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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 THERESA S. BASILIERE PRESIDING, TRIAL COURT CASE NO. 17-CT-301

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE HAS FAILED TO MEET ITS BURDEN TO ESTABLISH THAT A REASONABLE SUSPICION TO DETAIN MR. KAVALAUSKAS EXISTED UNDER THE FOURTH AMENDMENT.

The State protests in its Response Brief that, contrary to the statutory language which permits lane deviation if no "other traffic [is] . . . affected by such movement,"[1] that "there is no evidence the defendant first ascertained the lane change was safe, [or] whether or not it was in fact safe, ..." State's Brief at 4. Mr. Kavalauskas is somewhat perplexed by the State's position as it *is not his burden to establish these facts*.

As the State correctly acknowledges in its Response Brief, *it bears the burden of establishing a reasonable suspicion to detain* Mr. Kavalauskas. State's Brief at 2. Therefore, with respect to the foregoing "argument," Mr. Kavalauskas would proffer that the State has unwittingly made his case for him. The burden was on the State—not the Defendant—to establish to the lower court's satisfaction that any lane deviations allegedly made by Mr. Kavalauskas unsafely "affected" other traffic as § 346.34(1)(b) requires. In the absence of such proof, there is no evidence which supports a finding that Mr. Kavalauskas' detention was constitutional under the Fourth Amendment. This Court should reject the State's implied assertion that Mr. Kavalauskas was somehow obligated to establish that his movements did not "affect" other traffic without the slightest apology.

To this point, as Mr. Kavalauskas averred in his initial brief, Officer Achterberg testified that he was "about nine car lengths" behind Mr. Kavalauskus. (R51 at 5:20-22; 6:8-21; D-App. at 112-13.) Thus, there is no way in which Mr. Kavalauskas' lane changes

[1]Wis. Stat. 346.34(1)(b). This is the same standard as that set forth in § 346.13(1) which provides 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."

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. (R51, *passim*.)

The State also avers that there was "evidence to suspect the defendant may have been impaired or driving recklessly, with criminal negligence to the actual or potential drivers in front of him, ..." State's Brief at 4. There are two significant problems with the State's argument in this regard.

First, it is patently unconstitutional to detain, arrest, or convict a person for "potentially" engaging in criminal negligence. Our system of justice does not countenance preventative conviction based upon hypothetical scenarios or prognostications about what activities in which a person may engage in the future. For the State to argue that "potential drivers" could be affected by Mr. Kavalauskas' actions is not cricket under the statutory—or constitutional, for that matter—requirement that other traffic be "affected" by Mr. Kavalauskas' conduct.

Second, when the State proffers the foregoing argument, alleging that there is "evidence to suspect the defendant may have been impaired," it does so with *no citation to the record whatsoever.* Unsupported statements of fact on appeal should be disregarded by this Court as required under § 809.19(1)(e) and pursuant to *State v. Peck*, 143 Wis. 2d 624, 639-40 n.7, 422 N.W.2d 160 (Ct. App. 1988).

In fact, the State's assertion is *more than* unsupported, it is actually *contrary to* the facts established at the motion hearing in this case. Officer Achterberg noted that during the course of his observations of the Kavalauskus vehicle, no other vehicles were present in the roundabouts which would have been "affected" by Mr. Kavalauskus' not signaling the lane changes. (R51 at 6:23-25; 7:9-13; 8:19-22; D-App. at 113-15.) The State's argument is, therefore, more than *un*supported, it patently contradicts the evidence. Even the trial court agreed with Mr. Kavalauskas' position in this regard 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; emphasis added.)

It should also be recalled at this point that Officer Achterberg testified at the motion hearing that he did *not* observe Mr. Kavalauskus commit any other traffic violations. (R51 at 6:23-25; 7:9-13; 8:19-22; D-App. at 113-15.) Based upon all of the *facts* adduced at the hearing and which *are* a part of the record in this case, Mr. Kavalauskas posits that Officer Achterberg lacked a reasonable suspicion to detain him.

CONCLUSION

Based upon the foregoing authorities and arguments, Mr. Kavalauskas proffers 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.

Dated this 30th day of July, 2019.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

Sarvan Singh, Jr.
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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 818 words.

I hereby certify that I have submitted an electronic copy of this Brief 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 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 July 30, 2019. I further certify that the Brief was correctly addressed and postage was pre-paid.

Dated this 30th day of July, 2019.

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