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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 2019AP001488

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BARTOSZ MIKA,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE JUDGMENT OF
THE HONORABLE KRISTINE E. DRETTWAN, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY

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STATEMENT OF THE ISSUES

1. Did the circuit court properly exercise its discretion by reopening the evidence and adjourning the hearing?

   Circuit Court Answer: Yes.

2. Was there reasonable suspicion for stopping the defendant-appellant's vehicle?

   Circuit Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state believes that the briefs of the parties will set forth well-established legal authority governing the issues presented. Resolution of the issues in this case requires only application of these established legal principles to the particular facts of this case. The state therefore requests neither oral argument nor publication.

STATEMENT OF FACTS FROM THE REFUSAL HEARINGS RELEVANT TO REASONABLE SUSPICION TO STOP

June 10, 2019 Hearing:

Deputy Blanchard's Testimony:

At the refusal hearing held on June 10, 2019 the State called one witness, Walworth County Sheriff's Deputy Wayne Blanchard (R12:4-20). Deputy Blanchard testified that around 10:00 p.m. on February 18, 2019, he was on duty and advised by dispatch of an intoxicated male who was being disorderly with security staff at Alpine Valley. Dispatch

advised that the intoxicated disorderly male had just left Alpine Valley in a dark colored vehicle with Illinois plates (R12:5, 15-16, 19-20). The caller was a security guard at Alpine Valley, identified as off-duty Sheriff's Deputy Ruszkiewicz, who has over twenty-four years law enforcement experience (R12:16-17).

After receiving this information, Deputy Blanchard responded to the area. While en route, Deputy Blanchard was advised that Deputy Fiedler had located the suspect vehicle and had conducted a traffic stop on that vehicle on Highway 120 just south of Highway D in Walworth County, Wisconsin (R12:5-6, 16, 20). Upon arrival on scene, Deputy Blanchard spoke with Deputy Fiedler who advised that he made contact with both occupants of the vehicle, identified them, and believed that the driver was intoxicated because he smelled an odor of intoxicants on the driver's breath (R12:6). The driver was identified as Bartosz Mika (R12:6-7).

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following Deputy Blanchard's testimony, the State rested and Mika's attorney moved the Court to dismiss the matter alleging the State had failed to produce any evidence of reasonable suspicion for the stop (R12:21-22). The State responded that the "issue of this hearing is

limited to whether or not this deputy had probable cause to believe that this defendant was driving or operating a motor vehicle." (R12:22).

The trial court subsequently continued the hearing, stating:

> Here's the bottom line for the Court. I'm continuing this. You need to have Deputy Fiedler here.
>
> …
>
> I don't know if you didn't know that he was the one who made the stop or not. It's an OWI and it's a refusal so in the interest of public safety I need to hold a full hearing in this regard.
>
> There's no doubt in the Court's mind once Deputy Blanchard came on scene that when he – I don't need anymore testimony about whether or not there was probable cause for him to arrest him at that point. From the field sobriety, from his observations of the defendant, that's not the question. The question for me is the stop and whether or not this was – if there's enough to link up the reason for the stop to this defendant. 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. It's nothing on Deputy Blanchard. You needed to have Deputy Fiedler here. 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. Again, I'm not hearing any more testimony with regard to anything after the stop. Clearly, there was probable cause to arrest and clearly the

> defendant refused and had no reason not to. It was unreasonable. But I need to be able to hear through credible testimony. And I certainly know the collective observation doctrine. But Deputy Blanchard wasn't able to testify enough about what Deputy Fielder saw and knew and did. So that's why I need him to testify.

(R12:27-29).

Mika's attorney objected to adjourning the hearing (R12:29). In response the Court stated:

> I stated what I believe the issue is that I don't need anymore testimony, and 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. So I certainly note your objection for the record but this is what I believe I need to do in order to fully litigate this issue.

(R12:29-30).

The Court then proceeded to schedule an adjourned hearing to obtain additional evidence for July 30, 2019 (R12:30).

July 30, 2019 Hearing:

Prior the commencement of the continued refusal hearing Mika's attorney again objected to the Court's decision to adjourn the original refusal hearing (R13:3-6). Noting the objection the Court stated:

> Well you've made your argument again, and I disagree with it. It's the reason that I made the

> decision that I did back on June 10th. You're right, evidence had closed, parties had made their argument. But as you also stated the Court does have the discretion to reopen evidence if it believes that it's necessary in order to promote the interest of justice. I absolutely agree with you that one of the aspects of justice is protecting a defendant's rights. I also recognize that this is a civil matter, it's not a criminal matter. And I firmly believe that the interest of justice, it is a scale, especially in a civil case. It doesn't just include the defendant's rights. It also includes the rights of the public. 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. And, quite frankly, I do not agree with your argument to the Court that this Court is somehow assisting the state in this manner. I recognize that I reopened evidence to allow the second deputy to testify, but again, that's coming from the Court's perspective of being in the interest of the public and of public safety. 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 for this Court to engage in a full examination of the facts surrounding this incident involving this defendant and this civil matter of the refusal.
>
> So for those reasons the Court made that determination I need to hear everything before I can make a decision on that; so that's what I did. That being said, you've made your record. You have preserved it. And I'm going to allow the other deputy who was on the scene and who actually made the traffic stop testify.

(R13:6-8).

Deputy Brody Fiedler's Testimony:

At the refusal hearing held on July 30, 2019 the State called one witness, Walworth County Sheriff's Deputy Brody Fiedler (R13:9-19). Deputy Fiedler testified that on February 18, 2019 at approximately 10:00 p.m. he was on duty when he was dispatched to Alpine Valley for a report of a male that was intoxicated and disorderly (R13:9-10, 18). While responding, Deputy Fiedler was advised by dispatch that an off-duty deputy working as a security officer was on scene when the disorderly incident occurred and that he had contact with the intoxicated male suspect who had just left Alpine Valley in a black Audi with Illinois plates (R13:10, 14, 18, 19).

A couple of minutes after receiving this call, Deputy Fiedler located a vehicle matching the description given by dispatch, coming from the direct vicinity of Alpine Valley (R13:10-11, 19). Deputy Fiedler testified that the location of the vehicle, as well as the time he located the vehicle, was consistent with the information he had received from dispatch that the vehicle was leaving Alpine Valley. Deputy Fiedler was westbound on Highway D approaching the intersection of Highway D and Highway 120 when he observed a black Audi with Illinois license plates eastbound on Highway D at the intersection of Highway D and Highway 120. Deputy Fiedler observed that as the black Audi approached

the stop sign on Highway D in the right turn lane, the Audi came to a stop, then moved forward, stopped a second time and then turned south on Highway 120 toward Illinois (R13:10-11, 14-15, 17). There was no other traffic in the area at the time (R13:11, 17).

Upon seeing the black Audi, Deputy Fiedler pulled out behind the Audi and followed the Audi for approximately a quarter mile (R13:12, 16). Once behind the black Audi, Deputy Fiedler testified the Audi traveled extremely slowly in the lane of traffic. The speed limit in that area is fifty-five miles an hour and Deputy Fiedler testified the black Audi was traveling "slow enough that it would have impeded other traffic had there been other vehicles around while under the speed limit." (R13:11, 15-16). Deputy Fiedler testified that it was odd and unusual for a driver to be going as slow as the suspect vehicle was traveling (R13:16). Based on the unusual driving behavior observed by Deputy Fiedler, coupled with the information from dispatch, Deputy Fiedler conducted a traffic stop of the black Audi (R13:12, 16, 17, 19). The stop occurred just south of the intersection of Highway D and Highway 120 on Highway 120 located in the Town of LaFayette, Walworth County, Wisconsin (R13:12).

Deputy Fiedler made contact with the driver of the vehicle, who was identified as Mika. Mika admitted knowing that he was being stopped for having an argument at Alpine Valley (R13:12).

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence adduced at the refusal hearing, the trial court found that there was reasonable suspicion to stop Mika's vehicle. Specifically, the court stated:

> [T]he standard is a reasonable and articulated suspicion. It's a low level of proof. It has to be more than a hunch, absolutely. But it's not probable cause. The reality is is that both Deputy Blanchard and Deputy Fiedler have now testified that they were working on February 18th of 2019 at about 10:00 p.m. when dispatch put out notification to them that a call had come in to dispatch from off-duty Deputy Ruszkiewicz who was working security at Alpine. That Deputy Ruszkiewicz reported that there was an intoxicated and disorderly male at Alpine Valley. By the way, it's wintertime. We're not talking about the music theater. We're talking about the adjacent ski lodge. That there was an intoxicated and disorderly male at Alpine who was involved in an incident at Alpine and had driven off in a black Audi with Illinois plates.
>
> Deputy Fiedler testified that within a couple of minutes, not even that much time, he was approaching Alpine. He was coming on D up to the intersection with 120. He was a black Audi across from him approaching on D from the thither direction from Alpine Valley. He watches as this Audi does what he termed an abnormal stop, stopped once, and then crept forward, stopped again, and then made a right hand turn onto

Highway 120 heading southbound which as Deputy Fielder noted is in the direction of Illinois. Once the car had turned and he pulled in front of it he noted that it had Illinois plates. He followed it for about a quarter mile, saw that it was going very slow to the point where if there was other traffic it would have impeded it. The speed limit there is 55 and it was well under the speed limit. These were concerning to the deputy, but he testified that based on the totality of these circumstances, the information that he knew from dispatch which had relayed it from off-duty Deputy Ruszkiewicz, the information was an intoxicated and disorderly male involved in an incident at Alpine who has 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 male involved in an incident at Alpine. The deputy is allowed to rely on that report from another officer which in and of itself without a 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 in to 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 on the information that they have 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.

R13:27-30.[1] The Court concluded:

> [T]herefore, based on this record, I do believe that the state has shown as I have said a reasonable and articulated suspicion for stopping this vehicle…

R13:31.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SUA SPONTE REOPENING THE EVIDENCE AND ADJOURNING THE HEARING.

Mika concedes that a decision whether to reopen a case in order to produce additional testimony is within the broad discretion of the trial court, which 'may on its own motion reopen 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, 215 (1978). *See* Mika's Brief at p. 17-18. An appellate court will only reverse a court's decision to reopen a matter if "there [is] no reasonable basis for that decision." *Stivarius v. DiVall*, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984).

In this case, at the close of the hearing Mika argued that the State failed to establish reasonable suspicion for the stop of his vehicle. In response, the State incorrectly

[1] Mika does not challenge the trial court's findings of fact, only whether those facts establish reasonable suspicion to stop. *See* Mika's Appellate Brief at p. 27-28.

argued that reasonable suspicion for the stop was not an issue for the refusal hearing. *See State v. Anagnos,* 2012 WI 64, ¶ 42, 341 Wis.2d 576, 815 N.W.2d 675. The court noted that it lacked information on the reasonable suspicion for the stop, one of the factors to be considered in determining whether Mika's refusal was reasonable, because the deputy who was involved in the traffic stop of Mika's vehicle was not called to testify.

In reopening the evidence the Court explained:

> It's an OWI and it's a refusal so in the interest of public safety I need to hold a full hearing in this regard.
>
> …
>
> I don't need anymore testimony about whether or not there was probable cause for him to arrest him at that point. From the field sobriety, from his observations of the defendant, that's not the question. The question for me is the stop and whether or not this was – if there's enough to link up the reason for the stop to this defendant…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.

R12:27-28. The Court continued:

> 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. So I certainly note your objection for the record but this is what I believe I need to do in order to fully litigate this issue.

R12:30. In exercising its discretion the Court further stated:

> [I] reopened evidence to allow the second deputy to testify, but again, that's coming from the Court's perspective of being in the interest of the public and of public safety. 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 for this Court to engage in a full examination of the facts surrounding this incident involving this defendant and this civil matter of the refusal.
>
> So for those reasons the Court made that determination I need to hear everything before I can make a decision on that; so that's what I did.

R13:8.

As this record clearly shows, the Court did not abuse its discretion in reopening the evidentiary hearing to receive information concerning one of the factors to be considered by the court in disposing of the motion before it. Mika's contention that "the reopening of evidence in this matter was not done in the interest of equity and justice, but rather, because the Circuit Court made a determination that only a finding of guilt would result in 'justice'" is belied by the record. *See* Mika's Brief at p. 19. Instead, the Circuit Court's decision had a reasonable basis – to have the entire factual circumstances litigated

- and therefore, the Court did not erroneously exercise its discretion in reopening the evidence.

II. THE TIP TO DISPATCH, COMBINED WITH DEPUTY FIEDLER'S OBSERVATIONS, WAS SUFFICIENTLY RELIABLE FOR DEPUTY FIEDLER TO CONDUCT AN INVESTIGATORY STOP OF MIKA IN THIS CASE.

A defendant may raise the constitutionality of a traffic stop as a defense at a refusal hearing. *State v. Anagnos,* 2012 WI 64, ¶ 42, 341 Wis.2d 576, 815 N.W.2d 675. A stop is unconstitutional if it was not based on probable cause or reasonable suspicion. *Id.,* ¶ 20. Whether police had reasonable suspicion to conduct a stop presents a question of constitutional fact, that is, a mixed question of law and fact to which this Court applies a two-step standard of review. *Anagnos,* 341 Wis.2d 576, ¶ 21, 815 N.W.2d 675. "First, we review the circuit court's findings of historical fact under the clearly erroneous standard." *Id.,* "Second, we review the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court." *Id.*

The United States Supreme Court has held that a police officer may stop an individual when they reasonably suspect criminal activity may be afoot, based upon the officer's experience, and make reasonable inquiries aimed at confirming or dispelling his suspicions. *Terry v. Ohio*, 392

U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). The officer must be able to articulate inferences from those facts, reasonable to warrant the intrusion. *Id.* at 21. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest, to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. *See also State v. Anderson*, 155 Wis.2d 77, 454 N.W.2d 763 (1998); and 968.24[2], Wis. Stat. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining information, may be the most reasonable in light of the facts known to the officer at the time. *Adams v. Williams*, 407 U.S. 143, 145-146, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972).

The question of what constitutes reasonable suspicion is a common sense test. "Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training

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[2] Wis. Stat. § 968.24 provides: "After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped."

and experience?" *State v. Amos*, 220 Wis.2d 793, 584 N.W.2d 170, 172 (Ct. App. 1990) *citing State v. Jackson*, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989). It invokes the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

A determination of reasonableness depends on the totality of the circumstances. *State v. Waldner*, 206 Wis.2d 51, 53, 556 N.W.2d 681, 683 (1996). Suspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. If any reasonable inference of wrongful conduct can be objectively discerned, not withstanding the existence of other innocent inferences that could be drawn, the officers have a right to temporarily detain the individual for the purpose of inquiry. *Anderson*, 155 Wis.2d at 84, 454 N.W.2d at 768.

In the present case, Deputy Fiedler had reasonable and specific facts in support of why he initially stopped to investigate Mika. Deputy Fiedler received information through dispatch from an identified tipster, who happened to be an off-duty deputy sheriff, that a vehicle in the same vicinity and matching the description of Mika's

vehicle was being driven by a possible intoxicated driver. Deputy Fiedler was informed by dispatch that off-duty Deputy Ruszkiewicz was working as a security officer at Alpine Valley when he had contact with Mika, who Ruszkiewicz observed was disorderly and intoxicated. Deputy Ruszkiewicz also observed Mika drive away from Alpine Valley.

Our courts have recognized the importance of citizen informants and accordingly apply a relaxed test for reliability that shifts from a question of "personal reliability" to one of "observational reliability"." *See State v. Kolk*, 2006 WI App 261, ¶13, 298 Wis.2d 99, 726 N.W.2d 337. In order for an officer to rely on information given by a citizen informant, the Wisconsin Supreme Court has held that the tip should exhibit reasonable indicia of reliability. *State v. Rutzinski*, 2001 WI 22, ¶18, 241 Wis.2d 729, 623 N.W.2d 516. "In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity; and (2) the informant's basis of knowledge. These considerations should be viewed in light of the 'totality of the circumstances,' and not as discrete elements of a more rigid test." *Id.* (citations omitted).[3] Compared to

[3] Contrary to Mika's contention, *Rutzinski* controls the outcome of this case. Simply because the citizen informant in this case happens to be an off-duty police officer does not alter the test to be

anonymous tips, information from an identified source has an increased reliability because providing false information to the police could lead to arrest. *Id.* Moreover, if the tip is reasonably reliable, an officer needs less corroborating personal knowledge. *See State v. Paszek*, 50 Wis.2d 619, 631-32, 194 N.W.2d 836 (1971).

In *Rutzinski*, the arresting officer received a dispatch based upon a cell-phone report from an unidentified motorist of a possible intoxicated driver. Unlike here, in *Rutzinski* the officer did not independently observe any signs of erratic driving but stopped the suspect vehicle identified by the caller. Based upon evidence obtained after the stop, *Rutzinski*, like Mika, was arrested for operating a motor vehicle while intoxicated. In upholding the stop which was based solely upon an anonymous tip the Supreme Court held that the tip provided sufficient justification for the investigative stop because the tip contained sufficient indicia of the informant's reliability and the information in the tip exposed the informant to possible identification. The tip reported contemporaneous and verifiable observations regarding Rutzinski's alleged erratic driving, location, and

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applied to tips received from the public. Nor does Mika cite any authority to support his contention that information received from an off-duty police officer should be treated any differently from any other citizen informant.

vehicle's description; and the arresting officer verified many of the details in the informant's tip. Further, the allegations in the tip could suggest to a reasonable officer that Rutzinski was operating his vehicle while intoxicated. This exigency strongly weighs in favor of immediate police investigation. *Id.* at ¶38.

Here, consistent with the considerations in *Rutzinski*, off-duty Deputy Ruszkiewicz's tip contained sufficient indicia of reliability to justify Deputy Fiedler's investigatory stop of Mika.

First, the tipster in this case was from a reliable non-anonymous source. Indeed, the informant identified himself by name and was an off-duty deputy sheriff and a colleague of the arresting officer. In *Rutzinski*, the court determined that an allegation of illegal activity must be supported by "verifiable information indicating how the tipster came to know of the alleged illegal activity" only when that information was coming from "a totally anonymous tip." *Id*. 2001 WI 22 at ¶28. A tip from a known or identifiable informant whose reputation can be assessed or who can be held responsible if a tip turns out to be fabricated usually provides a basis for ascertaining the informant's veracity or basis of knowledge. *See Florida v. J.L.*, 529 U.S. 266, 270 (2000). Accordingly, such non-

anonymity weighs in favor of the tipster's reliability. *See Adams v. Williams*, 407 U.S. 143, 146-47, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972).

Second, not only did off-duty Deputy Ruszkiewicz provide information destroying his anonymity, he also provided contemporaneous and ongoing information that was independently verified by Deputy Fiedler - even though Deputy Ruszkiewicz's information alone was sufficient based on his reputation as a deputy sheriff. Deputy Ruszkiewicz claimed to have made firsthand observations of Mika's intoxicated condition; and he was able to provide a description of Mika's vehicle, and he accurately predicted the vehicle's direction of travel. Deputy Fiedler verified not only the type of vehicle, but that the vehicle was driving in the vicinity reported by Deputy Ruszkiewicz around the same time Deputy Fiedler received the tip. *See State v. Richardson*, 156 Wis.2d 128, 142, 456 N.W.2d 830 (1990) (when police independently corroborate significant aspects of an informant's tip, the inference arises that the tipster is truthful); *Alabama v. White*, 496 U.S. 325, 332, 110 L.Ed.2d 301, 110 S.Ct. 2412 (1990) (when a caller accurately predicts future behavior, this indicates that the tip is reliable).

Moreover, unlike the officer in *Rutzinski*, Deputy Fiedler observed unusual and concerning driving behavior that corroborated the tip made to dispatch. Deputy Fiedler observed Mika's vehicle come to a stop sign, stop, roll forward, and stop a second time before turning. Deputy Fiedler found this to be abnormal, particularly since there was no other traffic around and it was late at night. (R13:17). Deputy Fiedler also observed Mika's vehicle traveling well below the fifty-five mile per hour speed limit, to the point Deputy Fiedler believed it was impeding traffic (R13:15-16).

Finally, off-duty Deputy Ruszkiewicz provided information that Mika represented a threat to public safety. As noted above, *Rutzinski* has recognized a police officers need to act when a tip suggest[s] an imminent threat to the public safety. *Id*., ¶26:

> [W]e recognize that there may be circumstances where an informant's tip does not exhibit indicia of reliability that neatly fit within the bounds of the *Adams-White* spectrum, but where the allegations in the tip suggest an imminent threat to the public safety or other exigency that warrants immediate police investigation. In such circumstances, the Fourth Amendment and Article I, Section 11 do not require the police to idly stand by in hopes that their observations reveal suspicious behavior before the imminent threat comes to its fruition. Rather, it may be reasonable for an officer in such a situation to conclude that the potential for danger caused by

> a delay in immediate action justifies stopping the suspect without any further observation.

Id. Thus, in this case Deputy Fiedler had sufficient information, from a reliable identified informant coupled with his own observations of Mika's driving, to believe that Mika was a possible drunk driver.

While the *Rutzinski* court indicated that a blanket rule did not apply, it explicitly recognized that "drunk driving is an extraordinary danger," justifying unusual precautions. *Id.* at ¶36. The court found that the minimal intrusion that the stop would have presented had the suspect driver indeed not been intoxicated was outweighed by the extraordinary danger presented by drunk drivers. *Id.* at ¶ 37. This case is on all fours with *Rutzinski* with respect to the exigency that exists when potential drunk driving is involved. Indeed, this case is even a bit stronger than *Rutzinski* because the caller was identified by name before Mika's arrest, had direct contact with Mika and was a known colleague of Deputy Fiedler with twenty-four years of police experience, and Deputy Fiedler observed Mika operate his vehicle in an unusual and concerning manner.

As such, based on off-duty Deputy Ruszkiewicz's tip and Deputy Fiedler's own observations, Deputy Fiedler was

permitted to briefly stop Mika and make reasonable inquiries aimed at confirming or dispelling his suspicions. *Terry*, 392 U.S. 1 (1968). Although many innocent explanations could be hypothesized from Mika's conduct a reasonable officer cannot ignore the reasonable inference that Mika's behavior might also stem from unlawful behavior.

Based on the totality of these circumstances, a reasonable person in Deputy Fielder's position would reasonably suspect, based on the totality of these circumstances that the defendant had committed a crime. Based on the totality of these circumstances, "[i]t would have been poor police work indeed for an officer. . . to have failed to investigate this behavior further." *Anderson*, 115 Wis.2d at 84, 454 N.W.2d at 766, citing *Terry*, 392 U.S. at 23. As such, Deputy Fiedler had the right to temporarily freeze the situation in order to investigate.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the trial court be affirmed.

Dated this ____ day of December, 2019.

Respectfully submitted,

_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

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The length of the brief is ____ pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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: _____

Signed,

_____
Attorney