STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023 AP 398

Columbia Co. Circuit Court Case No. 2021 TR 6926R

STATE OF WISCONSIN,

Plaintiff - Respondent,

v.

JASON W. CASTILLO,

Defendant - Appellant.

ON APPEAL OF THE COURT'S JUDGMENT FINDING THE DEFENDANT GUILTY OF REFUSAL - SPECIFICALLY THE LEGALITY OF THE STOP, IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, BRANCH III, THE HONORABLE TROY D. CROSS, PRESIDING

BRIEF OF DEFENDANT - APPELLANT

Respectfully submitted,

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§ 939.23 (4)

STATEMENT OF THE ISSUES

WHETHER A STOP THAT OCCURRED WHILE THE OFFICER WAS ATTEMPTING A STOP OF A DIFFERENT VEHICLE IS A VIOLATION OF TERRY AND SHOULD RESULT IN THE EXCLUSION OF EVIDENCE OBTAINED FROM THE STOP

STATEMENT ON ORAL ARGUMENT

Appellant / Defendant is of the opinion that oral arguments are not necessary in this case.

STATEMENT OF THE CASE

The facts in this case are largely undisputed. On November 13th, 2021, Columbia County Sheriff's Deputy Daniel Hayes was on routine patrol when a vehicle approaching from the opposite direction failed to dim his/her headlamps. The Deputy turned around in an attempt to pull over the offending vehicle. The Defendant's vehicle was between him and the offending vehicle. Instead of looking for an opportunity to get around the Defendant's vehicle, the Deputy activated his lights, and both the Defendant's vehicle and the offending vehicle were pulled over. (Transcript October 21st, 2022, pages 4 – 7.)

The Deputy exited his vehicle with the intention of making "contact with both vehicles because they both stopped" despite the lack of reasonable suspicion to have stopped the Castillo vehicle. As the Deputy approached the vehicle driven by the Defendant, he noticed an odor of marijuana coming from that vehicle. The Defendant made an admission that he had smoked marijuana several hours earlier. (Id, pgs. 6-10)

The Defendant was subject to field sobriety testing. The Deputy testified that he observed insufficient clues to determine that there was impairment. The Deputy placed Mr. Castillo under arrest anyways. (Id. 11) The Defendant was read the Informing the Accused sheet and refused to take the blood test. Ultimately, a warrant was obtained, and blood was taken.

On cross examination, the Deputy admitted that after he turned around and got behind the two vehicles, he followed them for less than a mile. During this time, he indicated that he did not see an opportunity to safely pass the Defendant's vehicle. He also indicated that he did not make much of an effort to do so. During the very short time that he was behind the Defendant's vehicle, he did not observe anything from either vehicle that led to urgency of pulling the offending vehicle over – the vehicle was not pulling away, was not swerving, was not driving erratically.

The State filed the Notice of Intent to Revoke on November 17th, 2021. Mr. Castillo contested the refusal within the statutorily required time, submitting the same on November 22nd, 2021. An evidentiary hearing was held on the refusal on October 21st, 2022. The Court found at that time that probable cause existed for the arrest, and that the Defendant did, in fact, refuse to take the test. The Court held open the issue of whether the stop without reasonable suspicion should lead to the suppression of the evidence. The parties submitted authority, and the Court ruled on the issue February 3rd, 2023. The Court, in its ruling, likened this to the cases on "mistake of fact" justifying reasonable suspicion for a stop. Later in the Court's ruling, the Court found that this was not, in fact, a stop and rather a consensual encounter. The motion to suppress the stop was denied.

ARGUMENT

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is the seminal case on reasonable suspicion as justification for conducting investigatory stops. In *Terry,* the Court found that in order to justify such a seizure, police must have reasonable suspicion that a crime or violation has been or will be committed; that is, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from ***150* those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S.Ct. 1868. This "reasonable suspicion" standard was understood to be a lower standard than probable cause. *See id.* at 35–36, 88 S.Ct. 1868.

In *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Court extended the reasoning underlying *Terry* to include traffic stops, holding that a police officer "who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit" a violation may conduct a traffic stop in order to " 'investigate the circumstances that provoke suspicion.' " *See id.* at 439, 104 S.Ct. 3138 (citation omitted). In other words, while probable cause is enough to justify a traffic stop, probable cause is *not indispensable* to justify a traffic stop. Rather, police officers who reasonably suspect an individual is breaking the

law are permitted to conduct a traffic stop "to try to obtain information confirming or dispelling the officer's suspicions." *Id.*

Twelve years after *Berkemer,* the Supreme Court decided *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). In *Whren,* the Court addressed whether temporarily detaining "a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id.* at 808, 116 S.Ct. 1769.

In an opinion by Justice Scalia, a unanimous Court held that the brief detention of a motorist who police have probable cause to believe has violated a traffic law is not an unreasonable search or seizure within the meaning of the Fourth Amendment, even if the officer would not have initiated the stop without some additional law enforcement objective. *Id.* at 808, 818–19, 116 S.Ct. 1769. In other words, pretextual traffic stops —stops designed to investigate violations not related to the observed violation—are not per se unreasonable under the Fourth Amendment.

Not all encounters with law enforcement officers are "seizures" within the meaning of the Fourth Amendment. *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *State v. Kelsey C.R.,* 2001 WI 54, ¶ 30, 243 Wis.2d 422, 442, 626 N.W.2d 777. The general rule is that a seizure has occurred when an officer, "by means of physical force or show of authority, has in some

way restrained the liberty of a citizen...." *State v. Harris,* 206 Wis.2d 243, 253, 557 N.W.2d 245 (1996).

Defendant was not able to find any law at any level where the officer mistakenly stopped another vehicle in the officer's quest to pull over a different vehicle. Herein is an overview on the law on reasonable suspicion. This is clearly a seizure pursuant to the case law above. Mr. Castillo was driving, and the actions of the officer caused him to be pulled over to the side of the road. This was caused by the officer's "show of authority." *Terry* stands for the proposition that a seizure must be done with reasonable suspicion that a crime, or traffic violation has been or will be committed. The *Whren* case even says that an officer can make a stop to investigate whether a traffic violation is occurring if there is probable cause to do so. By everyone's admission, this did not occur. There exists no justification in the law that allows for the use of any evidence obtained in this fashion. What happened to Mr. Castillo isn't allowed by even the absolute lowest standard of reasonable suspicion consideration.

During Judge Cross' decision, he qualified this as a consensual encounter. The test for whether a stop is a consensual encounter is an objective one, focusing not on whether the defendant himself felt free to leave but whether a reasonable person, under all the circumstances, would have felt free to leave. *California v. Hodari D.,* 499 U.S. at 628, 111 S.Ct. 1547; *Michigan v. Chesternut,* 486 U.S. at 574, 108 S.Ct. 1975. "[T]he 'reasonable person' test presupposes an innocent

person." *Florida v. Bostick,* 501 U.S. at 438, 111 S.Ct. 2382. Mr. Castillo had a law enforcement officer that was behind him on the roadway with his squad lights on. As he pulled over, the officer pulled in behind his vehicle. Clearly, no reasonable person would have thought that under these circumstances that he would have had the right to pull back out and get back on the highway. This was NOT a consensual encounter as discussed by Judge Cross.

The fact that the officer did not intend to pull the Defendant over is immaterial. But pursuant to Wisconsin law, intent is more than the specific intention to do something. Section 939.23 (4) Wisconsin Statute indicates that ""With intent to" or "with intent that" means that the actor either has the purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that event." The officer had to know, in other words, his actions were "practically certain" to cause the event that occurred – that Mr. Castillo would be deprived of his liberty and subject to a traffic stop without the requisite level of suspicion to do so. By that definition, this stop absolutely was made intentionally.

CONCLUSION

This case really comes down to a couple of pretty simple concepts. First, was this a stop? Mr. Castillo was deprived of his liberty, and no reasonable person under the same circumstances would have felt free to leave. This was a stop. Second, was there the reasonable suspicion for the Defendant to leave? By everyone's admission, Jason committed no traffic violations nor was there any cause to believe that he was or would be doing so. The remedy to an illegal stop is the suppression of all evidence obtained as a result of the exclusionary rule. *State v. Washington,* 284 Wis. 2d 456, 700 NW 2d 305 2005 WI APP 123, citing *Wong Sun v. United States,* 371 US at 484, 83 S. Ct. 407. The decision of the circuit court should be overturned, and the refusal case dismissed.

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19 (8)(b), (bm) and (c) for a brief. The length of this brief is 1,646 words and 12 pages.

Dated this 13th day of June, 2023 at Watertown, Wisconsin.

Respectfully submitted,

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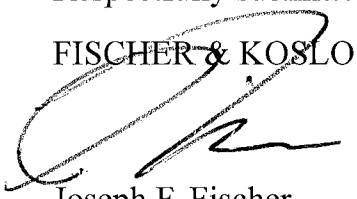

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