STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP98

CITY OF WEST BEND,

Plaintiff-Respondent,

-vs-

PETER F. PARSONS,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH III, THE HONORABLE TODD K. MARTENS PRESIDING, TRIAL COURT CASE NO. 20-CV-611

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & SINGH, LLC

Matthew M. Murray
State Bar No. 1070827

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

ARGUMENT

I. THE CITY HAS FAILED TO ESTABLISH THAT MR. PARSONS' ONGOING DETENTION WAS JUSTIFIED UNDER THE TOTALITY OF THE CIRCUMSTANCES.

The City has adopted what it characterizes as a "building blocks" approach to the facts of this case. City's Response Brief, at p.7. It has, however, selectively elected to use only the "red blocks" upon which to build its argument to the total exclusion of the "blue blocks." As both parties have recognized, the test which must be applied in the instant matter is a "*totality* of the circumstances [blocks]" test. For all of the reasons set forth below, the City's incomplete approach to the issue before this Court should be rejected without the slightest apology.

The first reason to reject the City's approach is that Mr. Parsons is *not* advocating that the officer "develop enough facts to prove the violation to a reasonable certainty, or even to have probable cause to arrest" as the City implies. City's Response Brief at pp. 7-8. Rather, Mr. Parsons is advocating that the standard at issue requires that the officer not make "leaps in logic" based upon common things which a *large cross-section* of the population does lest a reasonable suspicion exists to detain motorists based upon purely innocent conduct—which would cause an intolerable erosion of the Fourth Amendment.

More specifically, as Mr. Parsons noted in his initial brief, nearly one in five persons in Wisconsin smokes cigarettes. *See* Appellant's Initial Brief, at p.12. Under the "common sense" approach dictated in cases like *State v. Post*, 2007 WI 70, 301 Wis.2d 1, 733 N.W.2d 634, *United States v. Lyons*, 7 F.3d 973 (10th Cir. 1993), and *United States v. Colin*, 314 F.3d 439 (9th Cir. 2002), detaining a person for an activity in which the public regularly engages would subject "a substantial portion of the public . . . each day to an invasion of their privacy." *Lyons*, 7 F.3d at 976; *Colin*, 314 F.3d at 446; *Post*, 2007 WI 70, ¶ 20. Mr. Parsons cannot be "punished" for engaging in an unfortunately addictive behavior by having a law enforcement officer assume he is doing so to "disguise" the odor of intoxicants *unless other indicia are present which make it appear that this was his purpose.* If no other indicia are present, then the officer's "leap in logic" infringes on an individual's right to be free from unreasonable searches and seizures. Any other conclusion would permit law enforcement officers throughout the state to detain any person who smokes simply because he or she happens to be smoking at the time of their initial detention.

If more is required, then the question naturally follows: Was there more here

to go on than cigarette smoking? The answer to this question is where the *totality* of the building blocks comes into play. There was no "bad driving" in this case; Mr. Parsons did not slur his words; he did not have bloodshot or glassy eyes; he had no odor of intoxicants about his person in addition to the smell of cigarette smoke; he did not delay when responding to the officer's signal to stop; he parked his vehicle properly; he remained cooperative with the officer; he did not have any alcoholic beverages in his vehicle; he did not have any difficulty appropriately answering the officer's questions; he displayed no problems with his coordination, such as fumbling for his driver's license, registration, or insurance; and he did not exhibit any of the "typical" indicia of impairment All of these facts, when considered together, constitute a fuller picture of what constitutes the "building blocks" of the City's case. More importantly, however, they provide a concrete, specific, and articulable way for an officer to distinguish between his belief that the smoking of a cigarette is being done to disguise something versus it being done because the person is a chain smoker or smoking simply because he is nervous—an equally plausible explanation. In the absence of evidence which corroborates an officer's *speculation*, the officer is engaging in nothing more than an unfounded "leap in logic" which is no basis upon which to justify the enlargement of the scope of a citizen's detention.

Second, Mr. Parsons' suggested approach of looking at both the "red and blue building blocks" makes more sense than the City's selective approach. From a purely legal perspective, the City's myopic approach to the *totality* of the circumstances test undermines the very definition of what "totality" means. Precisely because it is an objective "*totality* of the circumstances" test which must be employed to assess whether a reasonable suspicion existed to enlarge the scope of Mr. Parsons' detention, this Court cannot consider only those facts favorable to the City as though they existed in a vacuum. It must consider all of the facts which mitigate against a conclusion that a reasonable suspicion exists just as it should account for those to be proffered by the City in support of its position. Mr. Parsons' point in this regard is best made by analogy. Assume, *arguendo*, there is a housefire and arson is suspected. While officers are establishing a perimeter for the fire department, they observe an individual holding a cigarette lighter watching the housefire burn. If these were the only facts known to a reviewing court, it might conclude under the totality of the circumstances that the detention of the individual for starting the housefire was justified. If, however, two more facts which were known to the officers were revealed, the detention of the individual may no longer have been constitutionally justified, to wit: (1) the person was the neighbor of the house which was ablaze and he was standing in his own yard, and (2) the individual was found to have a pack of cigarettes on his person because he is a chain smoker. Suddenly, an examination of the *totality* of the circumstances undercuts the notion that a reasonable suspicion existed to detain this individual. This Court should, therefore, give close and careful consideration to all of the additional factors known

to the officer at the time he encountered Mr. Parsons.

Third, the City claims that Mr. Parsons' admission that he was taking prescription medication for depression adds weight to its legal analysis. *See* City's Response Brief at p.7. Like Mr. Parsons' cigarette smoking, this too is a non-starter. The most recent statistics from the Center for Disease Control indicate that between 2015 and 2018, 13.2% of adults in the United States took anti-depressants.[1] Translated into "real numbers" used by the U.S. Census Bureau, this means that approximately 43,124,400 individuals were taking anti-depressants at the time of Mr. Parsons' detention.[2] Admitting to the consumption of a single beer—which, as Mr. Parsons noted in his initial brief is *not* illegal[3]—cannot lead to a "reasonable" conclusion that Mr. Parsons was impaired *in the absence of any other indicia of impairment* without making it seem as though the officer in this case was making an unfounded "leap in logic."

Fourth, the City attempts to discount Mr. Parsons' suggested "totality of the circumstances" approach in the instant case by suggesting that a law enforcement officer is not obligated to look for "innocent explanations" to a suspect's conduct. *See* City's Response Brief at p.8. While this is true, it is also true that *the absence of any facts which support the inferences the officer is attempting to draw* makes those inferences suspect and unreliable. Is the City truly suggesting that every person who has consumed one alcoholic beverage, smokes a cigarette, and happens to be on anti-depressant medication has forfeited their right to be free from unreasonable searches and seizures? It would seem so because under the City's approach, every person who happened to fit these three criteria could be detained for suspicion of operating while intoxicated. If anything violates the common-sense approach dictated by the common law, such unfounded leaps in logic certainly would.

Finally, the City wants to claim that Mr. Parsons' mentation was impaired simply because he allowed some cigarette ash to fall on his pants. *See* City's Brief at p.8. Again, this tunnel-visioned approach wholly ignores every other fact in the record which demonstrates the exact opposite. The record demonstrates that throughout the course of his interrogation by Officer Bateman, Mr. Parsons appropriately responded to the questions put to him about where he had been, what he had been drinking, *etc*., and when queried about his telephone number and address, he provided accurate and correct information. This conduct clearly demonstrates that Mr. Parsons had both an awareness of his surroundings and what

[1]https://www.cdc.gov/nchs/data/databriefs/db377-H.pdf.

[2]https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html.

[3]*See* Appellant's Initial Brief, at pp. 13-14.

was expected of him during a traffic stop. This is evidence of the fact that Mr. Parsons' ability to think clearly was not impaired, which also undermines the notion that sufficient facts existed to justify an enlargement of the scope of his detention and utterly undercuts the City's assertion that Mr. Parsons' mentation was impaired simply because a few flakes of cigarette ash fell on his pants.

As Mr. Parsons proffered in his initial brief, the parties in this matter are *not* starting on a "level playing field." The Fourth Amendment must be "liberally construed" in Mr. Parsons' favor from the first. *Mapp v. Ohio*, 367 U.S. 643, 647 (1961). Because reasonable proof of any wrongdoing based upon more than an officer's inferred "leaps of logic" is absent in the instant case, this Court has a duty to "liberally construe" the Fourth Amendment to guard Mr. Parsons against stealthy encroachments on his right to be free from unreasonable searches and seizures, and should, therefore, reverse the decision of the lower court.

CONCLUSION

Mr. Parsons respectfully requests that this Court reverse the decision of the court below on the grounds set forth herein and in his initial brief.

Dated this 12th day of May, 2022.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,633 words.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19.

Dated this 12th day of May, 2022.

MELOWSKI & SINGH, LLC

Electronically signed by:
Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant