

RECEIVED

07-08-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2015AP715-CR

Mark A. Tralmer,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND
DECISIONS DENYING SUPPRESSION AND
RECONSIDERATION MOTIONS, ENTERED IN THE
MONROE COUNTY CIRCUIT COURT, THE HONORABLE J.
DAVID RICE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819

Martinez & Ruby, LLP
144 4th Ave, Suite 2
Baraboo, WI 53913
(608) 355-2000

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	2
Statement of the Issues	3
Statement on Oral Argument	4
Statement on Publication	4
Statement of the Case	4
<u>Argument</u>	
I. THE CIRCUIT COURT APPLIED THE WRONG LEGAL STANDARD WHEN ANALYZING TRALMER’S MOTION TO SUPPRESS	8
II. OFFICER STEINBORN LACKED SUFFICIENT GROUND TO STOP TRALMER’S VEHICLE FOR AN ALLEGED TRAFFIC VIOLATION	10
Conclusion	14
Certification and Certificate of Compliance	15
Appendix	

TABLE OF AUTHORITIES

Cases Cited

	<u>PAGE</u>
<i>State v. Brown</i> , 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66	8-10
<i>State v. Longcore</i> , 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999)	9-10
<i>State v. Popke</i> , 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 (2009)	8, 10
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634	8-9

Constitutional Provisions and Statutes Cited

US Constitution, Amendment IV	4
Wisconsin Constitution, Article I, sec. 11	4

Wisconsin Statutes and Jury Instructions

Wis. Stat. sec. 346.05	11-12, 14
Wis. Stat. sec. 346.89	12, 14

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2015AP715-CR

Mark A. Tralmer,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND
DECISIONS DENYING SUPPRESSION AND
RECONSIDERATION MOTIONS, ENTERED IN THE
MONROE COUNTY CIRCUIT COURT, THE HONORABLE J.
DAVID RICE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STATEMENT OF THE ISSUES

- I.** DID THE TRIAL COURT APPLY THE CORRECT STANDARD OF REVIEW TO DETERMINE WHETHER THE OFFICER CONDUCTED A LAWFUL STOP OF TRALMER'S VEHICLE?

The trial court answered: yes.

- II.** DID OFFICER STEINBORN HAVE SUFFICIENT GROUNDS TO BELIEVE TRALMER HAD VIOLATED A TRAFFIC LAW AT THE TIME OF THE STOP?

The trial court determined that Steinborn had reasonable suspicion to believe Tralmer operated left of center. The court

did not analyze whether Steinborn had probable cause to believe Tralmer operated left of center.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

In all likelihood, this opinion will not merit publication because the issues are fact-specific, and the case is governed by existing precedent.

STATEMENT OF THE CASE

Mark Tralmer was arrested and charged with operating a motor vehicle while intoxicated, 2nd offense, as well as operating a motor vehicle with a prohibited alcohol concentration, 2nd offense, for an incident that occurred in Monroe County, Wisconsin, on January 5, 2014, in the city of Tomah (1: 1). A chemical breath test taken following Tralmer's arrest showed a blood alcohol level of 0.17 (1: 3).

The defense filed a motion to suppress, citing both the 4th amendment to the US Constitution and article 1, section 11 of the Wisconsin constitution, arguing the officer lacked reasonable suspicion to stop Tralmer's vehicle (15: 1-3). At the suppression hearing, Tomah Police Department Officer Wilbert Steinborn testified for the State. Steinborn had been an officer with Tomah PD since October 2012 (19: 5). Steinborn was on duty on the early morning of January 5, 2014 when he saw vehicle approaching him, and observed it go left of the center portion of the roadway into the oncoming lane and come back into its own lane (19: 6-7). This occurred around bar time at 2:30 am (19: 7-8). Steinborn testified that he believed the vehicle crossing the center line was a traffic violation, and he suspected the driver may have been intoxicated (19: 8). He identified Tralmer as the driver (19: 12-13). A video of Steinborn's squad camera was admitted as Exhibit 1 and played for the court (19: 8).

The court inquired whether the road was divided, and Steinborn testified it is not (19: 9). Further, Steinborn testified that there is not a marked centerline (19: 9).

Cross-examination focused on the winter weather conditions and whether crossing the center line was necessary based on the location of parked vehicles. Steinborn acknowledged that during that winter, there had been quite a bit of snow, and agreed the snow had been plowed toward the curb (19: 14-15). Steinborn agreed there were parked cars in the area, including cars parked on Tralmer's side of the road (19: 16). However, Steinborn testified that Tralmer did not move over for the first several parked cars, just the last one (19: 17).

Steinborn was questioned about whether Tralmer's driving affected other traffic, including the officer. Steinborn testified there was no traffic behind Tralmer (19: 17). There were no cars in front of the officer when he observed Tralmer (19: 17). Further, the movement of Tralmer's vehicle didn't affect the officer's vehicle (19: 17-18). Steinborn testified that Tralmer correctly stopped and proceeded from the stop sign (19: 18). Tralmer was driving in the correct lane when the officer performed U-turn to follow him (19: 18). At no point was Tralmer's vehicle speeding (19: 18). Steinborn followed Tralmer for no more than a minute, and did not observe any other alleged traffic violations (19: 19). Steinborn also agreed there are exceptions for when crossing the center line is permissible, but he did not see a reason to do so here (19: 19).

Tralmer testified at the suppression hearing. He observed vehicles parked by the road side, and crossed the center area of the road, before moving back towards the snowbank (19: 21). Following his arrest, Tralmer took pictures of the parked cars and snowy conditions, and also took measurements of the area, the same week the stop occurred (19: 27). Based on the photos and measurements, Tralmer testified to the following:

- The road was 36 feet wide from curb to curb (19: 22)

- The centerline would have been 18 feet from the curb (19: 23)
- The vehicle he swerved around was approximately 7 feet wide from mirror to mirror (19: 24)
- The width of the snowbank extended 3 ½ feet from the end of the curb (19: 26)
- Adding the width of the snowbank to the width of the vehicle parked beside it was approximately 11 ½ feet (19: 27)
- The 11 ½ feet measurement included the 7 foot-wide vehicle, the 3 ½ foot-wide snowbank, and 1 foot between the snowbank and the vehicle (19: 27)

Tralmer testified that he believed the parked car he maneuvered around was an obstruction to him (19: 24). There were no vehicles behind or in front of him in the roadway (19: 24). Tralmer testified that he believed in order to safely go around that vehicle, he would have had to cross the center area (19: 29).

The defense also presented testimony from Kevin Kroener, who owned and operated a state-licensed driving school in Tomah (19: 35). Kroener viewed the video and was asked to comment on Tralmer's driving (19: 35). Kroener testified there was nothing unusual about Tralmer's driving behavior, and that when you approach an obstruction in your lane on two-way traffic road, you can move out across the centerline and then get back into your lane as soon as possible as long as there's no traffic coming towards you (19: 37). Kroener considered a parked vehicle to be an obstruction (19: 37). For winter conditions, Kroener advised that it was safest to remain about 5 feet away from parked vehicles, especially at night (19: 37). Kroener described the winter of 2014 as the worst winter he could remember in Tomah based on the snowfall, and that there had been a large amount of snow piled up on the curb (19: 38).

The court denied the motion to suppress in an oral ruling. The court found the officer was driving down the

street, approaching an intersection, and observed a light from an oncoming car (19: 41-42). The light swerved out into the left lane and then swerved back to the right again as it approached the stop sign (19: 42). The court stated the question was whether under the circumstances the officer had reasonable suspicion to suspect that there was a traffic violation (19: 42).

The court noted it was 2:20 am, near bar time, when the officer saw the vehicle swerve out of its lane and back into its own lane (19: 42). The court found reasonable suspicion to believe either the driver was not paying careful attention and had to swerve at last minute, or reasonable suspicion the driver had driven too far over centerline (19: 42-43). The court essentially disregarded the driving instructor's testimony because his opinion "is not the test" (19: 43). The court affirmed its finding of reasonable suspicion and denied the motion (19: 43).

The defense submitted a written request for reconsideration, arguing that Officer Steinborn "did not have probable cause to conduct a traffic stop" on Tralmer (20: 1). The motion argued the evidence showed Tralmer was "forced" to move left of center based on the obstruction in the road – the parked car positioned in the roadway due to the snow piled by the curb (20: 1). The motion cited Kroener's testimony about best practices for safely navigating wintry road conditions, and argued that Tralmer's driving complied with that safety advice (20: 1). The motion argued that the only reasonable suspicion the officer had was that the driving occurred close to bar time, which was insufficient to stop the vehicle (20: 1).

The court denied this motion in a letter dated June 16, 2014 (22: 1). The court reaffirmed its finding of reasonable suspicion to stop Tralmer's vehicle based on Tralmer swerving abruptly into the oncoming traffic lane (22: 1). The court noted this "occurred at night under lighting conditions which made it difficult to determine the position of the defendant's vehicle in relation to the obstructing or parked vehicle on the street." (22: 1). The court noted this was sufficient "to raise reasonable suspicion in the officer's mind that he was violating a traffic law" (22: 1) (emphasis added).

Tralmer subsequently entered a no contest plea to operating while intoxicated 2nd offense, and was sentenced consistent with local OWI guidelines (40: 14-15; 34: 1). Tralmer filed a timely notice of intent and notice of appeal.

ARGUMENT

I. THE CIRCUIT COURT APPLIED THE WRONG LEGAL STANDARD WHEN ANALYZING TRALMER'S MOTION TO SUPPRESS

A. Summary of Arguments and Standard of Review

Tralmer asserts that the court applied the wrong legal standard (reasonable suspicion) when assessing his suppression motion, and that the proper standard was probable cause, because the stop was for an alleged traffic violation witnessed by the officer rather than suspicion of a violation that required further investigation. Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569 (2009). A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the "clearly erroneous standard," and the application of these historical facts to constitutional principles, which we review de novo. *Popke*, ¶10.

B. The Proper Standard For Assessing The Legality Of A Traffic Stop For An Alleged Traffic Violation Witnessed By An Officer

A stop can be based on either probable cause or reasonable suspicion, depending on the circumstances. *State v. Brown*, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66. Reasonable suspicion is the appropriate standard when the basis for the stop is suspicion of criminal activity. See *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. "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." *Id.*, ¶13. The officer is permitted to make such a stop and continue investigating whether a violation occurred.

Reasonable suspicion is also the proper standard for when an officer suspects a traffic violation occurred, and when this suspicion warrants further investigation. *State v. Longcore*, 226 Wis.2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd by equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620.

However, when the officer observes an alleged traffic or equipment violation being committed in his presence, probable cause is required. *Longcore*, 226 Wis.2d at 8-9. For example, in *Longcore*, the trial court found the officer had reasonable suspicion to stop the defendant's vehicle for a violation of the safety glass statute, § 347.43(1). *Id.* at 4. On appeal, Longcore argued the court improperly applied the reasonable suspicion standard, rather than probable cause, and the court of appeals agreed: "[Officer] Larson observed the plastic window covering, which he believed constituted an equipment violation. He did not act upon a suspicion that warranted further investigation, but on his observation of a violation being committed in his presence. The issue is, then, whether an officer has probable cause that a law has been broken..." *Id.* at 8-9; *see also Brown*, 2014 WI 69, ¶¶15-16 (discussing court of appeals holding that stop of vehicle for unlit bulb observed by officer must be based on probable cause; court of appeals ruling affirmed).

C. Since The Court Upheld The Stop Based On The Officer's Observation That Tralmer Allegedly Violated A Traffic Law, The Proper Standard Is Probable Cause

Tralmer's original motion to suppress claimed there was no reasonable suspicion to stop his vehicle (15: 1). At the suppression hearing, the court did not find reasonable suspicion of criminal activity, such as operating while intoxicated (15: 41-43). The court also did not find reasonable suspicion for anything that required additional investigation.

Instead, the court found reasonable suspicion of a suspected traffic violation committed in the officer's presence, observed directly by the officer - inattentive driving ("the driver was not paying careful attention") or that the driver had crossed the center line (19: 42-43). The court specifically found reasonable suspicion to believe a "traffic violation had occurred" (19: 42) (emphasis added).

After that finding, the defense moved for reconsideration, this time noting that Officer Steinborn "did not have probable cause to conduct a traffic stop" on Tralmer (20: 1). The court denied this request in a letter, reaffirming its finding that the officer had reasonable suspicion to stop Tralmer's vehicle for driving into the oncoming traffic lane, reasoning that this created "reasonable suspicion in the officer's mind that he was violating a traffic law" (22: 1). The court never addressed whether probable cause existed to stop Tralmer's vehicle based on the violation allegedly witnessed by Officer Steinborn.

Because this case involved alleged traffic violations witnessed by Steinborn – not a suspicion of that required additional investigation – probable cause is the appropriate standard. *See Longcore*, 226 Wis.2d at 8-9; *see also Brown*, 2014 WI 69, ¶¶15-16. The court's ruling did not address the proper legal standard. This court must assess whether the officer had probable cause to believe Tralmer violated a traffic law.

II. OFFICER STEINBORN LACKED SUFFICIENT GROUNDS TO STOP TRALMER'S VEHICLE FOR AN ALLEGED TRAFFIC VIOLATION

A. Standard of Review

"Probable cause refers to the "quantum of evidence which would lead a reasonable police officer to believe" that a traffic violation has occurred." *State v. Popke*, 2009 WI 37, ¶¶ 11, 14. *Popke* stated the probable cause standard meant that "[t]he 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." *Id.*, ¶14.

In the event this court finds that reasonable suspicion is the applicable standard, a stop may be based on reasonable suspicion when, under the totality of circumstances, the officer "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." *Id.* "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." *Id.* An officer's inchoate and unparticularized suspicion or hunch, however, will not give rise to reasonable suspicion. *Id.*

B. Officer Steinborn Lacked Probable Cause To Believe Tralmer Violated A Traffic Law

The circuit court upheld the stop on the belief that Tralmer was guilty of driving across the center line, based on the officer's observation of Tralmer swerving abruptly from his lane toward the center, and back into his lane (19: 42-43; 22: 1). However, the simple fact that Tralmer swerved to the center and back is not sufficient for probable cause to believe he violated Wis. Stat. sec. 346.05. That act cannot be viewed in a vacuum. The statute contains numerous exceptions for when driving left of center is permissible, including when overtaking an obstruction in the right half of the roadway. Wis. Stat. sec. 346.05(1)(d).

The officer acknowledged the road was snow-covered, with snow plowed against the curb (19: 15). Further, there were parked cars in the area, including parked cars on Tralmer's side of the road (19: 16). The snowy conditions were explained in greater detail by Tralmer's testimony, as he personally took pictures and measurements of the roadway the same week as the stop (19: 27). Tralmer's measurements showed the following:

- The center of the road was 18 feet from the edge

(19: 23);

- The distance between the curb and the edge of the mirror of a parked vehicle was 11 ½ feet (19: 27); and
- His own vehicle was 7 feet wide (19: 24).

Accordingly, even if Tralmer had driven right next to the parked cars, his own vehicle could not fit completely in the right-hand lane, and would have had to move left of center by at least ½ a foot. Common sense dictates that all drivers give some leeway to parked cars for safety purposes, which is supported by the testimony of Kevin Kroener, the certified driving instructor, who advised it was safest to remain about 5 feet away from parked vehicles in the winter (19: 37). Thus the snow piled against the curb caused parked cars to intrude into the driving lane, creating an obstruction. Safe driving practices in the wintry conditions on January 5, 2014 necessitated driving over the center line.

Further, although Officer Steinborn testified he observed Tralmer go into the “center portion of the roadway into the oncoming lane,” he also testified that this road didn’t have a marked centerline (19: 7, 9). As a result, the exact center of the road was unclear. There was no testimony about how far over the center Tralmer’s vehicle crossed. And the officer confirmed that there was no traffic behind Tralmer, there were no cars in front of the officer, and the movement of Tralmer’s vehicle didn’t affect the officer’s vehicle (19: 17-18). Traffic was completely unaffected, and Tralmer moved safely back into his own lane as soon as he was able.

When considering the totality of circumstances, including the lack of center line and the snowy conditions that caused parked vehicles to partially obstruct the right-hand lane, there simply was not probable cause to find Tralmer had violated sec. 346.05.

Likewise, the court’s finding that the officer had a sufficient basis to stop Tralmer for inattentive driving was not supported by the record (19: 42-43). Wis. Stat. sec. 346.89(1) states that “No person while driving a motor vehicle may be

engaged or occupied with an activity, other than driving the vehicle, that interferes or reasonably appears to interfere with the person's ability to drive the vehicle safely.”

In this case, the officer had observed Tralmer swerve once toward the center of the roadway, and then immediately move back into his lane and proceed to drive safely. The officer had not observed Tralmer engaged in any sort of activity that would have interfered with his ability to drive safely. Observing a driver swerve a single time, in snowy conditions, is not sufficient evidence to support probable cause to stop the driver for inattentive driving.

Accordingly, when analyzed under the correct standard of probable cause, the record does not provide sufficient grounds to support the stop of Tralmer’s vehicle. The case should be reversed, with an order suppressing all evidence obtained from the unlawful stop.

C. Alternatively, Officer Steinborn Lacked Reasonable Suspicion To Believe Tralmer Violated A Traffic Law

If this court finds that the appropriate legal standard is reasonable suspicion rather than probable cause, the defense believes the record is still insufficient to support the stop. Officer Steinborn had a hunch that the driver was intoxicated because the incident occurred in the early morning hours, the driver was coming from the downtown area, and because the driver swerved once into the center of the roadway (19: 8, 12). The court found the time of day significant, as well as the fact that Tralmer was coming from the downtown, “which is where bars are in Tomah” (19: 42). Of course, Steinborn didn’t actually see Tralmer coming out of a bar. And the court made no attempt to explain why it was permissible to assume a driver was coming from a bar simply because he was driving in an area “where bars are.” The defendant asserts this fact should carry no weight whatsoever, because it is nothing more than an unparticularized hunch that cannot support reasonable suspicion. The time of day and a single swerve into the center area are not enough to support reasonable suspicion of intoxicated driving.

That leaves the question of whether the officer had reasonable suspicion Tralmer had committed a traffic violation. Tralmer hereby incorporates his arguments from the probable cause section to demonstrate that Officer Steinborn lacked reasonable suspicion to stop for a traffic violation. As with probable cause, reasonable suspicion must be assessed under the totality of circumstances. In this case, the totality of circumstances include the fact that this roadway lacked a marked center line, and parked cars intruded into the right-hand lane due to snow piled up along the curb. A single, brief swerve around parked cars did not provide reasonable suspicion for a violation of either sections 346.05 or 346.89.

Based on the totality of circumstances, the officer lacked sufficient facts to support reasonable suspicion to stop Tralmer's vehicle. Accordingly, the evidence obtained from this unlawful stop must be suppressed, and all evidence gathered by the officer following this stop should be suppressed as fruits of the poisonous tree.

CONCLUSION

For the reasons discussed above, the defendant respectfully requests that this court reverse the judgment, reverse the order denying the motion to suppress, and remand to the circuit court for further proceedings.

Respectfully submitted 7/3/15:



Cole Daniel Ruby
State Bar No. 1064819

Martinez & Ruby, LLP
144 4th Avenue, Suite 2
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,433 words.

Dated 7/3/15:



COLE DANIEL RUBY

Attorney at Law
State Bar #1064819

Martinez & Ruby, LLP

144 4th Ave, Suite 2
Baraboo, WI 53913
(608) 355-2000

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

Signed 7/3/15:



COLE DANIEL RUBY

Attorney at Law

State Bar #1064819

Martinez & Ruby, LLP

144 4th Ave, Suite 2

Baraboo, WI 53913

(608) 355-2000

Attorney for Defendant-Appellant