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STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I

Appeal Case No. 2024AP001135-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

BILLY RAY EDWARD JOHNSON,

Defendant-Respondent.

APPEAL FROM THE ORDER OF DISMISSAL ENTERED
BY BRANCH 31, MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE HANNAH DUGAN,
PRESIDING.

BRIEF OF PLAINTIFF-APPELLANT

John Chisholm
District Attorney
Milwaukee County

Arthur K. Thexton
Assistant District Attorney
State Bar No. 1016702
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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COURT OF APPEALS
DISTRICT I

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ISSUE PRESENTED

After conducting a 3rd offense drunk driving investigation of Billy Ray Edward Johnson which included 39 minutes of “bodycam” video and audio footage, City of Milwaukee Police Officer Swieciak died before the commencement of trial. Fortunately, Milwaukee Police Officer Balistreri arrived six minutes following the initial stop and testified as to the authenticity of Officer Swieciak’s bodycam video and audio footage in that the bodycam footage accurately depicted the scene and events leading up to the arrest of Mr.

Johnson. At hearing, the State further presented a sworn affidavit from Milwaukee Police Officer Vavera from the fusion technology unit of the Milwaukee Police Department who verified that the video and audio footage from Officer Swieciak's bodycam was unaltered and free from tamper.

Was the testimony of an officer who did not record 39 minutes of bodycam footage but was present for and could identify the final 33 minutes of the bodycam footage as an accurate depiction of the scene and investigation—together with the sworn statement of an officer who verified that the 39 minutes of bodycam footage was neither compromised, altered, nor tampered with—enough to authenticate the entire recording under Wis. Stat. § 909.01?

The trial court answered: No.

The State urges this Court to answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. § (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Billy Ray Edward Johnson was driving his motor vehicle at 4:52 PM on October 6, 2020, when he was stopped for speeding 53 miles per hour in a 35 mile per hour zone by City of Milwaukee Police Officer Swieciak. Officer Swieciak was driving a Milwaukee Police Department motorcycle at the time when he pulled over Mr. Johnson. Officer Swieciak was wearing his MPD-issued police uniform and was equipped with a camera on his person which is referred to colloquially as a "bodycam." Officer Swieciak's investigation ultimately resulted in the arrest of Mr. Johnson for a third offense drunk driving. The State charged Mr. Johnson with Operating While

Intoxicated-3rd offense in Milwaukee County Circuit Court case number 2022CT000980.

During the pendency of the court case, Milwaukee Police Officer Swieciak died. On April 5, 2024, the trial court heard arguments pertaining to the defense's motion to prevent the introduction of Officer Swieciak's bodycam video and audio footage. The State indicated that fellow Milwaukee Police Officer Balistreri arrived on scene six minutes after Officer Swieciak's stop of Mr. Johnson. For that reason, Officer Balistreri could provide testimony at trial as to the accurate depiction of the final 33 minutes of Officer Swieciak's bodycam footage. However, the trial court would need to admit all 39 minutes of the bodycam footage, since the State would need to prove that Mr. Johnson had been driving, which the first six minutes of the bodycam footage would prove.

For that reason, the State presented a sworn affidavit of Milwaukee Police Officer Vavera who is knowledgeable as to technology because he works in the Milwaukee Police Department's fusion unit. Officer Vavera described the operation of a bodycam (R. 17, App. 24):

The process of recording on a body-worn camera is initiated by the recording officer, whose only options are to turn the device on and off. The recording officer never has the opportunity to edit or alter a recording, once made. At the end of the duty period or incident, the device is connected to the Department's interface and the entire recording is downloaded as a single file. Once downloaded, the recording officer has only read-only access, meaning that s/he can view it, but cannot edit it in any manner. When the recording is needed, such as for evidentiary purposes or to respond to a public records request, a copy is made from the original. In some cases, the copy is redacted to limit some of the recording by the Public Records Unit of the Department, but the original is never altered.

After downloading, the file is maintained on the Department's contracted provider's system, which is Axon, a company devoted to providing services like this to law enforcement agencies. Axon has protocols and "firewalls" which limit access to the server and assure that the file cannot be "hacked" or otherwise altered in any way, by either deletion or addition. In my 5 years of working in this function at the Department, I am not aware

of any breach of security of our video files held by Axon, or of any incident of alteration of an original recording in Axon's custody.

(R. 17, App. 24).

As mentioned, Milwaukee Police Officer Balistreri arrived approximately 6 minutes after Mr. Johnson was pulled over by fellow Officer Swieciak. For that reason, Officer Balistreri witnessed the events thereafter, and recorded them on his own bodycam. However, the only depiction of Mr. Johnson actually operating his car on the street was contained on Officer Swieciak's bodycam.

Following Field Sobriety tests and the administration of a preliminary breath test (PBT), Officer Swieciak arrested Mr. Johnson for operating a motor vehicle under the influence of an intoxicant. A subsequent sample of Mr. Johnson's blood was drawn at 6:22 PM on that same day which resulted in a blood alcohol concentration of 0.211% BAC by weight.

Unfortunately, Officer Swieciak subsequently died of unrelated medical causes. Without the admission of Officer Swieciak's bodycam into evidence at trial, the State would have no other admissible evidence to show that Mr. Johnson operated his car on a public highway. Although Officer Balistreri could testify as to the accuracy of the depiction of the bodycam footage during the final 33 minutes of Officer Swieciak's bodycam, Officer Balistreri did not observe Mr. Johnson driving his motor vehicle. Mr. Johnson was no longer in his car when Officer Balistreri arrived on scene, and Mr. Johnson did not otherwise indicate his operation of his motor vehicle on a public road in the presence of Officer Balistreri.

The State provided notice of its intention to introduce Officer Swieciak's bodycam video (R. 15, App. 30) at trial. Mr. Johnson objected and moved to suppress the introduction of Officer Swieciak's bodycam evidence (R. 16, App. 27). The parties submitted briefs (R. 16 App. 27 and R. 18 App. 22). The circuit court conducted a hearing on April 5, 2024, whereupon the parties were granted an opportunity to supplement their written briefs with oral argument. The State presented the sworn affidavit that Officer Vavera of the police department's technical unit averred that the bodycam recording

was a single electronic file, unaltered since its creation and download into the police department's computerized system. Nonetheless, the circuit court denied the State's request to admit that portion of the bodycam footage depicting events prior to the arrival of Officer Balistreri, holding that the bodycam footage could not be authenticated. The circuit court granted Mr. Johnson's motion to suppress the first six minutes of the bodycam video and audio footage (R. 20:12-14, App. 16-18). A written decision and order of dismissal was filed on June 12, 2024 (R. 23, App. 1). This appeal follows.

STANDARD OF REVIEW

The decision to admit or exclude evidence rests within the circuit court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. This Court may overturn a decision to admit or exclude evidence only when the circuit court has erroneously exercised its discretion. *State v. Giacomantonio*, 2016 WI App 62, ¶ 17, 371 Wis. 2d 452, 885 N.W.2d 394. This Court will not find an erroneous exercise of discretion if the record contains a reasonable basis for the circuit court's ruling. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629.

“The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Wis. Stat. § 909.01. Wisconsin Statute § 909.015 lists multiple methods for authenticating or identifying evidence. Wis. Stat. § 909.015(1–10). Its introductory clause states that these methods “are examples of authentication or identification conforming with the requirements of s. 909.01” “[b]y way of illustration only, and not by way of limitation.” Wis. Stat. § 909.015(intro.). See 7 Daniel D. Blinka, *Wisconsin Practice: Wisconsin Evidence* § 9015.0, at 1025 (4th ed. 2019) (“The rule's illustrations are not intended to exhaust the possible ways of authenticating or identifying this evidence.”).

“One way to lay a foundation is through the ‘[t]estimony of a witness with knowledge that a matter is what it is claimed to be.’” *Giacomantonio*, 371 Wis. 2d 452, ¶ 20 (quoting Wis. Stat. § 909.015(1)). Alternatively, Wis. Stat. § 909.015(4)

permits evidence to be authenticated through its “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” *Giacomantonio*, 371 Wis. 2d 452, ¶ 20. A party may authenticate evidence through circumstantial evidence. *Id.* ¶ 21.

Ultimately, “[a]uthentication is a ‘low standard,’ requiring only sufficient evidence that a reasonable factfinder could find the matter is what it is claimed to be; risks of fabrication or alteration run to the weight of the evidence, not admissibility.” *Blinka*, § 9015.4, at 1035.

ARGUMENT

I. The evidence presented by the State was sufficient to meet the low standard required for authentication.

There can be little doubt that in this case, the video footage is what the State claims it to be: the video recording of Officer Swieciak observing and stopping Johnson’s car, and the ensuing events leading to Johnson’s arrest (including the Field Sobriety Test sequence). To date, no serious factual challenge of this nature has been raised by the defense.

Nevertheless, the circuit court opined that each and every instant of the recording must be authenticated by a person who was present for the recording. A ruling of this kind, in effect, naturally would elevate Wis. Stat. § 909.015(1) [testimony of witness with knowledge] as the single most significant factor to serve as the basis for a finding of authenticity, instead of one of many. The State’s position is that this is not, nor should be, the law related to an evidentiary basis for a finding of authenticity.

In the argument portion of the court hearing, the defense objections were hyper-technical and directed largely at distracting the court from the central issue, that being, whether the bodycam footage of Mr. Johnson is what the State purports it to be: Video footage of Mr. Johnson at the time, day, and place in question.

No evidence suggests otherwise.

How do we know this? First, no contrary evidence was presented pertaining to the fact that the recording of Officer Swieciak's bodycam footage contained one single, unedited unit, as the sworn affidavit of MPD Officer Vavera explained:

The process of recording on a body-worn camera is initiated by the recording officer, whose only options are to turn the device on and off. The recording officer never has the opportunity to edit or alter a recording, once made. At the end of the duty period or incident, the device is connected to the Department's interface and the entire recording is downloaded as a single file.

After downloading, the file is maintained on the Department's contracted provider's system, which is Axon, a company devoted to providing services like this to law enforcement agencies. Axon has protocols and "firewalls" which limit access to the server and assure that the file cannot be "hacked" or otherwise altered in any way, by either deletion or addition. In my 5 years of working in this function at the Department, I am not aware of any breach of security of our video files held by Axon, or of any incident of alteration of an original recording in Axon's custody.

I have personally reviewed the 39:15 recording made by the body worn camera of the late Officer Mark Swiecek saved as:

TRAFFIC_STOP_CAD_202801823_IR202800127_SWIECIAK_JR_MARK_J-2.mp4. I watched the video and looked at the audit trail for that video as well. Nothing that I saw would make me believe that the video was altered in any way. In fact, looking at the audit trail, that video was only accessed by 3 people since it was uploaded. It was accessed by Sgt. Weber who created the case that was sent to the DA's office. Then by my boss, Lt. Cleveland, who added a category saying what type of assignment the officer that made the video was on, in this case FI stop/Traffic stop. And finally, by me to view the audit trail and watch the video on March 18, 2024.

(R. 17, App. 24).

No evidence of tampering or alteration of the bodycam footage was presented to the court or even reasonably suggested. Simply put, the bodycam footage depicted one continuous, uninterrupted, unaltered sequence of events.

Secondly, this Court can rest assured that overturning the circuit court's decision is proper because a second set of bodycam footage exists due to the arrival of Milwaukee Police Officer Balistreri after merely six minutes. That second set of bodycam footage matches the final 33 minutes of Officer Swieciak's bodycam footage. Because Officer Balistreri arrived on scene within only a handful of minutes after Officer Swieciak's recording began—and then, Officer Balistreri remained at the scene for the rest of the next 33 minutes of Officer Swieciak's bodycam footage—an additional accurate depiction of the investigation fortifies the State's position. Officer Balistreri's bodycam footage shows the exact same thing as Officer Swieciak's bodycam footage, albeit from a slightly different angle, for the entire period of time that both officers were present.

If the final 33 minutes of Officer Swieciak's bodycam footage are authentic (a conclusion apparent from the existence of two bodycam footages of two separate officers containing the exact same details), what possible reason can exist as a basis for the conclusion that the first six minutes are somehow not authentic, especially in the absence of any indication or evidence to the contrary?

The bodycam footage recording meets the requirements of the authentication statute in at least four ways:

1. Wisconsin Stat. § 909.015(1). The anticipated testimony of Officer Balistreri, who was on-scene for 33 of the 39 minutes, as described in the illustration in Wis. Stat. § 909.015(1);
2. Wisconsin Stat. § 909.015(4). The recording itself, which bears the distinctive characteristics of appearance, content, substance, and internal patterns which, taken in conjunction with the circumstances and lack of evidence of tamper or alteration, as described in the illustration in Wis. Stat. § 909.015(4);
3. Wisconsin Stat. § 909.015(9). The evidence described in the affidavit of Officer Vavera, which describes the process used to produce the recording, and showing that the process produces an accurate (i.e. unaltered) result,

as described in the illustration of Wis. Stat. § 909.015(9); and

4. Wisconsin Stat. § 909.015(7). The recording is a data compilation from a public office, as described in the illustration of Wis. Stat. § 909.015(7). (This particular subsection was not argued by the parties or considered by the trial court during the hearing on April 5, 2024.)

A jury should be permitted to see and hear Officer Swieciak's bodycam footage recording. It is an accurate depiction of what occurred during the stop of Mr. Johnson and the officers' ensuing OWI investigation. No factual finding at the hearing diminished or undermined the reliability or accuracy of the six minutes of bodycam footage at issue in this case. At trial, Officer Swieciak will be absent. Indisputably, the jury will be afforded the opportunity to assess the weight to be given to his bodycam footage evidence,¹ but there is no basis to deny its admissibility given the variety of different statutory pathways that exist to support a finding of authentication. The low standard of authentication has been met in this case.

CONCLUSION

For the reasons herein, the State respectfully asks this Court to reverse the circuit court's decision to suppress a portion of Officer Swieciak's bodycam footage as insufficiently authenticated, and thereafter dismiss the case. The State then asks for the case to be remanded with directions to find that the entire video recorded by Officer Swieciak's bodycam is what it purports to be, and therefore meets the requirements of Wis. Stat. § 909.01 for authentication.

Dated this 3rd day of September 2024.

Respectfully submitted,

JOHN CHISHOLM

¹ Certainly, at trial, the defense would be free to attempt to discredit the State's evidence or argue the issue of credibility and weight to be afforded any evidence offered by the State in its case-in-chief.

District Attorney
Milwaukee County

Electronically signed by:
Arthur K. Thexton
ARTHUR K. THEXTON
Assistant District Attorney
State Bar No. 1016702

P.O. Address:

Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3084.

Dated this 3rd day of September 2024.

Electronically signed by:

Arthur K. Thexton
ARTHUR K. THEXTON
Assistant District Attorney
State Bar No. 1016702

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 3rd day of September 2024.

Electronically signed by:

Arthur K. Thexton
ARTHUR K. THEXTON
Assistant District Attorney
State Bar No. 1016702