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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN

DISTRICT IV

COLUMBIA COUNTY,

Plaintiff-Respondent,

v.

Case No. 2015-AP-1650

Stephen M. Kokesh,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND
DECISION DENYING SUPPRESSION MOTION, ENTERED IN
THE COLUMBIA COUNTY CIRCUIT COURT, THE
HONORABLE DANIEL GEORGE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

**I. THE “SLIGHT” WEAVING ON A CURVING
COUNTY HIGHWAY IN A LANE HALF AS
WIDE DISTINGUISHES THIS CASE FROM
POST AND MILITATES AGAINST A FINDING
OF REASONABLE SUSPICION**

"[R]epeated weaving within a single lane" is a malleable enough standard that it can be interpreted to cover much innocent conduct. ... "Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634 (internal citation omitted).

These principles must be kept in mind when assessing the conduct observed in this case, because none of the observed conduct was unlawful. Some of the facts relied upon by the circuit court and the County to support reasonable suspicion—for example, driving at 2:30 am on Sunday morning—are contextual facts rather than observable conduct of the driver, and only lend minimal support to a reasonable suspicion analysis. In support, see the unpublished but citable *County of Sauk v. Leon*, 10AP1593, ¶25, 11/24/10 (Appendix: 7). In *Leon*, the stop occurred at 11:04 pm on a Friday night, but the court of appeals gave that factor little weight. ¶¶2, 25 (“[T]his incident occurred...some hours before “bar time,” and even if it had occurred around bar time, such a contextual fact would not have been enough to fill in the missing elements needed to support reasonable suspicion on this record”).

Further, when comparing this case to *Post*, one must keep in mind that although the court found reasonable suspicion, the court deemed it a “close call.” *Id.*, 2007 WI 60, ¶27. This is significant because the actual driving conduct (as opposed to the time of day or night of the week) observed in this case is less suspicious than that in *Post*. Here, the degree of weaving (5 feet laterally) was far less pronounced than in *Post* (10 feet laterally). *Id.*, ¶¶5, 35. The officer who observed the weaving described it as “a small amount of moving the vehicle to the right and to the left” (29: 24) (emphasis added). And the weaving here occurred on a single-lane country highway that was both curvy and hilly at times, travelling at 55 mph (29: 19), where it is logically more difficult to “follow a perfect vector” than the circumstances of *Post*, where the defendant drove down a double-wide lane on Water Street in Sauk City at 35 mph. *Id.*, ¶¶34, 56; see Village of Sauk City ordinance §317-4(A)(2)(a)—(c) (establishing speed limit of Water Street).

Under the totality of circumstances, the officer lacked reasonable suspicion to stop Kokesch’s vehicle. Accordingly, the evidence obtained from this unlawful stop must be suppressed, and all evidence gathered by the officer following this stop should be suppressed as fruits of the poisonous tree.

CONCLUSION

For the reasons discussed above, and in the defendant's brief-in-chief, the defendant respectfully requests that this court reverse the judgment, reverse the order denying the motion to suppress, and remand to the circuit court for further proceedings.

Respectfully submitted 2/11/16:



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 527 words.

Dated 2/11/16:



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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

Signed 2/11/16:

A handwritten signature in black ink, appearing to read 'CDR', is written over a horizontal line.

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