The Wisconsin Supreme Court holds that the Sixth Amendment's Confrontation Clause protects a defendant's right to confrontation at trial but not at a suppression hearing. Therefore, the Wisconsin Supreme Court found that the admission, at a suppression hearing, of a deceased police officer's recorded statements did not deprive the Defendant of his Constitutional rights.

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In State of Wisconsin v. Zamzow, ___ N.W.2d ___, 2017 WL 1281571 (Wis. April 6, 2017), the Wisconsin Supreme Court was asked to determine a question of first impression in the State's jurisprudence: whether the Sixth Amendment's Confrontation Clause applies at suppression hearings. Upon review, the Wisconsin Supreme Court upheld the trial court and the appellate court's conclusion that it did not. The relevant facts are as follows.

Officer Craig Birkholz of the Fond du Lac Police Department stopped Defendant Glenn Zamzow's car early on a Sunday morning after observing the car cross the center line. During the stop, Zamzow smelled of intoxicants and admitted to drinking alcohol. Officer Curt Beck arrived on the scene with a third officer to assist Officer Birkholz. The officers arrested Zamzow, and the State charged him with operating while intoxicated and operating with a prohibited alcohol concentration, both as third offenses. Zamzow filed a motion to suppress the evidence obtained during the stop and claimed that Officer Birkholz lacked reasonable suspicion for the stop. Before the trial court could hold a suppression hearing, Officer Birkholz died.

With Officer Birkholz unavailable to testify at the suppression hearing, the State relied on a recording of the stop and on the testimony from Officer Beck and from a computer forensic specialist from the police department to establish reasonable suspicion. The computer forensic specialist first testified about recordings from cameras mounted on the two squad cars involved in the stop. The forensic specialist testified that he prepared a DVD containing the dashboard camera video from each car. Next, Officer Beck explained his role in assisting with the stop. Officer Beck acknowledged watching the DVD with the dashboard camera videos, and he confirmed that the recording produced by his own car's camera fairly and accurately depicted the stop as he remembered it. Additionally, Officer Beck confirmed that the dashboard camera video from Officer Birkholz's car fairly and accurately depicted the events that Officer Beck personally observed and verified that the video consisted of a continuous, uninterrupted segment.

Based on this testimony and over defense counsel's objection to the impossibility of cross-examining Officer Birkholz about his reasons for initiating the stop, the trial court allowed the State to introduce the video from Officer Birkholz's car. After hearing arguments from Zamzow's counsel and from the State, the trial court took the suppression motion under advisement to further review the video. While watching the video in chambers, the trial court discovered that the recording included audio that had not accompanied the video at the suppression hearing. The trial court, then, ordered a second suppression hearing so that the audio accompanying the video could be played on the record.

At the second suppression hearing, the trial court heard the initial statement that Officer Birkholz made to Zamzow after initiating the stop: "Officer Birkholz, city police. The reason I stopped you is you were crossing the center line there coming at me and then again when I turned around and got behind you." The trial court also heard audio in which Officer Birkholz explained his basis for the stop to the arriving officers. Zamzow's counsel objected to admission of both audio statements, arguing that the inability to cross-examine Officer Birkholz denied Zamzow his right to confront a witness against him.

The trial court denied Zamzow's suppression motion and made the following findings of fact:

> [O]n Sunday night, March 13th, at 3:04 a.m. or thereabouts, the officer in this case, deceased Officer Birkholz, did make an observation that the defendant had crossed the center line on Johnson Street as he was approaching the Johnson street bridge from the east traveling west. The officer turned around, stopped the vehicle, and has testified that the vehicle crossed the center line again as it was going over the Johnson Street bridge.

From the video, the trial court could not "discern in any fashion . . . whether a cross of the center line occurred prior to the two vehicles crossing paths," and the trial court added that it was "difficult from the video to discern whether the defendant's vehicle actually crossed the center line as it was going over the bridge." Focusing instead on the statement that Officer Birkholz made to Zamzow, the trial court concluded, "the . . . testimony that the vehicle did, in fact, cross the center line twice in that short amount of time" provided a "sufficient basis for the officer to have made a stop for further inquiry."

On Zamzow's motion for reconsideration, the trial court clarified its decision by concluding that the Sixth Amendment's Confrontation Clause does not apply at a suppression hearing. The trial court added that, even if the Confrontation Clause does apply at suppression hearings, Officer Birkholz's statement to Zamzow was nontestimonial and, therefore, was admissible.

Zamzow proceeded to trial, and a jury convicted him. At trial, the jury did not hear the audio recording of Officer Birkholz's statement. After the trial court denied his motion for post-conviction relief, Zamzow appealed, and the court of appeals affirmed his conviction. On appeal, the court of appeals agreed with the trial court that "the Confrontation Clause simply does not apply to pretrial hearings such as the suppression hearing at issue in this case." Additionally, the court of appeals rejected Zamzow's claim that admitting the audio statements denied him due process of law. Zamzow, then, sought review from the Wisconsin Supreme Court.

The Wisconsin Supreme Court began its analysis by noting that the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him . . . ." Id. Thereafter, the Wisconsin Supreme Court began a historical analysis of the Confrontation Clause to determine the breath of the right contained therein. Initially, the Wisconsin Supreme Court agreed that, on its face, the Sixth Amendment's introductory phrase "[i]n all criminal prosecutions" seemed to speak in broad terms sufficient to apply to all criminal proceedings.

The Wisconsin Supreme Court ultimately determined, however, that the right to confrontation is a trial right. In reaching this conclusion, the Wisconsin Supreme Court stated that, as criminal procedure has evolved over time, it has begun to include various pretrial proceedings. The Wisconsin Supreme Court further noted that there is a difference in the standards and latitude allowed in determining probable cause versus a defendant's guilt. Guilt at trial must be proved beyond a reasonable doubt, but probable cause implicates only the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 175 (1949). Therefore, the Wisconsin Supreme Court determined that the right to confront witnesses is a trial right, and it based this conclusion, in large part, on the different purposes of a trial versus a pretrial proceeding. Specifically, the fact that a defendant's guilty need not be determined beyond a reasonable doubt in a pretrial hearing.

In reaching this conclusion, the Wisconsin Supreme Court joined other jurisdictions that had reached the same conclusion. For example, in People v. Felder, 129 P.3d 1072, 1073-74 (Colo. App. Ct. 2005), the Colorado Appellate Court observed that nothing in the United States Supreme Court's precedent suggests that it intended to alter its prior rulings allowing hearsay at pretrial proceedings (such as at a hearing on a suppression motion challenging the sufficiency of a search warrant) and reasoned that, had the Court intended the rule of Crawford to apply at the pretrial stage, it would have revisited its prior decisions refusing to recognize a Sixth Amendment right of pretrial confrontation. In State v. Woinarowicz, 720 N.W.2d 635 (N.D. 2006), the North Dakota Supreme Court held that in Crawford, the United States Supreme Court did not indicate it intended to change the law and apply the Confrontation Clause to pretrial hearings. . . . The Sixth Amendment right to confrontation is a trial right, which does not apply to pretrial suppression hearings."). And, in Vanmeter v. State, 165 S.W.3d 68, 74-75 (Tex. App. Ct. 2005), the Texas Appellate Court held: "Crawford did not change prior law that the constitutional right of confrontation is a trial right, not a pretrial right . . . . We hold, therefore, that Crawford does not apply at pretrial suppression hearings.").

As for Zamzow's claim that allowing the evidence violated his Due Process rights, the Wisconsin Supreme Court made short work of his argument. In rejecting his argument, the Wisconsin Supreme Court agreed with the lower courts in this case that the United States Supreme Court distinguished between pretrial and trial proceedings in evaluating Due Process claims and opined that due process is flexible and calls for such procedural protections as the particular situation demands.

Here, Officer Birkholz's death made him unavailable to testify at the suppression hearing, but the video and audio recording of the incident that led to Zamzow's arrest accurately and continuously documented the stop of Zamzow's car. Accordingly, the Wisconsin Supreme Court held that Zamzow's Due Process rights were not violated when the trial court admitted this evidence.

The Wisconsin Supreme concluded: "The right to confrontation arose at common law as a tool to test witness reliability at trial. With the advent of pretrial evidentiary hearings during the twentieth century, the Supreme Court has signaled that the right to confrontation persists as a trial protection and does

not apply during pretrial proceedings. The Sixth Amendment guarantees that a defendant whose guilt or innocence is at stake at trial may employ the greatest legal engine ever invented for the discovery of truth. But the Sixth Amendment does not mandate that statements considered at a suppression hearing face the crucible of cross-examination. Nor does the Due Process Clause demand this. Accordingly, we conclude that the circuit court did not deny Zamzow his rights under the Sixth and Fourteenth Amendments to the Constitution by relying on an audio recording of a deceased officer's statement at the suppression hearing." Zamzow, ___ N.3d. at ___, 2017 WL 1281571, at * 6 (internal quotation omitted).

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Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*