STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP162-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

MICHAEL J. SCHWERSINSKE, JR.,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, BRANCH V, THE HONORABLE PAUL G. CZISNY PRESIDING, TRIAL COURT CASE NO. 18-CT-495

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE INITIAL REASON FOR THE DETENTION IS NOT SUFFICIENT TO JUSTIFY AN ENLARGEMENT OF THE SCOPE OF MR. SCHWERSINSKE'S DETENTION IN THE ABSENCE OF OTHER, ADDITIONAL FACTS.

The State supposes that Mr. Schwerinske does not give enough weight to the fact that Deputy Bohlman testified that Mr. Schwersinske's vehicle was "operating on the wrong side of the road." State's Response Brief at p.9.[1] The officer's observation, however, is evidence of a reckless or inattentive driving violation. Once Deputy Bohlman makes contact with Mr. Schwersinske, at that point, in order to constitutionally justify an enlargement of the scope of Mr. Schwersinske's detention, the deputy must become aware of additional suspicious factors which *independently* form the basis of a reasonable suspicion to believe that another violation is afoot. *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

The *Betow* court framed the analysis this way:

> If, during a valid traffic stop, the officer becomes aware of **additional suspicious factors which are sufficient to give rise to an articulable suspicion** that the person has committed or is committing an offense or offenses **separate and distinct from the acts that prompted the officer's intervention in the first place,** the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id. at 94-95 (emphasis added), citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1975). Considering that the "additional suspicious factors" must be "separate and distinct from the act[]" which prompted Mr. Schwersinske's initial detention, Mr. Schwersinske's focused analysis on the alleged "odor of intoxicants" and "admission to drinking" in his case is appropriate because these are the "additional" factors which were "separate and distinct from the act[]" of reckless or inattentive driving. Put another way, the act of reckless or inattentive driving cannot be used

[1]The State begins numbering the pages of its brief with the notation that its actual page four is page "1," and then continues on cardinally therefrom using standard Arabic numbers. The State used lower case Roman numerals for its cover page through the last page of its Table of Authorities. The State's numbering format is contrary to Wis. Stat. § 809.19(8)(bm) which requires "sequential [Arabic] numbering starting at '1' on the cover." Given this discrepancy, Mr. Schwersinske will refer to specific pages of the State's brief not by the erroneous page numbering 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).

to bootstrap the issue of whether an *independent* reasonable suspicion to enlarge Mr. Schwersinske's detention existed based upon the odor of intoxicants and his admission to drinking.

As Mr. Schwersinske proffered in his initial brief, neither an odor of intoxicants nor an admission to consuming a lawful amount of an intoxicating beverage provides sufficient independent grounds upon which to expand a detention for reckless or inattentive driving, *especially considering* the totality of the remaining circumstances in this case. *See* Appellant's Initial Brief at pp. 11-13. The additional factors which comprise the "*totality* of the circumstances" in this case **and which, notably, were *not* present** are worth repeating here. More specifically, the evidentiary record is devoid of any proof that Mr. Schwersinske:

> Slurred his words;
>
> Had bloodshot or glassy eyes;
>
> Delayed responding to the officer's signal to stop;
>
> Parked his vehicle improperly;
>
> Was uncooperative with officers;
>
> Had any alcoholic beverages in his vehicle;
>
> Had any difficulty appropriately answering the officer's questions or exhibited any problems with his mentation; and
>
> Displayed any problems with his coordination, such as fumbling for his driver's license.

Based upon the foregoing, Mr. Schwersinske maintains that factors independent of the suspicion that he had been operating his motor vehicle inattentively or recklessly did not exist under the prevailing common law authority he offered in his initial brief.

The State characterizes the absence of the above-referenced facts as insufficient "disproof" of "strong indicators of intoxication," and therefore, the State impliedly suggests that this Court may disregard them. State's Response Brief at pp. 11-12. There are two significant problems with the State's position in that it both misunderstands the application of the appropriate standard and discounts the relevance of the absent indicators of impairment.

First, the State mischaracterizes the "totality of the circumstances" standard in this matter by implying that the absent facts are not sufficient "disproof" of an independent reasonable suspicion to enlarge the scope of Mr. Schwersinske's

detention. Mr. Schwersinske is not, however, required to *disprove* anything. The totality of the circumstances test does not *presume* an independent reasonable suspicion exists to enlarge the scope of a detention which must, by countervailing evidence, be "disproved." In other words, Mr. Schwersinske is not required to presuppose the State's assertion regarding a reasonable suspicion is accurate and that he must then "disprove" that assertion by presenting evidence to the contrary. Mr. Schwersinske does not bear the burden here. More correctly, what this Court is obligated to do is weigh the *totality* of all the circumstances, which totality includes the *absence* of a variety of otherwise commonly observed facts in an operating while intoxicated prosecution.

Second, the absence of the "typical" indicia of impairment is highly relevant. Mr. Schwersinske's point in this regard is best made by analogy. Assume, *arguendo*, that an individual is detained outside a tavern because he matches the description of a person who was recently involved in an altercation. In support of a probable cause determination, the State might rely upon the fact that (1) the person was found outside the complaining establishment and (2) the person matches the general description of the individual involved. Standing alone, these facts conspire to establish an argument—albeit a weak one—for probable cause to arrest. One must consider, however, the *totality* of the circumstances in this hypothetical. Suppose, instead of simply knowing the foregoing facts upon which the State relies, the following factors were *not* observed by the officer: (1) there was no blood on the suspect; (2) there were no visible scars on the suspect's hands; (3) the suspect's clothing was in prefect order rather than appearing disheveled; (4) the person was not breathing heavily or sweating as though he had just exerted himself—as one does in a fight; and (5) the individual is perfectly calm, rather than exhibiting indicia of anger or agitation. Under the State's approach, none of these facts which mitigate against the suspect individual having been involved in the altercation would be considered, despite the fact that they clearly point to a conclusion inapposite to the one the State wants to draw. Clearly, *absent* facts are just as relevant as present ones under the totality of the circumstances test.

CONCLUSION

For the reasons set forth herein and in Mr. Schwersinske's initial brief, he respectfully requests that this Court reverse the decision of the court below.

Dated this 11th day of July, 2022.

Respectfully submitted:

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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 1,163 words.

I hereby certify 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.

Dated this 11th day of July, 2022.

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