STATE OF WISCONSIN
COURT OF APPEALS
District IV

TOWN OF DUNN

Plaintiff-Appellant,

Appeal Nos. 2023AP1529, 2023AP1530, 2023AP1531

vs.

BRIAN S. LAFLEUR,

Defendant-Respondent.

TOWN OF DUNN'S REPLY BRIEF

APPEALING THE JUNE 21, 2023 FINAL ORDER IN
DANE COUNTY CIRCUIT COURT
CASE NOS. 22TR11269, 22TR11268 AND 22TR11270
THE HONORABLE DAVID CONWAY PRESIDING

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February 8, 2024

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ARGUMENT

I. DEPUTY KATZENMEYER HAD REASONABLE SUSPICION.

Mr. LaFleur argues that all Deputy Katzenmeyer had was a "mere hunch." *LaFleur Brief,* p. 8. Deputy Katzenmeyer did not act on a mere hunch. He observed Mr. LaFleur driving on a road that was closed. The only thing he didn't know, and couldn't know for certain without conducting a brief investigatory stop, is whether Mr. LaFleur had an innocent explanation for driving on the closed road – i.e. coming from or going to a property within the closed area. Even then, given that he knew the owner of the vehicle was not registered to someone living within the closed area, Deputy Katzenmeyer had very good reason to conclude one innocent explanation almost certainly did not exist.

"Reasonable suspicion is 'a low bar[.]'" ***State v. Nimmer***, 2022 WI 47, ¶25, 402 Wis. 2d 416, 975 N.W.2d 598 (alteration in original; citation omitted). "[O]fficers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***State v. Genous***, 2021 WI 50, ¶8, 397 Wis. 2d 293, 299, 961 N.W.2d 41. That, however, is the standard to which Mr. LaFleur argues Deputy Katzenmeyer should be held. He has asked the court to conclude that all possible innocent explanations for driving on the closed road must be conclusively ruled out before an investigatory stop may be undertaken. That is not the law.

Nor was the presence of Mr. LaFleur's vehicle in a closed area the only information that Deputy Katzenmeyer had. That the stretch of road where Mr.

LaFleur was driving was in a rural area is relevant, because in a less populated area, there are fewer places for a person not from the area to visit, particularly at 8:37 p.m. on a Saturday night. (R.18; R.31; R.33: 7-8; A. App. 0001, 0008-0009).

It is further relevant that there are 6 different places spaced across the closed area for people to exit. (R.18; A. App. 0001). Mr. LaFleur suggests that once a person has reason to visit any property on the road, that this gives legitimate reason to use the entire length. Thus, according to Mr. LaFleur, if he was there to visit the church that is on the far western end of the closed area, he would be within his right to travel the entire length of the closed road to get there, even if another route would allow him to avoid all but a small percentage of the closed area. This contention is absurd. Allowing limited use of a closed road to access property on the closed road cannot be interpreted to permit totally unnecessary use of the entire closed section.

Even if that is not the case, however, it is reasonable for Deputy Katzenmeyer to conclude that business owners, customers, employees or church goers are not likely to be traveling the road for these purposes at 8:37 p.m. on a Saturday night. It is also reasonable to conclude that law abiding persons would not drive on a closed road for longer than necessary.

"The reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." ***Kansas v. Glover***, 140 S. Ct. 1183, 1188, 206 L.Ed.2d 412, 420 (2020). Deputy Katzenmeyer had more than enough information to conclude that it was more likely than not that Mr. LaFleur was driving on the closed road

without a legitimate purpose. He could not know for certain until he conducted an investigatory stop and asked where he had come from. Had Deputy Katzenmeyer seen Mr. LaFleur enter the closed area and travel all the way through, he would have been 100% certain a violation occurred, but that is not what the reasonable suspicion standard requires. The trial court's ruling was erroneous.

II. THE TIMELINESS OF THE TOWNS APPEAL HAS BEEN DECIDED.

Mr. LaFleur has again briefed the question of whether the Town's appeal is timely. The court's September 13, 2023 decision denying his motion to dismiss could not have been clearer. "Nothing in LaFleur's motion or the circuit court docket entries establishes that a written notice of entry of a final judgment or order was given in this case." September 13, 2023 Order, p. 2. A written notice of entry of judgment is not merely any written evidence that a party knew the final order had been entered. Rather, it is a separate captioned and signed document that must be filed and served in order to shorten the time for appeal. See ***Soquet v. Soquet***, 117 Wis. 2d 553, 556-58, 345 N.W.2d 401 (1984).

Mr. LaFleur has not filed a motion for reconsideration under Wis. Stats. §(Rule) 809.24. The process does not contemplate merely rearguing a denied motion in a response brief. This portion of his brief should be found frivolous and stricken.

III. THE TOWN, HAVING LOST THE MOTION TO SUPPRESS, HAD NO CHOICE BUT TO VOLUNTARILY DISMISS BECAUSE IT HAD NO EVIDENCE UPON WHICH IT COULD RELY TO PROCEED TO TRIAL.

Mr. LaFleur argues that the Town obtained the relief it sought in its motion to dismiss filed June 21, 2023. This argument is similarly without merit. Virtually all of the evidence the Town needed to meet its burden of proof on the three citations issued to Mr. LaFleur required the Town to rely on evidence that was gleaned after Mr. LaFleur's stop. (R.20; R. App. A-8) No evidence of intoxication existed until after the stop and the court had already ruled Deputy Katzenmeyer lacked reasonable suspicion for the road closure violation. The result of the trial court's granting of Mr. LaFleur's suppression motion was that it lacked evidence to prove its case. (R.20; R. App. A-8) The case, however, had not been dismissed in a final order.

The Order granting Mr. LaFleur's motion was issued May 17, 2023. Over a month later, Mr. LaFleur had not moved for dismissal. The only way for the Town to bring finality to the case and allow it to appeal the trial court's ruling was to have the court enter an order dismissing the case for lack of evidence. The Town's motion was expressly based upon the lack of evidence caused by the court's ruling on the suppression motion and, further, the motion expressly reserved the Town's right to appeal. (R.20; R. App. A-8). Dismissal was not the relief the Town wanted. Rather, it was the result the Town was compelled to accept as a result of the court's adverse ruling.

LaFleur's reliance on ***Cty. of Racine v. Smith***, 122 Wis. 2d 431, 362 N.W.2d 439 (Ct. App. 1984) is misplaced. ***Smith*** is based on case-law that holds "a plea of guilty, knowingly and understandingly made, constitutes a waiver of non-jurisdictional defects and defenses, including claimed violations of constitutional rights." ***Smith***, 122 Wis. 2d at 434 (citations omitted). "The idea underlying the waiver rule is that a guilty plea itself constitutes both an admission that the defendant committed past acts and a consent that a judgment of conviction be entered against him without a trial." ***Smith***, 122 Wis. 2d at 437. These concepts have no application to a local government prosecuting ordinance violations. The Town and its prosecuting attorney, on the other hand, have an affirmative duty to the public and the court not to proceed to trial knowing it can present no evidence to support the charge.

In any event, the waiver rule discussed in ***Smith***, is a rule of judicial administration and its application subject to the court's discretion. ***Cty. of Ozaukee v. Quelle***, 198 Wis. 2d 269, 275, 542 N.W.2d 196, 198 (Ct. App. 1995) (overruled in part on other grounds by ***Washburn County v. Smith*** 2008 WI 23, ¶64, 308 Wis. 2d 65, 94, 746 N.W.2d 243). In ***Quelle*** the court of appeals applied fourt factors in determining the waiver rule should not be applied:

> First, although a jury trial was scheduled, the no contest plea saved administrative costs and time. As we pointed out in Smith, it often improves the administration of justice to avoid an unnecessary and protracted trial when the sole issue is a review of a suppression motion. Second, since the issue raised on appeal was squarely presented before the trial court and testimony was taken regarding the issue, we have an adequate record. Third, this does not appear to

> be a case where the defendant took a chance on a more lenient sentence and then brought this appeal when the sentence was more severe than hoped. All indications are that this was a garden-variety first offender driving while intoxicated case and the penalty assessed was no greater or lesser than usual. Fourth, there are no published cases applying the pertinent language in Bryant.

Quelle, 198 Wis. 2d at 275-76 (citations omitted).

In this case, the first and second reasons for waiver clearly apply in this case. It would have been a complete waste of time to go through a trial when the Town knew it did not any longer have sufficient evidence to win a conviction on any of the charges. Second, all of the facts necessary to decide the issue before the court are in the record.

The third reason is inapplicable here, but it illustrates why the waiver rule Mr. LaFleur asks the court to apply in cases in this case fails to serve the purpose of the rule. The Town received no potential advantage by requesting dismissal (other than posturing the case for an appeal of the suppression motion decision). Instead, it had no other choice.

Finally, while the fourth reason offered in ***Quelle*** also does not apply here, another principle does. Wis. Stats. §967.055 expresses an unambiguous legislative intention "to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant." Two of Mr. LaFleur's citations that were dismissed as a result of the grant of his suppression motion were charges relating to driving under the influence. Under the circumstances of this case, it would run contrary to the public interest to

dismiss this appeal because the Town did what was ethically required of it – move to dismiss charges where it knew it lacked the evidence to prove its case as a result of the suppression motion.

CONCLUSION

For the above and forgoing reasons, the trial court's decision to grant Mr. LaFleur's suppression motion should be reversed and all three citations remanded for further proceedings.

Dated this 8th day of February, 2024.

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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 1,721 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 8th day of February, 2024.

Electronically signed by: */s/ Matthew J. Fleming*
Matthew J. Fleming

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