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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT IV

State of Wisconsin)

_____)

(party designation) Appellant-Plaintiff)

-vs-)

Joseph Martin Blankenship)

_____)

(party designation) Respondent-Defendant)

**Brief
Cover**

Case No. _____

ON APPEAL FROM THE CIRCUIT COURT FOR Grant COUNTY,
THE HONORABLE (Name of Judge) Craig R. Day, PRESIDING

BRIEF OF Appellant-Plaintiff *

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STATEMENT OF THE ISSUE

Whether the officer had reasonable suspicion of impairment sufficient to request field sobriety tests based on the suspect driving late at night, a report of the suspect being a drunk driver, the suspect stopping without receiving a police signal, suspect's slurred speech, the suspect at one point being deprived of possession of his car keys by the people who presumably reported him, people believing that the suspect was an alcoholic, differing statements made by the suspect regarding the quantity and the timing of his alcohol consumption and the suspect's description of events that at first suggested he was being accused of having hit a child with his car.

Trial Court's answer: No

STATEMENT OF THE CASE

On 9/8/2023, the State of Wisconsin filed a criminal complaint charging Joseph Martin Blankenship with Operating a Motor Vehicle While Under the Influence of an Intoxicant (OMVI)-3rd and Operating a Motor Vehicle With a Prohibited Alcohol Concentration (OMV/PAC)-3rd (R.4). On 2/26/2024, the defendant filed a motion to suppress. (R.15). On 3/6/2024, the Trial Court conducted a motion hearing and granted the motion to suppress. On 4/16/2024, the Trial Court filed a written order granting the motion. (R.22).

The State appeals.

Statement on Oral Argument

Oral argument is not necessary. The parties can adequately address the issues with briefs.

STATEMENT ON PUBLICATION

Publication is not appropriate because the issue in this case does not meet any of the criteria under Section 809.23(1), Wis. Stats., and will be addressed by a single Appellate Judge.

STATEMENT OF THE FACTS

(BASED ON TRANSCRIPT FROM SUPPRESSION HEARING)

On 7/31/2023, Muscoda Police Officer Max Hougan had contact with Joseph Blankenship. (R. 20, pp. 5-6; App. pp.5-6). Dispatch had been notified that there was a potential drunk driver and that the reporter was trying to get the drunk driver's keys. (R. 20, p. 6; App. p.6). The vehicle was described as a blue Ford Escape. (R. 20, p. 6; App. p.6; App. p.6). Officer Hougan saw the vehicle being driven. (R. 20, p. 6; App. p.6). There were no other vehicles on the roadway because it was like 11:00 at night, almost midnight. (R. 20, p. 6; App. p.6). Officer Hougan got behind the vehicle. (R. 20, p. 6; App. p. 6). Officer Hougan did not observe any bad driving. (R. 20, p. 11; App. p. 11). The vehicle pulled over and stopped at 11:39 PM. (R. 20, pp. 6-7; App. pp. 6-7). Officer Hougan had been driving a marked squad, but Officer Hougan did not turn on his emergency lights or his siren. (R. 20, p. 7; App. p.7).

Officer Hougan approached Joseph Blankenship and asked if he was involved in a verbal altercation at the laundromat. (R. 20, p. 8; App. p.8). Joseph Blankenship admitted he was. (R. 20, p. 8; App. p. 8). Officer Hougan noticed that the defendant had slurred speech. (R. 20, p.

8; App. p.8). Officer Hougan asked Joseph Blankenship if he had been drinking and Joseph Blankenship admitted that he had three beers about three hours earlier. (R. 20, p. 8; App. p.8). Officer Hougan did not smell an odor of intoxicants coming from Joseph Blankenship. (R. 20, p. 10; App. p.10). Joseph Blankenship did not have bloodshot or glassy eyes and did not exhibit any difficulty handling his identification documents. (R. 20, p. 11; App. p.11).

(BASED ON VIDEO/AUDIO RECORDING)

- Joseph Blankenship was seated in the driver's seat when Officer Hougan approached the vehicle.
- Joseph Blankenship stated he was just coming around Muscoda and seen how everything was going (R. 18, 00:50).
- Joseph Blankenship informed Officer Hougan that people think they know his story. (R. 18, 01:25).
- Joseph Blankenship was explaining how these other people were saying that he hit a kid and at first made it sound like it happened that night, but then clarified that the accusation was that night, but that the allegation stemmed from an incident that happened approximately three weeks earlier. (R. 18, 1:30-2:00).

- Joseph Blankenship admitted that they had his keys earlier (R. 18, 2:13).
- The recording demonstrates that Joseph Blankenship and Officer Hougan had a mutual understanding as to who the other half of the verbal altercation involved. (R. 18, 2:20).
- Joseph Blankenship indicated that the other people had his keys and threw them on his hood. (R. 18, 3:03).
- When asked why these other people would think he was drunk, Joseph Blankenship indicated that they thought he was an alcoholic. (R. 18, 3:20).
- Joseph Blankenship admitted to drinking and indicated that he had two or three approximately 3-4 hours earlier. (R. 18, 3:25).
- Officer Hougan asked if Joseph Blankenship would step out of the vehicle to perform field sobriety tests. (R. 18, 3:37).
- Prior to the field sobriety testing, Joseph Blankenship stated that he had about three beers four hours earlier. Joseph Blankenship then stated that he had about three beers five hours earlier. Joseph Blankenship then stated that his last beer was about three hours earlier. (R. 18, 4:20-5:02).

- The field sobriety testing then starts. (R. 18, 5:16).

ARGUMENT

Standard of Review

In *State v. Smith*, 2018 WI 2 ¶ 9, 379 Wis. 2d 86, 95-96, the Court stated,

A suppression issue presents a question of constitutional fact. See *State v. Floyd*, 2017 WI 78 ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560. "We review the circuit court's findings of historical fact under the clearly erroneous standard. But the circuit court's application of the historical facts to constitutional principles is a question of law we review independently." *Id.* (internal citations omitted).

Reasonable Suspicion Law

Law enforcement officers may approach citizens and ask questions. In *State v. VanBeek*, 2021 WI 51, ¶¶ 26-28, 397 Wis. 2d 311, 327-328, the Court stated,

Not every police-citizen interaction implicates the Fourth Amendment. See *Terry*, 392 U.S. at 19 n.16; see also *State v. Griffith*, 2000 WI 72, ¶ 39, 263 Wis. 2d 48, 613 N.W.2d 72. Law enforcement officers may approach citizens on the street, put questions to them, and ask for identification without implicating the Fourth Amendment "as long as the police do not convey a message that compliance with their request is required." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); see also *INS v. Delgado*, 466 U.S. 210, 216 (1984) ("[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."). Absent law enforcement conduct that indicates required compliance, these types of interactions are consensual encounters

and generally to not receive Fourth Amendment scrutiny. *Bostick*, 501 U.S. at 434.

However, a police-citizen interaction can rise to the level of a temporary investigative detention, commonly referred to as a *Terry* stop. *Terry*, 392 U.S. at 30. To pass Fourth Amendment scrutiny, *Terry* stops must be supported by reasonable suspicion. *Id.*; see *Wis. Stat. §968.24* (codifying the standard for *Terry* stops).

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. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996) (citing *State v. Chambers*, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972)).

In State v. Rose, 2018 WI App. 5, ¶¶ 14-16, 379 Wis.2d

664, 672-672, the Court stated,

A law enforcement officer may detain an individual for investigative purposes if reasonable suspicion or probable cause of criminal activity exists. See *State v. Young*, 2006 WI 98, ¶¶ 20-21, 294 Wis. 2d 1, 717 N.W.2d 729. Reasonable suspicion exists if, under the totality of the circumstances, "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *State v. Post* 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonable suspicion must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Id.*, ¶10 (citation omitted). An officer "'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." See *id* (citation omitted); see also *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Additionally, our Supreme Court explained:

[S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

Young, 294 Wis. 2d 1, ¶ 21 (quoting *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)) (alterations in *Young*).

...

As *Rose* points out, a temporary investigative seizure based on reasonable suspicion may last only for the amount of time "reasonably required to complete [the stop's] mission"—"a traffic stop 'prolonged beyond' that point is 'unlawful.'" See *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015) (citation omitted).

In *State v. Waldner*, 206 Wis. 2d 51, 55-56 (1996), the Court stated,

The fundamental focus of the Fourth Amendment, and Wis. Stat. §968.24, is reasonableness. *State v. Anderson*, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990). The court of appeals accurately stated the test to be used for determining whether an investigatory stop was reasonable:

The test is an objective one, focusing on the reasonableness of the officer's intrusion into the defendant's freedom of movement: "law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those

facts, that the individual has committed [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or "hunch"...will not suffice.'"

In *State v. Nimmer*, 2022 WI 47, ¶¶ 24, 25, 402 Wis. 2d 416, 429-430, the Court stated,

Reasonable suspicion depends on the "totality of the circumstances." *Genous*, 397 Wis. 2d 293, ¶ 9 (citing *State v. Post*, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 733 N.W.2d 634). Just last term, we emphasized that "[w]e focused not on isolated, independent facts, but on 'the whole picture' viewed together." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). "Indeed, *Terry* itself involved a series of acts, each of them perhaps innocent if viewed separately, but which taken together warranted further investigation." *Id.* (quoting *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989)). In this case, the Court of Appeals erred by utilizing a "divide-and-conquer analysis." See *District of Columbia v. Wesby*, 583 U.S. 18, 138 S. Ct. 577, 588 (2018) (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

Reasonable suspicion is "a low bar[.]" *Genous*, 397 Wis. 2d 293, ¶ 8 (citing *Young*, 294 Wis. 2d 1, ¶ 21; *State v. Eason*, 2001 WI 98, ¶ 19, 245 Wis. 2d 206, 629 N.W.2d 625); see also *Anderson I*, 389 Wis. 2d 106, ¶ 33 ("reasonable suspicion is a fairly low standard to meet." (citing *Eason*, 245 Wis. 2d 206, ¶ 19)). "Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause[.]" *Navarette v. California*, 572 U.S. 393, 397 (2014) (internal citations and quotations marks removed). "[O]fficers are not required to rule out the possibility of innocent behavior before initiating a [*Terry*] stop." *Genous*, 397 Wis. 2d 293, ¶ 8 (quoting *State v. Anderson*

(*Anderson II*), 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)).

In *State v. Blatterman*, 2015 WI 46, ¶ 35, 362 Wis. 2d 138, 164-165, the Court stated, "The probable cause requirement 'deals with probabilities' and must be sufficient 'to lead a reasonable officer to believe that guilt is more than a possibility.'" "

State's Reasoning

For an arrest, a law enforcement officer needs probable cause. Probable cause entails sufficient facts from which a reasonable officer could conclude that a suspect is committing a crime. Probable cause does not mean more probable than not. As *Blatterman* points out, probable cause means sufficient facts and inferences that would lead a reasonable officer to conclude that guilt is *more than a mere possibility*. (emphasis added).

Reasonable suspicion is a body of facts and inferences that is less than probable cause and therefore, is less than the standard of *more than a mere possibility*. Logically speaking, reasonable suspicion could be viewed as evidence that would be less than a mere possibility of guilt or at most a mere possibility of guilt.

Based on *Nimmer*, the Reasonable Suspicion standard is a low bar and is a fairly low standard to meet.

Officer Hougan was not acting on a hunch or on inarticulable facts. Articulable facts in this case included:

- Officer Hougan receiving a report of a drunk driver driving a blue Ford Escape.
- Officer Hougan saw the blue Ford Escape.
- There was virtually no other traffic on the road.
- Mr. Blankenship pulled over and stopped without having received a signal from Officer Hougan.
- Mr. Blankenship's speech was slurred.
- Mr. Blankenship stating that people believed he was an alcoholic.
- Mr. Blankenship at one point being deprived of possession of his car keys (presumably by the people who believed he was an alcoholic and probably reported him as driving drunk).
- Mr. Blankenship's description of events that at first suggested that he was being accused of having hit a child with his car that night.
- Differing statements made by Mr. Blankenship regarding the quantity and the timing of his alcohol consumption.

All of the above factors and reasonable inferences that can be drawn from those facts should be sufficient to cause a Reasonable Officer to suspect that it was at least possible that Mr. Blankenship's ability to drive was impaired because of his consumption of alcohol. Given those facts and reasonable inferences that can be drawn from those facts, a Reasonable Officer should be allowed to request that the driver perform field sobriety testing before he is allowed to continue on his way.

CONCLUSION

Because of the low bar of the reasonable suspicion necessary to request field sobriety testing and because of the following facts:

- Officer Hougan receiving a report of a drunk driver driving a blue Ford Escape.
- Officer Hougan saw the blue Ford Escape.
- There was virtually no other traffic on the road.
- Mr. Blankenship pulled over and stopped without having received a signal from Officer Hougan.
- Mr. Blankenship's speech was slurred.
- Mr. Blankenship stating that people believed he was an alcoholic.

- Mr. Blankenship at one point being deprived of possession of his car keys (presumably by the people who believed he was an alcoholic and probably reported him as driving drunk).
- Mr. Blankenship's description of events that at first suggested that he was being accused of having hit a child with his car that night.
- Differing statements made by Mr. Blankenship regarding the quantity and the timing of his alcohol consumption.

The State feels that a reasonable officer should be allowed to request field sobriety testing.

The State respectfully requests that the Court of Appeals overturn the Trial Court's decision to suppress the evidence in this case.

Dated this 22nd day of May, 2024.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anthony J. Pozorski Sr.", is written over the typed name.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 18 pages.

Dated this 22nd day of May, 2024.

A handwritten signature in black ink, reading "Anthony J. Pozorski Sr.", written over a horizontal line.

Anthony J. Pozorski Sr.
Assistant District Attorney
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APPENDIX INDEX

1. Motion Hearing Transcript.....App. pp. 1-29

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of 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 trial 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 first names and last initials 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 22nd day of May, 2024.

Signed:

A handwritten signature in black ink, appearing to read "Anthony J. Pozorski Sr.", written over a horizontal line.

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**CERTIFICATE OF COMPLIANCE
WITH WIS STAT. § (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 Wis. Stat. § (Rule) 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 this 22nd day of May, 2024.


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