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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
APPEAL NO. 2013AP001128

IN THE MATTER OF THE REFUSAL OF DAVID ADAMS:

VILLAGE OF HALES CORNERS,

Plaintiff-Respondent

v.

DAVID E. ADAMS,

Defendant-Appellant.

ON APPEAL FROM THE ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT
DATED MAY 14, 2013
THE HONORABLE CAROLINA MARIA STARK PRESIDING

Circuit Court Case No. 2012TR16882

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the issues do not meet the criteria for publication in Wis. Stat. §809.23(1) and are fully presented by the briefs and record herein, the Plaintiff-Respondent does not request oral argument or publication.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the Trial Court Commit Error in Finding that the Defendant-Appellant, David Adams, Improperly Refused to Permit a test Pursuant to Wisconsin Statute §343.305?

Trial Court Answer: No

STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from a written Order of the Milwaukee County Circuit Court, the Honorable Carolina Maria Stark, signed on or about May 14, 2013, in which the Circuit Court held that the Defendant-Appellant, David Adams (hereinafter "Adams"), violated Wisconsin's implied consent law by improperly refusing to submit to a chemical test of his breath, in violation of Wisconsin Statute §343.305. While this matter is currently on appeal, there is still a pending matter in the Circuit Court arising out of the same factual events; namely, the Plaintiff-Respondent, the Village of Hales Corners (hereinafter the "Village"), is still prosecuting Adams for Operating While Intoxicated, contrary to Wis. Stat. §346.63.

B. Procedural Status of the Case Leading Up to the Appeal

Adams was issued two citations from the Village on or about August 27, 2011. The citations alleged: (1) Refuse Breathalyzer Test After Arrest

for Operating While Intoxicated, a violation of Wis. Stat. §343.305(9)(a) (hereinafter the "Refusal Citation"); and (2) Operating While Intoxicated, a violation of Wis. Stat. §346.63(1)(a). Upon receiving the Refusal Citation, Adams, through his counsel, timely filed a written request for a refusal hearing. The Village of Hales Corners Municipal Court conducted an evidentiary hearing on Adams' refusal citation, as well as the underlying citation for Operating While Intoxicated, and found Adams guilty on both citations.

Adams appealed the decisions of the Municipal Court to the Milwaukee County Circuit Court, seeking a de novo appeal. The Milwaukee County Circuit Court conducted an evidentiary hearing on the Refusal Citation on February 5, 2013 and April 12, 2013. On May 7, 2013, the Milwaukee County Circuit Court issued an oral ruling, finding Adams guilty on the Refusal Citation. The oral ruling of the Circuit Court was memorialized on or about May 14, 2013. The de novo review for the underlying Operating While Intoxicated citation is still pending in the Circuit Court.

C. Disposition of the Trial Court

On May 7, 2013, in an oral ruling, the Circuit Court held that Adams improperly refused to submit to a chemical test of his breath, in violation of Wis. Stat. §343.305. A written order to this effect was executed by the Circuit Court on May 14, 2013.

D. Statement of Facts Relevant to the Issues Presented for Review.

On August 27, 2011, Officer Douglas Sayeg (hereinafter "Officer Sayeg") was on duty as a police officer for the Village of Hales Corners. (R-App.2-3; R.18,pp.2-3) At approximately 10:06 p.m., Officer Sayeg received a police dispatch regarding a citizen report of a possible drunk driver near Forest Home Avenue and Highway 100 in the Village of Hales Corners. (R-App.3; R.18,p.3; R.9, Ex.3, Ex.5) The citizen caller reported that they were following the suspect vehicle, which was a red and gray van with a Wisconsin license plate number 157817. (R-App.3; R.18,p.3; R.9, Ex. 3, Ex.4) Further, the citizen caller stated that the van was "all over the road." (R-App.3; R.18,p.3; R.9, Ex.3, Ex.4) The citizen caller continued to follow the van while speaking to dispatch. (R-App.3; R.18,p.3; R.9, Ex.3, Ex.4)

After receiving the police dispatch, Officer Sayeg travelled towards the area of Highway 100 and Forest Home. (R-App.3; R.18,p.3; R.9, Ex.3, Ex.5) On his way there, Officer Sayeg received additional information from dispatch; namely, the citizen caller that continued to follow the suspect vehicle stated that the alleged drunk driver pulled into the parking lot of the China Inn Restaurant. (R-App.3; R.18,p.3; R.9, Ex.3, Ex.4, Ex.5)

Shortly thereafter, Officer Sayeg pulled into the parking lot of the China Inn Restaurant and located the van matching the description and license plate as reported by dispatch and the citizen caller. (R-App.3;

R.18,p.3; R.9, Ex.3, Ex.5) The van was properly parked, and Adams was the sole occupant in the van. (R-App.3; R.18,p.3) Officer Sayeg never saw the van in motion. (R-App.3; R.18,p.3)

Officer Sayeg then proceeded to park his squad car behind the van. (R-App.3; R.18,p.3) As Officer Sayeg was pulling behind the van, he personally witnessed Adams exit the van's driver's seat. (R-App.3-4; R.18,pp.3-4) Officer Sayeg observed that Adams had a hard time maintaining his balance, and needed to use the vehicle for balance as he exited the van. (R-App.3-4; R.18,pp.3-4) Officer Sayeg then activated his overhead emergency lights to initiate a stop on Adams. (R-App.4; R.18,p.4)

The citizen caller subsequently provided dispatch with his name, make and model of his vehicle, his current location, and his phone number. (R-App.4; R.18,p.4) Officer Sayeg did not obtain this information until after he initiated the stop on Adams. (R-App.4; R.18,p.4) Ultimately, Officer Sayeg arrested Adams for operating a motor vehicle while under the influence of an intoxicant. (R-App.4; R.18,p.4) Subsequent to the arrest, Officer Sayeg read Adams the informing the accused as required by Wis. Stat. §343.305(4), and Officer Sayeg asked Adams if he would submit to a chemical test of his breath. (R-App.4; R.18,p.4)(R.9, Ex.1) Adams refused, citing to his 5th Amendment rights. (R-App.4; R.18,p.4)(R.9, Ex.2) The

sole issue raised on appeal by Adams is whether Officer Sayeg had reasonable suspicion to initiate the traffic stop.

ARGUMENT

I. The Circuit Court Properly Held that Officer Sayeg Possessed Reasonable Suspicion to Initiate a Traffic Stop on Adams.

Whether there was probable cause or reasonable suspicion to conduct a stop is a question of constitutional fact, which is a mixed question of law and fact to which this court shall apply a two-step standard of review. First, this Court shall review the Circuit Court's findings of historical fact under the clearly erroneous standard. Second, this Court shall review the application of those historical facts to the constitutional principles independent of the determinations rendered by the Circuit Court. In re Refusal of Anagnos, 2012 WI 64, ¶21, 341 Wis. 2d 576, 815 N.W.2d 675.

"A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer's experience, he or she reasonably suspects 'that criminal activity may be afoot.'" State v. Wittrock, 2012 WI App 40, ¶6, 340 Wis. 2d 499, 812 N.W.2d 540 (unpublished), citing State v. Williams, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1969)). "Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from

those facts, that an individual was committing a crime." Wittrock, at ¶6, citing State v. Waldner, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). The stop must be based on something more than an officer's "inchoate and unparticularized suspicion or hunch." State v. Rutzinski, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. The test for determining whether reasonable suspicion exists is based upon an objective standard and takes into account the totality of the circumstances. State v. Rissley, 2012 WI App 112, ¶9, 344 Wis. 2d 422, 824 N.W.2d 853, citing State v. Williams, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. Rissley, at ¶9, citing State v. Post, 301 Wis. 2d 1, ¶10, 733 N.W.2d 634 (quoting Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "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." Rissley, at ¶9, citing Post, 301 Wis. 2d 1, ¶13, 733 N.W.2d 634. That commonsense approach "balances the interests of the State in detecting, preventing, and investigating crime and the rights of the individuals to be free from unreasonable intrusions." id.

A determination of reasonable suspicion for an investigatory stop and subsequent protective search is a question of constitutional fact. State

v. Kammeyer, 2013 WI App 30, ¶5, 346 Wis. 2d 279, 827 N.W.2d 929 (unpublished), citing State v. Williams, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. While this standard was set forth in the United States Supreme Court case of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the State of Wisconsin codified the reasonable suspicion standard in Wis. Stat. §968.24.

The State bears the burden of proving that a temporary detention was reasonable. Pickens, at ¶14; Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); State v. Quartana, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997). Such a detention requires a reasonable suspicion, grounded in "specific and articulable facts," and reasonable inferences from those facts, that an individual was engaging in illegal activity. Pickens, at ¶14; Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see also State v. Waldner, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

The Terry Court explained that courts need the underlying articulable facts in order to perform their neutral oversight function:

> [I]n justifying the particular intrusion [at a suppression hearing] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be

> subjected to the more detached, neutral scrutiny of a judge…

Pickens, at ¶14; Terry, 392 U.S. at 21, 88 S.Ct. 1868 (footnote omitted); See also Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (the protection of the Fourth Amendment consists of requiring that facts and reasonable inferences from those facts "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

Where an officer relies on information provided by dispatch, "reasonable suspicion is assessed by looking at the collective knowledge of police officers." Wittrock, at ¶7, citing State v. Pickens, 2010 WI App 5, ¶11, 323 Wis. 2d 226, 779 N.W.2d 1 (Wis. App 2009). "[U]nder the collective knowledge doctrine, '[t]he police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department.'" Rissley, at ¶19, citing State v. Mabra, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974). "The same reasoning applies to cases involving investigatory stops based upon reasonable suspicion." Rissley, at ¶19; State v. Pickens, 2010 WI App 5, ¶11-12, 15-17, 323 Wis. 2d 226, 779 N.W.2d 1; see also Hensley, 469 U.S. at 232, 105 S.Ct. 675 ("[I]f a…bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that…bulletin justifies a stop…")

If a defendant moves to suppress, the prosecutor must prove the collective knowledge that supports the stop. Wittrock, at ¶7, citing State v. Pickens, 2010 WI App 5 at ¶13. Thus, when an officer relies on an ATL or bulletin [or dispatch] in making a stop, the inquiry is whether the officer that initiated the ATL or communication, not the responding officer, had knowledge of specific and articulable facts supporting reasonable suspicion at the time of the stop. Wittrock, at ¶7 (emphasis added), citing United States v. Hensley, 469 U.S. 221, 231-32, 233, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (evidence uncovered in the course of a Terry stop "is admissible if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop.") Thus, for cases under the collective knowledge doctrine, the court must consider the information available to both the dispatcher and the police officer who made the stop when deciding whether the stop was justified by reasonable suspicion. Rissley, at ¶19.

In the present case, Adams only asserts that there was one finding of fact by the Circuit Court that constituted an erroneous finding. Specifically, Adams takes exception to the following statement of the Circuit Court:

> The citizen call provided the following information that was initially communicated by dispatch to Officer Sayeg. The citizen caller reported that they were following a red and gray van with license plate number 157817, that the van was all over the road on Forest Home traveling west and approaching Highway 100.

While Adams does not dispute the above finding of fact in its entirety, Adams takes issue with the fact that dispatch never informed Officer Sayeg that the "van was all over the road." However, as the transcript points out, dispatch did inform Officer Sayeg that there was a "possible drunk driver," after first receiving the information that the van was all over the road. (R.9, Ex. 3, Ex.4, Ex.5) This is a conclusion – possible drunk driver – that was made by the dispatcher after being informed that a van is all over the road. (R.9, Ex. 3, Ex.4, Ex.5) Thus, the Circuit Court's finding of fact was not erroneous. However, even if this finding of fact is erroneous, it is immaterial to this Court's analysis of law. Namely, pursuant to the collective knowledge doctrine, the court is to consider the information available to both the dispatcher and the police officer who made the stop. Rissley, at ¶19.

Here, because the Findings of Fact by the Circuit Court are undisputed, and are not erroneous, this Court must apply those facts to the law. Specifically, based upon the Findings of Fact made by the Circuit Court, did Officer Sayeg possess reasonable suspicion to initiate a traffic stop on Adams? The answer is yes.

First, while Officer Sayeg partially relied upon a police communication – here a police dispatch – in the absence of his personal knowledge, Adams has failed to address the collective knowledge doctrine. Rather, Adams' sole focus on appeal is what information Officer Sayeg was

personally aware of. Adams 'proposed analysis does not comply with Wisconsin law. Under the collective knowledge doctrine, this Court must look at all facts known within the police department – including the dispatcher – at the time Officer Sayeg made the stop. In the present case, this includes the information provided by the citizen caller to police dispatch stating that the van was all over the road, regardless of whether the dispatcher relayed this specific fact to Officer Sayeg. (R.9, Ex. 3, Ex.4, Ex.5) Because it is undisputed that the citizen caller informed the dispatcher that the van it was following was all over the road, the Court must take this fact into consideration in determining whether reasonable suspicion existed for Officer Sayeg to make the stop. (R.9, Ex. 3, Ex.4, Ex.5) Further, this statement, on its face, constitutes a specific, articulable fact, that Adams was committing a crime. Accordingly, Officer Sayeg possessed reasonable suspicion when he made the stop.

Because Adams failed to address or acknowledge the collective knowledge doctrine, Adams 'appellate brief is misguided. In particular, Adams primary focus on appeal revolves around what information was actually transmitted to Officer Sayeg, rather than on what information was possessed by the dispatcher who made the police dispatch. Because Adams failed to address this issue or the proper law, the majority of Adams appellate analysis is incorrect.

Second, while Adams focused on the court's holding in State v. Rutzinski, 2001 WI 22, ¶¶32-36, regarding the veracity of an informant's tip combined with the content of the tip, once again, Adams analysis is flawed. Specifically, Adams analysis is viewed solely from Officer Sayeg's perspective, without taking into consideration the information known to the dispatcher that was provided by the citizen caller. (See Appellant's Brief pp.13-14) Therefore, Adams' legal analysis is flawed and without merit. Had Adams performed a proper legal analysis, as conducted under the collective knowledge doctrine, it is clear that the considerations set forth in Rutzinski are present. Namely, the citizen caller, based upon their personal observations, stated that they were following the suspect vehicle – providing a color, description, and license plates of the vehicle; that the "van was all over the road;" and they provided real-time updates as to the van's location. (R.9, Ex. 3, Ex.4, Ex.5) This information provided by the citizen caller constituted credible, verifiable observations that were provided contemporaneously to the dispatcher as they occurred. (R.9, Ex. 3, Ex.4, Ex.5) Further, the information provided by the citizen caller contained sufficient detail – location, license plates, color of vehicle, type of vehicle, driving behavior – such that the observations were credible. (R.9, Ex. 3, Ex.4, Ex.5) Finally, the information provided by the citizen caller were sufficient to suggest that Adams posed an imminent threat to public

safety – erratic driving, all over the road (a sign of a possible intoxicated driver), then going into a parking lot where pedestrians may also be present.[1] (R.9, Ex. 3, Ex.4, Ex.5) Based upon the totality of the circumstances (including information known to the dispatcher), Officer Sayeg possessed reasonable suspicion to stop Adams.

Third, while Officer Sayeg primarily relied upon the collective knowledge of the dispatcher, Officer Sayeg was able to also make his own observation of Adams prior to initiating the stop. (R-App.3-4; R.18,pp.3-4) Specifically, prior to activating his overhead emergency lights and initiating the stop, Officer Sayeg personally observed Adams exit the vehicle and have a hard time maintaining his balance. (R-App.3-4; R.18,pp.3-4) In fact, Officer Sayeg testified that Adams had to use the vehicle to maintain his balance. (R-App.3-4; R.18,pp.3-4) This observation, coupled with the information possessed by the dispatcher as reported by the civilian witness, constitutes reasonable suspicion such that the stop on Adams was lawful. Accordingly, this Court should affirm the holding of the Circuit Court.

[1] Adams argues that he was no longer an imminent threat to public safety because he had pulled into a parking lot and legally parked his vehicle. However, at the time of the stop, Officer Sayeg did not know Adams' intentions (have dinner, have more to drink, leave, etc.) other than the fact that this was not Adams' home and that he may continue to drive further.

CONCLUSION

The Circuit Court properly exercised its discretion in making its findings of fact; and further, properly applied those facts to the law. Accordingly, this Court should affirm the decision of the Circuit Court.

Dated at Milwaukee, Wisconsin this 7th day of November, 2013.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of those portions of this brief referred to in Wis. Stats. § 809.19(1)(d), (e) and (f) is 3,031 words.

Dated at Milwaukee, Wisconsin this 7th day of November, 2013.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of s. 809.19(13).

I further certify that the electronic brief is identical in content 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.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. § 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 the confidentiality and with appropriate references to the record

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