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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2014 AP 349 CR

v.

PENNY S. ROSENDAHL,
Defendant-Appellant.

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED JANUARY 15, 2014 IN THE WINNEBAGO COUNTY
CIRCUIT COURT BRANCH ONE

The Honorable Thomas J. Gritton, Presiding

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Table of Contents

Statement of Issue Presented for Review	1
Statement on Oral Argument and Publication.....	1
Statement of the Case	1
Argument	1
I. Deputy Zill Had a Reasonable Articuable Suspicion to Stop Ms. Rosendahl Based on Her Failure to Yield Traffic Violation.....	3
II. Deputy Zill Had Reasonable Suspicion That Ms. Rosendahl Was Operating Under the Influence of an Intoxicant	5
Conclusion	8
Certifications	9
Appendix Table of Contents.....	11

Statutes & Constitutional Provisions Cited

U.S. Const. amend. IV	2
Wis. Stat. § 346.18(4).....	3
Wis. Stat. § 809.19(3)(a)(2).....	1

Cases Cited

<i>State v. Popke</i> , 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569	2-7
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634.....	2, 3, 5

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether Sheriff's Deputy Zill had reasonable suspicion to believe Ms. Rosendahl was committing a violation of a traffic or criminal law so as to stop her vehicle.

The trial court decided that Deputy Zill articulated reasonable suspicion to conduct a traffic stop.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is requesting neither publication nor oral argument as this matter involves application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

The State finds Ms. Rosendahl's recitation of the case facts to be sufficient, and pursuant to Wis. Stat. § 809.19(3)(a)(2), omits a repetitive statement of the case.

ARGUMENT

Deputy Zill articulated sufficient facts to demonstrate a reasonable suspicion that Ms. Rosendahl had committed a traffic violation for failure to yield and articulated a reasonable suspicion that she was committing a crime of operating while under the influence of an intoxicant. As such, Deputy Zill's stop of Ms. Rosendahl's vehicle was lawful, and any

evidence gathered pursuant to that stop is not subject to the exclusionary rule.

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause” U.S. Const. amend. IV.

Temporary detention of an individual during a stop of a vehicle by police is a seizure for the purposes of the Fourth Amendment. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. Such investigative stops are subject to the constitutional reasonableness requirement, and the State carries the burden to demonstrate that such a stop is reasonable. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634; *Popke*, 317 Wis. 2d 118, ¶11. However, a stop is reasonable “if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed.” *Popke*, 317 Wis. 2d 118, ¶11.

The test for reasonableness is one of common sense and is determined based on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶13. “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.” *Id.* 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.*, ¶10. The officer need not necessarily have probable cause to make an arrest in order to conduct an investigative stop. *Popke*, 317 Wis. 2d 118, ¶23. “This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions.” *Post*, 301 Wis. 2d 1, ¶13.

I. Deputy Zill Had a Reasonable Articulable Suspicion to Stop Ms. Rosendahl Based on Her Failure to Yield Traffic Violation

In this case, Deputy Zill had a reasonable articulable suspicion that a traffic violation had occurred, specifically, failure to yield the right-of-way pursuant to Wis. Stat. § 346.18(4), which states:

Entering Highway From Alley or Nonhighway Access. The operator of a vehicle entering a highway from an alley or from a point of access other than another highway shall yield the right-of-way to all vehicles approaching on the highway which the operator is entering.

At the motion hearing, Deputy Zill articulated that he was making a right-hand turn onto County Trunk II, at which time he observed a vehicle driven by Ms. Rosendahl pulling out of a bar parking lot driveway. (R. 27 (record):5 (page); A (Appendix) 5.) Deputy Zill stated that as he was making the right-hand turn, Ms. Rosendahl pulled out in front of him and Deputy Zill “had to apply [his] brakes heavily so [he] could avoid a collision.” (R. 27:5; A5.)

Based on these facts, Deputy Zill had probable cause to believe a traffic violation had occurred and probable cause to conduct a traffic stop of Ms. Rosendahl’s vehicle. As provided in *Popke*, where the facts of the case would warrant a reasonable officer to suspect that the individual has committed a traffic violation based on the totality of the facts and circumstances, the stop of that vehicle is reasonable. *Popke*, 317 Wis. 2d 118, ¶¶ 13, 17. That Deputy Zill did not actually conduct an immediate traffic stop is not at issue as the determination for the reasonableness of the stop hinges on whether evidence existed to lead a reasonable police officer to believe a traffic violation has occurred. Because Deputy Zill had probable cause to believe the traffic violation occurred, he had probable cause to stop Ms. Rosendahl’s vehicle.

II. Deputy Zill Had Reasonable Suspicion That Ms. Rosendahl Was Operating Under the Influence of an Intoxicant

Further, Deputy Zill stated sufficient facts at the motion hearing to articulate reasonable suspicion that Ms. Rosendahl was operating while under the influence of an intoxicant, based on the totality of the circumstances.

In this case, Ms. Rosendahl was pulling out of a bar parking lot. (R. 27:5; A5.) The time was 11:36 p.m. (R. 27:4-5; A4-5.) Deputy Zill observed the instance of Ms. Rosendahl failing to yield the right-of-way pulling out onto the highway. (R. 27:5; A5.) He further observed instances of Ms. Rosendahl deviating within her own lane of traffic and observed her make contact with the center line. (R. 27:6; A6.) Deputy Zill also observed that “on a couple occasions [Ms. Rosendahl’s vehicle] made contact and slightly crossed the center line in the oncoming lane of traffic.” (R. 27:6; A6.)

Similar to the facts present in *Post* or *Popke*, these facts, when viewed under the totality of the circumstances, give rise to the level of reasonable suspicion for Deputy Zill to conduct an investigatory stop. As the trial court in this case stated:

[t]he officer testified that [sic] turned right onto II to go east. A vehicle pulled out of the bar parking lot. He had to apply his brakes as a result of that and turned around to follow the vehicle. I don't think in the circumstances in the video that there is any significant bad driving. As I did indicate, though, it looked like the vehicle at least touched the center line in those three places I indicated, and I think the officer had the right, even though he decided not to, just from the pulling out of the parking lot alone to pull her over so under those circumstances I'm going to deny the motion.

(R. 27:16-17; A16-17.)

While Ms. Rosendahl seems to stress that her driving was not significantly poor and points to potential instances of good driving, those single factors alone do not negate the Deputy's other observations. As stated in *Popke*, "while any one of these facts, standing alone, might well be insufficient for reasonable suspicion, when such facts accumulate, and as they accumulate, reasonable inferences about the cumulative effect can be drawn." 317 Wis. 2d 118, ¶25 (internal citations omitted). In this case, under the totality of the circumstances, including the time of day, Ms. Rosendahl's departure from a bar, failure to yield, and lane deviations, the officer had reasonable suspicion to conduct a stop.

Notably, Ms. Rosendahl conflates the standards of reasonable suspicion and probable cause throughout her brief. Further, Ms. Rosendahl conflates the issues of probable cause to arrest with reasonable suspicion to

stop her vehicle. As noted at the motion hearing, Ms. Rosendahl challenged the constitutionality of the traffic stop, and such statement and hearing should limit the parameters of this Court's review to that stop. Further, probable cause is not required for a traffic stop. "Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed." *Popke*, 317 Wis. 2d 118, ¶23.

Deputy Zill observed and articulated sufficient facts to justify a stop of Ms. Rosendahl's vehicle. Ms. Rosendahl was pulling out of a bar parking lot near bar time. As the trial court found, Ms. Rosendahl's failure to yield the right-of-way to Deputy Zill should in and of itself justify a traffic stop. Further, those facts coupled with Deputy Zill's observations regarding Ms. Rosendahl's driving and touching the center line justifies an investigative stop to determine Ms. Rosendahl's condition.

CONCLUSION

For the reasons set forth above, Deputy Zill's stop of Ms. Rosendahl was lawful, and any evidence gathered subsequent to that stop should not be subject to the exclusionary rule.

Dated at Oshkosh, Wisconsin, this _____ day of May, 2014.

Anthony Steven Prekop
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,493 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief, ***other than the appendix material is not included in the electronic version.***

I further certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents, (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written findings or decision showing the circuit court's reasoning regarding these issues.

I further certify that if this appeal is taken from a circuit court order of 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 person, 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 on the date of signature I routed this brief to our office station for first class US Mail Postage to be affixed and mailed to:

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Dated at Oshkosh, Wisconsin, this _____ day of May, 2014.

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**APPENDIX
TABLE OF CONTENTS**

TRANSCRIPT OF MOTION TO SUPPRESS HEARING A1