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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP002603-CR
Fond du Lac County Circuit Court Case No. 2011CT000145

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLENN T. ZAMZOW

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER THE DENYING POSTCONVICTION RELEIF ENTERED IN FOND DU LAC CIRCUIT COURT BEFORE THE HONORABLE GARY R. SHARPE, PRESIDING

THE BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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TABLE OF AUTHORITIES

Statutes & Constitutional Provisions Cited

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Did the trial court err in denying the Motion to Suppress the traffic stop of Zamzow's vehicle?

Trial Court Answered: No.

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

III. STATEMENT OF THE CASE

The State concurs with the Statement of the Case presented by Appellant (hereinafter Zamzow) and offers no further information.

IV. STANDARD OF REVIEW

Whether reasonable suspicion is present is a question of constitutional fact which is reviewed de novo. State v. Powers, 275 Wis.2d 456, 685 N.W.2d 869**. (**Wis. App. 2004)

V. ARGUMENT

THE TRIAL COURT CORRECTLY DETERMINED THERE WAS REASONABLE SUSPICION FOR THE TRAFFIC STOP.

The trial court did not err in determining that there was reasonable suspicion for the traffic stop. More specifically, the trial court did not err in admitting the statement of the deceased Officer Birkholz to Zamzow explaining the basis of the traffic stop for consideration at the motion hearing.

Terry v. Ohio, requires that law enforcement "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" for an investigatory stop to be proper. 392 U.S. 1, 18 (1968). In State v. Anderson, the court noted that the focus of a *Terry* stop is reasonableness. 155 Wis.2d 77,83, 454 N.W.2d 763,766 (1990). *Anderson* further contemplated a commonsense balancing between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibilities. *Id.* at 87. With similar emphasis on reasonableness, where the evidence supports two competing inferences, support has been noted for the inference supporting law enforcement's actions, when that action was reasonable under the

circumstances. *See* State v. Tompkins, 144 Wis.2d 116, 125, 423 N.W.2d 823,827 (1988).[1]

In this case, it was impossible to elicit testimony from Officer Birkholz, the officer whom initiated the traffic stop, as he was deceased. (R. 85:15; A. App. 122). Pursuant to Wis. Stat. §967.055(1), in the State of Wisconsin, "[T]he legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant". As a result, OWI-related cases (violations of Wis. Stat. § 346.63) are often the product of extensive litigation throughout the state, despite potentially complex evidentiary motion hearings.

In this case, in the absence of Officer Birkholz the only evidence available to the State to meet the burden to establish reasonable suspicion of the traffic stop was the squad video. The trial court in its assessment of the video noted that the squad video was a depiction of Zamzow's driving behavior, but the video was not dispositive of the issue as to whether a traffic violation for crossing the center line had occurred. (80:19-20; A. App. 112-113). The trial court also considered Officer Birkholz's

[1] "We hold that where there is evidence that would lead a reasonable person to conclude that the evidence sought is likely to be in a particular location-although there may be other evidence that could lead a reasonable person to conclude that the evidence may instead be in another location-there is probable cause for a search of the first location."

commentary to Zamzow following the traffic stop, finding these statements were nontestimonial and otherwise admissible. (R. 80:23; A.App. 116; see also R 80:26; A. App. 119). The State maintains that the evidence considered by the trial court was not barred by rules of evidence or constitutional requirements. As a result the trial court was not clearly erroneous in determining that there was reasonable suspicion for the traffic stop, and this decision should be upheld.

a) THE CONFRONTATION CLAUSE DOES NOT PREVENT THE INTRODUCTION OF NONTESTIMONIAL STATEMENTS AT PRELMINARY EVIDENTIARY MOTIONS

Zamzow argues, that the initial statements by Officer Birkholz to him should not have been admitted into evidence as these statements were both testimonial and unreliable. (App. Brief, 8-9). There is also suggestive argument that Officer Birkholz could have easily falsified the basis for the traffic stop[2]. However, because the statement by Officer Birkholz to Zamzow was nontestimonial, the statement was reliable, and there is no evidence to suggest this was a pretextual or harassing stop of Zamzow, the

[2] See App. Brief at 13, where it is argued that Officer Birkholz needed to inform Mr. Zamzow of the basis of the stop in order to justify the stop .

trial court correctly allowed this statement to be admitted for consideration at the pretrial motion hearing.

In State v. Frambs, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990), which was a case was pertaining to a pretrial motion as to whether a declarant was unavailable, the Court of Appeals acknowledged the introduction of hearsay statements at pretrial motions. In *Frambs*, the court referenced Wis. Stat. §901.04(1), which, in full, provides the following:

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05" See also *Id.* at 703.

Interpreting this statute, *Frambs* stated that "[t]he trial court is not statutorily bound to apply the hearsay rule at this preliminary proceeding," and further that there was nothing to suggest that the Supreme Court intended the protection of confrontation clause to be available in pretrial situations under Wis. Stat. § 901.04(1). *Id.* at 704. On its face, Wis. Stat. § 901.04(1) vested substantial discretion to the trial court to address preliminary questions of admissibility of evidence in pretrial motions. *Frambs* directly acknowledges that there is no confrontation right as to a hearsay declarant at a pretrial motion hearing. *Id.* at 705.

Zamzow argues, that *Frambs,* was overruled in Crawford v. Washington, 541 U.S. 36 (2004), because *Crawford* was decided after *Frambs.* (App. Brief, 14). However, despite *Crawford* being decided after *Frambs,* in Wisconsin, *Frambs* is still looked favorably upon, is supported in the Wisconsin Practice Series[3], has not been expressly overruled, and otherwise still appears to be controlling law.

Zamzow further argues that Officer Birkholz's statement is also inadmissible because it is testimonial when assessed in the analysis laid out in State v. Manuel, 281 Wis. 2d 554,577, 697 N.W.2d 811,822, (2005) because the statement would be remembered in anticipation for litigation; however the State suggests that the *Manuel* analysis is so broad, it cannot readily be applied when viewed in consideration from law enforcement training requirements. It is well-established that law enforcement officers are trained to write detailed reports of their contact with individuals, in order to maintain an accurate record of the events of the contact. The *Manuel* analysis notes that "[f]or a statement to be testimonial…it must be a statement that [was] made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for later use at a trial". *Id.*

[3] See *Wisconsin Practice Series,* David D. Blinka, May 2014, §104.1 "Questions of admissibility generally", FN8.

The State suggests that this analysis has overreaching and broad results because *Manuel* creates the inevitable argument for all defendants that any statement recorded by law enforcement would weigh in favor of determining that the statement was significant enough that it would be available for use at a later trial, and thus be testimonial. The end result then becomes, where law enforcement complies with their training and experience to write detailed reports, what statements of a deceased officer to a defendant would be admissible under the *Manuel* analysis and be considered nontestimonial? The State has difficulty identifying these potential statements, if any, with any clarity, which is suggestive of the overreaching application of *Manuel.*

Zamzow further argues that even if the statement is nontestimonial the statement should be excluded as it is unreliable, and Zamzow expands the unreliability argument into due process concerns. (App. Brief, 16). However in this case, the statement is significantly more reliable because of the availability of the video. Unlike a circumstance where a statement is made, and there is no ability to confirm its accuracy in any regard, with the video of the traffic stop, reliability can be assessed by confirming that both the statement was made, and assessing the context the statement was made.

Zamzow argues that "the Confrontation Clause is the only way to test the reliability of the evidence" (App. Brief, 14), but this is an appeal of assessing one's right to confrontation at a pretrial motion hearing, not trial. In this case, the trial court could properly assess the reliability of the statement within their authority granted pursuant to Wis. Stat. § 901.04(1), because the trial court had a video available to review the statement directly as delivered by the declarant, and to determine the context in which the statement was made. Moreover, because this statement is not the product of being repeated by a third party as to what was said, in what tone it was said, and in what context it was said, the circumstance presented in this case is, in many ways, the best possible way to assess the reliability of any out of court statement, via the recording of the initial statement at the time it was made. On this basis, as long as the trial court operated within their authority pursuant to Wis. Stat. §901.04(1), due process concerns are not applicable, because statutes are presumed constitutional.[4]

[4] *See* Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund, 237 Wis.2d 99,110 613 N.W.2d 849, 857 (Wis.,2000) citing *Riccitelli v. Broekhuizen*, 227 Wis.2d 100, 119, 595 N.W.2d 392 (1999), that statutes are presumptively constitutional. *See also State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 46-47, 205 N.W.2d 784 (1973), which provides that if any doubt exists about a statute's constitutionality, the statute should be construed in favor of constitutionality.

Lastly, Zamzow argues that the statements by Officer Birkholz were merely to justify the traffic stop. (App. Brief, 13). The State interprets this argument to suggest that Officer Birkholz could have said anything he wanted in an effort to justify a stop that Officer Birkholz knew was improper. This argument is not supported in the factual record. There is nothing in the history of this case to suggest that this traffic stop was pretextual in any manner, or the statements were so delayed or disjoint to suggest that Officer Birkholz had fabricated the explanation of the traffic stop to Zamzow. Furthermore, the record is silent as to whether Officer Birkholz has had any prior disciplinary history pertaining to truthfulness issues, which in the absence of, demonstrates that Officer Birkholz was otherwise truthful in his career in law enforcement. Moreover, the record is also silent as to suggest that Officer Birkholz initiated a traffic stop in essence "just because", to harass Mr. Zamzow or abuse his authority. On the record presented, to suggest that Officer Birkholz had to "justify" the stop in any manner other than for why he believed the stop was proper is not supported and is speculative.

b) OVERBROAD APPLICATION OF THE CONFRONTATION CLAUSE WILL CREATE UNJUST RESULTS

The State acknowledges and appreciates the importance and integrity of the 6th Amendment right to confront one's accusers. The body of precedent acknowledging the significance of this right cannot be overstated, and is otherwise voluminous[5]. The State further acknowledges that the crucible of cross-examination is an integral mode of interrogation for available witnesses; however the rules of evidence have long recognized that not all witnesses are available to testify, and exceptions for unavailability must apply.

In this case, the potential exclusion of Officer Birkholz's statement to Zamzow creates an unfair and unreasonable application of confrontation requirements to law enforcement. The unfortunate reality is that law enforcement risks bodily harm or death everyday while in uniform, and in almost any case, as a product of the risk of working in law enforcement, or the general risks in life, there will be cases where law enforcement becomes deceased during the pendency of a criminal prosecution. Undoubtedly, these deaths may require the dismissal of cases without the

[5] See Crawford v. Washington, 541 U.S. 36, 43-50 (2004), which provides a historical perspective of the development of the Sixth Amendment.

officer's direct testimony; however in modern law enforcement, squad cameras and personal video/audio recorders are commonplace. These technological advances are designed to ensure the accuracy of reports and testimony, and improve the ability of courts to search for the truth. These advances also afford both parties the opportunity to present evidence from an unavailable witness with proper foundation and admission of these recordings. In cases such as this where technological advances are employed to ensure the integrity of evidence and due process, the State should permitted to the use of this evidence in furtherance of prosecution where the authenticity of the recording cannot be disputed.

Unlike a circumstance where there is no recording of the initial statement, where it could not even be established that the statement by the deceased officer was even made, with a video recording there can be no question regarding whether the statement was made. Moreover, where other law enforcement can authenticate the video and recording process, there is no bar to the admission of evidence, and such evidence should be permitted to be considered by trial courts in assessing preliminary questions pursuant to Wis. Stat. §901.04(1).

VI. CONCLUSION

For the reasons set forth, Officer Birkholz had the requisite reasonable suspicion to perform a traffic stop on Zamzow's vehicle, and the trial court was proper in considering the video and audio of the traffic stop. Therefore the trial court did not commit any error in denying the Motion to Suppress, and the trial court's decision be upheld.

Dated at Fond du Lac, Wisconsin this __ day of March, 2015

By: _____
Douglas R. Edelstein
WSBA No. 1070550
Attorney for the Respondent

VII. 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 12 pages, 2160 words.

I further certify pursuant to Wis. Stat. § 809.19(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 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.

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 this ___ day of March, 2015 at Fond du Lac, Wisconsin by:

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VIII. APPENDIX

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No Appendix is necessary for Respondent's Brief as no additional materials were referenced.