STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2024AP2559

CITY OF WEST BEND,

Plaintiff-Respondent,

-vs-

LOGAN PATRICK LANG,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN
THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH I,
THE HONORABLE RYAN HETZEL PRESIDING,
TRIAL COURT CASE NO. 23-TR-744

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE FACTS UPON WHICH THE CITY JUSTIFIES THE ENLARGEMENT OF THE SCOPE OF MR. LANG'S DETENTION ARE THIN AT BEST.

In its response brief, the City premises its argument that the officer in this matter had sufficient justification for expanding the scope of Mr. Lang's detention upon four facts it gleaned from the record, namely: (1) Mr. Lang drove without his headlamps lit; (2) he seemingly had difficulty responding to questions; (3) a "slight odor" of intoxicants was emanating from his "vehicle"; and (4) he denied consuming any alcoholic beverages. City's Response Brief, at pp. 6-9 [hereinafter "CRB"]. The City, however, fails to recognize two salient points regarding this matter. First, it treats each of the facts upon which it relies as though they are of equal weight in the reasonable suspicion calculus. Second, the City utterly ignores the *totality* of the circumstances known to the officer at the time he elected to expand the scope of Mr. Lang's detention. Each of these shortcomings will be examined in more detail below.

Regarding the City's description of the facts, it describes them in a manner which betrays its belief that each one should be given the same inculpating weight, as though Mr. Lang's circumstances presented some arithmetical calculation where one simply "adds up the numbers." This is not how judicial scrutiny operates, *i.e.*, as a rule, objective facts should be given more weight than subjective ones, and even among each of these groups, not all facts weigh the same. As Mr. Lang pointed out in his initial brief:

> What [Mr. Lang] *is* proffering, however, is that evidence exists on a *spectrum*. Some evidence is stronger, more telling, or powerful than other evidence. 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.

Defendant-Appellant's Initial Brief, at p.6 (emphasis in original).

Applying the notion described above to the circumstances of Mr. Lang's case is revelatory. For example, as Mr. Lang identified in his initial brief, it does not matter how a reviewing court **characterizes** a driver's headlamps as being unlit—whether due to an equipment violation or simply being "off"—because in each instance, the driver (at least theoretically) should be aware that the road before them is not fully lighted. Thus, in *State v. Gonzalez*, No. 2013AP2535-CR, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. May 8, 2014)(unpublished), the court could easily have construed Ms. Gonzalez's "equipment violation" as evidence of her being a "driver unaware," yet it did not. Make no mistake, Mr. Lang is not proposing that unlit headlamps are a fact to be ignored, but on the spectrum he described in his initial brief and restated above, this fact does not hold as much water as a circumstance in which half-full bottles of beer being found in a vehicle would carry. The City's argument that "Lang's apparent oblivion to driving after 11:15 p.m. without any lights on at all would lead a reasonable officer to question whether Lang was able to think clearly, appropriately observe the state of his vehicle, or appropriately observe that there was nothing illuminating the road—and, from that, reasonably infer that Lang was impaired" could just as easily be said of Ms. Gonzalez's driving, **but it was not**. CRB at pp. 6-7.

Regarding Mr. Lang's ostensible "difficulty" in responding to questions about from where he was coming, this carries the least weight of any fact the City has placed before this Court. CRB at pp. 7-8. More specifically, encounters between citizens and law enforcement officers present stressful circumstances for the citizen. No individual enjoys being detained on a public roadway, and during these unhappy contacts, there is nothing unusual about the detained individual being "nervous," and in so being, perhaps exhibiting delayed responses to questions. In fact, "nervousness" was the very fact the State put before the court in *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), as evidence of Betow's guilt, yet the court of appeals wholly undercut the value of this observation when it commented "**that a suspect may be nervous simply because he has been stopped by the police**." *Id*. at 96 (internal quotations omitted; emphasis added). If this is the case, then Mr. Lang's "delayed responses" are indicative of next to nothing when one considers ***all*** the evidence which demonstrates he was *not* "baffled." CRB at p.7. For example, Mr. Lang explained that he had pulled over to use his phone to text and Officer Gall admitted that he "had no reason not to" believe Mr. Lang (R27 at 25:20-25), and further conceded that Mr. Lang was doing "the smart thing" (R27 at 26:12-17); upon exiting the lot in which he had been parked, Mr. Lang

appropriately signaled his turn (R27 at 27:6-8); when Mr. Lang pulled over in response to the officer's lights, there was nothing unusual about the manner in which he parked (R27 at 31:12-21); and Mr. Lang already had his driver's license out and ready to give to Officer Gall when the officer approached his vehicle (R27 at 31:22-25). These are clearly *not* the actions of a baffled or confused person. Thus, it is far more likely that Mr. Lang's "delayed responses" are due to the nervousness he was experiencing—and which the *Betow* court acknowledged any citizen might experience—than they are due to impairment by alcohol.

As for the City's reliance on the "slight" odor of an intoxicant emanating from the Lang *vehicle* as an inculpating factor, this fact too is of little moment on the reasonable suspicion continuum. CRB at p.8. In its rebuttal, the City completely misses the mark with respect to the litany of cases upon which Mr. Lang relied regarding the value of such observations. First, contrary to the City's blatant mischaracterization of two of the cases Mr. Lang cited, they did *not* involve a circumstance in which "the odor of intoxicants was apparently the sole factor in an officer's reasonable suspicion analysis." CRB at p.8 (emphasis in original). For example, in *Gonzalez*, the court did not find a reasonable suspicion existed to enlarge the scope of Gonzalez's detention by relying upon the odor of an intoxicant emanating from her person, **and** Ms. Gonzales' headlamp being unlit, **along with** her having told the officer "an untruth." *Gonzalez*, 2014 WI App 71, ¶ 7. Similarly, in *County of Sauk v. Leon*, No. 2010AP1593, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (Ct. App. Nov. 24, 2010)(unpublished), the defendant's **vehicle had been parked "in a lane of traffic,"** the defendant **was engaged in "some type of disturbance,"** the defendant's **companion appeared "intoxicated,"** the defendant stated that he **had been coming from "Marley's"** (an establishment which presumably sold intoxicating beverages), and the defendant **admitted to drinking "one beer"** earlier in the evening. *Id.* ¶¶ 3-9 (emphasis added). Clearly, *neither* of these cases involved an odor of intoxicants as being the "sole" reason for the respective defendant's detentions. The City's assertion to the contrary actively misleads this Court, and therefore, should be disregarded without the slightest apology.

Next, the City's position that Mr. Lang's denial that he consumed any intoxicants is somehow inculpating is beyond credulity. CRB at pp. 8-9. First, as the City concedes, Officer Gall testified that he smelled only a "faint" odor of intoxicants. *Id.* More importantly, however, Officer Gall admitted that this odor

could not even be connected to Mr. Lang's person, but rather, was emanating from his *vehicle.* R27 at 34:6-15. Regarding this distinction, Mr. Lang proffers that the degree of attenuation from the "unquestionably inculpatory" end of the spectrum he discussed above is vast. When a law enforcement officer cannot even connect an ostensibly inculpating observation to the person who is suspected of being involved in some wrongdoing, its value is less than *de minimus*. While it is true that a law enforcement officer need not accept "innocent explanations" for supposedly incriminating inferences, it must also be true that inferences which cannot be directly connected to a suspect are of a lesser value than those which can be directly connected to the individual. Because the *faint* odor was emanating from the Lang *vehicle* rather than from Mr. Lang *himself*, there are a dozen non-inculpating explanations which could have given rise to the odor. Mr. Lang could have been acting as a designated driver and persons who were intoxicated could have been in his vehicle earlier in the evening. Mr. Lang could have broken a bottle of beer in his vehicle at one time which, upon soaking into the carpeting, would have left an odor. The odor of an intoxicant is not so unusual that other substances, such as the fruity smell of acetone, could not have caused it (if Mr. Lang was a painter, this is a substance he might have transported in his vehicle). The list could go on, but the point is already made: An odor without a nexus to the suspect individual is not as inculpating as one which *can be connected* to the person.

The City's contention that "[t]he *combination* of all the . . . facts would lead a reasonable officer to suspect Lang . . ." notwithstanding, the second problem with the City's position is that it fails to account for *all of the facts known* to Officer Gall at the time he made his election to expand the scope of Mr. Lang's detention. CRB at p.9 (emphasis in original). The City's accounting of the facts known to Officer Gall falls far short of a true representation of "the combination" of facts because it wholly ignores those facts which are counter-indicative of impairment. It is only by considering *all* of these facts that a true *totality* of the circumstances can be assessed.

For example, these facts were described in Mr. Lang's initial brief but bear repeating here: Mr. Lang had his driver's license ready to give the officer upon his approach, indicating a situational *awareness*; Officer Gall stated that Mr. Lang had done "the smart thing" by pulling over to text; **the lower court did not find Officer Gall credible** on the issue of Mr. Lang's speech being "slurred"; the officer never asserted that Mr. Lang had bloodshot eyes; there is no allegation that Mr. Lang had any difficulty with his fine motor skills; finally, the "other" parts of Mr. Lang's

driving behavior demonstrate that he was exercising the clear judgment and steady hand necessary to safely operate the vehicle by turning into the appropriate lane of travel, not speeding, not operating in an erratic manner, and properly signaling his exit from the parking lot.

Even if Mr. Lang were to concede that the circumstances of his case present a "close call" regarding whether the expansion of the scope of his detention was constitutional—a point which he does *not* concede—the underlying tenets of the Fourth Amendment must be "liberally construed in favor of the individual," which, from a practical standpoint, means that the scale should still tip in his favor. *Sgro v. United States*, 287 U.S. 206, 210 (1932). In recognizing "the duty of vigilance" this Court "owes" to the Fourth Amendment's "effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted," the principles undergirding the Fourth Amendment will be preserved. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Far too often, these precepts are overlooked, misapplied, or even given short shrift. To preserve the integrity of these guiding principles, this Court's judgment should be that the court below erred in denying Mr. Lang's motion "lest there . . . be impairment [not just of Mr. Lang's] rights," but of those individuals who later find themselves similarly situated when confronted by law enforcement officers who will continue to push the envelope of constitutional reasonableness.

CONCLUSION

Because the totality of the circumstances in the instant matter do not rise to the level of objectively establishing that sufficient grounds existed to enlarge the scope of Mr. Lang's initial detention, he respectfully requests that the Court reverse the decision of the circuit court.

Dated this 21st day of April, 2025.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
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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 2,252 words.

I also 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 21st day of April, 2025.

MELOWSKI & SINGH, LLC

Electronically signed by:
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