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COURT OF APPEALS

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OF WISCONSIN**

DISTRICT IV

Case No. 2014AP000515

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

DANIEL S. IVERSON,

DEFENDANT-RESPONDENT.

APPEAL FROM AN ORDER GRANTING MOTION TO
SUPPRESS AND FOR DISMISSAL ENTERED IN THE
CIRCUIT COURT FOR LA CROSSE COUNTY, THE
HONORABLE RAMONA A. GONZALEZ, PRESIDING

BRIEF AND APPENDIX OF THE
PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Did the circuit court correctly conclude that law enforcement did not have reasonable suspicion or probable cause justifying the stop of the defendant's vehicle?

Did the circuit court correctly conclude that law enforcement's perceived subjective motivation in investigating a possible impaired driver rendered the traffic stop unconstitutional?

STATEMENT OF THE CASE

The plaintiff-appellant, State of Wisconsin, appeals an order granting a motion to suppress evidence (9; A-Ap. 103). The defendant-respondent, Daniel S. Iverson, was issued citations in this case for operating a motor vehicle while under the influence of an intoxicant (OWI) as a first offense and operating a motor vehicle with a prohibited alcohol concentration (PAC) as a first offense (1:1-2). Iverson moved to suppress evidence gathered after his vehicle was stopped by law enforcement (7; A-Ap. 120-23). The trial court, the Honorable Ramona A. Gonzalez presiding, granted Iverson's motion after a hearing (9; A-Ap. 103). The State now appeals (10).

STATEMENT OF FACTS

Because this case is before this Court on appeal of a pretrial motion, most of the facts the State relies upon are taken from the testimony at the hearing on the motion to suppress.

On September 18, 2013, at approximately 1:00 a.m., Wisconsin State Patrol Trooper Michael Larsen was on patrol assigned to La Crosse County during the 11:00 p.m. to 7:00 a.m. shift (12:4; A-Ap. 107). At approximately 1:00 a.m., Trooper Larsen was traveling northbound on Rose Street in the City of La Crosse when he observed a silver Jeep SUV traveling in front of him (12:4; A-Ap. 107).

As Trooper Larsen followed, he observed the silver Jeep SUV begin to drift towards the centerline and back to its lane (12:4; A-Ap. 107). Trooper Larsen watched the same vehicle come to

complete stops at the intersections of Rose Street and Causeway Boulevard and Rose Street and Monitor Street (12:4-5; A-Ap. 106-108). Trooper Larsen observed that both intersection were controlled by a yellow flashing light with no traffic present that would warrant coming to a complete stop (12:5; A-Ap. 108).

As the silver Jeep SUV proceeded north of Monitor Street, Trooper Larsen observed a cigarette butt thrown from the passenger side of the vehicle which caused ashes to scatter across the right lane as it struck the ground (12:6; A-Ap. 109). Trooper Larsen initiated a traffic stop of the silver Jeep SUV because the cigarette butt was thrown from the window (12:6; A-Ap. 109).

The trooper approached the vehicle and made contact with the driver of the vehicle, identified as Daniel Iverson (12:7; A-Ap. 110). The trooper advised Iverson the reason for the stop and informed him that a cigarette butt had been thrown from his vehicle (12:7; A-Ap. 110). Iverson informed Trooper Larsen that he was unaware of the cigarette butt being thrown from the vehicle (12:7; A-Ap. 110). A passenger in the back seat of the vehicle stated, "That was me," and further advised Trooper Larsen that he didn't know such action was against the law (12:7; A-Ap. 110).

Following contact with the vehicle, Trooper Larsen ultimately arrested Iverson and issued citations for operating a motor vehicle while under the influence of an intoxicant (OWI) as a first offense and operating a motor vehicle with a prohibited alcohol concentration (PAC) as a first offense (1:1-2). Iverson moved to suppress evidence gathered after the trooper stopped his

vehicle, asserting that his arrest was unlawful because law enforcement did not have reasonable suspicion to stop his vehicle (7:1-4; A-Ap. 120-23).

At the conclusion of motion hearing, the circuit court, the Honorable Ramona A. Gonzalez presiding, granted Iverson's motion to suppress evidence (12:14-15; A-Ap. 117-18).

After granting Iverson's motion in an oral ruling, the circuit court entered a written order granting the motion (9; A-Ap. 103). The State now appeals the circuit court's order granting the motion to suppress evidence (10).

ARGUMENT

I. Trooper Michael Larsen had probable cause and reasonable suspicion to stop Iverson's vehicle based on his observation of a littering offense.

A. Applicable Law and Standard of Review.

A traffic stop is a seizure within the meaning of the Fourth Amendment. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. All such stops must be reasonable under the circumstances. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569. A traffic stop is generally a reasonable seizure if it is based upon either probable cause or reasonable suspicion to believe that a violation has occurred. *See State v. Gaulrapp*, 207 Wis. 2d 600, 604-06, 558 N.W.2d

696 (Ct. App. 1996); *see also Popke*, 317 Wis. 2d 118, ¶ 11.

Probable cause refers to the “quantum of evidence which would lead a reasonable police officer to believe” that a traffic violation has occurred. *Popke*, 317 Wis. 2d 118, ¶ 14, citing *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977). Probable cause exists when the officer has reasonable grounds to believe that the person is committing or has committed a crime. The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that the information “lead a reasonable officer to believe that guilt is more than a possibility.” *Popke*, 317 Wis. 2d 118, ¶ 14 (citation omitted).

Even if no probable cause exists, 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. *Id.* ¶ 23. 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. *Popke*, 317 Wis. 2d 118, ¶ 23 citing *Post*, 301 Wis. 2d 1, ¶ 10. 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. *Popke*, 317 Wis. 2d 118, ¶ 23.

Reasonableness is measured objectively by the totality of the circumstances. *Post*, 301 Wis. 2d 1,

¶ 13. In reviewing traffic stops, courts do not inquire into an officer's actual state of mind; instead, they determine whether the facts available to the officer could arouse suspicion in a reasonable person. *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

Whether there is probable cause or reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *Popke*, 317 Wis. 2d 118, ¶ 10. This Court applies a two-step standard of review. *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869. First, it reviews the trial court's findings of historical facts and upholds them unless they are clearly erroneous. *Id.* Second, this Court applies *de novo* review to whether the officer had reasonable suspicion or probable cause. *Id.*

B. The Stop Of Iverson's Vehicle Was Supported By Probable Cause and Reasonable Suspicion.

In granting Iverson's suppression motion, the circuit court implicitly found the stop of Iverson's vehicle was supported by neither probable cause nor reasonable suspicion, presumably in part because Trooper Larsen observed a littering offense attributed to a passenger's conduct rather than Iverson, the driver of the vehicle (12:14-15; A-Ap. 117-18).

The circuit court did not articulate specific findings of fact upon which its decision was based or rule precisely on whether Trooper Larsen's seizure of Iverson's vehicle was supported by probable cause or reasonable suspicion. (12:14-15;

A-Ap. 117-18). Nor did the court affirmatively rule on whether a discarded cigarette butt constituted solid waste pursuant to Wis. Stat. § 289.01(33), and consequently, whether Iverson or his passenger(s) were in violation of Wis. Stat. §§ 287.81(2) (12:12-16; A-Ap. 115-19).

In rendering its decision, the circuit court summarily concluded "... if that cigarette butt comes out of the driver's side, I'm with you, Trooper; I'm there; but not out of the passenger side. Motion to suppress is granted" (12:15; A-Ap. 118). It can be inferred from the court's ruling that the Court found Trooper Larsen's testimony credible, but because the alleged littering offense was perpetrated by a passenger and not Iverson, determined neither probable cause nor reasonable suspicion supported a traffic stop.

There are two potential reasonings underlying the court's conclusion. First, the Court accepted Iverson's argument that Trooper Larsen's observations did not support probable cause or reasonable suspicion because a passenger's act of throwing a cigarette butt onto a city street was not a violation of state statute (12:12-14; A-Ap. 115-17). Second, the Court determined Trooper Larsen was prohibited from effectuating a traffic stop of a vehicle due to a passenger's conduct. The State respectfully maintains that under either alternative, the circuit court was incorrect in ordering the suppression of evidence.

During the hearing on Iverson's motion, neither the Court nor defense counsel appeared to dispute that Trooper Larsen had followed Iverson's vehicle at a distance where he was able to observe a lit cigarette butt thrown from the passenger side of

the vehicle into the street, causing visible ashes to scatter across a lane of traffic (12-6; A-Ap. 109). During the motion hearing, Iverson advanced no argument that Trooper Larsen had misrepresented or mistaken his observations as they relate to the discarded cigarette butt.

Rather, Iverson merely advanced arguments concerning whether a discarded cigarette butt qualifies as solid waste pursuant to Wis. Stat. § 289.01(33), and whether Iverson expressly permitted a passenger to throw the cigarette butt from the vehicle contrary to Wis. Stat. § 287.81(2)(b) (12:12-13; A-Ap. 115-16). Contrary to Iverson's argument, the State maintains that Trooper Larsen's observations supported probable cause and reasonable suspicion to believe that Iverson had violated Wis. Stat. § 287.81(2)(b) and that one of his passengers had violated Wis. Stat. § 287.81(2)(a).

Of significant importance to this Court's decision is whether a cigarette butt qualifies as solid waste. The relevant statute defines solid waste as follows:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded or salvageable materials, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point

sources subject to permits under ch. 283, or source material, as defined in s. 254.31 (10), special nuclear material, as defined in s. 254.31 (11), or by-product material, as defined in s. 254.31 (1).

Wis. Stat. § 289.01(33). While reasonable minds may disagree as to the meaning of “community activities,” it is clear that a cigarette butt would nevertheless fall within the broad category of “other discarded or salvageable materials,” and therefore, meets the definition of solid waste.

Addressing the remainder of Iverson’s argument, the only remaining question is whether Trooper Larsen observed an individual located within Iverson’s vehicle that had “[d]eposit[ed] or discharge[d]” a cigarette butt “on or along any highway, in any waters of the state, on the ice of any waters of the state or on any other public or private property.” Wis. Stat. § 287.81(2)(a). Even assuming *arguendo* that Iverson did not verbalize permission to his passenger to discard a cigarette butt on a city street, Trooper Larsen undoubtedly made adequate observations to support probable cause and reasonable suspicion that a passenger had littered contrary to Wis. Stat. § 287.81(2)(a).

Furthermore, even if this Court were to accept as true Iverson’s arguments as they relate to whether Iverson or his passenger(s) had violated Wis. Stat. § 287.81(2), Trooper Larsen’s observations would still lead any reasonable law enforcement officer to believe that one of the vehicle occupants had violated La Crosse City Ordinance 7.04(A) which mandates that “no person shall throw, deposit, dump or discharge any glass, rubbish, filth or debris upon the streets,

alleys, public parks or other property of the City or upon any private property not owned by him or upon the surface of any body of water in the City” (8:2; 12:14-15; A-Ap. 117-18, 125).

Ultimately, under state statute or city ordinance, once Trooper Larsen had made his observations -- observations that would lead any reasonable officer to believe that either Iverson or his passenger’s guilt was more than a mere possibility -- the sole remaining issue concerned his authority to stop Iverson’s vehicle due to an offense committed by a passenger.

Officers may stop an automobile if they have an “articulable and reasonable suspicion that ... either the vehicle *or an occupant* is ... subject to seizure for violation of law.” *State v. Washington*, 120 Wis.2d 654, 660, 358 N.W.2d 304, 307 (Ct. App. 1984) (emphasis added) (citing *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979)). Accordingly, Trooper Larsen had probable cause and reasonable suspicion to temporarily detain Iverson’s vehicle regardless of whether Iverson himself or one of his passengers had committed the observed littering violation.

Ultimately, based on his personal observations, it is clear that Trooper Larsen at a minimum had probable cause and reasonable suspicion that an occupant in Iverson’s vehicle was responsible for a littering violation contrary to city ordinance, or alternatively, Wis. Stat. §§ 287.81(2)(a)-(b). Trooper Larsen acted reasonably in stopping the vehicle to investigate the violation and potentially issue citations, and the evidenced gathered after the stop should not have been suppressed.

C. Trooper Larsen's subjective motivation for initiating a traffic stop is immaterial in determining whether reasonable suspicion or probable cause existed at the time of the stop.

In granting Iverson's motion to suppress, the circuit court revealed its decision was based in part upon the belief that the seizure of Iverson's vehicle constituted a pretextual traffic stop. After hearing testimony, the court interjected during oral argument, stating that Trooper Larsen "wasn't stopping him to cite him for the litter. He was stopping him to see if he was a drunk driver. That's really the real reason for the stop. The reason for the stop is not the litter" (12:14-15; A- Ap. 117-18).

The State respectfully maintains that the circuit court was incorrect in considering the perceived subjective motivation of Trooper Larsen in stopping Iverson's vehicle.

As explained in detail above, Trooper Larsen had made sufficient observations to support probable cause and reasonable suspicion that Iverson or his passenger had violated state statute and city ordinance prohibiting littering. While Trooper Larsen noted Iverson's vehicle exhibited driving behavior commonly associated with impaired drivers such as drifting within a lane of traffic and stopping unnecessarily, his subjective desire to detect drunk drivers, even if confirmed, does not invalidate probable cause and reasonable suspicion to stop Iverson's vehicle.

Wisconsin has long recognized that “[a]s long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal. The officer's subjective intent does not alone render a search or seizure of an automobile or its occupants illegal, as long as there were objective facts that would have supported a correct legal theory to be applied and as long as there existed articulable facts fitting the traffic law violation.” *State v. Baudhuin*, 141 Wis.2d 642, 651, 416 N.W.2d 60, 63 (1987).

The United States Supreme Court has further recognized “the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978).

In the instant case, Trooper Larsen had before him clear, objective facts which supported a reasonable inference that a vehicle occupant intentionally discarded litter on a city street rather than a designated garbage receptacle. Even accepting the circuit court’s conclusion that a littering violation was simply an excuse disguising efforts to investigate a potentially intoxicated driver, Trooper Larsen acted reasonably when he stopped Iverson’s vehicle for a littering violation. Accordingly, the evidenced gathered after the stop should not have been suppressed.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court reverse the order of the circuit court granting Iverson's motion to suppress evidence.

Dated this 24th day of April, 2014.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,691 words.

John W. Kellis
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format 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.

Dated at La Crosse, Wisconsin, this 24th day of April, 2014.

John W. Kellis
Assistant District Attorney

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. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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.

Dated this 24th day of April, 2014.

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on April 24, 2014, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and five copies of the plaintiff-appellant's brief and appendix.

Dated this 24th day of April, 2014.

John W. Kellis
Assistant District Attorney