State of Wisconsin
Court of Appeals
District 2
Appeal No. 2014AP000707-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Peter J. Long,

Defendant-Appellant.

On appeal from a judgment of the Washington County Circuit Court, The Honorable James G. Pouros, presiding

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Defendant-Appellant's Brief and Appendix

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Avenue, Suite 1200
Milwaukee, WI 53233

414.671.9484

Attorneys for the Appellant

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Appendix

Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

Whether the circuit court erred in denying Long's motion to suppress all evidence seized by police after Long's warrantless arrest by a Washington County Sheriff's Deputy where the evidence presented at the motion hearing established that:

- Menasha police received information from an anonymous informant that Long was on his way to Milwaukee cut off the arm of a former cellmate so he could cook it and eat it;
- That Long may be under the influence of drugs or alcohol; but
- The officer made little or no effort to corroborate any of this information; and,
- To the extent the officer did investigate, the investigation refuted the informant's claim that Long was under the influence or that he needed assistance; and
- Based on this information, the Menasha officer issued an

"attempt to locate" notice which was relied upon by the sheriff's deputy who arrested Long.

Answered by the circuit court: No.

Summary of the Argument

The historical facts on this appeal are essentially uncontroverted. The question is one of constitutional fact. That is, whether, under the totality of the circumstances, the conduct of the officers in shutting down the traffic on a major highway, in stopping Long's vehicle, and then removing Long from the vehicle at gunpoint, was reasonable given the information the police had in their collective possession.

The conduct of the officers was extraordinarily unreasonable. Law enforcement deployed a near military-style operation in order to apprehend Long. This, based on uncorroborated, far-fetched information provided by an anonymous informant.

Statement of the Case

I. Procedural History

The defendant-appellant, Peter Long (hereinafter "Long") was charged in a criminal complaint filed on September 15, 2011 in the Washington County Circuit Court with operating

under the influence of alcohol, an eighth offense[1]. (R:1) Following a preliminary hearing, the court found probable cause and bound Long over for trial. (R:20-42) Long entered not guilty pleas.

On April 3, 2012 Long filed a motion to suppress all evidence seized by police after the warrantless stop of his vehicle. (R:28; App. B) The court conducted an evidentiary hearing into the motion on May 31, 2012, and then set a briefing schedule. On July 26, 2012 the judge issued a memorandum decision denying the motion. (R:38; App. C)

Thereafter, Long, *pro se*, filed a motion to reconsider the decision. (R:39) The court granted Long an additional hearing on September 28, 2012. Long, as well as Long's father, testified at this hearing.

On February 11, 2012 the court issued a memorandum decision denying Long's motion to reconsider. (R:52; App. D) [2]

Thereafter, on July 9, 2013 Long pleaded guilty to the charge. On August 22, 2013, the court sentenced the defendant to ten years in prison bifurcated as five years initial confinement and five years extended supervision. (R:76-44).

Long filed a notice of intent to pursue postconviction relief. There were no postconviction motions. Rather, on March 27, 2014, Long filed a notice of appeal

[1] The complaint was later amended to allege that this was Long's ninth offense. (R:11)
[2] Long petitioned the court of appeals for leave to appeal this nonfinal order. On March 12, 2013, the court of appeals denied the petition. *See* 2013AP000428-CRVLV

II. Factual Background

On September 14, 2011[3], in the late evening hours, Menasha police officer Corey Colburn was dispatched to a complaint of a "disturbance" at an apartment building owned by Long. (R:31-22, 23) According to the complaint, Long was supposedly banging his hand or his head on the door of a tenant demanding money. (R:31-23)

Based on this complaint, Colburn decided to go to Long's residence at 310 Wilson Street in Menasha. When Colburn arrived, he believed that Long was inside the residence, but Long would not answer the door. (R:31-24). Colburn testified that he had dispatch contact Long by telephone. Colburn claimed that, through the door, he could hear the dispatcher talking to Long. Colburn heard Long say that he was in Milwaukee. (R:31-24) According to Colburn, he thought Long's voice sounded "loud." (R:31-25) Colburn yelled through the door that he was going to issue Long a disorderly conduct ticket, and then he left.

Two hours later, Colburn received another call about Long, this time from a person who identified herself as a "concerned friend."[4] (R:31-26) Colburn spoke to the

[3] Unless otherwise noted, the facts are taken from the hearing on Long's motion to suppress evidence and his motion for reconsideration. Long's guilty plea and the court's sentence are not issues on this appeal.

[4] This person was never identified at the hearing

"concerned friend" on the telephone. It turned out that she was a tenant in a building owned by Long[5]. According to the informant, Long was on his way to Milwaukee to kill a former cellmate *Id.* Further, the tenant told Colburn that Long was possibly under the influence of narcotics or alcohol, and he was currently driving at speeds in excess of 120 miles per hour. (R:31-29) She did not explain how she came to believe that Long was under the influence. Remarkably, the tenant also claimed that Long planned to cut off the arm of a former cellmate who had caused Long to stay in prison longer, and then he intended return with it and cook it. (R:31-35, 36) Colburn admitted that the informant's claims seemed far-fetched. (R:31-42)[6]

Nevertheless, Colburn issued a statewide "attempt to locate" (ATL) for Long. (R:31-35; 48) Colburn testified that he issued the ATL as a "welfare check" for Long, *not as an arrest request.* (R:31-35) A description of Long's vehicle was also provided.

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[5] Colburn testified that this was a completely different tenant from the one who had made the earlier complaint. (R:31-42)

[6] Document 44 in the record on appeal is the transcript of Long's testimony at his *pro se* motion to reconsider. In his testimony, Long demonstrates that almost all of what the "friend" told Colburn is not true. According to Long, he was knocking on the apartment door as part of a pre-arranged collection of rent. Although it was early in the morning, it was because of the tenant's work schedule. Long said that he may have been in his apartment when Colburn arrived, but that it is a three story apartment, and he never heard any knocking. Moreover, Long produced DOC documents to prove that he did not spend additional time in prison because of something his roommate did. After receiving the testimony, the circuit judge declined to reconsider. Thus, it is not appropriate to include these facts in the Statement of the Facts. It is interesting, though, that, had Colburn conducted even a cursory investigation, there was an abundance of information available to him to suggest that the "concerned friend's" information was highly unreliable.

Colburn then went to the tenant's apartment. While he was there, Long called on the telephone. The tenant put the call on speaker. (R:31-30) During this conversation, Colburn heard Long say that he was driving ninety miles per hour to Milwaukee (R:31-30), that he had had police contact earlier that day, and that he planned to have one last evening of fun. (R:31-31) Nevertheless, Colburn heard Long say that he had stopped at McDonalds and had ordered some food, and that he was "fine." (R:31-43, 45)

During this conversation, the informant told Colburn that she was behind on her rent, and that she did not want to be evicted. (R:31-48) Moreover, the tenant told Colburn that she did not want him to use her name in any police report, and Colburn agreed. *Id.*

As mentioned, by the time Colburn went to the tenant's apartment he had already issued the ATL. While at the apartment listening in on Long's phone call, Colburn did not speak to Long to determine whether he needed any assistance, and Colburn did hear Long say that he was "fine." Colburn admitted that, based on the telephone call, there was no indication that Long was under the influence of alcohol or drugs. (R:31-44) Nevertheless, Colburn did not withdraw the ATL. (R:31-49)

The dispatcher, Jennifer Davis, testified that she spoke to Long on the telephone while he was driving. (R:31-54). She

said that she did not think that Long had slurred speech or difficulty communicating. (R:31-55) Long told her that he was going to Milwaukee on a date. (R:31-55) Specifically, Long did not indicate that he was in distress or that he required any assistance. (R:31-54) Still, the ATL was not withdrawn.

Having received the ATL, Washington County Deputy John Binsfeld began monitoring traffic on State Highway 41. (R:31-9)[7] According to Binsfeld, the ATL instructed him to "stop, *hold*, and advise. So she [the dispatcher] meant stop the individual . . . *hold them for that municipality* . . . advise them of such stop, and make determination what to do with him from there." (R:31-6)

In time, Binsfield identified Long's vehicle, and he followed it for eight to ten miles. (R:31-11, 12) During that stretch, Long was not speeding, and the only unusual driving that Binsfeld observed was a slight deviation over the fog line for approximately fifty feet. *Id.* At sixty-five miles per hour, this means that Long's tire was on the fog line for about one second.

Also, during the time Binsfeld was following Long's vehicle, he radioed other squad cars in the area to *shut down traffic* on Highway 41[8]. (R:31-10) It took about three or four minutes for Washington County Sheriff's Deputies to get into position with the road-block. (R:31-12)

[7] This would be the most likely route that one would take from Menasha to Milwaukee
[8] A fair characterization of this instruction is that Binsfeld set up a road-block for Long.

Binsfeld then initiated a traffic stop on Long's vehicle for the express purpose of conducting a "welfare check" but, according to Binsfeld, he "also had the reason of the deviating over the fog line." (R:31-13). Nevertheless, the stop was conducted with weapons drawn, pointed at Long, and Long was ordered out of his vehicle. (R:31-14) Long was immediately handcuffed.

Once Binsfeld had contact with Long, he claims that it appeared that Long was under the influence. Long was removed the vehicle and, following field testing, he was arrested for OWI. (R:1)[9]

Argument

I. The circuit court erred in denying Long's motion to suppress.

The historical facts on this appeal are essentially uncontroverted. The question is one of constitutional fact. That is, whether, under the totality of the circumstances, the conduct of the officers in shutting down the traffic on a major highway, in stopping Long's vehicle, and then removing Long from the vehicle at gunpoint, was reasonable given the information that the police had in their collective possession.

[9] The issue at the motion hearing was the stop of the vehicle and, therefore, no testimony was elicited concerning the events after the stop.

The conduct of the officers was extraordinarily unreasonable. Law enforcement deployed a near military-style operation in order to apprehend Long. This, based on uncorroborated, far-fetched information provided by an anonymous informant.

A. Standard of Appellate Review

The evidence relating to what occurred prior Long's arrest is uncontroverted.[10] Thus, the challenge presented by this appeal is whether, under those facts, the warrantless arrest of Long was reasonable. Whether a warrantless arrest is reasonable is a question of constitutional fact, which the appellate court determines independently of the trial court's conclusion. *State v. Griffin*, 131 Wis. 2d 41, 62, 388 N.W.2d 535 (1986).

B. Long was under arrest the moment the police conducted the traffic stop and then approached his vehicle with guns drawn.

The first step in any Fourth Amendment analysis is to identify the nature of the seizure. In his memorandum decision, the circuit judge noted that, "Both the prosecutor and defense attorney agreed that the stop of the vehicle needed to

[10] The evidence was uncontroverted at the motion hearing. As mentioned earlier, Long can demonstrate that most of what the "concerned friend" told Officer Colburn was demonstrably false.

be analyzed through a 4th Amendment reasonable suspicion approach." (R:38-2) This is entirely the wrong approach. Fortunately, on appeal, the court's application of the facts to the law is *de novo.* What happened here is anything but a temporary detention or a "welfare check". It was a full-blown arrest, and more.

Three factors are relevant to the question of whether an arrest has occurred: (1) whether the person's liberty or freedom of movement is restricted; (2) whether the arresting officer intends to restrain the person; and (3) whether the person believes or understands that she or he is in custody. *State v. Washington*, 134 Wis.2d 108, 124-25, 396 N.W.2d 156, 163 (1986); *State v. Disch,* 129 Wis.2d 225, 236-37, 385 N.W.2d 140, 144-45 (1986). These factors are applied regardless of whether the arrest is challenged under the fourth amendment (*Washington*) or statutorily (*Disch*). Arrest hinges, in part, on custody. The central idea of an arrest is the taking or detaining of a person by word or action in custody so as to subject his liberty to the actual control and will of the person making the arrest. *Huebner v. State*, 33 Wis.2d 505, 516, 147 N.W.2d 646, 651 (1967). Ultimately, whether a person has been seized is determined by an objective test; a person is seized only if, in view of all the circumstances, a reasonable person would have believed he was not free to leave. *Florida v. Royer*, 460 U.S. 491, 501-02 (1983); *State v. Kramar*, 149

Wis.2d 767, 781, 440 N.W.2d 317, 322 (1989).

A critical factor in determing the nature of a seizure is the degree to which the police exhibited official authority and the use of force. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991)

Here, then, Long was plainly "under arrest" at the point his vehicle was stopped and he was removed from the vehicle at gunpoint. Under no objective standard was this a "welfare check" or a temporary detention.

> [D]etentions may be reasonable for investigative purposes, yet violative of the Fourth Amendment. [internal citation omitted]. As courts, we must guard against police misconduct through overbearing or harassing techniques that tread upon people's personal security without the objective evidentiary justification the Constitution requires. *See Terry,* 392 U.S. at 15, 88 S.Ct. at 1876. "The police [may not] seek to verify their suspicions by means that approach the conditions of arrest." *Royer,* 460 U.S. at 499, 103 S.Ct. at 1325.

State v. Quartana, 213 Wis. 2d 440, 448, 570 N.W.2d 618, 622 (Ct. App. 1997)

Long's freedom of movement and personal security was severely restricted. There was a massive show of police force. The *traffic on State Highway 41 was shut down.* The officer conducted a traffic stop using the squad car's emergency lights. Long was removed from the vehicle at gunpoint. Any person in the position of Long would reasonably believe that he was under arrest. This is the very sort of overbearing and

harassing police conduct that the court of appeals warned against in *Quartana.*

Moreover, Binsfeld did not intend this to be a temporary detention to determine whether Long needed assistance. Binsfeld intended to hold Long for whatever time necessary to contact the Menasha Police for further instructions.

C. There was no probable cause to arrest Long.

Given the nature of the seizure, then, the question is whether there was probable cause to arrest Long. The standard is, of course, well-settled: probable cause for an arrest exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Kutz*, 267 Wis. 2d 531, 671 N.W.2d 660 (2003). "While the information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is 'more than a possibility,' it 'need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.'" *Id.*

> When police have relied, at least in part, on information from an informant, we balance two factors to determine whether officers acted reasonably in reliance on that information. *Id.,*
>
> The first is the quality of the information, which depends upon the reliability of the source. *Id.* The second is the quantity or content of the information. *Id.* There is an inversely proportional

> relationship between the quality and the quantity of information required to reach the threshold of reasonable suspicion. *Id.*
>
> In other words, if an informant is more reliable, there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information to conduct an investigatory stop.19 On the other hand, if an informant has limited reliability—for example, an entirely anonymous informant—the tip must contain more significant details or future predictions along with police corroboration.20 The relevant question is whether the tip contained "sufficient indicia of reliability," along with other information known to police, to support reasonable suspicion for an investigatory stop.

State v. Miller, 2012 WI 61, 341 Wis. 2d 307, 324-26, 815 N.W.2d 349, 358-59

Finally, the court must consider "the collective knowledge of the officer's entire department." *Id.*

> [I]n a collective knowledge situation, if a defendant moves to suppress, the prosecutor must prove the collective knowledge that supports the stop. Proof is not supplied by the mere testimony of one officer that he relied on the unspecified knowledge of another officer. Such testimony provides no basis for the court to assess the validity of the police suspicion—it contains no specific, articulable facts to which the court can apply the reasonable suspicion standard.

State v. Pickens, 2010 WI App 5, 323 Wis. 2d 226, 235, 779 N.W.2d 1, 5.

Here, in arresting Long, the arresting officer, Binsfeld, was relying entirely on the ATL issued by the Menasha officer, Colburn. Thus, the focus of the analysis is on the facts that

were in the possession of Colburn.

i. It was unreasonable for Colburn to rely upon the unverified claims of the tenant.

Where, as here, police rely upon information provided by an informant, the court must carefully consider both the reliability of the informant and the quality of the information provided.

In considering the reliability of the informant, perhaps the primary concern is whether the informant identified herself. Here, for all intents and purposes, the tenant was an anonymous tipster. Although the officer claimed to know the identity of the informant, her name was not put into the police report, and the informant's name was not disclosed at the motion hearing.

> The key to this analysis is the informant's knowledge or presumed knowledge that a consequence of disclosing his or her identity is accountability for providing a false tip. Stated differently, police may infer that an informant who risks disclosing his or her identity is more likely to be providing truthful information because the informant knows that police can hold him or her accountable for providing false information

Miller, 2012 WI 61, 341 Wis. 2d 307, 327, 815 N.W.2d 349, 359-60.

Because the tipster in this case refused to allow the

officer to use her name, she should be considered to be anonymous. In other words, she was not willing to put her name on the complaint. As such, the reliability of her claims is suspect right from the start.

More to the point, though, it is obvious that, when one considers the *content* of the informant's claims, the information is wholly unreliable. The informant claimed that Long was on his way to cut off the arm of a former cellmate, and that he was going to cook it and eat it. Even the officer admitted that the information seemed far-fetched.

The informant also claimed that Long was under the influence of alcohol or drugs, but Officer Colburn never asked her any questions to determine how the informant came to such a conclusion.

Then, in the face of this suspect information, Officer Colburn made next to no effort to corroborate any of it. He could have asked further questions of the informant. He could have telephone Long to discuss whether Long needed any assistance, or whether Long was about to commit a crime. He could have contacted the DOC to determine whether Long had ever been disciplined based upon information provided by a cellmate. Colburn did none of these things.

To the extent that Colburn did investigate the situation, the investigation refuted the claims of the informant. That is, when Colburn listened in on Long's phone call, Long did not

seem to be impaired. Long said that he was "fine" and that he needed no assistance.

Finally, central to the analysis of reliability is the fact that the tenant expressed that she had a motive to fabricate these claims against Long. She admitted that Long was her landlord, that she was behind on her rent, and she was afraid that Long would evict her. Thus, it was wholly unreasonable for Officer Colburn to issue an ATL for Long, much less was it reasonable for police to arrest Long in the manner that they did.

ii. Even assuming *arguendo* that the tenant is reliable, the facts possessed by Colburn were still insufficient to establish probable cause to arrest.

The unverified claim of the tenant that Long was traveling to Milwaukee to kill his former cellmate does not establish probable cause to believe that Long had committed any crime. Firstly, even the officer acknowledged that the claim of the tenant seemed far-fetched. Secondly, it is not a completed crime to express one's intent to commit a crime in the future[11]. In order to prove that the defendant attempted to commit a crime, there must be evidence to prove that the crime would, in fact, have been committed but for the intervention of some

[11] So long as one is not making an agreement with another to commit the crime. Making an agreement with another person to work together to commit a crime is the crime of conspiracy once one of the actors takes an affirmative step toward the commission of the crime.

extraneous factor. *See* § 939.32(3), Stats. Here, there is utterly no reason to believe that Long would, in fact, have killed his former cellmate if he had not been stopped by the police.

Similarly, Long's statement that he was driving ninety miles per hour does not establish probable cause to arrest him for speeding unless the arresting officer observes Long traveling at that speed (or at some other speed above the speed limit). Wisconsin has long followed the so-called *corpus delicti* rule, which stands for the proposition that a defendant cannot be convicted of an offense based upon the uncorroborated statement of the defendant. *State v. Bannister,* 2007 WI 86, 302 Wis. 2d 158, 169-70, 734 N.W.2d 892, 897-98. Thus, Long's uncorroborated statement that he was traveling ninety miles per hour does not establish probable cause to arrest him for speeding.

iii. It does not violate the traffic code to drive over the fog line on the right.

In his testimony, Binsford said that the reason he stopped Long was the ATL but, additionally, he had observed Long's vehicle drive briefly on the fog line.

There is no traffic regulation prohibiting a motorist from driving on the fog line at the right side of the roadway. § 346.13(3), provides that drivers "shall drive in the lane designated," and the Code also provides that drivers must

remain on the right side of the roadway. But neither this statute nor any other part of Chapter 346, Stats. states that the fog line is a boundary line for a lane, such that driving beyond it is illegal conduct.

Moreover, under the totality of the circumstances, Long's conduct in driving on the fog line for fifty feet out of a stretch of ten miles, does not permit any inference that he was driving recklessly nor that his ability to drive safely was impaired.

Thus, there was no probable cause to arrest Long.

Conclusion

For these reasons, it is respectfully requested that the court reverse the order of the circuit court denying Long's motion to suppress. The matter should be remanded with instructions for the court to vacate the guilty and the judgment of conviction, and to enter an order granting the motion to suppress evidence.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2014.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233

414.671.9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4237 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of _____, 2014:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 2
Appeal No. 2014AP-000707-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Peter J. Long,

Defendant-Appellant.

Defendant-Appellant's Brief and Appendix

A. Record on Appeal

B. July 26, 2011 memorandum decision denying motion

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the

administrative agency.

I further 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.

Dated this ____ day of June, 2014.

_____

Jeffrey W. Jensen