RECEIVED
08-13-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2020AP345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ANNE E. STRECKENBACH,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, BRANCH II, THE HONORABLE EMILY I. LONERGAN PRESIDING, TRIAL COURT CASE NO. 19-CT-66

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & ASSOCIATES, LLC

Sarvan Singh, Jr.
State Bar No. 1049920

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
sarvan@melowskilaw.com

ARGUMENT

I. THE STATE'S "CUSTODY" ARGUMENT MISSES THE POINT OF THE APPELLANT'S POSITION.

As expected, the State's rests the majority of its rebuttal argument in the instant appeal upon the claimed fact that Ms. Streckenbach was not "in custody" at the time the arresting officer in this case asked her the *twenty-four* preliminary questions he had regarding her medical conditions, drinking, sleep, awareness of the date and time, *etc.* To use a characterization employed by the State, this argument itself is a "red herring."

What the State overlooks is the fact that when conducting an allegedly non-custodial interrogation in the context of a *Terry*[1] stop, the *Terry* stop is supposed to conform itself to "*the least intrusive means* reasonably available to verify or dispel the officer's suspicion in a *short period of time*." *State v. Wilkens*, 159 Wis. 2d 618, 626, 465 N.W.2d 206 (Ct. App. 1990), quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983). Roadside contacts with law enforcement officers "are meant to be brief interactions . . . ." *State v. Floyd*, 2017 WI 78, ¶ 21, 377 Wis. 2d 394, 898 N.W.2d 560

The "least intrusive means/short period of time" analysis is *precisely* what the United States Supreme Court meant when it referred to it being permissible for law enforcement officers to ask a "modest" number of questions during a roadside interrogation in *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Notably, the *Berkermer* Court characterized the type of "least intrusive means" questioning as falling into two specific categories of questions, namely those (1) to determine "identity" and (2) "to obtain information confirming or dispelling the officer's suspicions." *Id*. at 439.

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

Examining the *twenty-four* interrogatories put to Ms. Streckenbach in this case, *none* of them are designed to determine her identity, and many of them—such as asking whether she had visited a dentist, what level of education she had achieved, whether she wore contacts, *et al*.—do nothing to confirm or dispel whether she might be under the influence. To this extent, the questioning violated not only the particularly described purpose of roadside questioning as described by the *Berkermer* Court, but extend the scope of the detention beyond the "least intrusive means" necessary to dispel or confirm suspicion "in a short period of time" as *required* under *Wilkens*, *Royer*, and *Floyd*.

In what could be construed as an implied argument to "play down" the seriousness of the violation Ms. Streckenbach alleges, the State attempts to characterize some of these questions as innocuous or non-incriminating. State's Brief at pp. 11-13. For example, the State proffers that a person's "level of rest" could impact upon their ability to perform field sobriety tests, therefore, questions regarding when the person slept, when they awoke, how many hours of sleep they had are not incriminating. This is simply not true, and even if it was, just because a question is *in part* seemingly innocuous does not mean that it does not also have an incriminating purpose. Knowing when a person slept and woke provides the State with valuable information prior to trial should the defendant make an effort to attribute any part of their alleged deficiency on the field sobriety tests at the time of trial to a lack of rest. If the defendant raises a defense that the officer's observations are not due to impairment by alcohol but rather because the person was not well rested, the preliminary roadside questioning has acted as a deposition of sorts in that it prepares the State to either anticipate such a defense or impeach it.

In what can only be branded as a somewhat comical twist in its position, the State undercuts its very own argument in this regard in the very same paragraph in which it makes it. The State claims the questioning regarding sleep is "innocent," but then in the same paragraph it goes on to observe that if a subject was "to do poorly on such testing, there might be no shortage of after-the-fact rationalizations that they could offer [such as lack of sleep]." State's Brief at p.12. This makes Ms. Streckenbach's point for her, namely

if the questions regarding sleep are truly intended not to be incriminating, then how is it that they could later be used *to impeach* the defendant if there is an "after-the-fact rationalization" at trial? At one point in its brief, the State accuses Ms. Streckenbach of wanting her cake and eating it too, but there could be no clearer example of this old saw than the one the State stumbles into in its brief.

Another significant shortcoming in the State's argument is its failure simply to recognize the "common sense" inherent in Ms. Streckenbach's argument. That is, there must be some point somewhere where roadside questioning crosses the line from being "modest" in design to quickly determine "identity" and "confirm or dispel suspicion" into the realm of unnecessarily burdensome and unconstitutional interrogation.[2] Ms. Streckenbach's point is perhaps best made by a *reductio ad absurdum* argument. For example, what if, *in addition to the twenty-four questions the officer is already asking a suspect regarding drinking and other issues*, the officer also asks the suspect whether they exercise; how frequently they exercise; when the last time was they exercised; *et al.*? Of what relevance is this line of questioning? Simply put, the concentration of ethanol in a person's system is a function of what percentage of their mass is muscle as opposed to fat because ethanol is not fat soluble.[3] Thus, this information is relevant. Similarly, it is relevant with respect to how a person might perform on the field sobriety tests because a person who has muscle fatigue from just coming off of a work-out at the gym might not perform as well on the tests, so why would a law enforcement officer not want to have an answer to these questions.

---

[2]Again, for emphasis, Wisconsin courts have held that permissible questioning of a person detained during a traffic stop must be "'reasonably related to the nature of the stop . . . .'" *State v. Gammons*, 2001 WI App 36, ¶ 18, 241 Wis. 2d 296, 625 N.W.2d 623, quoting *State v. Betow*, 226 Wis. 2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999). If the nature of a stop is due to a suspicion of impaired driving, what reasonable relationship does a visit to the dentist, for example, bear upon this fact?

[3]This is given by what is known as Widmark's formula. *See*, https://en.wikipedia.org/wiki/Blood_alcohol_content.

To the foregoing, one could also add a line of questioning regarding whether the person is under the care of a psychologist or psychiatrist; whether they suffer from any mental diseases or disorders; whether they have any cognitive deficits; *et al.*? Of what relevance is this line of questioning? If an officer has a detailed description of whether a person's cognitive abilities are impaired, s/he will better be able to evaluate whether the person will be able to understand instructions given during field sobriety testing. Similarly, in a more incriminating manner, if the accused engages in what the State characterizes as an "after-the-fact rationalization" at trial as to why they could not follow the officer's instructions, the State will have already "pinned the defendant down" on his/her cognitive abilities with this deposition-like line of questioning.

The list of at least thirty questions now put together could grow even larger if one adds to it a line of questioning regarding when the person last ate food; what they had to eat; over how long a period of time they consumed the food; *et al.*? Of what relevance is this line of questioning? It is well known that the rate of absorption of ethanol is affected by not only the amount of food in a person's stomach at the time they consume ethanol, but the type of food as well (fatty foods slow the absorption of ethanol relative to non-fatty foods).

Counsel for Ms. Streckenbach will spare this Court further additions to the growing list of now thirty-three questions, because she believes that her point is made. The State will almost invariably be able to find justifications for any type of question being asked—whether the State wants to characterize the question as "innocent," relevant to determining how a person might perform on field sobriety tests, or relevant to the dispelling or affirming suspicions, *etc*. Despite the fact that such justifications can always be found, at some point, as Ms. Streckenbach initially posited, the line of questioning crosses that which is "modestly" designed to be the "least intrusive means" necessary to "quickly dispel or confirm" a suspicion into the realm of the unreasonable. It is her position that this line was crossed in the instant case.

In yet another effort to justify the litany of questions asked in this case, the State argues that Ms. Streckenbach's logic is faulty that

only a "few" questions need be asked to confirm or dispel an officer's suspicions because "it would require a suspect to be honest about her consumption [of alcohol] to the officer." State's Brief at p.11. This argument is faulty for two simple reasons and therefore should be rejected without the slightest apology. First, it assumes all suspects lie. There is no basis in this record to make this assumption, and in fact, given that rarely is anything in this universe an "all or nothing" proposition, is very likely not accurate. Shockingly, there are individuals who answer law enforcement officer's questions honestly.

More importantly, however, is the second reason to reject this argument, and this reason is based in the most fundamental tenets of logic: if a suspect is going to lie anyway, why bother asking questions at all? What good does it do to ask a suspect a question about his or her drinking if one assumes the answer will not be truthful? The answer will not bring the officer any closer to ascertaining whether his or her suspicions are confirmed or dispelled if that answer is unreliable. It thus makes no sense whatsoever for the State to argue that a reduced list of questions is not more appropriate (and therefore consistent with *Berkermer*, *Royer*, and *Floyd*) because it would "require a suspect to be honest." This is a *non sequitur*.

Ultimately, the State attempts to undercut Ms. Streckenbach's reliance on *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, by repeatedly pointing out that *Knapp* involved a custodial interrogation. As demonstrated above, however, Ms. Streckenbach relies upon the spirit of the *Knapp* decision as much as anything else for the proposition that at some point the Wisconsin Constitution is going to be implicated in protecting a suspect from interrogation under Article I, § 8 when that interrogation goes well beyond the "least intrusive means" necessary to identify a suspect and to confirm or dispel the officer's suspicions. To disregard *Knapp's* holding in this regard undermines the idea that Wisconsin does not march in "lock step" with the federally established protections found in the U.S. Constitution

CONCLUSION

Because Ms. Streckenbach was extensively interrogated by the arresting officer in this matter after her initial detention beyond the scope of what was necessary to determine her identity and to dispel or confirm the officer's suspicions about her alleged impairment, her privilege against self-incrimination as guaranteed by Article I, § 8 of the Wisconsin Constitution was violated, and she therefore respectfully requests that this Court reverse the judgment of the circuit court and remand this case with directions to grant her motion.

Dated this 10th day of August, 2020.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

Sarvan Singh, Jr.
State Bar No. 1049920
Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 2,458 words. I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on August 10, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 10th day of August, 2020.

MELOWSKI & ASSOCIATES, LLC

_____

Sarvan Singh, Jr.
State Bar No. 1049920
Attorneys for Defendant-Appellant