RECEIVED
08-24-2010
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2010 AP 1170 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JOHN M. EATON,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered
in the Circuit Court for Dane County
the Honorable Robert Dechambeau and
the Honorable Stephen E. Ehlke Presiding
Trial Court Case No. 09 CT 3016

Respectfully Submitted:

Lanning Law Offices, LLC
2100 Gateway Court, Suite 200
West Bend, WI 53095
Telephone: (262) 334-9900

By: **Chad A. Lanning**
State Bar No. 1027573
Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii-iii

STATEMENT OF THE ISSUE 1

STATEMENT ON ORAL ARGUMENT 1

STATEMENT ON PUBLICATION 1

STATEMENT OF THE FACTS AND CASE 2-8

ARGUMENT 9-22

LAW ENFORCEMENT LACKED REASONABLE SUSPICION TO DETAIN MR. EATON.

A. Speed.

B. Slowing and Reluctantly Passing the Officer.

C. Weaving.

D. Stopping at the Yellow Light and Blinker.

E. The Totality of the Circumstances.

CONCLUSION 22

APPENDIX 100

TABLE OF AUTHORITIES

United States Supreme Court Cases:

Terry v. Ohio,
392 U.S. 1 (1968) 10,11

United States v. Hensley,
469 U.S. 221 (1985) 10

Wisconsin Supreme Court Cases:

Bellrichard v. Chicago & N. W. Ry.,
246 Wis. 569, 20 N.W. 2d 710 (1945) 13-14

City of Milwaukee v. Berry,
44 Wis. 2d 321, 171 N.W.2d 306 (1969) 13

City of Milwaukee v. Johnston,
21 Wis. 2d 411, 124 N.W.2d 690 (1963) 13

State v. Brown,
107 Wis. 2d 44, 318 N.W.2d 370 (1982) 15-16

State v. Popke,
2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 18

State v. Post,
2007 WI 60, 733 N.W.2d 634 10,11,12

State v. Richardson,
156 Wis. 2d 128, 456 N.W.2d 830(1990) 9-10,11,12

TABLE OF AUTHORITIES (cont.)

Wisconsin Supreme Court Cases (cont.):

State v. Rutzinski,
2001 WI 22, 623 N.W.2d 516 12

State v. Taylor,
60 Wis. 2d 506, 210 N.W.2d 873 (1973) 11,21

State v. Walder,
206 Wis. 2d 51, 556 N.W.2d 681 (1996) 11

STATEMENT OF THE ISSUE

WHETHER LAW ENFORCEMENT LACKED REASONABLE SUPICION TO STOP AND DETAIN MR. EATON?

Trial Court Answered: **No.**

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), Stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Appellant believes publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), Stats., this case involves the application of well-settled rules of law.

STATEMENT OF FACTS AND CASE

On June 5, 2009, at approximately 2:18 a.m. Mr. John Eaton, the Defendant-Appellant, was driving his motor vehicle on East Washington Avenue in Dane County, Wisconsin. (R26 at 5, 10.); (App. at 105,110.) At that time, Officer Joel Stelter of the Madison Police Department was driving ahead of and in same direction as Mr. Eaton on East Washington Avenue. (R26 at 12.); (App. at 112.)

Officer Stelter admitted that he knew he was driving below the speed limit, as he frequently drives below the speed limit in this area. (R26 at 19.); (App. at 119.) At one point, Officer Stelter stated that he was driving up to 5 miles an hour below the posted speed limit of 35 miles per hour.[1] (R26 at 12-13, 19.); (App. at 112-113, 119.)

---

1 Officer Stelter only looked at his speedometer once "after [he] was approached by the vehicle from behind." (R26 at 19.); (App. at 119.) Specifically, Officer Stelter stated that his speedometer was "approximately in the 32 range" at that time. *Id*.

Officer Stelter characterized Mr. Eaton's vehicle as approaching his vehicle at a high rate of speed relative to his vehicle's speed. (R26 at 13.); (App. at 113.) Further, Officer Stelter indicated that he estimated the speed Mr. Eaton's vehicle at 45 miles per hour. (R26 at 7.); (App. at 107.)

Eventually, Mr. Eaton caught up to the officer's vehicle. *Id*. Mr. Eaton then slowed and matched the officer's speed. *Id*. Officer Stelter acknowledged that drivers will hit their breaks when they first see an officer even when they are not doing anything wrong. (R26 at 14.); (App. at 14.)

Next, Officer Stelter slowed down even more, until his speed reached approximately 18 miles per hour. (R26 at 8.); (App. at 108.) At that point, Mr. Eaton stopped slowing with the officer, and resumed traveling at the speed limit. (R26 at 8,19.); (App. at 108,119.) Again, Officer Stelter acknowledged that drivers are reluctant to pass police officers, even if they are going the speed limit. (R26 at 14.); (App. at 114.)

Next, Officer Stelter stated that he observed Mr. Eaton's vehicle slowly weaving several feet in each direction. (R26 at 9,16.); (App. at 109, 116.) Lastly, Officer Stelter indicated that Mr. Eaton "put his turn signal on, got into the furthest right lane, came to a complete stop, sat there for a second or two, deactivated the turn signal and proceeded straight through the intersection." (R26 at 10.); (App. at 110.) Officer Stelter then activated his emergency lights and stopped Mr. Eaton's vehicle. *Id*.

Mr. Eaton was subsequently charged with Operating a Motor Vehicle While Under the Influence of an Intoxicant (Second Offense), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration (Second Offense). (R1.)

Through a written motion dated August 28, 2009, Mr. Eaton, by counsel, moved to suppress evidence based on a lack of reasonable suspicion to detain him. (R11.); (App. at 131-136.) A motion hearing was held on October 19, 2009. (R26.);

(App. at 101-130.) Officer Stelter was the only person to testify at the hearing.

During the hearing, Mr. Eaton objected to the officer's discussion of speed based upon a lack of foundation. (R26 at 5-8.); (App. at 105-8.) Moreover, the officer admitted that he had no idea exactly how fast Mr. Eaton was going. (R26 at 13.); (App. at 113.) Lastly, the officer was shown a portion of video recording that his dash mounted camera had made of the stop. (R26 at 16-18.); (App. at 116-18.); (R13.) After viewing the video, the officer admitted that he could not see the two to three feet of lane deviation that he had previously testified observing. (R26 at 18.); (App. at 118.) The officer, however, stated that the video was blurry. (R26 at 20.); (App. at 120.)

At the conclusion of the hearing, the State argued that the officer had probable cause to stop Mr. Eaton based on the officer's estimation that Mr. Eaton was above the speed limit. (R26 at 22.); (App. at 122.) Further, the State argued that

reasonable suspicion existed to justify the stop based upon the cumulative observations of the officer, i.e., bar time, unusual speed, weaving, stopping at a yellow light and using a turn signal, but going straight. *Id*.

Mr. Eaton argued that the officer lacked reasonable suspicion to stop him. First, the officer admitted that he did not know Mr. Eaton's speed. (R26 at 24.); (App. at 124.) Moreover, Mr. Eaton's slowing down when approaching the officer and any reluctance to pass were normal driving behaviors caused by the officer's own actions of intentionally driving below the speed limit. *Id*.

Second, the officer's testimony regarding substantial weaving was contradicted by the video recording. (R26 at 25-26.); (App. at 125-26.) Third, Mr. Eaton argued that stopping at a yellow light was not against the law, and was consistent with the requirement that drivers proceed with caution when

approaching a flashing yellow light. (R26 at 27-28.); (App. at 127-28.)

The circuit court denied Mr. Eaton's motion to suppress based upon the officer having reasonable suspicion under the totality of the circumstances. (R26 at 30.); (App. at 130.) Thus, the circuit court did not find the officer had probable cause to arrest based on the officer's estimation that Mr. Eaton was driving over the speed limit.

In its ruling, the circuit court stressed that in its experience, most videos are, "if not worthless, pretty close to it." (R26 at 28.); (App. at 28.) Thus, the court stated that it "completely discounted" the video. (R26 at 29.); (App. at 129.) Specifically, the court stated that the officer saw the weaving with his naked eye and "there's no evidence that it wasn't other then the video which in my view, which I guess is important here, in my view as evidence, it really doesn't show much." *Id.*

The circuit court then summarized the totality of the circumstances as follows:

> It's 2:18. He sees a vehicle coming up on him at what he determines, rightly or wrongly, but he determines as an excess of the speed limit. That's an indicator that someone may be impaired. The vehicle slows as the officer slows. I don't find that too unusual, but it is a factor that's added into the other factors; he's weaving in his lane and I accept the officer's testimony that he, as the officer drops behind him, the defendant's vehicle proceeds and turns on the turn signal, and then doesn't turn, but stops for these flashing lights.

(R26 at 30.); (App. at 130.)

Subsequently, Mr. Eaton plead no contest and was convicted of Operating a Motor Vehicle With a Prohibited Alcohol Concentration (Second Offense) in violation of Wisconsin Statute sec. 346.63(1)(b). The charge of Operating a Motor Vehicle While Intoxicated (Second Offense) was dismissed.

Mr. Eaton now appeals the denial of his Motion to Suppress Based on a Lack of Reasonable Suspicion to Detain him.

ARGUMENT

LAW ENFORCEMENT LACKED REASONABLE SUSPICION TO DETAIN MR. EATON.

Citizens have the right to be free from "unreasonable searches and seizures."[2] *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990)(citing the fourth amendment to the United States Constitution and Article I sec. 11 of the Wisconsin Constitution). When an officer stops a vehicle and detains its occupants, the Fourth and Fourteenth Amendments are implicated and reasonable suspicion, at a minimum, must exist

---

2 The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 11 of the Wisconsin Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or

for the seizure to be constitutional. *See Richardson*, 156 Wis. 2d at 139, citing *United States v. Hensley*, 469 U.S. 221, 226 (1985); s*ee generally Terry v. Ohio*, 392 U.S. 1 (1968); Wisconsin Stat. § 968.24 (2005-06)(codifying the *Terry* standard).

The question of whether an investigatory traffic stop violated a driver's constitutional rights because it was not based on reasonable suspicion is a question of constitutional fact. *State v. Post*, 2007 WI 60 ¶8, 733 N.W.2d 634. A question of constitutional fact is a mixed question of law and fact to which appellate courts apply a two-step standard of review. *Id.* First, appellate courts review the trial court's findings of historical fact under the clearly erroneous standard. *Id.* Second, appellate courts independently review the application of those facts to constitutional principles. *Id.*

---

affirmation, and particularly describing the place to be search and the persons or things to be seized.

The burden of establishing that an investigatory traffic stop is reasonable falls on the State. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

To execute a valid investigatory traffic stop, *Terry* and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *Richardson*, 156 Wis. 2d at 139, citing *Terry*, 392 U.S. at 27, 30. An officer's "inchoate and unparticularized suspicion or 'hunch'" will not suffice. *Post*, 2007 WI at ¶10, *citing Terry*, 392 U.S. at 27. Therefore, to justify a *Terry* stop, law enforcement officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts" led them to suspect criminal activity was afoot. *Terry*, 392 U.S. at 21, 30; *State v. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996).

The determination of reasonableness is a common sense test based on the totality of the facts and circumstances known to the officer at the time of the stop. *Richardson*, 156 Wis. 2d at 139-40; *see also Post*, 2007 WI at ¶13. This common sense approach balances the rights of individuals to be free from unreasonable intrusions, and the interests of the State to effectively prevent, detect, and investigate crimes. *State v. Rutzinski*, 2001 WI 22, ¶15, 241 Wis. 2d 729, 623 N.W.2d 516; *Post*, 2007 WI at ¶13.

A. Speed.

Officer Stelter admitted that he was aware that he was driving below the speed limit when he first noticed Mr. Eaton approaching him from behind. (R26 at 19.); (App. at 119.) Rather than speed up to the speed limit, Officer Stelter continued to drive below the speed limit and concluded that Mr. Eaton was traveling at high rate of speed relative to his speed. (R26 at 13.); (App. at 113.)

Further, Officer Stelter testified over Mr. Eaton's objection that he estimated Mr. Eaton's speed at 45 miles per hour, i.e., 10 over the posted speed limit. (R26 at 7.); (App. at 107.) Importantly, the circuit court did not accept the officer's estimation of speed. (R26 at 30.); (App. at 130.)

All of the officer's testimony regarding speed should have been completely discounted, however, as the proper foundation was not provided. Specifically, the Wisconsin Supreme Court has acknowledged that while it is difficult to estimate the speed of a vehicle moving in the opposite direction, it is possible. *City of Milwaukee v. Berry*, 44 Wis. 2d 321, 323-24, 171 N.W.2d 306 (1969). No other case has held that the driver of a moving vehicle can accurately look behind him and estimate the speed of an approaching vehicle. Moreover, the record in this case is unclear how the officer was in a position to estimate the speed of a vehicle approaching him from behind while controlling his own vehicle as it continued to travel down

the road. *See Bellrichard v Chicago & N. W. Ry*., 246 Wis. 569, 567, 20 N.W.2d 710 (1945)(viewing a train for a few seconds is too short to enable a witness to judge speed).

Thus, any reference to speed should not have been used in the totality of the circumstances to justify the stop of Mr. Eaton.

B. Slowing and Reluctantly Passing the Officer.

Mr. Eaton's vehicle eventually approached the officer's slow moving vehicle. Prior to passing the officer, Mr. Eaton slowed and matched the officer's speed. (R26 at 7-8.); (App. at 107-8.) Officer Stelter acknowledged that drivers will hit their breaks when they first see an officer even when they are not doing anything wrong. (R26 at 14.); (App. at 14.)

Next, rather than speeding up to the speed limit, or pulling to the side of the road, Officer Stelter slowed down even more, until his speed reached approximately 18 miles per hour. (R26 at 8.); (App. at 108.) At that point, Mr. Eaton stopped

matching the officer's speed, and resumed traveling at the speed limit. (R26 at 8,19.); (App. at 108,119.) Again, Officer Stelter acknowledged that drivers are reluctant to pass police officers, even if they are going the speed limit. (R26 at 14.); (App. at 114.)

Yet the officer testified that Mr. Eaton's behavior lead him to believe that Mr. Eaton was "attempting to prevent me from obtaining the information from the rear license plate of the vehicle." (R26 at 8.); (App. at 108.)

Importantly, the Wisconsin Supreme Court has stated that law enforcement should not be able to induce a driver's behavior and then take legal action against them for that behavior. *See State v. Brown*, 107 Wis. 2d 44, 55-56, 318 N.W.2d 370 (1982)(a defendant in a speeding case may claim that his violation should be excused if it was caused by the state itself through the actions of a law enforcement officer). Specifically, the *Brown* court stated:

> The traffic laws of this state are the citizen's primary exposure to law enforcement; for many citizens traffic law is the only area in which they have direct contact with law enforcement officers. Therefore it is particularly important in the enforcement of traffic laws that the public perceive a policy of even-handed and just law enforcement. If citizens are expected to deal fairly with the state and respect the laws, the state must deal fairly with its citizens and show respect for its citizens.

Id.

Importantly, an officer driving slowly down the street sends an ambiguous message to other drivers. For example, a driver may think that the officer is looking for a specific thing in the area, or perhaps the officer is aware of a specific danger. The driving public obviously will have no idea what the officer is doing, but will act consistent with their perception of possible a danger.

Thus, law enforcement should not be able to intentionally drive below the posted speed limit and then use the unknowing public's reaction as a reason to stop them. Admittedly, the circuit court did not find the fact that Mr. Eaton

slowed down as "too unusual." (R26 at 30.); (App. at 130.) Nevertheless, the circuit court still considered this as a factor in its analysis. *Id*. The circuit court, however, should not have considered that behavior at all.

C. Weaving.

Officer Stelter also testified that he observed Mr. Eaton's vehicle slowly weaving several feet in each direction. (R26 at 9,16.); (App. at 109,116.) Importantly, all of Mr. Eaton's alleged weaving should have been captured on Officer Stelter's video recording of the stop. (R26 at 16.); (App. at 116.) Yet, after viewing the video, Officer Stelter admitted that he could not see any weaving. (R26 at 18.); (App. at 118.) Further, the circuit court acknowledged that the video did not support the officer's testimony. Specifically, the court stated:

> He's looking at it with the naked eye and he sees this weaving. There's no evidence that it wasn't other than the video.

(R26 at 29.); (App. at 129.)

The circuit court then "completely discounted" the video and stated that the "best evidence" was the officer's testimony. *Id*.

The circuit court's statement that most video recordings are either worthless or close to it, indicates that the court's findings were biased. Rather, the video recording in this case contradicted the officer and, thus, the circuit court's findings to the contrary are clearly erroneous. *See State v. Popke*, 2009 WI 37, ¶20, 317 Wis. 2d 118, 765 N.W.2d 569. Therefore, the circuit court's implicit finding that the video did not contain any weaving should have been considered by the circuit court.

As Mr. Eaton argued at the motion hearing:

> The quality of the video in this case certainly isn't poor. There's no deviating. There are no lights moving across the screen. This is a clear night and you have a clear view of the Eaton vehicle from approximately two to three car lengths behind which would have been the officer's vantage point. Clearly, **you would be able to see the Eaton taillights moving in accordance with the officer's**

> **description if, in fact, those instances of lane deviations were as pronounced as he described**.

(R26 at 26.); (App. at 126.)(emphasis added).

Therefore, the circuit court's finding that Mr. Eaton had in fact weaved in his lane was unsupported by the record and was clearly erroneous. Thus, the reported weaving should not have been used in the totality of the circumstances to justify the stop of Mr. Eaton.

D. Stopping at the Yellow Light and Blinker.

It is legal to stop at a flashing yellow light. Specifically, Section 346.39(2) states:

> Flashing signals. Whenever flashing red or yellow signal are used they require obedience by vehicular traffic as follows:
> ….
> (2) Flashing Yellow (Caution Signal). When a yellow lens is illuminated with rapid intermittent flashes, operators of vehicle may proceed through the intersection or past such signal only with caution.

Furthermore, it is not illegal to activate a turn signal and not turn. There was nothing unusual regarding Mr. Eaton's driving in this regard. In fact, Mr. Eaton's driving

showed a cautious, safe driver, possibly looking for the correct street to turn on. Simply changing one's mind about executing a turn (e.g., the driver is lost, shoes the wrong road, etc.) should not subject people to unwarranted and unconstitutional stops.

In other words, the observations of stopping at a flashing yellow light and using a turn signal and not turning are inadequate to support the belief that Mr. Eaton was violating the law or operating under the influence of an intoxicant. As the Wisconsin Supreme Court held, "[s]tanding alone, driving the wrong way on a one-way street and failure to signal a turn are not indicative of driving under the influence." *City of Milwaukee v. Johnston*, 21 Wis. 2d 411, 413, 124 N.W.2d 690 (1963).

E. The Totality of the Circumstances.

In the present case, the circuit court should have considered the following facts in its totality of the circumstances analysis:

- The officer was driving below the speed limit when he decided to follow a vehicle he perceived as driving faster than him, but at some unknown speed. (R26 at 13.); (App. at 113.)

- After Mr. Eaton's vehicle passed the officer, Mr. Eaton maintained the proper speed. (R26 at 19.); (App. at 19.)

- Mr. Eaton used a blinker and changed lanes. (R26 at 10.); (App. at 10.)

- Mr. Eaton stopped at a flashing yellow light. *Id*.

- Mr. Eaton then deactivated his turn signal and continued through the intersection. (R26 at 10,12.); (App. at 110,112.)

- Mr. Eaton committed no traffic violations; and

- Mr. Eaton's vehicle was stopped at 2:18 A.M. (R26 at 11.); (App. at 111).

Again, the burden of establishing that an investigatory traffic stop is reasonable falls on the State. *Taylor*, 60 Wis. 2d at 519. Under the facts of this case, a reasonable police officer, in light of their experiences, would not suspect

that Mr. Eaton was committing the crime of Operating While Intoxicated.

The circuit court, however, incorrectly considered the additional factors of (1) the officer's determination of excessive speed; (2) that Mr. Eaton slowed down when the officer slowed down; and (3) that Mr. Eaton was weaving.

CONCLUSION

WHEREFOR, Mr. Eaton respectfully requests this Court to reverse his conviction based on the trial court's failure to suppress evidence.

Dated this ____ day of August, 2010.

Respectfully submitted,

LANNING LAW OFFICES, LLC

By:_____
Chad A. Lanning
State Bar No. 1027573
Attorney for Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2010 AP 1170 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JOHN EATON,

Defendant-Appellant.

APPENDIX

Table of Contents

Motion Hearing Transcript (R26.).....101-130

Motion to Suppress (R11.) 131-136

Judgment of Conviction (R22.) 137

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 3,839 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

(1) a table of contents;
(2) the findings or opinion of the trial court; and
(3) the 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 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.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this ____ day of August, 2010.

Respectfully submitted:

By:_____

Chad A. Lanning
State Bar No. 1027573
Attorney for Defendant-Appellant