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STATE OF WISCONSIN

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

DISTRICT IV

CASE NO. 2019AP000350

COUNTY OF WOOD,

Plaintiff-Appellant,

v.

TREVOR J. KRIZAN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF THE WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR., PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

Submitted by:

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REBUTTAL ARGUMENT

REASONABLE SUSPICION

Krizan argues in his brief that there was not reasonable suspicion to make a traffic stop. The question really is, was their reasonable suspicion to justify an investigatory stop, as Krizan's vehicle was already stopped when first observed by Deputy Dean?

As the Wisconsin Supreme Court explained in State v. Young, 2006 WI 98, 294 Wis.2d 1, 717 N.W.2d 729,

> an investigatory or *Terry* stop, usually involves only temporary questioning and thus constitutes only a minor infringement on personal liberty. An investigatory stop is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. *State v. Waldner,* 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996). An investigatory stop, though a seizure, allows police officers to briefly "detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Id.* at 55, 556 N.W.2d 681.
>
> Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. *Id.* A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient. *Terry,* 392 U.S. at 27, 88 S.Ct. 1868. On the other hand, "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *State v. Anderson,* 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990). As we have explained:
>
> > [S]uspicious conduct by its very nature is ambiguous, and the [principal] function of

> the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

Anderson, 155 Wis.2d at 84, 454 N.W.2d 763. The detention, however, must be no longer than necessary to clarify the ambiguity. *See Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *State v. Griffith,* 2000 WI 72, ¶ 54, 236 Wis.2d 48, 613 N.W.2d 72. Young, supra, ¶ 20 and 21.

That is exactly what Deputy Dean did in this case. Deputy Dean had concerns about the fact there was a vehicle parked in this boat landing, in the early morning hours, parked in a manner where the vehicle was hidden from view from the roadway and was occupied by two people. Deputy Dean approached the vehicle to find out why they were there. Upon making contact with Krizan Deputy Dean made observations that gave rise to reasonable suspicion Krizan was committing, had committed or was about to commit a crime of operating while intoxicated. The contact was minimally intrusive and meant only to clarify why the car was there and nothing more. Given that the vehicle was already stopped, the contact could not have been less intrusive. The contact only became extended when, upon

making contact with Krizan, Deputy Dean had the additional reasonable suspicion that Krizan's ability to drive might be impaired.

As stated in the State's initial brief, the Wisconsin Supreme Court in **State v. Waldner**, 206 Wis.2d 51, 556 N.W.2d 681 (1996), held that under certain circumstances police may detain an individual upon less than probable cause for arrest.

> Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. **Anderson**, 155 Wis.2d at 84. Thus, when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, **police officers have the right to temporarily detain the individual for the purpose of inquiry**. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. If a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, **the officers have the right to temporarily detain the individual for the purpose of inquiry**. **Waldner**, pg. 60. (Emphasis added.)

That is exactly what Deputy Dean did in this case. His actions were reasonable, his contact was minimally intrusive and a minor infringement, given that the vehicle was already stopped and parked, and lasted no longer than was necessary to resolve the inquiry. Again, it was only after that initial, consensual

contact with Krizan that additional reasonable suspicion came to Deputy Dean's attention with the detection of the odor of intoxicants and the admission of drinking prior to driving to that location that the contact was extended.

COMMUNITY CARETAKER

Krizan argues in their brief that the community caretaker doctrine did not apply, relying on the trial court's statement that "I don't have any evidence of distress." That is not the standard for the community caretaker doctrine.

As argued in the State's initial brief, the facts of our case are very similar to and controlled by State v. Truax, 318 Wis.2d 113, 767 N.W.2d 369, 2009 WI APP 60. In Truax, there were no observable signs of distress. The car, in Truax, drove past the police officer's squad car, pulled over and parked. There were no hazard lights activated, no smoke coming from the engine, no occupants emerging from the vehicle crying out for help or assistance. The vehicle simply parked and stayed there. ¶3, 4 and 5. Based on that conduct and that conduct alone, the officer in Truax pulled his squad car behind that vehicle and activated

his emergency lights in order to make contact with the occupants. The officer explained his concerns as to why he was making contact with that vehicle, ¶ 4, and in the course of that contact observed things that led him to believe the driver might be impaired. ¶6.

That is, in essence, exactly what Deputy Dean did in this case. Just as the Court in Truax found the officers conduct to be a legitimate exercise of the community caretaker doctrine, we ask that this Court find Deputy Dean's conduct was a legitimate exercise of the community caretaker doctrine.

SEIZURE

Krizan's last argument is that he was seized unconstitutionally. The State reiterates its argument that what occurred in this case did not constitute a seizure, at least not at the point in time when Deputy Dean made his initial contact with Krizan.

Krizan's brief states that Deputy Dean blocked Krizan's vehicle in place. There was absolutely no evidence of that presented at the motion hearing. Their arguments based on that notion are unfounded by the evidence in the record. In fact, the record shows the State attempted to play Deputy Dean's video of the

contact which would have clearly shown the trial court that Krizan was not blocked in and would have shown the contact between Deputy Dean and Krizan. A malfunction in playing the video occurred and the trial court said it did not need to see the video in order to make its ruling.

As argued in the State's initial brief, and reaffirmed here, the State believes this case is controlled by the ruling in County of Grant v. Vogt, 2014 WI 76, 356 Wis.2d 343, 850 N.W.2d 253.

The Court in **Vogt** found that the officer did not have reasonable suspicion to believe a crime was being committed at the point the officer had contact with the defendant. So the Court had to decide whether the defendant was seized by the officer prior to rolling down the window. The Court held that the defendant was not seized by the officer knocking on the window. **¶39**.

That is almost exactly what happened in our case. Deputy Dean may not have had a reasonable suspicion that a crime was being committed, had been committed or was about to be committed. But Deputy Dean, like the officer in **Vogt** had concerns about the fact there was a vehicle parked in this boat landing, in the early

morning hours, parked in a manner where the vehicle was hidden from view from the roadway and was occupied by two people. Like the officer in **Vogt**, Deputy Dean approached the vehicle to find out why they were there. Like the officer in **Vogt**, upon making contact with Krizan Deputy Dean made observations that gave rise to reasonable suspicion Krizan was committing, had committed or was about to commit a crime of operating while intoxicated.

The Court in **Vogt** said,

> Ultimately, what Deputy Small did in this case is what any traffic officer might have done: investigate an unusual situation. . . . Deputy Small was acting as a conscientious officer. He saw what he thought was suspicious behavior and decided to take a closer look. Even though Vogt's conduct may not have been sufficiently suspect to raise reasonable suspicion that a crime was afoot, it was reasonable for Deputy Small to try to learn more about the situation by engaging Vogt in a consensual conversation. **¶51**.
>
> [W]hile the law applicable to the facts of this case does not condone a seizure, it does not forestall an officer's reasonable attempt at further inquiry. In similar circumstances, a person has the choice to refuse an officer's attempt to converse and thereby retain his privacy, or respond by talking to the officer and aiding the officer in his duty to protect the public. A dutiful officer does not make a mistake by presenting a person with that choice. Only when the officer forecloses the choice by the way in which he exercises his authority – absent reasonable suspicion or probable cause – does he violate the Fourth Amendment. **¶52**.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court overrule the trial court's decision and send the matter back for further proceedings.

Dated this 25th day of September, 2019.

Respectfully submitted:

WOOD COUNTY DISTRICT ATTORNEY

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 8 pages.

Dated this 25th day of September, 2019.

Respectfully submitted:

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CERFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, and attached, either as a separate document or as a part of this brief, is an appendix that 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.

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 25th day of September, 2019.

Respectfully Submitted:

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