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COURT OF APPEALS

DISTRICT III

Appeal No. 2020 AP 1243 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

JENNIFER A. JENKINS,

Defendant – Appellant.

BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE

ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE MITCHELL J. METROPULOS PRESIDING

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Defendant-Appellant does not request publication as to the issues raised in this appeal.

STATEMENT OF THE CASE

This is an appeal from a *Judgment of Conviction* (R. 23) entered in the Circuit Court for Outagamie County, Branch III, before the Honorable Mitchell J. Metropulos, presiding judge.

On January 17, 2019, the State of Wisconsin filed a *Traffic Criminal Complaint* which charged the Defendant-Appellant, Jennifer A. Jenkins, with one count of Operating a Motor Vehicle While Intoxicated (Second Offense), contrary to sections 346.63 (1)(a) and 346.65 (2)(am)(2), Wis. Stats., and one count of Operating with Prohibited Alcohol Concentration (Second Offense), contrary to sections 346.63 (1)(b) and 346.65 (2)(am)(2), Wis. Stats. (R. 1).

Thereafter, on February 11, 2019, counsel for Ms. Jenkins appeared on her behalf and entered pleas of "not guilty" to both counts charged in the complaint. (R. 29:2).

On June 4, 2019, Ms. Jenkins filed a *Motion to Suppress Evidence*, wherein she asserted two (2) separate and distinct claims that police violated her constitutional rights and protections against unreasonable searches and seizures, as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 11, of the Wisconsin Constitution. (R. 14). Consequent to these claims, Ms. Jenkins sought an order to suppress all evidence which was causally obtained, either directly or indirectly, on the basis of the asserted constitutional violations. *Id*.

A *Motion Hearing* was held on July 10, 2019. (R. 30). The only witness presented by the State was Town of Grand Chute Police Officer Adam Miller ("Officer Miller"). (R. 30). After such hearing, Ms. Jenkins, by counsel, filed a brief in support of the motion to suppress evidence on August 9, 2019. (R. 15).

The next *Hearing* in this matter was held August 30, 2019, at which – based on discussions upon the record – the circuit court allowed the defense to supplement the record, particularly to submit and introduce an audiovisual recording(s) originated from cameras associated with Officer Miller. (R. 31:2-4). Accordingly, by a *Notice of Admission of Exhibit*, dated September 19, 2019, admitted was an "audiovisual recording originated from the camera situated within the patrol squad operated by Grand Chute Police Officer Adam Miller." (R. 17). Additionally, the defense filed a supplemental brief in support of the motion to suppress evidence on the same day. (R. 16.).

On September 27, 2019, a *Hearing* was held in which the circuit court advised it was unable to view the audiovisual recording originated from the arresting officer's patrol squad camera and therefore the matter was adjourned. (R. 32:2-3). Thereafter, hearings were held on October 9, 2019 and October 25, 2019. During both hearings, based on varying technical issues, it was noted that the circuit court was still unable to view the audiovisual recording; in turn, the matter was adjourned. (R. 33:2-4; R. 34:2-3, respectively).

Finally, at a *Hearing/Oral Ruling* held on October 31, 2019, the circuit court was able to view the audiovisual recording. (R. 35:2-3). Following the viewing of the recording, the circuit court allowed oral arguments by counsel. (R. 35:3-7). The circuit court then orally decided Ms. Jenkins' motion to suppress evidence on the record and denied the same. (R. 35:7-9).

On January 15, 2020, a *Plea and Sentencing Hearing* was held, at which Ms. Jenkins entered a plea of 'no contest' to Operating a Motor Vehicle While Intoxicated (Second Offense). (R. 36). The charge of Operating with Prohibited Alcohol Concentration (Second Offense) was dismissed. *Ibid*. The circuit court imposed the following sentence: confinement in jail for forty (40) days (subject to the SSTOP,[1] thirty (30) days stayed); a fine, plus applicable costs, fees and surcharges, for a total sum of $1,739.90; fourteen (14) month revocation of operating privileges; ignition interlock device order for a period of one (1) year; and an order for an alcohol/drug assessment. (R. 36:7-8).

A timely *Notice of Intent to Pursue Postconviction Relief* was filed on January 15, 2020. (R. 19). Ms. Jenkins sentence was stayed pending appeal. (see R. 21; R. 36:8; R. 23:1).

A *Judgement of Conviction* was entered on January 22, 2020 (R. 23). Ms. Jenkins now appeals.

STATEMENT OF THE RELEVANT FACTS

A. Motion to Suppress Evidence

Ms. Jenkins' motion to suppress evidence was filed on June 4, 2019, which asserted two claims: 1) that the traffic stop of Ms. Jenkins by the arresting officer that ultimately led to the charges in this matter was unlawful and unconstitutional; and 2) following arrest, that a collection of a blood specimen from Ms. Jenkins' body was accomplished unreasonably, thereby rendering such intrusion violative of the Fourth Amendment's prescription that all searches be reasonable. (R. 14: 3-5).

More specifically, as to the first claim, Ms. Jenkins' motion asserted that she was subject to an extra-jurisdictional traffic stop by the arresting officer, and that such stop:

[1] SSTOP is an acronym for the Safe Streets Options Program.

1) was not based on a personal observation of "a traffic code violation within [Officer Miller's] jurisdiction in order to justify an extra-jurisdictional traffic stop;" and

2) was not accomplished lawfully under the "fresh pursuit" doctrine and, consequently, it was conducted unreasonably under the circumstances.

(R. 14: 3-5).

As to the second claim, Ms. Jenkins' motion asserted that during the collection of a blood sample that she "was subject to multiple needle insertions into her body and the entire blood draw lasted an inordinate amount of time," resulting in undue pain and discomfort. (R. 14: 2, 5). The motion further asserted "that these circumstances rendered the blood draw unreasonable and therefore violative of the Fourth Amendment's prescription that all searches be reasonable." (R. 14: 5).

As to relief sought, the motion requested an order to suppress all evidence which was causally obtained, either directly or indirectly, on the basis of the asserted constitutional violations. *Id*.

B. Motion Hearing

As stated above, a *Motion Hearing* was held on July 10, 2019. The only witness at such hearing was Officer Miller.

Officer Miller, employed by the Town of Grand Chute Police Department, testified that on October 12, 2018, he was on patrol duty in the Town of Grand Chute. (R. 30:5). While northbound on Bluemound Drive, he observed a motor vehicle, later identified as a Jeep,[2] that "appeared to be traveling a little bit fast" eastbound on Wisconsin Avenue. (R. 30:5, 13). Officer Miller, however, was not "able to confirm" whether the Jeep was, in fact, traveling in excess of the posted speed limit. (R. 30:5).

[2] R. 30:12.

Officer Miller positioned his patrol squad behind the Jeep and intentionally began to follow the same. (R. 30:13). Both Officer Miller's patrol squad and the Jeep were directionally headed eastbound on Wisconsin Avenue. (R. 30:5). While following the Jeep, and while situated a mere "[t]hree car lengths" behind the same, Officer Miller claimed to observe both of the driver's side tires of the Jeep cross the centerline at "Wisconsin [Avenue] and Popp [Street]" within the Town of Grand Chute. (R. 30:5-6, 14). Officer Miller specifically testified that "at least a third" of the Jeep traveled into the oncoming lane of traffic. (R. 30:6).

Instead of performing a traffic stop, Officer Miller continued to follow the Jeep for about the distance of a mile out of his jurisdiction of the Town of Grand Chute and into the City of Appleton. (R. 30:15). As he followed the Jeep, Officer Miller claimed it had a "difficult time maintaining a straight line in its lane of traffic" but noted "it never deviated from the lane of traffic." (R. 30:6). Officer Miller testified that there were no other motor vehicles on the roadway at the time. (R: 30: 13-14).

Officer Miller testified that upon reaching the intersection of Wisconsin and Badger avenues, that he observed roughly a third of the Jeep's body width to cross the centerline once again. (R. 30:6). Officer Miller further testified that he then activated his traffic lights and claimed it took the Jeep about a minute to stop. (R. 30:7).

Although Officer Miller did not activate his patrol squad's overhead emergency lights until after exiting his jurisdictional boundary, he nevertheless testified that he actually "decided to active my squad lights when I observed the first violation" but delayed doing so in favor of continuing to follow the Jeep because "I was obtaining evidence." (R: 30: 16). Additionally, as he followed the Jeep, Officer Miller further testified the Jeep was traveling the same approximate speed eastbound on Wisconsin Avenue from the Town of Grand Chute and then into the City of Appleton. (R. 30: 20-21). While merely implied by the context of the testimony, Office Miller seemingly admitted the Jeep was not exceeding the speed limit as he followed the same, but noted he believed

the Jeep's driver "slowed down when she saw me." (R. 30:21).

It is undisputed that following the traffic stop, Ms. Jenkins was arrested for OWI. (R. 1: 3). After her arrest, Ms. Jenkins was transported to a hospital so that a sample of her blood could be drawn for chemical testing. (R. 30: 10, 12). Officer Miller testified that Ms. Jenkins was "not necessarily cooperative" with the phlebotomist and did not follow directions. (R: 30: 10-11). However, Officer Miller was unable to articulate what directions Ms. Jenkins failed to follow. (R: 30: 11).

C. Audiovisual Recording Evidence/Exhibit.

As noted above, Ms. Jenkins filed a *Notice of Admission of Exhibit*, dated September 19, 2019, which admitted an "audiovisual recording originated from the camera situated within the patrol squad operated by Grand Chute Police Officer Adam Miller." (R. 17). As also noted above, after presentation of challenges, the circuit court was able to view the audiovisual recording during the October 31, 2019, *Hearing/Oral Ruling*, particularly at time stamps of 22:42 to 23:53. (R. 35:2-3).

Concurrent with the filing of the notice admitting the audiovisual recording, Ms. Jenkins additionally filed a *Supplement to Brief in Support of Defendant's Motion to Suppress Evidence*. Within that supplemental brief, Ms. Jenkins outlined the following facts established by such exhibit:

1) At the July 10th *Motion Hearing*, Officer Miller testified that the alleged second cross-of-centerline violation by the Jeep occurred at intersection of Wisconsin and Badger avenues in the City of Appleton.

    - However, the footage shows that the cross-of-centerline violation occurred on Wisconsin Avenue between the intersects of Douglas and Gillett streets in the City of Appleton. Thus, the cross-of-centerline violation occurred two and one-half to three blocks east of the location in which Officer Miller claimed in testimony. See exhibit at times 12:22:44 AM to 12:22:50 AM.

2) At the July 10th *Motion Hearing*, Officer Miller testified

that the alleged second cross-of-centerline violation in the City of Appleton resulted in about one-third of the Jeep's body crossing the centerline.

- However, the footage shows that the cross of centerline by the Jeep was roughly a tire's width or so, but nothing close to one-third of the Jeep's body. See exhibit at times 12:22:44 AM to 12:22:50 AM.

3) At the July 10th *Motion Hearing*, Officer Miller testified that he activated his patrol squad's overhead emergency lights after his observation of the cross-of-centerline violation in the City of Appleton and, when viewed in context, he suggested it was immediate.

- However, the footage shows that Officer Miller actually activated his overhead red-and-blue lights at the intersection of Wisconsin Avenue/Mason Street in Appleton, which would be approximately one and one-half to two blocks east of the cross-of-centerline violation (or well over four blocks east of the intersection of Wisconsin and Badger avenues). See exhibit at times 12:23:12.

4) At the July 10th *Motion Hearing*, Officer Miller testified that after activation of his overhead red-and-blue lights, that the Jeep continued to travel for about one (1) minute before stopping.

- However, the footage uncontrovertibly shows that the Jeep stopped in about twenty (20) seconds after the activation of Officer Miller's overhead red-and-blue lights (which included time for the Jeep, with use of its blinker, to execute a right turn off of Wisconsin Avenue and stop at the next cross street of Summit Street). See exhibit at times 12:23:13 AM to 12:23:33 AM.

The exhibit shows the following facts:

- The approximate distance between the alleged lane deviation at the intersection of Wisconsin Avenue/Popp Street in Grand Chute to the point Officer Miller activated his squad's overhead red-and-blue lights at the intersection of Wisconsin Avenue/Mason Street was 1.4 miles. In other words, Officer Miller delayed the traffic stop unnecessarily by electing to travel for nearly a mile and half before attempting to effectuate a traffic stop.

- The approximate distance from the point that Officer

> Miller left his jurisdiction of Grand Chute to the point he actually activated his squad's overhead red-and-blue lights in Appleton was one-half mile. In other words, even after leaving his jurisdiction and upon entering a neighboring municipality, Officer Miller further delayed attempting to initiate a traffic stop by traveling roughly half of a mile in distance away from his home jurisdiction before even attempting to effectuate a traffic stop.
>
> - The approximate distance from the alleged lane deviation at the intersection of Wisconsin Avenue/Popp Street in Grand Chute to the location of the traffic stop was 1.6 miles apart.
>
> - That the footage rebuts Officer Miller's assertion that it took the driver of the Jeep an inordinate amount of time to respond to his squad's overhead red-and-blue lights, pull over and come to a complete stop. Indeed, the footage tends to show the driver's response time was reasonable and normal under the circumstances.

(R. 16: 1-2)(footnotes omitted). Not only were these asserted facts consistent with the audiovisual recording contained upon the admitted exhibit, but the State also did not materially dispute such assertions during any subsequent proceedings below.

D. The Circuit Court's Ruling

The circuit court orally denied Ms. Jenkins' motion to suppress evidence. (R. 35: 7-9).

i. Denial of Challenge of Traffic Stop.

In ruling on the challenge to the extra-jurisdictional traffic stop of Ms. Jenkins, the circuit court seemingly credited Officer Miller's testimony generally as it related to the two (2) alleged cross-of-centerline violations committed by Ms. Jenkins. *Ibid*.

First, the circuit court found that upon "review of the video today, it appears to be consistent with the testimony of Officer Miller" during the July 10th *Motion Hearing*, noting it

observed "the vehicle go over the centerline pretty early on to (sic) the video, and both the left wheels of the vehicle crossed the centerline[.]" (R. 35: 7). The circuit court acknowledged that this cross-of-centerline, as captured on the patrol squad camera recording, occurred in the City of Appleton. *Ibid*.

Second, circuit court found that the "original violation was observed by the officer in Grand Chute[,]" and further noted that this "first observation was made prior to the [squad camera] being activated." (R. 35: 7-8).

The circuit court then ruled that, based on Officer Miller's observation of the driver's cross-of-centerline violation within the Town of Grand Chute, that the officer "exercised reasonable discretion by continuing to follow the subject vehicle into the City of Appleton." (R. 35: 8). For these reasons, the circuit court held that "there certainly was a basis to pull the vehicle over in that the vehicle crossed the centerline[.]" (R. 35: 8). Consequently, the circuit court denied relief as to this claim. *Ibid*.

In its ruling, the circuit court did not clearly discriminate between the two (2) alleged cross-of-centerline violations and whether it was the first alleged violation that occurred within the officer's jurisdiction or second violation that occurred outside of the same, or both, that served as the basis to justify the traffic stop of Ms. Jenkins' motor vehicle. Moreover, as noted, the circuit court found that Officer Miller "exercised reasonable discretion" in following Ms. Jenkins' vehicle outside of his territorial jurisdiction before effectuating a traffic stop but failed to apply the established legal test set out by caselaw under the "fresh pursuit" doctrine.

ii. Denial of Challenge of Collection of Blood Sample.

In ruling on the challenge to the collection of a blood sample from Ms. Jenkins, the circuit court accurately noted it

"is a claim that the blood test itself was a violation of Miss Jenkins' Fourth Amendment rights." (R. 35: 8). The circuit court additionally noted that Ms. Jenkins "did not testify, nor did the person who retrieved the blood from the defendant[,]" and the "sole evidence" material to this issue was Officer Miller's testimony. (R. 35: 8-9). Indeed, the circuit court further announced that it "certainly… cannot speculate as to what [Ms. Jenkins] would have testified to, or even the phlebotomist, so I just have to rely on what the testimony was by Officer Miller with regards to that issue." (R. 35: 9).

Based on Officer Miller's testimony, the circuit court found that "there was a blood draw, and there may have been some issues to obtain the blood by the phlebotomist, but she was able to do that" and therefore there was "no evidence to indicate that there was any type of abuse or a violation of [Ms. Jenkins'] Fourth Amendment rights with regards to the administration of that blood test[.]" (R. 35: 9). Consequently, the circuit court denied relief as to this claim. *Ibid*.

STANDARD OF REVIEW

Upon review of issues that concern whether a search or seizure is reasonable is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. "A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles." *Ibid.*

ARGUMENT

I. Applicable Burden of Proof in Evidence Suppression Proceedings.

In the face of a challenge to an unlawful traffic stop or other challenge related to a warrantless search or seizure, the *onus probandi* rests entirely with the State. See *State v. Taylor*,

60 Wis. 2d 506, 519, 210 N.W.2d 873, 880 (1973) ("Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state.").

Just as in the circuit court, this standard is important during the appellate review process as well. Based on such standard, any undeveloped or equivocal evidentiary issues must therefore be resolved in favor of Ms. Jenkins and against the State.

II. Applicable Quantum of Evidence in a "Fresh Pursuit" Case.

As to be better explained *infra*, an issue raised in this appeal deals with the doctrine of "fresh pursuit," which originated under common law and was thereafter codified by statute, to wit, Wis. Stat. § 175.40 (2).

"Generally, Wisconsin police officers have no authority outside of the political subdivision in which they are officers." *State v. Haynes*, 2001 WI App 266, ¶13, 248 Wis. 2d 724, 733, 638 N.W.2d 82, 86 (citing *United States v. Mattes*, 687 F.2d 1039, 1041 (7th Cir. 1982)). One limited exception to this general legal rule is that of the "fresh pursuit" doctrine. In short, the fresh pursuit doctrine, under certain circumstances only, grants authority to a police officer who is actively engaged in proper pursuit of a suspect who flees or otherwise leaves the pursuing officer's geographical boundaries of jurisdiction to still follow that suspect anywhere within the state in order to accomplish an arrest. See Wis. Stat. § 175.40 (2). Logically, and as is no different than most limited exceptions carved-out against a general legal rule, the fresh pursuit doctrine demands complete delineation of its underlying legal standards (i.e., its applicable legal test/factors) so that its application to the factual circumstances of any given case are guided by both an ascertainable method of evaluation to resolve legal issues and to plainly circumscribe the limits of such exception.

While a handful of published cases in Wisconsin have addressed the "fresh pursuit" doctrine, such as *City of Brookfield v. Collar*, 148 Wis.2d 839, 841, 436 N.W.2d 911

(Ct. App. 1989), and *Haynes*, 2001 WI App 266, it nevertheless appears that none of those published cases have squarely addressed or explicitly ruled on the requisite quantum of evidence upon which an episode of fresh pursuit must be based. It is certainly well-established that, in order to be lawful, a traffic stop that occurs in a public place must be ordinarily supported by evidence that, at a minimum, meets or exceeds the standard of reasonable suspicion that a traffic law "has been or is being violated" by the driver, or perhaps an occupant, of the automobile. See *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 250, 868 N.W.2d 143, 151. However, in the context of a detention which is purportedly legally justified under the "fresh pursuit" doctrine, it is specifically asserted by Ms. Jenkins that a traffic stop must be supported by the standard of probable cause to arrest; and not upon a lesser standard, such as reasonable suspicion.[3] Thus, whether probable cause or reasonable suspicion is the proper standard is seemingly a novel issue and subject to determination by looking to the historical common law concept of "fresh pursuit" and its codification under Wis. Stat. § 175.40 (2), and other law germane to this subject.

At common law, the term "fresh pursuit" referred to the right of a police officer to cross jurisdictional lines in order to arrest a fleeing felon. See *Carson v. Pape*, 15 Wis. 2d 300, 308, 112 N.W.2d 693, 697 (1961)(citations omitted). The legislature, however, has codified the common law and additionally expanded the "fresh pursuit" doctrine beyond felonious offenses by its creation of Wis. Stat. § 175.40 (2), which provides:

---

[3] Ms. Jenkins presents two points on qualification or clarification:

> First, of course, Ms. Jenkins' assertion that the probable cause to arrest standard attaches to traffic stops accomplished under the guise of the "fresh pursuit" doctrine would naturally extend to the occurrence of any other varied form of a "seizure," within the meaning of the Fourth Amendment, U.S. Const., and Art. I, Sec. 11, Wis. Const., of a citizen by police.
>
> Second, Ms. Jenkins would tend to agree that "fresh pursuit" may also be premised upon a warrant for a person's arrest. However, because this case does not deal with an arrest warrant, Ms. Jenkins' argument focuses on the standard of probable cause to arrest.

> For purposes of civil and criminal liability, any peace officer may, when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance the officer is authorized to enforce.

The case of *Collar*, supra, is essentially the first Wisconsin case to substantively address the standards for fresh pursuit. Prior to *Collar*, Wisconsin courts had not developed specific standards defining fresh pursuit. *Id*., 148 Wis.2d at 842, 436 N.W.2d 911. For this reason, the *Collar* court turned to the caselaw of other states for guidance; the court ultimately adopted the three-point criteria set-forth in the Colorado case of *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979), noting such test was commonly utilized by courts in determining fresh pursuit. *Id*. Those criteria are: first, the officer must act without unnecessary delay; second, the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect; and, finally, the relationship in time between the commission of the offense, the commencement of the pursuit and the apprehension of the suspect is important (the greater the length of time, the less likely it is that the circumstances under which the police act are sufficiently exigent to justify an extrajurisdictional arrest). *Collar*, 148 Wis.2d at 842–43, 436 N.W.2d 911.

The specific issue of whether "fresh pursuit" must be based upon probable cause was not expressly addressed by the *Collar* court, as it was assumedly undisputed that the officer had probable cause of a traffic violation in that case. Moreover, the criteria set-forth under *Collar* focuses solely on the episode of "pursuit" actually undertaken by the officer under the fresh pursuit doctrine, but those legal factors do not necessarily lend themselves to ascertaining the quantum of proof on which that pursuit must be foundationally based. Rather, determining the requisite quantum of evidence, and whether sufficient proof existed to actuate a "pursuit" in the first instance, should be both an initial and a separate inquiry. Ms. Jenkins' contention in this appeal that the requisite quantum of evidence is that of probable cause to arrest is supported by the language in the statute itself, the historical common law origins of fresh pursuit doctrine, and *Collar's* third factor.

When interpreting statutes, its language is not read in a vacuum: "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. And "[a]ll words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning." Wis. Stat. § 990.01 (1).

As the plain language of Wis. Stat. § 175.40 (2) provides, an officer may only "follow" a person outside his or her primary jurisdiction into anywhere within the state to "arrest" that person. The word "follow" is commonly understood to mean "to go, proceed, or come after,"[4] whereas "arrest" is a legally technical word, meaning "the taking or keeping of person in custody by legal authority[.]" Black's Law Dictionary, Third Pocket Edition. It is clear by the legislature's use of words "follow" and "arrest" in Section 175.40 (2) that valid fresh pursuit necessarily requires that the officer must possess a quantum of proof sufficient to justify an arrest of the person before he or she may follow that person outside of his or her territorial jurisdiction.

And, of course, it is elementary that a warrantless arrest must be supported by probable cause. See e.g., Wis. Stat. § 968.07 ("Arrest by a law enforcement officer. A law enforcement officer may arrest a person when: … There are reasonable grounds to believe that the person is committing or has committed a crime."); Wis. Stat. § 345.22 ("Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.");[5] *State v. Secrist*,

[4] Available at: https://www.merriam-webster.com/dictionary/follow (last accessed 01/26/2021).

[5] The term "reasonable grounds" within these arrest statutes are "synonymous" with probable cause. See *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593, 595 (1977).

224 Wis.2d 201, 209, 212, 589 N.W.2d 387 (1999) ("Probable cause is the sine qua non of a lawful arrest."); and also *State v. Taylor*, 60 Wis. 2d 506, 512, 210 N.W.2d 873, 877 (1973) ("While an arrest without a warrant is lawful in some instances,...probable cause must be established as the basis for such an arrest.").

It is also equally clear that an "arrest" does not mean an investigatory detention, which only need be supported by the lower standard of reasonable suspicion, either. Indeed, by its very definition, an investigatory detention, or a "Terry-stop," does not encompass an arrest. See Wis. Stat. § 968.24; accord *State v. Patton*, 2006 WI App 235, ¶9, 297 Wis. 2d 415, 422, 724 N.W. 2d 347, 350 ("A Terry stop is not an arrest[.]").

Moreover, if the legislature intended to allow a police officer to follow a person outside his or her own territorial jurisdiction to conduct an investigatory detention upon reasonable suspicion, pursuant to Wis. Stat. § 968.24 or *Terry*, it would have presumably said so. This is so because the legislature is presumed to choose its terms carefully and with precision to express its meaning. *Ball v. District No. 4, Area Bd. of Vocational, Technical and Adult Educ.,* 117 Wis.2d 529, 539, 345 N.W.2d 389 (1984). And "where the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings." *Graziano v. Town of Long Lake,* 191 Wis.2d 812, 822, 530 N.W.2d 55, 59 (Ct. App. 1995). In fact, the legislature has surely demonstrated its ability to distinguish between an investigatory detention and an arrest, compare Wis. Stat. §968.24 ("Temporary questioning without arrest.") to Wis. Stat. § 968.07 ("Arrest by a law enforcement officer."), and by its use of only the word "arrest" within Wis. Stat. § 175.40 (2), but no reference to an investigatory detention, it must be presumed that the legislature intended that fresh pursuit is reserved for cases in which the police officer followed a person outside the officer's jurisdiction to effectuate an arrest based on probable cause.

Next, it is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed

and leaves no doubt of the legislature's intent. *Kranzush v. Badger State Mut. Cas. Co*.,103 Wis.2d 56, 74, 307 N.W.2d 256, 266(1981); *NBZ, Inc. v. Pilarski*, 185 Wis.2d 827, 836, 520 N.W.2d 93 (Ct. App. 1994). A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute. *Id*. To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory. *Id*. When a statute merely codifies common law, cases interpreting the common law are persuasive in interpreting that section. See *Reilly v. City of Racine*, 51 Wis. 526, 8 N.W. 417 (1881). However, statutes in derogation of the common law are strictly construed. *Maxey v. Redev. Auth. of Racine*, 94 Wis.2d 375,399, 288 N.W.2d 794 (1980).

Generally speaking, Wis. Stat. § 175.40 (2) is a codification of common law. The doctrine of "fresh pursuit" at common law referred to the right of a police officer to cross jurisdictional lines in order to arrest a fleeing felon. See *Pape*, 15 Wis. 2d at 308. There is no legislative signal within Wis. Stat. §175.40 (2) (and its predecessor sec. 66.31) to remotely suggest that the legislature intended to alter the underlying standard that the pursuit must be actuated and premised upon probable cause or a warrant to arrest. The only derogating effect that Wis. Stat. § 175.40 (2) had on the common law's "fresh pursuit" doctrine relates merely to the kinds of offenses for which can justify its invocation. The legislature simply expanded the fresh pursuit doctrine to include arrest for "any law or ordinance" contra only felony crimes under common law. Considering the common law doctrine of "fresh pursuit" required probable cause that a person committed a felony, it is likely that the legislature likewise intended to codify the common law requirement that probable cause of a law violation must exist before an officer can properly engage in fresh pursuit.

Even under *Collar*'s third factor, the term "commission of the offense" clearly implies a completed offense for which probable cause exists and not merely reason to stop to conduct an investigation under a lesser standard. Moreover, the *Collar* court relied upon and adopted the standards set-forth in the Colorado case of *Charnes v. Arnold*, supra, in fresh pursuit cases. For this reason, it is worth noting that in the Colorado

case *People v. McKay*, 10 P.3d 704, 706 (Colo. Ct. App. 2000), it was held under that state's fresh pursuit statue that fresh pursuit must be based on probable cause that a law violation was committed.

Finally, as persuasive authority, the Wisconsin Department of Justice (DOJ) has declared that in order for an officer to lawfully engage in fresh pursuit, probable cause must exist. The DOJ routinely releases a publication entitled Wisconsin Law Enforcement Officers Criminal Law Handbook.[6] In the revised 2008-09 version, it provides the following guidance on "fresh pursuit:"

> Fresh pursuit means the pursuit by a law enforcement officer of someone he/she has **probable cause to believe has violated any law or ordinance** the officer is authorized to enforce. This means that the infraction took place within the officer's and fresh pursuit allows the officer to follow that person outside of what normally would be his/her geographical limits. An officer now may, when in fresh pursuit, follow anywhere in the state and arrest any person for violation of any law or ordinance the officer is authorized to enforce.

Id., pp. 18-19 (emphasis supplied).

For these reasons, the correct standard for fresh pursuit is probable cause, and not a lesser standard such as reasonable suspicion.

III. The Arresting Officer Lacked Probable Cause to Believe a Traffic Code Violation Was Committed by the Appellant Within His Jurisdiction in Order to Justify an Extra-Jurisdictional Traffic Stop

It is undisputed that Officer Miller traveled outside of his geographical jurisdiction of the Town of Grand Chute and effectuated the traffic stop of Ms. Jenkins in the City of Appleton. The only alleged traffic code violation by Officer Miller within his jurisdiction was a cross-of-centerline

[6] Available at: https://www.wistatedocuments.org/digital/collection/p267601coll4/id/6629/rec/1 (last accessed by undersigned: 01/25/2021).

violation at "Wisconsin [Avenue] and Popp [Street]" within the Town of Grand Chute,[7] whereby he asserted that about one-third of Ms. Jenkins' Jeep crossed into the opposing, or oncoming, lane of traffic. R. 30: 5-6, 14.

Despite this testimony, the following is an image (facing east) originated from Google Maps[8] of the intersection Wisconsin Avenue and Popp Street:

[7] The alleged traffic code violation that occurred within the City of Appleton may *not* serve as a basis to justify the traffic stop of Ms. Jenkins. Officer Miller is not authorized to enforce the traffic code ordinances of another municipality and, moreover, he would lack police authority while outside of his own jurisdiction, unless his extra-jurisdictional activities were authorized under law, such as by the fresh pursuit doctrine. Wis. Stat. § 175.40 (2) only permits a police officer to pursue a person outside of his or her territorial jurisdiction to make an arrest for "violation of any law or ordinance the officer is **authorized to enforce**."(bolding supplied for emphasis). Also see *Haynes*, supra, ("Wisconsin police officers have no authority outside of the political subdivision in which they are officers."); and also Wisconsin Law Enforcement Officers Criminal Law Handbook, 2008-09 ("Fresh pursuit means the pursuit by a law enforcement officer of someone he/she has probable cause to believe has violated any law or ordinance the officer is authorized to enforce. **This means that the infraction took place within the officer's geographical jurisdiction and fresh pursuit allows the officer to follow that person outside of what normally would be his/her geographical limits**.")(emphasis supplied); and 61 Op. Att'y Gen. 419, 421 (1972)(attorney general opining that the fresh pursuit statute contemplates that the violation for which the pursuit is necessary occurred within the limits of the officer's municipality).

[8] Available at: https://goo.gl/maps/bw2J8LcZGRxRnn8p7 (last accessed: 01/27/2021). It is contended that this Court may take judicial notice of this fact, i.e., Google Maps and its related imagery, because it is "not subject to reasonable dispute" in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01.

Moreover, this specific Google Maps' image has a basis within the record in the circuit court. Ms. Jenkins' *Brief in Support of Defendant's Motion to Suppress Evidence*, filed August 9, 2019, imposed this specific image. At no point below did the State dispute the accuracy of the image or otherwise object in any manner to the same during any proceedings.

As the above image plainly demonstrates, at the intersection of Wisconsin Avenue and Popp Street in the Town of Grand Chute, there exists a raised concrete center median between the opposing lanes of travel. The divider median also contains erected vertical-standing posts that display traffic signage.

Based on these physical roadway features, it would be impossible for about one-third of Ms. Jenkins' Jeep's body width to cross the centerline and then into the opposing lane of travel, especially without striking the erected traffic signs. Indeed, contrary to Officer Miller's testimony that the Jeep intruded into the opposing or oncoming lane of traffic upon crossing the roadway's centerline, R. 30: 6, there is actually no true "centerline" to cross, much less an opposing or oncoming lane of traffic immediately adjacent to the yellow-colored roadway line.

This Court should hold the circuit court's factual finding that Ms. Jenkins' Jeep crossed the centerline at the intersection of Wisconsin Avenue and Popp Street is clearly erroneous because Officer Miller's testimony on this factual matter is incredible as a matter of law. *State v. King*, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994)("Incredible as a matter of law means inherently incredible, such as in conflict with the uniform course of nature[.]").

Because Officer Miller's testimony is incredible as a matter of law, the State failed to meet its burden of proof by establishing probable cause, or reasonable suspicion for that matter, that Ms. Jenkins committed a traffic code violation within the Town of Grand Chute. Consequently, the traffic stop at issue in this case was unlawful and violative of Ms. Jenkins' right against unreasonable seizures, as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 11, of the Wisconsin Constitution.

IV. The Officer Did Not Act in Valid "Fresh Pursuit"

As repeatedly noted supra, Wisconsin police officers have no authority outside their geographical jurisdiction, *Haynes*, 2001 WI App 266, ¶13; but an exception to this rule is the fresh pursuit doctrine codified under Wis. Stat. § 175.40 (2).[9] As also noted above, in Wisconsin, a police officer may leave his or her jurisdictional boundaries if he or she has probable cause to arrest for an offense committed in that officer's jurisdiction. In *Collar,* supra, the court adopted a three (3) part test to determine whether fresh pursuit was lawful:

- First, the officer must act without unnecessary delay. *Id.* at 842, 436 N.W.2d 911.

- Second, the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect. *Id.* at 842–43, 436 N.W.2d 911.

[9] As to be explained, the traffic stop of Ms. Jenkins by Officer Miller violated the fresh pursuit doctrine codified by Wis. Stat. § 175.40. Though the issue concerns itself with a violation of statute, the defense contends the ultimate issue for this Court is one of constitutional magnitude. The touchstone of the Fourth Amendment is reasonableness, *State v. Weber*, 2016 WI 96, ¶34, 372 Wis. 2d 202, 225, 887 N.W.2d 554, 565, and it is elementary that all "traffic stops must be reasonable under the circumstances." *State v. Houghton*, 2015 WI 79, ¶ 29, 364 Wis. 2d 234, 250, 868 N.W.2d 143, 151. When a police officer purports to act under the color of law but actually exceeds his legal authority vested by law and, as well, his acts actually violate the law in the process, the defense contends that the resulting "seizure" and ensuing arrest of a person is unlawful and consequently unreasonable. Therefore, the prohibition against unreasonable searches and seizures found under the Fourth Amendment and Article I, Section 11, Wis. Const., is clearly, and by definiton, violated.

- Finally, the relationship in time between the commission of the offense, the commencement of the pursuit and the apprehension of the suspect is important; the greater the length of time, the less likely it is that the circumstances under which the police act are sufficiently exigent to justify an extrajurisdictional arrest. *Id.* at 843, 436 N.W.2d 911.

Upon application of the *Collar* factors to the facts of this case, Officer Miller did not act in valid fresh pursuit.

A. First Criterion: The Officer Must Act Without Unnecessary Delay.

Assuming arguendo that Officer Miller did observe a traffic code violation within his jurisdiction, he nevertheless failed to act without unnecessary delay. In order to act in fresh pursuit, a police officer must act without "unnecessary delay." Oppositely put, any delay by the officer must be necessary under the facts and circumstances of the case. In testimony, Officer Miller acknowledged that the act of crossing the centerline was a traffic code violation which provided a basis to stop Ms. Jenkins' Jeep; however, despite his contention that he observed a traffic code violation, he chose not to engage in active pursuit in order effectuate a traffic stop but rather consciously chose to simply follow the Jeep for a substantial distance outside of his geographical jurisdiction. See R. 30: 14-15. The record is devoid of any factors whatsoever to justify or excuse the delay undertaken by Officer Miller or otherwise render the delay as necessary. In terms of distance, it was nearly one (1) mile from the alleged cross-of-centerline violation at the intersection of Wisconsin Avenue/Popp Street in Grand Chute to the jurisdictional boundary line of the City of Appleton.[10] Moreover, the distance from the alleged cross-

[10] See Google Maps at: https://www.google.com/maps/dir/44.2732481,-88.4548491/44.2732054,-88.4361796/@44.2728031,-88.4398295,15.32z/data=!4m2!4m1!3e0.

It is contended that this Court may take judicial notice of this fact, i.e., geographical boundaries and/or physical distances calculated by Google Maps, because it is "not subject to reasonable dispute" in that it is "capable

of-centerline violation at the intersection of Wisconsin Avenue/Popp Street in Grand Chute to the geographical point in which Officer Miller actively engaged in pursuit by activation of his patrol squad emergency lights at the intersection of Wisconsin Avenue/Mason Street was 1.4 miles.[11]

Officer Miller, after observing the alleged traffic code violation, had nearly an entire mile of roadway to effectuate a traffic stop within his own jurisdiction but, quite simply, elected not to. Beyond that, even after leaving his own geographical boundaries, Officer Miller further delayed attempting to initiate a traffic stop by traveling roughly half of a mile in distance into the City of Appleton before even attempting to effectuate a traffic stop.

In *Collar*, the defendant's car was observed by a police officer to have expired plates, speed, cross the centerline, and weave within its lane of travel. *Id*. at 148 Wis.2d at 840-41. The officer made these observations in her jurisdiction over the span of about a mile. *Id*. at 841. While both the police squad and the defendant's car were stopped at an intersection with a red traffic light, "the officer made her determination to stop the vehicle." *Ibid*. Once the traffic light turned green, both vehicles traveled out of the officer's geographical jurisdiction and a traffic stop was thereafter effectuated. *Ibid*. The officer testified that she did not activate her lights or sirens at the intersection because did not want to "cause Collar to enter the intersection against a red light in an attempt to let the officer pass." After clearing the intersection, the officer testified that she did not immediately "activate her siren or lights at that time because, due to road construction, there was no room on the shoulder for a safe stop;" however, once the construction zone was cleared, the officer effected that traffic stop. *Ibid*. On

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of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See Wis. Stat. § 902.01.

[11] See Google Maps at: https://www.google.com/maps/dir/44.2732481,-88.4548491/44.273077,-88.425848/@44.2722762,-88.4356802,15.32z/data=!4m2!4m1!3e0

It is contended that this Court may take judicial notice of this fact. See footnote 10, herein.

appeal, the *Collar* court held, inter alia, the officer's delay was reasonable and necessary under the facts of that case because "[a]ny delay between the officer's decision to stop Collar and the actual stop was reasonable in light of the officer's safety concerns about the intersection and the shoulderless construction zone" and "[t]o find otherwise would encourage peace officers to stop and arrest in situations where safety dictates they wait." *Id.* at 843.

The primary factors present in *Collar* that underpinned its ruling are not present here. This case demands a different result. In *Collar*, the court primarily relied on two factors to inform its outcome: first, the moment in which the police officer formed her decision to stop the defendant's car was the starting point to measure the delay to determine whether it was reasonable and necessary; and, second, the conditions present in that case interfered with the officer's ability to immediately conduct a traffic stop consistent with standards of safety. Both of those factors are not shared by the facts of this case.

First, unlike *Collar*, Officer Miller testified he immediately made the decision to effectuate a traffic stop based on the alleged cross-of-center violation at Wisconsin Avenue and Popp Street. (R. 30: 16). Indeed, Officer Miller asserted that he was approximately three (3) "car lengths" behind Ms. Jenkin's Jeep when he observed the alleged violation and candidly conceded that he "could have stopped" the Jeep then but "did not choose to pull her over" at that time, R. 30: 14. Despite Officer Miller's subjective decision to stop the Jeep, he simply – and for no apparent reason – chose not to and rather followed the Jeep for well over a mile before doing so.

Second, unlike *Collar*, there was no evidence presented to the Court concerning a safety issue, or any other conditions or circumstances, to reasonably justify or excuse the delay. Officer Miller also testified that there were no other motor vehicles on the roadway at the time either, which negates any inference that heavy or concentrated traffic presented an impediment to promptly conduct a traffic stop. Quite frankly, Officer Miller consciously chose to delay the traffic stop until he traveled well beyond his geographical boundaries and, plainly, there was an absence of any circumstances whatsoever

to render that decision reasonable and necessary. Thus, Officer Miller did not act without unnecessary delay and, consequently, he was not in valid fresh pursuit.

B. Second Criterion: The Pursuit Must Be Continuous and Uninterrupted, but There Need Not Be Continuous Surveillance.

In this case, once Officer Miller finally engaged in active pursuit of Ms. Jenkins' Jeep, the defense acknowledges it was continuous and uninterrupted in the sense that he did not abandon his efforts to stop her. However, it must be highlighted that the active pursuit did not occur until Officer Miller traveled well out of his own jurisdiction and nearly a half mile away from that jurisdictional boundary line.

C. Third Criterion: The Relationship in Time Between the Commission of the Offense, the Commencement of the Pursuit and the Apprehension of the Suspect.

"The greater the length of time, the less likely it is that the circumstances under which the police act are sufficiently exigent to justify an extrajurisdictional arrest." *Collar,* 148 Wis.2d at 843. Here, it must be undisputed that Officer Miller did not undertake active pursuit of Ms. Jenkins until nearly a mile-and-a-half away from the alleged traffic code violation. The time to travel such distance, together with any traffic control lights along that section of Wisconsin Avenue, would have consumed several minutes. While not particularly long in duration, such temporal proximities must be measured against the gravity of the alleged violation in order to evaluate the overall exigencies at hand. Cf. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 (1984)(holding, inter alia, that when determining if exigent circumstance exist for a warrantless intrusion, that courts are to measure the relative importance given by state law to the evidence sought by the intrusion).

An alleged cross-of-centerline violation is not a crime and such offense carries a mere maximum forfeiture of Forty Dollars ($40.00) for a first offense and One-Hundred Dollars ($100.00) for a second offense within a year. See secs. 346.13 and 346.17 (1), Wis. Stats. Thus, it is a kind of offense that is

extremely low on the scale of gravity and, therefore, is not a weighty factor in an exigent circumstances analysis. In this case, given the distance and temporal proximities between the alleged traffic code violation to the point of pursuit and apprehension, together with the modest gravity of the alleged violation, it negated (or at least greatly undermined) any exigencies that may have existed to justify an extra-jurisdictional stop and arrest of Ms. Jenkins.

V. The State Failed to Meet Its Burden of Proof that the Blood Draw from the Appellant Was Reasonable

The collection of the blood specimen is a "search" within the meaning of the Fourth Amendment and thus must be "reasonable" to pass constitutional scrutiny. *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013); IV Amend., U.S. Const.

In *Schmerber v. California*, 384 U.S. 757, 769–70, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the U.S. Supreme Court recognized that "intrusions beyond the body's surface" implicated "interests in human dignity and privacy which the Fourth Amendment protects." The *Schmerber* court, inter alia, held that a blood draw may be reasonable under the Fourth Amendment, and noted several conditions and circumstances underlying its conclusion in that case. *See id.* at 759, 770–72, 86 S.Ct. 1826. As material here, the *Schmerber* court examined the state's "means of testing" the defendant's blood-alcohol content and "manner" in which "the test was performed." *Id*. at 771–72, 86 S.Ct. 1826. There, the blood test was taken in a "reasonable manner" because it was taken "by a physician in a hospital environment according to accepted medical practices." *Id.* at 771, 86 S.Ct. 1826. The *Schmerber* court also noted that the defendant was not someone with a particular health or religious objection. *See id.* at 771, 86 S.Ct. 1826. With regard to the State's "means of testing," the Supreme Court explained: "[F]or most people the procedure involves virtually no risk, trauma, or pain." *Id.*

In *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), abrogated on other grounds by *McNeely*, supra, the court noted that the collection of a blood sample must be

reasonable under the circumstances, particularly noting that "the method used to take the blood sample" must be "a reasonable one and performed in a reasonable manner[.]" *Id*., 173 Wis. 2d at 534. Accord *State v. Bentley*, 92 Wis. 2d 860, 865, 286 N.W.2d 153, 155 (Ct. App. 1979)(holding a blood draw reasonable in that case, in part, because "[i]t was performed by a hospital technician in a hospital environment according to accepted medical practice.").

Ms. Jenkin's motion to suppress evidence asserted the following facts:

> During the blood draw, the phlebotomist encountered difficulties in harvesting a blood specimen from Ms. Jenkins' body. Such difficulties were not [t]he product of fault or contribution by Ms. Jenkins but rather were seemingly the product of her natural bodily structure (i.e., challenges in finding a vein with adequate blood supply). Ultimately, Ms. Jenkins was subject to a needle being inserted into her body at three (3) different locations and the process was unusually long in duration. The overall blood draw caused more pain and discomfort as to Ms. Jenkins than the ordinary person subject to a blood draw. A sample of her blood, albeit below the standard amount in volume required by the Laboratory of Hygiene, was collected. Officer Miller was present for and witnessed the blood draw procedure.

R. 14: 2, ¶7. Ms. Jenkins contends that the State failed to materially controvert Ms. Jenkin's asserted facts at the July 10, 2019, *Motion Hearing*.

Next, Ms. Jenkins' motion specifically contended that the blood draw was unreasonable and therefore violative of the Fourth Amendment:

> In this case, Ms. Jenkins was subject to multiple needle insertions into her body and the entire blood draw lasted an inordinate amount of time. Unlike the conditions noted by the *Schmerber* court, the procedure here involved undue pain and discomfort. A reasonable officer should have recognized this condition and undertook (or at least offered) an alternate and more reasonable means to test Ms. Jenkins' alcohol concentration, such as by breath or urine. The defense contends, under the unique facts of this case, that these circumstances rendered the blood draw unreasonable and therefore violative of the Fourth

> Amendment's prescription that all searches be reasonable.

R. 14: 5, ¶20.

At the July 10, 2019 *Motion Hearing*, the State did not present any witness beyond Officer Miller, such as the phlebotomist who collected a sample of Ms. Jenkins' blood, or other hospital staff. On this issue, Officer Miller's testimony was limited to his conclusory assertion that Ms. Jenkins was "not necessarily cooperative" with the phlebotomist and did not follow directions. (R: 30: 10-11). Nevertheless, Officer Miller did not offer-up any factual detail in support of his conclusion-based assertion that Ms. Jenkins was "not necessarily cooperative" with the phlebotomist and, similarly, he was unable to articulate what directions which Ms. Jenkins allegedly failed to follow. (R: 30: 11).

The State bears the burden of proof upon motions to suppress evidence. First, it is the State's burden to prove the facts essential to a finding that the search or seizure was reasonable and constitutional. See *Taylor*, 60 Wis. 2d at 519 ("Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state."). Second, the burden of proof, which as just noted is carried by the State and the not the defendant, is by the preponderance of the evidence. *State v. Rewolinski*, 159 Wis. 2d 1, 16 fn. 7, 464 N.W.2d 401, 407 fn. 7 (1990).

Generally, the term "burden of proof" actually encompasses two separate burdens. One burden is that of producing evidence, often called the 'burden of production.' "The party carrying the burden of production must 'introduce enough evidence on an issue to have the issue decided by the fact-finder[.]'" *In re Commitment of Hager*, 2018 WI 40, ¶2, fn 5, 381 Wis. 2d 74, 911 N.W.2d 17 (citing Black's Law Dictionary 236 (10th ed. 2014)). The other burden is the "burden of persuasion," which becomes significant after all the evidence has been introduced. "The party carrying the burden of persuasion must 'convince the fact-finder to view the facts in a way that favors that party.'" *Ibid*.

In this matter, the State failed to meet its burden of proof, most notably by its failure to produce enough evidence germane to the issue at hand before the circuit court. On the instant issue, the State presented largely conclusory testimony that Ms. Jenkins was not necessarily cooperative or that she did not follow some unspecified directions in regard to the phlebotomist. Without more, however, the evidentiary record in this case was patently deficient for the State to meet its burden of proof that the blood draw was constitutionally reasonable in light of Ms. Jenkins' claim to the contrary.

First, it is worth noting that based on the asserted facts within Ms. Jenkins' motion, such as that she was subject to multiple needling at different locations on her body over an amount of time that was inordinate to such a routine procedure, which assertedly caused her "undue pain and discomfort," it is not particularly surprising or unexpected that a person may experience stress, anxiousness or agitation that perhaps may be interpreted as a less than desirable level of cooperation or otherwise pose interference with an ability to diligently follow directions. Whether or not Ms. Jenkins was cooperative or failed to follow some unspecified directions is not exactly material or probative to the issue presented: that is, the reasonableness, or lack thereof, of the blood draw. This is especially true when no specific fact-based evidence was presented to evaluate the substance of the assertions alleging Ms. Jenkins was not necessarily cooperative or that she failed to follow some unspecified directions.

Second, the State failed to bring-forth evidence to establish the number of times Ms. Jenkin's was subject to a needle being inserted into her body during the blood draw, the duration of the blood draw procedure, and whether the process caused more pain and discomfort as to Ms. Jenkins than the ordinary person. Moreover, the State presented no evidence related to the generally accepted medical standards or practices that attach to the collection of blood samples by phlebotomists or other medical professionals when a subject, like Ms. Jenkins, naturally presents with a substantial challenge in tapping a vein with adequate blood supply. Similarly, the State presented no evidence as to whether the blood draw procedure imposed upon Ms. Jenkins in this case was consistent with generally accepted medical standards/practices, or was

otherwise medically reasonable, in order to sufficiently rebut or overcome her claim to the contrary.

During the circuit court's ruling on this issue, it noted that the State did not present any witnesses beyond Officer Miller and, also, that Ms. Jenkins did not testify. (R. 35: 8-9). The circuit court continued that it "certainly… cannot speculate as to what [Ms. Jenkins] would have testified to, or even the phlebotomist, so I just have to rely on what the testimony was by Officer Miller with regards to that issue." (R. 35: 9). The circuit court then proceeded to acknowledge that though there may have been "some issues to obtain the blood by the phlebotomist," it was ultimately obtained; and thus there was "no evidence to indicate that there was any type of abuse or a violation of [Ms. Jenkins'] Fourth Amendment rights with regards to the administration of that blood test[.]" (R. 35: 9).

Effectively, the circuit court acknowledged that there was a lack of evidence within the record to support a finding that the blood draw was unreasonable, specifically noting – inter alia – the State's failure to present more evidence on the topic. While Ms. Jenkins certainly agrees with the circuit court's evaluation that the evidentiary record on this issue is meager, she nevertheless disagrees with its ultimately ruling. Rather than holding the State accountable to its burden of proof, the circuit court failed to apply it all together and instead proceeded to rest its findings, quite literally, on the absence of evidence which – in turn – informed its decision to deny Ms. Jenkins' motion. Moreover, the circuit court's reference that Ms. Jenkins elected to not present her own testimony, together with its arguable adverse inference drawn therefrom, was tantamount to or, at least, treaded upon burden shifting.

Of significant note, and at the risk of undue repetitiveness, the circuit court, after orally cataloging the evidence that was *not* presented on the record, then ruled that there was "no evidence to indicate" a violation of Ms. Jenkins' constitutional rights, despite – of course – her pleaded factual allegations to contrary in her motion. (R. 35: 9). In order to meet its burden, the State was required to present some positive or affirmative evidence to establish that the blood draw was constitutionally reasonable. But the State failed to produce enough evidence on the instant issue when it had its chance

and, as a result, it left a bare-boned and patently deficient record which does not support the circuit court's ruling.

In summary, contrary to the circuit court's ruling, and consequent to the State bearing the burden of proof, the evidentiary deficiencies described above must be resolved in favor of Ms. Jenkins and against the State. As such, Ms. Jenkins contends that the State failed to meet it burden of proof that the blood draw was reasonable under the circumstance and therefore asserts that suppression of the evidence is warranted.

CONCLUSION

It is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress in this matter and remand with directions that the circuit court issue an order suppressing all evidence obtained consequent to the unlawful traffic stop and/or the unreasonable blood draw by police and against Defendant-Appellant.

Dated this 27th day of January 2021.

Respectfully submitted,
COTTLE | PASQUALE | LABORDE, s.c.

_____

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FORM AND LENGTH CERTIFICATION

I, Stephanie M. Rock, hereby certify that this portion of the 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 10,074 words.

Dated this 27th day of January 2021.

_____

Stephanie M. Rock
State Bar No.: 1117723

ELECTRONIC BRIEF CERTIFICATION

I, Stephanie M. Rock, hereby certify in accordance with Sec. 809.19 (12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 27th day of January 2021.

_____

Stephanie M. Rock
State Bar No.: 1117723

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2020 AP 1243 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

JENNIFER A. JENKINS,

Defendant – Appellant.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
)ss
OUTAGAMIE COUNTY)

I, Jason Masterson, being first duly sworn, under oath, states:

1. That I am a Paralegal employed by Cottle | Pasquale | Laborde, s.c.
2. That on January 28, 2021, I did deposit in a mail receptacle for the United States Postal Service, in a sealed package, correctly addressed for delivery to the Wisconsin Clerk of Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688, with postage pre-paid for first class mail, or class of mail at least equally expeditious, ten (10) copies the *Brief and Appendix of the Defendant- Appellant*, relative to the above-entitled matter.
3. That on the same day, I also sent via U.S. Mail, first class (or a class at least equally expeditious), three (3) service copies of the *Brief and Appendix of the Defendant-Appellant* to the Outagamie County District Attorney's Office, 320 South Walnut Street, Appleton, Wisconsin, 54911.

Dated: January ____, 2021.

_____
Jason Masterson
Paralegal

Subscribed and sworn to before
me this ____ January, 2021:

_____
Amaro Lopez, Notary Public
Outagamie County, State of Wisconsin
My Commission is Permanent.