STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021 AP 1100

COUNTY OF JEFFERSON,

Plaintiff-Respondent,

v.

JULIANNE WEDL,

Defendant- Appellant.

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A DOCKETED JUDGMENT ENTERED ON FEBRUARY 24, 2022, IN THE CIRCUIT COURT OF JEFFERSON COUNTY
The Honorable Dennis Moroney, Reserve Judge Presiding
Trial Court Case No. 2019TR008850

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Cases Cited:

Federal Cases Cited:

Wisconsin Statutes Cited:

Other Authority Cited:

ISSUES PRESENTED

I. WHETHER IT IS LAWFUL FOR A POLICE OFFICER, BASED ON NOTHING MORE THAN "AN ODOR OF INTOXICANTS," TO DETAIN A GOOD SAMARITAN WHO HAD STOPPED AT THE SCENE OF A VEHICLE FIRE, TO INVESTIGATE HER FOR A POSSIBLE OWI OFFENSE, BY TELLING HER SHE NEEDED TO REMAIN AS A WITNESS WHEN THE OFFICER HAD ACTUALLY DEEMED HER AN OWI SUSPECT.

The trial court answered: Yes.

II. WHETHER IT IS LAWFUL TO EXPAND THE INVESTIGATION OF SUCH A GOOD SAMARITAN TO INCLUDE FIELD SOBRIETY TESTS WHEN THE ONLY PROBATIVE INFORMATION GATHERED WAS A STRONG ODOR OF INTOXICANTS.

The trial court answered: Yes.

STATEMENT ON PUBLICATION

The appellant does not believe the Court's opinion in this case will meet the criteria for publication as the legal issues are not novel and can be resolved by the application of existing law.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issues presented.

STATEMENT OF THE CASE

On December 13, 2019, the plaintiff-respondent, County of Jefferson, filed a citation charging the defendant-appellant, Julianne Wedl, with OWI-1st Offense. (R1). Wedl entered a not guilty plea and filed a motion to suppress based on an unlawful detention. (R7; R10). On March 13, 2020, the circuit court conducted an evidentiary hearing on Wedl's motion and denied it. (R17; App. A). On February 25, 2022, and after a court trial, Wedl was found guilty of the offense. (R59). This appeal followed. (R61).

STATEMENT OF THE FACTS

On November 27, 2019, Julianne Wedl was on her way home from visiting a friend and traveling on Highway 26, south of County Trunk A in Jefferson County, when she came upon a vehicle fully engulfed in flames on the side of the highway. (R17-8-10). The vehicle was facing northbound on the shoulder of the southbound lanes. (*Id.* at 8). Wedl immediately pulled over to render assistance while fearing the worst: someone was trapped inside the burning vehicle as no one else was around. (*Id.*). Wedl ran from her vehicle and opened the passenger door of the vehicle, but flames shot at her and she had to retreat. (*Id.* at 14-15). She then reapproached the vehicle, but again was beaten back by flames. (*Id.* at 22). It greatly upset Wedl that someone could be trapped inside of the burning vehicle she was powerless to do anything about it.

Sometime shortly thereafter Jefferson County Sheriff Deputy Michael Williams arrived. (*Id.* at 7-10). By that time, an off-duty Beaver Dam police officer had also stopped and spoken with Wedl. (*Id.* at 14). Thus, when Deputy Williams arrived, a distraught Wedl and the Beaver Dam police officer immediately approached him. (*Id.* at 7-10). Deputy Williams described Wedl as in shock and fretting that someone inside the vehicle might be injured. (*Id.* at 10-12). Wedl described for Deputy Williams what she had witnessed and her efforts to save anyone who was in the vehicle. (*Id.* at 10).

Although the Beaver Dam officer expressed no concerns regarding Wedl, Deputy Williams detected an odor of intoxicants on her breath when he spoke with her. (*Id.* at 10,

14). He therefore arranged for another deputy to come to his location to conduct an OWI investigation. (*Id.* at 10). Deputy Williams then told Wedl to remain on the scene and suggested she wait inside his squad car, and she complied. (*Id.* at 11). About ten minutes later, Deputy Will Johnson arrived and at Deputy Williams' direction, approached Wedl and began his OWI investigation. (*Id.* at 12-13, 21).

Wedl was still distraught and crying, terribly vexed by the possibility someone she had been unable to save remained inside the burning vehicle. (*Id.* at 22, 26). She told Deputy Johnson why she was there, what she had seen, and what she had done. (*Id.*). While Deputy Johnson also noted an odor of intoxicants when talking to Wedl, he did not detect any slurred speech or observe any balance problems. (*Id.* at 23). And while he said her eyes appeared bloodshot and glassy, (*id.*), it was clear that in addition to being highly distraught and crying, Wedl had just endured close encounters with fire and smoke.

Deputy Johnson asked Wedl if she had been drinking that evening and she candidly responded that she had consumed two glasses of wine at her friend's house. (*Id.* at 24). Deputy Johnson did not bother to ask her, however, when she had consumed the wine, or when she had stopped. Instead, Deputy Johnson informed Wedl that he "was going to be conducting Standardized Field Sobriety Tests to see if she was impaired." (*Id.* at 24-25). She complied and performed the Field Sobriety Tests (hereinafter, "FTSs"), whereupon she was arrested. (*Id.*).

Argument

I. IT WAS UNLAWFUL FOR DEPUTY WILLIAMS TO DETAIN WEDL FOR AN OWI INVESTIGATION BY DEPUTY JOHNSON, BASED ON NOTHING MORE THAN "AN ODOR OF INTOXICANTS."

If an officer, in a traffic stop scenario, decides to question a motorist about other matters or require the motorist to perform tests, the officer requires legal justification for expanding the stop beyond its initial scope. *See, e.g.*, *State v. Malone*, 2004 WI 108, 274 Wis. 2d 540, 683 N.W.2d 1 (officer may only ask defendant questions outside scope of initial traffic stop when officer has specific and articulable facts giving rise to reasonable suspicion that a crime had been, was being, or was about to be committed); *See also State v. VanBeek*, 2021 WI 51, 397 Wis. 2d 311, 960 N.W.2d 32. Here, Deputy Williams ordered Wedl to remain on the scene with a ruse – she needed to give a statement as a witness – when the real reason for her detention was to allow Deputy Johnson to question her "about other matters, to wit, investigate her for a possible OWI offense. No one ever took a witness statement from Wedl about the vehicle fire. (R17-26).

The touchstone for a reasonable suspicion determination, whether it be made by an investigating officer or a reviewing court, is always "the totality of the circumstances." *State v. Post*, 2007 WI 60, ¶ 2, 301 Wis. 2d 1, 733 N.W.2d 634. The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). The circumstances of this case differ from the vast majority of "expansion of traffic stop" cases because Wedl was not stopped for any traffic violation. On the contrary, Wedl's encounter with police occurred only because she, the good Samaritan, had stopped to help another motorist she feared was in grave distress.

These unusual circumstances are relevant to the reasonable suspicion question for two reasons. First, Deputy Williams' appraisal of Wedl was devoid of any observations of

driving. He had reasonable suspicion to believe she *had* been driving, of course, because she told him so. The absence of any observations of driving, however, left a notable void as to the other element of the offense for which he detained her: that she was impaired to such a degree that rendered her unable to safely control her vehicle. Reasonable suspicion of intoxicated driving requires reasonable suspicion that the suspect is "[u]nder the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving." *See* sections 346.63(1)(a) and 346.01(1), Stats. As to this element of the suspected offense, Deputy Williams had nothing more than "an odor of intoxicants."

Second, the unusual nature of the police is also relevant because Deputy Williams knew what Wedl *had* done, and such was contraindicative of impairment. That Wedl had stopped and was there in the first place was telling, as it reflected clear thinking on her part, and a sense of moral responsibility befitting a sober individual. She did not need to stop, and likely would not have stopped had she been too intoxicated to drive safely. And when she did stop, she parked her vehicle appropriately, took appropriate (and heroic) steps to render assistance, and then correctly conveyed to law enforcement what she had done. These are not the actions of an impaired driver.

Wedl was detained when she was instructed to remain on the scene and, it was suggested, sit in Deputy William's squad car. Though told she was a witness, she was a suspect. The purpose of the detention was to investigate her for an OWI offense, and it was for precisely that purpose Deputy Johnson was dispatched to investigate her. (R17-27) ("I was called there because he believed that she was intoxicated"). In either event, a reasonable person in Wedl's shoes would not have felt free to leave. *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984). And she did not leave, but instead, complied and waited for her next interaction with law enforcement, which was Deputy Johnson investigating her.

Once again, this initial detention by Deputy Williams was based on nothing more than "an odor of intoxicants." (R17-10). Deputy Williams could not articulate anything else to suggest Wedl was intoxicated. (*Id.* at 11). Here it is

important to note, for reasons that will become apparent, that Deputy Williams did *not* say he detected a "strong" odor of intoxicants, only "*an* odor of intoxicants." (*Id.*) (emphasis added). That sole basis for detaining Wedl so Deputy Johnson could investigate her for a possible OWI violation was woefully insufficient. It is not illegal in Wisconsin to drive after drinking.[1] *See, e.g.,* WIS JI—CRIMINAL 2663 ("Not every person who has consumed alcoholic beverages is 'under the influence'. . . ."

The circuit court's remarks about its decision at the conclusion of the motion hearing left something to be desired:

> The deputies needed reasonable suspicion that the Defendant was consuming alcohol and driving in order to ask her to perform the Field Sobriety Tests. Given the totality of the circumstances, I found that that was present here.

(R17-39). As this rationale suggested the mere act of driving after the consumption of alcohol was *ipso facto* reasonable suspicion to detain, the court later felt the need to clarify its decision.

Nearly one year later, and after Wedl announced she intended to appeal the suppression ruling, (R17-3), the court revisited and cleaned up its decision:

> On March 13, the previous counsel asked the court to clarify its findings and orders, and I wanted to address that as I reviewed the transcript in preparation for today. What I was not doing on March 13 was making some declaration or trying to change the law in Wisconsin saying that, you know, if you admit that you consume alcohol and that you're driving, that that justifies automatically an

[1] The County will likely argue that Wedl would have thought she was detained *as a witness,* even though the record reveals such was decidedly not the case. However, even if that is what she initially thought, a reasonable person in her shoes would have then wondered why, in her presence, Deputy Johnson allowed the other witness, the off-duty Beaver Dam police officer, to go, while she could not. (*Id.* at 26).

> extension of a stop or an investigation regarding meeting field sobriety tests . . . I find that the officer needed to have reasonable suspicion regarding operating under the influence of alcohol. **There needed to be a determination of her recent driving, that Ms. Wedl was unable to drive safely**.

(R50-4-5) (emphasis added).

Here it would have been appropriate for the circuit court to pause and note the deputies knew nothing about Wedl's "recent driving," except her wherewithal to stop and assist a motorist in distress. Instead, the court ignored that void and went on:

> So, it begs the question, what is it about Ms. Wedl's affect that would lead the law enforcement officer to detain Ms. Wedl for further testing? And to that end, the court considered all of the totality of circumstances, including the strong odor of intoxicants, the admission to drinking. To a lesser extent, but still relevant were the glassy and bloodshot eyes that the officers noted, and the time of day, which was around bar time. . . . The court considered that Ms. Wedl was not slurring her speech, according to the officer's testimony, that she had no balance issues. The first law enforcement officer didn't notice that Ms. Wedl had any of these issues, but that's understandable, given the fact that a car was on fire at the scene. But the deputy did notice, and then the officer made a decision to detain to conduct the field sobriety tests and to investigate further. . . . The single factor that pushes this over in this close case is the testimony regarding the "strong odor of intoxicants." If there was just a "mere odor of intoxicants," the call would be much tougher, but with "strong odor" and the admission to drinking, in addition to the glassy and bloodshot eyes and the time of day, that was enough for the court to find that there was reasonable suspicion.

(R50-5-7). There are several problems with the court's reasoning, and they will be addressed in the next section of this brief. For purposes of this section, however, it suffices to say it does nothing to legitimize how the initial encounter with Deputy Williams was expanded to an OWI investigation.

II. IT WAS UNLAWFUL FOR DEPUTY JOHNSON TO FURTHER DETAIN WEDL FOR FIELD SOBRIETY TESTS WHEN THE ONLY PROBATIVE INFORMATION *HE* HAD WAS ALSO AN ODOR OF INTOXICANTS, EVEN IF HE BELATEDLY DESCRIBED IT AS STRONG.

The court further erred when it validated Deputy Johnson's expansion of his investigation to include FSTs. An officer's request that a driver perform FSTs can also be challenged because such a request constitutes a greater invasion of liberty than an initial police stop or encounter, and therefore must be separately justified by specific, articulable facts showing a reasonable basis for the request. *State v. Colstad*, 2003 WI App 25, ¶¶ 19–20, 260 Wis. 2d 406, 659 N.W.2d 394. Specifically, the officer must have a reasonable suspicion that the defendant was violating an OWI-related law to justify the request to perform field sobriety tests. *Id.* ¶ 19.

Deputy Johnson summarized, in a single sentence, the reason he further detained Wedl to perform FSTs:

> Using the totality of all the -- the odor, the bloodshot and glassy eyes and that she had said she was drinking, brought me to the decision to put her through Field Sobriety Testing.

(R17-27). He confirmed there was nothing else, and that Wedl was cooperative, and her speech and balance perfectly normal. (*Id.* at 28-29).[2]

[2] During his direct examination, Deputy Johnson only testified to "an odor of intoxicants." (R17-8, 10). It was only during cross-examination when the odor suddenly became "strong." (*Id.* at 29).

Here the court, also operating in the vacuum of any observation, either while driving or ambulating, to suggest Wedl was impaired, concluded that further detention for FSTs was proper because of: (1) a strong odor of intoxicants; (2) an admission to drinking; (3) bloodshot eyes; and (4) bar time. Taking these in reverse order, it should first be noted that shortly after midnight is not "bar time." More importantly, by the time Deputy Johnson instructed Wedl to perform FSTs, he knew the good Samaritan had been at her friend's house, and not a bar.

Second, any reliance on bloodshot eyes, under the totality of these circumstances, was not reasonable. Under different circumstances bloodshot eyes could give rise to suspicion, but Wedl had just been through an ordeal and, by the deputies' own admissions, was in a state of shock and crying. She had also just been in close proximity to fire and smoke. She had twice attempted to open the door and look into the vehicle only to be driven back by flames. Deputy Johnson's failure to consider this, the likely cause of Wedl's bloodshot eyes, not only tainted his reasonable suspicion determination, it further invoked the sardonic adage that "no good deed goes unpunished."[3]

It was also improper to take the odor of intoxicants and the admission to drinking and treat them as two separate clues, when they are redundant. Both do nothing more than express the same single clue: Wedl had been drinking. To take Wedl's admission of having consumed alcohol and treat it as a separate clue to help build a case for reasonable suspicion is a flawed approach. Indeed, what *would* have added suspicion to the odor of alcohol would have been Wedl denying having consumed alcohol. Such would have added suspicion because it would have betrayed that Wedl was being untruthful which, in turn, would have suggested consciousness of guilt. This very point

[2] The State will likely counter by arguing that investigating officers need not accept innocent explanations for putative clues, and that may be true. Here, however, the innocent explanation was obvious, not offered by Wedl. It was baked into Deputy Johnson's investigation. *See e.g.,. Post*, *supra* at ¶ 14 ("absent an **obvious** innocent explanation . . .") (emphasis added).

was made in *State v. Gonzalez*, 2014 WI App 71, ¶ 10, 354 Wis. 2d 625, 848 N.W.2d 905.[4]

Gonzalez concluded reasonable suspicion was lacking where the officer asked the defendant to exit her vehicle and perform FSTs based on: (1) an odor of alcohol emanating from the vehicle; (2) a denial of drinking coupled with a suspicious claim (later proven false) that the odor was residual from intoxicated passengers she had just dropped off; and (3) the time of the stop – just after 10:00 p.m. Here, Deputy Johnson had no more, and arguably less. There was an odor of alcohol on Wedl's breath and though it was midnight, Deputy Johnson knew Wedl had *not* been at a bar. Nor, unlike Gonzalez, did Wedl try to cover up her drinking.

In another unpublished but persuasive case this Court confirmed that even a strong odor of alcohol alone does not provide reasonable suspicion to justify an OWI investigation:

> Meye argues that the odor of intoxicants alone is insufficient to raise reasonable suspicion to make an investigatory stop. We agree. We will not cite, chapter and verse, all the . . . cases . . . where either we or our supreme court found facts sufficient for an investigatory stop. Suffice it to say that these decisions, both published and unpublished, include an officer or a citizen having observed traffic violations, erratic driving, mechanical defects with the vehicle, unexplained accidents or multiple indicia of physical impairment. Not one of these cases has held that reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped—and nothing else. As we already stated, the officer in this case observed no traffic violations, no erratic driving, saw no mechanical defects or had any other information from which to justify the seizure.

[3] *Gonzalez* is an unpublished opinion citable for its persuasive value only, Rule 809.23(3), and accordingly, a copy of *Gonzalez* is provided in Appendix B.

State v. Meye, 2010 WI App 120, ¶ 6, 329 Wis. 2d 272, 789 N.W.2d 755,[5] And, it should be noted, the traffic stop in *Meye* took place at 3:23 a.m.[6]

A final unpublished opinion by this Court is particularly instructive. *State v. Dotson*, 2021 WI App 1, 395 Wis. 2d 294, 953 N.W.2d 115.[7] Dotson was stopped at 1:21 a.m. in an area with several drinking establishments, and the officer recalled seeing Dotson's vehicle parked in front of one earlier in his shift. When the officer approached the driver's side window, Dotson rolled it down just six inches and was smoking a cigarette. The officer viewed this as a tactic to conceal the smell of intoxicants or marijuana in the vehicle or on Dotson's breath. Suspecting intoxication, the officer returned to his squad where he discovered Dotson had an outstanding arrest warrant. When asked to exit the vehicle, Dotson demurred to the point where the officer was about to smash the driver side window, whereupon Dotson rolled it up and voluntarily exited the vehicle. While placing Dotson under arrest, the officer smelled "the odor of intoxicants" on Dotson's person and therefore later put him through FSTs. *See Dotson* at ¶¶ 4-10.

Dotson concluded that the officer lacked the reasonable suspicion necessary to conduct FSTs. *Id.* at ¶ 15. The same result is compelled here once the bloodshot eyes are removed from the analysis, as they must reasonably be. In so concluding, *Dotson* noted there was no available evidence as to when and where he drank alcohol and the number of

[4] Copy provided in Appendix C pursuant to Rule 809.23(3).

[5] Copy provided in Appendix D pursuant to Rule 809.23(3).

[6] In *Meye*, the "strong" odor of intoxicants emanated from *two* individuals who had just exited a vehicle, and the officer could not determine if it was coming from the driver, the passenger, or both. *Meye*, at ¶ 2. *Gonzalez*, however, noted that so far as this Court could tell:

> The *Meye* court's decision did not hinge on the ambiguity of whether the odor was coming from the driver or passenger. Rather, the court concluded that this ambiguity "exacerbated" "[t]he weakness of this seizure."

Gonzalez, at ¶ 19, *citing Meye*, at ¶ 9.

beverages he consumed (in *Dotson* it was suppressed due to a *Miranda* violation while here the investigation fell short on that front). Dotson was also persuaded by the absence of any evidence that Dotson exhibited outward signs of intoxication or impairment, such as slurred speech or difficulty with balance. *Dotson*, at ¶ 16.

Conclusion and Relief Requested

For all the foregoing reasons, Wedl respectfully requests that this Court reverse the circuit court's decision on her motion to suppress, vacate her conviction, and remand for further proceedings with instructions that the circuit court suppress any evidence obtained after Deputy Williams detained her for Deputy Johnson's OWI investigation or, in the alternative, after Deputy Johnson ordered her to perform FSTs.

Dated this 18th day of April, 2022.

Electronically signed by: Rex Anderegg
REX R. ANDEREGG
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 3,510 words, as counted by Microsoft 365.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of April, 2022.

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