STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP001010

COUNTY OF COLUMBIA,

Plaintiff-Respondent,

vs.

BRITTANY N. KRUMBECK,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
COLUMBIA COUNTY, THE HONORABLE
ALAN J. WHITE, PRESIDING

Respectfully submitted,

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Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITY

WISCONSIN STATE CASES CITED

OTHER STATE CASES CITED

FEDERAL CASES CITED

WISCONSIN STATE STATUTES CITED

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ISSUES PRESENTED

A. Was the stop of the defendant-appellant's vehicle, following the officer having seen it drift within its own lane and not touch either the centerline or fogline, unlawful?

Trial court. No. The trial court concluded, in what it characterized as "a very close case," that the stop of the defendant'appellant's vehicle was not unlawful.

B. Was the subsequent arrest of the defendant-appellant for operating while intoxicated unlawful, based on the defendant-appellant's performance on the field sobriety tests, combined with the manner in which the officer conducted them?

Trial court. The trial court found there was probable cause to arrest.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Appellant does not request that the opinion in this appeal be published, nor does he request oral argument of the issues presented in this case, but stands ready to so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE

By citations filed in the Columbia County Circuit Court on August 20, 2012, Brittany N. Krumbeck (hereinafter the Ms. Krumbeck), was charged in case number 12 TR 6200 with operating a motor vehicle while under the influence of an intoxicant (OWI), contrary to Wis. Stat. § 346.63(1)(a), and, in case number 12 TR 6491, operating a motor vehicle while having a prohibited alcohol concentration (PAC), contrary to Wis. Stat. § 346.63(1)(b), both as first offenses.

On June 24, 2013, Ms. Krumbeck filed a Motion to Suppress –

Unlawful Stop, Detention and Arrest. Following a two-part evidentiary hearing held before the Honorable Alan White, by means of a written decision, the Appellant's motion to suppress was denied. Following a trial on stipulated facts, the defendant was found guilty of the OWI charge, while the PAC charge was dismissed on the Court's motion.

By Notice of Appeal filed May 11, 2015, the Appellant appeals the trial court's denial of her motion to suppress.

FACTS

On August 11, 2012, Deputy Timothy Schultz of the Columbia County Sheriff's Office was on duty in the Township of Leeds, Columbia County, Wisconsin (30: 4). Shortly before 3:00 a.m., he was driving southbound on Highway 51 when a vehicle pulled in front of him (30: 5). He continued to follow the vehicle and confirmed that the registration and registered owner's driver license were valid (30: 5). He observed what he characterized as "fading towards the center line" then back towards the fog line, though he noted that the vehicle never crossed the center line or the fog line, but only drifted within the approximately 10-12 feet width of the lane of travel (30: 5, 27; 31: 12-13). He further acknowledged that poor road conditions such as pot holes and pitted paths of travel would make it difficult for a driver to maintain a straight line of travel for all but a mile of the roughly six and a half to seven mile

distance over which he was following it (30: 6-7). In fact, based on the road conditions, Deputy Schultz did not think the vehicle's drifting would have justified a traffic stop (31:6). Moreover, a portion of the approximately one mile of "good" roadway consisted of a curve, and Schultz agreed that it wouldn't be unusual for a driver negotiating such a curve to come close to the center line (30: 32). The driver's conduct on this "good" portion of roadway was captured by Schultz's squad video, and during this time two vehicles driving in the opposite direction passed the vehicle and Schultz agreed that the driver did not need to take any evasive actions and was never in danger of striking these vehicles (31: 8). The drifting observed by Schultz did not exhibit any particular pattern, including any snake-like "S" pattern (31: 13). Schultz also did not observe any other driving conduct that he considered as grounds to stop the vehicle (31: 10).

Deputy Schultz then activated his emergency lights to conduct a stop of the vehicle on Highway 51, north of County Highway K (30: 8). Schultz made contact with the driver and sole occupant, who he identified as Brittany Krumbeck (30: 9, 10). When he approached Ms. Krumbeck, Schultz noticed what he believed to be an odor of intoxicants coming from within the vehicle (30:10). He also characterized Ms. Krumbeck's eyes as being bloodshot and glassy, and believed that there

was a delay Ms. Krumbeck's responding to his questions (30:10). However, Schultz acknowledged that Ms. Krumbeck's responses were appropriate and intelligible and that she was able to provide her license without any fumbling or other difficulty (31: 15). When Schultz asked Ms. Krumbeck if she had anything to drink, she responded that she had two alcoholic drinks between 10:00 p.m and two hours prior to the stop, though he didn't recall which type (30: 11-12).

Schultz then asked Ms. Krumbeck to exit the vehicle and stand between the two cars to perform standardized field sobriety testing, including a horizontal gaze nystagmus (HGN) test, a walk-and-turn test and a one-leg-stand test (30: 12-13). In doing so, Ms. Krumbeck did not display any difficulty with balance or walking (31: 17)

Initially, Schultz testified that he observed six out of six possible "clues" on the HGN test – lack of smooth pursuit in each eye, distinct nystagmus at maximum deviation, and onset of nystagmus prior to reaching a 45 degree angle (30: 16-18). However, upon reviewing the administration of the HGN on video, Schultz admitted that he did not perform the test properly according to his training, which is necessary to maintain the validity of the test, subject to "minor" variation (31:18, 31). However, the variations in his administration of the HGN were hardly minor, and Schultz actually skipped the check for smooth pursuit

altogether, only checked for nystagmus at maximum deviation in one eye, and did not complete the check for onset of nystagmus prior to a 45 degree angle (31:27). And he further acknowledged that the nystagmus he did observe could have been induced by passing traffic.

On the walk-and-turn test, according to Schultz, Ms. Krumbeck exhibited two out of eight possible "clues" (30: 21). Similarly, he testified that she exhibited two of four "clues" on the one-leg-stand test, swaying and hopping (30: 22). However, again upon reviewing video evidence, Schultz admitted that Ms. Krumbeck did not, in fact, hop in a manner that could be considered a "clue" pursuant to his training, but only "adjusted her foot" (31:34).

Following the administration of standardized field sobriety testing, Schultz administered a preliminary breath test (PBT) to Ms. Krumbeck and then placed her under arrest for allegedly operating while intoxicated (30: 24).

ARGUMENT

I. BURDEN OF PROOF AND STANDARD OF REVIEW

When reviewing a circuit court's determination regarding the suppression of evidence, the findings of fact made by the circuit court are to be upheld unless they are against the great weight and clear preponderance of the evidence. State v. Richardson, 156 Wis. 2d 128,

137, 456 N.W.2d 63 (Ct. App. 1991). Whether these facts constitute probable cause to arrest is determined by considering the totality of the circumstances known to the officer at the time of the arrest. Illinois v. Gates, 462 U.S. 213 (1983); State v. Babbitt, 188 Wis. 2d 349, 525 N.W.2d 102, 104(Ct. App. 1994); State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 839, 840 (1971).

An officer, in other words, is not free to pick and choose only those facts which suggest an offense has been committed. Instead, the officer must view the facts in light of ordinary experience and other factors either present or not present. State v. Truax, 151 Wis. 2d 354, 44 N.W.2d 432, 435 (Ct. App. 1989); State v. Wilkes, 117 Wis. 2d 495, 345 N.W.2d 498, 501 (Ct. App. 1984). The facts known to the officer must establish that guilt is more than a mere possibility. Truax, 444 N.W.2d at 435; State v. Cheers, 102 Wis. 2d 367, 306 N.W.2d 676 (1981). Rather, the totality of the circumstances must amount to "that quantum of evidence which would lead a police officer, acting as a reasonable man, to believe that the defendant probably committed a crime." Browne v. State, 24 Wis. 2d 491, 503, 129 N.W.2d 175 (1964); State v. McAttee, 2001 WI App 262, 248 Wis. 2d 865, 637 N.W.2d 774.

The Fourth Amendment applies to all police contacts. Moreover, the burden of proving that the police contact in this case was lawful is,

in all respects, upon the plaintiff-respndentt. The burden of proving the legality of any police contact, including the lawfulness of an arrest, is always on the government, never on the defendant, and a warrantless arrest is *per se* unreasonable. State v. Verhagen, 86 Wis. 2d 262, 272 N.W.2d 105 (Ct. App. 1978); Leroux v. State, 58 Wis. 2d 671, 207 N.W.2d 589 (1973).

II. REASONABLE SUSPICION TO STOP

If Deputy Schultz believed that Ms. Krumbeck's driving constituted any traffic violation, he was mistaken. A traffic stop may not be justified on the ground that the stop was based on a mistaken, but reasonable view of the law. State v. Longcore, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999) aff'd 233 Wis. 2d 278, 607 N.W.2d 620. See also: Bryan v. United States, 524 U.S. 184, 196, 118 S. Ct. 1939, (1998), stating that: "There is no good faith exception to the exclusionary rule for police who enforce a legal standard that does not exist. Creating a good faith exception here would run counter to the exclusionary rule's goal by removing any incentive for the police to know or learn the law we entrust them to enforce." However, Deputy Schultz, himself, testified that there was no traffic violation committed by Ms. Krumbeck – just his observations of her legal conduct while driving.

Deputy Schultz at no time observed the defendant touch or cross the center line. Similarly, Deputy Schultz at no time observed the defendant touch or cross the fog line. Rather, the defendant's driving was entirely within her proper lane. Yet, following observation of this perfectly lawful conduct on the part of the defendant, Deputy Schultz testified he chose to stop her.

It is clear that Ms. Krumbeck did not touch or cross the centerline. And, even though Ms. Krumbeck did not touch or cross the fog line, an analysis of case law as it relates to fog lines is helpful in the analysis of the case at hand. Wisconsin case law does not address whether crossing the fog line is a per se violation of the requirement that the operator of a vehicle shall drive in the lane designated. However, an analysis of the law of other jurisdictions is helpful. Many other jurisdictions have found that crossing the fog line is a common event which does not establish reasonable suspicion of anything. See: United States v. Gregory, 79 F.3d 973, 978 (10th Cir 1996), holding that an incident of a vehicle crossing into the emergency lane of a roadway does not violate state statute's requirement that vehicles remain in a single lane "as nearly as practical"; Rowe v. State of Maryland, 769 A.2d 879, 889 (Md. 2001), concluding that "momentary crossing of the edge line of the roadway and later touching of that line" was not reasonable

suspicion; Crooks v. State, 710 So. 2d 1041, 1043 (Fla. Dist. Ct. App. 1998), holding that driving over into emergency lane three times does not constitute reasonable suspicion; United States v. Ochoa, 4 F.Supp. 2d 1007, 1012 (D. Kan. 1998), finding that drifting onto the shoulder of the road did not justify a stop of the vehicle.

The Tenth Circuit Court of Appeals held, when deciding this issue:

> "If failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy."

United States v. Lyons, 7 F.3d 973, 976 (10th Cir. 1993), overruled on other grounds by United States v. Botero-Ospina, 71 F.3d 783, 786-87 (10th Cir. 1995).

Wisconsin's Supreme Court similarly ruled that weaving within one's lane of traffic does not create reasonable suspicion to stop a driver for operating while intoxicated, partially relying on the reasoning set forth in Lyons cited above. State v. Post, 301 Wis 2d 1, 733 N.W.2d 634 (2007). In Post, the State argued that repeated weaving within a single lane gives an experienced officer reasonable suspicion to make an investigatory stop. Id at ¶18. The Court rejected this argument, noting that "repeated weaving within a single lane is a malleable enough

standard that it can be interpreted to cover much innocent conduct." Id at ¶20 (internal quotations omitted). The Court went on to hold that:

> Because the standard proffered by the State can be interpreted to cover conduct that many innocent drivers commit, it may subject a substantial portion of the public to invasions of their privacy. It is in effect no standard at all. Adopting it here would allow essentially unfettered discretion and permit the arbitrary invasions of privacy by government officials addressed by the Fourth Amendment and Article I, Section 11.

Id at ¶21. The Post Court reasoned that permitting investigatory stops based only on weaving would fail to strike the appropriate balance between the State's interest in detecting, preventing, and investigating crime with the individual's interest in being free from unreasonable intrusions. Id. Thus, the assertion that Ms. Krumbeck failed to travel in a perfectly straight manner entirely within her own lane of travel – and nothing else – cannot support Deputy Schultz's stop of her vehicle.

Focusing then on the above statement – "and nothing else" – it is important to note that there was not any other articulable fact in this case that would support a reasonable suspicion that Ms. Krumbeck was operating under the influence of an intoxicant as envisioned in by the Post Court's decision when examining the case of State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), and the totality of the circumstances.

The facts of this case can easily be distinguished from Waldner – a case in which reasonable suspicion was found in the absence of any

specific traffic violation. Unlike Waldner, there are no other facts to support further inquiry under an objective reasonable suspicion standard. In Waldner, there were references to other actions by the defendant, none of which were independently unlawful. The Waldner court concluded that, when taken together, these actions combined to create a reasonable suspicion justifying the stop. In that case, the defendant was driving at an unusually slow rate, stopped in the roadway even though there was no stop required, accelerated rapidly after turning onto a side street, and then parked. The defendant then opened his car door and poured "a mixture of liquid and ice" out of a plastic cup onto the roadway. He then exited his vehicle and upon seeing the officer began to walk in the other direction. Id at 52-53. While none of these actions alone would have constituted a basis for stopping the defendant, the Waldner court held that they combined to create a reasonable suspicion that the driver was impaired. Id at 58.

As recognized in State v. Allen, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999), the confluence of otherwise lawful actions may constitute "building block[s]" in the totality of the circumstances equation described in Waldner. Allen, 226 Wis. 2d at 75-76. The Post Court, specifically relying on the additional, legal, actions, as in Waldner, found the stop justified as based on reasonable suspicion. The

Post Court specifically held:

> Thus, we adopt neither the bright-line rule proffered by the State that weaving within a single lane may alone give rise to reasonable suspicion, nor the bright-line rule advocated by Post that weaving within a single lane must be erratic, unsafe, or illegal to give rise to reasonable suspicion. Rather, we maintain the well-established principle that reviewing courts must determine whether there was reasonable suspicion for an investigative stop based on the totality of the circumstances.

Post, 301 Wis 2d at 16.

The Post Court went on, then, to discuss the totality of the circumstances in the case before it:

> Post's vehicle appeared to be "moving between the roadway centerline and parking lane." Moving between the roadway centerline and parking lane is not slight deviation within one's own lane. … Our read of [the officer's] testimony does not support the view that Post's weaving constituted only slight deviation within one lane.

Id at 17.

The Post Court noted that it was significant in their collective eyes that Post's driving was "S-type driving" and "cover[ed] ***both*** the traveling lane and the parking lane." Id at 18, emphasis supplied. They found it particularly "noteworthy that the single lane here, described as between 22 and 24 feet, is approximately ***twice as wide*** as the standard single lane." Id. Emphasis supplied. On the contrary, the lane in this case was standard width of 10-12 feet, according to Schultz.

The Post Court ultimately concluded:

> When viewed in isolation, the individual facts that Post was weaving across the travel and parking lanes, that the weaving

> created a discernible S-type pattern, that Post's vehicle was canted [1] into the parking lane, and that the incident took place at night may not be sufficient to warrant a reasonable officer to suspect that Post was driving while intoxicated. As this court stated in Waldner, "[a]ny one of these facts, standing alone, might well be insufficient." However, such facts accumulate, and "as they accumulate, reasonable inferences about the cumulative effect can be drawn." We determine, under the totality of the circumstances, that [the arresting officer in Post] presented specific and articulable facts, which taken together with rational inferences from those facts, give rise to the reasonable suspicion necessary for an investigative stop.

Id at 21-22

In the case before this Court, there are no convergence of unusual facts which can be combined to create reasonable suspicion. There are ***no facts***, whatsoever, other than the completely legal, and not unusual, slight weaving within her own standard 10-12 foot wide lane. There is no "weaving across the travel and parking lanes." There is no weaving which created a "discernible S-type pattern" across a width of 22-24 feet and covering two (2) distinct and discernable lanes. There is no "cant[ing]" of her vehicle. In short, there are ***no facts*** as in Post for this Court to utilize in making a reasonable suspicion determination.

If one were to compare the driving in this case with the driving in Post, it would look just like the diagram attached at the conclusion of this brief. And with that, it is clear the officer was observing nothing like the driving in Post. And because all he did witness was the

1 According to the officer, "canted" meant that Post "wasn't traveling in the designated traveling lane." Post at 17.

perfectly legal and not unusual, weaving within her own lane, reasonable suspicion did not and could not exist.

III. PROBABLE CAUSE TO ARREST

Any subsequently obtained evidence proffered by Deputy Schultz in support of probable cause is consequently irrelevant because obtained solely as the result of an unlawful stop of the defendant. Although, to complete the picture, the defendant would argue that the horizontal gaze nystagmus (HGN) test lends *no support* to the probable cause determination as the officer, himself, testified he didn't do it correctly, and when not done correctly, the results are compromised, if not eliminated. The defendant performed the walk-and-turn test (WAT) adequately (which, as essentially lay observations with no scientific underpinning, the court can be the judge of simply by viewing the video, see: City of West Bend v. Wilkens, 2005 WI App 36, 278 Wis.2d 643, 693 N.W. 2d 324)[2]; and the defendant completely passed the one-leg stand (OLS), notwithstanding the officer trying to count a clue against her which is not even a clue according to his training.[3] Consequently, for the reasons stated above, the officer's observations did not rise to the

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2 Notwithstanding the State's attempt to get the officer to claim a clue existed when he already testified it didn't and didn't note it in his report.

3 The officer testified that while he scored a clue for "hopping" at one point on the OLS, he clarified on cross-examination that not only did he state in his report that "it wasn't so much a hop," but that it wasn't a hop at all and did not constitute a clue according to his training for which he could have counted.

level of probable cause to arrest for operating while intoxicated, which would require a level of proof to raise a reasonable belief "that the defendant probably committed a crime." Browne, 24 Wis. 2d 491.

IV. CONCLUSION

For the above-stated reasons, Krumbeck respectfully asks this Court to reverse the trial court's denial of her Motion to Suppress – Unlawful Stop, Detention and Arrest.

Dated at Middleton, Wisconsin, August 12, 2015.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 3497 words.

_____

STEPHEN E. MAYS