

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

11-17-2010

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeals No. 2010AP001170-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOHN M EATON,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 15, THE HONORABLE STEPHEN EHLKE, PRESIDING

Everett D. Mitchell
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1068408

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT ON PUBLICATION AND ORAL ARGUMENT	iv
ISSUES PRESENTED.	iv
STATEMENT OF FACTS AND CASE.	1
ARGUMENT	4
CONCLUSION	13
CERTIFICATION.	15
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12).	16

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<u>State v. Anderson</u> , 149 Wis. 2d 663, 439 N.W.2d 840 (Ct. App. 1989)	7
<u>State v. Anderson</u> , 155 Wis. 2d 77, 454 N.W.2d 763 (1990)8,11
<u>State v. Chambers</u> , 55 Wis. 2d 289, 198 N.W.2d 377 (1972)	9
<u>State v. Post</u> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634.8,10,12
<u>State v. Popke</u> 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569	11
<u>State v. Richardson</u> , 156 Wis. 2d 128, 456 N.W.2d 830 (1990).	2, 6, 8, 13
<u>State v. Taylor</u> , 226 Wis. 2d 490, 595 N.W.2d 56 (Ct. App. 1999).	8
<u>State v. Waldner</u> , 206 Wis. 2d 51, 556 N.W.2d 681 (1996).	5, 7, 8, 15
<u>State v. Williams</u> , 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462.	8
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868 (1968)	5-7, 13-14

STATUTES CITED

Wisconsin Statutes § 968.245, 6

OTHER AUTHORITIES CITED

R.26 - Transcript of Hearing on Motion to Suppress
Held October 19, 2009 1-3,9-12,14,16-17

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Because the issue can be fully addressed by the parties' briefs and may be resolved by application of precedent, neither oral argument nor publication is warranted.

ISSUE PRESENTED

(1) Whether under the totality of the circumstances, did Officer Stelter had reasonable suspicion to stop and detain Eaton's vehicle on June 5, 2009?

Trial court answered: **YES**

STATEMENT OF FACTS AND CASE

On June 5, 2009, at approximately 2:18 am, Madison Police Officer, Joel Stelter, was patrolling East Washington Avenue in city of Madison. [R26.5:5-14]. Officer Stelter observed a vehicle approaching his vehicle from behind at a high rate of speed. [R26.5:20-21]. Officer Stelter estimated that this speed was higher than the posted speed limit. [R26.7:7-10]. Officer Stelter attempted to get behind the vehicle to obtain information about the vehicle and the operator. [R26.7:24-25]. As the officer slowed down his vehicle, the vehicle that approached at a high rate of speed, slowed his vehicle. [R26.8:3-4]. Officer Stelter testified that based on his training and experience, the suspect vehicle was attempting to prevent the officer from obtaining the information from the rear license plate of the vehicle. [R26.8:17-20].

Next Officer Stelter observed the vehicle slowly weaving several feet to the right and left within its lane. [R26.9:13-14]. Officer Stelter testified that weaving in a lane is often indicia of impaired driving. [R26.9:20-22]. As Officer Stelter was attempting to an NCIS check on the vehicle and the driver, he noticed the driver put his turn signal on, go to the furthest right lane, and come to a

complete stop at a flashing yellow traffic light. [R26.10:5-9]. The vehicle stopped at the flashing yellow traffic light for a second or two. [R26.10:6]. After sitting at the flashing yellow light for a second or two, the vehicle deactivated the turn signal and proceeded through the intersection. [R26.10:7-8]. Officer Stelter indicated that a person stopping at a blinking yellow traffic signal for several seconds is a possible indicia of impaired driving. [R26.10:9-12]. At this time, Officer Stelter activated his emergency lights and stopped the vehicle. [R26.10:14-15]. After he pulled over the vehicle, Officer Stelter identified the driver by a Wisconsin Driver's License as John Eaton. [R26.10:18-24].

Mr. Eaton was charged with Operating a Motor Vehicle While Intoxicated (Second Offense) and Operating a Motor Vehicle with Prohibited Alcohol Concentration (Second Offense).

A suppression hearing was held on October 19, 2009. [R26.1]. At the hearing, Officer Stelter testified that he observed a vehicle approach his vehicle at approximately 45 miles per hour, a rate higher than the posted speed limit of 35. [R26.7:7-14]. In summarizing his reasons stopping the vehicle, Officer Stelter concluded:

"the time of the night being 2:18 am, which is right around the time that bars and taverns are closing their doors and sending their patrons out, the fact that the vehicle was in my estimation exceeding the speed limit, the vehicle did not make any attempt to slow until it was near my position on the roadway and slowed as I slowed to obtain additional information, the vehicle weaved within its lane, the vehicle activated its turn signal and came to a complete stop at a flashing yellow light and deactivated its turn signal and continued through that intersection."

[R26.11:20-25-12:7].

The circuit court found that the stop was reasonable under the totality of the circumstances in this case and denied the defendant's motion to suppress. [R26.30:20-23]. The circuit court summarized the totality of the circumstances as follows:

He knows it's bar time. 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 and granted, a flashing light in Wisconsin says proceed with caution, but it does not necessarily stop. He stops, then proceeds on. I think a reasonable person under those circumstances would at least have reasonable suspicion something is going on, and would have a responsibility to see what was missed, if anything.

[R26.30:2-19].

ARGUMENT

I. OFFICER STELTER WAS JUSTIFIED IN EFFECTING A *TERRY* STOP OF EATON BECAUSE HE HAD REASONABLE SUSPICION BASED ON SPECIFIC, ARTICULABLE FACTS IN LIGHT OF HIS TRAINING AND EXPERIENCE THAT EATON WAS OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

A. TERRY STOPS GENERALLY

A police officer may perform a limited investigative stop when, at the time of the stop, the police officer has specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); State v. Waldner, *supra*; Wisconsin Statutes § 968.24. In Terry v. Ohio, *supra*, the United States Supreme Court held that a police officer may, under appropriate circumstances, detain a person for purposes of investigating possible criminal behavior, even in the absence of probable cause for arrest. Terry, 392 U.S. 1 at 30-31. For such a stop, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. *Id.* at 21. State v. Post, 301 Wis. 2d 1, ¶ 10. The Fourth Amendment

does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868 (1968), recognizes that "it may be the essence of good police work to adopt an intermediate response."

Wisconsin has adopted the Terry rule [see, e.g., State v. Chambers, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972)], and has codified it in Wisconsin Statutes § 968.24 (07-8), which provides:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

To execute a valid investigatory stop, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. State v. Richardson, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Lawful acts may form the basis for a police officer's reasonable

suspicion of criminal activity. Waldner, 206 Wis. 2d at 58-59.

In reviewing whether a stop was justified by specific and articulable facts, an appellate court is not bound by the police officer's motivation or subjective assessment of the circumstances. State v. Anderson, 149 Wis. 2d 663, 675, 439 N.W.2d 840 (Ct. App. 1989), *reversed on other grounds by* State v. Anderson, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). The stop is considered lawful if the circumstances, viewed objectively, justify the stop. Id. Whether the circumstances satisfy the reasonableness requirement is a question of law reviewed without deference to the lower court. See Waldner, 206 Wis. 2d at 54.

B.REASONABLENESS UNDER THE TOTALITY OF THE CIRCUMSTANCES

The test of whether a Terry stop is justified is whether the stop was reasonable under the totality of the circumstances. Waldner, 206 Wis. 2d at 58; see also State v. Post, 2007 WI 60, ¶ 2, 301 Wis. 2d 1, 733 N.W.2d 634. An officer may conduct an investigative stop when the officer has grounds to reasonably suspect, under the totality of the circumstances, that a traffic violation has

been or will be committed. State v. Popke, 317 Wis. 2d 118, ¶ 23, 765 N.W.2d 569. In determining what facts are sufficient to authorize police to stop an individual or a vehicle, the court must take the totality of the circumstances into account. State v. Williams, 2002 WI App 306, ¶ 12, 258 Wis. 2d 395, 655 N.W.2d 462 (internal citations omitted); State v. Post, 2007 WI 60, ¶ 2, 301 Wis. 2d 1, 733 N.W.2d 634. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. State v. Taylor, 226 Wis. 2d 490, 495, 595 N.W.2d 56 (Ct. App. 1999); State v. Anderson, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). This test is an objective one: would the facts available to the officer at the moment of the stop or seizure warrant a person of reasonable caution in the belief that the action taken was appropriate? State v. Richardson, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. State v. Anderson, 155 Wis. 2d 77, 84, 454 N.W.2d 763

(1990). The test is ultimately one of reasonableness. Waldner, 206 Wis. 2d at 55.

1. THE STOP OF EATON'S VEHICLE WAS JUSTIFIED UNDER THE TOTALITY OF THE CIRCUMSTANCES

In applying the law to the facts of the instant case, State v. Post, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, is instructive. In Post, the Wisconsin Supreme Court held that while a vehicle's weaving *within a single lane* is not in itself enough to justify a Terry stop, the officer must take into account the totality of the circumstances in order to find reasonable suspicion to stop a vehicle. Id. at ¶¶ 2, 26.

The Court in Post, relying upon that same Court's decision in State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), also found that lateral movements by a vehicle need not be "erratic, unsafe, or [even] illegal" in order for there to be reasonable suspicion for a stop. State v. Post, 2007 WI 60 at ¶¶ 23-24. In looking at the totality of the circumstances, the Post Court took into account the time of night - in that case, 9:30 pm - as well as the vehicle's weaving within its own lane, and determined that

the officer did in fact have reasonable suspicion to stop Post's vehicle. Id. at ¶¶ 36-38.

In this case Officer Stelter articulated several facts that provided the reasonable suspicion necessary to stop the defendant's vehicle.

a. Bar Time

First, Officer Stelter observed the defendant's vehicle traveling down East Washington at 2:18 am on June 6, 2009. In Officer Stelter's training and experience, 2:18 am is the time of morning when bars and taverns are closing their doors and sending their patrons out. [R26.11:20-22]. Driving down the street at 2:18 am in the morning is not unlawful. However, the time of morning can be used in the calculation of the totality of circumstances that Officer Stelter used when stopping the defendant's vehicle. State v. Lange, 2009 WI 49, ¶32(indicating that the time of night the defendant was out is relevant).

b. Speed of the Vehicle

Secondly, Officer Stelter estimated the vehicle exceeded the posted speed limit of 35 miles per hour. [R26.13:1-3]. Officer Stelter described the defendant's vehicle approaching his vehicle at a high rate of speed. [R26.7:7-10]. Based on Officer Stelter's training, the

vehicle was traveling at approximately 45 miles per hour. [R26.7:14]. This estimation meant the vehicle was traveling at least 10 miles per hour over the posted 35 mile per hour. [R26.13.1]. While there was no specific case law indicating how a driver of a moving vehicle can accurately look behind him and estimate the speed of an approaching vehicle, Officer Stelter stated that he was trained to estimate vehicles coming from various directions both coming towards and away from him. [R26.7.2-6]. Based on this training, Officer Stelter estimated that the defendant's vehicle traveled at a rate higher than the posted speed limit. [R26.7:7-10].

c. Slowing down of vehicle

Thirdly, Officer Stelter observed the defendant's vehicle slow down so as to prevent him from being able to obtain the information from the rear license place of the vehicle. [R26.8:17-20]. Officer Stelter slowed his vehicle down to approximately 18 miles per hour before the defendant's vehicle stopped slowing down with Officer Stelter's vehicle. [R26.8:3-7]. This slowing down of the defendant's vehicle indicated to Officer Stelter that the defendant was attempting to prevent the officer from being able to obtain information from the rear license plate of

the vehicle. [R26.8:17-20]. While the circuit court did not find the fact that the defendant slows as the officer slows as "too unusual," [R26.30:7] the circuit court noted that it is a factor that's added into the other factors. [R26.30:7-8].

d. Weaving Within the Lane

Fourthly, Officer Stelter testified that he observed the vehicle slowly weaving within its lane. [R26.9:13-14]. In addition, Officer Stelter observed the vehicle drifting several feet to the right and to the left as it is traveling. [R26.9:17-19]. In Officer Stelter's training and experience, slowly weaving is often an indication of impaired driving. [R26.9:20-22]. The defendant indicates that the video of the weaving should be excluded because the video directly contradicts Officer Stelter's testimony. However, Officer Stelter testified that the video quality that he was watching on the computer had a blurry glare. [R26.20:5-7]. Officer Stelter also testified that he was not able to see everything on that video that he observed in person. [R26.20:8-10]. In fact Officer Stelter does not doubt whether or not he saw the car weaving. [R26.20:11-13]. The circuit court concluded that the best

evidence is what the officer testified to and under oath.
[R26.29:15-16].

e. Stop at a Blinking Yellow Light

Lastly, Officer Stelter testified that the vehicle came to a complete stop for several seconds at a blinking yellow light. [R26.10:9-11]. Officer Stelter observed the vehicle come to a complete stop at the blinking yellow traffic signal and the vehicle sat at the yellow blinking traffic light for a second or two. [R26.10:4-9]. In the officer's training and experience, a person coming to a complete stop for several seconds at a blinking yellow traffic light is a possible indicator of impaired driving. [R26.10:11-13]. While stopping at a flashing yellow traffic light may not be against the law, the stopping of the defendant's vehicle could place other drivers at risk especially if drivers follow the law and continue to proceed through the yellow flashing lights. The stopping at the flashing yellow traffic light can be used as a factor when examining the totality of the circumstances Officer Stelter used when stopping the defendant's vehicle. State v. Waldner, 206 Wis. 2d 51, 61 (1996).

As the circuit court noted, there was no single overt act that would serve as the constitutional basis for a

stop, but circuit courts have to look at the totality of the circumstances. [R26.29:18-20]. The series of acts taken together warranted further investigation by Officer Stelter. As the Court noted in Post: "The proper test to apply is for the court to look to the totality of the facts taken together. The building blocks of facts accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." 301 Wis. 2d 1, ¶ 16.

CONCLUSION

The Court should deny the Defendant-Appellant's motion and uphold the circuit court's decision. Officer Stelter presented specific and articulable facts, which taken together with rational inferences from those facts, give rise to the reasonable suspicion necessary for an investigative stop. Specifically, Officer Stelter observed the defendant traveling at a high rate of speed, after bar time, slowing down of vehicle to prevent the officer from obtaining vehicle information, a vehicle weaving in its lane, and stopping at a yellow flashing traffic light. These facts, when taken together give rise to the reasonable suspicion necessary for Officer Stelter to stop

the defendant's vehicle and as such the stop was not in violation of Eaton's Constitutional rights.

Dated this 17th day of November, 2010

Respectfully submitted,

Everett D. Mitchell
Assistant District Attorney
State Bar No. 1068408

215 South Hamilton Street
Dane County Courthouse
Madison, WI 53703
608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other 3 sides.

The length of this brief is 14 pages.

Dated: November 17, 2010

Signed,

Assistant District Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated this _____ day of November, 2010.

Everett Mitchell
Assistant/Deputy District Attorney
Dane County, Wisconsin