Turkmen's search for his driver's license was apparently brief,

* Even if the case were citable, that the court found those factors were "probably sufficient" means, as the phrase itself indicates, that the court was *not* holding they *were* in fact sufficient, and the court in ***Grimh*** did not hold the factors to be enough by themselves. (Respondent's App. 9).

and is consistent with a belief that the specific item Schlichting asked for (20:6; A-Ap. 106) was in a pocket, not his wallet, and that upon realizing his mistake he handed Schlichting his wallet realizing—correctly—the license was in the wallet. (20:6-7; A-Ap. 106-07). The absence of confusion is bolstered by the fact Turkmen was able immediately to produce his proof of insurance. (20:7; A-Ap. 107). Nor did Schlichting say Turkmen had any difficulty in understanding him or otherwise describe observations of Turkmen's demeanor that suggested he was confused. Thus, viewed in light of all the information available, Turkmen's quick search of his pockets is scant evidence of alcohol-induced confusion and thus offers at best a very weak indication of intoxication.

In short, then, the totality of the circumstances here—the information Schlichting collected subsequent to the initial stop combined with information acquired before the stop—did not provide reasonable suspicion that Turkmen was driving under the influence of an intoxicant. While Turkmen acknowledges this is a close case because Schlichting had some basis for suspicion, the countervailing information undermined that basis to such an extent that all the information taken together does not rise to the level sufficient to support reasonable suspicion. Accordingly, the circuit court should have granted Turkmen's motion to suppress.

CONCLUSION

For the reasons stated above and in Turkmen's brief-in-chief, the circuit court erred in finding there was reasonable suspicion supporting Turkmen's continued detention for the administration of field sobriety tests. This court should reverse the order of the circuit court denying Turkmen's motion to suppress and remand the case for further proceedings.

Dated this 4th day of December, 2018.

Respectfully submitted,

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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 produced with a proportional serif font. The length of this brief is 2,268 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, 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 on or after this date.

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 one or more initials or other appropriate pseudonym or designation 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 reproduced to preserve confidentiality and with appropriate references to the record.

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 4th day of December, 2018.

Signed:

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APPENDIX

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