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WISCONSIN COURT OF APPEALS
DISTRICT: III

CLERK OF COURT OF APPEALS
OF WISCONSIN

Appeal No.: 2015AP001220

State of Wisconsin,

Plaintiff-Appellant,

-v-

Justin Carl Herman Hembel,

Defendant-Respondent.

BRIEF OF RESPONDENT

Appeal from Orders of Dismissal and Suppression of the
St. Croix County Circuit Court,
The Honorable Eric J. Lundell, Presiding

Angela R. Olson
ANGELA OLSON LAW
1301 Coulee Road, Suite 2
Hudson, WI 54016
715-386-8888
State Bar No. 1056581
Attorney for Respondent

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent, Justin Carl Herman Hembel, does not believe oral argument is necessary in this case. The issues are straightforward and it is not likely that oral argument would assist the Court in deciding the case.

Respondent believes that the opinion in the case does not need to be published. The Courts have already decided a very similar issue in previously published caselaw.

STATEMENT OF CASE

Justin Hembel (Hembel) supplements and contests herein the Statement of the Case presented by the State in their brief.

When the officer first viewed Hembel he was pulling into the Flying J Travel Plaza at approximately 2:30 a.m. in the Village of Roberts, Wisconsin. R10, 5:7-12; 8:20-23. Upon pulling in to the Flying J, there is no information that Hembel did not use his turn signal. R10, 8:24 – 9:2. In fact, the officer did not observe anything out of the ordinary with the vehicle at this time. *Id.* The officer testified the Flying J Travel Plaza was well lit. R10, 9:6-8. When the vehicle pulled away from the Flying J traveling about 500 feet without its headlights on the area was still very well lit. R10, 9:14-19. The vehicle then turned on its headlights. R10, 9:20-22. The vehicle properly stopped at the red stoplight and then proceeded through the green stoplight. R10, 9:23 – 10:3. Up to this point the officer did not have any reason to pull the vehicle over and did not decide to do so at this time. R10, 10:4-7.

The vehicle then proceeded east on 70th Avenue until it approached a four-way stop sign at 70th Avenue and 130th Street. R10, 10:8-16. When the vehicle stopped at the four-way stop sign there was no other traffic around. R10, 10:18 – 11:1. The vehicle was not interfering with any other traffic. R10, 11:2-4. Hembel's vehicle remained at the stop sign for approximately ten seconds after the officer's squad approached the vehicle from behind. R10, 12:8-9. The vehicle then shifted into drive and pulled away, which is when the officer activated his emergency lights. R10, 11:5-13. The officer did not observe any erratic driving. R10, 11:14-16.

When the officer saw the vehicle positioned in the right lane of the road, Hembel's vehicle was positioned parallel to the center line. R10, 12:12-15. The vehicle was positioned parallel to where the fog line would have been, however there was no fog line on the road in that area. R10, 12:16-17. The vehicle was not positioned diagonally. R10, 12:18-20.

The officer testified as to the length of time Hembel was positioned at the stop sign. The officer gave a few different estimates of times. R10, 13:2-9. From the time the officer saw the vehicle arrive at the stop sign to when the vehicle pulled away from the stop sign approximately thirty-five to forty-five seconds passed. *Id.* The officer arrived at the estimate of the time from how long the brake lights were illuminated at the stop sign until the time the vehicle pulled away from the stop sign. R10, 14:10-13. Hembel was stopped at the stop sign for a period of time and then the officer believed Hembel parked at the stop sign. R10, 6:21-24. Hembel remained at the stop sign for approximately ten seconds while the officer was behind the vehicle. R10, 12:8-9. The officer did not attempt to pull the vehicle over, however, until the vehicle had already pulled away from the stop sign. R10, 11:5-8.

The remainder of the State's Statement of the Case is hereby joined, except Hembel disputes the State's Statement of the Case insofar as the State refers to the officer detecting an odor of intoxicants. Pl.-Appellant's Br. 3. Nowhere in the record did the officer testify or was evidence presented that Officer Kasten detected an odor of intoxicants on Hembel. That allegation should thus not be considered by the Court as providing any basis for the stop or investigation in this case.

The Circuit Court granted Hembel's Motions to Suppress and Dismiss. In making the Findings, the Circuit Court noted, you can't text and drive. R10, 17:3-4. The Circuit Court went on to note, you cannot use Google maps and drive. R10, 17:6-7. The Circuit Court noted Hembel was in a rural area. R10, 17:19. The Circuit Court stated that we discourage texting and driving and using data. R10, 17:13-15. The Circuit Court could not find anything Hembel did to rise to the level of probable cause to stop his vehicle. R10, 17:15-16.

The State appeals from the Circuit Court's Findings granting the Motions to Suppress and to Dismiss. Hembel submits this brief in support of upholding the Circuit Court's Findings.

ARGUMENT

I. THE CIRCUIT COURT'S DECISION THAT OFFICER KASTEN DID NOT HAVE PROBABLE CAUSE TO STOP HEMBEL'S VEHICLE SHOULD BE UPHELD BECAUSE THE CIRCUIT COURT'S FINDINGS ARE NOT CLEARLY ERRONEOUS, THE LAW AS APPLIED TO THE FACTS OF THIS CASE INDEPENDENTLY DOES NOT SUPPORT A FINDING OF PROBABLE CAUSE AND HEMBEL DID NOT VIOLATE WIS. STAT. § 346.54(1)(A).

A. The Circuit Court's Findings are not clearly erroneous and the law as applied to the facts of this case independently does not support a finding of probable cause.

Review of an order granting a motion to suppress evidence presents a question of constitutional fact that the Court of Appeals is to review under two different standards. *State v. Bunten*, 664 N.W.2d 683, 265 Wis. 2d 938 (Ct. App. 2003). On review of a Motion to Suppress Evidence, first, the Court of Appeals is to uphold the Circuit Court's findings of fact unless they are clearly erroneous. *Id.*; *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). A finding is clearly erroneous if "it is against the great weight and clear preponderance of the evidence." *State v. Sykes*, 2005 WI 48, ¶ 21 n. 8, 279 Wis. 2d 742, 695 N.W.2d 277 (2005) (quoting *State v. Tomlinson*, 2002 WI 91, ¶ 36, 254 Wis. 2d 502 (2002)). Second, the Court is then to independently apply the law to those facts. *Bunten*, 265 Wis. 2d at ¶ 4 (citing *State v. Kiekhefer*, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997)). In this case, the Court must review whether the Circuit Court's ruling is clearly erroneous. If the Circuit Court's ruling is not clearly erroneous, this Court must independently apply the law of whether

probable cause to make a traffic stop exists under the facts of this case.¹

The Fourth Amendment requires an objective justification for making a traffic stop. *See Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000). In its brief, the State posits that a traffic stop is reasonable when an officer has probable cause that a traffic violation has occurred. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). “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, ¶ 14, 317 Wis. 2d 118, 765 N.W.2d 569 (2009); citing *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1997) (internal quotations omitted.) An officer does not have to rule out all possible innocent explanations when investigating a criminal or traffic violation. Courts have repeatedly said while innocent explanations could be hypothesized, officers are not required to rule those hypotheses out before investigating. *State v. Jackson*, 434 N.W.2d 386, 391, 147 Wis. 2d 824, 834 (1989) (emphasis added).

The Court of Appeals’ decision in *State v. Fields* supports the Circuit Court’s Findings in this case. *State v. Fields*, 2000 WI App 218, 239 Wis. 2d 38, 619 N.W.2d 279, (Ct. App. 2000). In *Fields*, the officer testified that just before midnight he was driving southbound on a road in the middle of farm country. *Id.* at ¶¶2, 15. The officer noticed the defendant’s vehicle stopped at a stop sign at an intersection. *Id.* at ¶3. The intersection was in a rural area. *Id.* at ¶2. The officer noticed the vehicle stopped at the stop sign for five to ten seconds. *Id.* at ¶4.² The officer then pulled the vehicle over “for suspicious activity” of “resting at the stop sign.” *Id.* at ¶5. The officer found this activity suspicious because there was no traffic, there was not a stop light, and the vehicle could have gone well before the officer left the intersection. *Id.* The officer testified that he

¹ Because the officer pulled Hembel over for allegedly violating a law, Hembel will agree that the standard at the time of the stop in this case was probable cause as the State indicates in their brief.

² From the background set forth in *Fields*, Fields’ vehicle may have been stopped at the stop sign prior to the officer noticing him and thus, was stopped at the stop sign for a total of longer than five to ten seconds.

thought the vehicle might possibly be a drunk driver or someone whose license was revoked or suspended. *Id.* The Court of Appeals overturned the Circuit Court's Denial of the Motion to Suppress because "[b]ased on the totality of circumstances...Fields' slightly longer than normal stop at the stop sign, at that time and in that location, [did not give] rise to the level of 'specific and articulable facts' necessary to justify reasonable suspicion that Fields had committed or was committing an unlawful act." *Id.* at ¶23.

In overturning the Circuit Court's ruling, the Court of Appeals in *Fields* cited cases from other jurisdictions to support its decision.

In *State v. Wiese*, 525 N.W.2d 412 (Iowa 1994) [*overruled on other grounds by State v. Cline*, 617 N.W.2d 277 (Iowa 2000)], slow driving in the absence of erratic driving, interference with traffic, or the posted limit did not constitute grounds for a stop. In *State v. Brown*, 509 N.W.2d 69 (N.D. 1993), driving at a slower than usual speed did not by itself create reasonable suspicion of driving while under the influence. In *State v. Reynolds*, 899 P.2d 540, 272 Mont. 46 (1995), waiting seven to ten seconds at an intersection plus "bordering on traveling too fast" did not support a particular suspicion of wrongdoing. In *Kappel v. Director, ND Dep't of Transp.*, 602 N.W.2d 718, 1999 ND 213 (1999), stopping at a stop sign for ten seconds at 1:00 a.m. then weaving in the lane of traffic was a sufficient basis to stop. The North Dakota court reached the same result in *State v. Gothmiller*, 499 N.W.2d 590 (N.D. 1993), where an anonymous person reported a drunk driver, described the vehicle and its location, officers then located the vehicle stopped for a few seconds. The concurrence was careful to point out that the pause at the stop sign, without the anonymous tip, would not have been enough to trigger reasonable suspicion.

Id. at ¶20 (emphasis added).

According to *Fields* and the cases cited by the Court of Appeals in *Fields* something more than merely stopping at a stop sign for a longer than normal period of time is required to amount to probable cause (or reasonable suspicion) to perform a traffic stop.

In this case the Court has nothing more than what the court had in *Fields*. Hembel was stopped at a stop sign in a rural area as was the driver in *Fields*. No other traffic was affected. In *Fields* and the cases cited in *Fields*, the drivers were all at the stop signs for around ten seconds. In this case, Hembel was stopped at the stop sign for ten seconds while the officer was behind him. Simply because Hembel may have been at the stop sign for an additional twenty-five to thirty-five seconds, does not make this case significantly different from *Fields* or those cited in *Fields*.³ The court in *Fields* did not put a maximum time allowable on a stop before the stop rises to the level of probable cause. Further, it is worthy of note that the officer stopped Hembel after he pulled away from the stop sign, not while he was positioned at the stop sign. If he was violating a law while at the stop sign, the officer would have initiated the stop while behind Hembel at the stop sign. The officer had a visual of Hembel's vehicle before he stopped at the stop sign and observed no traffic violations which caused him to pull Hembel over. If this was a situation where Hembel was impeding traffic, in the middle of the intersection, or driving erratically while on his phone, there would have been more facts to amount to probable cause. In this case, there are no other facts rising to the level of probable cause.

When the officer made contact with Hembel's vehicle Hembel explained he was looking at Google maps. The Circuit Court found that a driver cannot text or use data while driving and Hembel was not doing so. While officers do not have to rule out all possible innocent explanations, this does not mean that an actual innocent explanation cannot be enough to dispel reasonable suspicion or probable cause. As Officer Kastens explained, Hembel informed him he was operating Google Maps and looking for his

³ See *supra* note 2. It is likely that Fields was stopped at the stop sign for longer than just the five to ten seconds he was there after the officer noticed him because the officer did not say he saw the vehicle approach and stop at the stop sign, he first noticed the vehicle when it was already at the stop sign. Further, the vehicle was "resting at the stop sign before [the officer got there]." *Fields*, 2000 WI App. at ¶ 5. That possible longer timeframe was not mentioned by the Court of Appeals and as such that possible longer timeframe did not lend additional grounds for reasonable suspicion.

friend's house. That is the actual innocent explanation for Hembel's stopping in the manner he did; this is not a possible or hypothetical explanation. Such an innocent explanation can dispel the reasonable suspicion.

The totality of the circumstances in this case does not amount to probable cause. In *Fields*, the totality of the circumstances including a slightly longer than normal stop at the stop sign, at just before midnight, in a rural location did not support reasonable suspicion. Under the totality of the circumstances in this case, Hembel stopping slightly longer than normal—to look at Google Maps and thus not violate the law by texting and driving—in a rural location, late at night, with no other traffic around, does not give rise to probable cause. Further, the Court of Appeals in *Fields* applied the law of reasonable suspicion to the facts of the case rather than probable cause. As the State notes in their brief, reasonable suspicion is a lower standard than probable cause which applies in this case. If the facts in *Fields* could not even rise to the level of reasonable suspicion, the facts in this case certainly cannot rise to the higher level of probable cause.

The Circuit Court's Findings are not clearly erroneous and the law as applied to the facts of this case defeats the officer's probable cause. Hembel's actions in stopping at the stop sign for slightly longer than normal do not amount to probable cause as the same actions did not amount to probable cause in *Fields*. The Circuit Court's decision should be upheld.

B. The officer did not have probable cause because Hembel did not violate Wis. Stat. § 346.54(1)(a) as a matter of law.

The State in its brief cites Wis. Stat. § 346.54(1)(a) as the basis for Officer Kasten's probable cause to stop Hembel. The State does not attempt to justify Officer Kasten's stop of Hembel based on any other violation of the law or other justification. Rather, the State only relies on an argument that Hembel was parked illegally when Officer Kasten made the traffic stop.

While the State attempts to argue that Hembel violated Wis. Stat. § 346.54(1)(a), Hembel did not violate Wis. Stat. § 346.54(1)(a). Wis. Stat. § 346.54(1)(a) states,

Upon a street where traffic is permitted to move in both directions simultaneously and where angle parking is not clearly designated by official traffic signs or markers, a vehicle must be parked parallel to the edge of the street, headed in the direction of traffic on the right side of the street.

Id.

In this case, the officer testified that Hembel had shifted his vehicle into park. The officer testified that Hembel was parked parallel to the street. Hembel was headed in the direction of the traffic on the right side of the street as well. There is no information or testimony that angle parking was not designated. Regardless, the officer testified Hembel was not diagonally parked. According to the officer, Hembel was parked parallel to the edge of the street, in the correct direction as required by statute. Hembel did not violate Wis. Stat. § 346.54(1)(a).

Hembel did not violate Wis. Stat. § 346.54 (1)(a). The officer testified Hembel was parked parallel to the edge of the street, on a two lane road, headed in the direction of traffic on the right side of the street. Hembel's actions do not support a probable cause finding that he had violated, was violating or was about to violate the law. The Circuit Court's Order should be upheld.

CONCLUSION

The Circuit Court's Findings are not clearly erroneous and the law as applied to the facts of this case independently does not support probable cause. Hembel was in a rural area, not interfering with any other traffic, stopped slightly longer than normal to access Google Maps, not violating Wis. Stat. § 346.54(1)(a). The Order granting Hembel's Motions to Suppress and Dismiss should be upheld.

Dated: 11/2/15

ANGELA OLSON LAW

A handwritten signature in black ink, appearing to read 'AR Olson', written over a horizontal line.

Angela R. Olson, #1056581

Attorney for Respondent

1301 Coulee Road, Ste. 2

Hudson, Wisconsin 54016

(715) 386-8888

CERTIFICATION OF MAILING

I certify that this brief was deposited into the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on November 2, 2015.

I further certify that on November 2, 2015, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated: 11/2/15

ANGELA OLSON LAW

A handwritten signature in black ink, appearing to read 'AR Olson', is written over a horizontal line.

Angela R. Olson, #1056581
Attorney for Respondent
1301 Coulee Road, Ste. 2
Hudson, Wisconsin 54016
(715) 386-8888

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19 (8) (b) and (c) for a brief and appendix produced with proportional serif font.

The length of this brief is 2,904 words.

Dated: 11/2/15

ANGELA OLSON LAW



Angela R. Olson, #1056581
Attorney for Respondent
1301 Coulee Road, Ste. 2
Hudson, Wisconsin 54016
(715) 386-8888

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I 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.

Dated: 11/2/15

ANGELA OLSON LAW

A handwritten signature in black ink, appearing to read 'A. Olson', is written over a horizontal line.

Angela R. Olson, #1056581

Attorney for Respondent

1301 Coulee Road, Ste. 2

Hudson, Wisconsin 54016

(715) 386-8888

