STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CITY OF EAU CLAIRE,
Plaintiff-Appellant,

v.

Appeal No. 16AP248

DAVID EUGENE PHELPS,
Defendant-Respondent,

REPLY BRIEF OF PLAINTIFF-APPELLANT CITY OF EAU CLAIRE

ON APPEAL FROM THE EAU CLAIRE CIRCUIT COURT
CASE NOs. 2015TR7555; 2015TR8099
THE HONORABLE WILLIAM M. GABLER, SR. PRESIDING

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INTRODUCTION

Officer McClain had sufficient articulable facts to stop Phelps. The material facts in this case are not disputed. Phelps' brief provided little legal authority to support his arguments, and included numerous factual inaccuracies. This brief will address some of the factual inaccuracies contained in Phelps' brief, will highlight concessions made by Phelps which limit the scope of this Court's inquiry, and respond to arguments raised by Phelps.

STANDARD OF REVIEW

The application of constitutional principles to undisputed facts is a question of law that is reviewed de novo without deference to the circuit court's decision. *State v. VanLaarhoven*, 2001 WI App 275, ¶ 5, 248 Wis. 2d 881, 885, 637 N.W.2d 411, 414; *State v. Foust*, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905, 907 (Ct. App. 1997). This case does not involve any disputed material facts, and thus the standard of review is de novo.

ARGUMENT

I. Officer McClain had reasonable suspicion to stop Phelps.

Officer McClain had reasonable suspicion to stop Phelps. Officer McClain observed Phelps travel approximately 12 m.p.h. in a 35 m.p.h. and then 30 m.p.h. zone at 2:30 a.m. on a Sunday morning. Officer McClain testified that Phelps impeded him. Officer McClain observed Phelps execute an illegal turn at an intersection Officer McClain described as "level, flat" and "free and clear of any debris." Phelps conceded he had his turn signal on for "a long period of time going over the bridge." This is a sufficient basis for initiating a traffic stop, and Officer McClain's actions constitute precisely the type of vigilant and legally appropriate police work that should be applauded instead of punished.

Phelps' response brief contains factual inaccuracies, important concessions which limit the scope of inquiry, and meritless arguments which lack legal support.

II. Phelps' brief contains factual inaccuracies.

Phelps' brief contains a number of factual inaccuracies which the City will endeavor to address as concisely as possible. First,

Phelps claims his testimony regarding the road conditions consisting of potholes and broken glass was unrefuted. (Def. Brief, P. 2) This is inaccurate. Officer McClain testified the intersection where the turn was made was "level, flat" and also was "free and clear of any debris." (R. 11: 5) Additionally, Officer McClain testified that he noticed nothing unusual about the road conditions. (R. 11: 6). Consequently, the characterization that this issue is "unrefuted" is incorrect.

Second, Phelps states that it is likely the relevant posted speed limit was 25 miles per hour. (Def. Brief, P. 1). Facts in the record directly contradict this assertion. Officer McClain stated that the speed limit where Phelps was operating was 35 miles per hour at one point and 30 miles per hour at another. (R. 11: 5-6). Phelps did not dispute these facts at the circuit court. Additionally, the circuit court made findings of fact that the speed limit was 30 miles per hour. (R. 11: 24) It is difficult to understand why Phelps believes Wis. Stat. § 346.57(4)(e), which expressly permits cities to post speed limits above 25 m.p.h. by using official traffic signs, makes it "likely" the undisputed facts in the record are erroneous.

Third, Phelps states that the City of Eau Claire "takes certain liberties with the facts of this case" by describing the Lake Street bridge as "lengthy" when "the record is silent as to its length." (Def. Brief, P. 3 fn. 2) Phelps himself conceded during the motion hearing that his turn signal was on for a "long period of time going over the bridge." (R. 11: 18) Concluding that "lengthy" and "long" are synonymous is reasonable, and thus the City's description of the bridge is supported by the record in this case.

Fourth, Phelps' Statement of Facts alleges that his vehicle "never impeded traffic." (Def. Brief, P. 3) To the extent this statement constitutes a factual assertion rather than a legal conclusion - to which the parties disagree - this statement is inaccurate. Officer McClain testified that Phelps impeded his squad car – a fact that the circuit court appeared to include in its findings of fact despite determining that the fact did not impact the legal analysis. (R. 11: 8-9, 25) ("There was no impeding of any cars, *other than the law enforcement officer's)* (emphasis added).

Fifth, Phelps asserts that the City made a "material factual assertion that is patently incorrect" when it argued that Phelps

passed an opportunity to turn with his turn signal on. Officer McClain testified that Phelps had his turn signal on for a block to a block and a half prior to turning. (R. 11: 5) It is reasonable to infer that "a block to a block and a half" includes, at a minimum, one cross street.[1] Consequently it is reasonable to infer – and not "patently incorrect" – that Phelps passed an opportunity to turn with his signal on.

Finally, Phelps asserts that the "circuit court took judicial notice of the fact that there has been a longstanding policy in the Eau Claire area not to conduct traffic stops for an arguably improper turn of the precise kind attributed to Phelps." (Def. Brief 15) (emphasis added). This is incorrect. The circuit court concluded that it was the policy of local law enforcement "not to issue tickets" for improper turns. (Def. Brief 15; R. 11: 25) (emphasis added).

[1] "City Block" is generally defined as "a rectangular area in a city *surrounded by streets* and usually containing several buildings." The Free Dictionary (June 28, 2016, 10:59 AM), http://www.thefreedictionary.com/city+block (emphasis added). Traveling greater than one city block thus implies the existence of a cross street.

III. Phelps does not contest many facts and arguments.

In addition to facts that were not disputed at the circuit court level, Phelps did not dispute many facts and arguments in his response brief. This is helpful in narrowing the scope of the Court's inquiry. On appeal, if a respondent does not refute an argument, it may be taken "as confessed." *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Phelps concedes he drove his vehicle approximately 12 m.p.h. on the morning in question. (R. 11: 17) Phelps concedes he turned into the far left lane while making a right hand turn. (R. 11: 18) And Phelps concedes he left his turn signal on for a long time while crossing the Lake Street bridge. (R. 11: 18) Additionally, Phelps does not dispute a number of arguments raised in the City's initial appellate brief.

First, Phelps does not argue that the time of day and day of the week are relevant considerations in the reasonable suspicion analysis – particularly in the drunk driving context.[2] Second, Phelps

[2] Phelps alleges that the City of Eau Claire did not establish a factual basis for bar closing time in Eau Claire. (Def. Brief, P. 8) 2:30 a.m. on a Sunday morning is

does not dispute that a technical statutory violation can provide a legal basis for a traffic stop. Third, Phelps concedes that officers are not required to rule out innocent explanations before initiating a traffic stop. Fourth, Phelps does not dispute that an investigatory stop is reasonable if any reasonable inference of wrongful conduct can be objectively discerned. All of these concessions support the City's arguments raised in its initial brief.

Phelps' factual inaccuracies and concessions are not the only relevant items contained in his response brief. Phelps' brief also contains meritless arguments that lack legal support.

IV. Phelps' arguments are meritless and lack legal support.

Phelps' arguments are meritless and lack legal support. Phelps' response brief appears to include the following arguments: 1) Driving extremely slow (12 m.ph. in a 30 and 35 m.p.h. zone) cannot be considered a factor in effectuating a traffic stop even at 2:30 a.m. on a Sunday morning because it strains the 4th Amendment; 2) Facts unknown to a police officer – namely the

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unquestionably a day and time with an increased number of drunk drivers on the road, and thus this is a relevant factor for the court to consider.

alleged justifications for illegal or suspicious driving – preclude traffic stops; 3) There was no unusual driving, only an abundance of caution; 4) It is permissible to impede police squad cars as squad cars do not constitute traffic; 5) Police officers are not allowed to effectuate a traffic stop when observing a traffic violation if the police department has a policy of not issuing citations for that traffic violation; and 6) the City's exclusionary rule arguments are waived.[3]

The City will address these arguments one at a time. First, as demonstrated in the City's initial brief to this Court, case law has repeatedly concluded that slow speed is a relevant factor in creating a reasonable suspicion to effectuate a traffic stop – especially in the early morning hours on weekends. It is undisputed that Phelps was traveling approximately 12 m.p.h. in a 30 m.p.h. and 35 m.ph. zone around 2:30 a.m. on a Sunday morning. Officer McClain testified that Phelps' extremely slow speed impeded his squad car. These are relevant facts for a court to consider in determining whether a police

[3] Phelps also states the circuit court decision to dismiss the entire case may have been error. The City is aware that courts sometimes dismiss (civil) OWI 1st offense citations if suppression is dispositive because it is questionable whether Wis. Stat. § 974.05 provides the prosecution with an opportunity to immediately appeal.

officer had a reasonable suspicion to stop Phelps. Contrary to Phelps' assertion, a reasonable suspicion framework that permits police officers to stop motorists at both unreasonably high and unreasonably low speeds does not strain the 4th amendment.

Second, Phelps' alleged justifications for his illegal and suspicious driving are only relevant to the totality of the circumstances if known to the officer prior to the traffic stop. Officer McClain testified that the intersection was "level, flat" and "free and clear of any debris." No evidence was offered, other than the disagreement of the defendant, which contradicted Officer McClain's perceptions. No photos of the road or intersection were offered. No evidence corroborated Phelps' testimony. Even assuming, for the sake of argument, that Officer McClain was simply mistaken about the condition of the roadway, no evidence was offered demonstrating that Officer McClain's perception was sufficiently unreasonable that Officer McClain could not have reasonably suspected Phelps' turn was illegal.

Third, contrary to Phelps' assertion, there was unusual driving. Phelps' speed was remarkably slower than the speed limit

at 2:30 a.m. on a Sunday morning. Officer McClain testified that Phelps impeded his vehicle, and no facts contradict his testimony. Phelps executed an illegal turn. And Phelps conceded he left his turn signal on for a "long period of time going over the bridge." (R. 11: 18)

Fourth, Phelps provides no authority to support his argument that police cars do not constitute "traffic" for the purposes of Wis. Stat. § 346.59. In fact, Phelps' interpretation is not consistent with the plain language of the statutes. Wis. Stat. § 340.01(68) defines "traffic" as "pedestrians, ridden or herded or driven animals, vehicles and other conveyances, either *singly* or together, while using any highway for the purpose of travel." (emphasis added). Wis. Stat. § 346.01 states that the words and phrases defined in § 340.01 are used in the same sense in this chapter unless a different definition is specifically provided. A police squad car is indisputably a "vehicle" and thus constitutes traffic under Wis. Stat. § 346.59 because even a single vehicle constitutes "traffic" under the Wisconsin statutes.

The cases cited by the defendant do not support the defendant's arguments on this point. *State v. Baudhuin*, 141 Wis. 2d 642, 416 N.W.2d 60 (1987) does not state that a minimum number of vehicles is necessary to violate § 346.59, and the clear language of Wis. Stat. § 340.01(68) demonstrates a single vehicle constitutes "traffic" for the purposes of § 346.59. *Baudhuin* concluded that a police officer's subjective intent not to issue a citation did not impact the reasonable suspicion analysis where articulable facts to believe a defendant violated a traffic law were present – a conclusion that cuts against the defendant's argument that a police department policy not to issue citations for a particular traffic violation impacts the reasonable suspicion analysis.

Additionally, *Slattery v. Lofy,* 45 Wis. 2d 155, 172 N.W.2d 341 (1969) does not state, as Phelps alleges, that "no violation of section 346.59 where motorist could have simply passed vehicle without danger or incident." *Lofy* involved a civil suit where the court determined that a motorist traveling 15 to 18 miles per hour when he was struck from the rear was not the cause of the accident where motorist was entering area where reduced speed was required

and passing lane was free of traffic. Phelps provides little argument as to why *Baudhuin* or *Lofy* require a different interpretation of Wis. Stat. § 346.59 than an interpretation that follows the clear language of §§ 340.01 and 346.01.

Fifth, Phelps provides no legal authority to support the contention that a police department policy – assuming for the sake of argument such a policy exists – not to issue a citation for a particular traffic violation precludes a police officer from initiating traffic stops for such a violation. The record does not include any evidence that Officer McClain issued a citation, and thus there is no evidence in the record that the alleged policy was violated.

Baudhuin makes clear that an intent not to issue a citation does not implicate the reasonable suspicion analysis and Phelps provides no meaningful legal authority to support his argument to the contrary. Police department policy is not binding legal authority that supersedes state law. Moreover, Phelps fails to address the City's argument that a policy not to cite does not preclude officers from initiating traffic stops and issuing warnings.

Sixth, the Court may consider the City's exclusionary rule argument despite the fact it was not specifically addressed at the trial court. The waiver rule is a rule of judicial administration, and as such, a reviewing court has the inherent authority to disregard a waiver and address the merits of an unpreserved issue in exceptional cases. *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 17, 273 Wis. 2d 76, 90, 681 N.W.2d 190, 197. This case provides such an unusual circumstance. It was only after all evidence and arguments were received that the circuit court, while announcing its decision, stated that it was relying on an alleged police department policy not to issue improper turn citations in reaching its decision. This concept was not briefed, not argued, and not brought up until the circuit court announced its decision. Both parties have addressed this issue in their briefs to this court and it is reasonable, considering the unusual nature of this case, for the Court to address this argument if necessary.

CONCLUSION

For all the foregoing reasons the court should reverse the decision of the circuit court.

Dated this __ day of June, 2016.

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,485 words.

Dated this 29th day of June, 2016.

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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 mailed on June 29th, 2016.

A copy of this certificate is being filed with the court and served on all opposing parties as of this date.

Dated this 29th day of June, 2016.

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CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 29th, 2016.

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