WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

-v-

DAVID LAWRENCE EASTMAN,

Defendant-Appellant

Case No 2013AP001401 CR

Defendant-Appellant's Brief and Appendix

Appeal from the circuit court for Bayfield County, John Anderson, Judge.

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STATEMENT OF ISSUES

The issue presented in this case is:

1. Whether law enforcement exceeded their authority when they seized the defendant's motor vehicle as he was pulling away from the area where his car had previously been in the ditch.

The trial court answered "no" to this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Eastman does not request oral argument or publication. The issue presented in this appeal involves the application of settled case law to the facts.

STATEMENT OF THE CASE

FACTS AND PROCEDURAL POSTURE

The relevant facts were submitted to the court via stipulation of the parties as to the admissibility of the investigating officer's report. (See July 26, 2012 motion hearing transcript, page 1: 16-20). The initial suppression motion was heard on July 26, 2012, and no factual testimony was given. The officer's report provides the following factual circumstances:

1. On January 15, 2012, Iron River Police Officer Stoychoff was on patrol on County Highway A east of Iron Lake Road, Bayfield County, in the state of Wisconsin.

2. At approximately 7:07 p.m., Officer Stoychoff received a report of a vehicle in the ditch. Officer Stoychoff responded to the scene and found the vehicle but no passengers. He left the scene to attempt to locate a driver and/or passengers.

3. At approximately 7:58 p.m. Officer Stoychoff returned to the scene. At this time the vehicle had been pulled from the ditch and "was driving away".

4. Officer Stoychoff activated his emergency lights, and effectuated a traffic stop. Contact with the defendant driver yielded indicia of intoxication which led to the arrest and chemical testing of the defendant's blood.

The circuit court heard the motion on the above-stipulated facts and denied the defendant's motion on the record on July 26, 2012, and through a written order filed on August 1, 2012. Subsequently, defendant, through counsel, filed a motion to re-consider on August 13, 2012. The motion to reconsider was heard on August 23, 2012. At that time, the court permitted additional exhibits and testimony by the arresting officer over the objection of counsel. As the motion for reconsideration was made in order to correct an error of law, and not fact, the State should not have been permitted to introduce any new exhibits or testimony. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons*, Ltd., 2004 WI App. 129, 275 Wis.2d 397, 685 N.W.2d 397, 03–0773. Consequently, the court should not consider the exhibits or testimony taken at that hearing in rendering its decision in this case. The circuit court reiterated its denial of the defendant's suppression motion and the matter was set for subsequent hearings.

The defendant was convicted of OWI–3rd after a plea hearing on February 12, 2013.

ARGUMENT

THE EVIDENCE AGAINST EASTMAN OUGHT TO BE SUPPRESSED BECAUSE IT WAS THE PRODUCT OF ILLEGAL DETENTION BY THE ARRESTING OFFICER

A court which is reviewing law enforcement's seizure of a citizen is to apply the facts to relevant case law in order to determine the legality of the arresting officer's actions. The concern implicated here is the right of citizens "to be secure in their persons . . . against unreasonable searches and seizures." This right is safeguarded in the Fourth Amendment of the United States Constitution, as well as Article I, section 11 of the Wisconsin Constitution. In *Terry v. Ohio*, the U.S. Supreme Court held that investigative stops are seizures within the meaning of the Fourth Amendment, however, police officers may sometimes conduct such stops where there is no probable cause to make an arrest. 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). These stops must be based on more than an officer's "inchoate and unparticularized suspicion or `hunch.'" *Id*. at 27, 88 S.Ct. 1868. In order to be permissible, the 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, 88 S.Ct. 1868. Investigative traffic stops such as the one in the instant case are subject to the constitutional reasonableness requirement. *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *State v. Rutzinski*, 2001 WI 22, ¶ 14, 241 Wis.2d 729, 623

N.W.2d 516. Importantly, the burden of establishing the reasonableness of an investigative stop falls on the state. *State v. Taylor*, 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973).

Whether the police acted reasonably is subjected to a common sense test. Reviewing courts are to determine whether the facts of the case 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. Anderson*, 155 Wis.2d 77, 83-84, 454 N.W.2d 763 (1990). Ultimately, the reasonableness of a stop is determined based on the totality of the facts and circumstances. *State v. Williams*, 2001 WI 21, ¶ 22, 241 Wis.2d 631, 623 N.W.2d 106.

In reviewing case law not only in Wisconsin, but other jurisdictions, there are no cases which provide precedential support for the proposition that a car in the ditch *per se* gives rise to a reasonable suspicion of criminal activity. In particular, this case is factually distinguishable from a large majority of cases involving vehicles in the ditch, or involved in accidents, due to the fact that the car in this case was removed from the ditch and was driving away prior to the investigating officer making contact with the driver. *See, i.e., State v. Seibel*, 163 Wis.2d 164, 471 N.W.2d 226 (1991).

In addition, it should be noted that courts in Wisconsin have typically been reluctant to find that any single factor gives rise to reasonable suspicion, unless the single factor constitutes a traffic offense. *See, e.g., State v. Post*, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634. In *Post*, the Court explicitly rejected the formulation of "bright-line rules" in determining reasonable suspicion cases, noting that all the relevant jurisprudence indicates that the proper basis is the "totality of circumstances" test. *Id*. at ¶ 38. The court's adoption of such a "bright line rule" in the instant case, i.e., that being in the ditch at any point justifies a police investigatory stop later on, would be anathema to established case law such as *Post*.

The arresting officer in this case acted too quickly. Wisconsin jurisprudence indicates that individual facts and circumstances must aggregate to form a reasonable suspicion, and in this case, the actions of the officer prevented this from happening. As the Court indicated in *Post*:

> "When viewed in isolation, the individual facts...may not be sufficient to warrant a reasonable officer to suspect that Post was driving while intoxicated.... '[A]ny one of these facts, standing alone, might well be insufficient.' However, such facts accumulate,

and ‘as they accumulate, reasonable inferences about the cumulative effect can be drawn.’"

Id. at ¶ 37 (citing *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996)). Nothing would have prevented the officer from following the defendant’s vehicle upon the public roadway in order to see if he could make any aggregating observations which would give rise to the requisite reasonable suspicion discussed in *Waldner*. Instead, the officer here sought to satisfy his curiosity by exercising his police authority without adequate justification.

Finally, there were no circumstances which imposed a duty on the investigating officer under Wisconsin’s "community caretaker" standard. *See, i.e., State v. Anderson*, 142 Wis.2d 162, 417 N.W.2d 411 (Ct.App.1987). The *Anderson* decision speaks to a balancing test to determine whether law enforcement has the prerogative to seize citizens in order to further their capacity as helpers and caretakers of the public. *Id*. In order to justify a seizure under this function, law enforcement must show both a "bona fide community caretaker activity" as well as facts tending to show that "the public need and interest outweigh the intrusion upon the privacy of the individual". *Id*. at 169. The courts further explained that the application of the test requires "an objective analysis of the circumstances confronting the police officer" and "an objective assessment of the intrusion upon the privacy of the citizen." *Id*. at 168. It is established law that an officer should stop to render assistance to a citizen who had pulled to the side of the road. *State v. Goebel*, 103 Wis.2d 203, 208, 307 N.W.2d 915 (1981).

However, in this case, the defendant’s vehicle had been extricated from its place in the ditch, and was operable. In fact it was being driven away. The circumstances of the instant case contrast starkly with the factual predicates of other, legitimate, community caretaker cases. *See, e.g., State v. Kramer*, 2009 WI 14, 759 N.W.2d 598. It was precisely the fact that the driver no longer needed any inquiry from the "community caretaker" which necessitated the investigating officer to execute the traffic stop with his emergency lights. No information was apparent to indicate the driver was in need of medical attention, nor had the accident been reported by the driver, nor had an emergency call been made by the driver. Nearly an hour had passed since the circumstance of the car in the ditch had become known to law

enforcement. This was certainly more than enough time for anyone who had been in the car to notify an ambulance, or law enforcement, if necessary. The officer had examined the vehicle and found no one in it. The officer knew that there was not an injured or unresponsive person in the car who needed medical or other aid. There was no blood on the snow, or other indication that emergency assistance was needed. Under the circumstances, the investigating officer's intrusion upon the defendant's liberty was not to render assistance in a manner "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" because there was clear indication that help was no longer needed. *State v. Dull*, 211 Wis.2d 652, 658, 565 N.W.2d 575 (Ct. App.1997). The officer in this case was curious. In other words, he had a hunch that the driver of the vehicle might have been intoxicated, and it was this curiosity which he sought to satisfy by seizing the defendant when he saw him pulling away under his own power. Satisfaction of a "hunch" is not only an improper motive under the community caretaker doctrine, but it is also an expressly prohibited basis for a stop under all relevant jurisprudence. *See, i.e., Terry*, 392 U.S. at 27, 88 S.Ct. 1868.

CONCLUSION

For the reasons given above, this court should vacate the defendant's conviction, and suppress all evidence against the defendant which was derived from the officer's illegal seizure.

Dated this 11th day of September, 2013.

Respectfully submitted,

_____

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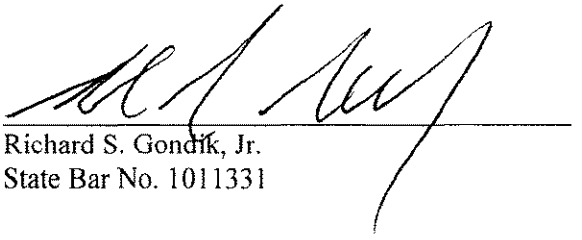
Dated: September 11, 2013

RICHARD S. GONDIK, JR., S.C.



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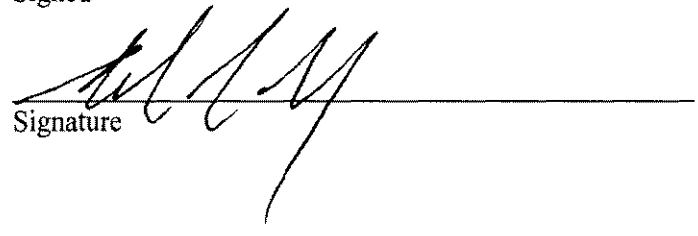

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