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OF WISCONSIN**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II  
APPEAL FROM THE CIRCUIT COURT  
OF WAUKESHA COUNTY  
HONORABLE MARIA LAZAR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Waukesha County  
Case No. 2019AP001650-CR  
Circuit Court No. 17CT1665

KELLY RICHARDSON,

Defendant-Appellant.

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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### ISSUE PRESENTED

- I. Did the trial court err when it denied Ms. Richardson's Motion to Suppress Evidence by finding sufficient facts to constitute reasonable suspicion to initiate an investigatory stop?

Ms. Richardson brought this issue in a pre-trial motion. After a hearing, the trial court denied the motion. A copy of the motion and transcript from its motion hearing is contained in the appendix.

### POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not required, publication is not requested.

### STATEMENT OF THE CASE

On December 19, 2017, Ms. Kelly Richardson was charged with Operating a Motor Vehicle while Intoxicated – Third Offense, contrary to Wis. Stat. 346.63(1)(a) and Operating a Motor Vehicle While Revoked, contrary to Wis. Stats. 343.44(1)(b). (*Ex: 1 – Complaint, Pg. 1-2*).

The Complaint alleged that on December 15, 2017, Sergeant Monreal of the Muskego Police Department was dispatched to the area of PNC Bank, located at S74W17100 Janesville Road, for a report of a possible intoxicated subject who was driving a vehicle. *Id.* at 2. Dispatch advised Sergeant Monreal that staff at the PNC

Bank believed the subject to be intoxicated because she left the bank smelling of intoxicants and her speech was slurred. *Id.*

Sergeant Monreal was given a vehicle description and the license plate of the subject and Sergeant Monreal located that vehicle in the Walmart parking lot located at W159S6530 Moorland Road. *Id.* Sergeant Monreal made contact with the owner of the vehicle, Kelly Richardson, as she walked back to her vehicle. *Id.* Officer Monreal never observed Ms. Richardson driving her vehicle. Upon speaking with Ms. Richardson, Sergeant Monreal allegedly observed a strong odor of intoxicants coming from her breath, detected a distinct slur to her speech, and observed that her eyes were bloodshot and glassy. *Id.* Ms. Richardson denied consuming any alcohol that day. *Id.* Nonetheless, Officer Monreal asked Ms. Richardson to perform field sobriety tests at the Tess Corners Fire Department due to the extremely cold weather conditions. *Id.*

Once they arrived at the fire station, Ms. Richardson performed the field sobriety tests. *Id.* On the horizontal gaze nystagmus test, the one leg stand test, the walk and turn test and the Romberg test, Officer Monreal allegedly observed clues of intoxication. *Id.* at 2-3. Ms. Richardson was then given a PBT which indicated a result of .170 grams of alcohol per 210 liters of the defendant's breath. *Id.* at 3. Based on Ms. Richardson's performance of the field sobriety tests and the results of the PBT, Sergeant

Monreal believed Ms. Richardson to be intoxicated. *Id.* Ms. Richardson was then transported to the Waukesha Memorial Hospital where a blood draw was performed. *Id.*

Upon reviewing a teletype of Ms. Richardson's driving record from the State of Wisconsin Department of Transportation, Division of Motor Vehicles, Officer Monreal learned that Ms. Richardson was convicted of Operating While Intoxicated on July 14, 2008 and August 26, 2015. *Id.* The same teletype also showed that Ms. Richardson's driver's license was revoked in relation to operating while under the influence of an intoxicant. *Id.*

Through counsel, Ms. Richardson filed a Motion to Suppress Evidence on June 8, 2018. (Exhibit 2 – Motion to Suppress Evidence). The Motion argued that Sergeant Monreal had no probable cause to stop and seize Ms. Richardson and, therefore, all evidence after the illegal seizure should be suppressed as the seizure violated Ms. Richardson's 4<sup>th</sup> Amendment rights. *Id.* That motion was denied.

On December 3, 2018, Ms. Richardson plead guilty to Operating While Intoxicated – Third Offense and Operating While Revoked was dismissed and read-in. Ms. Richardson was sentenced to 270 days in jail, with the first 7 months incarcerated with Huber release and the last 2 months to be served in the Day Reporting

Center. That sentenced was stayed pending appeal. (*Ex. 3 – Judgment of Conviction*).

On December 3, 2018, defense counsel filed a Notice of Intent to Pursue Post-Conviction Relief. (*Ex. 4*). On June 26, 2019, appellate counsel filed a Post-Conviction Motion. (*Ex. 4*). On August 15, 2019, the trial court filed a decision and order denying the Post-Conviction Motion. (*Ex. 5*).

### APPELLANT'S ISSUE ON APPEAL

- II. Whether The Trial Court Erred in Denying the Motion to Suppress Evidence by Finding that Law Enforcement had Reasonable Suspicion to Initiate an Investigatory Stop of Ms. Richardson

#### A. Summary of the Argument

The trial court erred in denying the motion to suppress evidence by finding reasonable suspicion, justifying the investigatory stop of Ms. Richardson.

Law enforcement initiated an investigatory stop of a vehicle being driven by Ms. Richardson after observing a vehicle matching the description of a subject who may have been operating a vehicle while intoxicated. At the time of the investigatory stop, law enforcement had no information to suggest Ms. Richardson was actually operating a vehicle while intoxicated. Some observers of Ms. Richardson allegedly noticed some signs of intoxication, law enforcement did not observe any clues prior to the investigatory stop



that Ms. Richardson was actually intoxicated. Law enforcement was merely speculating that Ms. Richardson was operating a vehicle while intoxicated based on vague information.

Ms. Richardson submits that an investigatory stop must be supported by reasonable suspicion that the individual is actually engaged in criminal activity. The speculation that a person might be engaging in criminal conduct is not enough to justify an intrusion into the liberty and privacy interests protected by the Fourth Amendment.

Accordingly, Ms. Richardson respectfully submits that the trial court erred in denying her motion to suppress evidence by finding reasonable suspicion for the stop and seizure.

#### B. Standard of Review

In reviewing a denial of a motion to suppress, the reviewing court will uphold the trial court's findings of fact unless they are clearly erroneous. State v. Young, 212 Wis.2d, 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Whether those facts satisfy the constitutional requirement of reasonableness is a question of law, which the reviewing court considers *de novo*. *Id.* A reviewing court considers the determination of reasonable suspicion *de novo*. State v. Williams, 2001 WI 21, 241 Wis.2d 531, 623 N.W.2d 106, ¶ 18.

### C. Relevant Law

The Fourth Amendment to the United States Constitution provides, in part, “The right of people to be secure in ... unreasonable searches and seizures, shall not be violated. Thus, the Fourth Amendment prohibits unreasonable searches and seizures. This prohibition also applies to the Wisconsin State Constitution through Article 1, Section 11.

An investigatory stop is a seizure and is subject to the Fourth Amendment requirement that all searches and seizures be reasonable. State v. Young, 212 Wis.2d 417 at 424; Terry v. Ohio, 392 U.S. 1, 20-22, 88 S.Ct. 1868 (1968).

In order for an investigative stop to be warranted, it is required that a law enforcement officer reasonable suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. State v. Limon, 2008 WI App. 77, 312 Wis.2d 174, 751 N.W.2d 877, ¶14.

The law enforcement officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonable warrant the intrusion. State v. Young, 212 Wis.2d 417 at 424-425.

The questions of what constitutes reasonable suspicion is a common sense test, considering under all the facts and circumstances present, what a reasonable police officer would

reasonably suspect in light of his or her own training and experience.

*Id.* at 424.

#### D. Argument

Ms. Richardson acknowledges the State's interest in investigating criminal activity, and recognizes that Terry stops further that interest. The reasonable suspicion standard functions to balance the State's interest against the privacy of the individual. See: State v. Amos, 220 Wis.2d 793, 799, 584 N.W.2d 170 (Ct. App. 1998).

In order to safeguard the individual's interest, law enforcement must rely on specific articulable facts and the reasonable inferences drawn from said facts that the person is involved in criminal activity in order to execute a valid investigatory stop.

In this case, law enforcement had no specific articulable facts that Ms. Richardson was operating a vehicle while intoxicated. Law enforcement officers were given a description and license plate number of a vehicle that was being operated by an individual suspected to be intoxicated. That suspicion derived from vague observations by certain individuals that led them to believe Ms. Richardson may have been intoxicated.

When officers observed Ms. Richardson's vehicle, they did not observe any erratic driving and found the car parked correctly in

a parking stall in the Walmart parking lot. Therefore, based on some vague observations that Ms. Richardson may have been intoxicated, law enforcement officers believed Ms. Richardson may have been operating a vehicle while intoxicated.

Ms. Richardson submits that justification for the investigatory stop was insufficient under the reasonable suspicion standard. Accordingly, the seizure was unreasonable and the evidence recovered should be suppressed/excluded from use at trial.

1. Discussion of Facts Set Forth by Law Enforcement at Motion Hearing

At the motion hearing on Ms. Richardson's motion to suppress, Sergeant Monreal testified regarding the question of the basis for the investigatory stop of Ms. Richardson.

Essentially, Sergeant Monreal concluded that he stopped Ms. Richardson at the Walmart parking lot based on the complaint from the PNC Bank employees that Ms. Richardson was intoxicated and "I wanted to make sure the driver would not get bank in the vehicle and drive away and cause an accident." (*Exhibit 6: Motion Hearing dated August 15, 2018, P. 10*).

During cross-examination, Sergeant Monreal acknowledged the PNC Bank employees did not mention any concern that Ms. Richardson struggled to complete her transaction, get into her vehicle or drive. *Id* at P. 11. Instead, he stated the employees only relayed to dispatch that Ms. Richardson appeared to have slurred

speech and the odor of intoxicants emanating from Ms. Richardson's person. *Id* at P. 10.

Sergeant Monreal eventually made contact with the vehicle and followed it for approximately 15 minutes. *Id* at P.12. He acknowledged that he did not notice the vehicle accelerate to a high rate of speed. *Id* at P. 13. When asked if he observed any traffic violations by the vehicle, Sergeant Monreal responded, "I was not able to observe any traffic violations of the vehicle." *Id*. He also noted that the vehicle was parked correctly in the Walmart parking lot. *Id* at P. 14. When asked if he saw any bad driving whatsoever, Sergeant Monreal responded "I didn't see any." *Id*.

Finally, when asked whether he had any idea of whether Ms. Richardson suffered from a speech impediment, Sergeant Monreal responded "I don't recall". *Id*. at 19.

Following the testimony of law enforcement, the court heard arguments from the parties. The court then denied them motion to suppress.

2. The Information and Facts Relied on by Law Enforcement do not Constitute Sufficient Reasonable Suspicion to Justify the Investigatory Stop of Ms. Richardson

In explaining its decision to deny the motion to suppress, the court discussed the facts it considered in determining that law enforcement had a reasonable belief to justify the investigatory stop of Ms. Richardson:

He had the fact that there were bank officers and employees who called in and were concerned enough to call in and advise that they believe that Ms. Richardson was intoxicated. Those bank officers observed the odor of intoxicants ... The employees also observed what they thought was slurred speech ... They were concerned. They took that added step. They called the police and told them who Ms. Richardson was, what she was wearing, what she was driving and the license plate number. (*Id* at 30-31).

The court then explained the factors Sergeant Monreal considered prior to making the investigatory stop:

He observed the car later on. He did not in his words see any traffic violations but he also conceded or admitted that there were points that he could not see if there were any lane deviations or anything else. He did get to the parking lot and after Ms. Richardson returned he was able to confirm and corroborate the statements, those specific and articulable facts that were made by bank employees, he observed them, observing on his own the odor of intoxicants and slurred speech. (*Id* at 31-32).

However, when it came to the alleged slurred speech observed by the PNC bank employees, the Court noted:

I will give you, Mr. Crawford, it's possible that Ms. Richardson didn't have any slurred speech, there was no slurred speech, it was due to speech impediment. That doesn't make a difference. It doesn't take away the fact that both bank employees and Sergeant Monreal observed the odor of intoxicants and bloodshot eyes. So I will give you for purposes of this motion that there was no slurred speech. I still believe there were enough specific facts for Sergeant Monreal to believe that a crime had been or a violation had been committed that Ms. Richardson was under the influence of intoxicants sufficient enough that she should not be driving an automobile. (*Id* at 32).

The Court then summarized its conclusion:

I believe that taken into account all of these factors ... that they led up to a sufficient basis for Sergeant Monreal to determine that there was an issue here. There was probable cause here. And there was reasonable suspicion to believe given all of the circumstances that further investigation of an OWI was based on those facts was within the sergeant's discretion to conduct and that the subsequent arrest was appropriate. (*Id* at 33).

Ms. Richardson respectfully disagrees with the Court's conclusion.

a. The Facts Set Forth by Law Enforcement are Insufficient to Constitute Reasonable Suspicion that Ms. Richardson was Engaged in Criminal Activity.

The facts relied on by law enforcement and set forth at the motion hearing are insufficient to establish reasonable suspicion to conclude that Ms. Richardson was engaged in criminal activity, necessary to justify the investigatory stop.

In State v. Young, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997), the court applied a standard of reasonable suspicion that considered the conduct of the individual who was stopped by law enforcement. The court noted that criminal activity may be afoot even if the individual is observed engaging in innocent activity “if reasonable inference of unlawful conduct can be objectively discerned.” *Id* at 430.

Thus, a reasonable inference of criminal conduct on the part of the person being stopped is necessary, as such an inference must be “objectively discerned” if the observed conduct appears innocent.

The justification for the stop that was offered by Sergeant Monreal was that he had reason to believe that Ms. Richardson was intoxicated and he was making sure she would not begin driving her vehicle. The only factors that Sergeant Monreal relied on to form that conclusion was that PNC Bank employees alerted dispatch that a subject matching Ms. Richardson’s description (1) smelled of intoxicants and (2) had slurred speech.

However, the PNC Bank employees noted that Ms. Richardson did not appear to be stumbling or had difficulty completing her transaction. Sergeant Monreal added that he did not notice any bad driving from Ms. Richardson, her vehicle was parked in a parking stall correctly, and she did not appear to be stumbling when walking to the car. Further, the trial court noted that Ms. Richardson may suffer from a speech impediment and, therefore, conceded the alleged slurred speech may not have been a sign of intoxication.

Therefore, the only legitimate information Sergeant Monreal relied on to conduct his investigatory stop was that employees informed dispatch that Ms. Richardson smelled of intoxicants. Even if that were true, smelling of intoxicants in and of itself does not create a reasonable suspicion that illegal activity was taking place. It is not illegal to drink alcohol in the State of Wisconsin. Nor is it illegal to frequent establishments that serve alcohol. Either of those explanations could have explained the odor of intoxicants without suggesting criminal activity was afoot.

There are several possible indicators of intoxication that would have created a totality of circumstances to suggest Ms. Richardson was operating while intoxicated. The PNC Bank employees could have stated Ms. Richardson was stumbling or struggled to complete her transaction. A responding officer could



have had Ms. Richardson perform field sobriety tests. Sergeant Monreal could have observed Ms. Richardson engage in poor or dangerous driving. None of those factors were present in this case.

Therefore, prior to the stop, the only factor Sergeant Monreal considered was a suggestion from witnesses that Ms. Richardson allegedly smelled of intoxicants. That theoretical possibility along is not a specific articulable fact that supports a reasonable inference that Ms. Richardson was actually operating her vehicle while intoxicated.

When the facts set forth by law enforcement at the motion hearing are considered in totality, they do not add up to a reasonable suspicion that Ms. Richardson was actually engaging in criminal activity that justified the investigatory stop.

b. Reasonable Suspicion of the Possibility that Criminal Activity is Afoot is insufficient to justify a Terry Investigatory Stop

The facts set forth at the motion hearing do not establish a reasonable suspicion that Ms. Richardson was actually engaging in criminal activity. Sergeant Monreal's belief that Ms. Richardson might have been operating while intoxicated was mere speculation. A reasonable inference is a qualitative measure of a certain degree of likelihood or probability. Speculation is merely a reflection of possibility.

Based on the available information provided to Sergeant Monreal, a reasonable officer may have concluded that Ms. Richardson was possibly involved in criminal activity. However, the standard of reasonable suspicion calls for a significantly more qualitative foundation.

In State v. Young, 212 Wis.2d 417 at 424, the court considered whether an investigatory stop was justified by reasonable suspicion. Officers initiated an investigatory stop of an individual suspected to be involved in drug trafficking because the suspect was stopped in an area known for drug trafficking and had been observed by another officer making short term contact with an individual.

The court held that those justifications were insufficient to establish a reasonable suspicion to justify the stop. The court further held that the area of the stop was residential and there was nothing inherently suspicious about the suspect's observed conduct as large numbers of innocent citizens engage in such conduct on a daily basis. *Id* at 429-430.

Finally, the court held that conduct that has an innocent explanation can also give rise to reasonable suspicion if a reasonable inference of unlawful activity can be objectively discerned. *Id* at 430. Based on the factors provided by the officer, the court was unable to objectively discern a reasonable

inference of unlawful conduct when the observed conduct was not inherently suspicious nor became suspicious based on its context.

This case is analogous to Young. While law enforcement was informed a subject matching Ms. Richardson's description smelled of intoxicants and had slurred speech, those officers did not objectively observe Ms. Richardson engaging in criminal activity. Ms. Richardson was driving without committing any traffic violations and officers did not observe any other indicia that would have suggested the driver of the vehicle was intoxicated. Officers only observed Ms. Richardson engaging in innocent conduct that by itself would not be suspicious.

Only by considering the conduct in the context of speculation that Ms. Richardson may be intoxicated while driving does law enforcement justify the stop. The possibility of criminal activity is insufficient to justify an investigatory stop. Therefore, a reasonable belief that Ms. Richardson was actually engaging in criminal activity cannot be objectively discerned from her conduct.

3. The Evidence Obtained from Ms. Richardson's Performance on Field Sobriety Tests Must be Suppressed in Accordance with the Exclusionary Rule

Because the investigatory stop of Ms. Richardson was an unreasonable seizure, the ensuing field sobriety tests must also be deemed unreasonable. In accordance with the exclusionary rule, the

evidence recovered from Ms. Richardson's field sobriety tests must be suppressed.

The exclusionary rule requires courts to suppress evidence obtained through an illegal search or seizure. Wong Sun v. United States, 371 U.S. 471, 488 (1963). This rule applied not only to primary evidence seized during the illegal search, but also to derivative evidence acquired as a result of that search, unless the state shows sufficient attenuation from the original illegality to dissipate that taint. State v. Carroll, 2010 WI 8, 322, Wis. 299, 778, N.W.2d 1, ¶19.

Under the attenuation doctrine, the determinative issue is whether the evidence came about from the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. State v. Simmons, 220 Wis.2d 775, 781, 585 N.W.2d 165 (Ct. App. 1998).

After considering the relevant factors such as the amount of time elapsed, the presence of intervening circumstances and the degree of the unlawful conduct, the evidence seized during the field sobriety tests came about only through a direct exploitation of the illegality.

Law enforcement seized Ms. Richardson without a reasonable suspicion that she was engaged in criminal activity. That seizure was illegal and violated Ms. Richardson's rights guaranteed

by the Fourth Amendment of the United States Constitution. The field sobriety tests occurred immediately after the illegal contact was made with Ms. Richardson.

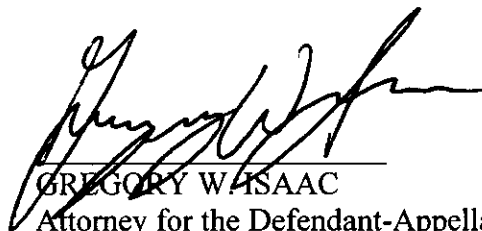
Sergeant Monreal could have believed they were acting in accordance with Ms. Richardson's Fourth Amendment rights, but the unlawful investigatory stop of Ms. Richardson was an infringement on her liberty. Because the recovery of evidence after the field sobriety tests is not sufficiently attenuated from the unreasonable seizure, the evidence must be excluded.

Conclusion

Ms. Richardson respectfully requests that this court reverse the denial of her motion to suppress, vacate the judgment of conviction and remand this case for further proceedings.

Dated this 8<sup>th</sup> day of October, 2019.

Respectfully submitted,



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Certification of Brief Compliance with Wis. Stats. §  
809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. §809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 4335 words

Certification of Appendix Compliance with Wis. Stats. §  
809.19(2)(a)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an Appendix that complies with Wis. Stats. § 809.19(2)(a) and contains (1) a table of content; (2) the findings or opinions of the trial court; and (4) portions of the record essential to the understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if required by law to be confidential, the portions of the record included in the Appendix are reproduced using first names and last initials instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that

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