

STATE OF WISCONSIN
COURT OF APPEALS OF WISCONSIN
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2015AP1650

COLUMBIA COUNTY,

Plaintiff-Respondent,

vs.

STEPHEN M. KOKESH,

Defendant-Appellant,

BRIEF OF PLAINTIFF-- RESPONDENT

ON APPEAL FROM A CONVICTION IN THE CIRCUIT COURT
FOR COLUMBIA COUNTY, THE HON. DANIEL GEORGE,
PRESIDING, WHO ISSUED THE DECISION IN THIS CASE
THAT IS BEING APPEALED

Respectfully submitted,

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STATEMENT OF THE ISSUES

The Appellant's only issue on appeal is whether Deputy Steinle had reasonable suspicion to effectuate a traffic stop in this case.

TRIAL COURT'S ANSWER

The Trial Court denied the defendant's motion to suppress (R. 14), thereby holding that Deputy Steinle did have reasonable suspicion to effectuate the traffic stop. The Trial Court stated:

Under the totality of the circumstances, considering the hour of the day and the type of driving behavior, although it was not in itself a violation of any traffic law, the continuous drifting back and forth in the defendant's lane of travel, together with the straddling of the fog line, the touching or going over the fog line, again on a couple further occasions provided the officer with reasonable suspicion that the defendant was operating potentially while impaired and justified the stop and further inquiry. (R. 32, p. 5, lines 16-25 and p. 6, lines 1-2).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent would request the opportunity to present oral argument in this case, if the Court would feel that it would be appropriate, to help further define the issues and to clear up any questions that the Court may have.

The Respondent does not request that this case be published because the Respondent believes that this case will be limited to its own facts and have little or no precedential value to future cases.

I. FACTS

The Facts in the case are contained in the transcripts of the motion hearing conducted on June 10, 2014 (R. 29 and 30). Because the facts are all contained in the transcripts of the above hearing, there is no dispute in the facts, just a dispute in the interpretation of them and a dispute in the law.

II. QUESTIONS PRESENTED

The only question that is relevant for this appeal is whether, under the totality of these circumstances, Deputy Steinle had reasonable suspicion that the operator of this vehicle was engaged in criminal activity or by extension, breaking a traffic law by operating his motor vehicle while under the influence of an intoxicant or operating his vehicle while having a prohibited alcohol concentration.

III. TRIAL COURT'S FINDINGS THAT DEPUTY
STEINLE HAD A REASONABLE SUSPICION TO
PERFORM A TRAFFIC STOP ON THIS VEHICLE WAS
NOT CLEARLY ERRONEOUS

The Respondent believes that the Standard of Review for this Court on the question presented is that it is a constitutional question of law that this Court will review *de novo*.¹ The Trial Court held that under the totality of these circumstances, that Deputy Steinle was justified in performing the traffic stop. (R. 32, pages 5-6).

The Trial Court stated:

Under the totality of the circumstances, considering the hour of the day and the type of driving behavior, although it was not in itself a violation of any traffic law, the continuous drifting back and forth in the defendant's lane of travel, together with the straddling of the fog line, the touching or going over the fog line, again on a couple further occasions provided the officer with reasonable suspicion that the defendant was operating potentially while impaired and justified the stop and further inquiry. (R. 32, p. 5, lines 16-25 and p. 6, lines 1-2).

¹ II. STANDARD OF REVIEW

10 Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Mitchell*, 167 Wis.2d 672, 684, 482 N.W.2d 364 (1992); *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. 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*. *Id.*, ¶¶ 18–19. *State v. Popke*, 2009 WI 37, ¶¶ 9-10, 317 Wis. 2d 118, 126, 765 N.W.2d 569, 573.

IV. ARGUMENT

The Appellant argues that the facts of this case did not amount to a reasonable suspicion for Deputy Steinle to perform a traffic stop. (*See generally*, Appellant's Brief). The Respondent disagrees with this assertion and asks that this Court agree with the ruling from the Trial Court and deny the Appellants request.

The Respondent believes that Deputy Steinle possessed a reasonable suspicion to believe that Mr. Kokesh was operating his motor vehicle while impaired and was justified in performing this traffic stop. Reasonable Suspicion, as defined by Chief Justice Abrahamson in a concurring opinion in the *Renz* case is defined as:

9. Reasonable Suspicion. In order to stop a person an officer must be able to articulate specific grounds for having a "reasonable suspicion" that the individual is engaged in criminal activity. See Wis. Stat. § 968.24 (1997–98) and maj. op. at 549 n. 11 for a description of the reasonable suspicion standard.

The reasonable suspicion standard was adopted in *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), in another context. In that case, the U.S. Supreme Court held that before police execute a search warrant without knocking and announcing their presence, the officers must have a "reasonable suspicion," under the circumstances, that knocking would be dangerous or futile or that it would inhibit the effective investigation of the crime. *Richards*, 520 U.S. at 394, 117 S.Ct. 1416.

Cty. of Jefferson v. Renz, 231 Wis. 2d 293, 327, 603 N.W.2d 541, 556 (1999).

The reasons that make up the reasonable suspicion in this case are first the time of day and the day that this incident occurred on. The first time that

Deputy Steinle saw Mr. Kokesh's vehicle was at about 2:28 a.m. (R. 29, p. 6, lines 24-25). The day was also important as it was a weekend morning.² (R. 29, p. 7, lines 1-2). The second reason is that as the vehicle approached Deputy Steinle, he noticed that it was straddling the white fog line. (R. 29, p. 7, lines 7-9). This behavior led Deputy Steinle to turn around and follow the vehicle. (R. 29, p. 7, lines 15-16).

The third fact that Deputy Steinle observed was that as he was following the vehicle on Hwy. 60, he noticed that it was going from fog line to center line. (R. 29, p. 8 lines, 13-15). Deputy Steinle did not recall how many times that the vehicle went from fog line to center line, but he did recall that it seemed consistent. (R. 29, p. 8, lines 18-20). Deputy Steinle further described the driving pattern as "weaving". (R. 29, p. 8, line 22).

The fourth fact that Deputy Steinle observed was that the "weaving" of Mr. Kokesh's vehicle occurred over a four to five mile stretch of Hwy. 60. (R. 29, p. 10, line 1). It is the Respondent's position that four to five miles of consistent weaving within one's own lane is not insignificant. The fifth fact that Deputy Steinle observed was that there were no weather conditions such as snow or

² Third, the time of night is relevant. Officer Hoffman's and Officer Penly's uncontroverted testimony was that they encountered the defendant about when Saturday night bar-time traffic arrives in Maple Bluff from downtown Madison. It is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning. *State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 397, 766 N.W.2d 551, 557.

ice that was on the road that could have explained this driving behavior. (R. 29, p. 9, lines 6-9). There was also not any other traffic on the road, other than Deputy Steinle, that could have explained the reason for this four to five miles of consistent weaving. (R. 29, p. 9, lines 10-12). And, there was nothing else that Deputy Steinle was able to observe, on the road, that could explain the driving behavior. (R. 29, p. 9, lines 13-16).

The Appellant argues that these facts, under these circumstances, do not add up to reasonable suspicion. The Appellant cites this Court to the *Post*³ case to support his argument.

The Respondent agrees that this Court should read the *Post* case, but the facts of this case are very similar to those in the *Post* case, such that they are almost indistinguishable. The Appellant has provided this Court with a chart which sets the facts of this case next to those of the *Post* case. (See p. 10 of the Appellant's Brief).

The first box of the chart in the Appellant's Brief is for time of day. The *Post* case took place at 9:30 p.m., whereas this case took place at 2:28 a.m. What the Appellant did not include was that the *Post* incident took place on a Thursday night, specifically February 19, 2004. A check of CCAP showed that the offense date was 2/19/2004. A historical check of the calendar for 2004 showed that February 19, 2004 was a Thursday.

³ *State v. Post*, 301 Wis.2d 1; 733 N.W.2d 634 (2007).

A check of CCAP for this case showed that the offense date was 12/15/13. A historical check of the calendar for 2013 showed that December 15, 2013 was a Sunday. This is consistent with Deputy Steinle's testimony that the incident took place on a weekend morning. (R. 29, p. 7, lines 1-2).

The fact that this incident took place at around bar time on a weekend morning is additional information that was not present in the *Post* case. (See footnote 2 above.) In fact, this incident took place around bar time on a Sunday morning from a Saturday night, similar to the timing in the *Lange* case from footnote 2.

The second box in the Appellant's chart discusses initial observation. The Respondent would submit that the initial observations in each case are of similar nature and weight. In the *Post* case, the vehicle was "canted", i.e., driving partially in the unmarked parking lane, whereas in this case the Appellant's vehicle was straddling the fog line. (See p. 10 of the Appellant's Brief).

The third (degree of weaving), fourth (frequency of weaving), fifth (distance traveled), sixth (width of lane), seventh (width of vehicle), and eighth (measurement of weaving within lane) boxes from the Appellant's brief (See p. 10) can all be dealt with together since they are all intertwined in the assessment of this case. All of these factors deal with the totality of the degree of how the defendant's in these cases were driving. These are all part of the totality of the

circumstances that the *Post* Court discussed in its decision.⁴

The Appellant argues (See chart on p. 10 of Appellant's Brief) that the Supreme Court found that the defendant's weaving in the *Post* case was more than a "slight deviation" whereas the weaving that Deputy Steinle described in this case was a small amount of moving or a slight deviation in his lane. However, conversely, the frequency in this case of the weaving was continuous for 4-5 miles versus that of several times over a 2 block period in the *Post* case. (See Appellant's Brief chart at p. 10).

The Appellant also argues (See chart on p. 10 of Appellant's Brief) that the lane was wider and that the amount of weave was greater in the *Post* case than they are in this case. That may be true, but it is the Respondent's position that these are not detrimental or dispositive of the case. It is a totality of the circumstances which is controlling and under the totality of the circumstances, when weighed against the facts in the *Post* case, it is the Respondent's position that Deputy Steinle had reasonable suspicion to stop this vehicle.

⁴ In sum, we determine that weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle. However, we also determine that under the totality of the circumstances, the police officer did have reasonable suspicion in this case, and that the stop did not violate Post's constitutional right to be free from unreasonable searches and seizures. Accordingly, we reverse the court of appeals. *State v. Post*, 2007 WI 60, ¶ 38, 301 Wis. 2d 1, 22, 733 N.W.2d 634, 644.

The ninth box (See chart on p. 10 of Appellant's Brief) in the chart deals with touching the fog line. In the *Post* case, there was no fog line to touch, but the defendant drove into the unmarked parking lane, whereas in this case, the defendant crossed the fog line a couple of times. Arguably, this case showed more egregious driving because the driver should have clearly seen the fog line and still crossed it anyway, whereas in *Post* where there is no line, it would be more difficult to determine if he was crossing the line.

The last box (See chart on p. 10 of Appellant's Brief) in the chart deals with type of roads. In the *Post* case the roads were City roads whereas in the present case, the roads were County highways. The importance of this is that presumably, there is going to be more traffic in the City and thus, more danger to the public of someone who is impaired. However, the Respondent submits that this would be important if each case dealt with a similar distance. If the present case only dealt with Deputy Steinle observing this vehicle over a 2 block period on the County highway, it would not come close to rivaling the *Post* case, however, because Deputy Steinle followed this vehicle for 4-5 miles and there was a continuous drift, the Respondent suggests that this is equally egregious to the 2 city blocks, if not more due to the length of the continuous weaving.

VII. CONCLUSION

It is the Respondent's position that, under the totality of the circumstances, the time of day (around bar time) the day of the week (a weekend morning), the crossing of the fog line on more than one occasion, and the continuous drifting or weaving over a 4-5 mile stretch, that Deputy Steinle had reasonable suspicion to believe that the operator of this vehicle was impaired and thus the traffic stop was justified. The Respondent acknowledges that the *Post* Court held that weaving within one's own lane, was not in and of itself enough to justify a traffic stop, (See footnote 4) however there is more in this case just like there was in the *Post* case. The Respondent submits that this case is at least equal to *Post* if not a little more favorable under the circumstances to holding that Deputy Steinle had reasonable suspicion to justify stopping this vehicle.

Given the facts of this case, the Trial Court was absolutely correct in its ruling that the officer had reasonable suspicion to believe that the operator of the vehicle was impaired and was justified in stopping the vehicle. Because the Trial Court was correct in its ruling, the Respondent asks that this Court uphold the Trial Court's decision and deny the Appellant's appeal.

Dated at Portage, Wisconsin, January 7th, 2016

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a Proportional Serif Font. The length of this brief is 2,522 words.

Dated this 7th day of January, 2016.

Signed,

Troy D. Cross
Attorney

**CERTIFICATE OF COMPLIANCE WITH RULE
809.19(2)**

ELECTRONIC E-FILING

I hereby certify that:

I have submitted an electronic copy of the brief in case 2015AP1650, 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 this 7th day of January, 2016.

Signed:

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