STATE OF WISCONSIN

COURT OF APPEALS

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

REPLY BRIEF OF DEFENDANT-APPELLANT MICHAEL A. WILSON

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ARGUMENT

I. THE STATE'S BRIEF FAILS TO GRAPPLE WITH THE ORIGINAL MUNICIPAL PROSECUTOR'S FORFEITURE OF ITS RIGHT TO RAISE THE MUNICIPAL COURT'S INCOMPETENCE WHEN THE ORIGINAL OMVWI CONVICTION WAS REOPENED AND AMENDED, AND AS A RESULT, ITS ARGUMENT THAT CLAIM PRECLUSION DOES NOT APPLY ALSO FAILS.

As was noted in Wilson's opening brief, the competence of a municipal court to exercise its jurisdiction is an issue which can be waived or forfeited, just as a circuit court's competence to exercise its jurisdiction can be waived or

forfeited. ***City of Cedarburg v. Hansen***, 2020 WI 11, ¶¶50-52, 390 Wis.2d 109, 938 N.W.2d 463.

Here, as was noted in Wilson's opening brief, 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. But as was also argued in Wilson's opening brief, 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).

Nonetheless, the State argues that because the dismissal of the refusal was done by a municipal court which as a factual matter lacked competence to entertain that action, Wilson cannot satisfy the third element of claim preclusion, namely, that there was a final judgment on the merits *by a court of competent jurisdiction.* As was explained in Wilson's opening brief, 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 (emphasis added). 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).

The State focuses its argument against the application of claim preclusion in this matter on the italicized language above regarding the third element. 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. The State, however, contends that because the municipal court lacked competence to exercise its jurisdiction with respect to the original refusal citation, Wilson cannot show that the final judgment on the merits of the refusal citation was in fact sufficient to trigger the application of claim preclusion.

The State's argument however, fails to come to grips with Wilson's argument that 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 such knowing abandonment of a viable argument represents waiver of the right to raise said argument later. 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, AND NOTHING IN THE STATE'S ARGUMENT REFUTES THAT FACT.

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).

As was argued in Wilson's opening brief, and contrary to the circuit court's rather conclusory ruling and the State's argument, 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. As was argued in Wilson's opening brief, 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). While the State argues that the caller provided two pieces of information – that a person who was leaving the bowling alley appeared to be intoxicated and that that person drove off in a particular direction in a red sedan – this is really one single piece of information, and amounts to no more than a conclusory allegation that someone was "driving drunk."

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. Nothing in the State's argument or the record supplies the missing details which were significant to the ***Post*** court's finding that there was reasonable suspicion in that case, which that court notably referred to, as noted above, as a "close call." ***Post***, 301 Wis.2d 1, ¶27.

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 and in the defendant's opening brief, 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 March 30, 2023:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,587 words.

Dated March 30, 2023:

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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 March 30, 2023:

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