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COURT OF APPEALS
DISTRICT II

02-10-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal Nos. 2014-AP-1949 and
2014-AP-1950

ANDREW T. JODA,

Defendant-Appellant.

On Appeal of an order denying Defendant's motion to
suppress evidence and judgment of conviction entered
in the Circuit Court of Waukesha County, The
Honorable Judge Jennifer Dorow, Presiding.

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Whether the Circuit Court's factual finding that the defendant made an illegal U-turn based on the testimony of Deputy Becker is clearly erroneous.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("state") submits that oral argumentation is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE AND FACTS

On December 23, 2013, the defendant brought a motion in front of Waukesha County Circuit Court Judge Jennifer Dorow, to suppress evidence for lack of reasonable suspicion for a traffic stop conducted by Deputy William R. Becker of the Waukesha County Sheriff's Department. (R. 24:3, App. 1-3). This stop occurred on June 23, 2013, which resulted in the defendant being cited for, and ultimately convicted of, operating while intoxicated as a first offense. (R. 24: 1-5, App. 5:20-8:17).

During direct examination, Deputy Becker testified that at approximately 12:48 a.m. on the morning of June, 23, 2013, he was working as a patrol deputy and driving a marked Crown Victoria squad car. (R. 24:5-6, App. 5:20-6:3). He indicated that while he was turning southbound on Grandview Boulevard from the westbound Interstate 94(I-94) off-ramp, he noticed a vehicle which he later identified as the defendant's white Subaru Impreza. (R. 24:6, App. 6:4-10).

The Impreza was stopped at the traffic lights on North Grandview Boulevard and the eastbound I-94 on and off ramps. (R. 24:6, App. 6:11-23). The vehicle was sitting in furthest left lane of northbound Grandview Blvd., with its left turn signal activated. (R. 24:6, App. 6:12-7:13) At the time he noticed the vehicle, Deputy Becker was making a turn at an intersection north of I-94, and the

defendant's vehicle was sitting at an intersection south of I-94. (R. 24:6-7, App. 6:20-7:3). When Deputy Becker noted the vehicle had a left turn signal activated, he found it odd because no proper left turns or U-Turns could be made at that set of lights. (R. 24:7, App. 7:14-25). He indicated that he thought the vehicle was either going to turn left and enter an off ramp for eastbound I-94 traffic, or make an illegal U-Turn. (R. 24:7, App. 7:14-25). He indicated this drew his attention because of the potential danger that the defendant would enter the off ramp, into any oncoming traffic. (R. 24:7, App. 7:14-25).

Deputy Becker testified that he then observed the defendant perform an illegal U-turn in violation of the traffic signs at the intersection. (R. 24:8, App. 8:5-8). He positioned himself behind the defendant's vehicle as it travelled southbound on Grandview Blvd. (R. 24:8, App. 8:5-17) Based on the illegal U-turn, Deputy Becker performed a traffic stop on the defendant's vehicle. (R. 24:8, App. 8:17).

Later during direct examination, Deputy Becker could not recall the results of the preliminary breath test he administered to the defendant. (R. 24:17, App. 17:8-11). The state then produced a copy of Deputy Becker's written police report in order to refresh his memory. (R. 24:17, App. 17:8-16). After viewing the report Deputy Becker

testified that the defendant's preliminary breath test indicated a result of 0.173. (R. 24:18, App. 18:13-15).

During cross-examination, the defense questioned Deputy Becker regarding the police report used by the state to refresh his memory regarding the preliminary breath test. (R. 24:21, App. 21:15-22:3). Deputy Becker stated that the report was typed within 24 hours of the traffic stop. (R. 24:23, App. 23:13). Deputy Becker testified that as he approached the defendant's vehicle at the stop lights south of I-94, the defendant turned in front of him. (R. 24:27, App. 27:5-7). Following this statement, Deputy Becker indicated he could not remember whether the defendant had conducted the illegal U-turn in front of him or behind him while Deputy Becker viewed it in the rear view mirror. (R. 24:27, App. 27:11-13). Then the defense introduced the same police report to refresh Deputy Becker's memory as to whether the defendant was in front of or behind him, at which point, Deputy Becker stated that the police report did not contain that information. (R. 24:27, App. 27:19-25).

Deputy Becker indicated he did not think that he passed by the defendant before the defendant performed the illegal U-Turn. (R. 24:28, App. 28:1-5). Deputy Becker also agreed with defense, and indicated on northbound Grandview at the intersection south of I-94 there is no left turn lane. (R. 24:28, pp. 28:12-15). Deputy Becker

further stated that there was a left turn lane at the intersection on the north side of I-94. (R. 24:28, App. 28:16-18). When asked if U-turns were legal at the intersection north of I-94, Deputy Becker stated that he did not know. (R. 24:30, App. 30:13-15).

The defense then introduced a picture of the intersection north of I-94, from a vantage point looking northbound on Grandview. (R. 24:32, App. 31:10-32:8). The defense asked Deputy Becker if the picture reflected how that intersection looked on June 23, 2013, specifically that it lacked a “no U-turn” sign. (R. 24:32, App. 32:9-22). To this question, Deputy Becker replied that he did not know if the sign was there on June 23, 2013, but that he doubted they would take it down. (R. 24:32, App. 32:9-22).

The defense then directed Deputy Becker to his police report, which stated the defendant was in a left turn lane when he noticed the vehicle. (R. 24:34, App. 34:12-15). The defense then asked Deputy Becker if the defendant had actually been in a left turn lane at the intersection north of I-94, because that is the only intersection with left turn lanes. (R. 24:35, App. 35:21-23). Deputy Becker answered, “No, he was on the south side of 94.” (R. 24:35, App. 35:24). He acknowledged that his mental recollection was different than what exactly was typed in the police report. (R. 24:36, App. 36:13).

On redirect examination, Deputy Becker testified that he would not have passed the defendant's vehicle with the left directional on, because there was a potential that he might turn into oncoming traffic. (R. 24:39, App. 39:1-9). Deputy Becker further testified that while making his left hand turn onto North Grandview Boulevard on the north side of I-94, the defendant's vehicle was not at the same intersection, right in front of him, and instead at the intersection south of I-94. (R. 24:40, App. 40:18-20).

The defendant then testified that he had been stopped at the intersection south of I-94 in the left northbound lane of Grandview with his left directional on in order to signal his intent to enter I-94 at the next intersection. (R. 24:45-46, App. 45:25-46:23). He further testified that he did not conduct an illegal U-Turn at the intersection south of I-94, and instead conducted a U-Turn at the intersection north of I-94. (R. 24:47, App. 47:20-48:16). He stated he was then traveling in the same direction as the deputy, and eventually a deputy came from behind him after pulling from the right side of the road. (R. 24:49, App. 49:10-13). He was then stopped by Deputy Becker. (R. 24:49-50, App. 49:21-50:2).

During cross examination the defendant admitted he had 6 to 7 drinks at a pool hall prior to being pulled over by Deputy Becker. (R. 24:51, App. 51:6-7). He also testified he left the pool hall around

midnight and had not been anywhere else before the traffic stop. (R. 24:51, App. 51:8-12).

In finding that there was reasonable suspicion for Deputy Becker to initiate the traffic stop, the court noted that the defendant stated he had six to seven drinks that evening. (R. 24: 65-66, App. 65:15-66:15). The court also noted that if the defendant had made a left turn at the southern intersection, he would have entered oncoming traffic, and this concerned Deputy Becker. (R. 24:36, App. 63:11-14). The court stated that the significant level of intoxication made the defendant less credible than the deputy. (R. 24:66, App. 66:2-15). Furthermore, the court noted that in making its decision, the discrepancy in time was taken into account because the stop did not occur for 45 minutes after the defendant claims he left the pool hall. (R. 24:66, App. 66:16-21). On this basis, the court found that Deputy Becker had reasonable suspicion to stop the defendant for violating the traffic laws regarding U-turns. (R. 24:67, App. 67: 17-24).

ARGUMENT

In reviewing a lower court's decision on the suppression of evidence, this Court should uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 221, 629 N.W.2d 625, 631.

I. THE CIRCUIT COURT'S FINDING THAT DEPUTY BECKER HAD REASONABLE SUSPICION TO STOP THE DEFENDANT IS NOT CLEARLY ERRONEOUS AND SHOULD BE AFFIRMED ON THE BASIS THAT IT IS SUPPORTED BY DEPUTY BECKER'S TESTIMONY.

A court's factual findings made during a motion to suppress are clearly erroneous if they are "against the great weight and clear preponderance of the evidence." *See State v. Guzy*, 139 Wis.2d 663, 407 N.W.2d 548, 552 (1987) (citing *State v. Flynn*, 92 Wis.2d 427, 437, 285 N.W.2d 710 (1979)). The credibility of witnesses and police officers at suppression hearings, absent the jury, is to be assessed by the court. *Flynn*, 285 N.W.2d at 714. Furthermore, on appeal, deference is to be given to the trial court's factual findings as any conflicts in testimony will be resolved in favor of the trial court's findings. *Id.*

Various decisions discussed below suggest that when a law enforcement officer provides testimony to the trial court that a defendant made a traffic violation, and there is also conflicting

evidence of that violation, the Court of Appeals should defer to the trial court's findings of fact. For example, in 2011 the Court of Appeals upheld a trial court's factual finding that a defendant supplied reasonable suspicion to law enforcement by deviating from his lane. *State v. Walli* 2011 WI App 86, ¶¶ 1, 17, 18, 334 Wis. 2d 402, 405, 799 N.W.2d 898, 900. The Court indicated that the finding was not clearly erroneous based on the officer's testimony, despite an unclear piece of video evidence of the deviation. *Id.* During the hearing on the defendant's motion to suppress, the officer testified that as the defendant's vehicle moved towards him in the opposite lane it veered towards him over the center line startling him. *Id.* at ¶ 3. A video from the officer's squad car was introduced in which it was difficult to tell if the defendant did in fact veer towards the officer, breaking the traffic law. *Id.* at ¶ 4. In affirming the trial court's decision that the defendant had veered over the center line, the Court noted that the officer had testified that he witnessed the car cross the center line, and that although the video was ambiguous, the Court did not find this factual finding clearly erroneous. *Id.* at ¶¶ 18, 17.

In *State v. Puchacz*, the Court of Appeals upheld a finding that there was reasonable suspicion for an officer to stop a defendant who he observed swerve over the center line. *State v. Pauchacz*, 2010 WI App 30, ¶ 17, 323 Wis. 2d 741, 752, 780 N.W.2d 536, 541. The

defendant argued because the officer's testimony conflicted with an intern riding with him, there was not a sufficient factual basis to find that he deviated over the line. *Id.* at ¶ 17. In upholding the trial court's finding, the Court noted that although the intern stated at the suppression hearing he did not see the defendant's vehicle deviate, he stated he could not be sure because he was not paying attention. *Id.*

In *State v. Batt*, the Court of Appeals affirmed a trial court's finding that an officer provided the defendant with an alternative alcohol test because it was not clearly erroneous. *State v. Batt*, 2010 WI App 155, ¶ 15, 330 Wis. 2d 159, 170, 793 N.W.2d 104, 109. The defendant argued that he did not consent to the blood test, however, the court found that, although the officer could not remember the exact sequence of events, it was clear that the defendant was given the choice of an alternative test. *Id.* at ¶ 15.

In interpreting the Fourth Amendment's prohibition on unreasonable searches and seizures, the Supreme Court of the United States held that in order to stop and detain an individual for an investigation, a law enforcement official must have specific, articulable facts, which would cause a reasonable person to believe the stop was appropriate. *Terry v. Ohio*, 392 U.S. 1, 21, 22 (1968). The reasonable suspicion requirement set forth in *Terry* has been adopted by the Wisconsin Supreme Court, as well as codified in Wis. Stats. § 968.24

(2013-2014), which reads, “a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime.” *See State v. Flynn*, 92 Wis.2d 427, 285 N.W.2d 710 (1979).

In the present case, because the Circuit Court’s finding that the defendant made an illegal U-turn reflects a credibility determination, it must be affirmed because it was not clearly erroneous. Although the defendant stated that he did not make an illegal U-turn, the fact that he was significantly intoxicated, and had several gaps in his recollection of events that evening supports the Circuit Court’s finding that he had in fact performed an illegal U-turn according to Deputy Becker’s testimony.

While Deputy Becker’s testimony differed from his original police report, he adamantly stated that he saw the defendant make an illegal U-turn South of I-94. (R. 24: 25-40). Deputy Becker indicated the defendant’s vehicle drew his attention because of the potential danger inherent in turning into oncoming traffic. The Circuit Court took this into consideration before denying the defense motion. Although the deputy used his report to refresh his recollection of the exact

preliminary breath test result, he did not need it to testify to the location of the U-Turn.

When the defense asked Deputy Becker if his police report would alter his testimony about the defendant's location, he indicated no. Although Deputy Becker did indicate he could not exactly remember his positioning relative to the defendant on the night in question, this does not necessarily lead to the conclusion that the deputy certainly remembered the location of the U-Turn incorrectly during the hearing. It is not necessary for Deputy Becker to remember his own location in order to remember the defendant's location. Memory does not work like a photograph or video, and specific observations about an event may be remembered. In this case the inherent danger involved in a vehicle entering oncoming traffic supports the deputy's recollection of the defendant's position. The testimony given by the deputy surely supports the Circuit Court's finding, and given this testimony, those findings were not clearly erroneous.

Additionally, the Circuit Court's finding that the defendant lacked credibility was not clearly erroneous, but had a sufficient factual basis in the defendant's testimony. The defendant testified that he left a bar called Master Z's Pool Hall located "on Grandview Boulevard South of Silvernail in Waukesha...right around midnight." (R. 24:44,

App. 44:10-15). He further stated that he was intending to return to his parent's home and drove north on Grandview Boulevard until he got to I-94 where he made a U-turn. (R. 24:44-48, App. 44:21-48:19). The defendant stated that while he was driving down North Grandview Boulevard after leaving the bar he wanted to "go return to Denny's," and during cross examination stated he did not go anywhere in between leaving the pool hall and getting pulled over. (R. 24:51, App. 51:10-12). Finally, the defendant testified that he had six to seven beers that evening, and Deputy Becker testified that the defendant's preliminary breath test resulted in a 0.173. (R. 24:18, 51, App. 18:15, 51:7).

The above facts certainly support a finding that the defendant, although confident in stating he did not make an illegal U-turn, lacked credibility for his memory of the evening based on the amount of alcohol he had consumed and the gap in time between when he testified he left the bar and made the illegal turn.

In the *Walli* case, the Court of Appeals found that the officer's testimony about witnessing the defendant swerve was sufficient to support the trial court's finding that the defendant did in fact swerve, even though the video evidence was ambiguous. *Walli* at ¶¶ 1, 17, 18. In the present case, the Circuit Court's finding that the defendant made an illegal U-turn is supported by Deputy Becker's testimony, even though the police report was ambiguous about the deputy's exact

location. (R. 24: 27). If the officer's testimony provided sufficient evidence for the trial court to make a finding that the defendant did swerve across the center line in *Walli*, then Deputy Becker's testimony surely provides the same here, regardless of a misstatement in his report. *Id.* Although, a misstatement in Deputy Becker's police report may support the defense's theory that the U-turn was not illegal, it is not sufficient to support a holding that the trial Court's factual findings are clearly erroneous.

Similarly, given the Court of Appeals holding in *Puchacz*, where it affirmed a trial court's finding that the officer's testimony was more credible than an intern who said he did not see the defendant's vehicle swerve, then in the case at hand, the significant level of intoxication demonstrated by the field sobriety and preliminary breath tests is sufficient for the court to discount the defendant's testimony, and find that Deputy Becker's version of events is the truth. *Pauchacz* at ¶17. A high level of intoxication should be sufficient for a Circuit Court to make a finding that is not clearly erroneous regarding the credibility of a sober law enforcement officer versus an intoxicated defendant.

Finally, an officer's testimony about the exact sequence of events, does not have to be exact in order for a Circuit Court to glean that a certain event the officer observed in fact happened. Like in *Batt*, where the court held that although the officer could not recall the

specific sequence of events, it was clear that he offered the defendant an alternative alcohol intoxication test, in the present case, even though Deputy Becker may have not been able to recall whether he was in front of or behind the defendant at the time he made the illegal U-turn, the court was able to glean that the defendant did make an illegal U-turn. *Batt* at ¶ 15.

The Circuit Court's finding that the defendant in this case made an illegal U-turn is based upon testimony presented at the hearing, and therefore is not erroneous. Additionally, the Circuit Court's findings in this case regarding the credibility of the witnesses to the stop are not clearly erroneous because they have a basis in the testimony elicited at the motion hearing.

CONCLUSION

For all the reasons stated above, the County respectfully requests that the Court affirm the circuit court's denial of the defendant's suppression motion, and affirm the judgments of conviction.

Dated this ___ day of February, 2015.

Respectfully,

Abbey Nickolie
Assistant District Attorney
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Attorney for Plaintiff-Respondent
State Bar Number 1092722

CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with proportional serif font. The length of this brief is 3949 words long.

Dated this ____ day of February, 2015.

Abbey Nickolie
Assistant District Attorney
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Attorney for Plaintiff-Respondent
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**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 Waukesha, Wisconsin this ____ day of February, 2015.

Abbey Nickolie
Assistant District Attorney
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as 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; (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 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 ____ day of February, 2015.

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