COURT OF APPEALS OF WISCONSIN
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

District 2

v.

Appeal No. 2019AP001488

BARTOSZ MIKA,

Defendant-Appellant.

Circuit Court Case No. 2019TR000490

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM JUDGMENT OF CIRCUIT COURT FOR WALWORTH COUNTY,
THE HON. KRISTINE E. DRETTWAN, PRESIDING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT ON ORAL ARGUMENT AND PUBLICATION vi

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Procedural Status of the Case Leading Up to the Appeal 2

C. Disposition of the Trial Court 4

D. Statement of Facts Relevant to the Issues Presented for Review 6

ARGUMENT 12

I. The Circuit Court Committed Error By Finding that the Defendant Violated Wisconsin's Implied Consent Law, Wis. Stat. § 343.305 12

A. The Court Committed Error in Reopening the Evidence After Determining that the State Failed to Meet its Burden 16

B. The Circuit Court Committed Error When it Held that the Collective Knowledge Doctrine Did Not Apply to the Present Matter. 20

C. The Circuit Court Committed Error When it Determined that the Traffic Stop was Based Upon Reasonable Suspicion 27

CONCLUSION 28

FORM AND LENGTH CERTIFICATION 29

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13) 30

TABLE OF AUTHORITIES

CASES

Page

260 N. 12th St., LLC v. DOT, 2011 WI 103,1i 38, 338 Wis. 2d 34, 808 N.W. 2d 72 18
Artz v. Kirt, 126 Wis. 2d 510, 375 N.W.2d 219 (Ct. App. 1985) 18
Desjarlais v. State, 73 Wis. 2d 480, 491, 243 N.W.2d 453, 459 (1976) 22
Diener v. Heritage Mut. Ins. Co., 37 Wis. 2d 411, 421, 155 N.W.2d 37 (1967) 17
Estate of Javornik, 35 Wis. 2d 741, 746, 151 N.W.2d 721, 723-24 (1967) 18
Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) 14
In re Refusal of Anagnos, 2012 WI 64, ¶21, 341 Wis. 2d 576, 815 N.W.2d 675 12
Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) 14, 24
Larry v. Harris, 2008 WI 81, 1f15, 311 Wis. 2d 326, 752 N.W.2d 279 18
McGowan v. Chicago & N.W. Ry. Co., 91 Wis. 147, 153, 64 N.W. 891 (1895) 17
Miller v. Hanover Ins. Co., 2010 WI 75, 326 Wis. 2d 640, 785 N.W. 2d 493 18
Porter v. Ford Motor Co., 2015 WI App 39, 362 Wis. 2d 505, 865 N.W.2d 207 18
Schaffer v. State, *75* Wis. 2d 673, 677, 250 N.W.2d 326 (1977) 21, 22
State v. Anagnos (In re Anagnos), 2012 WI 64, P42-P43, 341 Wis. 2d 576, 595-596, 815 N.W.2d 675, 684-685 16
State v. Hanson, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978) 18
State v. Kammeyer, 2013 WI App 30, ¶5, 346 Wis. 2d 279, 827 N.W.2d 929 13
State v. Mabra, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974) 15, 21
State v. Pickens, 2010 WI App 5,1111, 323 Wis. 2d 226, 779 N.W.2d 1 (Wis. App 2009) 14, 15, 20, 21, 22, 23, 24, 25
State v. Post, 301 Wis. 2d 1, ¶10, 733 N.W.2d 634 13

State v. Quartana, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997) 14
State v. Rissley, 2012 WI App 112,119, 344 Wis. 2d 422, 824 N.W.2d 853 ..... 13, 15, 16, 21
State v. Rutzinski, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516 13
State v. Shears, 68 Wis. 2d 217, 253, 229 N.W.2d 103, 121 (1975) 22
State v. Taylor, at 515-16, 210 N.W.2d at 878 22
State v. Waldner, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996) 13, 14
State v. Williams, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106 ..... 12, 13
State v. Wittrock, 2012 WI App 40, ¶6, 340 Wis. 2d 499, 812 N.W.2d 540 ..... 12, 13, 15, 20, 21
Sukula v. Heritage Mut. Ins. Co., 2005 WI 83, ¶ 8, 282 Wis. 2d 46, 698 N.W. 2d 610 18
Tangwell v. Stuckey, 135 F.3d 510, 517 (7th Cir. 1998) 23
Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968) 12, 13, 14, 15, 21, 24, 26
United States v. Gonzalez-Lopez, 548 U.S. 140, 152, 126 S. Ct. 2557, 2566, 165 L. Ed. 2d 409, 421-422 19
United States v. Hensley, 469 U.S. 221, 231-32, 233, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) 15, 21, 23, 24

STATUTES

	Page
Wis. Stats. §809.23(1)	vi
Wis. Stat. § 343.305	4, 6, 12,
Wis. Stat. § 343.305(9)(a)5.a.	16
Wis. Stat. § 343.305(9)(d)	16
Wis. Stat. § 343.305(10)	6
Wis. Stat. § 809.19(1)(d)	29
Wis. Stat. § 809.19(1)(e)	29
Wis. Stat. § 809.19(1)(f)	29
Wis. Stat. § 809.12(2)(a)	31
Wis. Stat. § 809.19(8)(b)	29
Wis. Stat. § 809.19(8)(c)	29
Wis. Stat. § 968.24	14

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues do not meet the criteria for publication in Wis. Stat. § 809.23(1) and are fully presented by the briefs and record herein; as such, the Defendant-Respondent does not request oral argument or publication.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the Circuit Court commit error reopening the evidence and adjourning the Hearing after the Parties rested and gave closing arguments upon determining that the State failed to prove its case?

CIRCUIT COURT ANSWER: No.

Did the Circuit Court commit error in determining that the collective knowledge doctrine was not applicable to matter?

CIRCUIT COURT ANSWER: No

Did the State provide sufficient evidence to establish that there was reasonable suspicion for the traffic stop?

CIRCUIT COURT ANSWER: Yes

STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises out of a Refusal Hearing that spanned two dates. At the initial Refusal Hearing, the State failed to produce any witnesses that could provide testimony related to the traffic stop of the Defendant. After closing arguments, the Circuit Court, *sua sponte,* reopened the evidence, adjourned the Refusal Hearing, and ordered the State to produce **its witness that made the traffic stop of the** Defendant. At the adjourned Refusal Hearing, the State produced the deputy that initiated the traffic stop, but it failed to produce the off-duty officer that provided the basis for the reasonable **suspicion for the traffic stop to police dispatch.**

Defendant-Appellant maintains that the State failed to prove its case at the initial Refusal Hearing and the matter should be dismissed. The Circuit Court agreed that the State failed to prove its case, but refused to dismiss the matter, reopened the evidence, and adjourned the hearing to provide the State with an additional opportunity to meet its burden.Even being provided a second opportunity, the State again failed to meet its burden to produce all necessary witnesses.

B. Procedural Status of the Case Leading Up to the Appeal

The Defendant was the subject of a traffic stop initiated by an officer in the Walworth County Sheriff's Department on the evening of February 18, 2019 that ultimately resulted in the Defendant being issued two citations: (1) Operating While Intoxicated (1st Offense); and (2) Refusal to Take Test for Intoxication. (R.1). On February 19, 2019 (the "Refusal Hearing"), the State filed its Notice of Intent to Revoke Operating Privilege. (R.1). The Defendant timely requested a refusal hearing, and the Circuit Court held a Refusal Hearing on June 10, 2019. (A. App. 1-31, R.12). The State called one witness at the June 10, 2019 Refusal Hearing; however, the State's sole witness was unable to provide any evidence to establish reasonable suspicion to initiate a traffic stop on the Defendant. (A. App. 16, R.12, p.16, 11. 6-25, p.17, 11. 1-23). The State rested its case upon the conclusion of its sole witness. (A. App. 21, R.12, p. 21, 11. 20). The Defense did not call any witnesses at the June 10, 2019 Refusal Hearing, and moved the Circuit Court to dismiss the matter as the State failed to provide any evidence to establish that there

was reasonable suspicion to initiate the traffic stop. (A. App. 21-22, R.12, pp. 21-22, 11. 21-25, 1-2). The Circuit Court heard arguments from the State as well as the Defense. (A. App. 22-27, R.12 pp. 22-27). At the conclusion of closing arguments, the Circuit Court agreed that the State failed to meet its burden to establish reasonable suspicion to initiate a traffic stop on the Defendant. However, the Circuit Court stated, "But because of the public interest and the Court determining whether or not this was a legitimate stop or not I need to hear from Deputy Fiedler. So I am going to set this over for another date so that he can be brought in to testify." (A. App. 28, R.12, p. 28,11. 13-18). The Defense objected to the adjournment. (A. App. 29, R.12, p. 29, 11. 4-16). The Circuit Court opined, "There's no doubt in my mind that he was driving drunk that night according to the testimony I already have." (A. App. 30, R.12, p.30, 11. 2-4). The Circuit Court then proceeded to schedule an adjourned hearing to obtain additional evidence.

On July 30, 2019, the Circuit Court held a Continued Refusal Hearing (the "Continued Refusal Hearing"). (A. App. 32-68, R.13). Prior to the commencement of the Continued Refusal Hearing, the Defendant renewed his objection to the Circuit Court's decision to adjourn the original Refusal Hearing upon determining that the State failed to meet its burden. (A. App. 34-37. R.13, p. 3-6). The Circuit Court, while recognizing that the State failed to meet its burden at the initial Refusal Hearing, again denied Defense's objection, citing the "interests ofjustice." (A. App. 38-39, R.13, p. 7-8). The State then produced one additional witness at the Continued Refusal Hearing, the Officer that initiated the traffic stop of the

Defendant. (A. App. 39-44, R. 13, pp. 8-13). At the conclusion of the Continued Refusal Hearing, the Circuit Court held that the Defendant violated Wisconsin's implied consent law, Wis. Stat. § 343.305 and issued the required penalties. (A. App. 57-63, R.13, pp. 26-32).

On August 13, 2019, Defendant timely filed a Notice of Appeal. (R.8).

On August 14, 2019, the Circuit Court transmitted the record to the Court of Appeals. (R.9).

The Court of Appeals, through correspondence dated September 13, 2019, initially questioned whether it possessed jurisdiction over this matter. All jurisdictional issues were resolved though the Circuit Court's entry of an Order dated October 2, 2019. (R. 17).

On October 11, 2019, the Circuit Court transmitted the Supplemental Notice of Compilation of Record to the Court of Appeals. (R.15).

C. Disposition of the Trial Court

On June 10, 2019, by Oral Decision, the Circuit Court held that the State failed to prove its case by failing to have necessary witnesses provide testimony, stating in part:

> And although Deputy Blanchard testified generally speaking about what Deputy Fiedler had seen there was basically only one vague comment that the vehicle matched the description, and Fiedler had only seen one other vehicle or something like that out by Alpine; that's not enough for this Court to link it, quite frankly...You needed to have Deputy Fiedler here.
>
> (A.App. 28, R.12, p. 28, 11.5-13).

However, the Circuit Court, *sua sponte,* reopened the evidence and set the matter over for another hearing in order to permit the State to bring in additional witnesses to prove its case. The Defendant objected to the adjournment, and the Circuit Court stated:

> I put on the record the reason why I'm doing this, because it's a public safety concern. There's no doubt in my mind that he was driving drunk that night according to the testimony I already have. The question is whether or not they had the right to pull him over and that's what I need to determine and that's my job.
>
> (A.App. 23-25, R.12, pp. 29-30,11. 23-25, 1-6)

On July 30, 2019, by oral ruling, the Circuit Court once again denied the Defendant's objection to the reopening of evidence, adjournment, and continuation of the Refusal Hearing, stating, in part:

> You're right, evidence had closed, parties had made their argument...The state here, quite frankly, made a mistake. They did not bring in the witnesses that they needed to have for that hearing, but that's not the same as the fact that those witnesses did not exist and that the Court is somehow manipulating the evidence or the circumstances to make something when there is nothing there...It would have been very easy for the Court at the end of that other hearing to just say there's not enough here, I'm dismissing it. But the Court knew from the testimony of the deputy that did testify that there was other evidence out there that was necessary in order of this Court to engage in a full examination of the facts surrounding this incident involving this defendant and this civil matter refusal.
>
> (A. App. 38-39, R. 13, p. 7-8, 11.3-25, 1-14)

Upon completion of the Continued Refusal Hearing, on July 30, 2019 the Circuit Court, by Oral Decision, held that the Defendant violated Wisconsin's implied consent law, Wis. Stat. § 343.305. (A. App. 32-68, R.13). A written order to this effect was executed by the Circuit Court on October 2, 2019. (R.15).

D. Statement of Facts Relevant to the Issues Presented for Review.

The State filed this matter in Walworth County Circuit Court on February 19, 2019, asserting that the Defendant, Bartosz Mika ("Mika") violated Wis. Stat. § 343.305(10), alleging that Mika improperly refused to take a test for intoxication. (R.1). Mika timely filed a request for a Refusal Hearing. (R.3). The Refusal Hearing was set for June 10, 2019. (A. App. 1-31, R.12).

At the June 10, 2019 Refusal Hearing, the State produced one single witness, Deputy Wayne Blanchard of the Walworth County Sheriff's Department. (A. App. 1-31, R. 12). Deputy Blanchard testified that he heard a dispatch callout of an intoxicated male who was being disorderly with security staff at Alpine Valley and had left in a dark vehicle. (A. App. 5, R.12, p.5, 11.16-20). By the time Deputy Blanchard was able to make contact with Mika, Mika was already stopped by another Deputy from the Walworth County Sheriff's Department, Deputy Fiedler. (A. App. 5-6, R.12, pp. 5-6, 11. 21-25, 1-4). Deputy Blanchard then testified about his initial observations of Mika, and further, Deputy Blanchard had Mika perform standard field sobriety tests. (A. App. 7, R.12, p. 7, 11. 5-14). Deputy Blanchard further testified that based upon his experience, as well as Mika's performance on the standard field sobriety tests, he believed that Mika was intoxicated, and placed

Mika under arrest. (A. App. 13-14, R.12, pp. 13-14, 11. 12-25, 1). Subsequent to placing Mika under arrest, Deputy Blanchard transported Mika to the Walworth County Jail where he read Mika the Informing the Accused, upon which Mika refused to provide Deputy Blanchard with a sample of his breath. (A. App. 14, R.12, p.14, 11. 2-24).

Deputy Blanchard testified that he did not initiate the traffic stop on Mika, personally witness Mika commit any traffic violations, witness Mika engage in any erratic driving, nor witness any mechanical defects on Mika's vehicle. (A. App. 16, R.12, p. 16,11. 16-20). Further, the sole articulable fact of intoxication or a violation of any traffic law attributable to Mika that Deputy Blanchard was aware of prior to the traffic stop on Mika was based upon the dispatch callout of an intoxicated individual. (A. App. 16-17, R.12, pp.16-17, 11. 21-25, 1-14). While Deputy Blanchard stated that he knew the individual that placed the call to dispatch was an off-duty Sheriffs Deputy, Deputy Blanchard never spoke to that individual, either before or after the stop of Mika. (A. App. 17, R.12, p. 17, 11. 3-18). Deputy Blanchard confirmed that "he had no reasonable suspicion" to make a traffic stop on Mika. (A. App. 17, R.12, p. 17, 11. 21-23).

Additionally, with regards to the dispatch callout, Deputy Blanchard testified that the sole report was for an intoxicated male driving a dark vehicle. (A. App. 5, R.12, p. 5, 11.16-20). Dispatch failed to provide any additional details to Deputy Blanchard, including the ethnicity of the driver, a make or model of the vehicle, or even a partial license plate of the vehicle. (A. App. 19-20, R. 12, pp. 19-20, 11. 18-

25, 1-10). Further, Deputy Blanchard agreed that "any dark vehicle" in the vicinity could have been subject of a traffic stop that evening and it would have matched the dispatch callout. (A. App. 20, R. 12, p. 20, 11. 2-10).

At the conclusion of Deputy Blanchard's testimony, the State rested its case. (A. App. 21, R.12, p.21, 11. 20). The State failed to call Deputy Fiedler (the Deputy that Deputy Blanchard testified initiated the traffic stop on Mika). The State failed to call the off-duty deputy that made the call to dispatch reporting that there was an intoxicated male who was being disorderly with security. The State failed to call a single witness to establish that there was reasonable suspicion to initiate a traffic stop on Mika. Rather, the State rested its case.

Mika moved to dismiss the matter as the State failed to meet its burden of proof by failing to prove reasonable suspicion to initiate the traffic stop. The Circuit Court heard arguments from counsel, and ultimately, while agreeing that the State failed to meet its burden, ordered that the evidence be reopened, the matter adjourned and the Refusal Hearing continued so that the State could produce Deputy Fiedler to provide testimony related to the traffic stop on Mika. (A. App. 27-30, R.12, pp. 27-30). The State never requested an adjournment or continuation of the Refusal Hearing. (A. App. 1-31, R.12). The Circuit Court made this decision on its own and stated: "So I am going to set this over for another date so that he [Deputy Fiedler] can be brought in to testify." (A. App. 28, R.12, p. 28, 11.17-18). "Deputy Blanchard wasn't able to testify enough about what Deputy Fiedler saw and knew and did." (A. App. 29, R.12, p. 29, 11. 1-2).

Mika objected to the reopening of the evidence and the adjournment and continuation of the Refusal Hearing. (A. App. 29, R.12, p.29,11.4-16). The Circuit Court denied Mika's objection, and stated that it was adjourning and continuing the Refusal Hearing "because it's a public safety concern. There's no doubt in my mind he was driving drunk that night according to the testimony I already have. The question is whether or not they had the right to pull him over and that's what I need to determine and that's my job." (A. App. 30, R.12, p. 30, 11. 1-6).

The Continued Refusal Hearing occurred on July 30, 2019. (A. App. 32-68, R.13). Prior to taking any testimony, Mika again renewed his objection to the Circuit Court's reopening of evidence, adjournment and continuation of the Refusal Hearing. (A. App. 34-37, R.13, pp.3-6). The Circuit Court again recognized that the State failed to prove its case at the initial Refusal Hearing before the State rested its case, stating: "The state here, quite frankly, made a mistake. They did not bring in the witnesses that they needed to have here for that hearing, but that's not the same as the fact that those witnesses did not exist and that the Court is somehow manipulating the evidence or the circumstances to make something when there is nothing there." (A. App. 47-54, R.13, p. 7, 11. 16-23). The Court continued, stating that its decision to reopen the evidence was "in the interest of the public and public safety." (A. App. 39, R.13, p.8, 11. 4-5).

Once the evidence was reopened, the State called one witness, Deputy Brody Fiedler. (A. App. 39, R.13, p.8, 11. 23-24). Deputy Fiedler testified that he also heard the dispatch callout for a male that was intoxicated and disorderly at Alpine

Valley. (A. App. 40-41, R.13, pp. 9-10, 11. 24-25, 1-2). Deputy Fiedler provided additional detail from the dispatch callout that Deputy Blanchard failed to provide, namely, Deputy Fiedler testified that dispatch gave a make of the vehicle, along with a statement that the vehicle had Illinois plates'. (A. App. 41, R.13, p.10, 11. 6-9). Subsequent to receiving the dispatch callout, Deputy Fiedler stated that he saw a vehicle matching the description that was reported, he thought the vehicle was driving slow, and initiated a traffic stop of the vehicle. (A. App. 42-43, R.13, pp.11-12, 11. 3-25, 1-7). In particular, Deputy Fiedler testified that he had "reasonable suspicion that the vehicle was the suspect vehicle so I conducted a traffic stop believing that the driver was possibly impaired, because that was part of the report from the off-duty deputy[2]who was on scene." (A. App. 43, R.13, p.12, 11. 3-7). Deputy Fiedler then concluded that the vehicle he stopped was Mika's, and Deputy Fiedler gave his initial impressions of Mika. (A. App. 43-44, R.13, pp. 12-13, 11. 14-25, 11. 1-3).

During cross-examination, Deputy Fiedler acknowledged that dispatch callout that he was relying upon solely used the words "intoxicated and disorderly male." (A. App. 44, R.13, p.13, 11. 13-25). Deputy Fiedler was not provided with any additional information from dispatch, such as why they believed the individual was intoxicated or what signs of intoxication were observed. (A. App. 44-45, R.13,

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' The State never introduced a transcript from the dispatch callout.

[2]Deputy Fiedler provided testimony that the initial call to dispatch was from an off-duty deputy at Alpine Valley. However, as discussed in more detail throughout, the State failed to call this off-duty deputy as a witness.

pp. 13-14, 11. 13-25, 1-8). Additionally, just like Deputy Blanchard, Deputy Fiedler never spoke to the off-duty deputy that made the initial call to dispatch and never verified the information provided to dispatch. (A. App. 45, R.13. p. 14, 11. 9-16). Deputy Fiedler testified that he only followed Mika's vehicle for a quarter mile, and during that time, Deputy Fiedler did not witness Mika commit any traffic violations, swerve out of his lane, or have any mechanical defects. (A. App. 47, R.13, p. 16,11. 8-16). Rather, Deputy Fiedler's sole reason for the stop, as stated on direct examination, was that he had "reasonable suspicion that the vehicle was the suspect vehicle." (A. App. 43, R.13, p.12, 11. 3-7). Deputy Fiedler did not issue Mika any citations. (A. App. 47-48, R.13, pp.16-17, 11. 25, 1-2). Deputy Fiedler never spoke to the individual that made the initial call to dispatch, never obtained a written statement from that individual, and never felt the need to contact that individual. (A. App. 48-49, R.13, pp. 17-18, 11. 20-25, 1-8). Additionally, Deputy Fiedler confirmed that dispatch failed to provide him with a race of the suspect, an age of the suspect, or whether the suspect vehicle was a sedan or SUV; rather, it was just an intoxicated, disorderly male in a dark Audi with Illinois plates. (A. App. 49, R.13, p. 18, 11. 9-23).

Upon the completion of Deputy Fiedler's testimony, the State rested. The State failed to call the individual that placed the initial call to dispatch reporting the intoxicated and disorderly male leaving Alpine Valley. While Deputy Fiedler and Deputy Blanchard testified that the report came from an off-duty sheriff's deputy, neither of them ever spoke to this individual or obtained a written statement from

this individual, and the individual was not called as a witness. The State failed to provide any testimony related to the collective knowledge that supported the traffic stop on Mika.

ARGUMENT

I. The Circuit Court Committed Error By Finding that the Defendant Violated Wisconsin's Implied Consent Law, Wis. Stat. § 343.305.

Whether there was probable cause or reasonable suspicion to conduct a stop is a question of constitutional fact, which is a mixed question of law and fact to which this court shall apply a two-step standard of review. First, this Court shall review the Circuit Court's findings of historical fact under the clearly erroneous standard. Second, this Court shall review the application of those historical facts to the constitutional principles independent of the determinations rendered by the Circuit Court. *In re Refusal of Anagnos,* 2012 WI 64, ¶21, 341 Wis. 2d 576, 815 N.W.2d 675.

"A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer's experience, he or she reasonably suspects "that criminal activity may be afoot." *State v. Wittrock,* 2012 WI App 40, ¶6, 340 Wis. 2d 499, 812 N.W.2d 540 (unpublished), citing *State v. Williams,* 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1969)). "Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences

from those facts, that an individual was committing a crime." *Wittrock,* at ¶6, citing *State v. Waldner,* 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). The stop must be based on something more than an officer's "inchoate and unparticularized suspicion or hunch." *State v. Rutzinski,* 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. The test for determining whether reasonable suspicion exists is based upon an objective standard and takes into account the totality of the circumstances. , 2012 WI App 112, ¶9, 344 Wis. 2d 422, 824 N.W.2d 853, citing *State v. Williams*, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *Rissley,* at ¶9, citing *State v. Post,* 301 Wis. 2d 1, ¶10, 733 N.W.2d 634 (quoting *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "The crucial question is whether 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." *Rissley,* at ¶9, citing *Post,* 301 Wis. 2d 1, ¶13, 733 N.W.2d 634. That commonsense approach "balances the interests of the State in detecting, preventing, and investigating crime and the rights of the individuals to be free from unreasonable intrusions." *id.*

A determination of reasonable suspicion for an investigatory stop and subsequent protective search is a question of constitutional fact. *State v. Kammeyer*, 2013 WI App 30, ¶5, 346 Wis. 2d 279, 827 N.W.2d 929 (unpublished), citing *State v. Williams,* 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. While this

standard was set forth in the United States Supreme Court case of *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the State of Wisconsin codified the reasonable suspicion standard in Wis. Stat. §968.24.

The State bears the burden of proving that a temporary detention was reasonable. *Pickens,* at ¶14; *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *State v. Quartana,* 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997). Such a detention requires a reasonable suspicion, grounded in "specific and articulable facts," and reasonable inferences from those facts, that an individual was engaging in illegal activity. *Pickens,* at ¶14; *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see also State v. Waldner,* 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

The *Terry* Court explained that courts need the underlying articulable facts in order to perform their neutral oversight function:

> [I]n justifying the particular intrusion [at a suppression hearing] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge...

Pickens, at ¶14; *Terry,* 392 U.S. at 21, 88 S.Ct. 1868 (footnote omitted); *See also Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (the protection of the Fourth Amendment consists of requiring that facts and reasonable inferences from those facts "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

Where an officer relies on information provided by dispatch, "reasonable suspicion is assessed by looking at the collective knowledge of police officers." *Wittrock,* at ¶7, citing *State v. Pickens,* 2010 WI App 5, ¶11, 323 Wis. 2d 226, 779 N.W.2d 1 (Wis. App 2009). "[U]nder the collective knowledge doctrine, [t]he police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department.' *Rissley,* at ¶19, citing *State v. Mabra,* 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974). "The same reasoning applies to cases involving investigatory stops based upon reasonable suspicion." *Rissley,* at ¶19; *State v. Pickens,* 2010 WI App 5, ¶11-12, 15-17, 323 Wis. 2d 226, 779 N.W.2d 1; *see also Hensley,* 469 U.S. at 232, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) ("[I]f a...bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that...bulletin justifies a stop...")

If a defendant moves to suppress, the prosecutor must prove the collective knowledge that supports the stop. *Witrock,* at ¶7, citing *State v. Pickens,* 2010 WI App 5 at ¶13. Thus, when an officer relies on an ATL or bulletin [or dispatch] in making a stop, the inquiry is whether the officer that initiated the ATL or communication, not the responding officer, had knowledge of specific and articulable facts supporting reasonable suspicion at the time of the stop. *Wittrock,* at ¶7 (emphasis added), citing *United States v. Hensley,* 469 at 231-32, 233, 105 S.Ct. 675, (evidence uncovered in the course of a *Terry* stop "is admissible if the

police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop"). Thus, for cases under the collective knowledge doctrine, the court must consider the information available to both the dispatcher and the police officer who made the stop when deciding whether the stop was justified by reasonable suspicion. *Rissley,* at ¶19 .

In the context of a refusal hearing, while the issues are limited as set forth in Wis. Stat § 343.305(9)(a)5.a., the Wisconsin Supreme Court has held:

> We conclude that Wis. Stat. § 343.305(9)(a)5.a. does not limit the circuit court to considering whether, based on all the evidence gathered up until the moment of the arrest, the officer had probable cause to believe the defendant was operating while under the influence of an intoxicant. The language of the statute provides that a defendant may also contest whether he was lawfully placed under arrest. As part of this inquiry, the circuit court may entertain an argument **that the arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion.** [emphasis added]
>
> If the court concludes that the defendant was not "lawfully placed under arrest," then it has determined the issue set forth in sub. (9)(a)5.a. favorably to the defendant. Under those circumstances, Wis. Stat. § 343.305(9)(d) provides that "the court shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question."

State v. Anagnos (In re Anagnos), 2012 WI 64, P42-P43, 341 Wis. 2d 576, 595-596, 815 N.W.2d 675, 684-685.

A. The Court Committed Error in Reopening the Evidence After Determining that the State Failed to Meet its Burden.

It is undisputed that at the initial Refusal Hearing on June 10, 2019, the State failed to produce any evidence to establish that the traffic stop that preceded the arrest was based upon probable cause or reasonable suspicion. In fact, the sole witness at that Refusal Hearing did not make any contact with Mika until Mika was already stopped. The Circuit Court recognized as much after the Parties rested, closed the evidence, and gave closing arguments. By that time, despite the State's failure to produce any evidence of the traffic stop, the Circuit Court had already made up its mind: "There's no doubt in my mind that he was driving drunk that night." (A. App. 30, R.12, p.30,11.2-3). Thus, the Circuit Court, on its own motion, reopened the evidence, and adjourned the Refusal Hearing to a later date to permit the State to produce evidence related to the traffic stop in order to obtain the Circuit Court's desired result.

"The general rule is that after the evidence of the defendant is closed the plaintiff will be confined to rebutting evidence, and will not be allowed to produce original or direct evidence on his part, or go into his original case again; but the rule is not inflexible, and the court may, in its discretion, allow or refuse to receive such evidence." *Diener v. Heritage Mut. Ins. Co.,* 37 Wis. 2d 411, 421, 155 N.W.2d 37 (1967) (quoting *McGowan v. Chicago & N.W. Ry. Co.,* 91 Wis. 147, 153, 64 N.W. 891 (1895)). A circuit court "may on its own motion reopen [a case] for

further testimony in order to make a more complete record **in the interests of equity and justice."** *State v. Hanson*, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978) (emphasis added); *Weiss v. United Fire & Casualty Co.*, 197 Wis. 2d 365, 387, 541 N.W.2d 753, 761 (1995). "A trial court's decision as to whether to reopen a case for the presentation of additional evidence involves the exercise of discretion, requiring consideration of general principles of equity and justice, including consideration of whether the opposing party will be prejudiced in the trial or proof of his contentions." *Artz v. Kirt*, 126 Wis. 2d 510, 375 N.W.2d 219 (Ct. App. 1985)(citing *Estate of Javornik*, 35 Wis. 2d 741, 746, 151 N.W.2d 721, 723-24 (1967)). In determining whether the Circuit Court erroneously exercised its discretion, the Court of Appeals determines whether the decision is based on the facts of record and on the application of the correct legal standard. *260 N. 12th St., LLC v. DOT*, 2011 WI 103, ¶ 38, 338 Wis. 2d 34, 808 N.W. 2d 72; Miller v. Hanover Ins. Co., 2010 WI 75, 326 Wis. 2d 640, 785 N.W. 2d 493, citing Sukula v. Heritage Mut. Ins. Co., 2005 WI 83, ¶ 8, 282 Wis. 2d 46, 698 N.W. 2d 610 and Larry v. Harris, 2008 WI 81, ¶ 15, 311 Wis. 2d 326, 752 N.W.2d 279. Statutory interpretations and the application of a statute to specific facts are questions of law that are reviewed de novo. *Porter v. Ford Motor Co.*, 2015 WI App 39, 362 Wis. 2d 505, 865 N.W.2d 207.

Here, the State never requested an adjournment of the Refusal Hearing or otherwise sought to reopen the evidence. Rather, it was not until after the Circuit Court determined that the State failed to meet its burden that the Circuit Court, on

its own motion, reopened testimony. At this point, the Circuit Court had heard evidence related to Mika's performance on standard field sobriety tests and had already made a determination in this matter: "There's no doubt in my mind that he was driving drunk that night." (A. App. 30, R.12, p.30,11.2-3). Thus, the reopening of evidence in this matter was not done in the interests of equity and justice, but rather, because the Circuit Court made a determination that only a finding of guilt would result in "justice."

The United States Supreme Court has stated: "The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152, 126 S. Ct. 2557, 2566, 165 L. Ed. 2d 409, 421-422 (citation omitted). When the Circuit Court makes a determination that the State failed to prove its case, but nevertheless has already determined that the Defendant was driving drunk, and thus, reopens the case on its own motion in order to provide the State with an additional opportunity to prove its case; said decision flies in the face of a trial that "appears fair to all who observe them."

The Circuit Court, in attempting to satisfy the interests of justice requirement[3], stated that this includes "the interest of the public." (A. App. 38, R.13, p. 7, 11. 15-16). Presumably, the Circuit Court feels that if this Defendant, who the

[3]At no point did the Circuit Court discuss the interests of equity.

Circuit Court has already made a determination was driving drunk, is not found guilty, that the interests of the public would be harmed. However, the interests of justice can only be served if it ensures that the process is fair, and that defendants are provided with fair trials.

Because the Circuit Court's reopening of evidence was not fair, equitable, or in the interests of equity and justice, this Court should reverse the Circuit Court and hold that the State failed to meet its burden when it closed its case on June 10, 2019.

B. The Circuit Court Committed Error When it Held that the Collective Knowledge Doctrine Did Not Apply to the Present Matter.

The Circuit Court committed error when it held that the traffic stop of Mika was not a collective knowledge doctrine case. Namely, the testimony of Deputy Fiedler, the deputy that initiated the traffic stop , did not state that he had reasonable suspicion that Mika committed a traffic violation or otherwise broke the law; but rather, that he had "reasonable suspicion that the vehicle was the suspect vehicle [that dispatch informed him about]." (A. App. 43, R.13, p.12, 11. 3-7).

Where an officer relies on information provided by dispatch, "reasonable suspicion is assessed by looking at the collective knowledge of police officers." *Wittrock,* at ¶7, citing *State v. Pickens,* 2010 WI App 5, ¶11, 323 Wis. 2d 226, 779 N.W.2d 1 (Wis. App 2009). "[U]nder the collective knowledge doctrine, `[t]he police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department.'"

Rissley, at ¶19, citing *State v. Mabra,* 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974). "The same reasoning applies to cases involving investigatory stops based upon reasonable suspicion." *Rissley,* at ¶19; *State v. Pickens*, 2010 WI App 5, ¶11-12, 15-17, 323 Wis. 2d 226, 779 N.W.2d 1; *see also Hensley,* 469 U.S. at 232, 105 S.Ct. 675 (TV a...bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that ...bulletin justifies a stop...").

If a defendant moves to suppress, **the prosecutor must prove the collective knowledge that supports the stop.** *Witrock,* at ¶7, citing *State v. Pickens*, 2010 WI App 5 at !113 (emphasis added). Thus, when an **officer** relies on an ATL or bulletin [or dispatch] in making a stop, the inquiry is whether the **officer that initiated** the ATL or communication, not the responding officer, had knowledge of specific and articulable facts supporting reasonable suspicion at the time of the stop. *Wittrock,* at ¶7 (emphasis added), citing *United States v. Hensley,* 469 U.S. 221, 231-32, 233, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (evidence uncovered in the course of a *Terry* stop "is admissible if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop"). Thus, for cases under the collective knowledge doctrine, the court must consider the information available to both the dispatcher and the police officer who made the stop when deciding whether the stop was justified by reasonable suspicion. *Rissley,* at **¶19.**

While an officer, who in good faith relies upon such collective information, is legally justified to make an arrest, *Schaffer v. State,* 75 Wis. 2d 673, 677, 250

N.W.2d 326 (1977), such legal justification, however, cannot alone constitute probable cause for such an arrest; **for it is necessary that the officer's underlying assumption of probable cause be correct.** *Schaffer,* at 677 (emphasis added); *State v. Taylor,* at 515-16, 210 N.W.2d at 878. Where an officer relies upon a police communication in making an arrest, in the absence of his personal knowledge of probable cause, the arrest will only be based on probable cause, and thus valid, when such facts exist within the police department. *Schaffer,* at 677; *Desjarlais v. State,* 73 Wis. 2d 480, 491, 243 N.W.2d 453, 459 (1976); *State v. Shears,* 68 Wis. 2d 217, 253, 229 N.W.2d 103, 121 (1975). Where the State fails to produce any evidence establishing the facts constituting probable cause for the defendant's arrest known by the party that issues the communication, the State failed to establish probable cause. *Schaffer,* at 677.

The collective knowledge doctrine was discussed at length in *State v. Pickens,* 2010 WI App. 5, 323 Wis. 2d 226, 779 N.W.2d 1. Specifically, the Court stated:

> Pickens does not dispute that reasonable suspicion is assessed by looking at the collective knowledge of police officers.But he does argue that, in the absence of underlying facts, the mere knowledge of the suspicion of other officers is not the sort of information courts may consider in determining whether the reasonable suspicion standard is met. We agree.

State v. Pickens, 2010 WI App 5, **¶11,** 323 Wis. 2d 226, 779 N.W.2d 1.

Thus, in a collective knowledge case, the court's analysis focuses, as it must, **"on the information presented to the court** and not on the undeniable fact that

police officers often properly act on the basis of the knowledge of other officers without knowing the underlying facts." *Id.* (emphasis added). For example, under the collective knowledge doctrine, an investigating officer with knowledge of facts amounting to reasonable suspicion may direct a second officer without such knowledge to detain a suspect. *Pickens*, at ¶12 (emphasis added); *See Tangwell v. Stuckey,* 135 F.3d 510, 517 (7thCir. 1998) (where an arresting officer does not personally know the facts, an arrest is proper if the knowledge of the officer directing the arrest, or the collective knowledge of police, is sufficient to constitute probable cause). "At the same time, in a collective knowledge situation, **if a defendant moves to suppress, the prosecutor must prove the collective knowledge that supports the stop. Proof is not supplied by the mere testimony of one officer that he relied on the unspecified knowledge of another officer. Such testimony provides no basis for the court to assess the validity of the police suspicion — it contains no specific, articulable facts to which the court can apply the reasonable suspicion standard."** *Pickens,* at ¶13 (emphasis added).

In making this determination, the *Pickens* court relied upon the holding of the United States Supreme Court in *United States v. Hensley,* 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). *Hensley* addressed how an officer's reliance on non-specific information from other officers as contained in a police flier or bulletin can result in reasonable suspicion; Specifically, the United Stated Supreme Court stated:

> [I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information. If the flyer has been issued in the absence of a reasonable suspicion, then a stop...violates the Fourth Amendment... [W]e hold that the evidence uncovered in the course of the stop is admissible ***if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop,*** and if the stop that in fact occurred is not significantly more intrusive than would have been permitted by the issuing department.
>
> *Pickens,* at ¶15, citing *Hensley,*. at 232-233, 105 S.Ct. 675 (emphasis added; citations omitted).

Thus, pursuant to *Terry, Johnson* and *Hensley,* when a court assesses the reasonableness of a temporary detention, the Court may not consider the bare fact that investigating officers know that other officers suspect an individual of involvement in prior criminal behavior, because such evidence does not provide specific, articulable facts. *Pickens,* at ¶16.

The law does not hold that police officers must have personal knowledge of all the facts needed to support a seizure before acting. Rather, the court's focus is on what comes later — proof at a suppression hearing. As to the suppression hearing in *Pickens,* the court held that the prosecutor did not present sufficient evidence to establish reasonable suspicion.Specifically, the prosecutor solely presented testimony of the investigating officers which consisted of the bare knowledge that other officers suspected that Pickens was involved in a prior shooting. *Pickens,* at ¶17. This is not enough. The same applies in the present case.

Here, the Deputy that initiated the traffic stop on Mika did so based upon the unspecified knowledge of another, off-duty deputy. Deputy Fiedler's testimony stated as much. Thus, as the Court held in *Pickens,* such testimony provides no basis for the court to assess the validity of the original suspicion as Deputy Fiedler's testimony contained no specific, articulable facts to which the court could apply the reasonable suspicion standard. Additionally, the State failed to elicit testimony from the deputy that initiated the police dispatch that formed the basis for Deputy Fiedler's reasonable suspicion to conduct a traffic stop on Mika. Despite the lack of testimony from the deputy that initiated the dispatch, the Circuit Court held:

> I don't find that this is a case where the State is relying on some sort of collective knowledge of law enforcement in order to make this traffic stop. So while I recognize the law that you have cited to the Court, I don't think it's applicable here with regard to collective knowledge. Although it would have been nice to hear from Deputy Ruszkiewicz who was the off-duty deputy who called in to dispatch that evening, I don't think it was required.

(A.App. 57, R.13, p. 26, 11. 16-25)

While the Circuit Court held that this is not a collective knowledge case, the Circuit Court then utilized all of the alleged collective knowledge of law enforcement when setting forth the reason(s) why there was reasonable suspicion for the stop, stating:

> ...but he testified that based on the totality of the circumstances, **the information he knew from dispatch which had relayed it from off-duty Deputy Ruskiewicz, the information was an intoxicated and**

> **disorderly male involved in an incident at Alpine who had driven off in a black Audi with Illinois plates.** That is absolutely reasonable suspicion that a crime may be afoot, that something may have happened. **The deputy had called in that there was an intoxicated in an incident at Alpine. The deputy is allowed to rely on that report from another officer which in and of itself without further explanation of why he thought was intoxicated is enough to make the stop.**
>
> Officers are allowed to conduct what are essentially Terry stops of vehicles in order to ascertain if there is criminal activity afoot. So the Court is satisfied that Deputy Fiedler based on his testimony has shown that there was that level of reasonable suspicion that he was able to articulate. **This is not some unknown anonymous caller calling into dispatch.** That might be more suspect. It happens all the time that if someone calls in driving down the road and there's someone in front of them weaving all over the road, et cetera, officers try to locate those vehicles and then try to make a traffic stop based upon the information that they received. **This is even more than an anonymous caller. This is a known caller who actually is an off-duty deputy from the same department making this assertion.** So this is not something where the collective knowledge in terms of needing to have that officer testify case law applies.

(A. App. 59-61, R.13, pp. 28-30, 11. 18-25, 1-25, 1-4)(emphasis added).

Clearly the Circuit Court relied upon the collective knowledge of law enforcement to set forth the reasons why there was reasonable suspicion for the traffic stop. However, the Circuit Court refused to apply the collective knowledge doctrine to the case at hand, presumably because the State failed to provide any testimony from the underlying deputy that initiated the dispatch. Every articulable fact testified about by Deputy Fiedler to establish the reasonable suspicion for the

traffic stop was not based upon first-hand knowledge, or facts actually observed and seen by Deputy Fiedler; but rather, were based upon the collective knowledge as relayed from the off-duty deputy to dispatch to Deputy Fiedler. In fact, the Circuit Court stressed how reliable this information was for Deputy Fiedler, even though the Circuit Court never got to hear testimony from the deputy that initiated the dispatch.

The Circuit Court committed error in holding that the collective knowledge doctrine did not apply to this case. Further, the Circuit Court committed error in permitting Deputy Fiedler to rely upon the collective knowledge of law enforcement in forming a reasonable suspicion to make a traffic stop on Mika without also hearing testimony from the deputy that initiated the dispatch that Deputy Fiedler relied upon.

C. The Circuit Court Committed Error When it Determined that the Traffic Stop was Based Upon Reasonable Suspicion.

The Circuit Court committed error when it held that Deputy Fiedler's traffic stop on Mika was based upon reasonable suspicion. As stated previously, Deputy Fiedler could not point to any specific articulable facts that he personally observed to show that criminal activity was afoot. Rather, he solely relied upon the information provided to him from police dispatch. If the Circuit Court is going to hold that this is not a collective knowledge doctrine case and that the State is not required to present the deputy that initiated the police dispatch that provided the requisite reasonable suspicion for the traffic stop, the State should not be permitted

to then utilize that information to form the basis for the traffic stop. Deputy Fiedler's testimony setting forth his reasonable suspicion for the traffic stop was not that he believed criminal activity was afoot, but rather, that he had "reasonable suspicion that the vehicle was the suspect vehicle so I conducted a traffic stop believing that the driver was possibly impaired, because that was part of the report from the off-duty deputy who was on scene." (A. App. 43, R.13. p. 12, 11. 3-7). This is not sufficient.

CONCLUSION

The Circuit Court committed error when it reopened evidence and provided the State with a road map to prove its case. The Circuit Court committed error when it held this was not a collective knowledge doctrine case, and stated that the testimony of the off-duty deputy that initiated the police dispatch that Deputy Fiedler relied upon for reasonable suspicion to make the traffic stop was not necessary. The Circuit Court committed error when it held that there was reasonable suspicion to initiate a traffic stop on Mika. Accordingly, this Court should overturn the decision of the Circuit Court.

Dated at Milwaukee, Wisconsin this 19th day of November, 2019.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of those portions of this brief referred to in Wis. Stats. § 809.19(1)(d), (e) and (f) is 7,755 words.

Dated at Milwaukee, Wisconsin this 19th day of November, 2019.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated at Milwaukee, Wisconsin this 19th day of November, 2019.

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