

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III**

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OF WISCONSIN**

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**Appellate Case Nos. 15 AP 1571 CR & 15 AP 1572 CR  
(consolidated)  
Trial Court Case Nos. 14 CT 885 & 14 CM 1250**

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

**-vs-**

**THOMAS ORT,**

Defendant-Appellant.

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**BRIEF AND APPENDIX OF  
DEFENDANT-APPELLANT**

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**Appealed from a Judgment of Conviction Entered  
In the Circuit Court for Outagamie County  
The Honorable Nancy J. Krueger Presiding**

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Respectfully Submitted:

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## **STATEMENT OF THE ISSUE**

**WHETHER LAW ENFORCEMENT HAD PROBABLE CAUSE TO SEIZE MR. ORT WHEN THE OFFICER WAS LOOKING TO STOP A SILVER TRUCK, AND THEN STOPPED THE FIRST SILVER TRUCK HE SAW?**

Trial Court Answered: **No.**

## **STATEMENT ON ORAL ARGUMENT**

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), Stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

## **STATEMENT ON PUBLICATION**

The Defendant-Appellant believes publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), stats., this case involves the application of well-settled rules of law to a common fact situation.

## STATEMENT OF FACTS AND CASE

On September 26, 2014, at approximately 7:49 p.m. Officer Charles Vosters was stopped at a red light when a vehicle traveling in the opposite direction stopped in the middle of the road alongside his vehicle. (R17 at 3-4.) Officer Vosters recognized the driver of this vehicle as the ex-police-chief's son, Michael Campbell. (R17 at 4.) Officer Vosters referred to Campbell as "Mike" and said that he had "all positive contacts" with him. *Id.*

Campbell reported that he was being followed by a guy "in a silver truck [who] was swerving and tailgating me." *Id.* While Officer Vosters was speaking with Campbell, a "silver truck" came around the corner – and stopped alongside the two other stopped vehicles. *Id.*

Despite the fact that Campbell was stopped in the middle of the road, blocking the roadway, Officer Vosters described the silver truck as almost running "into the back of Mike." *Id.*

Officer Vosters did not specifically describe the silver truck as speeding or swearing or how it in fact “almost” ran into “Mike.”

Rather, Officer Vosters stated that all three vehicles were stopped side by side by side – with the silver truck being “15 feet [to] 20 feet” away from his vehicle. *Id.* Officer Vosters then asked Campbell “is that the guy?” *Id.* Campbell agreed. *Id.* Officer Vosters noted that the truck was being driven by a younger male, wearing a blue shirt. *Id.*

At that time, the truck left. (R17 at 5.) Campbell began to follow the truck and Officer Vosters made a U-turn to try and catch up to the truck. *Id.* Officer Vosters admitted that he lost sight of the truck. *Id.*

Officer Vosters then caught up to Campbell, who was stopped at an intersection. (R17 at 6.) Campbell was pointing “kind of frantically” out his window. (R17 at 16.) Officer Vosters looked in that direction and saw what “appeared to be the same exact truck” traveling at a high rate of speed down

Main Street. *Id.* Officer Vosters then began to follow that truck, but Campbell stayed behind.

Officer Vosters, however, again lost sight of that truck “due to a large hill.” *Id.* Officer Vosters crested the hill and continued driving to 5<sup>th</sup> Street – where he looked down the street and “noticed the same truck parked on the side of the road with the brake lights on, or parking.” *Id.*

Officer Vosters then activated his emergency lights as he was pulling up to the truck. (R17 at 8-9.) Prior to activating his emergency lights and stopping this vehicle, Officer Vosters was unable to see the driver of this truck to confirm if it was the same young male in a blue shirt he had seen earlier. (R17 at 15.) Moreover, Officer Vosters had no unique identifying information on the truck that was involved with Campbell – other than it was silver.<sup>1</sup> (R17 at 15.)

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<sup>1</sup> There was other information available to law enforcement after the emergency lights were activated. For example, Campbell had described the silver truck as having “flames on the side – which Mr. Ort’s vehicle lacked

The driver of the stopped vehicle was identified as Thomas M. Ort, the Defendant-Appellant. (R17 at 9.) Mr. Ort was subsequently charged in Outagamie County Case No. 14 CT 885 with Operating While Intoxicated (3<sup>rd</sup> Offense) and Operating with a Prohibited Alcohol Concentration (3<sup>rd</sup> Offense). Further, Mr. Ort was charged in Outagamie County Case No. 14 CM 1250 with Obstructing an Officer.

Subsequently, Mr. Ort filed a motion to suppress evidence in each case based upon a lack of reasonable suspicion to stop his vehicle. (R6.) On January 30, 2015, a hearing was held on the motion to suppress. (R17.)

At the conclusion of the hearing, the circuit court held, in part, as follows:

[T]he officer's observations during his pursuit of this vehicle would under the totality of the circumstances certainly give him reasonable suspicion for the stop. He articulated objective facts which indicates the

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and that the officer indicated that he saw the driver exit the vehicle and that person was wearing a light blue shirt. *See* (R17 at 9,15, 22, 25.) These facts, however, were not known to the officer at the time of the stop, and as such, are not discussed further.



identification by Mr. Campbell that this was the truck. At the time that's the information the officer had, and the officer had observations that this truck was speeding and stopped him for that reason as well.

(R17 at 25-26.)

Mr. Ort later plead no contest and was convicted of Operating a Motor Vehicle While Under the Influence of an Intoxicant (Third Offense) in violation of Wisconsin Statute sec. 346.63(1)(a). (R12.) Further, Mr. Ort was convicted of Obstructing an Officer in violation of Wisconsin Statute sec. 946.41(1). The charge of Operating a Motor Vehicle With a Prohibited Alcohol Concentration (Third Offense) was dismissed.

Mr. Ort now appeals the denial of his motions to suppress.

### **STANDARD OF REVIEW**

The question of whether an investigatory traffic stop violated a driver's constitutional rights is a question of constitutional fact. *State v. Post*, 2007 WI 60 ¶8, 733 N.W.2d

634. A question of constitutional fact is a mixed question of law and fact to which appellate courts apply a two-step standard of review. *Id.* First, appellate courts review the trial court’s findings of historical fact under the clearly erroneous standard. *Id.* Second, appellate courts independently review the application of those facts to constitutional principles. *Id.*

## ARGUMENT

### **LAW ENFORCEMENT LACKED REASONABLE SUSPICION OR PROBABLE CAUSE TO SEIZE MR. ORT.**

Citizens have the right to be free from “unreasonable searches and seizures.”<sup>2</sup> *State v. Richardson*, 156 Wis. 2d 128,

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2 The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 11 of the Wisconsin Constitution provides:

The right of the people to be secure in their persons,

137, 456 N.W.2d 830 (1990)(citing the fourth amendment to the United States Constitution and Article I sec. 11 of the Wisconsin Constitution). When an officer stops a vehicle and detains its occupants, the fourth and fourteenth amendments are implicated and reasonable suspicion, at a minimum, must exist for the seizure to be constitutional. *See Richardson*, 156 Wis. 2d at 139, citing *United States v. Hensley*, 469 U.S. 221, 226 (1985); *see generally Terry v. Ohio*, 392 U.S. 1 (1968); Wisconsin Stat. § 968.24 (codifying the *Terry* standard).

The burden of establishing that an investigatory traffic stop is reasonable falls on the State. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

To execute a valid investigatory traffic stop, *Terry* and its progeny require that a law enforcement officer reasonably

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houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the persons or things to be seized.

suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *Richardson*, 156 Wis. 2d at 139, citing *Terry*, 392 U.S. at 27, 30. An officer's "inchoate and unparticularized suspicion or 'hunch'" will not suffice. *Post*, 2007 WI at ¶10, citing *Terry*, 392 U.S. at 27. Therefore, to justify a *Terry* stop, law enforcement officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts" led them to suspect criminal activity was afoot. *Terry*, 392 U.S. at 21, 30; *State v. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996).

The determination of reasonableness is a common sense test based on the totality of the facts and circumstances known to the officer at the time of the stop. *Richardson*, 156 Wis. 2d at 139-40; *see also Post*, 2007 WI at ¶13. This common sense approach balances the rights of individuals to be free from unreasonable intrusions, and the interests of the State to

effectively prevent, detect, and investigate crimes. *State v. Rutzinski*, 2001 WI 22, ¶15, 241 Wis. 2d 729, 623 N.W.2d 516; *Post*, 2007 WI at ¶13.

In the present case, Officer Vosters heard Campbell report that someone was “tailgating [him] and swerving.” (R17 at 4, 11.) Tailgating is a term used to describe another driver following at an unsafe distance. Yet, when Officer Vosters encounters Campbell – the silver truck is not seen. Swerving is a much more subjective term. In this case, Campbell never says what driving behaviors he actually observed.

What is known to Officer Vosters, is that Campbell has stopped in the middle of the road, which would certainly impact other traffic. Officer Vosters then sees a silver truck stop alongside the other two vehicles and testified in a conclusory manner that the truck almost hits Campbell’s vehicle. (R17 at 4.)

Further, Officer Vosters knows that Campbell is an ex-police-chief's son. Thus, he would have suspected that had this been a serious situation, the son of police chief would be well versed on calling police to report dangerous driving – not the random seeing an officer and talking to him in the middle of the road that took place in this case.

Importantly, after a brief stop, the silver truck drives away, and Officer Vosters did not activate his emergency lights or make an attempt to stop the truck right there. Rather, Officer Vosters makes a U-turn, loses track of the truck.

When Officer Vosters later sees Campbell pointing at a speeding, silver truck, Officer Vosters again does not activate his emergency lights. Rather, Officer Vosters turns and drives in that direction. (R17 at 14.) Unfortunately, Officer Vosters again loses sight of the truck and proceeds to stop the first silver truck he sees. As argued to the circuit court below, Mr. Ort's vehicle was a generic, standard pickup truck. (R17 at 21.)

There are literally hundreds of such vehicles on Wisconsin's highways. *Id.*

Thus, the officer's action in stopping the first silver truck he saw after losing sight of sight of the offending car amounted to nothing more than a hunch prohibited by *Terry*.

Rather, Officer Vosters could have pulled up to the vehicle to speak to the driver before activating his emergency lights and detaining the driver.

## **CONCLUSION**

**WHEREFOR**, Mr. Ort respectfully requests this Court to reverse his convictions based on the circuit court's failure to suppress evidence.

Dated this \_\_\_\_ day of October, 2015.

Respectfully submitted,  
**LUBAR & LANNING, LLC**

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**APPENDIX**

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## CERTIFICATION

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I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,250 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

- (1) a table of contents;
- (2) the findings or opinion of the trial court; and
- (3) the 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.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 27<sup>th</sup> day of October, 2015.

Respectfully submitted:

By: \_\_\_\_\_

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