STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021 AP 1100

COUNTY OF JEFFERSON,

Plaintiff-Respondent,

v.

JULIANNE WEDL,

Defendant- Appellant.

REPLY 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:

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."

The County argues that Wedl was not really detained when Deputy Williams told her not to leave, but instead, to remain until Deputy Johnson arrived. The County tacitly concedes that when Deputy Williams told Wedl that Deputy Johnson was going to take a statement from her, this was a ruse because the real reason for her detention was to allow Deputy Johnson to investigate her for a possible OWI offense. At this point, the County argues, Wedl would have believed she was "free to leave." (County Response, p. 9). Wedl posits that no reasonable person would fee free to leave under such circumstances. *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984).

That Deputy Williams jumped the gun, based on nothing more than an odor of alcohol, is evident from what he advised dispatch. Deputy Johnson testified that "he was called there because [Deputy Williams] believed that she was intoxicated." (R17-27). Here, Deputy Williams was approached by a Good Samaritan who, in turn, was accompanied by an off-duty police officer who had noticed nothing suspicious about Wedl. Deputy Williams knew, because Wedl told him, that she had come across a vehicle on fire and stopped to render assistance.

Deputy Williams also knew, because again Wedl told him, that she had approached the vehicle and tried to ascertain whether anyone was inside of it. She told him that when she tried to open the door twice, she was beaten back by the smoke, heat and flames. For her troubles, Deputy Williams decided to detain this responsible and quick-thinking citizen *who had intentionally brought herself into contact with police* because he "believed she was intoxicated," all based on nothing more than a mere odor of intoxicants. (*Id.*).

Thus, and despite the fact it is not unlawful to drink and drive in Wisconsin, Deputy Williams detained Wedl with a ruse: another deputy was coming to take from her the statement *he* had just taken from her. In fact, no one ever officially took amy witness statement from Wedl about the vehicle fire. (R17-26). Deputy Williams suggested that Wedl wait, not in her own car but in his squad car, "to keep warm." And yet, the State claims, a reasonable person in her position would have felt free to simply jump in her car and drive away. This makes little sense under "the totality of the circumstances." *State v. Post*, 2007 WI 60, ¶ 2, 301 Wis. 2d 1, 733 N.W.2d 634.

Wedl dutifully did as she was told. She submitted to Deputy Williams' show of authority. *United States v. Mendenhall*, 446 U.S. 544 (1980). The County's reliance on *Michigan v. Chesternut*, 486 U.S. 567 (1988), is misplaced. *Chesternut* involved an arrest, not the detention of a conscientious witness turned suspect so that another police officer could further the detention. Wedl submitted to Deputy William's authority and could not have felt free to leave.

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.

The court further erred when it validated Deputy Johnson's expansion of his investigation to include FSTs, a greater invasion of liberty than an initial police stop or encounter. *State v. Colstad*, 2003 WI App 25, ¶¶ 19–20, 260 Wis. 2d 406, 659 N.W.2d 394. So thin was the evidence that Deputy Johnson had to extend the detention that he summarized it in a single sentence:

> 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). There was nothing else. Wedl was cooperative and her speech and balance were perfectly normal. (*Id.* at 28-29).

To validate this arrest, the circuit court reached to construe the detention to have occurred "at bar time," when it decidedly was not. It further failed to weigh the fact that anyone who had just been through the ordeal Wedl had, and which included, by the deputy's own admissions, crying, emotional and agitated, would by definition have bloodshot eyes. What would have been notable is if Wedl's eyes had *not* been red and bloodshot.

Moreover, the County fails to address the impropriety of taking the odor of intoxicants and Wedl's admission to drinking and treating them as two separate clues. Again, what would have been suspicious is if Wedl had denied consuming alcohol with an odor of alcohol traveling along with her denial. This, not her admission, would have suggested consciousness of guilt. *State v. Gonzalez*, 2014 WI App 71, ¶ 10, 354 Wis. 2d 625, 848 N.W.2d 905.

Finally, the State does not address the other unpublished cases that Wedl has cited, copies of which were provided in Wedl's appendix. Once the bloodshot eyes are removed from the analysis, as they must reasonably be here under the totality of the circumstances, what remains is the odor of alcohol versus a wealth of observations (balance, speech, etc.) and behavior (stopping to assist an emergency and bringing herself into contact with police) that bespeak sobriety, not impairment.

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 22nd day of June, 2022.

Electronically signed by: Rex Anderegg
REX R. ANDEREGG
State Bar No. 1016560
Atty. for Defendant-Appellant

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 936 words, as counted by Microsoft 365.

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 22nd day of June, 2022.

Electronically signed by: Rex Anderegg
REX R. ANDEREGG
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Attorney for Defendant-Appellant