STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

La Crosse County Case No. 17 CF 36

v. Appeal No. 2019AP002174-CR

CHRISTOPHER J. VAALER,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISION DENYING SUPPRESSION MOTION, ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE RAMONA A. GONZALEZ, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

I. DID DEPUTY ANDERSON HAVE SUFFICIENT REASONABLE SUSPICION THAT VAALER WAS OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT (OMVWI) TO EXTEND THE SCOPE AND DURATION OF THE STOP SO AS TO JUSTIFY HIS OMVWI INVESTIGATION?

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT

Vaaler does not request oral argument, as the issues involved in this matter can be fully presented in the parties' briefs.

STATEMENT ON PUBLICATION

This matter presents issues which involve only the application of established law to the particular facts of the case. As such, publication ordinarily would not be appropriate, however, in the event that the court rules Vaaler's favor, the dearth of published caselaw detailing sets of facts that do not rise to the level of reasonable suspicion suggests that publication may be appropriate.

STATEMENT OF THE CASE

On January 7, 2017 at approximately 2:43 a.m., Deputy Joseph Anderson of the La Crosse County Sheriff's office executed a traffic stop of a vehicle being operated by Vaaler. (8). As a result of events taking place subsequently, Vaaler was arrested and charged with operating a motor vehicle while under the influence of an intoxicant (OMVWI) as a fourth offense.[1] (R3: 1-4). Vaaler filed a motion to suppress any evidence obtained after Deputy Anderson ordered him out of the vehicle to ask him to perform field sobriety tests on the basis that the deputy lacked reasonable suspicion that he was impaired or otherwise in violation of Wis. Stat. § 346.63 sufficient to justify expanding the scope of the stop and extending its duration to conduct an OMVWI investigation. (R21: 1-4).

At the suppression hearing, Deputy Anderson testified that the reason for the initial stop was that Vaaler's vehicle was being operated in the dark without its headlights on, although the vehicle's fog lamps were lit. (R59: 9). When Deputy Anderson made contact with Vaaler, he explained the reason for the stop to him, and in response Vaaler was able to turn his vehicle's headlights on without difficulty. (R59: 9) When asked, Vaaler indicated that he was coming from Brice's Prairie, and the stop took place in the Town of Holmen, approximately five minutes from Brice's Prairie, according to Deputy Anderson. (R59: 9-10).

[1] Vaaler successfully collaterally attacked a previous OWI-related conviction, resulting in the filing of an amended complaint reducing the charge to third offense OMVWI. (R14: 1-7; R15: 1-3); these events are not at issue in this appeal.

When Anderson made contact with Vaaler, he detected a strong odor of intoxicants emanating from the vehicle, and also saw an open can of Miller Lite in the center console of the vehicle. (R59: 10). Deputy Anderson testified that he asked Vaaler a number of questions, and further, that some but not all of Vaaler's responses were delayed in some unspecified fashion. (R59: 10). Vaaler denied that he had been drinking. (R59: 10). Deputy Anderson also testified that he suspected that Vaaler was operating while impaired based upon the odor of intoxicants and the delayed answer Vaaler gave to the question Anderson asked regarding where Vaaler was coming from that evening, which delay the deputy testified was, in his experience, indicative of a person pausing to formulate a lie. (R59: 10-11). Anderson stated that he secured the can of Miller Lite that was in the center console of the vehicle, and that it was approximately half full of beer at the time. (R59: 11). When Anderson asked whose beer it was, Vaaler's female passenger stated that it belonged to her. (R59: 11). At this point, a portion of the squad video was played, starting at timestamp 2:42:59, paused at 2:43:38, after which playback was resumed with the in-squad audio turned off and the overall volume increased. The video was stopped at timestamp 2:46:20. (R59: 12-13).

On cross, Attorney Schroeder played the squad video starting at 2:41:42. (R59: 15). Deputy Anderson agreed that the previously unplayed minute between 2:41:42 and 2:42:59 depicted him following the vehicle that turned out to be Vaaler's vehicle, and further, that there were lights on Vaaler's vehicle which appeared to be illuminating the road to some extent. (R59: 15). In addition, the area where the stop took place had streetlights which provided "ample" illumination. (R59: 16). Anderson did not observe any weaving or other indicia of impairment in Vaaler's operation of the vehicle, and agreed that Vaaler used his turn signal properly to signal a turn. (R59: 15). Anderson also agreed that nothing in the way that Vaaler pulled over after Anderson activated his emergency lights and siren to initiate the traffic stop indicated that Vaaler was in any way impaired. (R59: 15-16). Similarly, Vaaler did not appear to Anderson to have bloodshot or glassy eyes, nor was Vaaler's speech slurred, even slightly. (R59: 16). As was noted earlier, Vaaler denied that he had been drinking. (R59:

16-17).

As to Vaaler's female passenger, Anderson testified that it was obvious that she was intoxicated, that she was slurring her speech, and that she appeared to be impaired. (R59: 17). Anderson then confirmed that when asked, the passenger claimed that the beer in the center console belonged to her. (R59: 17). Importantly, prior to asking Vaaler to step out of the vehicle to perform standardized field sobriety tests (SFSTs), Deputy Anderson did not check Vaaler's criminal history and so was unaware of whether Vaaler had ever been convicted of operating while impaired in the past. (R59: 18).

According to Anderson, the decision to ask Vaaler to exit the vehicle to perform SFSTs was based on the following factors: (1) the odor of intoxicants emanating from the vehicle; (2) the time of day; (3) the fact that Vaaler was operating the vehicle with only fog lamps on; and (4) the open can of beer in the center console of the vehicle. (R59: 18). Deputy Anderson testified that he believed the passenger when she stated that the beer can belonged to her, and further, admitted that he could not tell whether the odor of intoxicants was coming from Vaaler or the clearly intoxicated female passenger. (R59: 18). Anderson then testified that while the area in which the stop took place was well-lit by streetlights, the area Vaaler was coming from was not, as the area Vaaler stated he was coming from was rural. (R59: 19).

The court found that the initial stop was permissible based upon the headlight violation, and denied the motion to suppress based on the court's belief that the other facts adduced at the hearing were sufficient to allow the deputy to form the level of suspicion necessary to request that Vaaler perform standardized field sobriety tests. (R59: 19-20). In particular, the circuit court relied on the following facts in support of its determination that reasonable suspicion sufficient to support a request for field sobriety tests existed: (1) there was an odor of intoxicants emanating from the vehicle, the source of which the officer could not determine; and (2) there was an open container of beer in the center console of the vehicle, a container which the passenger claimed as hers, which claim the officer admitted he believed to be truthful. (R59: 18, 19-20). In addition to these factors, the fact that Vaaler was driving late

at night with only his fog lights on could also be taken to support reasonable suspicion. (R59: 18). Nonetheless, the court rested its ruling on the two factors identified above. (R59: 19-20).

The matter then proceeded to trial, after which Vaaler was convicted of operating a motor vehicle while impaired as a third offense. (R48: 1-2). This appeal follows; additional facts shall be stated as necessary below.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS REASONABLE SUSPICION SUFFICIENT TO JUSTIFY EXTENDING THE STOP BY CONDUCTING AN OMVWI INVESTIGATION, AND AS SUCH, THE CIRCUIT COURT SHOULD HAVE GRANTED VAALER'S MOTION TO SUPPRESS.

A. Summary of Arguments and Standard of Review

This court's "review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis.2d 302, 786 N.W.2d 463 (citation omitted). Similarly, "[w]hether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis.2d 118, 765 N.W.2d 569 (citations omitted). "When presented with a question of constitutional fact, this court engages in a two-step inquiry. First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." ***Robinson***, 327 Wis.2d 302, ¶ 22, 786 N.W.2d 463 (citations omitted). "A finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis.2d 358, 752 N.W.2d 748 (internal citations and quotation marks omitted, brackets added).

"Reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." ***State v.***

Houghton, 2015 WI 79, ¶30, 364 Wis.2d 234, 868 N.W.2d 143. A traffic stop which was justified by reasonable suspicion of a traffic offense may become unlawful if the scope of the police officer's investigation extends beyond the purpose for which the stop was made without additional particularized reasonable suspicion to justify detouring from the stop's original mission. ***Rodriguez v. United States***, 575 U.S. ___, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492 (2015); *see also* ***State v. Betow***, 226 Wis.2d 90, 94-95, 593 N.W.2d 499 (Ct.App. 1999). Absent such additional reasonable suspicion, a stop which lasts longer than is reasonably necessary to address the justified mission of the stop is unlawful, as "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." ***Rodriguez***, 135 S.Ct. at 1614. (brackets and ellipsis added) (*citing* ***United States v. Sharpe***, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) ("in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation")).

Here, Deputy Anderson had only the following arguably suspicious facts available to him at the time that he extended the stop by launching an OWI investigation: (1) there was an odor of alcohol emanating from the vehicle, and while Deputy Anderson characterized that odor as being "strong," he also admitted that he could not tell from whom it was emanating of the three occupants of the vehicle; (2) Vaaler had been driving without his headlights on, but with his parking and fog lights on; (3) there was a half-full can of beer in the center console which was claimed by the front seat passenger, who was visibly intoxicated, and Deputy Anderson believed the passenger when she said the beer belonged to her; and (4) the stop took place at around 2:43 a.m. As is argued more extensively below, this collection of facts was insufficient to support a reasonable suspicion that Vaaler was operating a motor vehicle while impaired, and as such, the circuit court's conclusion to the contrary was error.

B. **While the initial stop for a violation of Wis. Stat. § 347.06(1) was valid, Deputy Anderson unlawfully extended the stop by embarking on an OWI investigation without reasonable suspicion sufficient to justify such an investigation, and as**

such, the circuit court erred when it denied Vaaler's motion to suppress the results of the OWI investigation.

Whether there is sufficient reasonable suspicion to justify extending a traffic stop for an equipment violation by launching into an unrelated investigation must be determined by an evaluation of the totality of the circumstances. ***State v. Newer***, 2007 WI App 236, ¶8, 306 Wis. 2d 193, 742 N.W.2d 923 (*citing* ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106 ("In determining whether the police have lawfully conducted a Terry stop, we consider the totality of the circumstances."); *see also* ***Alabama v. White***, 496 U.S. 325, 328, 110 S.Ct. 2412 (1990) (reasonable suspicion is to be evaluated in light of the totality of the circumstances).

Here, the circuit court relied upon the following factors in determining that there Deputy Anderson had the requisite reasonable suspicion to justify requesting that Vaaler perform field sobriety tests: (1) there was an odor of intoxicants emanating from the vehicle, the source of which the officer could not determine; and (2) there was an open container of beer in the center console of the vehicle, a container which the passenger claimed as hers, which claim the officer admitted he believed to be truthful. (R59: 18, 19-20). Deputy Anderson testified that in addition to those factors, he had also relied upon Vaaler's allegedly sometimes-delayed responses to Anderson's questions, the time of day, and the fact that Vaaler had been driving with his fog lamps lit, but without his headlights similarly lit. (R59: 10-11, 18).

There were additional facts testified to at the suppression hearing which are relevant to a totality of the circumstances analysis in that they tend to negate the inference that Vaaler was impaired by an intoxicant. First, and other than the fact that Vaaler was driving at night with only his fog lamps on, Deputy Anderson admitted that he did not observe any indicia of impairment in Vaaler's driving conduct prior to or during the stop. (R59: 15-16). Second, Vaaler did not exhibit any of the traditional indicia of impairment such as bloodshot or glassy eyes and slurred speech, and he also denied drinking alcohol that evening. (R59: 16-17). In contrast, his front seat passenger was, according to Deputy Anderson, visibly

impaired. (R59: 17). Third, while the area Vaaler was coming from rural, Deputy Anderson did see that the road ahead of Vaaler was illuminated to some extent by the fog lamps, and in addition, the area where the stop took place had "ample" illumination. (R59: 15-16). Fourth and finally, Deputy Anderson did not check whether Vaaler had a criminal history prior to requesting that he perform field sobriety tests, and as such did not have knowledge at that time of any prior OMVWI convictions (or any other criminal convictions, for that matter) which Vaaler may have had. (R59: 18).

As is often the case where the test to be applied involves an examination and weighing of the totality of the circumstances, it is instructive to examine caselaw finding specific sets of facts to support reasonable suspicion as well as caselaw finding specific sets of facts *not* to support reasonable suspicion; such an analysis follows.

On the one hand, there are a number of cases wherein the facts available to the officer were found to be sufficient, if barely so, to support reasonable suspicion of criminal activity. In ***State v. Waldner***, for instance, the Supreme Court of Wisconsin found the following set of facts, together, to support a reasonable suspicion of impaired driving: the vehicle was observed driving slowly then suddenly accelerating at 12:30 a.m.; the vehicle was observed stopping at an uncontrolled intersection and pausing there for a period of time before turning left; and the driver was observed opening the door and dumping a mixture of liquid and ice onto the roadway. ***Waldner***, 206 Wis.2d 51, 60-61, 556 N.W.2d 681 (1996).

Similarly, in ***State v. Seibel***, the court there relied upon four indicia of impairment to support its conclusion that the officers there did in fact have a reasonable suspicion that Seibel's operation of a motor vehicle was impaired by alcohol: (1) Seibel had been engaged in "unexplained erratic driving" which caused an accident; (2) Seibel's friends emitted a strong odor of alcohol, and Seibel had been engaged in a "joint venture" with them, traveling between taverns on their motorcycles; (3) a police chief believed that he had at one point smelled the odor of alcohol on Seibel, but did not smell it later on; and (4) while at a hospital, Seibel "exhibited a belligerence and lack of contact with reality often associated with excessive

drinking." ***Seibel***, 163 Wis.2d 164, 181-83, 471 N.W.2d 226 (1991).

In ***State v. Post***, a case which the court characterized as "close," 2007 WI 60, ¶27, 301 Wis.2d 1, 733 N.W.2d 634, the court held that the following facts were sufficient taken together to support a reasonable suspicion of impaired driving, despite the fact that none of them taken alone would do so: (1) Post was weaving in a discernible S-type pattern for several blocks; (2) Post vehicle was "canted" into the parking lane; (3) during the course of the weaving, Post's vehicle traveled all the way across both the travel and the parking lanes; and (4) the stop took place at night. ***Post***, 301 Wis.2d 1, ¶37.

To wrap up the discussion of cases where reasonable suspicion of impaired driving was found to exist, albeit barely, there is an unpublished but citable opinion of this court which is instructive in light of the particular facts here. In ***State v. Resch***, found that there was a reasonable suspicion of intoxicated driving sufficient to justify extending a stop to conduct field sobriety tests where all of the following information was available to the officer: "he smelled of intoxicants; consumed at least "a little" alcohol; was sitting by himself in a vehicle, which was idling at the stop sign of a private parking lot with its headlights off; had lost his friends whom he allegedly had been following; gave no clear explanation as to what he was doing in the parking lot; and was stopped around 2:30 in the morning." ***Resch***, No. 2010AP2321-CR, ¶23, unpublished slip op. (Apr. 27, 2011).

In contrast, several published opinions of this court have held that reasonable suspicion sufficient to support extending a stop to conduct an investigation unrelated to the original justification for the stop was not present on the facts presented in said cases. In ***State v. Betow***, for instance, the court of appeals held that all of the following facts, even when taken together, failed to support a reasonable suspicion of criminal activity: (1) the suspect's wallet had a picture of a mushroom on it; (2) the stop occurred late at night; (3) the suspect appeared nervous; (4) the suspect was returning to Appleton from Madison; (5) the investigating officer thought the suspect's story about what he had been doing in Madison sounded implausible. ***Betow***, 226 Wis.2d 90, 95-97, 593

N.W.2d 499 (Ct. App. 1999).

Similarly, in ***State v. Gammons***, this court held that the following set of facts did not support reasonable suspicion to extend a stop to conduct a drug investigation: (1) the suspect vehicle was stopped in "drug-related" area; (2) the stop occurred at 10:00 p.m.; (3) the suspect vehicle was from Illinois; (4) an investigating officer had personal knowledge of prior drug activity on the suspect's part; and (5) the suspect appeared nervous and uneasy. ***Gammons***, 2001 WI App 36, ¶21, 241 Wis.2d 296, 625 N.W.2d 623.

In addition, there is a collection of unpublished opinions of this court which are useful in identifying situations in which the officer's suspicion of impaired driving was unreasonable, and therefore in which the officer's extension of a stop to conduct field sobriety tests was held to be unlawful. In ***State v. Meye***, the police officer involved detected a strong odor of intoxicants coming from two individuals who had just exited a vehicle, but the officer was not able to tell from whom the odor was emanating. ***Meye***, No. 2010AP336-CR, ¶2, unpublished slip op. (July 14, 2010). The court held that this odor of intoxicants, even ignoring the ambiguity as to its source, was insufficient to support even so much as a reasonable suspicion of intoxicated driving (although it did also state that the ambiguity exacerbated the weakness of the seizure). ***Id.***, ¶¶6, 9.

Further, in ***County of Sauk v. Leon***, an officer detected an odor of alcohol on the breath of a person he had stopped around 11:00 p.m., and the person admitted that he had consumed one beer with dinner an hour or so earlier. ***Leon***, No. 2010AP1593, ¶¶2, 9-10, unpublished slip op. (Nov. 24, 2010). Like the ***Meye*** court, the ***Leon*** court concluded that these two facts, standing alone, were insufficient to support even a reasonable suspicion of intoxicated driving. ***Id.***, ¶28. Importantly, ***Leon*** court was also careful to note that many ordinarily present indicia of intoxication or impairment were *not* present, stating that "the deputy did not note any outward signs that Leon was intoxicated, such as trouble with balance, bloodshot eyes, watery eyes, or slurred speech" and further noting that Leon did not have any trouble getting his driver's license out of his wallet. ***Id.***, ¶10.

Finally, in ***State v. Gonzalez***, this court held that the following factors taken together did not add up to reasonable suspicion sufficient to justify requesting field sobriety testing: "(1) an odor of alcohol of an unspecified intensity "coming from [the] vehicle," 2) Gonzalez's explanation that the odor was the result of friends she was transporting, not her, and 3) the time of the stop, just after 10:00 p.m." ***Gonzalez***, No. 2013AP2585-CR, ¶17, unpublished slip op. (May 8, 2014). Notably in the context of the present case, although the officer there had stopped Gonzalez did so because one of her headlights was nonfunctional, the officer did not observe any other bad driving behaviors, nor did the officer observe any indicia of intoxication from Gonzalez herself other than the odor of alcohol mentioned above. ***Id.***, ¶¶3-4. What must also be kept in mind, the ***Gonzalez*** court concluded, is the principle that it is not illegal to drink alcohol and then drive in Wisconsin; rather, it is only illegal to operate a motor vehicle after having consumed enough alcohol to be "under the influence of an intoxicant . . . to a degree which renders [one] incapable of safely driving." ***Id.***, ¶13 (citing Wis. JI-CRIMINAL 2663 and Wis. Stat. §§ 346.63(1)(a) and 346.01(1)).

As a final note before returning to the facts of this case, the ***Resch*** court, in holding that there were sufficient facts to support a reasonable suspicion to justify the extension of the stop to conduct field sobriety tests, noted and specifically approved of the holding in ***Meye***, explaining that:

> Though we agree with the holding of ***Meye***, its application to Resch's case does not lead this court to conclude that the deputy lacked a reasonable suspicion to administer the field sobriety tests. In ***Meye***, the police officer relied solely on the odor of intoxicants to conduct an investigatory stop. That is not what happened in Resch's case. Here, the odor of intoxicants was only one of several relevant factors in the reasonable suspicion determination. In addition to the odor of intoxicants, the trial court considered the totality of the circumstances surrounding the deputy's imposition of the field sobriety tests.

Resch, No. 2010AP2321-CR, ¶20 (emphasis added, internal citations omitted). The emphasized language (coupled with the holdings in ***Gonzalez***, ***Meye***, and ***Leon***) makes clear that an odor of alcohol, standing alone, particularly where (and analogously to the case at bar) the odor is of an unspecified intensity or where there is ambiguity as to its source, cannot support a reasonable suspicion of intoxicated operation of a vehicle without substantially more suspicious factors being present.

Here, the suspicious facts available to Deputy Anderson, particularly when viewed in light of the almost total absence of any of the usual indicia of impairment, much more closely resemble the facts in ***Betow***, ***Gammons***, ***Leon***, ***Meye***, and ***Gonzalez*** than they do the facts in ***Waldner***, ***Seibel***, ***Post***, and ***Resch***. Like the facts in the cases finding that there was not reasonable suspicion present, the facts in this case show no indication of impairment other than a minor traffic offense, unlit headlights. The probative value of Vaaler's failure to turn on his headlights is also substantially reduced by the fact that his fog lamps were in fact on and providing some illumination, and further, the area in which the stop took place was well-lit. The inference that Vaaler failed to turn on his headlights due to impairment is therefore weaker than it otherwise would be. In these respects, this case is almost precisely analogous to ***Gonzalez*** described above; there as here the stop was predicated on a minor traffic violation, and there as here the driver did not exhibit *any* signs of impairment outside of his presence within a vehicle that itself was emanating an odor of alcohol, one which the officer could not say from whom in the vehicle it was emanating. *See* ***Gonzalez***, No. 2013AP2585-CR, ¶¶3-4.

Further, the facts in this case are similar to those in ***Betow***, ***Gammons***, ***Leon***, ***Meye***, and ***Gonzalez*** in the additional respect that as in all of those cases, there were no indications of problematic driving, and outside of the "excessive nervousness" alluded to in some of those cases, there were no indicia of impairment other than the odor of alcohol emanating from a source which the officer could not determine. It bears repeating that, much like the facts in ***Meye*** and ***Gonzalez***, there was here an ambiguity as to whether the odor of alcohol detected by the deputy was originating from Vaaler rather than

from his obviously impaired passengers, further undercutting the reasonableness of the deputy's suspicions regarding Vaaler. *See*, *e.g.*, ***Gonzalez***, No. 2013AP2585-CR, ¶19 (observing that the ***Meye*** court premised its holding on a conclusion that an odor of alcohol standing alone was insufficient to support reasonable suspicion, but also noting that the court there had added that the "ambiguity "exacerbated" "[t]he weakness of this seizure."") (*quoting* ***Meye***, No. 2010AP336-CR, ¶9).

On the other side of the coin, the facts in this case, particularly when viewed in light of the totality of the circumstances, are not as suspicious as the facts found to support reasonable suspicion of impaired driving in any of the cases discussed above. To begin, all of those cases involved something not present here being considered as part of the totality of the circumstances: problematic or suspicious driving conduct and/or behavior indicating possible impairment was observed by the officer in each case. *See*, *e.g.*, ***Waldner***, 206 Wis.2d at 60-61 (driving excessively slow then abruptly speeding up, then stopping and waiting at an uncontrolled intersection); ***Seibel***, 163 Wis.2d at 181-83 (unexplained erratic driving as well as belligerent conduct at a hospital indicating a lack of contact with reality); ***Post***, 301 Wis.2d 1, ¶37 (weaving technically within one's lane, but actually covering the entirety of both the travel and parking lanes in a wide S-type curve); and ***Resch***, No. 2010AP2321-CR, ¶23 (driver was idling at a stop sign in a private parking lot, admitted to drinking "a little," gave an implausible story regarding having lost the friends he was following, and was unable to give an explanation as to why he was idling in the private parking lot without his lights on).

Here, there was no observed "bad" driving conduct (again, other than the headlights being off but the fog lamps being on), there were no observed indicia of impairment prior to the request for field sobriety tests other than an odor of alcohol, the odor of alcohol was at best ambiguous as to its source, and there was no admission to drinking. Further, the officer admitted that he believed the visibly impaired front seat passenger when she claimed the half-full beer can in the center console as hers, (R59: 18), and as such, could not have reasonably relied upon its presence in the center console to

support a reasonable suspicion that Vaaler was operating while impaired by alcohol consumption. *See* ***Gonzalez***, No. 2013AP2585-CR, ¶13 (reasonable suspicion of operating while impaired requires reasonable suspicion that the driver is incapable of safely driving due to alcohol consumption, not just reasonable suspicion that the driver had consumed some unknown amount of alcohol).

While it is true that an officer is not required to accept innocent explanations of ambiguous circumstances, *see* ***State v. Colstad***, 2003 WI App 25, ¶21, 260 Wis.2d 406, 659 N.W.2d 394, it is also the case that an officer ought to be bound by the opinions he or she actually did come to regarding such ambiguous circumstances when analyzing whether the officer reasonably suspected a person was impaired, particularly in light of the primary purpose of the exclusionary rule: deterrence of police lawlessness. *See*, *e.g.*, ***State v. Dearborn***, 2010 WI 84, ¶35, 327 Wis.2d 252, 786 N.W.2d 97 ("The application of the exclusionary rule should focus on its efficacy in deterring future Fourth Amendment violations."). As such, Deputy Anderson could not have formed a reasonable suspicion that Vaaler was impaired by alcohol consumption prior to requesting field sobriety testing, and as such, Vaaler's motion should have been granted.

CONCLUSION

For the reasons discussed above, the defendant, Christopher J. Vaaler, respectfully requests that this court reverse and vacate the judgment of conviction entered against him in this matter, vacate the order denying his motion to suppress, and remand to the circuit court for further proceedings with instructions that the circuit court shall grant his motion to suppress.

Respectfully submitted 2/13/2020:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,675 words.

Dated 2/13/2020:

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 2/13/2020:

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CERTIFICATION REGARDING APPENDIX

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 Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 the record is 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 including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated 2/13/2020:

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