

RECEIVED

STATE OF WISCONSIN **02-03-2016**

C O U R T O F A P P E A L S
CLERK OF COURT OF APPEALS
OF WISCONSIN

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15AP2183-CR

v.

Sabrina Marie Hebert,

Brown County Case

No. 14CT1413

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION
AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED
AND ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH 1, THE
HONORABLE DONALD ZUIDMULDER PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

PETIT & DOMMERSHAUSEN, S.C.

By: Jaymes K. Fenton

State Bar No. 1084265

1650 Midway Road

Menasha, WI 54952

Phone: (920) 739-9900

Fax: (920) 739-9909

Attorneys for the
Defendant-Appellant

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED.	2
STATEMENT ON ORAL ARGUMENT AND PUBLICATION . . .	2
STATEMENT OF CASE	3
STATEMENT OF FACTS.	4
STANDARD OF REVIEW.	5
ARGUMENT	6
I. IN LIGHT OF THE VIDEO EVIDENCE, THE TRIAL COURT'S FINDING THAT HEBERT VIOLATED A TRAFFIC LAW IS CLEARLY ERRONEOUS, AND THEREFORE, THE STOP OF HER VEHICLE WAS UNCONSTITUTIONAL	6
CONCLUSION	9

CASES CITED

<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868 (1968) . . .	6
<u>State v. Post</u> , 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634.	6,8
<u>State v. Rutzinski</u> , 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516.	6
<u>State v. Walli</u> , 2011 WI App 86, 334 Wis.2d 402, 799 N.W.2d 898.	5
<u>State v. Williams</u> , 2001 WI 21, 241 Wis.2d 631, 623 N.W.2d 106.	5

STATE OF WISCONSIN
C O U R T O F A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15AP2183-CR

v.

Sabrina Marie Hebert,

Brown County Case

No. 14CT1413

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION
AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED
AND ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH 1, THE
HONORABLE DONALD ZUIDMULDER PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

ISSUES PRESENTED

Did the stop of Hebert's vehicle violate her
Constitutional protections against unreasonable search
and seizure?

The trial court answered this question in the
negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the defendant-
appellant, Sabrina Marie Hebert (hereinafter "Hebert")

anticipates that the briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF THE CASE

On October 9, 2014 a criminal complaint was filed against Hebert, charging her with Operating While Intoxicated- 2nd Offense, and Operating with a Prohibited Alcohol Concentration- 2nd Offense. (R. 1). On January 7, 2015, Hebert filed a motions seeking to suppression evidence obtained as the result of a warrantless and unlawful detention. (R. 18; App. 104). Specifically, the motion alleged that the investigating officer had no basis to conduct a traffic stop of Hebert's vehicle. (Id).

A hearing was held on the motion on February 12, 2015. (R. 50; App. 106). At the hearing, testimony was taken from the investigating officer, Deputy Marc Shield of the Brown County Sheriff's Office, and from the defendant, Sabrina Hebert. (R. 50:3; App. 108).

Following the testimony, the court denied the motion. (R. 50:22; App. 127). As a result, at the same hearing, Hebert entered a plea of guilty to Count 2; Operating with a Prohibited Alcohol Concentration, with Count 1 dismissed by the state. (Id). Hebert was sentenced to 5 days in jail, a \$1528.40 fine plus costs, a 13 month revocation of her driver's license, and a 13 month ignition interlock order. (R. 27; App. 101)

Hebert now appeals.

STATEMENT OF FACTS

At approximately 2:30 am on the morning of July 6, 2015, Hebert was observed to be driving her vehicle in Brown County by Deputy Marc Shield. (R. 50:5; App. 110). Deputy Shield testified that he observed Hebert's vehicle began to touch the centerline. (R. 50:6; App. 111). After this alleged incident, Deputy Shield activated his vehicle's dashboard camera. (Id). Deputy Shield testified that he believed he observed the vehicle partially touch the centerline three times (R. 50:7; App. 112). Deputy Shield did not observe any other traffic violations, nor did he notice any sort of equipment violations. (R. 50:7; App. 112). Shortly

after these alleged violations, Deputy Shield initiated a traffic stop, at which point Hebert promptly and safely pulled her vehicle to the side of the road. (R. 50:10; App. 115).

STANDARD OF REVIEW

Whether reasonable suspicion exists is a question of constitutional fact. State v. Williams, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. A trial court's finding of historical fact will be upheld unless clearly erroneous. Id. Additionally, the determination of reasonable suspicion 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

I. IN LIGHT OF THE VIDEO EVIDENCE, THE TRIAL COURT'S FINDING THAT HEBERT VIOLATED A TRAFFIC LAW IS CLEARLY ERRONEOUS, AND THEREFORE, THE STOP OF HER VEHICLE WAS UNCONSTITUTIONAL.

Pursuant to 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 reasonable suspicion. State v. Rutzinski, 2001 WI 22, ¶¶12-14, 241 Wis. 2d 729, 623 N.W.2d 516. Terry v. Ohio, 392 U.S. 1, 30 88 S.Ct. 1868 (1968).

This standard requires that the stop be based on something more than an unparticularized suspicion or hunch. Terry, 392 U.S. at 27. A constitutional traffic stop must be based on an officer having specific and articulable facts which, taken together with rational inferences, create reasonable suspicion. Id. at 21.

The determination of reasonableness is a common sense test. State v. Post, 2007 WI 60, ¶13, 301 Wis.2d 1, 733 N.W.2d 634. The crucial issue is whether a reasonable officer, based upon his training and experience, would suspect the individual was committing a crime. Id.

Weaving within a single lane, without any additional relevant factors, does not create reasonable suspicion to conduct an investigative stop of a vehicle. Id. ¶38.

Here, Deputy Shield was driving southbound on a four lane road with two lanes in each direction. (R. 50:5; App. 110). Shield was in the right lane, with Hebert in the left. (R.50:6; App. 111; Exhibit 1). During Shield's testimony, a digital video taken from his squad car was introduced into evidence. (R. 24; Exhibit 1). The court was shown the video from the start to the 1:21 time stamp. (R. 50:9-10; App. 114-115).

The video directly contradicts Shield's testimony as it does not conclusively show that Hebert's vehicle crossed the center line. Because Shield was in the right lane, with Hebert in the left, it is difficult to determine with any amount of certainty where her tires actually are at all times. At no point in the video is it clear that Hebert crosses the center line. Further, the video showed no other erratic driving or any other traffic violation. Deputy Shield did not have the

requisite level of suspicion to stop Hebert's vehicle.

The trial court itself could not make a determination that Hebert's vehicle actually crossed or touched the center line. The court, in its ruling, stated that Hebert, "in the court's view, was touching the center line or coming very close to the center line." (R. 50:21; App. 126). The court determined that it appeared that Hebert may have only come close to the center line without actually crossing the line. Instead, the court chose to uphold the stop on the basis that Hebert's vehicle weaved within the lane. (Id). Weaving within a lane cannot form the basis for a legal traffic stop. Post, 2007 WI 60, ¶38. Therefore, the court's determination was clearly erroneous.

CONCLUSION

Because the video shows that Hebert did not violate a traffic law, Deputy Shield did not have probable cause to affect a traffic stop of her vehicle. The court's findings that probable cause existed were clearly erroneous as weaving within a lane cannot form the basis for a stop. Additionally, by the court's own admission, the video was not clear enough to determine

that Shield's testimony that Hebert crossed the center line was credible in light of the video evidence. The trial court erred in denying Hebert's suppression motion. This Court should vacate the judgment of conviction and reverse the trial court's order.

Dated this _____ day of February, 2016.

PETIT & DOMMERSHAUSEN, S.C.
By: Jaymes K. Fenton
Attorneys for the Defendant-Appellant
State Bar No. #
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including

oral or written rulings or decisions showing the circuit 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 or 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 _____ day of February, 2016.

Jaymes K. Fenton

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has nine (9) pages.

Dated this _____ day of February, 2016.

Jaymes K Fenton

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 _____ day of February, 2016.

Jaymes K. Fenton

CERTIFICATION OF MAILING

I hereby certify that: This brief was, on February 3, 2016, delivered to a third-party mail carrier (FedEx) for delivery to the Clerk of Court of Appeals within three calendar days pursuant to Wis. Stat. § 809.80 (3) (b). I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this _____ day of February, 2016.

Jaymes K. Fenton