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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2019-AP-610

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ROBERT L. KAVALAUSKAS,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, BRANCH I, THE HONORABLE TERESA S. BASILIERE PRESIDING, TRIAL COURT CASE NO. 17-CT-301

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE LAW ENFORCEMENT OFFICER IN THIS CASE LACKED A REASONABLE SUSPICION TO DETAIN MR. KAVALAUSKAS WHEN HE OBSERVED MR. KAVALAUSKAS "CUT THROUGH" SEVERAL ROUNDABOUTS IN THE CITY OF OSHKOSH?

> Trial Court Answered: NO. The circuit court concluded that while Mr. Kavalauskas' driving behavior "couldn't sustain a citation under the circumstances," it nevertheless found that the common law permitted a law enforcement officer to initiate a detention based upon conduct which is suspicious even if otherwise "innocent." (R52 at 3-5; D-App. at 105-07.)

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Kavalauskas believes publication of this Court's decision zis NOT WARRENTED as the common law authorities which articulate the "reasonable suspicion" standard are well-settled.

STATEMENT OF THE CASE AND THE FACTS

On April 1, 2017, while driving his motor vehicle westbound through several roundabouts in the City of Oshkosh located at 9th Street and Koeller Road, the overpass of U.S. 41, and Washburn Road, the above-named Defendant-Appellant, Robert L. Kavalauskas, was detained by Officer Aaron Achterberg of the Oshkosh Police Department for allegedly "switching" from one lane

to another within each of the roundabouts without visibly signaling the lane changes. (R1 at 2; R51 at 3:17 to 4:11; D-App. at 110-11.)

Officer Achterberg testified that his initial observations of the Kavalauskas vehicle were made at a distance of "about nine car lengths" until such time as he was able to catch up to the Kavalauskas' vehicle in the last of the roundabouts. (R51 at 5:20-22; 6:8-21; D-App. at 112-13.) During the course of his observations of the Kavalauskas vehicle, Officer Achterberg testified that no other vehicles were present in the roundabouts nor did he observe Mr. Kavalauskas commit any other traffic violations. (R51 at 6:23-25; 7:9-13; 8:19-22; D-App. at 113-15.)

After detaining Mr. Kavalauskas, Officer Achterberg made contact with Mr. Kavalauskas and noted that he had an odor of intoxicants emanating from his person and appeared to have "glassy eyes." (R1 at 2.) Ultimately, Officer Achterberg had Mr. Kavalauskas submit to a battery of standardized field sobriety tests, which tests Mr. Kavalauskas ostensibly failed. (R1 at 3-5.) Thereafter, Officer Achterberg placed Mr. Kavalauskas under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a). (R1.) Mr. Kavalauskas was then transported to the Aurora Medical Center in Oshkosh for a blood withdrawal. (R1 at 5.) Subsequent analysis of Mr. Kavalauskas' blood specimen yielded a result above the legal limit and he was additionally charged with Operating a Motor Vehicle With a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b). (R1 at 7.)

Mr. Kavalauskas retained private counsel, Attorney Lauren Stuckert, to represent him on the aforesaid charges. (R4.) Attorney Stuckert filed a Motion to Suppress Evidence Derived From Unlawful Stop challenging whether Officer Achterberg violated Mr. Kavalauskas' right to be free from unreasonable seizure under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution. (R9.)

An evidentiary hearing on Mr. Kavalauskas' motion was held on October 4, 2017, at which Officer Achterberg was the sole

witness for the State. (R51, *passim*.) On October 17, 2017, the circuit court, the Honorable Thomas Gritton presiding, issued a decision from the bench denying Mr. Kavalauskas' motion. (R52; D-App. at 103-08.)

Shortly after the court denied his motion, Mr. Kavalauskas retained alternate counsel, Attorney Sarvan Singh, Jr., and a Stipulation for Substitution of Counsel was filed with the circuit court on December 12, 2017. (R26.) On February 8, 2019, Mr. Kavalauskas changed his plea to one of No Contest and he was adjudicated guilty of the operating while intoxicated offense before the Honorable Teresa S. Basiliere who had been assigned to the case as successor to Judge Gritton. (R40; R33.)

Upon his conviction, Mr. Kavalauskas initiated this appeal by filing a Notice of Intent to Pursue Post-Conviction Relief and Notice of Appeal. (R42; R45.)

STANDARD OF REVIEW ON APPEAL

This appeal presents a question relating to whether a particular set of facts rises to the level of providing the law enforcement officer in this matter with a reasonable suspicion to detain Mr. Kavalauskas. As such, this Court engages in a two-step standard of review pursuant to *State v. Hajicek*, 2001 WI 3, ¶¶ 16; 26, 240 Wis. 2d 349, 620 N.W.2d 781. The first step compels this Court to review the lower court's determination of historical facts for clear error. *Id*. ¶ 16. Thereafter, the question of whether those facts meet the constitutional standard is a question this Court reviews *de novo. Id.*

ARGUMENT

I. THE LAW IN WISCONSIN AS IT RELATES TO REASONABLE SUSPICION TO DETAIN A DEFENDANT UNDER THE FOURTH AMENDMENT.

A. The Fourth Amendment in General.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[1] The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

"The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals" *State v. Riechl*, 114 Wis. 2d 511, 339 N.W.2d 127 (Ct. App. 1983). Capricious or arbitrary police action is not tolerated under the umbrella of the Fourth Amendment. "The basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

[1]The Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

It is well-settled that Fourth Amendment "provisions for the security of persons and property should be liberally construed." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886). "A close and literal construction [of these provisions] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

Within the ambit of the Fourth Amendment, there are recognized three levels of encounter, namely: (1) the "simple encounter" for which the individual is afforded no constitutional protection because his or her movement is not restricted; (2) the investigatory detention, or *Terry* stop, for which the officer must have a reasonable suspicion to detain the person, *see Terry v. Ohio*, 392 U.S. 1 (1968); and (3) the custodial arrest which requires probable cause. *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982); *Henry v. United States*, 361 U.S. 98 (1959). It is this mid-level encounter, the investigatory detention, which is at issue in the instant case.

B. The Requirement of Reasonable Suspicion As It Relates to Investigatory Detentions.

With respect to investigatory detentions, it has long been the jurisprudence of this State and the Federal Courts that

> [l]aw 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. **An 'inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.'**

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(emphasis added); *United States v. Pavelski*, 789 F.2d 485, 489 (7th Cir. 1986). The United States Supreme Court has

repeatedly echoed throughout all of its decisions relating to *Terry* stops that a concrete, "particularized suspicion that the person is committing a crime" must exist before the Fourth Amendment will countenance a detention of the individual for the purpose of conducting an investigation. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

For purposes of determining whether Officer Achterberg's actions constituted an illegal detention of Mr. Kavalauskas's person under the Fourth Amendment, the inquiry involves ascertaining whether they were reasonable under the "totality of the circumstances."

> When determining if the standard of reasonable suspicion [is] met, those facts known to the officer must be considered together as a **totality of the circumstances**. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

State v. Powers, 2004 WI App. 143, ¶ 7, 275 Wis. 2d 456, 685 N.W.2d 869 (emphasis added). The "totality of the circumstances" test is an objective test of reasonableness. *Terry,* 392 U.S. at 20-21.

Whether an investigatory detention is constitutionally reasonable turns upon "'a particularized and objective basis' for suspecting the person stopped **[is engaged in] criminal activity**. *Ornelas v. United States*, 517 U.S. 690, 696 (1996)(emphasis added).

The United States Supreme Court emphasized the need for a particularized suspicion **of wrongdoing** in *United States v. Cortez*, 499 U.S. 411 (1981). Therein the Court elucidated that the totality of the circumstances

> must raise a suspicion that the particular individual being stopped **is engaged in wrongdoing**. Chief Justice Warren, speaking for the Court in *Terry v. Ohio, supra*, said '[that] this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'

Cortez, 499 U.S. at 418 (emphasis in original in part, added in part), citing *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

A particularized basis is one which requires that there be some nexus, or link, between the officer's action in detaining a suspect and the suspect actually engaging "in wrongdoing." Absent a nexus between the officer's actions and the potential "wrongdoing," a detention is constitutionally unreasonable under the Fourth Amendment because it would be tantamount to nothing more than an officer casting a "wide net" in the hope that it might sweep up someone who committed a violation of the law. It is this aspect of the Fourth Amendment's reasonableness standard which requires more than "mere suspicions" but "particularized and objective facts of wrongdoing" which is at issue in the case at bar.

II. OFFICER ACHTERBERG'S OBSERVATIONS OF MR. KAVALAUSKAS DO NOT RISE TO THE LEVEL OF PROVIDING HIM WITH A REASONABLE SUSPICION TO DETAIN MR. KAVALAUSKAS.

A. What Is Not at Issue Herein.

At the motion hearing in the instant case, two points of law which play a significant role in determining the outcome of this case were raised. Notably, the first of these must be distinguished from the "real" question presented by Mr. Kavalauskas, and the second of which must be clarified before the appropriate analysis of the question presented may be undertaken. These two points of law will be taken up by Mr. Kavalauskas now before the substantive heart of the issue he presents will be addressed.

1. Officer Achterberg's Observations of Mr. Kavalauskas' Alleged Failure to Signal His Lane Changes Do Not Constitute the Heart of the Matter Herein.

Much was made at the evidentiary hearing in this case as to whether Mr. Kavalauskas signaled the lane changes he made in the roundabouts through which he travelled on the night of his arrest. (R51 at 3-5; D-App. at 3:17 to 4:11; D-App. at 110-11.) The implication of this testimony was that Mr. Kavalauskas' failure to so signal might have constituted a cognizable violation of the Wisconsin Traffic Code, and more specifically, a violation of Wis. Stat. § 346.34. If his conduct did violate § 346.34, the argument goes, a nexus *would* exist between Mr. Kavalauskas' conduct and a particularized, objective belief that he was "engaged in wrongdoing" as required by the holdings in cases such as *Cortez, Ornelas, Brown, Prouse, et al*., which in turn would satisfy the Fourth Amendment's reasonableness requirement regarding his detention. If this was true, the inquiry in this case could end there.

Based upon the testimony of Officer Achterberg, however, it is evident that no violation of § 346.34 occurred in the instant matter. Wisconsin Statute § 346.34 does require that "an appropriate signal" be given by a vehicle when stopping, turning, or making a lane change, however, the requirement of giving such a signal *is conditioned upon* "**other traffic . . . be[ing] affected by such movement**." Wis. Stat. 346.34(1)(b)(emphasis added). There was no other traffic upon the roadway which would have been affected by Mr. Kavalauskas' lane changes, and in the absence of this condition, § 346.34 would *not* require him to signal his lane changes.

Officer Achterberg testified that he was "about nine car lengths" behind Mr. Kavalauskas' vehicle. (R51 at 5:20-22; 6:8-21; D-App. at 112-13.) Because of this distance, there is no way in which Mr. Kavalauskas' lane changes would have "affected" the officer's driving, and notably, the State presented no evidence whatsoever at the hearing that Officer Achterberg's vehicle was affected by Mr. Kavalauskas' failure to signal. The record in this case is utterly silent in this regard.

Additionally, Officer Achterberg noted that during the course of his observations of the Kavalauskas vehicle, no other vehicles were present in the roundabouts which would have been "affected"

by Mr. Kavalauskas' not signaling the lane changes. (R51 at 6:23-25; 7:9-13; 8:19-22; D-App. at 113-15.)

In its decision on Mr. Kavalauskas' motion challenging whether a reasonable suspicion to detain him existed, the circuit court itself recognized as much when it commented that Mr. Kavalauskas' driving behavior "couldn't sustain a citation under the circumstances, ..." (R52 at 3-5; D-App. at 105-07.)

Thus, it must be made clear from the outset that any "reasonable suspicion" to detain Mr. Kavalauskas proffered by the State cannot be premised upon an assertion that § 346.34 had been violated. Mr. Kavalauskas is *not* arguing that this Court cannot consider unsignalled lane changes as part of the "totality of the circumstances" herein. What Mr. Kavalauskas *is arguing*, however, is that the unsignalled lane changes, in and of themselves, do *not* constitute a valid, independent reason for his detention under the Fourth Amendment.

2. The Test to Determine Whether a Reasonable Suspicion to Detain Mr. Kavalauskas Existed Under the Fourth Amendment Does Require the Imputation of Some Alleged "Wrongdoing" in His Conduct Contrary to the Circuit Court's Implied Assertions to the Contrary.

In finding that a reasonable suspicion to detain Mr. Kavalauskas existed under the Fourth Amendment, the lower court came dangerously close to enunciating a standard of review which would sweep purely innocent conduct up in its net, thereby contravening the requirement that a suspect be involved in some "wrongdoing" as expressed by the Courts in *Cortez, Ornelas, Brown, Prouse, Brignoni-Ponce, et al.*.

As Mr. Kavalauskas identified in Section I.B., *supra*, every decision of the United States Supreme Court—and Wisconsin Supreme Court for that matter—which articulated or clarified the standard for establishing a reasonable suspicion to detain an

individual for the purpose of conducting an investigatory detention required that there be some objectively articulable suspicion that the individual was "engaged in some wrongdoing." In fact, the *Cortez* Court went so far as to refer to this notion as "*the central teaching of this Court's Fourth Amendment jurisprudence*." *Cortez*, 499 U.S. at 418 (emphasis in original).

When the trial court stated during it decision that a law enforcement officer does not need to "have grounds to issue a traffic citation to make a traffic stop nor does [reasonable suspicion] require that the officer have grounds to believe that the unusual driving is caused by intoxication rather than drowsiness or some other innocent cause before the stop" can be effectuated, Mr. Kavalauskas simply wishes to make clear that the trial court's articulation of the reasonable suspicion standard, in the way it did, should not be read as countenancing a detention when the suspect's driving behavior has no nexus whatsoever to any reasonable inference of wrongdoing. As the *Guzy* court admonished, "**[a]n 'inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.'** *Guzy*, 139 Wis. 2d at 675 (emphasis added).

B. Officer Achterberg Lacked a Reasonable Suspicion to Detain Mr. Kavalauskas.

The central question raised by Mr. Kavalauskas herein has finally been reached, namely: Did Officer Achterberg have a reasonable suspicion to detain him based solely upon his observation that Mr. Kavalauskas was "cutting" the shortest path through the roundabouts which he traversed without signaling his intention to do so? The short answer to this question is, "No, he did not."

First, as already discussed above, Mr. Kavalauskas' failure to signal his lane changes violated no cognizable provision of Wisconsin's Traffic Code. *See* Section II.A.1., *supra*.

Second, were any other, independent observations of poor driving behavior made by Officer Achterberg which, of themselves, could contribute toward satisfying the reasonable suspicion calculus? Again, the short answer is, "No." Officer Achterberg

testified at the motion hearing in this case that he did *not* observe Mr. Kavalauskas commit any other traffic violations. (R51 at 6:23-25; 7:9-13; 8:19-22; D-App. at 113-15.)

Third, were the unsignalled lane changes themselves executed in violation of any provision of the Traffic Code? The answer is an unequivocal "No" as well. Wisconsin Statute § 346.13(1) provides in plain and unambiguous language that " . . . the operator of a vehicle . . . shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear." Wis. Stat. § 346.13(1). As the record demonstrates, there were no other vehicles in the roundabout while Mr. Kavalauskas was making his lane changes, and § 346.13 only prohibits the movement from one lane to another when doing so would affect the safety of other vehicles approaching from the rear—a fact notably absent from the record herein and unaverred by Officer Achterberg. Mr. Kavalauskas' unsignalled lane changes were no different than the unsignalled left turn made by the defendant in *State v. Angagnos*, 337 Wis. 2d 57, 805 N.W.2d 722 (2001), in which the court held that an unsignalled left turn did not violate the law when no oncoming or tailing traffic, or present pedestrian, was present.

Finally, did the "overall" perception of Mr. Kavalauskas' driving behavior create an inference that he was engaged in some wrongdoing which merited his detention under the Fourth Amendment? The answer to this final question is, "No." While no common law decision of this, or as far as Mr. Kavalauskas' can tell, any other jurisdiction is directly on point with the facts of this case, there a some decisions which come tantalizingly close and the holdings of which are instructive. For example, in *United States v. Lyons*, 7 F.3d 973 (10th Cir. 1993), the Tenth Circuit Court of Appeals made the following observation about the notion that a motor vehicle operator is obligated to maintain his or her vehicle in the straightest possible path which bisects the lane travelled: "Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *Lyons*, 7

F.3d at 976; citing *United States v. Colin*, 314 F.3d 439, 446 (9th Cir. 2002). The Tenth Circuit warned against such unreasonable requirements because human nature precludes the possibility of perfection, and the driver therein, by weaving within his lane several times, was simply acting consistent with his nature.

The exact same thing can be said of Mr. Kavalauskas in that human nature compels most of us to traverse the shortest distance between two points, and that, in Euclidean geometry, is a straight line. Mr. Kavalauskas was quite simply working his way through each of the roundabouts at issue herein in the quickest, most efficient way he knew how, to wit: by navigating through them in the shortest possible distance. He accomplished all of this without affecting other traffic, without committing any other cognizable traffic violations, without weaving, without speeding, *etc*.. Based upon the fact that he did not violate § 346.13; did not violate § 346.34; did not violate any other traffic law; and was driving in a manner which is completely consistent with innocent behavior from which no nexus can be drawn to any inference of wrongdoing, Officer Achterberg lacked a reasonable suspicion to detain him.

When all of the foregoing factors are taken together and are placed on the great constitutional scale that is the Fourth Amendment, it tips not insignificantly in Mr. Kavalauskas' favor because the rights of the individual to be free from oppressive government interference with their liberty far outweigh any privilege the State has in investigating an non-existent offense.

CONCLUSION

Based upon the foregoing authorities and arguments, Mr. Kavalauskas posits that Officer Achterberg lacked sufficient objective, specific, and articulable facts upon which to premise a reasonable suspicion to detain him, contrary to the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution, and therefore, the order of the circuit court finding Mr. Kavalauskas' detention constitutional should be reversed and his cause remanded to the circuit court to enter an order not inconsistent herewith.

Dated this 11th day of June, 2019.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this Brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the Brief is 3,689 words. I also certify that filed with this Brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 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 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 reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic Brief is identical in content and format to the printed form of the brief. Additionally, this Brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 11, 2019. I further certify that the Brief and appendix was correctly addressed and postage was pre-paid.

Dated this 11th day of June, 2019.

MELOWSKI & ASSOCIATES, LLC

_____

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STATE OF WISCONSIN
COURT OF APPEALS
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STATE OF WISCONSIN,

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APPENDIX OF DEFENDANT-APPELLANT

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