STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2023AP1796

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ASIF AHMED,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY, BRANCH I, THE HONORABLE GLORIA L. DOYLE PRESIDING, TRIAL COURT CASE NO. 22-TR-2265

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

THE CIRCUMSTANCES SURROUNDING MR. AHMED'S ARREST MUST BE VIEWED AS A "TOTALITY."

While the State correctly asserts in its lead argument that field sobriety tests are not "required" to establish probable cause to arrest an individual for an impaired driving related offense, its assignation of significant weight to the fact that Mr. Ahmed *ostensibly* refused to perform them (because he did not concur with the officer's assertion that the surface upon which he was asked to do them was level) ignores all of the other facts present which constitute the ***totality*** of the circumstances in this matter.

While it is true that a law enforcement officer is not obligated to accept an "innocent explanation" for a person's conduct—such as Mr. Ahmed's contention regarding the slope of the surface of the parking lot on which he was asked to perform tests—it fails to recognize that "evidence" of consciousness of guilt, like so much evidence in general, falls on a spectrum. It cannot be gainsaid that some evidence is "stronger" than other evidence, more telling, or powerful than other evidence, *i.e.*, evidence exists on a *continuum*. For example, it is far more powerful to find a defendant's DNA on a murder weapon than it is to have a third party testify that the accused was overheard yelling at the victim, "I'm gonna kill you." Certainly, both may be considered, but it is uncontestable that the former is more inculpating than the latter. This same notion is true of the *de minimus* weight which should be afforded Mr. Ahmed's alleged "refusal" to perform field sobriety test. *See*, pp. 4-5, *infra*.

The "totality" of the circumstances test, as it has been applied by the State in this case, has devolved into a one-sided examination of facts which constitute only a *part* of the "totality" of the information known to Officer Lozano at the time he arrested Mr. Ahmed. In fact, the State tellingly ignores a plethora of facts adduced at the hearing in this matter which Mr. Ahmed cited in his initial brief. *See* Defendant-Appellant's Initial Brief, at pp. 8-10. This betrays a weakness in the Stat's position. It is the equivalent of looking at only one side of a balance scale to see whether it has moved, rather than noticing that the other side of the scale is also weighted and may be tipped more significantly.

Legal determinations under the "*totality* of the circumstances" test which are premised on an utter disregard for innocent facts that weaken a finding of probable cause—and instead support an alternate conclusion of innocence—is

constitutionally specious and violates the Fourth Amendment's "reasonableness" standard as well as the commonly accepted definition of the word "totality."

At some point, even though it is well settled that "innocent behavior" may support a conclusion that a reasonable suspicion exists to believe a crime is afoot,[1] there must come a moment when a line is impermissibly crossed by utterly ignoring the "innocent" facts which are *counter-indicative* of impairment.

Of particular relevance to the task which this Court must undertake is *United States v. Arvizu*, 534 U.S. 266 (2002), because it happens to come the closest—albeit not in the precise words or circumstances—to recognizing Mr. Ahmed's point about *countervailing* innocent facts which form part of the *totality* of the circumstances.

More specifically, the *Arvizu* Court was reviewing whether the Ninth Circuit correctly applied the totality of the circumstances test when it parsed out the conclusions to be drawn from the innocent behaviors it examined from those which were incriminating. In its analysis, the *Arvizu* Court stated:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing.
>
> * * *
>
> We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. **The court appeared to believe that each observation by [the border patrol agent] that was by itself readily susceptible to an innocent explanation was entitled to "no weight."** ***Terry*****, however, precludes this sort of divide-and-conquer analysis.**

Arvizu, 534 U.S. at 273-74 (citations omitted; emphasis added). While the *Arvizu* Court was admittedly examining the "innocent behavior" of the defendant in the context of how it might *support* a determination of reasonable suspicion, the Court's overall point is clear: "innocent" factors cannot be *excluded* from consideration in the "totality of the circumstances" test.

[1] *See, e.g., United States v. Arvizu,* 534 U.S. 266 (2002).

If this statement is true—that facts which are "innocent" in nature *are* entitled to some "weight"—then there must be some point at which the "inferential pendulum" swings from *supporting* an inference of wrongdoing to *undermining* it, and that is the case here.

If the totality of the circumstances test is employed as intended—when determining whether the individual is objectively manifesting behavior that justifies an arrest—courts should consider everything objectively discernable from the citizen-law enforcement encounter, *i.e.*, the whole picture. In fact, that is precisely how the Supreme Court characterized it: "[T]he totality of the circumstances—**the whole picture**—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981)(emphasis added). "Based upon that **whole picture** the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id*. at 417-18 (emphasis added).

Despite recognizing that the totality of the circumstances test involves an examination of the "whole picture" known to law enforcement officers, the State does not take the facts of Mr. Ahmed's case as a *whole*. Rather, it cherry picks facts which, because they are not proffered in *context*, provide an incomplete picture of what was *known* to Officer Lozano.

Finally, there is one particular bone of contention on which Mr. Ahmed wants to chew with the State. More specifically, the State asserts that "Ahmed does not say he wants to move to City Hall" in support of its argument. State's Response Brief, at p.9. **Mr. Ahmed, however, had no cause to make such a protestation at the time because Officer Lozano never informed him that the destination of where he was being taken had changed.** It is worth restating the *facts* of this case identified in Mr. Ahmed's initial brief here, to wit:

> Officer Lozano informed Mr. Ahmed that he wanted to take him to an alternate location for field sobriety testing. (R15 at 16:7-13);
>
> Mr. Ahmed consented to be removed to the alternate locale. (*Id.*);
>
> Mr. Ahmed was informed that the alternate location was going to be City Hall. (*Id.*);

> **Officer Lozano's intention was to take Mr. Ahmed to City Hall, however, after consulting with his supervisor, Officer Lozano *changed his mind* and instead elected to take Mr. Ahmed to an alternate location**. (R15 at 17:13-25);
>
> Officer Lozano transported Mr. Ahmed to the parking lot at Bluffside Tavern instead of City Hall. (R15 at 19:6-20);
>
> After changing the destination to which Mr. Ahmed was to be taken, **Officer Lozano admitted that he could not recall whether he informed Mr. Ahmed of the change in plans prior to arriving at the Bluffside.** (R15 at 19:21 to 20:1);
>
> Prior to arriving at the Bluffside, there had been no disagreement between Officer Lozano and Mr. Ahmed being willing to perform field sobriety tests. (R15 at 21:11-14);
>
> After arriving at the Bluffside, and informing Officer Lozano that he felt the parking lot on which he was being asked to perform balance and coordination tests was not level, Mr. Ahmed still "repeatedly told [Officer Lozano] that he was willing to do the field sobriety tests." (R15 at 22:14-16);
>
> "At no point from start to finish in this case did [Mr. Ahmed] ever indicate that he was unwilling to do the field sobriety tests." (R15 at 22:17-20); and
>
> Because of what he perceived to be an unlevel surface at Bluffside, Mr. Ahmed said to Officer Lozano, "[O]fficer, if you could just drive me five minutes away [to City Hall], I'll do them [referring to the field sobriety tests]." (R15 at 22:21-23).

Clearly, Mr. Ahmed *did* indicate that he wanted to go to the original location (City Hall) initially identified by Officer Lozano because he *both* said that he was *not* refusing to perform the requested tests, but rather, wanted to be taken "five minutes away" to (impliedly) the original destination, which was City Hall. It does not matter whether City Hall was actually "five minutes away" because—*regardless of its distance*—that is the location to which Mr. Ahmed was informed he was being taken. Thus, it can be concluded that Mr. Ahmed's alleged refusal to perform the tests was a direct function of the confusion *induced by Officer Lozano* himself. If that is not patently unfair—to hold officer induced bewilderment against an accused—what would be?

CONCLUSION

Based upon the foregoing, Mr. Ahmed proffers that the *totality* of the circumstances in this case do not rise to the level of establishing probable cause to

arrest, and therefore, he respectfully requests that this Court reverse the decision of the circuit court denying Mr. Ahmed's motion.

Dated this 6th day of January, 2024.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
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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 1,746 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).

Dated this 6th day of January, 2024.

MELOWSKI & SINGH, LLC

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