STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2022AP157-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

MICHAEL P. RUDOLF,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, BRANCH VII, THE HONORABLE MARK G. SCHROEDER PRESIDING, TRIAL COURT CASE NO. 20-CT-663

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. EXAMINING THE *TOTALITY* OF THE CIRCUMSTANCES IN THIS CASE, OFFICER KISLEWSKI LACKED A REASONABLE SUSPICION TO DETAIN MR. RUDOLF.

A. The Impact of State v. Post, *2007 WI 60, On This Case.*

Relying heavily on *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, the State argues that the facts of Mr. Rudolf's case were more egregious than those examined by the court in *Post*. Respondent's Brief at pp. 7-8.[1] In making its argument, the State posits that if there was a reasonable suspicion to detain Post, there must be a reasonable suspicion to have detained Mr. Rudolf. Before undertaking any further analysis, it must be made clear that the *Post* court did **not** create a bright-line rule which *per se* permits a law enforcement officer to detain a driver for weaving within their designated lane. *Post*, 2007 WI 60, ¶¶ 20-21. In fact, when assessing whether a bright-line rule regarding "weaving" could exist to detain any vehicle based solely upon this behavior, the *Post* court unequivocally rejected a request from the State that it establish such a rule, and reminded the State that a bright-line rule cut from this fabric "fails to strike the appropriate balance between the State's interest in detecting, preventing, and investigating crime with the individual's interest in being free from unreasonable intrusions." *Id*. ¶ 20. Based upon the *Post* court's recognition that a vehicle's weaving could have innocent explanations, it concluded that "the standard proffered by the State can be interpreted to cover conduct that many innocent drivers commit, [and] it may subject a substantial portion of the public to invasions of their privacy [which] is in effect no standard at all." *Id*. ¶ 21.

As it should have, in lieu of the bright-line rule encouraged by the State, the *Post* court reminded that the appropriate test to be applied in any case involving the reasonableness of the detention of a motor vehicle is the "totality of the circumstances" test. *Id*. ¶¶ 18, 26-27.

[1]The State begins renumbering the pages of its brief at its actual page six with the notation that page six is page "1," and then continues on cardinally therefrom. The State's numbering format is contrary to Wis. Stat. § 809.19(8)(bm) which requires "sequential numbering starting at '1' on the cover." Given this discrepancy, Mr. Rudolf will refer to specific pages of the State's brief not by the page number employed by the State, but rather by the page's actual cardinal position if the cover of its brief had been treated as page one (1).

B. Assessing the State's Facts.

As part of its analysis, the State describes several facts in this case which it believes support a determination that there was a reasonable suspicion to detain Mr. Rudolf. Each of the State's factors will be addressed in turn.

First, the State claims that the time of day Mr. Rudolf was detained, *i.e.*, 10:40 p.m., is "a factor that weigh[s] in favor of a reasonable stop." Respondent's Brief at p.13, citing *Post*, 2007 WI 60. This fact, however, carries little weight not only because the *Post* court commented that the time in that case, *i.e.*, 9:30 p.m., was not "significant," but also because other decisions have discounted even later times as having little impact upon the determination of whether there is a reasonable suspicion to detain a vehicle. For example, in *County of Sauk v. Leon*, No. 2010AP1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (Ct. App. Nov. 24, 2010)(unpublished),[2] the court commented that "this incident occurred **at around 11:00 p.m.**, some hours before 'bar time,' and even if it had occurred around bar time, such a contextual fact would not have been enough to fill in the missing elements needed to support reasonable suspicion on this record." *Id*. ¶ 25 (emphasis added). Notably, the discounting of the value of the time in *Leon* was later echoed in *State v. Gonzalez*, No. 2013AP2585-CR, 2014 WI App 71, 354 N.W.2d 625 (Ct. App. May 8, 2014)(unpublished),[3] when the court stated "I also note the time of day [10:07 p.m.]. The stop occurred just after 10:00 p.m. . . . **Common sense suggests to me that this adds little to reasonable suspicion here**." *Id*. ¶ 16 (emphasis added). Clearly, none of the foregoing courts—*Post*, *Leon*, and *Gonzalez*—felt that times between 10:00 and 11:00 p.m. were of any real value in assessing reasonable suspicion, contrary to the State's reliance on the same.

Second, the State's assertion that Mr. Rudolf would turn into the parking lot of a closed business was, according to the officer, "odd" is utterly meaningless because it is *not* an objective and specific "fact." Respondent's Brief at p.13. More specifically as Mr. Rudolf noted in his initial brief, the United States Supreme Court emphasized the need for an *objective* and particularized suspicion of wrongdoing in

[2]This is a limited precedent opinion which may be cited for their persuasive value pursuant to Wis. Stat. § 809.23 (2021-22).

[3]*Id*.

United States v. Cortez, 499 U.S. 411 (1981). In *Cortez*, the Supreme Court admonished that:

> Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, *supra*, said '[that] this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'"

Cortez, 499 U.S. at 418 (emphasis in original), citing *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Quite frankly, there is nothing objectively quantifiable about the term "odd." It is a nebulous description, the meaning of which is hardly *specific* and *objective*. What is "odd" to one person may not be to another. For example, would it be "odd" for a person to pull off the road and into a parking lot if they wanted to safely use their cell phone? Would it similarly be "odd" if a person pulled into a parking lot to read a map or get their bearings? Is it "odd" for a tired driver to pull into a parking lot and switch places with a well-rested passenger? It is not "odd" to do any of the foregoing, rather, it is actually something which should be encouraged because each of the foregoing examples represent a driver who is acting safely. These hypotheticals represent examples of why the officer's *subjective* assessment that Mr. Rudolf was acting "oddly" are of no value under the *Cortez* court's requirement that there be "specificity" in the information.

Third, the State addresses Mr. Rudolf's point of law that crossing a fog line does not constitute a cognizable violation of Wisconsin's Traffic Code, *in itself*, by making extended references to unpublished decisions of the court of appeals and the Seventh Circuit Court of Appeals. Respondent's Brief at pp. 17-18. The decisions offered by the State make Mr. Rudolf's point for him in that none of the decisions holds that the crossing of a fog line in Wisconsin constitutes a *per se* violation of the Traffic Code. Mr. Rudolf acknowledges that each of the decisions presented by the State discusses how such behavior may be factored into the totality of the circumstances test, but to be clear, none of the proffered opinions concludes that crossing the fog line is, in and of itself, a cognizable *violation of the law*.

Finally, the State attempts to engage in a legislative act by endeavoring to craft a "fog line" statute piecemeal from portions of the Traffic Code which define "traffic lane." Respondent's Brief at pp. 18-22. Regrettably for the State, as Mr.

Rudolf set forth above and in his initial brief, there is nothing in the code which defines the edge of the roadway. The State's argument is akin to the tailor who promises to make a garment from "whole cloth," but then stitches the final product from remnants.

C. The True "Totality of the Circumstances."

Beyond Officer Kislewski's *unrecorded observations* that Mr. Rudolf deviated from his lane of travel, there exists independent and objective video evidence in this case and the telling testimony of the officer himself. When these things are taken together—as a "totality"—they reveal that no reasonable suspicion existed to detain Mr. Rudolf. For example, Officer Kislewski admitted that the portion of Mr. Rudolf's driving which was captured on his squad video was *not* "consistent with the driving that [he] alleged took place before the recording began." R28 at 21:12-16. He further conceded that the driving which was recorded did not "depict any traffic violations." R28 at 21:17-20. Moreover, Officer Kislewski testified that the perfect driving behavior which was recorded occurred over a distance of approximately three-quarters of a mile. R28 at 22:18-21. Additionally, Officer Kislewski admitted that Mr. Rudolf: (1) was driving "at an appropriate speed"; (2) stopped appropriately for a red light; (3) properly signaled a left turn and executed the turn without any problems; and (4) exhibited "no abnormalities whatsoever in his driving behavior." D-App. at 104.

Based upon the foregoing *totality* of the circumstances, Mr. Rudolf proffers that the officer in this matter lacked a reasonable suspicion to detain him, and therefore, respectfully requests that this Court reverse the decision of the court below.

Dated this 6th day of June, 2022.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
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Attorneys for Defendant-Appellant
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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 1,550 words.

I also certify that that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 6, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 6th day of June, 2022.

MELOWSKI & SINGH, LLC

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