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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.

REPLY BRIEF 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

COTTLE | PASQUALE | LABORDE, s.c.
Stephanie M. Rock
State Bar No.: 1117723

Attorney for Defendant-Appellant

608 North Sixth Street
Sheboygan, WI 53081
Telephone: (920) 459-8490
Facsimile: (920) 459-8493
E-Mail: srock@kcplawgroup.com

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[1] Appending *State v. Smith,* 2018 WI App 21, 380 Wis. 2d 509, 913 N.W.2d 515 (unpublished), pursuant to 809.23 (3)(b).

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Telephone: (920) 459-8490
Facsimile: (920) 459-8493
E-Mail: srock@kcplawgroup.com

REPLY ARGUMENTS

I. The State's Objection to Google Maps Sources.

Responding to the Google Maps imagery[2] provided in Jenkin's opening brief at page 20, the State objects and asserts that Jenkins provides this image "for the first time" to dispute the alleged traffic violation in Grand Chute. (St.'s Br., p. 10).

Firstly, the State's assertion is mistaken. As noted in Jenkins' opening brief, this specific Google Maps' image was included in her supporting brief in circuit court. App. Br., p. 19, fn. 8. Moreover, during oral arguments to the circuit court on the motion, counsel for Jenkins expressly referenced the image during oral arguments. R. 35:5-6. At no point below did the State dispute the accuracy of the image or otherwise object in any manner.

Secondly, also stated in Jenkins' opening brief, this Court may take judicial notice of Google Maps and its related imagery per Wis. Stat. § 902.01. See App. Br., p. 19, fn. 8. This Court has previously taken judicial notice of Google Maps in *State v. Smith*, 2018 WI App 21, ¶3, fn. 1, 380 Wis. 2d 509, 913 N.W.2d 515 (unpublished).

Lastly, the State argues that "[e]ven if this Court was allowed to look outside the record, there is no testimony relating to whether this is the correct intersection, if that is how the intersection looked in October 2018, or if that close-up at that specific angle shows where the violation occurred." (St.'s Br., p. 10).

The concerns raised by the State may be quickly disposed:

- During all instances in which the Google Maps' image was used, the internet address was provided to source such imagery (see footnote 1, herein). A review of Google Maps presents an irrefutable conclusion that it captures the intersection of Wisconsin Avenue and Popp Street in Grand Chute and, therefore, is the "correct intersection."

[2] Available at: https://www.google.com/maps/@44.2732186,-88.4550986,3a,75y,54.18h,89.07t/data=!3m6!1e1!3m4!1s66z38IR7pUMJOmA-CnCS_Q!2e0!7i13312!8i6656 (last accessed: 03/12/2021).

- Whether the image represents "how the intersection looked in October 2018" is also easily ascertainable by use of Google Maps. The internet address provided to the source of the image, see footnote 1 herein, indicates the image was originally captured in September 2016; however, upon use of the "street view" feature – which archives imagery captured from different time periods – also contains imagery captured in July 2019.[3] Both the 2016 and 2019 images of the of intersection show the existence of the raised concrete center median between the opposing lanes of travel. The incident at issue in this appeal occurred on October 12, 2018 and therefore it is irrefutable that the Google Maps images shows "how the intersection looked in October 2018."

- As to the issue of whether the image shows "where the violation occurred," Officer Miller explicitly testified that the alleged cross-of-centerline violation occurred at this intersection. (R. 30:5-6, 14).

II. The State Concedes that Probable Cause is the Correct Standard in a "Fresh Pursuit" Case.

In Jenkins' opening brief, she argues that probable cause is the correct standard under the "fresh pursuit" doctrine. See App. Br., Argument, Section II. The State presents no specific argument in opposition to such argument and it is therefore deemed conceded. *See Schlieper v. DNR,* 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994)(an appeal litigant's failure to refute an opposing litigant's argument operates as a concession as to such argument).

[3] Available at: https://www.google.com/maps/@44.2732181,-88.455037,3a,75y,34.72h,86.09t/data=!3m6!1e1!3m4!1sK91n4IAC0X56EjKTkdBmAw!2e0!7i16384!8i8192 (last accessed: 03/12/2021).

III. The State's Argument for Basis of Traffic Stop.

The State argues that the traffic stop of Jenkins by Officer Miller was lawful, whereby it generally asserts three main contentions:

1. Officer Miller observed Ms. Jenkins' vehicle cross the centerline "while in the Town of Grand Chute[.]" (St.'s Br., p. 9).

2. That Officer Miller observed Ms. Jenkins' vehicle cross the center line "again after entering the City of Appleton." (St.'s Br., p. 9).

3. Lastly, under the totality of the circumstances, Officer Miller possessed reasonable suspicion of OWI for the traffic stop based on lane violations, time of night, and swerving in lane of travel. (St.'s Br., pp. 11-12).

Each contention will be addressed in turn.

As it relates to its first contention, the State specifically argues that Officer Miller observed a cross-of-centerline violation at the intersection of Wisconsin Avenue and Popp Street in Grand Chute, noting the circuit court found Officer Miller's testimony generally credible. (St.'s Br., pp. 9-10). The State's position is largely centered on its contentions that a) the circuit court found Officer Miller's testimony credible, and b) that the Google Maps' image showing the intersection may not be considered by this Court to determine whether or not the circuit court's factual-finding was clearly erroneous. However, as noted above, the image not only has a basis in the record, but this Court may also take judicial notice of the same.

The State next argues, without elaboration, that "[t]he image, even if admissible, does not make those factual findings clearly erroneous." (St.'s Br., p. 10). The State, perhaps recognizing that the image is in diametric conflict with Officer Miller's testimony, conspicuously omits any substantive oppositional argument to support its position and it thus should be rejected. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992)("Pettit's arguments are not developed themes reflecting any legal reasoning. Instead, the arguments are supported by only general statements. We may decline to review issues inadequately

briefed."). As such, Jenkins points to her opening brief, particularly pages 18-21, where it was explained that Officer Miller's testimony that she crossed the centerline in Grand Chute was incredible as a matter of law.

As it relates to the second contention, Jenkins stands on her opening brief. In short, it is contended that any traffic code violation that occurred within Appleton may not serve as a basis for the traffic stop because Officer Miller is not authorized to enforce the traffic code of another municipality and, as is contended, he lacked police authority outside of his jurisdiction. See App. Br. p. 19, fn. 7 (collecting authorities).

As it relates to the third contention, Jenkins largely stands on her opening brief, except to briefly reply to the State's reliance on *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634. As is well-established throughout the briefs, Ms. Jenkins disputes the occurrence of the alleged traffic violation in Grand Chute and contends that any traffic violation in Appleton may not be used as a basis for the traffic stop. Accordingly, under these arguments, the only remaining assertions are the Jeep's alleged lane weaving and nighttime driving.

In *Post*, the court rejected the state's invitation to adopt a bright-line rule that a motor vehicle's "repeated weaving within a single lane alone gives rise to reasonable suspicion." *Id*., at ¶14. Instead, the "determination is based on the totality of the circumstance[.]" *Ibid*. There, the *Post* court found that the driving behaviors observed by the officer added-up to reasonable suspicion under the facts whereby a motorist was traveling on a city street that was especially wide (22 to 24 feet), was observed to be "canted" at one point and thereafter was seen repeatedly making "S-type" curves, whereby the vehicle was "mov[ing] over approximately ten feet from right to left within the … lane." *Id*., ¶¶3-5. Even under those circumstances, the *Post* court held it was a "close call." *Id*., ¶27.

In this case, there was no testimony from Officer Miller describing the width of the roadway, or the nature or actual frequency of the alleged lane weaving; thus, it is not aptly compared to *Post*. Obviously, if *Post* was a "close case," the facts of this case, even considering the nighttime driving, falls well short in supplying a basis for the traffic stop, especially when the standard for "fresh pursuit" is probable cause.

IV. The State's Argument on Application of *Collar* Factors.

Jenkins stands on her opening brief regarding application of the *Collar* factors to the facts of this case, with a single exception. The State compares this case to *State v. Haynes*, 2001 WI App 266, 248 Wis. 2d 724, 638 N.W.2d 82, whereby it was found the officer was acting in valid fresh pursuit. The State cites *Haynes* for the proposition that the officer's pursuit was two miles and, in this case, the following was "significantly less." St.'s Br., p. 15. However, the State omits a meaningful distinction in *Haynes* from this case. In *Haynes*, the officer "testified that after witnessing the violation, he immediately activated his emergency lights and siren" and any delay was attributable to the defendant's failure to pullover. *Id*., ¶7. In this case, Officer Miller candidly acknowledged he did not immediately attempt to effectuate a traffic stop, but rather continued to follow the Jeep for about the distance of a mile out of his jurisdiction. (R. 30:15).

V. The State's Argument that Suppression is Not the Remedy.

The State argues that even if the fresh pursuit doctrine or its codifying statute was violated, that suppression is not the remedy.

First, it is noted that at no point below did the State present this argument. See R. 35:3-5 (prosecutor's oral argument). Jenkins contends that the State forfeited this argument. See *State v. Gove,* 148 Wis.2d 936, 940-41, 437 N.W.2d 218 (1989)(the general rule is that issues not presented to the circuit court will not be considered for the first time on appeal). The State has now forfeited any argument that suppression would not have been the remedy because it never presented such argument below and, arguably, implicitly conceded such remedy in the trial court. *See e.g., State v. Rogers,* 196 Wis.2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)(explaining that the forfeiture rule requires that, to preserve its arguments, a party must "make all of their arguments to the trial court"); and *In re Guardianship of Willa L*., 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 ("the 'fundamental' forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court").

Second, Jenkins has repeatedly claimed a constitutional violation, including in both her motion in circuit court (R. 14:3-4), and her opening brief at page 21, fn. 9. Moreover, courts have held that a warrantless arrest executed outside an arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause. *Ross v. Neff,* 905 F.2d 1349, 1353-54 (10th Cir. 1990). Absent hot pursuit or some kind of exigent circumstances, an extra-jurisdictional arrest is presumptively unreasonable. *Ross,* 905 F.2d at 1354 & n. 6.

VI. The State's Argument on Meeting its Burden of Proof on the Blood Draw Issue.

The State concedes that it carried the burden of proof at the evidence suppression hearing. St.'s Br., p. 21. The State's argument that it met such burden may be condensed as follows:

- That Officer Miller and the phlebotomist[4] did not use unreasonable or unnecessary force to accomplish the blood draw from Jenkins. St.'s Br., pp. 23-24.

- That "[t]here is no evidence that the blood draw was delayed or complicated by anything other than Jenkins uncooperative conduct, including giving her attention to the security guard rather than the phlebotomist." St.'s Br., pp. 20-21.

In arguing the blood draw was reasonable, the State asserts that no unreasonable or unnecessary force was used to accomplish the blood draw from Jenkins. In support, the State cites *California v. Rettele*, 550 U.S. 609 (2007), and *Graham v. Connor*, 490 U.S. 386 (1989). *Ibid*. However, *Rettele* and *Graham* lend little to no support to its position. Both cases arose from civil lawsuits brought under 42 U.S.C. § 1983 by citizens against police for a claim of excessive force during an investigatory detention, *Graham*, 490 U.S. at 388, and claims for violations of the right

[4] In its brief, the State briefly writes a statement that implies it is debatable whether or not the phlebotomist would be considered a "government agent." St.'s Br., p. 23. Because the phlebotomist was acting at the behest of law enforcement, the blood draw would be considered a government search. See *State v. Payano-Roman*, 2006 WI 47, ¶ 28, 290 Wis. 2d 380, 394, 714 N.W.2d 548, 555 (holding that medical procedure was government search).

against unreasonable searches and seizures by "obtaining a warrant in reckless fashion and conducting an unreasonable search and detention," *Rettele*, 550 U.S. at 612. The facts of those cases are drastically different than here, and the legal principles and standards announced in those cases are inapposite.

While use of excessive force may violate the Fourth Amendment, Jenkins' argument is not necessarily grounded under such a claim. The essence of Jenkins' claims is deceptively simple: largely based on her body's natural venous structure, the blood draw transcended the ordinarily routine and expected nature of such procedure, and she was subject to undue pain and discomfort as a result. And that other reasonable alternatives to test Jenkins' alcohol concentration would have been available, such as a breath or urine test.

The appropriate framework to apply to the issue at hand is provided by *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966). In holding that the blood draw in that case was reasonable, the facts the *Schmerber* court relied on were:

(1) The defendant's blood was taken by a physician;

(2) The defendant's blood was taken in a hospital;

(3) The defendant's blood was taken according to accepted medical practices.

Id.

As observed in Jenkin's opening brief, her motion specifically asserted that she was subject to multiple needling into her body enduring over an unusually long time period for a blood draw procedure, which caused "undue pain and discomfort." App. Br., p. 27. It was further asserted that such blood draw challenges were "the product of her natural bodily structure (i.e., challenges in finding a vein with adequate blood supply)." *Ibid*. Indeed, despite Jenkins' particularized factual and legal claims within her motion, at the motion hearing:

(1) The State failed to present testimony from Officer Miller directly responsive to the factual allegations contained within Jenkins' motion, such as it failed:

a. to establish how many locations and times Ms. Jenkins was needled;
b. how much time the blood draw consumed; and
c. whether Ms. Jenkins manifested physical signs of undue or abnormal pain and discomfort.

(2) The State failed to present the testimony of the purported phlebotomist who collected the blood sample; and

(3) The State failed to present any evidence related to the generally accepted medical standards, protocols or practices that attach to the collection of blood samples by phlebotomists when a subject, like Jenkins, naturally presents with a substantial challenge in locating and tapping a vein with adequate blood supply.

As a result of these evidentiary deficiencies, Jenkins' factual claims within her motion essentially stand as entirely uncontroverted. See generally R. 30:11-12 (Officer Miller's testimony on subject of blood draw).

On this record, the training, experience, and skill of the phlebotomist in this case is entirely unknown. Thus, there is no evidence to determine her level of professional competency as a phlebotomist, particularly when a subject's body presents uniquely with challenges in locating, tapping, and harvesting a blood sample. Similarly, there is no evidence to determine whether or not the phlebotomist followed accepted medical standards, protocols, or practices under the circumstances of this case, such as using the appropriately sized needle based on the subject's vein size, puncturing the skin and vein at the appropriate site and angle to minimize pain, injury and the risk of infection, or the medical standards or guidelines related to continual venipuncture when a subject presents with physical conditions beyond her control that serve to complicate the blood draw. Similarly, there is no evidence to determine the applicable medical standards when a subject presents with a natural bodily venous structure that interferes or inhibits securing a blood specimen in a routine or expected manner.[5] In *State v. Kozel,* 2017

[5] Without such evidentiary showing from the State, many questions remain unanswered. For example, do applicable medical standards mandate or suggest

WI 3, 373 Wis. 2d 1, 889 N.W.2d 423, the Wisconsin Supreme Court upheld the circuit court's finding that an EMT performed a blood draw "in accordance with medically accepted procedures." ¶44. The *Kozel* court highlighted that the EMT "testified as to his training in drawing blood, the specific procedures he was taught to follow, and the fact that he followed those procedures in this case" *Ibid*. On this record, there is not a scintilla of evidence to support a finding that the phlebotomist followed or complied with applicable medical standards for blood draws based on the individual circumstances of this case.

Because there is no evidence within the record to controvert Jenkins' claims about the mechanics of the blood draw and the attendant infliction of undue pain and discomfort, or whether or not the phlebotomist's administration was in accordance with reasonable medical standards, the State simply focuses on Jenkins alleged "uncooperative conduct" to argue it satisfied its burden of proof. St.'s Br., pp. 20-21. First of all, despite the State's characterization, Officer Miller never testified that Jenkins was "more interested" in insulting the security guard than the blood draw; rather, he simply testified that "[d]uring the time that the phlebotomist was attempting to get her blood, Miss Jenkins was not necessarily cooperative with her, and also making comments

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that venipuncture be terminated if a person presents with non-suitable veins to obtain an adequate blood supply? Do those standards set a limitation on the number of attempts at venipuncture when initial attempts prove unsuccessful? Do those standards provide guidance on what performance to undertake under circumstances in which a person presents with a natural venous structure that frustrates the ordinarily routine and expected nature of blood draws? Not only do these questions remain unanswered, but it is virtually impossible to determine if generally accepted medical standards, or otherwise reasonable medical practices, were administered to Jenkins during the blood draw in this case.

In *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611 (1985), the court provided the blood draw in *Schmerber* was based upon the recognition that "society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity" and further highlighted that the "degree of intrusion" under the blood draw in that case "was minimized as well by the fact that a blood test 'involves virtually no risk, trauma, or pain'" and was performed by a physician in a hospital environment according to accepted medical practice. *Id*., at 762, n. 5. While a blood draw may be routine or complication-free for many others, Jenkins asserts that her blood draw was not the type of routine procedure contemplated by the *Schmerber* court based on the individual circumstances; instead, the blood draw was complicated by factors beyond her control and, unlike *Schmerber*, it involved undue pain and discomfort and unreasonably intruded upon bodily privacy, security and integrity.

towards the security guard….” R. 30:10-11. Second, when examined, Officer Miller was unable to articulate what directions Jenkins allegedly failed to follow. (R: 30: 11). Third, Officer Miller never testified in any meaningful manner whether or not Jenkins’ alleged lack of cooperation or insulting commentary actually contributed or caused the complications during the blood draw procedure, *ibid*, and State’s arguments to the contrary are entirely couched in conjecture and speculation.

In order to meet its burden of proof, the State was required to produce evidence demonstrating that the blood draw was reasonable under the circumstances. However, it failed to contest Jenkins’ claims that she was subject to multiple needling into her body at various locations, the procedure was inordinately lengthy in time, and she suffered undue pain and discomfort as a result. The State likewise failed to establish whether or not, based on the circumstances of the blood draw, that the phlebotomist reasonably complied with applicable medical standards, protocols or practices.

CONCLUSION

It is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress evidence 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 12th day of March 2021.

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

Stephanie M. Rock
Attorney for Defendant-Appellant
State Bar No.: 1117723
608 North Sixth Street
Sheboygan, WI 53081
Telephone: (920) 459-8490
Facsimile: (920) 459-8493
E-Mail: srock@kcplawgroup.com

FORM AND LENGTH CERTIFICATION

I, Stephanie M. Rock, 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 2,997 words.

Dated this 12th day of March 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 12th day of March 2021.

_____

Stephanie M. Rock
State Bar No.: 1117723