COURT OF APPEALS

DISTRICT III

Appellate Case No. 2014AP002369

COUNTY OF LANGLADE,
Plaintiff-Respondent,

v.

CASEY JOSEPH STEGALL,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR LANGLADE COUNTY, THE HONORABLE FRED W. KAWALSKI, PRESIDING
TRIAL COURT CASE NOS. 12 TR 641 and 12 TR 642

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the issue raised can be decided based on application of established legal principles to the facts of the particular case. The State acknowledges that publication is not available in a one-judge appeal.

STATEMENT OF FACTS

At about 2:48 AM on August 7, 2012, Langlade County Sheriff's Department Sergeant Andrew Tainter saw a person, Casey Stegall, operating a motor vehicle recklessly on STH 64, in Langlade County, making "an abrupt turn on - northbound on Fraley Road in a manner that I considered reckless and certainly too fast and imprudent speed to be turning the corner at." (R. 20, pp. 4-5) Mr. Stegall proceeded to ignore the police officer following him, and eventually honking and calling out to him, as he drove home, parked in his driveway, exited his vehicle and then walked into his house and shut the door. (R. 20, p. 5) Sergeant Tainter knocked on the door, and Mr. Stegall answered, emitting a very strong odor of intoxicants. The officer asked him to come outside, and he did, finally yielding to the officer's authority. (R. 20, p. 6)

Mr. Stegall moved the trial court to suppress evidence obtained from this encounter, claiming that the officer detained him without the reasonable suspicion necessary for a seizure. After a motion hearing on May 7, 2013, the trial court denied the motion and entered a written decision with findings on September 25, 2013. (R. 10)

ARGUMENT

THE TRIAL COURT PROPERLY DENIED STEGALL'S MOTION TO SUPPRESS BECAUSE THE *TERRY* STOP WAS BASED UPON REASONABLE ARTICULABLE SUSPICION

A challenge to the trial court's order denying a suppression motion presents a question of constitutional fact. On review of a question of constitutional fact, this Court must uphold the lower court's findings of fact and credibility determinations unless they are clearly erroneous. This Court then independently applies the law to those not clearly erroneous facts as found by the trial court. See State v. Hughes, 2000 WI 24, 233 Wis.2d 280, 607 N.W.2d 621.

Mr. Stegall contends that on August 7, 2012, he was stopped without reasonable articulable suspicion by Langlade County Sheriff's Department Sergeant Andrew Tainter. Mr. Stegall argues that the trial court committed error by denying his Motion to Suppress. The County will demonstrate from the record that the trial court properly denied the Motion to Suppress because the "Terry stop" conducted by law enforcement on this date was lawfully based upon reasonable articulable suspicion.

A determination of whether the officer acted lawfully turns on whether he had sufficient cause at the time he conducted a "Terry stop," or seizure. In determining whether Sgt. Tainter had the requisite lawful cause at the time of this encounter with Mr. Stegall, the trial court needed to apply an objective, common sense test and consider the totality of circumstances present at the time of the seizure. State v. Guzy, 139 Wis.2d 663, 407 N.W.2d 548 (1987).

In order to effect a seizure, an officer must make a show of authority, and the citizen must actually yield to that show of authority. State v. Kelsey C.R., 2001 WI 54, ¶33, 243 Wis.2d 422, 626 N.W.2d 777. Without both elements, there is no seizure.

To execute a valid investigatory stop, an officer must suspect, in light of his or her experience, that some

kind of illegal activity has taken or is taking place. Terry v. Ohio, 392 U.S. 1 (1968). Whether the behavior amounts to a crime or an ordinance violation is of little significance, as either may justify an investigatory stop. State v. Krier, 165 Wis.2d 673, 478 N.W.2d 63 (Ct. App. 1991). A traffic stop is generally considered reasonable if the officer has probable cause to believe that a traffic violation has occurred, or has grounds to reasonably suspect a violation has been or will be committed. State v. Popke, 2009 WI 37, 317 Wis.2d 118, 765 N.W.2d 569. In fact, the officer need not observe any unlawful activity, as an investigatory stop may be based on observations of lawful conduct, as long as reasonable inferences can be drawn that criminal activity is afoot. State v. Waldner, 206 Wis.2d 51, 556 N.W.2d 681 (1996). Moreover, the evidence need not be sufficient to prove guilt, nor even to show that guilt is more probable than not; instead, the objective facts before the police need only be sufficient to lead a reasonable person to conclude that guilt is more than a possibility. State v. Truax, 151 Wis.2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989). It is a common sense test in which the totality of the circumstances facing the officer is considered. County of Dane v. Sharpee, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

Mr. Stegall points out that the trial court did not make a finding of when he was seized by the officer. (App. Brief, p.6) While the trial court's decision does not identify explicitly the precise moment in time when a seizure took place, the trial court clearly articulates that the officer's initial observations regarding the reckless driving at the intersection of STH 64 and Fraley Road combined with the extreme lateness of the hour provided the officer with reasonable articulable suspicion. The trial court implicitly found that the officer had the requisite cause to effectuate a traffic stop as soon as those observations were made, so any lack of specificity as to what time thereafter a seizure took place is academic. The trial court's findings that the reckless driving had taken place at approximately 2:45 a.m. as reported and observed by the officer was not clearly erroneous.

The officer specifically articulated his reason for following the defendant when he saw the defendant

making "an abrupt turn on - northbound on Fraley Road in a manner that I considered reckless and certainly too fast and imprudent speed to be turning the corner at." (R.20, pp. 4-5) Mr. Stegall's laundry list of erratic driving behaviors that the officer did not note is irrelevant and unnecessary to a finding of reasonable suspicion.

> Although erratic driving may be evidence that the defendant is under the influence of an intoxicant, the statute "does not require proof of an appreciable interference in the management of a motor vehicle." Because an OWI conviction does not require proof of erratic driving, proof of erratic driving is obviously not required for purposes of a reasonable suspicion. State v. Powers, 275 Wis.2d 456, 466, 685 N.W.2d 869 (Ct. App. 2004) citation omitted

Additionally, the time of day (i.e., at or around "bar time") also supports the deputy's decision to conduct a traffic stop in order to investigate impairment. State v. Lange, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 766 N.W.2d 551, and State v.Post, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 733 N.W.2d 634.

The County acknowledges that the Court will independently apply the established Fourth Amendment principles to these facts and on the whole record of this case, will determine when a seizure took place. Mr. Stegall's liberty was not restrained and he did not yield to the officer's authority until such time as he voluntarily left his home and submitted to consensual police contact and questioning. At the time that there was a personal encounter at the doorway between Mr. Stegall and the officer, a reasonable officer could have detected the odor of intoxicants. Therefore, the additional facts that Mr. Stegall ignored the presence of the squad car pulling into his driveway, ignored the officer's honking and verbal requests to stop, (R. 20, p.5) and that the officer "detected a very strong odor of intoxicants" (R.20, p.6) should be considered as part of the totality of the circumstances leading to the officer's reasonable articulable suspicion that a traffic violation had taken place, namely a violation of either secs. 346.62 or 346.63, Wis. Stats., or both.

Also see State v. Anderson, 155 Wis.2d 77, 454 N.W.2d 763 (1990), for the holding that flight from an

officer can provide reasonable articulable suspicion for an investigatory stop.

In State v. Powers, an Osco store clerk called the police to report a possibly intoxicated man trying to buy beer. After the officer saw the man get into his vehicle and start driving through the Osco parking lot, he tried to stop him, flashing his squad lights, then activating his siren, but the man ignored him and exited the lot and drove down the street, finally stopping in a different parking lot. Upon reviewing these facts, the Powers court took the opportunity to clarify the elements of a seizure, stating:

> Before addressing Powers' arguments, we will clarify when a seizure occurs. The trial court held that Powers was seized when Bethia activated his emergency lights. That is not the law in Wisconsin. In State v. Kelsey C.R., 2001 WI 54, ¶ 33, 243 Wis.2d 422, 626 N.W.2d 777, the supreme court held, "In order to effect a seizure, an officer must make a show of authority, and the citizen must actually yield to that show of authority." In this case, the seizure did not occur until Powers pulled off the public street, into a parking lot, and parked in front of a restaurant. Therefore, in considering whether the standard for reasonable suspicion has been met, we may include in the totality of the circumstances everything from the tip from the clerk at Osco to Powers' parking in front of the restaurant. State v. Powers, 275 Wis.2d 456, ¶ 8.

Like Powers, Mr. Stegall in this case ignored the officer and never yielded to authority until he came back out of the house. Thus no seizure occurred until then, and all of his prior behavior including reckless driving, ignoring the squad and honking horn, and strongly smelling of intoxicants may be properly included in the totality of the circumstances supporting the officer's reasonable suspicion to effectuate the seizure that followed.

The trial court correctly ruled that the officer could have stopped Mr. Stegall based upon the specific instance of reckless driving that he articulated alone. He was under no obligation to wait for more instances of poor driving. The fact that he made further observations prior to a seizure taking place should also be construed in favor of the court's decision to deny the motion for suppression.

The touchstone of the Fourth Amendment is reasonableness. The Court is asked to consider whether the officer's actions were reasonable under the totality of the circumstances present. In this case, an officer with about seven years of experience (R. 20, p. 3) saw the defendant drive recklessly, at an imprudent speed, at 2:48 AM, then ignore the pursuing officer and go into his house. It was reasonable for the officer to approach the defendant, and once he did, he noted the strong odor of intoxicants and continued to act reasonably in asking the defendant to perform field sobriety tests.

CONCLUSION

The trial court's factual findings were not clearly erroneous and the trial court denied Mr. Stegall's motion in accordance with the law. Therefore, the County asks the Court to affirm the judgment of conviction entered below.

Dated this 27th day of February, 2015.

Respectfully submitted,

_____

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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 2341 words.

Dated this 27th day of February, 2015.

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Ralph M. Uttke
Langlade County 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 this 27th day of February, 2015.

_____
Ralph M. Uttke
Langlade County District Attorney