STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2013AP538

CITY OF STEVENS POINT,

Plaintiff-Respondent,

-vs-

KATRINA L. SHURPIT,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered in the Circuit Court for Portage County, the Honorable Thomas Eagon Presiding
Trial Court Case Nos. 12 TR 2459 & 12 TR 2460

Respectfully Submitted:

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STATEMENT OF THE ISSUE

I. **WHETHER THE CITY MET ITS BURDEN OF SHOWING REASONABLE SUSPICION TO STOP AND DETAIN THE DEFENDANT FOR THE PURPOSES OF AN INVESTIGATORY STOP?**

Trial Court Answered: **Yes.**

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

Defendant-Appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT OF FACTS AND CASE

On May 11, 2012, at approximately 2:22 a.m. Richard Gawlik, an on duty City of Stevens Point Street Department employee, observed a Sports Utility Vehicle (SUV) back into a truck and flee the scene. (R. 19, pp. 4-5, 9, 41.) Mr. Gawlik then radioed police to report his observations. (R. 19, pp. 5, 41.) Mr. Gawlik described the vehicle as a SUV and thought it was a Honda CVR (sic) or Rav-4; however, he was not positive on the make. (R. 19, pp. 10, 13, 17, 42, 48.) Mr. Gawlik described the vehicle as either grayish-silver, but also stated that he was not positive on the color. (R. 19, p. 6.) Mr. Gawlik tried to follow the vehicle, but could not get a license plate. (R. 19, p. 41.) The vehicle was lost by the corner of Second Street and Fourth Avenue in Stevens Point, WI at 2:27 a.m. (R. 19, p. 42.)

The dispatcher working was Ms. Lampert. (R. 19, p. 11.) After receiving the call from Mr. Gawlik, Ms. Lampert entered the information provided into a Computer Aided Dispatch (CAD) report including: Honda, SUV, unknown make. (R. 19, pp. 13, 17, 42, 45.) Ms. Lampert relayed to Officer Trochinski that "streets" lost the suspect vehicle near "St. Pete's," and that the suspect vehicle was gray or greenish with unknown make. (R. 19, pp. 16, 44.) However, Ms. Lampert failed to provide this information to Officer Jessica Trochinski, the officer who was dispatched to the scene of the hit and run. (R. 19, pp. 16, 44.) The CAD reports are, however, accessible to officers through their in-squad computers. (R. 19, p. 45.)

Officer Trochinski, after receiving the dispatch notification, drove towards the last known location of the suspect vehicle. (R. 19, pp. 45-46.) She then turned west on Fourth Avenue and observed a car lawfully parked on the side of the road with its taillights on and running. (R. 19, pp. 27-

28, 46.) This is about five or six blocks from St. Pete's. (R. 19, p. 46.) Officer Trochinski approached the vehicle slowly from the rear and noticed "fresh" damage on the rear bumper. (R. 19, p. 46.) The vehicle was a 2010 four door Mazda car that was silver in color. (R. 1; R. 19, p. 43). Officer Tochinski activated her emergency lights. (R. 19, pp. 33-34, 46-47.) She approached the driver of the vehicle and identified her as Katrina L. Shurpit. (R. 1; R. 19, p. 34). Based upon her observations, Officer Trochinski arrested Shurpit for Operating While Intoxicated – First Offense. (R. 19, p. 47.)

Shortly after the stop, Mr. Gawlik arrived on scene and informed Officer Trochinski that this was not the vehicle involved in the hit and run because the vehicle he saw was an SUV and not a car, which the defendant was driving. (R. 19, pp. 9, 43.)

An evidentiary hearing was held and the Court determined that there was reasonable suspicion to stop Shurpit's vehicle. (R. 19 pp. 44, 47.) In making this ruling, the trial court made three separate holdings:

First, the trial court held that the officer had reasonable suspicion to stop Shurpit's vehicle based on the information provided by dispatch. (R. 19, p. 47.) The trial court reasoned that: (1) Shurpit's vehicle matched the right color; (2) the vehicle had "fresh"[1] damage to the rear of the vehicle indicating that it had recently been in an accident or a crash; (3) it was in the general area of the last sighting by the city street department employee; (4) the vehicle was observed by the officer within five minutes of the last sighting by the city street department employee; (5) the vehicle was running; and

[1] The conclusory statement that the damage to Shurpit's vehicle was "fresh" was not explained or elaborated upon during the motion hearing.

(6) there was no other traffic that evening except for one red vehicle on Second Street. (R. 19, pp. 47-48.)

Second, the trial court analyzed the facts under the collective knowledge doctrine and held there was reasonable suspicion even if the officer was imputed with the knowledge that the witness identified the vehicle as an SUV. (R. 19, p. 48.) The trial court reasoned that because it is unknown what make the SUV was, and because "it's hard to tell these days which cars are considered SUV's and which aren't," the SUV information was too vague that it would have negated the reasonable suspicion. (R. 19, pp. 48-50.)

Finally, the trial court found that the officer had reasonable suspicion to stop the vehicle regardless because it was "bar time," "the vehicle was stopped on the road,"[2] the tail lights were on, and you had "fresh" damage to the rear of the vehicle. (R. 19, p. 51.)

A court trial was held on January 30, 2013 and Shurpit was found guilty of Operating with a Prohibited Alcohol Concentration (PAC) – First Offense and Operating While Intoxicated – First Offense. (R. 13, p. 1.) The penalties were stayed pending the outcome of this appeal. (R. 13, p.1.)

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[2] Officer Trochinski testified that Shurpit's vehicle "appeared to have been parked on the side of the road." (R. 19, p. 28.)

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT OFFICER TROCHINSKI HAD REASONABLE SUSPICION TO STOP AND DETAIN MS. SHURPIT.

The right of citizens to be free from "unreasonable searches and seizures" is protected by both the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution.

There can be no dispute that Officer Trochinski "seized" Shurpit when she pulled up behind the vehicle and initiated her emergency lights. (R. 19, pp. 33-34, 46-47.) The question in this appeal is whether that seizure was "unreasonable."

An officer may not infringe on an individual's right to be free from a stop and detention unless that officer has "suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual has committed a crime." *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987), *citing*, *United States v. Hensley*, 469 U.S. 221, 226 (1985). The test is an objective one, and entails consideration of the "totality of the facts and circumstances" present at the time of the detention. *Guzy* at 679-80; *United States v. Arvizu*, 534 U.S. 266 (2002).

Applying this standard to the facts of this case, Shurpit contends that Officer Trochinski lacked reasonable suspicion to stop and detain her under all three scenarios posed by the trial court: (1) without the collective knowledge doctrine the officer lacked reasonable suspicion that Shurpit's vehicle was involved in the hit and run; (2) under the collective

knowledge doctrine the officer lacked reasonable suspicion because the officer was imputed with the knowledge that the suspect vehicle was an SUV and Shurpit's vehicle was a car; and (3) the officer did not have reasonable suspicion that some other crime had been, or was being, committed.

Whether the officer's actions violated Shurpit's constitutional guarantees involves an issue of constitutional fact. In resolving such issues, this court defers to the trial court's findings of historical facts, and affirms those findings unless they are clearly erroneous. *State v. Martwick*, 2000 WI 5 ¶ 18, 231 Wis. 2d 801, 604 N.W.2d 552. This court, however, independently review the trial court's application of constitutional standards to those historical facts. *Id.* at ¶ 20.

A. The totality of the circumstances, without the collective knowledge doctrine, did not provide Officer Trochinski with reasonable suspicion that Shurpit's vehicle was involved in the hit and run.

Just how "reasonable" must an officer's "suspicion" of a particular suspect's vehicle be to permit the officer to temporarily seize that suspect's vehicle? The "reasonable suspicion" standard attempts to accommodate both the public's interest in solving crimes and apprehending offenders and the individual's right to be free of arbitrary intrusions on her personal liberty. It achieves that objective by demanding the use of "selective investigative procedures' whereby seizures are made only of those to whom there exists a 'reasonable possibility' of their" having committed the crime in question. 4 W. LAFAVE, SEARCH AND SEIZURE, § 9.5(g), at 550 (4th ed. 2004).

No litmus paper test exists to precisely identify the particular combinations of facts and circumstances necessary

to establish this "reasonable possibility." However, Professor LaFave has identified six factors that are appropriately considered in answering this question. 4 W. LAFAVE, SEARCH AND SEIZURE, § 9.5(g), at 550-51 (4th ed. 2004).[3] Our Supreme Court has adopted this six-factor test for assessing "reasonable suspicion." *Guzy*, 139 Wis. 2d at 677; *State v. Harris*, 206 Wis. 2d 243, 260, 557 N.W.2d 245 (1996). The six factors are:

> (1) The particularity of the description of the offender or the offender or the vehicle in which he fled;
>
> (2) The size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred;
>
> (3) The number of persons about in that area;
>
> (4) The known or probable direction of the offender's flight;
>
> (5) Observed activity by the particular person stopped; and
>
> (6) Knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Furthermore, the Supreme Court of Wisconsin in *Guzy* added some additional factors to consider.

> (1) Are alternative means of further investigation available, such as a license plate check, closer observation of the suspects, or obtaining additional information? If so, the reasonableness of the stop

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[3] The test was first described in an earlier version of the treatise, 3 W. LAFAVE, SEARCH AND SEIZURE, § 9.3(d), at 461 (2d. ed. 1987). The earlier version was cited in both *Guzy* and *Harris*.

based on scant facts may well be questionable.

(2) Is there a possibility that if law enforcement officers do not act immediately the opportunity for further investigation would be lost? A minimal amount of facts may, under these circumstances, be given greater weight than if the opportunity to act in the future is not foreclosed.

(3) What actions would be necessary following the stop for law enforcement officers to determine whether to arrest or release the suspected individual?

(4) Will the stop create the opportunity to corroborate a known physical feature of a suspect or clothing description with minimal intrusion on personal security?

Guzy, 139 Wis. 2d at 678-679.

Shurpit will now discuss how these factors pertain to the instant case.

i. Particularity of the descripton.

Officer Trochinski was told that the suspected vehicle was grayish or greenish in color. (R. 19, pp. 16, 44.) While Shurpit's vehicle matched this description, the description itself was so general that a great many vehicles would have matched it.

Trochinski was not told to look for a vehicle of any particular make or with a particular license plate. She was not told whether the vehicle was a SUV, car, or truck. She was not told whether the vehicle was two doors or four. She was given no other distinguishing features.

Quoting Professor LaFave, the Wisconsin Supreme

Court has twice recognized that "the most important consideration concerning a physical description 'is whether the description is sufficiently unique to permit a reasonable degree of selectivity unique to permit a reasonable degree of selectivity from the group of all potential suspects.'" *Guzy*, *supra*, 139 Wis. 2d at 680; *Harris*, *supra*, 206 Wis. 2d at 262, n. 15. It is axiomatic that the more general the description of a suspected vehicle, the greater the number of persons who would likely match that description. And the greater the number of potential matches, the less likely it is that any one person who is deemed to match the description is the actual perpetrator of the crime being investigated. That is why the particularity of the description is such a significant factor in the "reasonable suspicion" calculus.

In the present case, the description given Officer Trochinski was simply too general for it to be meaningful that Shurpit's vehicle matched it.

ii. Size of the area and lapse of time.

Professor LaFave notes, "the time and spatial relation of the stop to the crime is an important consideration in determining the lawfulness of the stop. The elapsed time indicates the maximum distance it would be possible for the offender to have covered since the crime, and this in turn supplies the radius of the area in which he might be found." 4 W. LAFAVE, *supra*, at 561. The radius of the area in which the offender might be found, in turn, determines "the universe of potential suspects." *Id.* at 562.

In this case, it is extremely significant that the suspect was in a vehicle. It was approximately five minutes from the time "streets" lost sight of the SUV to the time that Officer Trochinski observed Shurpit's car. (R. 19, p. 47.) While the record does not reflect what the speed limit was in the area, it

is noteworthy that even traveling at twenty five miles per hour, the suspect vehicle could be over two miles from that location in five minutes. How many grayish or green vehicles would be found in such an area within the city of Stevens Point?

iii. Number of persons about.

The record reveals that in the five minutes from when she was dispatched to when she observed Shurpit's vehicle, Trochinski observed one other red vehicle driving. (R. 19, pp. 47-48.) This fact deserves no weight. Its significance logically depends on the assumption that the vehicle was not parked or miles from the officer's location.

There is no reason to think that after this period of time, the driver would have either been driving in the neighborhood or parked on the side of the road with the vehicle running and the taillights on.

iv. Probable direction of flight.

Officer Trochinski was informed that the Street Department employee lost the suspect vehicle as it was driving North on Second Street around the area of St. Pete's. (R. 19, pp. 16, 44.) While this is at the intersection of Second Street and Fourth Avenue where Shurpit's vehicle was found, this factor is very weak.

v. Observed activity by the particular person stopped.

Under the circumstances, Shurpit did not react in any suspicious manner. She did not try to hide, flee, or even put the vehicle in motion as the officer drove up slowly behind her car. (R. 19, pp. 33-34, 46-47.)

vi. Knowledge that person stopped had been involved in other crimes.

There is nothing in the record to suggest that at the time of the stop, Officer Trochinski had any knowledge whatsoever of Shurpit's identity or of any prior criminal activity. This factor simply does not pertain to this case.

Even when considering all of these facts together, as this court is required to do, they do not amount to reasonable suspicion that Shurpit's vehicle was involved in the hit-and-run.

vii. *Guzy* factors.

In the present case, Officer Trochinski had alternative means of further investigation available, such as a license plate check, a radio call to dispatch to confirm if the vehicle matched the description, or simply asking Shurpit (without seizing her) as to where she was coming from and how she damaged her bumper. Shurpit's vehicle was stationary and there was no need for Officer Trochinski to have initiated the emergency lights to officially stop Shurpit. (R. 19, pp. 33-34, 46-47.) Since Shurpit's vehicle was already parked, there was also no risk that these alternatives would be lost if the officer did not initiate her emergency lights immediately. The actions required for Officer Trochinski to determine whether to arrest or release Shurpit would have been the same with or without the stop, and therefore the stop was unnecessary. Finally, the stop did not create the opportunity to corroborate any description of a suspect as the vehicle was already stopped and gave no indication it was about to leave.

B. Once Mr. Gawlik's description of the suspect vehicle as a SUV is considered, it is even more apparent that the officer lacked reasonable suspicion to stop and detain Shurpit.

Even if the court were to conclude that Officer Trochinski did have reasonable suspicion to detain Shurpit based on the description of the vehicle that was provided to her, the stop still cannot pass constitutional muster. It is appropriate for this court to consider the information the police possessed which, apparently due to the negligence of its own employees, was never communicated to Officer Trochinski. Had the officer been supplied with a *full and correct* description of the suspected hit and run vehicle, she could not reasonably have concluded that Shurpit's vehicle matched the description. Without that matching characteristic, the officer lacked a sufficient basis for stopping Shurpit's car as a potential suspect in the hit and run.

In evaluating the objective reasonableness of the officer's actions, the court must consider all of the facts collectively known by the police. The "collective knowledge" doctrine is frequently used to uphold a stop when the police collectively possess facts amounting to reasonable suspicion, even though the particular officer making the stop may not independently possess sufficient facts to take the appropriate action. *E.g., United States v. Hensley*, 469 U.S. 221 (1985) (officer objectively relied on wanted flyer in making stop, reasonableness of stop depended on facts known by department issuing the flyer). It only stands to reason that if the "collective knowledge" of the police force is appropriately considered when that knowledge *supports* a finding of reasonable suspicion, it must also be taken into account when the facts as a whole militate *against* such a finding.

Consideration of all the facts available to the police at the time of the stop properly encourages the police to pay attention to detail when obtaining and, more importantly, *disseminating* descriptions of those who have committed crimes. Conversely, if only those details made known to the officer making the stop were properly considered, police departments might be encouraged to omit important descriptive details in communicating with their officers, so as to cast as wide a net as possible for potential suspects. While such a policy might result in more investigative detentions being upheld, it presumably would not result in more crimes actually being solved. At the same time, it would occasion more frequent intrusions on the personal liberty of our citizens, and a waste of scarce law enforcement resources.

In the present case, Mr. Gawlik had informed the police dispatcher that the vehicle was an SUV of an unknown make, but similar to a Honda CRV or Rav-4, and this information was never provided to Officer Trochinski. (R. 19, p. 9-10, 17, 41-42.) The trial court held there was reasonable suspicion even if the officer was imputed with the knowledge that the witness identified the vehicle as an SUV under the collective knowledge doctrine. (R. 19, p. 48.) The trial court reasoned that because it is unknown what make the SUV was, and because "it's hard to tell these days which cars are considered SUV's and which aren't," the SUV information was too vague that it would have negated the reasonable suspicion. (R. 19, pp. 48-50.)

Shurpit acknowledges that discrepancies between a witness' description and a suspect's observed characteristics do not always deprive the officer of the reasonable suspicion necessary to detain that suspect. As Professor LaFave observes, "investigating officers must be allowed to take account of the possibility that some of the descriptive factors supplied by victims or witnesses may be in error." 4 W.

LAFAVE, SEARCH AND SEIZURE, § 9.5(g) at 557 (4th ed. 2004). "What must be taken into account is the strength of those points of comparison which do match up and whether the nature of the descriptive factors which do not match is such that an error as to them is not improbable." *Id.*

When the additional details omitted from what was communicated to Officer Trochinski are considered, it becomes abundantly clear that Shurpit's car did not match the hit and run suspect vehicle and the trial court erred in its reasoning.

Here, it is highly improbable that Shurpit's car could have been mistaken for any model of SUV. A SUV or Sports Utility Vehicle is defined as a "rugged automotive vehicle similar to a station wagon but built on a light-truck chassis." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/sport-utility+vehicle (last visited Jun. 10, 2013). Traditional SUVs use the body frame of a truck, meaning that they have more room for passengers and are larger in size than a car. Additionally, SUVs have a higher ground clearance, significant cargo bay, have more passenger room and are either four-wheel drive or all-wheel drive. *SUV Center*, Edmunds.com, Inc., www.edmunds.com/suv/ (last visited Jun. 10, 2013). The introduction of crossover SUVs has created a vehicle that is built on a car frame and is less boxy than the traditional SUV but are still tall like a traditional SUV. *Crossover Center*, Edmunds.com, Inc., http://www.edmunds.com/crossover/(last visited Jun. 10, 2013). Despite a less boxy frame than a SUV the crossover size and shape still makes it easily distinguishable from that of a car. Indeed, the eye witness communicated to Officer Trochinski at the scene of the stop that this was not the hit and run vehicle because the vehicle he saw was an SUV. (R. 19 pp. 8-9.) The term is completely understandable and the make of the SUV matters not.

Contrary to the trial court's opinion, it is not hard to tell "these days" which cars are considered SUV's and which aren't. In fact entire Wisconsin Court of Appeals opinions can be written by referring to the acronym SUV without ever having to spell it out. *See State v. Becerra*, 2010 WI App 33, 323 Wis. 2d 823, 781 N.W.2d 551 (unpublished). People know the difference between a SUV and a car.

The collective knowledge doctrine will deter sloppy police work. *Someone* in the police department relayed the information with reckless disregard for the actual details of the hit and run suspect vehicle. Errors of this sort, whether viewed as reckless or merely negligent, should not be tolerated, lest the police be allowed to profit from their own incompetence. Exclusion of the evidence under these circumstances is not only appropriate, it is necessary.

C. The officer did not have reasonable suspicion that some other crime had been, or was being, committed.

"A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, *id.*, or have grounds to reasonably suspect a violation has been or will be committed." *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citing *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996).

It is difficult to determine what violation the trial court had in mind when it ruled that an officer would have had reasonable suspicion to stop a vehicle because it was stopped on the side of the road at bar time with the taillights on, and had "fresh" damage to the rear of the vehicle. (R. 19, pp. 18, 51.)

The totality of the circumstances, without the call to law enforcement about the hit-and-run, simply contain too few building blocks to form the necessary reasonable suspicion or probable cause that a violation had or was occurring.

CONCLUSION

WHEREFOR, the defendant respectfully requests this Court to reverse the decision of the circuit court denying her motion to suppress and remand this matter for further proceedings.

Dated this 25th day of June, 2013.

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 3,908 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) 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 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

A copy of this certificate is included in the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of June, 2013.

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

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