STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 14-AP-2860-CR
Circuit Court Case No. 14-CT-459

v.

TIMOTHY J. RELYEA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE IMPOSED IN THE CIRCUIT COURT OF DANE COUNTY ON JULY 8, 2015, DANE COUNTY CASE NO 12-CT-1089, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

I. Does drinking out of a brown bottle while operating a motor vehicle, in and of itself, establish reasonable articulable suspicion to conduct an investigatory stop?

A hearing on the defendant's motion to suppress evidence was held on June 12, 2014 in front of the Honorable William E. Hanrahan. The court determined that the observation of the driver "guzzling the substance from the bottle" was sufficient evidence in conducting the investigatory stop and that "…the actions of the officer were objectively reasonable in stopping the defendant." (R. 34, p. 20) (App. A-21). The court denied the motion to suppress. Id.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will fully present and meet the issues on appeal and further develop the legal theories and authorities on each side. Pursuant to §752.31 (3) Wis. Stats. this case shall be decided by a one judge panel unless the court, sua sponte, orders a three judge panel pursuant to §809.41 (3) Wis. Stats. Oral argument is not requested at this time.

STATEMENT OF THE CASE AND FACTS

On March 29, 2014 at approximately 5:30 p.m., while en route to back up another police officer, City of Stoughton Sergeant Brian Gowan was traveling eastbound on Highway 51, Main Street, when he identified a red Ford-150 truck traveling westbound near the intersection of Linn Street in the City of Stoughton. (R. 33; p. 5-6) (App. A-6-7). As he met and passed the vehicle he looked through the side window of the F-150, it was down, and saw the driver of the vehicle drinking out of a brown bottle which Gowan "…perceived to be like a micro brew." Id. at 6. (App. A-7). After he witnessed this, Gowan made a U-turn and began to follow the vehicle. Id. at 7-8 (App. A-8-9). He followed the Ford F-150 for no more than "probably 7 blocks, 6 blocks in heavy traffic." Id. at 11. During the time that he followed the vehicle it did not speed or drive erratically. Id. at 12. Indeed, Gowan did not observe any traffic violations. Id. at 12. (App. A-12). The sole reason that Sergeant Gowan stopped the vehicle was because he was acting on the belief that the bottle contained alcohol. Id. at 12. The driver, subsequently identified as Timothy Relyea, was stopped, arrested and charged with OWI.

A formal Criminal Complaint was filed charging Timothy Relyea with Operating While Intoxicated and Operating a Motor Vehicle with a Prohibited Alcohol Concentration as a Second Offense. (R. 3). He made his initial appearance on May 8, 2014. (R. 4). Numerous pretrial motions were filed on May 27, 2014 including a Notice

of Motion and Motion to Suppress Evidence Based Upon an Unconstitutional Automobile Search. (R. 6-17).

A hearing challenging the stop of the vehicle was held on June 12, 2014. (R. 18, 33). The court determined that Sergeant Gowan's actions in stopping the vehicle based solely on his observation that the driver of the vehicle was drinking from what appeared to be a brown beer bottle were objectively reasonable. (R. 33; p. 21) (App. A-22). The court also sidestepped the defendant's motion to dismiss for failure to identify the defendant as the driver of the motor vehicle and concluded, de facto, that because the issue was narrowed to reasonable suspicion to stop the vehicle and because the motion referred to Mr. Relyea that identification was not at issue. (R. 33; p. 16-17) (App. A-18-19). Subsequent to the decision denying the Motion to Suppress the case was resolved pursuant to a plea.

On July 8, 2014 Timothy Relyea entered a plea of no contest to Count One of the Criminal Complaint and was adjudged guilty of operating while under the influence of an intoxicant as a second offense. (R. 20, 21). The court imposed a sentence of five (5) days in the Dane County Jail, a fine and costs of one thousand one hundred seventy nine and 00/100 dollars ($1,179.00) plus a mandatory AODA assessment. (App. A-1). A two hundred and 00/100 dollars ($200.00) DNA surcharge was also imposed. Mr. Relyea's license was revoked for a period of twelve (12) months and he was required to install an IID for a period of twelve (12) months. (R. 23). On July 22, 2014 the defendant filed a Notice of Motion for Stay Pending Appeal. (R. 25). A Notice of Intent to Pursue Post-

Conviction Relief was filed on July 23, 2014. (R. 26). On July 24, 2014 the court entered an Order Staying the Sentence Pending Appeal (R. 27).

A timely Notice of Appeal was filed on December 8, 2014 which brings this appeal before the court. (R. 32). Further facts will be set forth as necessary below.

ARGUMENT

I. DRINKING OUT OF A BROWN BOTTLE WHILE OPERATING A MOTOR VEHICLE, IN AND OF ITSELF, CANNOT ESTABLISH REASONABLE ARTICULABLE SUSPICION TO CONDUCT AN INVESTIGATORY STOP.

A police officer may temporarily detain an individual to investigate potential criminal behavior when the officer has reasonable suspicion that the individual has committed or is about to commit a crime. §968.24 Wis. Stats. An investigative detention is a seizure within the meaning of the Fourth Amendment to the United States Constitution and Article 11 of the Wisconsin Constitution. The question of whether reasonable suspicion exists to conduct an investigatory stop is a question of constitutional fact, which is a mixed question of law and fact and requires the application of a two-step standard of review. State v. Post, 301 Wis.2d 1, ¶8 (2007). First, a circuit court's findings of historical fact are reviewed under the clearly erroneous standard. State v. Jackson, 147 Wis.2d 824, 834 (1989). Secondly, the application of those historical facts to the constitutional standard is reviewed de novo. Id. Reasonable suspicion to make an investigatory stop is based on a common sense test: what would a reasonable police officer reasonably expect in light of his or her training and experience under all of the

facts and circumstances present. State v. Jackson, 147 Wis.2d, 824, 834 (1989). In determining whether an officer had reasonable suspicion to conduct an investigatory stop, this court examines the totality of the circumstances known to the officer. State v. Williams, 2001 WI 21, ¶22.

Here the totality of circumstances do not establish the necessary inferences to support a finding of reasonable suspicion. On March 29, 2014 at approximately 5:30 p.m., Stoughton Police Sergeant Brian Gowan was en route to back up another officer and was traveling eastbound on Hwy 51 which is East Main Street in the City of Stoughton. (R. 33; p. 5) (App. A-6). The roads were clear and it was sunny outside. Id. Around the intersection of Lynn Street Gowan noticed several vehicles westbound, one of which was a red Ford F-150 pick up truck. As he traveled in the opposite direction he saw through the side window a subject drinking what he "assumed" and "perceived to be like a microbrew out of a bottle." Id. at 6. (App. A-7). When he made this observation Gowan was traveling between 25 and 30 mph. Although he initially testified that the subject driver, never identified by Gowan as the defendant during the motion hearing, was drinking out of the brown bottle he later described it as a "guzzle." The driver then put the bottle out of sight. Id. at 6. (App. A-7). After making this observation Gowan turned around and followed the vehicle for six or seven blocks. Id. at 11. (App. A-12). During this time the vehicle didn't speed or drive erratically and in fact Gowan did not observe any traffic violations. Officer Gowan acknowledged his familiarity with the brown bottles that root beer sometimes come in. For example, he is familiar with

Sprecher Root Beer and it is clear from the evidence that he did not know, and could not tell, whether this was a bottle of beer or a bottle of root beer. (R. 19; 33, p. 8) (App. A-10). Thus, the only and sole reason for conducting the investigatory stop was his observation that the driver drank from a brown bottle. The record does not demonstrate any other facts supporting that drinking from a brown bottle is in any way illegal or in and of itself suspicious. In fact many people drink legal beverages from bottles and cans in their cars and then place them out of sight in a cup holder or console.

Here, under the totality of the circumstances, the officer lacked articulable suspicion or probable cause to stop the vehicle for any type of traffic violation. Gowan indicated that traffic was heavy. If reasonable suspicion existed that the driver of the vehicle was impaired by alcohol, it is likely his driving would have manifested behavior consistent with intoxicated driving such as erratic driving, crossing the centerline, weaving in between the lane of traffic or some other traffic violation. Yet here there are no such observations. Drinking out of a brown unidentified bottle while driving cannot, in and of itself, rise to the level of reasonable inference under the totality of the circumstances that criminal activity is afoot or that an ordinance violation has been or is being broken just like weaving within a single traffic lane does not alone rise to reasonable suspicion. Post. Even though the traffic was heavy and Gowan followed the vehicle for approximately six or seven blocks in total before it was pulled over he observed nothing suspicious or unusual about the driving. The vehicle was not being driven erratically, never made abrupt movements or otherwise engaged in driving

behavior which could support an inference that the vehicle operator was intoxicated. Even though Gowan testified that the driver of the vehicle drank from a brown bottle, which he thought was a microbrew, that sole fact can not rise to an articulable suspicion of criminal activity that is reasonable. If that were the case then ordinary citizens would be subject to investigatory stops merely because they drink from a bottle which the officer thinks is a beer bottle or any other bottle for that matter which the Officer has a hunch might contain alcohol. While this may give rise to a generalized suspicion it does not rise to the level of a particularized reasonable suspicion of criminal activity and this court should reverse the trial court's denial of the motion to suppress.

CONCLUSION

A traffic stop is a "major interference in the lives of the [vehicle's] occupants" Coolidge v. New Hampshire, 403 U.S. 443, 479 (1971), and with it carries an invasion of privacy "…regardless of the motivation for the stop." State v. Post, 2007 WI 60 ¶43. The totality of the circumstances in this case and the inferences derived from those facts do not establish reasonable suspicion that any criminal activity was afoot or that Timothy Releya was in any way involved in illegal activity. Drinking from an unidentified brown bottle while in a vehicle in and of itself can not by itself provide the necessary specific and articulable facts necessary to support a Terry stop nor can it meet the demand for specificity required to warrant a Fourth Amendment intrusion. The trial court erred in finding reasonable suspicion and the investigatory stop violated the Fourth

Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution which prohibit unreasonable searches and seizures. Therefore this court should reverse the trial court's denial of the motion to suppress.

Respectfully submitted this day 20th of March, 2015.

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CERTIFICATION

Undersigned counsel hereby certifies that this appellate brief conforms to the rules contained in §809.19 (8) (b) and (c) Wis. Stats. for a brief produced with the proportional serif font. The length of this brief is 2,516 words.

Signed:

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Patrick J. Stangl

CERTIFICATION OF COMPLIANCE WITH RULE 809.19 (12)

The undersigned certifies that an electronic copy of this brief, excluding the appendix, if any, complies with the requirement of §809.19 (12). The electronic brief is identical in content and format to the printed brief filed this date.

A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

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Patrick J. Stangl

CERTIFICATION OF APPENDIX

I hereby certify that 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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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.

Signed:

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Patrick J. Stangl

APPENDIX

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