STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2022AP860

WAUPACA COUNTY,

Plaintiff-Respondent,

-vs-

HUNTER J. WHEELOCK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUPACA COUNTY, BRANCH I, THE HONORABLE TROY L. NIELSEN PRESIDING, TRIAL COURT CASE NO. 19-TR-4090

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE MAKES ASSUMPTIONS WHICH DO NOT RISE TO THE LEVEL OF ESTABLISHING A REASONABLE SUSPICION TO DETAIN MR. WHEELOCK.

As part of its initial response to Mr. Wheelock's argument in the instant matter, the State relies heavily upon the fact that Mr. Wheelock had "glassy red eyes" when he was first approached by Sgt. Studzinski. *See* State's Response Brief at p.9[1] [hereinafter "SRB"]. In fact, the State goes so far as to discount the National Highway Traffic Safety Administration [hereinafter "NHTSA"] study which Mr. Wheelock cited in his initial brief for the proposition that "red eyes" are not a reliable indicator of impairment by relying upon *State v. Tullberg*, 2014 WI 134, 359 Wis. 2d 421, 857 N.W.2d 120, for the proposition that it is permissible for a law enforcement officer to consider "red eyes" as an indicator of impairment. SRB at p.10.

While it is true that *Tullberg* permits officers to consider "red eyes" as an indicator of impairment, the State nevertheless misses the point of Mr. Wheelock's position with respect to Sgt. Studzinski's reliance on "red eyes" in this case. More specifically, Sgt. Studzinski *only* observed that Mr. Wheelock had red eyes when he made his decision to detain him when it comes to the "traditional" indicia of impairment. That is, the observation of red and glassy eyes is usually accompanied by additional subjective indicia of intoxication, such as an odor of intoxicants, slurred or slow speech, confusion or difficulty thinking, "slow" movements, *et al*. In this case, if one momentarily excludes the "high-crime" area in which Mr. Wheelock was parked (an issue he will again address below), none of the other traditional indicia of impairment were present. Sergeant Studzinski was acting on a *single* indicator of impairment which, as noted in Mr. Wheelock's initial brief, NHTSA did not consider a reliable gauge of whether someone might be under the influence. Mr. Wheelock's point in this regard is that the farther one drifts away

[1]The State begins numbering the pages of its brief with the notation that its actual page two is page "1," and then continues sequentially therefrom using standard Arabic numbers. The State left its cover page unnumbered. 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. Raddemann will refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as page one (1) as it should have been.

from indicia which are covariant with one another, *i.e.*, indicators which corroborate the conclusion to be drawn, the less reliable the conclusion of impairment becomes.

The following example is illustrative of Mr. Wheelock's point. Assume, *arguendo*, a law enforcement officer observes that a person has an odor of intoxicant about them, has bloodshot eyes, slurred speech, difficulty in responding to questions, and exhibits slow movements. Clearly, the inference one might reasonably draw is that this individual is under the influence of something. The reason is simple: *each* and *every* observation corroborates the other, thereby increasing the likelihood that the conclusion to be drawn—that the person is impaired—is the correct one. Now assume, *arguendo*, that the same officer only observes the person to have red eyes and nothing else. Given that there is both far less information upon which to rely *and* that NHTSA has acknowledged that red eyes could be caused by a variety of non-alcohol related causes, the inference that this individual is "under the influence" is far less strong than in the former example.

Mr. Wheelock's ostensibly red eyes are not the only justification for Sgt. Studzinski's detention as the State notes. Not surprisingly, the State reminds that "Sergeant Studzinski observed a driver and a passenger parked in an area apparently favored by local young people to frequent when they want to drink or use illegal drugs." SRB at p.11. While the State concedes "that an individual's presence in an area of expected illegal activity, standing alone is not enough to support a reasonable, particularized suspicion that the person is committing a crime," it yet continues that other factors were present which bolster the conclusion that Mr. Wheelock was engaged in some violation of the law. *Id*. Among these factors, the State urges this Court to consider that Mr. Wheelock "was surprised to see a police officer." *Id*. There are so many problems with the State's reliance on this "fact" that Mr. Wheelock is hard pressed to know where to begin with his rebuttal.

First, it is not unreasonable to wonder who would *not* be surprised to have a law enforcement officer approach them when they are parked in a rural area? When a law enforcement officer engages anyone, the individual is likely to have a startled reaction as they ask themselves, "Why are you approaching me? What did I do?"

Second, if Mr. Wheelock is preoccupied in conversation with his passenger and suddenly a car pulls along side of him and the driver begins speaking with him—regardless of whether it is a law enforcement officer or a private citizen—Mr.

Wheelock could easily be startled by the stranger's distracting him from what he was doing.

Third, Sgt. Studzinski's asserting that Mr. Wheelock seemed "surprised" when he came upon him is itself nothing more than an indefinable, non-objective factor which fails to meet the Fourth Amendment's *objectiveness* standard. *See*, e.g., *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). How could the officer possibly know what Mr. Wheelock was thinking or feeling at the time? What in the record before this Court provides a specific basis for understanding the "how and why" of Sgt. Studzinski's conclusion? The short answer is that there is nothing. As the *Guzy* court noted:

> **The test is an objective test.** Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. **An inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.**

Guzy, 139 Wis. 2d at 675 (emphasis added); *United States v. Pavelski*, 789 F.2d 485, 489 (7th Cir. 1986).

Finally, the State attempts to deflate Mr. Wheelock's statement to Sgt. Studzinski that he was parked at the side of the road because he was looking for a place to go sledding as a *non sequitur* because "it is highly unlikely that one would seek a place to go sledding while parked on the side of the road in the dark." SRB at p.13. The State generously allows that "it is not inconceivable" that this is precisely what Mr. Wheelock was doing at the time. *Id*. The State fails to recognize that Mr. Wheelock is not obligated to prove the reasonableness of his actions to the officer when there is no obvious violation of the law afoot. If Mr. Wheelock wanted to sit at the side of the road and proffer to the officer as his justification therefor that he was trying to summon a Pagan deity, or that he wanted to stop and play Canasta with his friend, or that he liked how the air smelled in that area, or that he was waiting for a cattle stampede, *etc*., makes no difference. Mr. Wheelock needs neither to defend nor justify why he is engaged in legal activity.

Setting that aside for the moment, as the State concedes, it is not unreasonable to believe that Mr. Wheelock was looking for a place to go sledding. After all, this was a country setting and the heart of winter was approaching. He may very well have parked to take a visual survey of the area with his friend, which is not unreasonable when scanning for places to sled. Similarly, he might have observed a place to sled and wanted to stop and take a longer look at it. The State

offered *nothing* into the record which establishes that the area in which Mr. Wheelock was parked was *not* conducive to sledding.

In summary, even when the limited facts of this case are construed in a light most favorable to the State, the inferences the State wants this Court to draw are beyond the objective reasonableness standard imposed by the Fourth Amendment. Sergeant Studzinski had no constitutionally justifiable reason to detain Mr. Wheelock, and therefore, the lower court should have granted his motion to suppress.

CONCLUSION

Because Sgt. Studzinski lacked sufficient grounds upon which to establish a reasonable suspicion to believe that Mr. Wheelock was engaged in wrongdoing, Mr. Wheelock's respectfully requests that this Court reverse the decision of the lower court.

Dated this 4th day of October, 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 1,469 words.

Finally, 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 12th day of October, 2022.

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