

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

RECEIVED

11-02-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2015AP001788
Outagamie County Circuit Court Case Nos. 2013CV001063

TOWN OF GRAND CHUTE,

Plaintiff-Respondent,

v.

SHELLEY L. KOWALEWSKI,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND OF THE TRIAL COURT'S RULING
DENYING THE DEFENDANTS MOTION FOR
SUPPRESSION OF EVIDENCE IN THE CIRCUIT
COURT FOR OUTAGAMIE COUNTY, THE
HONORABLE GREGORY B. GILL, JR., PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT SHELLEY L. KOWALEWSKI

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	iv
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.....	iv
STATEMENT OF THE CASE/FACTS.....	1
STANDARD OF REVIEW.....	7
ARGUMENT	8
OFFICER ENNEPER DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO STOP MS. KOWALEWSKI'S VEHICLE.....	8
CONCLUSION	11
FORM AND LENGTH CERTIFICATION	12
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	13
APPENDIX CERTIFICATION	14
APPENDIX.....	16
Order.....	A.App. 1
Excerpts from Motion Hearing- 05/04/2014 ..	A.App. 2

TABLE OF AUTHORITIES

Page No.

CASES

Wisconsin Supreme Court

State v. Anderson, 155 Wis. 2d 77, 454 N.W.2d 763
(1990). 7

State v. Popke, 2009 WI 37, 317 Wis.2d 118, 765
N.W.2d 569. 5,6

State v. Post, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d
634 7,9

State v. Waldner, 206 Wis.2d 51, 556 N.W.2d 681
(1996). 8,9

Wisconsin Court of Appeals

State v. Gaulrap, 207 Wis.2d 600, 558 N.W.2d 696
(Ct. App. 1996) 5,6

State v. Powers, 2004 WI App 143, 275 Wis.2d 456,
685 N.W.2d 869. 4

State v. Walli, 2011 WI App 86, 334 Wis.2d 402, 799
N.W.2d 898. 5

United States Supreme Court

Terry v. Ohio, 392 U.S. 1 (1968). 6

WISCONSIN STATUTES

Wis. Stat. §346.13 7

Wis. Stat. §346.34. 8

STATEMENT OF THE ISSUES

Did Town of Grand Chute Police Officer, Shawn Enneper have the requisite level of suspicion to stop Ms. Kowalewski's vehicle?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Shelley L. Kowalewski, (Ms. Kowalewski) was charged in the Town of Grand Chute Municipal Court, Outagamie County with having operated a motor vehicle while under the influence of an intoxicant and operated a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on January 23, 2013. On April 8, 2013, in writing, Ms. Kowalewski entered a not guilty plea to both charges. On the same date, Ms. Kowalewski filed a motion for suppression of evidence challenging the stop of her vehicle. On August 21, 2013, a hearing on the defendant's motion and a trial to the court was held before the Town of Grand Chute Municipal Court, the Honorable Charles W. Klausen, Judge, presiding. The Court orally denied the defendant's motion and found Ms. Kowalewski guilty of both charges.

On September 5, 2013, Ms. Kowalewski, by counsel, timely filed a written Notice of Appeal of the municipal court judgment. The matter was transferred to the Outagamie County Circuit Court. The defendant refiled the motion for suppression of evidence on December 5, 2013. (R.2:1/ A.App.1). The

Plaintiff-Respondent filed an objection to Ms. Kowalewski's motion on December 12, 2013.

A hearing on Ms. Kowalewski's motion was held on May 5, 2014. The court denied said motion, and a written Order denying the motion was filed on August 18, 2015. (R.15:1). A trial to the court was held on June 9, 2015. The court found Ms. Kowalewski guilty of both charges, a final written order of guilt being filed on July 13, 2015. Ms. Kowalewski timely filed a Notice of Appeal on August 26, 2015. The appeal stems from the judgment of conviction, and the court denying Ms. Kowalewski's motion for suppression of evidence.

The pertinent facts to this appeal were adduced at the motion hearing held on May 15, 2014 through the testimony of Town of Grand Chute Police Officer Shawn Enneper. Officer Enneper testified that he had worked for the Town of Grand Chute Police Department for five years. He testified that his duties included traffic stops and OWI investigations among other things. (R.21:5/ A.App. 2). Officer Enneper testified that on January 23, 2013, he was working patrol duties in the Town of Grand Chute. As he was traveling westbound on West College Avenue, he observed Ms. Kowalewski's vehicle ahead of him. (R.21:6/ A.App. 3). Enneper testified that the time was

approximately 2:30 a.m., and that there was normally bar traffic proceeding through the town at that time. *Id.*

While he could not remember the distance he was behind Ms. Kowalewski's vehicle, he testified that he observed her vehicle drift in its lane. Because of it drifting in its lane, Enneper activated his mobile camera. (R.21:7/ A.App. 4). Enneper testified that the vehicle appeared to touch the white line that separated lane one and lane two on College Avenue. *Id.* He testified that "he believed that he observed that another time as well." *Id.*

Additionally, as the vehicle approached highway 41, the vehicle maneuvered into the left lane to turn southbound without using its directional signal. *Id.* At that point, Officer Enneper activated his emergency lights and stopped Ms. Kowalewski's vehicle. Enneper testified it is his belief that people should use their direction signals all the time. (R.21:9/ A.App. 5).

On cross-examination, defense counsel played the officer's squad video. Enneper acknowledged that there were no other vehicles on the road when Ms. Kowalewski turned onto Highway 41. He further acknowledged that the video accurately represented what he saw that night. (R.21:14/ A.App. 7).

The Plaintiff argued that the evidence presented was sufficient to establish reasonable suspicion to stop Ms. Kowalewski's vehicle even if a traffic law violation was not observed. (R.21:19/ A.App. 8). The defense argued that Ms. Kowalewski did not commit a traffic violation and that Officer Enneper did not have the requisite level of suspicion to stop Ms. Kowalewski. (R.21:21/ A.App. 9). The court found that Officer Enneper had a reasonable basis to believe that Ms. Kowalewski committed a traffic law violation. *Id.* However, the court additionally found that the officer articulated sufficient facts to support the stop. (R.21:23/ A.App. 10). The court proceeded to deny the defendant's motion.

The defendant timely appealed after a court trial finding Ms. Kowalewski guilty of both offenses. The appeal herein stems from the court Order denying Ms. Kowalewski's motion for suppression of evidence. Ms. Kowalewski timely filed a Notice of Appeal on August 26, 2015.

STANDARD OF REVIEW

Whether reasonable suspicion exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis.2d 456, 685 N.W.2d 869. The court applies a two-step

standard of review when reviewing questions of constitutional fact. A trial court's finding of historical fact will be upheld unless they are clearly erroneous. However, determining whether a reasonable suspicion justified the stop is reviewed de novo. *Id.* Furthermore, "when evidence in the record consists of disputed testimony and a video recording" the court applies "the clearly erroneous standard of review when ...reviewing the trial court's finding of fact based on that recording." *State v. Walli*, 2011 WI App 86, ¶18, 334 Wis.2d 402, 799 N.W.2d 898.

ARGUMENT

A. OFFICER ENNEPER DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO STOP MS. KOWALEWSKI'S VEHICLE

It is well settled that the "temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment." *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct.App. 1996). To satisfy the constitutional standard of the 4th Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, an investigative traffic stop must be supported by either "probable cause to believe that a traffic violation has occurred, or an

officer must have grounds to reasonably suspect that a violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶12, 317 Wis.2d 118, 765 N.W.2d 569.

“Probable cause refers to the ‘quantum of evidence which would lead a reasonable police officer to believe’ that a violation has occurred.” *Popke* at ¶14 citing to *Johnson v. State*, 75 Wis.2d 344, 348, 249 N.W.2d 593(1977). The evidence must be sufficient to “lead a reasonable officer to believe that guilt is more than a possibility.” *Id.*

However, even if probable does not exist, an officer can conduct a traffic stop where “under the totality of the circumstances, he has grounds to reasonably suspect that a crime or traffic violation has been or will be committed.” *State v. Gaulrapp*, 207 Wis.2d 600, at 605, 558 N.W.2d 696. In this situation, an 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.” *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W. 634. “The 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.* at ¶13.

This standard requires that the stop be based on something more than an “inchoate and unparticularized suspicion or ‘hunch.’” *Terry v. Ohio*, 392 U.S. 1, 27 (1968). “The determination of reasonableness is a common sense test.” *State v. Post*, 2007 WI 60, ¶ 301 Wis.2d 1, 733 N.W.2d 634 *citing State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

The facts here would not have led a reasonable officer in Officer Enneper’s position to believe that Ms. Kowalewski had committed a traffic law violation. Officer Enneper did not have probable cause to believe that a traffic law violation had occurred. Wis. Stat. §346.13(3) requires that vehicles drive within their designated lanes:

Notwithstanding sub. (2), when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.

The statute is violated when one deviates from the designated lane of travel. Here, neither Officer Enneper’s testimony nor the video support a violation of Wis. Stat. §346.13(3). While Ms. Kowalewski’s vehicle might have briefly touched the white dividing line, she never deviated from the designated lane until she turned into the left turn lane to head

southbound on Highway 41. Thus, Ms. Kowalewski did not violate Wis. Stat. §346.13(3).

Additionally, Officer Enneper did not have probable cause to believe that Ms. Kowalewski violated Wis. Stat. §346.34(1)(a)(3) or (b). Wis. Stat. §346.34(1)(a)(3) requires no turn to be made “from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety.” Additionally, Wis. Stat. 346.34(1)(b) states that “In the event any other traffic may be affected by the movement, no person may turn any vehicle without giving an appropriate signal in the manner provided in s. 346.35 ...” Contrary to Officer Enneper’s an individual does not have to always use her turn signal. Only when other traffic may be affected must a signal be used.

The record does not support probable cause to stop Ms. Kowalewski for violating either statute. Officer Enneper acknowledged there was no other traffic in any lane. (R.21:11/A.App. 6). Thus, there was no other traffic that would have been affected by Ms. Kowalewski’s movement. Moreover, there is nothing in the record that suggested the movements toward the white line were not made with reasonable safety. Both the

adduced testimony and video fail to support Officer Enneper stopping Ms. Kowalewski for an alleged traffic law violation.

However, conduct does not need to be unlawful to support an investigative detention. Even lawful conduct under appropriate circumstances might support an investigative detention. *State v. Waldner*, 206 Wis.2d 51 at 60, 556 N.W.2d 681 (1996). The issue is did Ms. Kowalweski's driving behavior, albeit lawful, coupled with the time of night provide Officer Enneper with a reasonable inference that unlawful conduct was afoot. "When a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." *State v. Waldner*, 206 Wis.2d 51 at 60, 556 N.W.2d 681 (1996).

The observations of Officer Enneper and the video show minor deviations with a single lane of travel. But for briefly touching the white dividing line, the video showed Ms. Kowalewski stayed in her lane until she moved into the left hand turn lane and turned southbound on Highway 41. There were no erratic or jerky movements. Furthermore, repeated movement in

a single lane alone does not provide an officer with reasonable suspicion to stop a vehicle. *State v. Post*, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634. In *Post*, the court recognized, “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.* at ¶20, citing to *United States v. Colin*, 314 F.3d 439, 446 (9th Cir.2002).

Thus, while in some situations, lawful conduct can form the basis for an investigatory stop, here, using the totality of the circumstances analysis, the information available to Officer Enneper would not have led him to suspect that Ms. Kowalewski was committing a violation. At best, the evidence revealed that Officer Enneper may have had an inchoate hunch that Ms. Kowalewski operating while impaired, but clearly more than an inchoate hunch is needed for the Plaintiff to prevail.

CONCLUSION

Because the information available to Officer Enneper did not show that Ms. Kowalewski committed a traffic law violation, and because minor deviations did not support reasonable suspicion that Ms. Kowalewski was operating while impaired, Officer Enneper did not have the requisite level of suspicion to stop Ms. Kowalewski's vehicle. Thus, the trial court erred in denying the defendant's suppression motion. The Court should vacate the judgment of conviction and reverse the trial court's order.

Dated this 2nd day of November, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 20 pages. The word count is 3528.

Dated this 2nd day of November, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby 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 this 2nd day of November, 2015.

Respectfully submitted,

Piel Law Office

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) 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 a 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.

Dated this 2nd day of November, 2015.

Respectfully submitted,

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX