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.

ON APPEAL FROM THE CIRCUIT COURT
FOR OUTAGAMIE COUNTY,
THE HONORABLE MITCHEL J. METROPULOS, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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CASES CITED:

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ISSUE PRESENTED

Was the Court correct in denying the Defense Motion to Suppress, stating that Officer Krieg had reasonable suspicion to stop and detain Paul R. VanderLinden to determine if he was operating while intoxicated based on a known informant's tip that he was seen drinking two beers during a movie, including chugging one before driving a vehicle.

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.

ARGUMENT

In order to justify a stop which is made for investigatory purposes, the State or Police must have a reasonable suspicion which is grounded in specific articulable facts and reasonable inferences from those facts, that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25. ¶8, 260 Wis.2d 406, 659 N.W.2d 394.

In reviewing the question of whether a police officer had reasonable suspicion to make a stop, the Appellate Courts in the State of Wisconsin have held that the Circuit Court's Findings of Fact will be upheld unless they are against the greater weight and clear preponderance of the evidence, and whether those facts satisfy the constitutional requirement of reasonableness is a question of law and the Appellate Court is not bound by the lower Court's dicision on that specific issue. *State v. Waldner*, 206 Wis.2d 51, 58, ¶1, 556 N.W.2d 681 (1986). The Supreme Court of the State of Wisconsin, in that same case of *State v Waldner* at ¶3, citing *State v. Guzy*, 139 Wis.2d 663, 671, 407 N.W.2d 548 (1987), also pointed out that the test to be used for determining whether an investigatory stop was reasonable "... is an objective one, focusing on the reasonableness of the officers'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 had suspicion grounded in specific, articulable 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 the case at hand, the Court found after testimony at a Motion Hearing held on August 15, 2014, that Officer Krieg had reasonable suspicion to stop Paul VanderLinden's vehicle. The Court found that there were reasonable inferences for the officer to stop the vehicle and to investigate

the situation. The Court found that the stop was lawful. Paul VanderLinden argues that the stop was not lawful, because there was nothing reported or observed that rose to the level of reasonable suspicion that a crime was committed or was being committing or that a crime was about to be committed.

The heart of the situation relies on what tips from a known informant would constitute a reasonable suspicion that the driver may be driving while intoxicated, or as the Trial Court put it, "... whether or not what had been reported was enough to allow the officer to stop the vehicle and then to do an independent investigation to determine whether or not this defendant was the operator of a motor vehicle while intoxicated, so the officer did not need probable cause to stop the vehicle and it would not appear that based on this information that the officer had probable cause, but I do think that the information that he received rises to the level of reaonable suspicion". (R37 at 31)

The Trial Court went on to address the germane considerations referred to in ¶3 of the *Waldner* opinion addressed above by stating, "There are a number of interences that can be taken from the reporting that someone's been drinking before driving. One reasonable inference is that the person's consumed alcohol, but has not risen to the level of being intoxicated, and I think the officer under these circumstances has the authority then to stop a vehicle to determine if the person's intoxicated." (R37 at 31)

Think is the key word here. The Trial Court thinks that just because someone was observed drinking beer before getting into a vehicle and then driving justifies a investigatory stop and detention. If that were the case, then police all around our great state could have an officer, uniformed or not, sit inside a bar watching patron's drink alcohol, wait for them to leave, and then pull over each and every vehicle that was being driven by a person who was observed drinking alcohol to conduct an investigation to determine if that person was driving while intoxicated. Officers first must observe or rely

on something that rises to the level of reasonable suspicion that a driver is indeed driving while intoxicated such as swerving, not making a complete stop, driving at night without headlights on, etc. The same argument can be made for informants, whether known or unknown, calling in saying they saw somebody drink alcohol and then drive as the sole basis for the police to pull over such drivers to find out for sure if they are intoxicated or not. Absent any other facts which point to driving while intoxicated, or intoxicated behavior and then driving, this would not rise to the level of reasonable suspicion.

"The other reasonable inference is he possibly could be intoxicated. The observations made that there were two beers consumed, one beer in the pocket, I think the reasonable inference of that is that the beer is going to be consumed in short order. The other reasonable inferences is that although there had been two observed consumptions of beer, especially when one is slugged in the parking lot, that is reasonable to assume that the person had had more beer, perhaps more alcohol, prior to that, so I do think it's reasonable for the officer to at least investigate as to whether or not this person was, indeed, intoxicated while driving, so I am going to find that the stop was lawful ..." (R37 at 32) Here is where the Trial Court assumed the wrong inferences. When an observer witnesses an adult male drink less than two beers during the course of an almost two hour long movie, the reasonable inference to make would be that he was drinking slowly, which is why he had to chug the second or part of the second one before he left. The Trial Court in making these assumptions that it is reasonable to infere that Paul VanderLinden was going to consume a third beer in "short order" and that he had more beer or other alcohol before the movie are just that, assumptions, and assumed through the lens of hindsight; and therefore are not reasonable inferences supporting a reasonable suspicion to make a stop.

Many appellate decisions, in addressing the same issue(s) as presented in this case have looked to State v. Colstad in deciding what constitutes a reasonable suspicion to make an investigatory stop. The Colstad Court pointed out that reasonable suspicion "... is a common sense test: under all the facts and circumstances present, what would a reasonable officer reasonably suspect in light of his or her training and experience." *State v. Colstad*, 260 Wis.2d 406, 414, ¶8, 659 N.W.2nd 84 (Ct. App. 1997). Additionally, in the case of *State v. Waldner* the Supreme Court further expounded and poined out that courts must look to the totality of the circumstances in determining whether reasonable suspicion exists. *State v. Waldner* 206 Wis. 2D at 58, ¶7. The Waldner Court also pointed out, "The Fourth Amendment does not require a police officer who lacks precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus posibly allow a crime to occur or a criminal to escape.

Officer Krieg testified at the Motion Hearing on August 15, 2014, about the time and circumstances, as well as the particulars of the tips called in which were the reasons for the stop of the vehicle driven by Paul VanderLinden. (R37 at 4-22) Officer Krieg was asked if the witnesses reported Paul VanderLinden showing any signs of intoxication at the theater or was acting disorderly, and he said they did not. (R37 at 13-14) Officer Krieg also was asked if he observed Paul VanderLinden driving bad including speeding or weaving, and he said no. (R37 at 15) Officer Krieg states, "It was primarily the report of the drinking of beer." as the reason for the traffic stop. (R37 at 18)

In this case, the informants simply reported seeing an adult male consume two beers at a movie theater and then get into a vehicle and drive away. No signs of intoxicated behavior or intoxicated driving were reported or observed by either the informants, or Officer Krieg. The totality of the circumstances are just that; nothing more can be reasonably

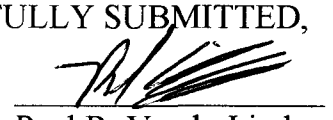
inferred to provide a reasonable suspicion that Paul VanderLinden was driving while intoxicated, and therefore the stop and detention was not legal. If either the informants or officer observed any signs of intoxication, including bad driving, there could be a reasonable inference that the driver could be driving while intoxicated. Based on the facts and circumstances in this situation, it would seem reasonable if Officer Krieg conducted his investigation by following the vehicle being driven by Paul VanderLinden, looking for signs of intoxication such as bad driving. But absent any specific, articulable facts which directly point to or can reasonably infer that a crime was committed or being committed, the stop must be deemed illegal.

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 7th day of December, 2015.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on December 8th, 2015, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief was correctly addressed.

DATE: December 7th, 2015

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 1,808 words.

Signed:

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