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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2015AP002440 – CR

v.

CURTIS D. CHRISTIANSON,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION OF THE
CIRCUIT COURT FOR EAU CLAIRE COUNTY, BRANCH 5,
THE HONORABLE PAUL LENZ, PRESIDING

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ISSUES PRESENTED

1. Did the trial court err in denying Defendant's motion to suppress evidence derived from an unlawful stop?
 - a. The trial court answered no, and allowed evidence derived from the traffic stop of the Defendant.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant requests neither oral argument nor publication.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Curtis Christianson was charged with operating a motor vehicle under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), third offenses, contrary to Wis. Stat. §346.63(1)(a) and §346.63(1)(b), respectively.

Mr. Christianson's motion to suppress evidence derived from an unlawful stop and unlawful arrest was heard before the Eau Claire County Circuit Court, the Honorable Paul Lenz presiding. The Circuit Court denied the motion and the matter was thereafter tried to a jury. This is an appeal of the Circuit Court's denial of the motion to suppress.

Curtis Christianson asserts that the holding of the Circuit Court was erroneous. It was unlawful for the police officer to stop Mr. Christianson,

as there was no probable cause that he had disobeyed any traffic regulation, nor reasonable suspicion that he was under the influence of an intoxicant, contrary to Wis. Stat. §346.63(1)(a). Whether there is probable cause for an officer to conduct a traffic stop is a question of constitutional fact. A question of constitutional fact is a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. The court should apply a two-step standard of review to this type of question. *Id.* First, the court reviews the circuit court's findings of fact under the clearly erroneous standard, and second, it reviews de novo the application of those facts to constitutional principles. *Id.*

On October 16, 2014, Curtis Christianson was stopped for allegedly violating Wis. Stat. §346.13, deviating from designated lane. R. 19, p 4-5. Thereafter his detention was expanded to an investigation as to whether Mr. Christianson was operating while under the influence, and he was subsequently arrested for the same. R. 19. On February 10, 2015, Mr. Christianson filed a motion to suppress evidence derived from an unlawful stop and unlawful arrest, R. 5, and on June 1, 2015, a hearing was held on that motion. R. 19.

At the motion hearing, the state called one witness, Officer John Gunderson, of the Eau Claire County Sherriff's Office. The officer testified that he observed Mr. Christianson driving, followed him for approximately two miles, and that he deviated from his lane a number of times. R. 19, p.5. The officer testified that his squad was equipped with a video camera, and that he had the ability to turn that camera on at any point. R. 19, p 18-19. He further testified that in this case he did not take any action to turn the camera on, and thus it came on automatically 30 seconds prior to the activation of his squad lights. R. 19. P. 19. A portion of the officer's squad video was played, and he agreed that the driving he observed was more or less consistent with the driving observed on the video. R. 19 p. 43. The video showed Mr. Christianson moving to the right over the fog line where barrels were impeding the left lane. R. 19, p. 43. The officer testified that Mr. Christianson was traveling below the speed limit, and that traveling below the speed limit in a construction zone with a marked squad car following would be normal driving behavior. R. 19, p. 27. The officer further testified that Mr. Christianson reacted to the officer's squad lights, pulled over in an appropriate, normal fashion, at a safe place. R. 19, p. 29. When questioned as to whether it appeared that

Mr. Christianson was looking for a safe spot to pull over in relation to the construction, the officer testified that he couldn't speculate what the driver would have been thinking. R. 19, p.29. When questioned as to it would be normal for a driver to want to maintain a certain distance from traffic construction barrels, the officer testified that he couldn't speculate what drivers would feel like they need to do. R. 19, p.28.

ARGUMENT

Mr. Christianson was stopped, detained, and arrested without a warrant. Under such circumstances, the State bears the burden of demonstrating that the requisite level of cause was demonstrated at every infringement of the detainee's liberty. See *State v. Cheers*, 102 Wis.2d 367, 306 N.W.2d 676 (1981). If an officer conducts a traffic stop on the suspicion of impaired driving, then the officer must have a reasonable suspicion to believe that the defendant is, in fact, driving while impaired. *State v. Post*, 301 Wis. 2d 1; 733 N.W.2d 634 (2007). If however, the officer conducts a traffic stop based on a specific traffic violation, such as unsafe lane deviation, speeding, etc., then the officer must have probable cause to believe that the specific violation occurred. *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (1999). A determination of probable cause

requires a finding that guilt is more than a mere possibility. *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (1971).

Here, the state failed to establish that the officer had reasonable suspicion that Mr. Christianson was operating while under the influence. The officer testified that he followed Mr. Christianson for two miles, and that the driving during that time was more or less consistent with the driving shown on his squad video. The images on the squad video show a driver who was driving under the speed limit and appropriately responding to traffic conditions such as construction. Thus there was no reasonable suspicion that Mr. Christianson was operating while under the influence of an intoxicant.

The state did not demonstrate that the officer had the probable cause needed to affect a traffic stop for a specific traffic violation. The officer testified that he saw Mr. Christianson deviate from his designated lane. Wis. Stat. §346.13(1) provides that “[t]he operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.” Wis. Stat. §346.13(1). Here, the testimony

establishes that the officer followed Mr. Christianson for two miles. Mr. Christianson was driving below the speed limit. The officer testified that he could have turned his squad camera on at any time, however the only driving that was captured on video shows Mr. Christianson driving in the appropriate lane, and moving over to the right to avoid barrels in the next lane. The officer testified Mr. Christianson's driving behavior was more or less consistent with what was shown on the video. Further, a violation of Wis. Stat. §346.13(1) does not occur unless a driver fails to ascertain that such movement can be made with safety to other vehicles. Here, there is no evidence that any vehicle was actually or possibly affected by Mr. Christianson's lane deviation, and the officer repeatedly testified that he could not speculate as to what any driver might be thinking when taking driving actions, much less what Mr. Christianson specifically was ascertaining. Thus there was no probable cause to stop Mr. Christianson for violation of a specific traffic statute.

CONCLUSION

The defendant-appellant respectfully prays that the matter be reversed and remanded for actions consistent with such reversal. Defendant states that the facts of this case demonstrate that there was no reasonable

suspicion that he was operating while under the influence of an intoxicant,
and no probable cause that he violated a specific traffic statute.

Signed and dated this 24 day of March, 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 1,287 words.

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. Stats. §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 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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this 24 day of March, 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____

BY: Emily Bell

Attorney for the Defendant

State Bar No.: 1065784

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 Wis. Stat. §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.

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Respectfully submitted,
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APPENDIX

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