

12-02-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

v. Plaintiff-Respondent, Appeal No. 2015AP1788
Circuit Court Case No. 13CV1063

Defendant-Appellant.

Appeal from the Circuit Court of Outagamie County,
The Honorable Gregory B. Gill, Jr., Presiding

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STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Petitioner-Respondent, Town of Grand Chute (“the Town”) does not request oral argument or publication.

Oral argument in this matter would be of no benefit to the Court as the briefs submitted by the parties fully develop the theories and legal authorities necessary to decide this matter. Further, the issues in this appeal involve no more than the application of well-settled rules of law to the facts in this case. Thus, the criteria for publication pursuant to section 809.23 are not satisfied in this appeal and publication is therefore unnecessary.

Finally, as this is an appeal pursuant to section 752.31(2), publication seems frustrated by section 809.23(4)(b) of the Wisconsin Statutes.

STATEMENT OF THE CASE

Although not required, the Town is including a brief "Statement of the Case" to supplement the Statement of the Case provided in Appellant Shelley Kowalewski's ("Shelley") Brief.

To be clear, Officer Enneper saw both Shelley's front and rear passenger tires touch the solid white lane line (R. 21-13:4, 21-15:12-15; R-App. 10-11), and he made this observation on more than one occasion. (R. 21-7:3-7.)

In addition to Officer Enneper's observations recited by Shelley in her Brief, Officer Enneper explained to Shelley the reason for his stop as follows: "I had observed that she appeared to be drifting in her lane of travel. I also advised her that it appeared she failed to use her turn signal or directional signal when she changed lanes from lane number one into the turn lane." (R. 21-8:7-12; R-App. 6.)

Officer Enneper testified that Shelley's driving behavior initially drew his attention- she was weaving in her lane of traffic, and ultimately failed to use her turn signal while changing lanes. (R. 21-16:12-20.) As to Shelley's failure to use her turn signal while changing lanes, Officer Enneper was traveling to the rear of Shelley's vehicle and testified that

Shelley should have recognized his vehicle behind her in traffic. (R. 21-8:13-16.)

Officer Enneper's testimony was that there were several reasons he made the traffic stop. (R. 21-15:23-25; R-App. 11.) He took in to account that it was 2:30 in the morning on a weekend night. (R. 21-16:1-5; R-App. 12.) In the Officer's words, he considered "the totality of the circumstances." (R. 21-16:6; R-App. 12.) "Being a Saturday evening, Sunday morning, Saturdays in downtown Appleton are typically a heavy restaurant or bar crowd, and the fact it was near that closing time of those businesses, 2:30 in the morning." (R. 21-16:6-10; R-App. 12.)

ARGUMENT

I. STANDARD OF REVIEW

The Town does not disagree that "[t]he 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) (*citing Whren v. United States*, 517 U.S. 806 (1996)).

Because the Fourth Amendment is not restricted to criminal cases, a civil OWI defendant is entitled to suppression only if the Defendant is stopped on *less than a reasonable, articulable suspicion* of committing an offense. *State v. Wilks*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984); *Cty of Milwaukee v. Cohen*, 57 Wis.2d 38, 203 N.W.2d 633 (1973); *Village of Menomonee Falls v. Kunz*, 126 Wis. 2d 143, 376 N.W.2d 359 (Ct. App. 1985).

Whether a traffic stop is reasonable is a question of constitutional fact involving a two-step standard of review. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. First, the court of appeals reviews the trial court's findings of fact under the clearly erroneous standard. *Id.* Next, the court reviews the application of those facts to constitutional principles *de novo*. *Id.*

The test for determining whether reasonable suspicion exists is based on an objective standard and takes into account the totality of the circumstances. *State v. Williams*, 2001 WI 21, ¶ 22, 241 Wis. 2d 631, 623 N.W.2d 106. Reasonable suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those

facts, reasonably warrant” the intrusion of the stop. *Post*, 2007 WI 60 at ¶ 10 (*quoting Terry v. Ohio*, 392 U.S. 1, 21, (1968)).

“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.” *Post*, 2007 WI 60 at ¶ 13.

II. RESPONDENT MAY ADVANCE ANY ARGUMENT THAT WILL SUSTAIN A CIRCUIT COURT’S RULING

As the Respondent to this appeal, the Town may advance any argument that will sustain the circuit court’s ruling. *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567, 572 (Ct. App. 1998). Although an appellant is limited before the court of appeals to the arguments it made before the circuit court, *State v. Bustamante*, 201 Wis.2 d 562, 571, 549 N.W.2d 746 (Ct. App. 1996), respondents are not similarly limited. *State v. Lock*, 2013 WI App 80, ¶ 40, 348 Wis. 2d 334, 833 N.W.2d 189 (*citing State v. Ortiz*, 2001 WI App 215, ¶ 25, 247 Wis. 2d 836, 634 N.W.2d 860).

III. THE TRIAL COURT APPROPRIATELY DETERMINED THAT OFFICER ENNEPER HAD THE REQUISITE LEVEL OF SUSPICION TO MAKE A TRAFFIC STOP

Shelley states without any legal citation or authority that “[t]he facts here would not have led a reasonable officer in Officer Enneper’s position

to believe that she had committed a traffic violation. (App. Br. at 7.) Conversely, Officer's Enneper's testimony during the Suppression Hearing was that he believed he had reasonable suspicion to conduct a traffic stop. (R. 21-17:2-8; R-App. 13.)

Shelley argues that she did not violate section 346.13 of the Wisconsin Statutes (requiring drivers to drive in the lane designated). (App. Br. at 8.) She cites no legal authority, however, to support her conclusory statement that she did not violate this law.

Whether the court interprets "driving in the lane designated" to mean that a driver must not drive on the lane lines or conversely that driving on the lane lines does constitute driving within the designated lane, the standard is not whether the offense *was* committed but rather whether an officer had a reasonable, articulable suspicion of an individual *committing* an offense. *State v. Wilks*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984); *Cty of Milwaukee v. Cohen*, 57 Wis.2d 38, 203 N.W.2d 633 (1973); *Village of Menomonee Falls v. Kunz*, 126 Wis. 2d 143, 376 N.W.2d 359 (Ct. App. 1985). As the circuit court held,

In addition . . . the officer was able to identify certain articulable facts which supported his belief that there may have been additional issues related to [Shelley's] driving abilities, in particular, and as was noted on the video, there was at least one instance where the vehicle touched a white center line. It did appear in the court's view that perhaps there was

actually two times the vehicle came in and out . . . [t]here was, second, a line where the vehicle drifted outwards and towards the right immediately prior to making the turn. In addition, the officer testified that there may have been a lane deviation . . . not a complete lane deviation, but enough to warrant a concern of the officer . . . so that constitutes somewhere between two and three lane deviations.

(R-21-22:9-25, 21-23:1-3; R-App. 15-16.)

This case can thus be distinguished from *Post* in that here, Shelley actually made contact, on numerous occasions, with a marked lane line. (See R. 21-23:1-3; R-App. 16). In *Post*, the driver was in a traffic lane next to a parking lane, which was not marked or delineated in any way. *Post*, 2007 WI 60 at ¶ 3. The officer in *Post* saw the driver drive partially in the unmarked parking lane. *Id.* at ¶ 4. The issue in *Post* dealt with weaving *only*, and did not address facts in which a vehicle made actual contact, on numerous occasions, with a designated lane line, thus arguably violating section 346.34(1)(a)(3).

The *Post* court actually refused to delineate a bright-line rule that weaving within a single lane does or does not provide an officer with reasonable suspicion to make a traffic stop. *Id.* at ¶ 18. “[T]his court has consistently maintained that the determination of reasonable suspicion is based upon the totality of the circumstances.” *Id.* (citations omitted).

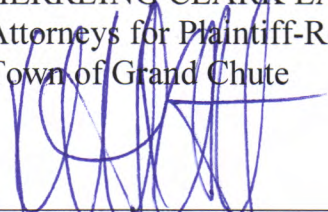
Shelley also argues she did not violate section 346.34. In making her argument, Shelley states “there was no other traffic in any lane.” (App. Br. at 8.). However, Shelley completely ignores that Officer Enneper’s vehicle was on the road behind her. Section 346.34(1)(b) states that “[i]n the event *any other traffic may be affected by the movement*, no person may turn without giving an appropriate signal.” Certainly, Officer Enneper’s vehicle constitutes “any other traffic,” and his placement on the roadway could have been affected by Shelley’s movement.

CONCLUSION

For all of the aforementioned reasons, Town of Grand Chute respectfully requests that the Wisconsin Court of Appeals affirm the decision of the Honorable Gregory B. Gill, Jr., as the trial court's decision was sound, proper, reasonable and within the discretion of the court.

Respectfully submitted this 2nd day of December, 2015

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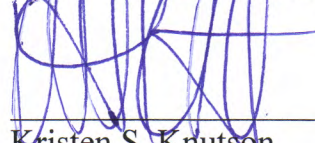
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CERTIFICATION OF FORM AND LENGTH

I hereby 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 1,409 words.

Dated: December 2, 2015

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CERTIFICATION OF COMPLIANCE WITH

WIS. STAT. § 809.19(13)

I hereby that:

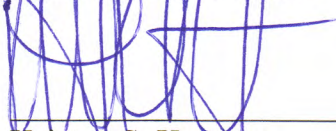
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirement of s. 809.19(13). I further certify that:

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: December 2, 2015

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