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

SUBMITTED BY:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

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

A. The State Failed to Show that Reopening of Evidence was in the Interest of Justice.

It is undisputed that the State failed to produce evidence sufficient to meet its burden to result in a finding of guilt for the Defendant at the initial Refusal Hearing; the Circuit Court held so, and now, in its Response Brief, the State has acknowledged as much. *(See* Respondent's Brief, pp. 13-14) When a party fails to produce evidence sufficient to meet its burden, rests it case, makes closing arguments, and has the Trial Court tell that party it failed to meet its burden, typically, the Trial Court grants a judgment for the other party. Here, however, subsequent to the conclusion of closing arguments, rather than grant a judgment of dismissal for the Defendant, the Court, *sua sponte,* reopened evidence and informed the State what testimony the Court needed to hear in order to find the Defendant guilty. The Court did so under the misguided theory of "public safety" — as the Court had already determined that the Defendant was driving drunk on the night in question. "Public Safety" is not a standard in which to reopen evidence. Rather, while trial courts have discretion to reopen evidence, it must be based on the interest of equity and justice. Obtaining a preferred result in favor of the State is not the interests of equity and justice. Rather, ensuring that all defendants are provided with fair and impartial trials constitutes equity and justice.

Here, because the Trial Court determined that the Defendant was driving drunk (even though there was no testimony provided to justify the initial stop), the Trial Court felt it was appropriate to reopen the evidence, as a failure to do so would have undoubtedly resulted in a dismissal of the charges against the Defendant. The rationale stated by the Trial Court for reopening the evidence was that the issue needed to be "fully litigated" (R.12, p.30) and that the "rights of the public" would somehow be harmed if evidence was not reopened. The Trial Court would not be interested in the "rights of the public" unless the Trial Court had not already determined that the Defendant was driving drunk on the night in question. Whether the Defendant was actually driving drunk or not is not the issue; rather, the issue is did the State present sufficient evidence to meet its burden to prove the Defendant was driving drunk in violation of the Wisconsin Statutes. The State presented its case, rested, and made closing arguments. The Trial Court agreed with defense counsel that the State failed to meet its burden. That should be the end of it.

The State failed to point to any specific facts or evidence in the record to show that the reopening of evidence was in the interests of equity and justice; presumably, this is because the State never moved to reopen evidence. Rather, the State simply block quoted the holding of the Trial Court and made a conclusory statement that the Trial Court "did not erroneously exercise its discretion in reopening the evidence." *(See* Respondent's Brief p. 16). Permitting Trial Courts to reopen evidence and provide the State with instructions on what evidence the

Trial Court needs at a subsequent hearing in order to convict is both improper, and flies in the face of equity and justice.

The Circuit Court decision to reopen evidence should be overturned.

B. The Traffic Stop on the Defendant was not based upon Reasonable Suspicion.

Although the basis for the stop was information provided by an off-duty sheriff's deputy to dispatch and then to the sheriff's deputy that made the stop, the State makes the assertion that the collective knowledge does not apply. If that is true, the State clearly failed to meet its burden, as the State cannot rely upon the collective knowledge within the department at the time of the stop (report of off-duty deputy, dispatch, etc.). The primary reason that the State asserts that the collective knowledge doctrine does not apply is because the State failed of call as a witness or provide testimony from the off-duty deputy that initiated the call to dispatch. Rather than ask this Court to rely on the collective knowledge doctrine, that State asserts that the information provided by the off-duty deputy is akin to a civilian tipster reporting information to police. While the State would ask this Court to treat the off-duty deputy as a civilian witness, the State seeks to also have this Court permit the State to utilize all of the inferences and assumptions that are associated with the collective knowledge doctrine. The bottom line is this: the State's star witness that initiated the report of an intoxicated individual failed to testify in this case. The State should not be benefitted with any inferences or assumptions of his "knowledge" without his testimony.

Assuming that this Court does not apply the collective knowledge doctrine, and rather, applies the standards as set forth in *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 337, and its progeny, the State still failed to meet its burden. In cases where a tip is determined to be reliable, and further, in which the officer relying on the tip failed to observe any independent observations, the key element is that the tip contains contemporaneous and verifiable observations of the defendant. In fact, in *Rutzinski,* the caller was personally witnessing erratic driving, in real time, while providing dispatch with the details. *Id.* at ¶38. Here, the caller to dispatch did not observe any driving, let alone erratic driving. Rather, the caller to dispatch merely stated that there was an intoxicated and disorderly male. Through two hearings in the Trial Court, not one witness testified to a specific articulable fact prior to the stop as to why they believed the defendant was intoxicated. That is because the off-duty deputy that made the conclusion of "intoxicated male" did not testify.

Additionally, when information is passed from an informant to the police, in order for the information to be sufficient to justify reasonable suspicion for an investigative stop under the Fourth Amendment, the information cannot merely be a vague report of wrongdoing; this is true whether the informant is a civilian or law enforcement. Multiple jurisdictions hold that the vague report that a driver is "intoxicated" or "drunk" is insufficient to justify a stop under the Fourth Amendment:

> Tip that driver is "intoxicated" is not enough. *E.g. Harris v. Commonwealth,* 376 Va. 689, 668 S.E.2d 141, 146 (Va. 2006).

> Callers unexplained "belief" that the driver was under the influence of alcohol not enough. *State v. Lee*, 282 Mont. 391, 938 P.2d 637, 638-640 (Mont. 1997).
>
> Tip indicating that there was a "possible drunk driver" who "could barely keep his head up" in fast-food drive-up lane not enough. *State v. Miller,* 510 N.W.2d 638, 640-645 (N.D. 1994).

For a tip to be sufficient to constitute reasonable suspicion to stop, the tip – **as relayed to the officer —** must include specific articulable facts supporting the suspicion of drunk driving[1]. Here, there were no articulable facts provided to the deputy that conducted the stop to conclude that the defendant was intoxicated. The State, knowing that it lacks any specific articulable facts of intoxication, attempts to hang its hat on the allegation the off-duty deputy's information inherently was reliable. However, no matter how reliable the tipster is, an officer cannot merely rely upon the vague statement of "drunk" or "intoxicated" without more. The State was provided with two opportunities to present the off-duty deputy as a witness and allow him the chance to testify as to what he observed, why his observations led him to conclude that the defendant was intoxicate, what he relayed to dispatch, and how his training led him to this conclusion. Unfortunately, the State chose not to call him as a witness. The Trial Court cannot supplement the record with his knowledge and/or experience when he does not testify.

[1]Had the State relied upon the collective knowledge doctrine ***and*** presented the off-duty deputy as a witness, the State would presumably be able to rely upon the vague statement of "intoxicated" male.

As Deputy Fiedler testified, 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). The key element is that Deputy Fiedler's reasonable suspicion was not that the defendant committed any traffic violations such that he could justify the stop based on his own personal observations; but rather, that he had reasonable suspicion that he located the "suspect vehicle." Because the State failed to provide, through testimony, any specific articulable facts that the Defendant committed, was committing, or was about to commit a crime, Deputy Fiedler lacked the necessary reasonable suspicion to conduct a traffic stop on the Defendant. If there is not a valid stop, then the Defendant cannot be gulty under Wisconsin's Implied Consent Law, Wis. Stat. §343.305.

CONCLUSION

The Trial Court committed error by finding that the Defendant violated Wisconsin's Implied Consent Law, Wis. Stat. §343.305.

[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.

Dated at Milwaukee, Wisconsin this 6th day of January, 2020.

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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 (0 is 1,727 words.

Dated at Milwaukee, Wisconsin this 6th day of January, 2020.

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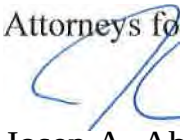

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

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

I further certify that this electronic brief is identical in content 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 at Milwaukee, Wisconsin this 6th day of January, 2020.

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