STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Columbia County Case No. 21-TR-1741R
v. Appeal No. 2022AP001099

MICHAEL A. WILSON,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISION FINDING THAT A REFUSAL WAS IMPROPER ENTERED IN THE COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE TROY D. CROSS, PRESIDING

BRIEF OF DEFENDANT-APPELLANT MICHAEL A. WILSON

JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar #1091114

Martinez & Ruby, LLP
620 8TH Avenue
Baraboo, WI 53913
(608) 355-2000
jeremiah@martinezandruby.com
Attorneys for Defendant-Appellant

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STATEMENT OF THE ISSUES

I. SHOULD MR. WILSON'S MOTION TO DISMISS THE NOTICE OF INTENT TO REVOKE MR. WILSON'S DRIVER'S LICENSE HAVE BEEN GRANTED?

The circuit court answered: no.

II. IF THE NOTICE OF INTENT TO REVOKE MR. WILSON'S DRIVER'S LICENSE SHOULD NOT HAVE BEEN DISMISSED, WAS MR. WILSON'S REFUSAL IMPROPER?

The circuit court answered: yes.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

In all likelihood, this opinion will not merit publication because the issues are fact-specific, and the case is governed by existing precedent; as such, publication is unnecessary.

STATEMENT OF THE CASE

On December 6, 2018 at approximately 9:04 p.m., Officer Alexander Secord, then an officer with the City of Columbus police department, was dispatched to address a driving complaint from an unidentified citizen calling from the Fast Lanes Bowling Alley alleging that an individual operating a red sedan had left the bowling alley going south on Industrial Drive, and that the reporting individual felt that the individual operating the red sedan was intoxicated. (R26: 20, 22-24). Secord located a red sedan traveling on a James Street roughly five minutes later, which Secord stated was consistent both temporally and geographically with the red sedan mentioned by the citizen caller. (R26: 24-25). Secord testified that he observed the red sedan engage in an "S-shaped swerve" twice, going from the yellow center line to the white line on the right edge of the road separating the car travel lane from the bicycle lane. (R26: 25). He further testified that while at no point did the red sedan cross the yellow center line, it did cross the white line separating the car travel lane from the bicycle lane at least once. (R26: 26).

At that point, Secord executed a traffic stop of the red sedan, and made contact with the operator, Mr. Wilson. R26: 26). Secord said that Mr. Wilson had slurred speech, bloodshot and glassy eyes, and that Secord could detect an "odor of intoxicants coming from the interior of the vehicle." (R26: 27). Secord recalled that Mr. Wilson told him that he was coming from a bar, and that he had not had a lot to drink. *Id.* At that point, Secord ordered Mr. Wilson out of the vehicle and asked that he perform standardized field sobriety tests (SFSTs). *Id.* Secord first administered the horizontal gaze nystagmus

(HGN) test, and testified that Mr. Wilson exhibited six of six potential clues on that test. (R26: 29-30). Following this, Secord administered the walk-and-turn (WAT) test; Secord stated that Mr. Wilson exhibited numerous clues, and that Secord stopped the test after the first seven steps due to safety concerns. (R26: 32-33). Secord then administered the one-leg-stand (OLS) test, but stopped it almost immediately due to Mr. Wilson appearing to become unbalanced. (R26: 33-34). A preliminary breath test was then administered, with a result of .304. (R26: 34).

At that point, Mr. Wilson was placed under arrest, and Secord at some point later read Mr. Wilson the Informing the Accused form in compliance with Wis. Stat. § 343.305(4); Wilson was asked to submit to an evidentiary test of his blood, which request he refused. (R26: 35-36). Secord issued a notice of intent on December 6, 2018 to revoke Mr. Wilson's driver's license as a result of the refusal, but at no point was there testimony to the effect that this notice was ever given to Mr. Wilson, and it is apparent that a citation for operating while impaired as a first offense and for the refusal were also issued, both requiring Mr. Wilson to respond to them in the Columbia County Municipal Court. (R26: 4). Mr. Wilson did appear, and resolved the matter via pleading to the operating while impaired citation in exchange for dismissal of the refusal matter. *Id.*

Mr. Wilson later retained counsel, Attorney Daniel Kaminsky, and filed a motion in the Columbia County Municipal Court to reopen and dismiss the operating while impaired as a first offense matter on the basis that it should have been charged as a second-offense operating while impaired in light of a prior conviction for operating while impaired. (R26: 5). While the motion was pending, on October 14, 2020, Attorney Kaminsky and the attorney for the City of Columbus, Paul Johnson, entered into a stipulation to reopen the operating while impaired – first offense conviction and amend it to a citation for reckless driving. (R26: 4). Attorney Johnson did not, in the stipulation or otherwise, require that the refusal which had been dismissed be reopened. *Id.*

Subsequently, on February 26, 2021, a different officer issued a new notice of intent to revoke Mr. Wilson's driver's

license, this time returnable to the Columbia County circuit court. (R4: 3). On March 10, 2021, Mr. Wilson, by and through Attorney Kaminsky, filed an objection to and motion to dismiss the notice of intent on the ground that it was issued in violation of the requirement stated in Wis. Stat. § 343.305(9)(a) that such notice be *immediately* issued, along with a timely request for a refusal hearing. (R1; R4: 1-4). The State responded in writing on April 20, 2021, arguing that the notice of intent was in fact timely and proper. (R9: 1-3). More than a year later, the circuit court finally scheduled a hearing on the motion and the request for a refusal hearing. (R26: 1).

At the hearing, Wilson argued that because the City of Columbus had moved to dismiss the original refusal citation and did not seek to have it reinstated as part of the stipulation to reopen and amend the 2018 operating while impaired citation to a reckless driving citation, and because the Columbia County Municipal Court was a proper venue for that citation, the State could not after a delay of nearly three years seek to reissue the refusal notice and citation at issue in this case. (R26: 3-5). In addition, Wilson argued that the refusal notice was untimely under the statute, and that as a result it should be dismissed for failure to issue it "immediately" as required by statute. (R26: 8-9).

The State responded by arguing that the municipal court "lacked competency or jurisdiction" to adjudicate the refusal, and that the statute of limitations contained in Wis. Stat. § 893.93(1m)(a) applied to refusals, and thus the second notice of intent to revoke was timely filed. (R26: 10-11). Further, the State argued that the duty to "immediately" issue the notice of intent to revoke was merely directory, not mandatory, and therefore violating that duty could have no effect on the validity or enforceability of the refusal citation. (R26: 12-13).

The court first determined that although the original refusal citation was dismissed by the municipal court at the City of Columbus's request, that adjudication was without legal effect because the municipal court lacked competency to adjudicate the citation in light of the existence of Mr. Wilson's prior OWI conviction. (R26: 18-19). The court further found that it could not discern any reason why the dismissal of the refusal citation would have satisfied the statute requiring that

circuit courts allow dismissal of refusals (among other OWI-related charges) only if such dismissal would be consistent with the public's interest in deterring impaired operation of motor vehicles and related offenses. (R26: 19). The court then denied the motion to dismiss without further elaboration. *Id.*

Following the denial of Mr. Wilson's motion to dismiss the refusal, testimony was taken from Officer Alexander Secord as outlined above. (R26: 20-38). At no point was there any testimony or other evidence offered to show that either notice of intent to revoke Mr. Wilson's driver's license regarding the December 6, 2018 incident were ever given to or mailed to him. *Id.* Officer Secord, in addition to testifying as summarized above, admitted that he could not identify the person sitting with Attorney Kaminsky at the hearing, but did state that he verified Mr. Wilson's identity at the time of the stop via his driver's license; he did also say that he did not verify with Mr. Wilson that the date of birth listed on the driver's license was in fact Mr. Wilson's date of birth. (R26: 36-37). Finally, Secord also admitted that he was not the officer who issued the second notice of intent to revoke and citation for refusal which is at issue here. (R26: 38).

At the conclusion of the testimony, Wilson moved to dismiss the refusal both for lack of identification and because Officer Secord was not the officer who issued said refusal. (R26: 38). The circuit court did not believe that the officer who issued the refusal was required to testify in support of it, but did ask the State to respond regarding the identification issue. *Id.* The State responded by arguing that the testimony Secord was able to give regarding identification was sufficient to meet the State's burden of proof, although the State could not articulate what that burden was. (R26: 39). The circuit court ultimately concluded that it was a probable cause determination at issue, and therefore that was the burden the State needed to meet. (R26: 40-41). Wilson then argued that because the officer could not identify Wilson in the courtroom, and further did not ensure that the person he interacted with on December 6, 2018 was in fact Michael A. Wilson, the State had not established identity. (R26: 41-43). Wilson further underscored the point by noting that the officer did not testify that he verified Mr. Wilson's driver's license number at the scene, as well as his date of birth, and that the State could not

match the notice of intent prepared by a different officer 26 months after the incident about which there was no testimony or other evidence regarding whether or how that second notice was delivered to Mr. Wilson. (R26: 44-45).

The court found that there was no requirement that the officer who issued the refusal citation and notice of intent to revoke be present in court to testify in support of it, nor was there any requirement that the State offer any evidence to show whether or how the refusal and notice of intent to revoke were delivered to the driver at issue. (R26: 45). The court further found that there was no requirement that an in-court identification take place, and that the evidence the State had presented on that issue was sufficient to carry its burden to show that the person cited was the person who allegedly improperly refused. (R26: 45-47).

Turning to the merits of the refusal issue, the State proceeded to argue that based on the citizen informant's information as well as the S-shaped swerves and single instance of the vehicle crossing the white line separating the car lane from the bicycle lane observed by Officer Secord, there was reasonable suspicion sufficient to support the stop of Mr. Wilson's vehicle. (R26: 47-48). The State further argued that the additional observations made by Secord of Mr. Wilson upon making contact with him constituted sufficient reasonable suspicion to allow Secord to request that Wilson perform SFSTs, that his performance on the SFSTs provided Secord with the requisite probable cause to believe that Wilson was operating while impaired necessary to allow him to request that Wilson to submit to a PBT, and that the PBT result provided Secord with probable cause to arrest Wilson for operating while impaired. (R26: 47-49). The State finally argued that Secord did read the Informing the Accused form to Wilson verbatim as required, and that Wilson's subsequent refusal was therefore improper. (R26: 49).

Wilson argued first that although the original refusal and notice of intent to revoke issued on December 6, 2018 was issued in a timely fashion, the second notice of intent to revoke was not issued in a timely fashion, nor was there any evidence supporting that it was ever either directly provided to or mailed to Mr. Wilson, and because the issue of whether the notice was

properly issued and delivered to Mr. Wilson is an issue at a refusal hearing, the refusal citation should be dismissed. (R26: 49-50).

The circuit court ruled that first, there was reasonable suspicion to support the stop based on solely the S-swerve and crossing of the white line separating the car lane from the bicycle lane, and that the citizen caller's information was "icing on the cake," adding to the reasonableness of the stop. (R26: 51). The court continued, stating that the officer's subsequent observations, Wilson's performance on the SFSTs, and the PBT result all together supported probable cause to arrest Wilson for an OWI offense, that he was read the Informing the Accused form verbatim, and that Wilson did refuse. (R26: 51-53). The court then further found that Wilson must have had proper notice of the original refusal citation, as he showed up to the appearance date on it, but the court also found that the original refusal was filed in the wrong court. (R26: 53). Based on all of that, the circuit court found that the refusal was improper, and found Wilson guilty of an improper refusal. *Id.* The judgment of conviction was entered several days after the hearing, on May 16, 2022. (R17: 1-2).

Mr. Wilson filed a timely notice of appeal on June 30, 2022; this appeal follows. (R21: 1). Additional facts shall be stated as necessary below.

ARGUMENT

I. ALTHOUGH IT IS TRUE THAT THE COLUMBIA COUNTY MUNICIPAL COURT LACKED COMPETENCE TO ADJUDICATE THE ORIGINAL REFUSAL AND OPERATING WHILE IMPAIRED CITATIONS, THE CITY OF COLUMBUS FORFEITED ANY CHALLENGE TO THE MUNICIPAL COURT'S COMPETENCE BY FAILING TO RAISE THE ISSUE IN ITS STIPULATION WITH WILSON, RENDERING THE PRESENT CITATION IMPROPER AND BARRED BY THE DOCTRINE OF CLAIM PRECLUSION.

No circuit court in the State of Wisconsin ever lacks

subject-matter jurisdiction, but courts can lack competency to adjudicate matters based on failures to comply with governing statutes. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶7-9, 273 Wis.2d 76, 681 N.W.2d 190. Further, any noncompliance with governing statutes or ordinances may affect a court's competency to exercise its subject-matter jurisdiction, but do not operate to deprive said court of said jurisdiction. ***Id.***, ¶¶2-3. Challenges to a court's competency to exercise its subject-matter jurisdiction are forfeited if not timely raised in that court. ***Id.***, ¶¶30, 38. While all of the language above was discussed in ***Mikrut*** in terms of circuit court competence and subject-matter jurisdiction, the Supreme Court of Wisconsin has applied the same analysis to municipal courts, and agreed that municipal courts have subject matter jurisdiction over any alleged ordinance violation, as the initial refusal citation was in this matter, and that in the event that, as here, there was an undisclosed prior OWI conviction, the municipal court lacks competency, an issue which may be forfeited or waived, rather than subject-matter jurisdiction, an issue which may not be forfeited or waived. ***City of Cedarburg v. Hansen***, 2020 WI 11, ¶¶50-52, 390 Wis.2d 109, 938 N.W.2d 463.

Here, the municipal court may have lacked competence to exercise its subject matter jurisdiction over the refusal citation in light of the fact that it arose from what was factually a second-offense OWI charge, but it had jurisdiction to adjudicate the citation nonetheless. ***Id.***, ¶3. By failing to raise the issue of municipal court competence when the original citations were disposed of, and by again failing to raise the issue as part of the stipulation reopening and amending the OWI conviction to a conviction for reckless driving offered to and accepted by the Columbia County Municipal Court, the City of Columbus forfeited the issue. ***Id.***, ¶4. The State further forfeited the competency issue by failing to reissue the refusal citation for a period of 26 months after the original incident. (R26: 15).

Further, and although this was not directly argued by Wilson in the circuit court, it was heavily implied by the arguments Wilson did make, the State is bound by the City of Columbus's forfeiture of the competency issue with respect to the refusal citation at issue here, and is also bound by the City's

failure to move to reopen the original refusal citation in response to Wilson's motion to reopen and vacate the OWI first conviction in the municipal court, as a result of the doctrine of claim preclusion, as shall be shown below.

Claim preclusion makes a final adjudication on the merits in a prior action a bar to later actions between the same parties as to all matters that were or could have been litigated in the earlier action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Claim preclusion has three elements: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity of the causes of action in the two suits; and (3) a final judgment on the merits by a court of competent jurisdiction. ***Id.*** at 551. There is also an issue of overriding fairness. The law of claim preclusion is not an ironclad rule to be doggedly applied, even if literally appropriate, without regard to countervailing considerations. ***Patzer v. Board of Regents of the Univ. of Wis. Sys.***, 763 F.2d 851, 856 (7th Cir. 1985). "Claim preclusion may be disregarded in appropriate circumstances when the policies favoring preclusion of a second action are trumped by other significant policies." ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 236, 601 N.W.2d 627 (1999).

Here, there can be no doubt that the State of Wisconsin and the City of Columbus share an identity in their interest in prosecuting the factual allegations underlying the refusal citations at issue, and thus that the State of Wisconsin is, for claim preclusion purposes, in privy with the City of Columbus. *See* ***In re the Paternity of Mayonia M.M***., 202 Wis. 2d 460, 468, 551 N.W.2d 31 (Ct. App. 1996) ("It is a fundamental premise of preclusion law that nonparties to a prior decision cannot be bound by it unless they had *sufficient identity of interest with a party* that their interests are deemed to have been litigated. ") (emphasis added, internal citations omitted). Accordingly, the first element of claim preclusion is satisfied. The second element is clearly also satisfied, as the citations are both for allegedly improperly refusing a test requested by an officer under Wis. Stat. § 343.305, and both citations involve the same underlying facts. As to the third element, it has already been established that the municipal court had jurisdiction over the original refusal citation, and it is

undisputed that there was a final judgment pursuant to a plea agreement on the original refusal citation, resulting in its dismissal.

Finally, although if timely raised a competency issue might be interposed regarding the third element, that issue, as was argued above, was forfeited by the City when it, despite clearly knowing that the municipal court's competence was being challenged as a result of Wilson's motion, nonetheless did not raise the competence issue with respect to the previously dismissed refusal citation. The third element of claim preclusion is therefore met, and as such, the State was barred by the doctrine of claim preclusion from attempting to relitigate the issue by way of the second refusal citation at issue here. ***Bugher***, 189 Wis.2d at 550.

Accordingly, because the original refusal citation at issue here was dismissed as part of a plea agreement, and because the City did not move to reopen the dismissed refusal citation as part of its stipulation resolving Wilson's motion to reopen vacate the OWI as a first offense conviction, the State cannot now be heard to complain that the municipal court lacked competency to adjudicate the original refusal citation, was barred by the doctrine of claim preclusion from issuing and attempting to litigate the second refusal citation, and thus Wilson's motion to dismiss the second refusal citation should have been granted.

II. EVEN IF THE MOTION TO DISMISS THE REFUSAL CITATION FOR THE REASONS CITED ABOVE WAS PROPERLY DENIED BY THE CIRCUIT COURT, THERE WAS INSUFFICIENT REASONABLE SUSPICION TO SUPPORT THE INITIAL STOP IN THIS MATTER, AND THUS REVERSAL IS REQUIRED.

An officer has reasonable suspicion "when, at the time of the stop, he or she possesses specific and articulable facts which would warrant a reasonable belief that criminal activity is or was afoot." ***State v. VanBeek***, 2021 WI 51, ¶28, 397 Wis.2d 311, 960 N.W.2d 32. "Reasonable suspicion, as with other Fourth Amendment inquiries, is an objective test that

examines the totality of circumstances." ***Id.***, ¶52 (internal citations omitted). "An officer has reasonable suspicion if he or she has 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." ***Id.*** (internal citations and quotation marks omitted).

Here, and contrary to the circuit court's rather conclusory ruling, there was no such reasonable suspicion to support the traffic stop here, and as such, the circuit court's ruling cannot stand for that reason alone, even if the State was not, as is argued above, barred from issuing the citation at issue here pursuant to the doctrine of claim preclusion. The facts relied upon by the circuit court to support a reasonable suspicion that Wilson was operating while impaired include (1) two observed S-shaped swerves largely within the travel lane, (2) one observed crossing of the white line separating the car lane from the bicycle lane (albeit, how far over that line was never established, nor was the duration of time involved over which these S-shaped swerves allegedly took place), and (3) a citizen report that said citizen was concerned that the operator of a red sedan was intoxicated, without further information as to why the citizen had that concern. (R26: 48).

These facts, even taken together, simply do not add up to a reasonable suspicion that criminal activity was afoot. ***State v. Betow***, 226 Wis.2d 90, 593 N.W.2d 499 (Ct. App. 1999) is instructive on this point. There, Betow was stopped for speeding, and the court of appeals concluded that the officer prolonged an initially valid traffic stop without reasonable suspicion that Betow had controlled substances in his possession. ***Id.*** at 95-98. The State argued that reasonable suspicion existed based on the following facts: (1) Betow's wallet had a mushroom sticker on it, which the State argued denoted drug use; (2) the stop occurred late at night; (3) Betow seemed nervous; (4) Betow was returning to Appleton from Madison, a city that the State argued was associated with ready drug obtainment; and (5) Betow did not provide the officer with a plausible explanation for his purpose in Madison. ***Id.*** The Court of Appeals found that all of those facts taken together nonetheless did not add up to a reasonable suspicion of criminal activity, and therefore concluded that the stop was

illegally prolonged. ***Id.*** at 98.

Similarly, the facts in ***State v. Gammons*** were more suspicious than the facts here, and yet again, the Court of Appeals found that there was not reasonable suspicion sufficient to support expansion of the scope of a traffic stop; those facts were as follows: "(1) an out-of-town vehicle in an area purportedly known for drug activity; (2) a night-time stop; (3) and a nervous suspect." ***Van Beek***, 397 Wis.2d 311, ¶64 (quoting ***Gammons***, 2001 WI App 36, ¶¶1-2, 23-25, 241 Wis.2d 296, 625 N.W.2d 623).

Finally, and most instructively, in ***State v. Post***, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634, the Supreme Court of Wisconsin rejected the State's argument that there should be a bright-line rule that weaving within a single lane is reasonable suspicion supporting a stop to investigate whether the operator of the vehicle is impaired. ***Id.***, ¶14. The Court in ***Post*** ultimately did determine that the officer in that case did have sufficient reasonable suspicion to justify the stop, *see* ***id.***, but did so on the basis of the totality of the circumstances, which included suspicious facts not present here. In rejecting the State's request for a bright-line rule regarding weaving within a single lane, the Court noted that

> the State's proffered bright-line rule is problematic because movements that may be characterized as "repeated weaving within a single lane" may, under the totality of the circumstances, fail to give rise to reasonable suspicion. This may be the case, for example, where the "weaving" *is minimal or happens very few times over a great distance.* Courts in a number of other jurisdictions have concluded that weaving within a single lane can be insignificant enough that it does not give rise to reasonable suspicion. In such cases, weaving within a single lane would not alone warrant a reasonable police officer to suspect that the individual has committed, was committing, or is about to commit a crime.

Post, 301 Wis.2d 1, ¶19 (emphasis added).

The facts which the ***Post c***ourt found in their totality to support reasonable suspicion, albeit which the Court expressly admitted presented a "close call," *see* ***id.***, ¶27 were all of the following: (1) that Post's vehicle appeared to be moving between the roadway centerline and the parking lane, which the Court characterized as more than a slight deviation within one lane; (2) further, the officer involved described the vehicle as being "canted" into the parking lane, meaning that it was at times not within the designated travel lane at all; (3) the car at issue traveled roughly ten feet from one extreme to the other of the S-curve it was tracing with its weaving, coming within 12 inches of the center lane and within 6 feet of the curb, fully crossing into the parking lane from the designated travel lane; (4) the weaving took place several times over just two blocks; and (5) the incident took place at 9:30 p.m., which time of day was not as significant as it would have been had the time been closer to the time at which bars are to close, was nonetheless an ingredient in the reasonable suspicion calculus. ***Id.***, ¶¶30-36.

Here, the incident took place around 9:00 p.m., similar to the incident in ***Post***, and the S-shaped "swerves" testified to here were described in general terms similar to how the S-shaped weaving was described in ***Post***. But the similarities end there. While Secord did testify that Wilson's vehicle crossed the white line between the car lane and the bicycle lane, he at no point provided any information as to how far across the white line the vehicle got. (R26: 20-32). Further, Secord mentioned only two S-shaped "swerves," and did not specify over what distance he and Wilson traveled while he observed the "swerves," nor did he allege that the vehicle was at any point wholly outside of the car lane. *Id.*

Finally, there was no allegation of any other bad driving conduct. This leaves only the citizen informant's alleged statement that the citizen was concerned that the operator of a red sedan was in some sense "intoxicated." While it is true that an informant who risks or allows his or her identity being revealed to the police is considered more reliable than an anonymous informant, it is nonetheless the case that the probative value of a citizen informant's information is in part a function of how detailed the citizen's information is. ***State v.***

Guzy, 139 Wis.2d 673, 676-77, 407 N.W.2d 548 (1987). The factors which courts have considered to be useful in assessing whether a citizen's information can supply reasonable suspicion of a law violation in situations resembling the one here are as follows:

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Guzy, 139 Wis.2d at 677 (internal citations and quotation marks omitted).

Here, we have a barebones description of the vehicle – "a red sedan" – and no description of the operator other than an allegation that the caller was concerned that said operator may be intoxicated. (R26: 23-24). And while there were allegedly only five minutes between the time that Secord was dispatched to address the caller's allegations and the time at which he spotted a red sedan in a location which Secord described as being consistent with the caller's statement that the red sedan was traveling south on Industrial Drive, no information was provided regarding the number of other vehicles in the area, and nothing beyond a conclusory allegation that the operator of the red sedan was impaired was relayed to Secord, nor is there any other information in the record regarding statements the caller may have made to dispatch to provide a basis for that allegation. (R26: 24-32).

As to the observed activity by Wilson, and as noted above, there were simply two S-shaped "swerves" in which Wilson's vehicle largely stayed within the car lane, and no allegation that he ever left the car lane to any significant extent beyond once briefly crossing the white line into the bicycle

lane to an unknown extent, and no information was provided regarding the distance over which these two "swerves" took place. (R26: 25-26). Based on the record available here, the S-shaped "swerves" observed by Secord could just as well have been the gentle and minimal weaving within one lane referred to by the ***Post*** court as being insufficient to rise to the level of a reasonable suspicion of impairment. ***Post***, 302 Wis.2d 1, ¶19.

As such, Officer Secord did not, based solely on the conclusory allegations in the citizen caller's information as relayed to Secord by dispatch as well as the observed driving behavior on Wilson's part, have a reasonable suspicion that Wilson was operating while impaired as opposed to a mere hunch that this was the case, and as such, the circuit court erred in finding that Wilson's refusal was improper, and should instead have dismissed the refusal citation because the traffic stop resulting in the refusal was unsupported by reasonable suspicion, and therefore Wilson's arrest was ultimately not lawful. *See* ***State v. Anagnos***, 2012 WI 64, ¶41, 341 Wis.2d 576, 815 N.W.2d 675 (whether a person was lawfully arrested for an OWI-related offense is an issue at a refusal hearing, and a lack of reasonable suspicion supporting the stop therefore can be raised as an issue at a refusal hearing).

CONCLUSION

For the reasons discussed above, the defendant respectfully requests that this court reverse the circuit court's judgment finding that the State was not precluded from relitigating the refusal issue and that Wilson's refusal was improper, and remand to the circuit court with instructions that the refusal citation in this matter must be dismissed.

Respectfully submitted December 19, 2022:

Electronically signed by:
Jeremiah Wolfgang Meyer-O'Day
State Bar No. 1091114

Martinez & Ruby, LLP
620 8th Avenue

Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009
jeremiah@martinezandruby.com

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,083 words.

Dated December 19, 2022:

Electronically signed by:
JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar No. 1091114

Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009
jeremiah@martinezandruby.com

CERTIFICATE OF COMPLIANCE

WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated December 19, 2022:

Electronically signed by:
JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar No. 1091114

Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009
jeremiah@martinezandruby.com

APPELLANT DAVID R ROBERTS' APPENDIX –

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