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STATE OF WISCONSIN

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

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

La Crosse County Case No. 17 CF 36
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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S ARGUMENT IGNORES CRITICAL FACTS BOTH IN THIS CASE AND IN THE CASES IT CITES IN SUPPORT OF ITS ARGUMENT, AND HAS IN ANY EVENT FAILED TO DEMONSTRATE THAT THE OMVWI INVESTIGATION WAS SUPPORTED BY REASONABLE SUSPICION AS OPPOSED TO A HUNCH.

The State in its brief argues that Deputy Anderson had a reasonable suspicion to believe that Vaaler was operating while impaired when Anderson launched his OMVWI investigation based on the following factors:

(1) Vaaler's operation of his vehicle without headlights

> illuminated, which resulted in the traffic stop in the first place; (2) the time of day, (3) Vaaler's apparent dishonesty when answering Deputy Anderson's questions; (4) the presence of an open can of Miller Lite in the center console of the vehicle; and (5) the odor of intoxicants coming from Vaaler's vehicle.

(State's Br. at 9). With respect to each of factors (1), (4), and (5), the State ignores the entirety of the facts of record, and further, with respect to the overall analysis, fails to grapple with the totality of the circumstances, instead focusing only on those factors which support its position.

In addition, the State relies upon unpublished authority to support its position but fails to note that said authority is distinguishable in this highly fact-specific context. *See* ***State v. Miller***, 2012 WI 61, ¶35, 341 Wis. 2d 307, 815 N.W.2d 349 (holding that an inquiry into whether there is "reasonable suspicion [is] based on the totality of the circumstances [and thus] is naturally highly fact specific and must "be decided on its own facts."") (brackets added) (quoting ***Terry v. Ohio***, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Finally, the State fails to take account of other, more closely on-point unpublished authority which undermines its position.

Regarding factor (1), for instance, the State states in its brief that "[t]he fact that Vaaler was travelling approximately five minutes in dark conditions and did not realize that the road ahead was not illuminated by his headlights can indicate impaired judgement due to alcohol consumption." (State's Br. at 9). This is a distortion of what the facts actually were, in that it completely ignores the fact that the deputy admitted the foglights illuminated the road ahead "to some extent" and that Anderson never clarified whether that meant that Vaaler should have noticed, while traveling through a darkened rural area, that the road was not as well-illuminated as it would have been had he had his headlights on. (R59: 15).

No evidence was presented by the State to further clarify this statement by Deputy Anderson, nor was any evidence presented as to the difference in illumination between Vaaler's foglights and Vaaler's headlights. Given that the State has the burden to show that reasonable suspicion existed sufficient to justify expanding the scope of the traffic stop, *see*

State v. Quartana, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997), this is insufficient. At best, this factor weighs only weakly in establishing the necessary *additional* facts beyond those supporting the initial stop which are required to support a reasonable suspicion that Vaaler was, in addition to operating without his headlights on at night, operating while impaired. *See* ***State v. Gammons***, 2001 WI App 36, ¶¶18–19, 241 Wis.2d 296, 625 N.W.2d 623.

Further, the State argues that as to factors (4) and (5), the open can of beer in the center console and the odor of intoxicants emanating from the vehicle, these facts support reasonable suspicion of impairment on Vaaler's part mainly because Deputy Anderson was not required to believe innocent explanations for these facts, citing to ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 691 (1996) in support of that proposition. (State's Br. at 10). While this is true as far as it goes, it fails to address critical facts raised in Vaaler's opening brief undercutting the force of this argument.

First, Deputy Anderson admitted that he believed the passenger when she stated that the open beer can in the center console belonged to her. (R59: 18). In arguing that even though Deputy Anderson did in fact believe Vaaler's passenger when she claimed the open beer can in the center console as hers, he nonetheless was allowed to factor that into his reasonable suspicion calculus as to Vaaler, the State fails to address Vaaler's argument that notwithstanding the fact that police *may* ignore innocent explanations for ambiguous conduct, where they do in fact accept such innocent explanations, they should be bound by that acceptance in order to serve the main purpose of the exclusionary rule: deterrence of police lawlessness. *See* ***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."). By failing to address Vaaler's argument on this point, the State has conceded the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded); *see also* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) ("When a respondent does not refute an appellant's argument, we may assume it is conceded.").

Second, Deputy Anderson also admitted that he told his partner that he couldn't determine from whom the odor of intoxicants he detected was emanating. (R59: 18). The State's argument again fails to come to grips with the effect of this admission on the reasonable suspicion calculus, and fails to address Vaaler's argument that this ambiguity severely undercuts the utility of this fact in supporting reasonable suspicion. The State again cites without elaboration to ***Waldner*** in support of the proposition that an officer need not eliminate innocent explanations in determining whether a suspicion is reasonable. (State's Br. at 10).

Again, this is true as far as it goes, but an officer cannot reasonably rely on what, by his own admission, at best ambiguously might be evidence of impairment on Vaaler's part. *See*, *e.g.*, ***State v. Hogan***, 2015 WI 76, ¶50, 364 Wis.2d 167, 868 N.W.2d 124 ("The possibility that innocent explanations may exist for observed behavior does not preclude a finding of reasonable suspicion, but as a practical matter, police cannot expect to conduct field sobriety tests on every motorist who is shaking and nervous when stopped by an officer."); *see also* ***State v. Meye***, No. 2010AP336-CR, ¶2, unpublished slip op. (July 14, 2010) (ambiguity as to source of odor of alcohol undermines reasonableness of suspicion) *and* ***State v. Gonzalez***, No. 2013AP2585-CR, ¶17, unpublished slip op. (May 8, 2014) (same). By failing to come to grips with Vaaler's argument, the State has again conceded that the weight to be given to the odor of alcohol emanating from Vaaler's vehicle is at best negligible, as was argued in Vaaler's opening brief. ***Peterson***, 222 Wis. 2d at 459.

Finally, the State cites to an unpublished opinion for the proposition that an officer need not observe the usual personal indicia of impairment (e.g., bloodshot or glassy eyes, slurred speech, trouble executing simple tasks) in order to form reasonable suspicion sufficient to support a request for field sobriety tests. ***Town of Freedom v. Fellinger***, No. 2013AP614, ¶24, unpublished slip op. (Aug. 6, 2013). ("there is no requirement that officers make these observations before requesting field sobriety tests."). What the State leaves out of its discussion of that case is that, in addition to circumstances present there which are also present here, the defendant there

had admitted to drinking at least "two beers" prior to driving, and that the ***Fellinger*** court cited to other cases in support of its reasonable suspicion finding which likewise included an admission to drinking, not present here. ***Id.***, ¶¶3, 24 (citing ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (indicators of intoxication include odor of intoxicants and *admission of drinking*)) (emphasis added).

There is another unpublished case which completely undercuts the State's position. In that case, this court found significant the fact that the officer there could not localize the source of the odor of intoxicants to the driver, and held that this inability to determine whether the odor emanated from the driver or from elsewhere in the vehicle significantly lowered the probability that the driver there was committing a crime. *See* ***State v. Quitko***, No. 2019AP200-CR, ¶21, unpublished slip op. (May 12, 2020) (citing and quoting ***State v. Secrist***, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999) (referring to probative value of odor of marijuana emanating from a vehicle and stating that "[t]he probability diminishes if the odor is not strong or recent, *if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor.*")) (brackets and emphasis added).

Here, as in ***Quitko***, the deputy was faced with significant ambiguity as to the source and probative value of the odor of intoxicants he detected emanating from the vehicle; in fact, "the source of the odor [was] not near [Vaaler]," "there [were] several people in the vehicle," and "[Vaaler's passenger's intoxicated state and admission to the open intoxicant being hers] offer[ed] a reasonable explanation for the odor[,]" thereby significantly diminishing the weight Deputy Anderson could reasonably have given to the said odor of intoxicants in determining whether he could reasonably suspect that Vaaler was operating while impaired. ***Secrist***, 224 Wis.2d at 218 (brackets added). Accordingly, all that remains in terms of suspicious facts available to Deputy Anderson beyond the at best weakly probative odor of alcohol emanating from the vehicle, not Vaaler, is the time of day and the fact that Vaaler's response to where he was coming from was "delayed."

As was argued in Vaaler's opening brief, these facts, particularly in light of the lack of any other indicia of impairment on Vaaler's part such as bad driving, an admission to drinking, bloodshot or glossy eyes, slurred speech, and difficulty performing simple tasks such as extracting one's license from one's wallet (all of which facts are part of the totality of the circumstances), render Deputy Anderson's suspicion that Vaaler was operating while impaired unreasonable. Thus, under the totality of the circumstances, Deputy Anderson did not have a reasonable suspicion to believe that Vaaler was operating while impaired when Deputy Anderson expanded the scope and duration of the stop by launching an OMVWI investigation, and as such, the results of that investigation should have been, and must be, suppressed as the fruits of an unlawfully extended seizure. *See* ***Rodriguez v. United States***, 575 U.S. ___, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492 (2015) (traffic stop becomes "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."); *see also* ***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.").

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 7/10/2020:

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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 1,908 words.

Dated 7/10/2020:

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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 7/10/2020:

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