STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

COLUMBIA COUNTY,

Plaintiff-Respondent,

v. Case No. 2015-AP-1650

Stephen M. Kokesh,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISION DENYING SUPPRESSION MOTION, ENTERED IN THE COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE DANIEL GEORGE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional Provisions and Statutes Cited

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STATEMENT OF THE ISSUES

I. DID DEPUTY STEINLE'S OBSERVATIONS OF KOKESH WEAVING SLIGHTLY WITHIN HIS OWN LANE AND TOUCHING THE FOG LINE TWICE, OVER THE COURSE OF APPROXIMATELY FIVE MILES ON A COUNTRY HIGHWAY, CREATE REASONABLE SUSPICION TO BELIEVE KOKESH WAS OPERATING WHILE INTOXICATED?

The trial court determined that Deputy Steinle had reasonable suspicion to stop Kokesh's vehicle.

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

This opinion will not be published because it will be decided by one judge.

STATEMENT OF THE CASE

This case involves a traffic stop based on the vehicle operator weaving slightly within his own lane of traffic and touching the fog line, similar to the situation in ***State v. Post,*** *infra***,** where the court found reasonable suspicion despite the lack of actual traffic violations. However, this case is distinguishable from ***Post*** because here the weaving was far less pronounced, occurred over a four to five mile stretch through curvy, hilly country roads, and in a traffic lane only half as wide as in ***Post***. Under the totality of circumstances, the long stretch of time during which the slight weaving occurred greatly diminishes the suspicious nature of that behavior, and was insufficient to justify a traffic stop.

Stephen Kokesh was arrested and charged with operating a motor vehicle while intoxicated, 1st offense for an incident that occurred in Columbia County, Wisconsin, on December 15, 2013, in the township of West Point (1: 1). The defense filed a motion to suppress, arguing no reasonable suspicion existed to stop Kokesh's vehicle (11: 1-3).

At the suppression hearing, Columbia County Sheriff's Deputy Steinle testified that he first observed Kokesh's vehicle coming towards him on Highway 60 at 2:28 am (29: 6). Deputy Steinle was traveling approximately 55 mph and testified nothing in his police report suggested Kokesh was exceeding the speed limit (29: 19). Deputy Steinle observed that the vehicle's tires were "straddling the fog line" (29: 17). However, Steinle did not know how long the vehicle's tires were over the fog line, nor could he provide an estimate of how many inches the vehicle's tires were over the fog line (29: 20-21). Deputy Steinle testified it was dark outside, which limited his ability to make observations (29: 19-20). Further, although there was one street light at the intersection

of Highway 60 and Gannon, the street light did not assist him in making his observations (29: 20).

Deputy Steinle turned his squad car around to follow Kokesh but did not activate his emergency lights and siren at that time (29: 7).[1] Once he caught up to Kokesh's vehicle, Deputy Steinle positioned himself approximately four to six car lengths behind (29: 10, 22). For the next four to five miles, Deputy Steinle followed Kokesh's vehicle, maintaining the four to six car lengths' distance the entire time (29: 9-10, 22). Deputy Steinle described this stretch of roadway as "straight, curvy," and "hill[y]" (29: 9-10). Given he was travelling for four to five miles at 55 mph, Deputy Steinle agreed he would have been following Kokesh for "roughly" four to six minutes before pulling him over (29: 22-23).

Deputy Steinle testified that he eventually pulled Kokesh over based on two main observations. The first was that Kokesh was "weaving" from the fog line to center line (29: 8). When asked how many times he observed Kokesh weaving, Deputy Steinle couldn't recall (29: 8). When asked if the weaving was "continuous," Steinle answered, "Yes" (29: 10).

However, cross-examination revealed the weaving was actually minimal. Deputy Steinle agreed that in his police report he characterized the vehicle's movement as "slightly swerving or weaving" from the center line to the fog line (29: 23-24). Deputy Steinle testified that his use of "slight" meant there was a "small amount of moving the vehicle to the right and to the left" (29: 24). Additionally, Deputy Steinle made no reference to the weaving being "continuous" in his report, and testified that he did not leave out any important details from his report regarding observations of Kokesh's driving (29: 17).

The other main basis for the stop was Deputy Steinle's observation that during this four to five mile period, Kokesh's

[1] Deputy Steinle did activate his in-squad camera, and a recording of the stop was created. However, both the State and defense chose not to submit the recording as evidence at the suppression hearing (31: 5-9). The circuit court did not review the recording prior to making a ruling, and the recording is not part of the record on appeal.

vehicle traveled on or right of the fog line twice (29: 11, 25). However, Deputy Steinle testified that his police report specifically stated he observed Kokesh weaving from the center line to the fog line but the vehicle "did not cross either line[]" (29: 24).

Deputy Steinle agreed that some road lanes are wider than others, but did not know the width of the westbound lane of Highway 60 (29: 18). The defense presented testimony from Megan Cowans, who measured the width of the westbound lane at two points. Near the intersection with Dettman Road, Cowans measured the width of Highway 60 from the inside of the yellow center line to the inside of the fog line to be 11 feet, 5 inches (30: 34). Near the intersection of Barta Road, Cowans measured the width of Highway 60 from the inside of the yellow center line to the inside of the fog line to be 10 feet, 10 inches (30: 35). Cowans also measured the width of Kokesh's vehicle to be 71 inches (5 feet, 11 inches) from the outside edges of the tires (30: 37).

The court denied the motion to suppress in an oral ruling. The court acknowledged that none of Kokesh's driving behavior, in and of itself, constituted a traffic violation (32: 5). The court nonetheless concluded Deputy Steinle had reasonable suspicion to stop Kokesh's vehicle based on four facts:

- When Steinle first observed the vehicle, Kokesh was "completely straddling the fog line" (32: 5);

- Deputy Steinle observed Kokesh "drifting from the fog line, to the center line, back and forth continuously" over a four-to-five mile period (32: 5);

- The deputy observed Kokesh "touch or go over the fog line on a couple more occasions" during that four-to-five mile stretch (32: 5); and

- The time of day (32: 5).

Following the denial of his suppression motion, Kokesh proceeded to a court trial. After taking evidence and testimony, the court found Kokesh guilty (22). Kokesh then filed a notice of appeal (26).

ARGUMENT

I. CONSIDERING DEPUTY STEINLE FOLLOWED KOKESH'S VEHICLE FOR APPROXIMATELY FIVE MILES ON A CURVY COUNTRY HIGHWAY, THE MINIMAL WEAVING AND TOUCHING THE FOG LINE OBSERVED BY STEINLE DID NOT CREATE REASONABLE SUSPICION TO BELIEVE KOKESH WAS OPERATING WHILE INTOXICATED

A. **Standard of Review**

Kokesh asserts that, at the time Deputy Steinle stopped his vehicle, the deputy lacked reasonable suspicion to believe he had committed or was committing any criminal activity. Whether a traffic stop is reasonable is a question of constitutional fact. ***State v. Post,*** 2007 WI 60, ¶8, 301 Wis. 2d 1, 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.*** The appellate court reviews the circuit court's findings of historical fact under the clearly erroneous standard, and reviews the application of those facts to constitutional principles *de novo*. ***Id.***

B. **Reasonable Suspicion to Conduct a Traffic Stop And *State v. Post***

Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect citizens against unreasonable searches and seizures. When evaluating whether a stop is supported by reasonable suspicion, "[t]he 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. A traffic stop must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" ***Id.,*** ¶10, citing ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). Rather, 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. ***Post, id.,*** ¶10**.** The reasonableness of a stop is determined based on the totality of the facts and circumstances. ***Id.,*** ¶13.

The Wisconsin Supreme Court previously upheld a traffic stop based primarily upon the vehicle weaving within its own lane of traffic in ***Post. Id.,*** ¶38. The court first discussed ***State v. Waldner,*** which concluded that a valid stop for suspicion of driving while intoxicated could be based on several specific, articulable facts that were insufficient when viewed in isolation but acted as "building blocks of fact" toward reasonable suspicion when viewed cumulatively. ***State v. Waldner,*** 206 Wis. 2d 51, 556 N.W.2d 681 (1996). ***Waldner,*** as recognized by ***Post,*** demonstrated the importance of the "totality of circumstances" test when determining reasonableness. ***Post,*** 2007 WI 60, ¶17.

Accordingly, the ***Post*** court rejected the State's request for a bright-line rule that repeated weaving within a single lane alone gives an experienced police officer reasonable suspicion to make an investigatory stop. ***Id.,*** ¶¶19-21. The court explained that repeated weaving within one's own lane may not warrant a traffic stop under certain circumstances, such as when the weaving occurs over a "great distance:"

> the State's proffered bright-line rule is problematic because movements that may be characterized as "repeated weaving within a single lane" may, under the totality of the circumstances, fail to give rise to reasonable suspicion. This may be the case, for example, where the "weaving" is minimal or happens very few times over a great distance. Courts in a number of other jurisdictions have concluded that weaving within a single lane can be insignificant enough that it does not give rise to reasonable suspicion. In such cases, weaving within a single lane would not alone warrant a reasonable police officer to suspect that the individual has committed, was committing, or is about to commit a crime.

Id., ¶19. The court explained that such weaving does not necessarily justify a traffic stop because weaving is universal among drivers:

> In addition, the rule that weaving within a single lane may alone give rise to reasonable suspicion fails 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. "[R]epeated weaving within a single lane" is a malleable enough standard that it can be interpreted to cover much innocent conduct. In ***U.S. v. Lyons***, a police officer made an investigatory stop after having seen the defendant's vehicle weave three to four times within a single lane. 7 F.3d 973, 974 (10th Cir. 1993). The court recognized "the universality of drivers' 'weaving' in their lanes." ***Id.*** at 976. It therefore cautioned that allowing weaving to justify a vehicle stop may subject many innocent people to an investigation. "Indeed, 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." ***Id.; United States v. Colin***, 314 F.3d 439, 446 (9th Cir. 2002).

Id., ¶¶19-20 (footnotes omitted). The court also rejected the defendant's claim that the driving must be erratic or dangerous to create reasonable suspicion, concluding, "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." ***Id.,*** ¶26.

C. **Under The Totality Of Circumstances, Deputy Steinle Lacked Reasonable Suspicion To Believe Kokesh Was Driving While Intoxicated**

A closer examination of the facts in ***Post*** shows that, although similar, the facts in this case are far less suspicious. And considering the Supreme Court found reasonable suspicion in ***Post*** only after determining that case "present[ed] a close call" the facts surrounding the stop of Kokesh's vehicle clearly fall below what is necessary to establish reasonable suspicion. ***Id.,*** ¶27.

Post held the following specific and articulable facts, when viewed under the totality of circumstances, as supporting reasonable suspicion: (1) when the officer first observed Post's vehicle, it was "canted into the parking lane"

and "wasn't in the designated traffic lane;" (2) Post's vehicle was weaving approximately 10 feet laterally, and was within a lane that was "twice as wide as the standard single lane;" (3) Post's vehicle moved in a discernible S-type pattern several times over two blocks; and (4) the incident took place at 9:30 at night. ***Id.*** ¶¶35-36. In other words, reasonable suspicion in ***Post*** was based on the same basic factors as the present case—defendant's vehicle initially observed to be straddling a traffic line, repeatedly weaving within a lane of traffic, and the incident occurred at night.

Upon closer inspection, however, the facts in ***Post*** are far more suspicious than in the present case:

	State v. Post	***County v. Kokesh***
Time of day	9:30 pm (¶4)	2:28 am (29: 6)
Initial observation	Vehicle "canted," i.e. driving partially in unmarked parking lane (¶4)	Vehicle straddling the fog line (29: 7)
Degree of weaving	Supreme Court rejects Court of Appeals finding that the weaving was a "slight deviation within one lane" (¶29);	Deputy Steinle indicated the vehicle was "slightly swerving or weaving," meaning "a small amount of moving the vehicle to the right and to the left" (29: 24)
Frequency of weaving	"several times" (¶5)	"continuous," though not mentioned in report (29: 8-10, 23-24)
Distance travelled	2 blocks (¶5)	4-5 miles (29: 9-10)
Width of lane	22-24 feet (¶3);	11 feet (30: 34-35)[2]
Width of vehicle	8 feet (¶34)	6 feet (30: 37)[3]
Measurement of weaving within lane	Approximately 10 feet from right to left (¶¶5, 35)	Approximately 5 feet from right to left[4]
Touched fog line?	No fog line; drove into unmarked parking lane (¶¶3-4)	Drove on fog line twice (29: 24)
Type of roads	City (¶3)	Country highway (29: 6)

[2] This is an approximation of the two points measured, one of which was 10 feet 10 inches, and the other 11 feet 5 inches (29: 34-35).
[3] This is rounded up from 5 feet 11 inches (29: 37).
[4] This is calculated from subtracting the vehicle width (6 feet) from the lane width (11 feet), and keeping in mind Deputy Steinle's testimony and report that Kokesh's vehicle weaved from the center line to the fog line but did not cross either line (29: 24).

The observation of the vehicle in ***Post*** being "canted" into the parking lane is essentially the same as Kokesh's vehicle straddling the fog line. The only reason the defendant in ***Post*** didn't cross a line into another lane is that the parking lane was unmarked, and he was actually weaving within a lane that was twice as wide as that in the present case. The Supreme Court found the fact that Post was weaving in a double-wide traffic lane to be particularly "noteworthy," a fact is not present here. ***Id.*** ¶36.

Further, the weaving in ***Post*** was about twice as wide (10 feet vs. 5 feet), and occurred over a much shorter distance (2 blocks vs. 4-5 miles). Finally, in ***Post*** the suspicious weaving occurred in a city, not on a country road traveling at 55 mph where some areas of the road were curvy or hilly.

Post may have been a "close call," but this is not. Like the officer in ***Post,*** this officer did not observe any traffic violations. Unlike in ***Post,*** the weaving this officer observed was far less pronounced, over a much greater distance and time period, and on a dark, occasionally curvy country road. Under the totality of circumstances, the officer lacked reasonable suspicion to stop Kokesh'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 12/16/15:

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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 2,487 words.

Dated 12/16/15:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify 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 12/16/15:

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