15AP0901

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

APPEAL # 15AP901 CR
Case No. 13-CT-1249

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

PAUL R. VANDERLINDEN,
Defendant-Appellant.

APPEAL FROM A FINAL ORDER, DENYING A REQUEST FOR SUPPRESSION OF EVIDENCE, ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MITCHEL METROPULOS, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was the Court correct in denying the Defense Motion to Suppress when the officer lacked reasonable suspicion that a crime was committed and the judge effectively applied a hindsight argument, where there could be no reasonable inference, to justify the initial stop by the police allowing the police to use the asserted justification that a legal air freshener was adequate justification to stop, detain, and compel the Defendant to participate in further inquiry.

The Circuit Court denied the Defendant's Motion and allowed the spurious evidence to be admitted.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary, as the appeal can be resolved upon the parties' briefs. Publication is not necessary in this case, unless the court determines otherwise.

STATEMENT OF THE CASE

This is an appeal from an Orders Denying Motions on De Novo Review Hearing entered in the Circuit Court for Outagamie County on August 15, 2014 (R 37), December 22, 2014 (R 38) and February 20, 2015 (R 39), the Honorable Mitchell J. Metropulos presiding, in which the Court determined that it found that because there was no new evidence it would not consider the Defendant's Motions to Suppress the evidence against the Defendant because of an unlawful stop and the evidence that was acquired thereafter as Fruit of the Poisonous Tree. The Defendant assets that the officer lacked any Reasonable Suspicion, which was required to effectuate the initial stop, and therefore all subsequent actions by the police were violative of the Defendant's Rights. The Court concluded that, in hindsight, the officer was justified.

The Court concluded that the officer was justified in the stop, from this the Defendant appeals.

SUMMARY OF THE FACTS

Paul R. VanderLinden was arrested for Operating While Intoxicated (OWI) on October 9, 2013. The arresting officer had heard a report come over his radio that a vehicle matching the Defendant's was being operated by a possibly intoxicated person. (R3, 1) The Defendant was subsequently

stopped and as a result of that stop was charged with Operating a Motor Vehicle While Intoxicated, 2nd Offense. (R3,3).

Mr. VanderLinden's original attorney, Jeffrey T. Oswald, Esq., filed a Notice of Motion to Dismiss/Unlawful Arrest on July 11, 2014 (R 8), a Motion to Suppress Results of Test (R 10), and a Motion, Motion to Dismiss the Fruits of Illegal Arrest (R 9), and a Motion to Suppress (R 11). A Stipulation (R 12-1) and Order to Substitute Attorney (R 12-2) was filed with the Court and Atty. Eric Pitsch filed a Notice of Retainer (R 13) and a Motion for New Dates (R 14), all of this on September 24, 2014, at which time the Court granted the continuance (R 15). On November 6, 2014 Atty. Pitsch filed a Motion to Suppress/Unlawful Detention and Arrest (R 17) and on January 21, 2015 Atty. Pitsch filed a Motion for new dates (R 18). The Court subsequently denied the various Motions to Suppress and Dismiss at which time Atty. Pitsch filed a Motion for Reconsideration (R 19) and an Affidavit in Support of the Motion for Reconsideration (R 20).

At various Motion Hearings held on August 15, 2014 (R 37), December 22, 2014 (R 38), and February 20, 2015 (R 39) the Court heard arguments from the parties regarding the Suppression and Dismissal issues raised by the Defendant. The Court below, unilaterally, denied VanderLinden's Motions and the Court, in many instances, used the lens of hindsight to justify the actions of the police that are the subject matter of the various Motions to Dismiss and Suppress. The Court subsequently convicted VanderLinden on Count 1 (R 25) and acquitted him on Count 2 (R 26). Mr. VanderLinden was convicted of O.W.I. 2nd (§346.63 (1)(a)) on April 1, 2015 (R 25) and on that same date, and pursuant to a Prosecutor's Motion, the Court dismissed the 2nd Count, Operating With P.A.C. 2nd (§346.63(1)(b).

Paul VanderLinden now Appeals from the decisions of the Court below denying the Suppression of the Evidence (R 11, R 17, R 19) as the result of an unlawful Stop and Detention

(R 8) and the failure of the Court to Suppress all evidence gathered thereafter as Fruit of the Poisonous Tree (R 9); to wit:

ARGUMENT

I. A Report That Someone Was Seen Indulging In What Is Undisputedly Lawful Behavior Does Not Rise To A Level That Would Allow A Violation Of The Defendant's Constitutional Rights Under The Fourth Amendment.

The Defendant does not dispute that he was observed consuming two normal sized (12 oz.) beers, one in the parking lot of that theater. However, there was nothing to indicate that the Defendant consumed any more than those two 12 oz. beers. And, because the movie theater is not an establishment that serves or sells alcoholic beverages it is not reasonable to assume that VanderLinden had consumed anything more than those two beers. The fact that one or more people may have called the police to report that they had seen a full grown male consume 24 oz. of beer in a one hour period of time.

"Fourth Amendment case law has treated stops based primarily on informant tips as worthy of more scrutiny than stops based on direct police observations." *State v. Batt*, 2010 WI App 155, 19 (Wis.App. 2010). "Investigative traffic stops, regardless of how brief in duration, are governed by this constitutional reasonableness requirement. In accordance with this requirement, a police officer may temporarily stop a suspicious vehicle to maintain the status quo while determining the identity of the driver or obtaining other relevant information. However, to pass muster under the Fourth Amendment and Article I, Section 11, an officer initiating an investigative stop must have, at a minimum, a reasonable suspicion that the driver or occupants of the

vehicle have committed an offense. As the United States Supreme Court first articulated in Terry v. Ohio, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), this requires that the stop be based on something more than the officer's "inchoate and unparticularized suspicion or 'hunch.' At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot." *State v. Rutzinski*, 2001 WI 22, 7-8 (Wis. 2001)(internal citations omitted).

"Under the 'totality of the circumstances' approach, the quantity and quality of the information possessed by police is seen as inversely proportional. In other words, if a tip has a relatively low degree of reliability, more information will be required before it can be said that police possess reasonable suspicion necessary to make a lawful stop. Stated conversely, if the tip has a high degree of reliability, the police need not have as much additional information to establish reasonable suspicion." *State v. Bartlett*, 2002 WI App 102, 9 (Wis.App. 2004). Here, as it regards illegal activity, there was absolutely no information provided by the unproven tipster that there was any crime which had been or was going to be committed. Ergo, there was no information, reliable or otherwise, that there was any crime.

When the police receive a tip that something is potentially amiss from the viewpoint of the tipster and there is nothing to indicate that any of the reported behavior is contrary to any statute, the report does not rise to the level reasonable suspicion, let alone the necessary probable cause. Ergo, the reliability of the tip here is of no moment because the tip did not lead the police to believe that there was any statutory violation which had occurred: there was a tip that the VanderLinden had engaged in legal behavior. "The doctrine of qualified immunity does not help defendant . . . because it is clearly established that the dispatch officer's statement was

not enough to support a finding of reasonable suspicion. In addition to the general propositions established in cases like White and Terry, many courts have held that vague reports of possible wrongdoing are not enough to justify an investigative stop under the Fourth Amendment, even if they come from other officers." *Bernardi v. Klein*, 2010 U.S. Dist. LEXIS 5697, 6-7 (W.D.Wi. 2010).

And, because there was no indicia of criminal activity or any imminent danger, as the "tip" in no way asserted any facts that would lead the police to conclude that the Defendant was under the influence of alcohol, let alone intoxicated. "[B]efore such a stop can provide admissible evidence, law enforcement officers 'must be able to point to specific and articulable facts' sufficient to give rise to a reasonable suspicion that an individual has committed or is committing a crime. Terry, 392 U.S. at 21; McGann, No. 92-1520, slip op. at 23. This court uses a totality of the circumstances test in deciding whether the officer's suspicion was reasonable enough to allow the admission of the seized evidence. Pavelski, 789 F.2d at 489." *United States v. Packer*, 15 F.3d 654, 658 (7th Cir. 1994). Additionally, the United States District Court for the Western District of Wisconsin, citing a North Dakota case, held that a "tip indicating that there was 'possible drunk driver' who 'could barely hold his head up' in pickup truck in fast-food restaurant's drive-up lane not enough." *Bernardi v. Klein*, 2010 U.S. Dist. LEXIS 5697, 7-8 (W.D.Wi. 2010), citing, *State v. Miller*, 510 N.W.2d 638, 640-645 (N.D. 1994).

Therefore, as a matter of law the police lacked the necessary Probable Cause to effectuate an investigative stop of the Defendant.

II. **The Police Lacked The Necessary Suspicion To Effect A Lawful Fourth Amendment Stop and the Court Cannot Assume Facts Not In Evidence or Speculate Retrospectively So As to Attempt to Make The Stop Lawful.**

In the instant matter there is no indicia that would allow the Court to extrapolate any facts necessary to justify the stop by the police. Because the stop fails on its face the Court cannot simply insert facts that would provide the necessary justification after the fact. The fact remains that the Defendant was not in any place where additional alcohol was or would be available. And, there was absolutely no indication that the Defendant was in possession of nothing more than the two beers that were the subject matter of the tip; as discussed above, the consumption of two beers is indicia of nothing rising to any level that would justify further investigation without foreknowledge of additional facts. Knowledge assumed post-stop is wholly inadequate to justify the collection of evidence in violation of the 4th Amendment.

Additionally, to state that these facts are reasonably, a reasonable inference, assumed based on the evidence is contrary to the law. What the Court would be doing is assuming evidence after the fact! The fact that the stop was wholly unjustified would not even allow us to get to this point. The arresting officer testified, when asked what the justification for the stop was, stated that the stop, "[was] based on the view of obstruction, as well as the information provided by the witnesses." (R 37-7 (22)) The officer stated that the PRIMARY reason for the stop, because the alleged witness information provided no legal basis, was because VanderLinden had something hanging from his rear-view mirror, which is not a violation. Further, the officer went on to testify that, counsel's question was "correct" in that no indicia of intoxication was mentioned, only that he was seen having a beer. (R 37-13) Actually the statement about the "obstructed view" may be a subterfuge as well because Officer Krieg further stated that "I did not observe any

driving behaviors," and that "based on the report I wanted to make a stop." (R 37-15) In other words the officer had decided to make the stop irrespective of what he observed, wholly based on the report of someone being involved in a legal activity.

In fact Officer Krieg agreed that he did not observe "any other signs of intoxication, weird behavior . . . [or] anything else that would . . . draw your attention to a motor vehicle and think that the person was intoxicated." (R37-18) In fact the Officer went on to testify that the totality of the rationale for the stop was that two witnesses had seen VanderLinden drink two beers. (R37-19).

There is and can be no "after the fact" reasonable inference, it is contrary to our entire system of justice. The indicia of a statutory violation must occur first, period. In fact, if the search had been executed pursuant to a Search Warrant (which there was not) the Court, even at the stage of the issuance of that Search Warrant, is barred from assuming facts or the type of extrapolation occurring here. "Under the Fourth Amendment to the Constitution and the Federal Rules of Criminal Procedure, an affidavit for a search warrant must recite facts and may not be based entirely upon information and belief." See generally, *Giordenello v. United States*, 357 U.S. 480, 485 (1958).

The Court, in that same August 15, 2014 Motion Hearing went on to extrapolate that, "

In a case highly analogous to the instant matter the court held that:

"This case turns on whether the .15 blood test result can be considered in the probable cause analysis. If we exclude the . 15 blood test result from the probable cause determination, we conclude that, based on the totality of the circumstances, Heindel did not have probable cause to reasonably believe Fischer operated his motorcycle while impaired. See Popke,

317 Wis. 2d 118, ¶14. Specifically, without the .15 blood test result, at the moment of arrest, Heindel knew Fischer drove his motorcycle into a ditch, exhibited no mannerisms indicative of impairment, was responding appropriately to Heindel's questions, admitted to consuming two beers with lunch, smelled slightly of intoxicants, gave a plausible explanation for the accident, and had a preliminary breath test result of .06. Based solely on these facts, especially the preliminary breath test result—used expressly by officers to determine probable cause—we conclude that Heindel did not have information that would lead him to reasonably believe Fischer was operating while intoxicated." *County of Marathon v. Fischer*, 2013 WI App 128, 7-8 (Wis. App. 2013).

The point of this case is that, despite the later determination that the defendant in that matter had a fairly high b.a.c., there was no indicia that would have given the police the necessary probable cause to get to the point where a breath test was legal justifiable. So is the issue here, the police had no indicia that rose to the level of probable cause that would allow them to detain the Defendant. In fact, the only "fact" that the tipster gave to the police that could be verified was that there was a certain car that was being driven. The informant did not assert that anyone was driving while intoxicated or impaired, nor did the arresting officer observe anything in the Defendant's driving that would have risen to a level of suspicion. For the Court to extrapolate on the basis of these scant, before the stop, facts, is to justify an unconstitutional stop with assumed facts under the all too convenient lens of retrospect.

Our issue, on Appeal, becomes more focused on what the decision of the Court below stated as it regards the legality of the stop and the admissibility of the evidence after acquired. The Court below stated that "the other reasonable inference is that although there had been two observed consumptions of beer, especially when one is being slugged in the parking lot,

that is reasonable to assume that the person had more beer, perhaps more alcohol prior to that time . . .." (R 37-32). Initially the Defendant would like to note that it is not a reasonable inference that someone was consuming alcohol in a movie theater. Movie theaters do not sell alcoholic beverages nor allow the consumption of any outside beverages in their establishments; so is the case with the theater attended that night. Additionally, the rapid consumption of one beer in a parking lot is indicative of a person not wishing to perform the illegal acts of possessing an open container in the car and/or consuming alcohol while driving. As for the beer ostensibly placed in the pocket, it is unreasonable to speculate that person placed an opened beer into their pocket and it is not reasonable to speculate that a person with alcohol in their car will open it. If that were the case the police would have free reign over many vehicles to stop them at will because of the presence of lawful alcohol in their car.

The courts of Wisconsin are replete with cases stating repeatedly that mere speculation is no substitute for a "reasonable inference" and what the Court below did, in allowing the unreasonable stop and search, was wholly based on speculation. "[A] question of fact to be determined by the jury and upheld by the court, if within the field of reasonable inferences and not in that of speculation and conjecture." *Boldig v. Urban Tel. Co.*, 224 Wis. 93, 106 (Wis. 1937). "Our review of a sufficiency of the evidence claim is very narrow. We give great deference to the trier of fact and do not substitute our judgment 'unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.' However, a fact-finder cannot base its findings on conjecture and speculation; reasonable inferences must be supported by facts in the record." *State v. Christina V.(In re Christina V.)*, 2013 WI App 94, 9 (Wis.Ct.App. 2013). "While a magistrate is permitted reasonable inferences from

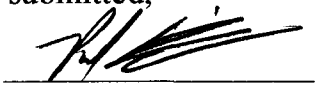
the information presented, "'the finding cannot be based on the affiant's suspicions and conclusions, the magistrate may make the usual inferences reasonable persons would draw from the facts presented." *State v. Jackson*, 2008 WI App 109, P19 (Wis.Ct.App. 2008).

CONCLUSION

For the reasons set forth above, Mr. VanderLinden respectfully requests that the Court of Appeals vacate the conviction and determine the Circuit Court had mistakenly allowed the stop and the admission of the subsequent evidence.

Dated this 28th day of September, 2015.

Respectfully submitted,



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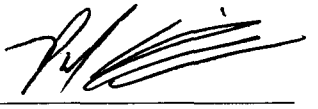
CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 28, 2015. I further certify that the brief was correctly addressed and postage was pre-paid.

Signed:



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,251 words.

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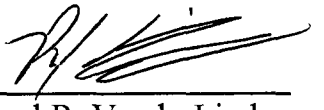

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