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**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT IV**

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**Appellate Case No. 2010 AP 1170 CR**

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

**-vs-**

**JOHN M. EATON,**

Defendant-Appellant.

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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**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**

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Respectfully Submitted:

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## ARGUMENT

### LAW ENFORCEMENT LACKED REASONABLE SUSPICION TO DETAIN MR. EATON.

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.*

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).

## A. Speed.

The State continues to argue in its brief that Officer Stelter was justified in stopping Mr. Eaton because Officer Stelter estimated that Mr. Eaton was "traveling at least 10 miles per hour over the posted 35 mile per hour" speed limit. (State's br. at 10) Thus, the State has chosen to ignore the officer's subsequent testimony on cross-examination where he admitted that he had no idea exactly how fast Mr. Eaton was going. (R26 at 13.) More troubling, however, is the State's refusal to acknowledge that the circuit court rejected the officer's estimation of speed.

Specifically, while the circuit court stated that the officer testified that the vehicle was traveling in excess of the speed limit, the circuit court could not determine whether that testimony was "right or wrong" based on the evidence before it. (R26 at 30.)

Importantly, had the circuit court accepted the officer's estimation of speed, there would have been probable cause for the stop making the circuit court's determination of reasonable suspicion unnecessary.[1]

The circuit court's inability to determine if the officer's estimation of speed was "right or wrong" was based on the State's failure to prove the speed allegations, i.e. the lack of foundation to support the officer's testimony. Again, Mr. Eaton had previously objected to the officer's testimony as follows:

> Officer: As I was patrolling, a vehicle approached me from the rear traveling at a high rate of speed. I would estimate the vehicle speed as approximately 45 miles an hour.
>
> Attorney: Objection, foundation as vehicle speed estimate.
>
> Court: The objection is sustained on foundation grounds. You can lay a foundation.
>
> Attorney: Ask the answer be stricken.

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1 The State even argued to the circuit court that the officer had probable cause to stop Mr. Eaton based on the officer's speed observations. (R26 at 22.) The State has not argued on appeal that the circuit court erred by failing to find the stop was supported by probable cause and has waived that argument.

Court: The answer is stricken.

State: Officer, at approximately what speed were you driving at this time?

Officer: I was traveling at approximately 32 miles per hour.

State: When you observed this other vehicle, was it approaching at a very fast rate?

Officer: It was approaching at a high rate of speed.

Attorney: Objection as to the characterization of high rate of speed. There's no foundation for this.

Court: The objection is overruled. The answer can stand.

State: Based on your training and experience, how fast would you estimate that this car was traveling in order to close the distance between you and itself?

Officer: I would estimate the speed at approximately 45 miles per hour.

Attorney: Objection, foundation.

Court: Sustained.

Attorney: Ask the answer be stricken.

Court: The answer is stricken.

State: Officer Stelter, in the course of your training, have you been trained to detect, to estimate the speed of vehicles coming from various directions both towards and away from you?

Officer: I have.

State: And based on your training, would you estimate that this car was traveling at a rate higher than the posted speed limit?

Officer: I would.

Attorney: Objection, foundation.

Court: Overruled.

State: Based on your estimation, what would that speed be?

Officer: Approximately 45 miles per hour.

Attorney: The same objection, Judge.

Court: Overruled. The answer can stand.

(R26 at 5-7.)

Again, the officer's statement that he was trained to estimate the speed of vehicles coming towards him is meaningless in this case without more information. The circuit court needed a foundation for the officer's testimony consisting of an explanation that the officer's training in speed estimation was for vehicles approaching him from behind while he was in motion in the same direction. For example, the officer would

need to have testified that his speed estimation training consisted of:

- driving down the road at around 30 miles per hour;
- looking in his rearview mirror/side mirror/over his shoulder;
- locating reference points over the glare of oncoming headlights at night; and
- observing the suspect vehicle over some minimum period of time.

Moreover, even assuming that the officer had such training, there is nothing in the record that he was in a position to judge Mr. Eaton's alleged speed, saw any reference points or that he observed Mr. Eaton's vehicle long enough to make any estimation of speed. *See City of Milwaukee v. Berry*, 44 Wis. 2d 321, 324, 171 N.W.2d 305 (1969)(holding that while it is difficult to estimate the speed of a vehicle moving in the opposite direction, it is at least possible.)

Therefore, all of the officer's testimony regarding speed in this case should have been completely discounted because the proper foundation was not provided. 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.**

Similar to its argument above, the State continues to argue in its brief that Officer Stelter was justified in stopping Mr. Eaton, in part, because Mr. Eaton was attempting to prevent the officer from seeing his rear license plate. (State's br. at 10-11, 13.) Specifically, the State argued in its brief:

> Specifically, Officer Stelter observed the defendant traveling at a high rate of speed, after bar time, **slowing down of vehicle [sic] to prevent the officer from obtaining vehicle information**. . . . These facts, when taken together give rise to the reasonable suspicion necessary. . . .

(State's br. at 13.)(emphasis added).

The circuit court did not make a finding that Mr. Eaton was suspiciously attempting to prevent the officer from

observing his rear license plate. To the contrary, as the State admitted, the circuit court held that Mr. Eaton's slowing down was not "too unusual." (State's br. at 11.); (R26 at 30.) Moreover, the State makes no argument that the circuit court's finding was erroneous.

The circuit court did hold it would add the fact that Mr. Eaton slowed down with all the other circumstances of the case. (R26 at 30.) However, the fact that Mr. Eaton slowed down in response to the officer's driving behavior should not be a factor considered by this Court in determining whether the officer had reasonable suspicion to stop him.

For example, the law does not condone the successful prosecution of offenses that are caused by the state's agents. *See State v. Brown*, 107 Wis. 2d 44, 55, 318 N.W.2d 370 (1982). Likewise, the law should not condone a law enforcement officer creating a situation where he knows citizens will slow down, and then stop them for slowing down.

Again, the officer knew he was driving below the speed limit and knew that the driving public would be reluctant to pass him even if they were going the speed limit. (R26 at 14, 19.) Officer Stelter should not be allowed to harry drivers into making unusual maneuvers such that he would then be "justified" in stopping them based on their reactions.

Accordingly, because the officer's own driving behavior induced Mr. Eaton's "not too unusual" driving behavior, it should not have been considered under the totality of the circumstances to justify his stop.

### C. Weaving.

The State relies on the circuit court's finding that the officer observed Mr. Eaton weaving in his lane of travel even though that testimony was contradicted by the video. Specifically, the officer testified, in part, regarding the weaving and the video as follows:

Attorney: But you indicated the weaving was pretty pronounced, but you described it as being two to three feet to the right and two to three feet to the left, right?

Officer: Yeah.

Attorney: It would be fairly obvious weaving, right?

Officer: Yes.

Attorney: Now, when you got behind Mr. Eaton's vehicle, your squad camera became activated; is that right?

Officer: Yes, I activated it.

Attorney: So from the period of time that you pulled behind the Eaton vehicle to the period of time that the traffic stop occurs, it's - - it's caught on your camera; is that right?

Officer: That's correct.

Attorney: Judge, at this point in time I would like to play that portion of the video for the court.

Court: Go ahead.

Attorney: And what I'd like for you to do, Officer, is watch the screen, if you could, and if you need to reposition yourself, feel free, but what I'd like for you to do is simply identify to the Court whether you see the two to three feet weaving maneuvers that you've previously testified to?

[Video played.]

> Attorney: That would be the point in time where you posed yourself behind his vehicle? That would be the point in time when the traffic stop is initiated?
>
> Officer: Yes.
>
> Attorney: That was a yes to the last two questions. Thank you.
>
> [Video marked and received into evidence.]
>
> Attorney: Officer, you had a chance to watch the video of the driving that we previously played; is that correct?
>
> Officer: That's correct.
>
> Attorney: **Was the two to three feet lane deviation that you previously testified to visible to you when you watched the video?**
>
> Officer: **No, it was not.**

(R26 at 15-18.)(emphasis added).

Likewise, the circuit court acknowledged that the video did not support the officer's testimony. (R26 at 29.) 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**. Which in my view, which I guess is important here, in my view as [sic] evidence, it really doesn't show much. So, you know, I have to - - I have to completely

> discount the video because I don't think it - - I don't think it's the best evidence.

(R26 at 29.)(emphasis added).

Importantly, the circuit court's statement that the "video, as so many of those and, quite frankly, in most of them that I've seen in my time on the bench are, if not worthless, pretty close to it because it really doesn't show what one would see with the naked eye," shows a bias against videos. (R26 at 28.) Moreover, the circuit court's ruling was based partially on evidence, i.e., other videos from other cases, which were not before the court in this case. Thus, the circuit court's finding- rejecting the video- was contrary to the evidence and was clearly erroneous. *See State v. Popke*, 2009 WI 37, ¶20, 317 Wis. 2d 118, 765 N.W.2d 569.

Importantly, the State does not cite to any portion of the video containing the alleged weaving. Rather, the State notes that the video had a "blurry glare" and that the officer was

able to see more than the camera fixed to his squad was capable of capturing on video. *See* (State's br. at 11.)

Again, 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.)(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.

The State agreed in its brief that it is legal to stop at a flashing yellow light. (State's br. at 12.) The State,

however, then argued that the officer was justified in detaining Mr. Eaton because stopping at a yellow light "could place other drivers at risk especially if drivers follow the law and continue to proceed through the yellow flashing lights." (State's br. at 12.) The State's argument that cautiously stopping at a flashing yellow light is dangerous is without merit.

First, other drivers could not legally drive through a yellow light "with caution" if doing so would place them "at risk" because of a vehicle stopped at the intersection. Second, if the State's argument was true, everyone slowing down or stopping at a stop light as the light turns from green to yellow, is equally placing other driver's at risk because other drivers may want to legally drive through the yellow light prior to it turning red. Lastly, the State certainly would not argue that Officer Stelter was endangering other traffic when he was intentionally drove below the speed limit prior to stopping Mr. Eaton.

The State does not address Mr. Eaton's turning on his turn signal and then not turning as part of the totality of the circumstances and Mr. Eaton, therefore will not address it here.

**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.);
- After Mr. Eaton's vehicle passed the officer, Mr. Eaton maintained the proper speed. (R26 at 19.);
- Mr. Eaton used a blinker and changed lanes. (R26 at 10.);
- Mr. Eaton stopped at a flashing yellow light. *Id*.
- Mr. Eaton committed no traffic violations; and
- Mr. Eaton's vehicle was stopped at 2:18A.M. (R26 at 11.)

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.

Again, the circuit court 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 when determining that the officer had reasonable suspicion to stop him.

## 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 November, 2010.

Respectfully submitted,

**LANNING LAW OFFICES, LLC**

By:_____
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## 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 2,819 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 November, 2010.

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