STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015 AP 2649

CITY OF APPLETON,

Plaintiff-Respondent,

v.

JACOB ANTHONY VANDENBERG,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE AND A JUDGMENT OF CONVICTION, ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The City of Appleton does not request oral argument or publication. This case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the City exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a). Facts additional to those presented in Vandenberg's brief will be set forth where necessary within the argument section.

ARGUMENT

I. BY SIGNING THE PLEA AGREMENET FORM INDICATING THAT HE WAS PLEADING "NO CONTEST", VANDENBERG WAIVED HIS RIGHT TO RAISE ANY CLAIM UNDER THE FOURTH AMENDMENT AND WIS. CONST. ART. I, § 7

The United States Supreme Court has established the principle that a knowing and voluntary guilty plea normally bars the defendant from later challenging alleged constitutional violations that occurred prior to the plea. *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

Wisconsin has adopted an analogous rule finding that a voluntary and intelligent guilty or no-contest plea waives all nonjurisdictional defects and defenses, including alleged constitutional violations. *State v. Oakley*, 2001 WI 103, ¶23, 245 Wis. 2d 447, 629 N.W.2d 200 ; *State v. Bangert,* 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986); *State v. Riekkoff*, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983); *Hawkins v. State*, 26 Wis. 2d 443, 448, 132 N.W.2d 545 (1965); *State v. Damaske*, 212 Wis. 2d 169, 188, 567 N.W.2d 905 (Ct. App. 1997). Courts refer to this as "the

guilty-plea-waiver rule." *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886.

There is a sole statutory exception to the guilty-plea-waiver rule in criminal cases. Wis. Stat. § 971.31(10) allows a defendant in a criminal case to plead guilty or no contest but still preserve the ability to appeal "[a]n order denying a motion to suppress evidence". *Id.* This exception is found to be unique to criminal cases. Indeed, in the *County of Racine v. Smith*, 122 Wis. 2d 431, 436, 362 N.W.2d 439 (Ct. App. 1984), the court of appeals determined that:

> The legislature has not directed that sec. 971.31(10), Stats., which is part of the criminal code, be applied to guilty or no contest pleas in civil forfeitures. It provides no defense against the application of the common law rule that such pleas constitute a waiver of nonjurisdictional defects. The extension of sec. 971.31(10) to civil forfeitures is a matter for the legislature, not this court, to consider.

This case involves a civil forfeiture, and as such, is not a criminal case. Both in statute and case law, it is clear that Vandenberg has waived his right to appeal the findings of the suppression hearing after his plea of no contest.

While an appellate court may, in its discretion, review nonjurisdictional errors, *County of Racine*, 122 Wis. 2d at 434, 362 N.W.2d at 441, there are not any compelling reasons to do so in this case. The defendant knew he was giving up his ability to present the very issue he now raises in this appeal by entering his no contest plea. The stipulation drafted by the defense attorney and signed by the defendant, the defense attorney, and the City-plaintiff acknowledged as such. (Stip. 13:2-3). Indeed, the defendant, though the stipulation, recognized that there were factual disputes and that the Plaintiff-City had the burden of proving its case. (Stip. 13:2). Nevertheless, the Defendant entered into the stipulation where he received a more lenient sentence than the Eighth Judicial Administrative District guidelines would have required if

the court imposed the sentence based upon the defendant's chemical test result. Indeed, the stipulation entered into by all parties allowed the defendant to be sentenced based upon a .149 g/100mL of ethanol, providing for a reduced forfeiture, a reduced period of revocation and waiver of the ignition interlock device requirement. (Stip 13:1-4). There is nothing to suggest that the defendant's plea was anything other than knowing, voluntary, and intelligently made. When Vandenberg waived his right to a trial, Vandenberg rendered moot his ability to present the issues he's now raising on appeal. There is no reason to revisit those issues and disregard the guilty-plea-waiver rule.

Certainly, in deciding whether the guilty plea waiver rule should apply, this court may consider four factors: (1) the administrative efficiencies resulting from the plea (2) whether an adequate record was developed (3) whether the appeal was motivated by the severity of the sentence, and (4) the nature of the issue. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995). The City does not dispute that the signing of the plea agreement saved time and expense, nor does it dispute that an adequate record has been developed. The City, does however, assert that Vandenberg did receive a more lenient sentence in exchange for accepting responsibility and a quick resolution of the OWI. He now appeals the very sentence that he negotiated for.

As such, this court should apply the guilty-plea-waiver rule in this case and promptly dispose of this appeal. The rule is applicable here because the issue before the court, specifically whether there was sufficient reasonable suspicion to initiate a traffic stop, is well-settled. Indeed, the defendant concedes that same. (Def's Br. 8). Seemingly in an effort to distinguish this appeal, Mr. Vandenberg suggests that this court needs to conduct a separate analysis to determine whether Vandenberg, did in fact, violate Wisconsin's hit-and-run statute. (Def's Br. 10-14). This argument misleading. Indeed, the defendant was never cited for a hit-and-run violation. Instead, the only reference to the violation was through the officer's testimony when

he advised that one of the purposes to the traffic stop (in addition to reasonable suspicion of operating a motor vehicle while intoxicated) was to effectively evaluate whether a hit-and- run had occurred (R. 20:18). The trial court similarly referenced the hit and run within the ruling, stating:

> That [Lt. Steinke] had reasonable suspicion that [Vandenberg] was either violating or had violated a traffic law. I think the stop was reasonable under all the circumstances. It was a brief detention that would allow him to further investigate either a potential of driving while intoxicated, or the potential of a hit-and-run.

R. 20:46-47.

Indeed, the testimony at the motion hearing established that through a brief stop, Lt. Steinke was able to determine that Vandenberg's driving behavior did not rise to the level of a violation of the hit and run state statute. The only question before this court is whether sufficient reasonable suspicion was established by Lt. Steinke to initiate a traffic stop. The law is well settled in this area. As such, this court should decline to address Vandenberg's issues he presents in this brief to the court.

For all these reasons, this court should apply the guilty-plea-waiver rule and dismiss the defendant's appeal.

II. THE CIRCUIT COURT PROPERLY DENIED THE MOTION TO SUPPRESS

A. The standard of review.

Upon review of a denial of a motion to suppress, findings of historical fact are upheld unless found to be clearly erroneous. *State v. Sykes*, 2005 WI 48, ¶ 12 (citing *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829). The application of constitutional principles to those facts is reviewed de novo. *Id.*

B. The legal standards applicable to traffic stops.

A traffic stop is reasonable if the officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). An officer may conduct a traffic stop based upon a reasonable suspicion the person is violating a non-criminal traffic law. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143. Indeed *Houghton* further explains:

> [a]s the [United States] Supreme Court has noted, "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief." *Berkemer v. McCarty,* 468 U.S. 420, 437 (1984). When weighed against the public interest in safe roads, we are satisfied that the "temporary and brief" detention of a traffic stop is an "appropriate manner" in which a police officer may "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 U.S. at 22.

Houghton, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143

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

Reasonable suspicion is evaluated in light of the officer's experience and the totality of the circumstances present. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). The reasonable suspicion justification for a stop is a common sense inquiry balancing the interests of society in solving crime with insulating members of that society from unreasonable intrusions. *Id*.

The test for determining the existence of reasonable suspicion is an objective one 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. The standard for an investigatory U. S. Constitutional Fourth Amendment

intrusion is less than for an arrest, though reasonable suspicion cannot be based merely on an inchoate suspicion or hunch. *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305. In determining whether an officer has the requisite reasonable suspicion, a court looks at the facts known to the officer at the time, together with any rational inferences drawn from those facts. But an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. *Id.*

A fair summary of the applicable law is this: reasonable suspicion is subject to an objective inquiry based on the totality of the circumstances. While reasonable suspicion requires less than the probable cause necessary for an arrest, it requires more than an unparticularized suspicion or hunch. An officer is not required to eliminate all possibilities of innocent behavior before initiating a Fourth Amendment intrusion; it is a common sense balancing between the interests of the public in having safe roadways with the reasonableness of the intrusion.

C. Application of Facts to the Law.

As set forth above, the stop of a vehicle is reasonable if the law enforcement officer can point to specific and articulable facts that led the officer, in light of his training and experience, to reasonably suspect that the driver is violating a traffic law.

Under the reasonable suspicion standard, Lt. Steinke had cause to stop Vandenberg's vehicle. The officer testified at the suppression hearing that he has worked at the Appleton Police Department for 28 years (R. 20:6). In that capacity, he has worked as a nighttime supervisor, supervising all of the patrol unit (R. 20:6-7). He also advised that, through experience, he is familiar with a parking lot in the downtown Appleton area located in the 300 block of West Washington Street (R. 20:8). He further testified that, through his experience, he knows that this

particular parking lot is used by people that patronize the bars in the downtown Appleton area (R. 20:8-9). Lt. Steinke also stated that he knows that this particular parking lot as a location where drug activity, other disorderly natures, and drunk driving occurs. (R. 20:9). Through experience, Lt. Steinke also advised that he's familiar with the exit route within the parking lot. (R. 20:10-11, 13-14). Lt. Steinke testified that he knows there to be a metal sign that is fabricated and located right next to a concrete median. (R. 20:10, 16, 25-27). The concrete median is described to be elevated approximately six inches from the ground. (R. 20:10). Lt. Steinke additionally testified that he has observed vehicles safely exit the parking lot without hitting the sign. He also advised that he himself has been able to exit the parking lot without hitting the curb area and the sign. (R. 20:13-14).

Lt. Steinke further advised that he knows 2:30a.m. to be a notable time of day, particularly on weekend nights, as that would be the closing time for the liquor establishments. (R. 20:9). He testified that this is significant in that persons who have been consuming intoxicating beverages are known to be operating motor vehicles at around that same time. (R. 20:9).

Lt. Steinke testified that he began his shift at the Appleton Police Department on Saturday night, February 7, 2015 at 10:00p.m. (R. 20:8). His particular shift assignment was set to conclude at 6:00a.m. on Sunday morning. (R. 20:8). Lt. Steinke testified that during the early morning hours on Sunday – specifically at 2:30a.m., he was working conducting general patrol in the 300 block of West Washington Street within a lighted parking lot located at the same address. (R. 20:8-9, 13).

As he was conducting patrol through the parking lot, Lt. Steinke observed a truck (with Vandenberg later identified as the driver) within the parking lot driving toward the exit-way. (R. 20:10; 13). Lt. Steinke specifically noted that as the truck was attempting to exit the parking lot, the truck's right rear tire clipped the

concrete median– causing the truck to rise up or bump over the median. (R. 20:12, 22, 25-26). Lt. Steinke was initially unable to distinguish whether both the metal sign and concrete median or only the concrete median was struck by the truck. (R. 20:12, 22, 25). Lt. Steinke testified that he was, certain that, at a minimum, Vandenberg hit the concrete median as he exited the lot. (R. 20:25). Lt. Steinke noted that as he began following Vandenberg's truck, he observed that the sign located right next to the concrete median was damaged. (R. 15).

Lt. Steinke testified that by the time he exited the parking lot and caught up to Vandenberg, Vandenberg was at the intersection of Washington and Division Streets. (R. 28). Lt. Steinke testified that he observed Vandenberg initiate a turn, traveling northbound on Division Street. (R. 20:28). Lt. Steinke then initiated the traffic stop within "seconds", prior to Vandenberg traveling a full city block. (R. 28). Lt. Steinke testified that he initiated the traffic stop because, in part, Vandenberg's driving ability was suspect. (R. 20:13, 18, 26). Undeniably, Vandenberg was unable to safely exit the parking lot without striking and traveling up onto the curb. The explanation for this driving behavior could simple – and attributed to inattentive or careless driving. In the alternative, and more dangerous: the driver could be impaired. Lt. Steinke was also concerned that Vandenberg had damaged property of another. (R. 20:26). Based upon the totality of the circumstances, Lt. Steinke advised that was concerned that there may be a hit-and-run traffic violation as well an intoxicated driver endangering the public safety (R. 20:27).

It made perfect sense for Lt. Steinke to make a brief investigative stop to conduct an inquiry based upon the totality of the circumstances present. Certainly it was prudent for Lt. Steinke to examine whether Vandenberg had struck the sign, and subsequently determine what, if any, damage occurred as a direct result of Vandenberg's driving. Indeed, once Lt. Steinke was able to make contact with Vandenberg, he noted that there was damage to Vandenberg's truck and it was consistent with the location

of the damage and the height of the sign. (R. 20:16-17). Delaying the contact with Vandenberg certainly could have resulted in evidence being tampered with and/ or destroyed. Certainly, Vandenberg could have made the necessary repairs to his truck and subsequently denied contact with the sign. In the alternative, if Lt. Steinke had delayed contact with Vandenberg, the sign owner could have claimed that Vandenberg caused all of the damage to the sign. Both of these hypotheticals are quickly dispelled due to the quick and reasonable thinking of Lt. Steinke. Vandenberg was mobile – the sign was not. It made logical sense to make contact with Vandenberg first to effectively investigate whether Lt. Steinke just observed a hit and run violation.

Moreover, the driving behavior of Vandenberg was not the only specific, articulable fact in the case. It is certainly notable that Vandenberg was driving at approximately 2:30 a.m. on a weekend. (R. 9-10). Additionally, the location of the driving is significant. Indeed, Vandenberg was observed in a parking lot within the downtown area commonly utilized by bar patrons and drunk drivers as well as criminals engaged in drug activity and other disorderly actions. (R. 20:9).

Vandenberg argues that Lt. Steinke did not have reasonable suspicion to initiate a traffic stop because Lt. Steinke had not yet thoroughly developed a firm case that Vandenberg had committed a hit-and-run. (Def's Br. 10-14). This argument seems to suggest that Lt. Steinke needed to thoroughly first conduct an investigation into the damage entirely independent from Vandenberg and then evaluate whether there was sufficient probable cause for a violation. As set forth above, probable cause to arrest is not the standard. Similarly, Vandenberg also suggests that Lt. Steinke should have conducted an investigation using techniques other than conducting a *Terry* stop. Vandenberg's suggestion regarding effective investigation techniques is not consistent with what is required of police officers. Indeed, courts have held that lack of probable cause to arrest:

> ". . . does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. [Citation omitted]. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officers at the time."
>
> *Adams v. Williams*, 407 U.S. 143, 145-46 (1972).

Indeed, while the case law above references criminal investigations, the proposition is the same in civil cases involving forfeitures, such as the present case. Here, Lt. Steinke is not required to observe Vandenberg leave a parking lot known for drug and drunk patrons at 2:30a.m. on the weekend, strike a curb, also strike a sign, and look the other way. He is allowed to conduct a brief *Terry* stop to gather more information. The intrusion was minimal and is certainly outweighed by the public's interest in safe streets. Here, briefly stopping the driver, Vandenberg, to assess whether there was any damage to his vehicle indicative of causing the damage to the sign, as well as assess his ability to safely control a motor vehicle, was reasonable in light of the circumstances.

As set forth earlier, reasonable suspicion is best summarized as more than a hunch but less than probable cause. That fits within the facts of this case. Lt. Steinke did not testify that he had developed probable cause for a hit and run violation by Vandenberg. It is clear from the testimony that there was more than a hunch by Lt. Steinke that a hit-and-run may have occurred and the driver may be under the influence of an intoxicant. Lieutenant Steinke's initial suspicions proved to be true. Indeed, there is no dispute that Vandenberg was operating a motor vehicle and subsequent the chemical test result revealed a blood alcohol concentration above the double the legal limit. (Def's Br.

7). The suspicions of Lt. Steinke were reasonable under the circumstances.

The City submits that the trial court correctly found that Lt. Steinke's stop of Vandenberg's vehicle was justified by reasonable suspicion.

CONCLUSION

This court should apply the guilty-plea-waiver rule and dispose of this appeal.

In the alternative, for all of the reasons stated above, the City asks that this court affirm the judgment of conviction and order denying suppression.

Dated this ____ day of May, 2016.

Respectfully submitted,

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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 and appendix produced with a proportional serif font. The length of this brief is 3314 words.

_____

Amanda K. Jadin
Assistant City Attorney

CERTIFICATION OF ELECTRONIC BRIEF

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. § (Rule) 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 May, 2016.

_____

Amanda K. Jadin
Assistant City Attorney