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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appellate Case No. 2017-AP1048

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

-vs-

NICHOLAS O. MORAN,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, BRANCH XLV, THE HONORABLE MICHELLE A. HAVAS PRESIDING, TRIAL COURT CASE NOS. 15-TR-7965, 15-TR-7966 & 15-TR-7967

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE ARRESTING OFFICER IN THIS CASE LACKED A REASONABLE SUSPICION TO DETAIN MR. MORAN FOR THE PURPOSE OF CONDUCTING FIELD SOBRIETY TESTS?

> Trial Court Answered: NO. The circuit court concluded that a variety of factors, *inter alia*, Mr. Moran chewing a minty gum, his turning his head away from the officer to answer questions, his admitting drinking at Miller Park, and his not being accurate about the time of day, were sufficient to provide the officer with a reasonable suspicion to conduct field sobriety tests.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Moran believes publication of this Court's decision is NOT WARRENTED as the common law authorities which articulate the "reasonable suspicion" standard are well-settled.

STATEMENT OF THE CASE AND THE FACTS

On Thursday, April 23, 2015, while operating his motor vehicle westbound on Interstate 94 near the Hawley Road exit in the County of Milwaukee, State of Wisconsin, the above-named Defendant-Appellant, Nicholas O. Moran, was involved in a minor "fender-bender" accident. (R28 at 5:7-25.)

After the accident, Deputy Nicholas Kellner of the Milwaukee County Sheriff's Office arrived on the scene and made contact with Mr. Moran. (R28 at 6:2-16.) Upon making contact with Mr. Moran, Deputy Kellner asked him what had occurred, and Mr. Moran indicated that he was travelling to Bluemound Road after leaving the Milwaukee Brewers baseball game. (R28 at 7:22 to 8:8.)

As he engaged Mr. Moran in conversation, Deputy Kellner indicated that Mr. Moran would "turn his head away" as he answered the deputy's questions. (R28 at 8:10-11.) Notably, however, this observation did not appear in Deputy Kellner's narrative report of the incident. (R28 at 13:25 to 14:3.) Deputy Kellner also observed that Mr. Moran was chewing a minty gum, but did not observe the odor of any intoxicants. (R28 at 8:16-19; 14:24 to 15:3.)

When asked how the accident occurred, Mr. Moran admitted that he had been looking down at his wallet and came upon "the car in front of him too fast . . . ." (R28 at 8:23-25.) Overall, however, Deputy Kellner considered the incident to be "very minor." (R28 at 12:14-18.) Deputy Kellner then inquired as to whether Mr. Moran had been consuming intoxicating beverages prior to the accident. (R28 at 9:3.) Mr. Moran responded that he had four beers at the Brewer game. (R28 at 9:3-5.) When he asked Mr. Moran at what time he had consumed the intoxicants, Mr. Moran indicated that he had been drinking over a five hour period from approximately 11:00 a.m. to 4:00 p.m.. (R28 at 20:7-13.)

At this juncture, Deputy Kellner believed it was appropriate to extend Mr. Moran's detention in order to conduct field sobriety tests. (R28 at 10:1-9.) After administering the field sobriety tests, Deputy Kellner arrested Mr. Moran for Operating a Motor Vehicle While Under the Influence of an Intoxicant-First Offense [hereinafter "OWI"], contrary to Wis. Stat. § 346.63(1)(a).[1] (R1.)

[1]All references herein to the Wisconsin Statutes are to the 2015-2016 version unless otherwise noted.

Subsequent to his arrest, Mr. Moran was transported to the Milwaukee County Sheriff's Department where the Informing the Accused form was read to him and he was asked to submit to an evidentiary chemical test of his breath. Based upon his breath test result, an additional charge of Operating a Motor Vehicle With a Prohibited Alcohol Concentration-First Offense was also issued.[2] (R15.) Mr. Moran pled Not Guilty to both charges. (R4; R17.)

After retaining counsel, a Motion to Suppress Due to Unlawful Detention was filed on Mr. Moran's behalf, challenging whether the arresting officer had a reasonable suspicion to enlarge the scope of Mr. Moran's detention to include field sobriety testing. (R7.)

An evidentiary hearing on Mr. Moran's motion was held on January 15, 2016, at which Deputy Kellner testified. (R28.) On February 18, 2016, the circuit court, the Honorable Michelle Havas presiding, issued a decision from the bench denying Mr. Moran's motion. (R29; D-App. at 102-113.) Subsequently, Mr. Moran filed a Motion for Reconsideration which was also denied.

Mr. Moran's case was tried to the court on April 8, 2017, at which time Mr. Moran was found guilty on all counts. (R24; D-App. at 101.) Thereafter, Mr. Moran initiated this appeal. (R25.)

ARGUMENT

I. THE LAW IN WISCONSIN AS IT RELATES TO REASONABLE SUSPICION TO DETAIN A DEFENDANT UNDER THE FOURTH AMENDMENT IN THE CONTEXT OF ANONYMOUSLY TIPPED INFORMATION.

A. Standard of Review on Appeal.

This appeal presents a question relating to whether a particular set of facts rise to the level of providing the law

[2] A companion charge of Inattentive Driving was also issued.

enforcement officer in this matter with a reasonable suspicion to detain Mr. Moran for the purpose of conducting field sobriety tests. As such, this Court engages in a two-step standard of review pursuant to *State v. Hajicek*, 2001 WI 3, ¶¶ 16; 26, 240 Wis. 2d 349, 620 N.W.2d 781. The first step compels this Court to review the lower court's determination of historical facts for clear error. *Id.* ¶ 16. Thereafter, the question of whether those facts meet the constitutional standard is a question this Court reviews *de novo*. *Id.*

B. Verifying Anonymously Tipped Information Under Illinois v. Gates, *462 U.S. 213 (1983).*

In *Illinois v. Gates*, 462 U.S. 213 (1983), the United States Supreme Court revisited how rigidly the test for examining the reliability of "tipped" information should be applied. Otherwise known as the "*Aguilar-Spinelli*" test, it was developed for determining what level of proof is needed to support a finding of probable cause to issue a warrant when part of the information law enforcement relies upon in applying for the warrant comes from a "tipster." *Gates*, 462 U.S. at 227-28.

Concerned that state and federal courts were applying the two-pronged *Aguilar-Spinelli* test too rigidly and mechanistically,[1] the Supreme Court indicated that the new test would involve an examination of the "totality of the circumstances" in which everything related to the tipped information—its basis of knowledge, veracity, and reliability—would be fair game, but in which the weakness of one factor could be bolstered by an exceptionally strong showing in another. *Id.* at 230-31. Under the auspices of the newly formulated *Gates* test, there is no assumption made that the tipped information is, in fact, accurate. Accuracy of the information is what must be determined by corroboration of the basis of knowledge, veracity, and reliability of the facts known to the officers *vis a vis* the tipped information.

[1]The test involved examining the tipster's "basis of knowledge" on one prong and his "veracity" and/or "reliability" on the other.

Although the instant case does not involve the examination of an application for a warrant, *Gates* is instructive because it demonstrates how the court must weigh and assess the facts known to law enforcement officers when they are not making direct observations of illegal activity themselves, but instead are relying upon tipped information. To this end, *Gates* is entirely applicable because the information Deputy Kellner received regarding the driver of the "black vehicle" had come from an anonymous tipster. (R28 at 10:4-7; "somebody" had called dispatch.)

C. The Law of Reasonable Suspicion.

It has long been the jurisprudence of this State and the Federal Courts that "[l]aw enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. An 'inchoate and ***unparticularized*** suspicion or 'hunch'. . . will not suffice." *State v. Guzy,* 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(*emphasis added*); *United States v. Pavelski,* 789 F.2d 485, 489 (7th Cir. 1986). The jurisprudence of the United States Supreme Court in requiring that a "***particularized*** suspicion that the person is committing a crime" exists before the Fourth Amendment will allow for an investigatory detention. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)(emphasis added).

The reason that more than a mere "inchoate suspicion or hunch" is required is because "[t]he Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals" *State v. Riechl*, 114 Wis. 2d 511, 339 N.W.2d 127 (Ct. App. 1983). Capricious or arbitrary police action is not tolerated under the umbrella of the Fourth Amendment. "The basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

Instructive on this very point in a traffic context is *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), which provides that once a driver is stopped for a traffic violation, he or she may be asked questions and detained for purposes reasonably related to the nature of the stop. *Id.* at 93. If, however, additional observations are made which give rise to a reasonable inference that additional or other violations are being or have been committed, then the scope of the driver's original detention may be enlarged. *Id.* at 95. More specifically, the *Betow* court noted:

> The key is the "reasonable relationship" between the detention and the reasons for which the stop was made. If such an "articulable suspicion" exists, the person may be temporarily stopped and detained to allow the officer to "investigate the circumstances that provoke suspicion," as long as "the stop and inquiry [are] reasonably related in scope to the justification for their initiation." **If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun**. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id. at 94-95, *citing Berkemer v. McCarty*, 468 U.S. 420, 439 (1975)(emphasis added).

Betow involved a circumstance in which the defendant had been stopped by a law enforcement officer for speeding. *Betow*, 226 Wis. 2d at 92. When the officer approached Betow's vehicle to speak with him, he observed that Betow appeared to be nervous, and that when he asked for identification, he observed that a mushroom was embroidered on the outside of Betow's wallet. *Id.* The officer testified that it was his experience that persons with such wallets often were drug users. *Id.* After patting Betow down and finding nothing, he detained Betow further to await the arrival of a K9 Unit. *Id.* at 93. Ultimately, the *Betow* court found that Betow's Fourth Amendment right to be free from unreasonable searches and seizures was violated because the mushroom sewn on

Betow's wallet and his nervous appearance were insufficient grounds to enlarge the scope of Betow's detention beyond the investigation of the speeding allegation. *Id.* at 98-99.

If the "key" to enlarging the scope of a stop and detention is, as the *Betow* and *Berkemer* Courts held, having a "reasonable relationship" between the further investigation and the "circumstances that provoke [the] suspicion," this case falls woefully short of meeting that standard.

II. DEPUTY KELLNER'S OBSERVATIONS OF MR. MORAN DO NOT RISE TO THE LEVEL OF PROVIDING HIM WITH A REASONABLE SUSPICION TO FURTHER DETAIN MR. MORAN IN ORDER TO CONDUCT FIELD SOBRIETY TESTS.

At the motion hearing in this matter, when asked why he enlarged the scope of Mr. Moran's detention to include field sobriety testing, Deputy Kellner proffered the following:

> Based upon Mr. Moran not speaking to me directly, looking away, chewing the mint gum, and the vagueness of lack of detail in what he was saying happened in the accident, in conjunction with the original call that I was dispatched to in the CAD information that somebody on scene believed that the operator of the black vehicle was drinking or had been drinking, all those put together made me believe that the next appropriate step would be to perform field sobriety tests.

R28 at 10:1-9.

Examining each of the factors upon which Deputy Kellner relied reveals that collectively, they do not rise to the level of corroborating the tipped information to the point where they satisfy the *Gates* or *Betow* standards.

A. Deputy Kellner May Not Rely Upon the Tipped Information to Corroborate the Tipped Information.

According to Deputy Kellner, one of the things upon which he relied to support his conclusion that Mr. Moran was potentially operating while intoxicated was the fact that "somebody on scene believed that the operator of the black vehicle was drinking or had been drinking." R28 at 10:5-7. For Deputy Kellner to rely upon the very information he was on the scene to investigate defines the notion of "bootstrapping." In other words, Deputy Kellner may not rely upon anonymously tipped information that a person is intoxicated to prove that a person was, in fact, intoxicated. To do so would utterly undermine the *Gates* test not simply to a point of legal obscurity, but to oblivion.

Based upon the foregoing, the deputy's reliance on the tipped information under investigation as proof of the very thing being investigated is a *non sequitur*, and should be discarded from the reasonable suspicion calculus.

B. The Remaining Facts Relied Upon By Deputy Kellner Are Completely Innocent In Nature and Therefore Do Not Rise to the Level of Providing a Reasonable Suspicion to Further Detain Mr. Moran.

The remaining facts upon which Deputy Kellner premised his decision to enlarge the scope of Mr. Moran's detention included the following: (1) Mr. Mr. Moran's chewing a minty gum; (2) his looking away while speaking with him; and (3) the lack of detail in the answers he gave as to what transpired.

Whether examined cumulatively or individually, the foregoing facts are insufficient grounds upon which to premise an enlargement of Mr. Moran's detention.

1. Deputy Kellner's Observations of Mr. Moran's Alleged Furtive Behavior Are Not Credible.

The first and perhaps most important consideration for this Court regarding whether Deputy Kellner had sufficient reason to

extend Mr. Moran's initial detention relates to the "convenience" of Deputy Kellner's observations. That is, if Deputy Kellner felt that Mr. Moran's vague answers and alleged "looking away" were so important to his determination that there was a reason to detain Mr. Moran, why did Deputy Kellner not make note of those facts in his report? On cross-examination at the motion hearing, Deputy Kellner admitted that these two observations appeared nowhere within his report. (R28 at 13:25 to 14:8.) At the time of the hearing, nine months had already transpired between his testifying and his contact with Mr. Moran. (R28 at 12:21-23.) Almost miraculously, however, Deputy Kellner recalled two factors which were primary in his decision to detain an individual whose contact with him had somehow not blended into the hundreds of other persons with whom he must have had contact in the intervening nine months. The absence of any reference to these critical factors in his report makes their first mention at the motion hearing seem too convenient to be anything other than improvisation on the part of Deputy Kellner knowing that he was faced with a "thin case."

Further undercutting the veracity of Deputy Kellner's assertions that Mr. Moran was "looking away" and was "vague" with his answers is a comment he admitted making to his partner about why he was going to detain Mr. Moran for further investigation. Instead of indicating to his partner that Mr. Moran was "being vague," or "evasive," or "acting furtively," or "appearing impaired," or any of the other sundry comments which could have been made consistent with his eleventh-hour testimony about Mr. Moran's alleged behavioral quirks, Deputy Kellner tells his partner that the reason he is "going to check him out [is] because of the other driver's concerns." (R28 at 14:16-23.) If Mr. Moran's behavior truly was disconcerting for the deputy in terms of whether Mr. Moran was trying to hide his alleged impairment, there is no reason why Deputy Kellner should choose to say he is investigating further solely because of what an untrained civilian, who had no direct contact with Mr. Moran, averred. Had Mr. Moran been as furtive as the deputy alleged in his courtroom testimony, then his comment to his partner should have been consistent with such observations because they are so important in terms of their justifying a further detention of Mr. Moran.

The further detention and investigation of Mr. Moran's condition without additional facts coming to light violates the *Guzy* requirement that the officer's suspicion be "particularized." *Guzy*, 139 Wis. 2d at 675. Instead of having specific, objective, and particularized facts to which he could point which rose to the level of providing the reasonable suspicion the Fourth Amendment requires, any enlargement of the scope of Mr. Moran's detention acts as an arbitrary invasion of privacy the *Riechl* and *Boggess* courts warned against. *See*, Section I.C., *supra*.

Even if one considers that Deputy Kellner is being entirely truthful about his observations of Mr. Moran's "nervous" behavior in looking away and being vague with his answers, these facts remain insufficient under the Fourth Amendment to justify an investigatory detention given the similarity between Mr. Moran's case and the *Betow* court's holding. The court in *Betow* found that Betow's nervous behavior, even in conjunction with the mushroom being sewn on his wallet, were insufficient to justify his further detention beyond the speeding violation. *Betow*, 226 Wis. 2d at 98-99. This is very much akin to Mr. Moran's situation. Betow's "nervousness" can be likened to Mr. Moran's looking away and being vague, and his mention of having consumed four beers over a five hour period can be likened to the mushroom on Betow's wallet. Viewed in this light, the *Betow* holding would not allow for the enlargement of the scope of Mr. Moran's detention.

2. The Totality of the Circumstances of This Case Reveal That No Reasonable Suspicion to Further Detain Mr. Moran Existed Under the Fourth Amendment.

What has been completely overlooked by the court below—but which is just as relevant to the reasonable suspicion inquiry—is what was *not* observed. The absence of the classical indicia of impairment must carry weight as well in the reasonable suspicion determination.

For example, the record is devoid of any mention that Mr. Moran's speech was slurred. (R28 at 18:6-8.) As this Court is aware from its own precedent, "slurred speech" is not just a common, but almost universal, observation in a detention for intoxicated driving.

Likewise absent from the "usual suspects" when it comes to indicia of impairment is any observation by the deputy of bloodshot and/or glassy eyes. (R28 at 18:14-17.) Again, virtually one-hundred percent of drunk driving cases include this observation. The fact that it is absent is telling in and of itself.

Also absent from Deputy Kellner's observations is any notation that Mr. Moran had difficulty producing his driver's license when instructed to do so, or that he fumbled with his wallet, as impaired drivers so often do. (R28 at 17:20 to 18:1.) In fact, throughout his entire investigation, Deputy Kellner made no observations of Mr. Moran fumbling with anything. (R28 at 13:15-22.)

Additionally, Deputy Kellner did not discern that Mr. Moran had any difficulty with his mentation. As one example, Deputy Kellner testified that he did not recall that Mr. Moran had any difficulty providing him with his telephone number when asked to do so. (R21:10-12.)

Most telling of all of the "absent facts" in Deputy Kellner's observations is the classic comment on the suspect's ability to maintain his balance. Deputy Kellner not only admitted that he made no observations of any problems Mr. Moran had with his balance, but affirmatively stated on the record that "I wouldn't say he had problems with his coordination." (R28 at 19:9-12.)

Given the questionable veracity of Deputy Kellner's observations of Mr. Moran's alleged "head turning" and "vague answers" to some of his questions, and further, given the absence of all of the "classic" indicia of impairment such as slurred speech, bloodshot and glassy eyes, poor finger dexterity, poor balance and coordination, and poor mentation, all that Deputy Kellner is really

left with in terms of justifications for the enlargement of Mr. Moran's detention is the "minty odor" of his gum chewing and the minor "fender bender."

The fact that Mr. Moran was chewing gum is easily dismissible because, in Deputy Kellner's own words, "people chew gum all the time. It's in itself not a stand-alone indication of somebody who's impaired or trying to mask that they were drinking." (R28 at 10:20-22.)

As for the accident, again Deputy Kellner makes two important admissions, namely (1) a person who is involved in a motor vehicle accident is not always impaired (R28 at 10:13-15); and (2) on the day of the Brewer game, traffic was "very heavy" and as such, minor accidents such as that which occurred in this case "are pretty common under those types of traffic conditions." (R28 at 22:3-9.)

When all of the foregoing factors are taken together—as both the positive and negative observations must be—and are placed on the great constitutional scale of the Fourth Amendment, it tips not insignificantly in Mr. Moran's favor because the rights of the individual to be free from oppressive government interference far outweigh any privilege the state has in investigating an offense based upon mere guesswork.

CONCLUSION

Based upon the foregoing authorities and arguments, Mr. Moran posits that Deputy Kellner lacked sufficient objective, specific, and articulable facts upon which to extend his detention to include field sobriety testing. The deputy's reliance on the tipped information as proof of the tipped information is misplaced and contrary to principles of logic, and his remaining reliance upon purely innocent factors without consideration of those observations which are absent from his contact with Mr. Moran leads to but one conclusion, to wit: no reasonable suspicion to require Mr. Moran to perform field sobriety tests existed in this case.

Dated this 17th day of August, 2017.

Respectfully submitted:

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By: _____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 3,770 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains (1) a Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix 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 August 7, 2017. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 17th day of August, 2017.

Respectfully submitted:

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APPENDIX

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