

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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**No. 2016AP385-CR**

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**STATE OF WISCONSIN,**

Plaintiff- Respondent,

v.

**JEFFREY JACOB UDELHOFEN,**

Defendant- Appellant

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**ON APPEAL FROM AN ORDER OF THE CIRCUIT  
COURT OF GRANT COUNTY, THE HONORABLE  
CRAIG R. DAY PRESIDING, DENYING A MOTION  
TO SUPPRESS EVIDENCE DUE TO LACK OF  
REASONABLE SUSPICION OR PROBABLE CAUSE  
TO CONDUCT TRAFFIC STOP**

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**BRIEF AND APPENDIX OF DEFENDANT-  
APPELLANT**

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## **ISSUE PRESENTED**

Whether the State met its burden of proof establishing either reasonable suspicion or probable cause to stop Mr. Udelhofen's vehicle?

The circuit court answered: Yes.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal. Because the appeal is before a single judge, publication is not available.

## **STATEMENT OF THE CASE**

Udelhofen appeals from the circuit court ruling denying his motion to suppress evidence found after stopping his vehicle for operating left of center.

## **STATEMENT OF FACTS**

On October 17, 2014, at approximately 9:52 p.m., Town of Potosi Police Officer Mark Schwartz was near the intersection of British Hollow and Stage Road when he observed Mr. Udelhofen's vehicle paused on Stage Road. (Trans. 2:7-16). He started following it. (Trans. 3:3-5). While doing so, he allegedly observed the vehicle operating left of center, which Officer Schwartz relied upon as a basis to conduct a traffic stop. (Trans. 9:13-22). However, Officer Schwartz could not identify the statute he believed Mr. Udelhofen's driving violated. (Trans. 6:1-12).

Officer Schwartz testified that Stage Road is a "back road" with no painted lines whatsoever, (trans. 12:19-25). It is narrower than a county highway and has merely a "small" gravel shoulder. (Trans. 13:1-7). Officer Schwartz also testified that had Stage Road been marked with a centerline, Mr. Udelhofen's vehicle "would have been at least half... in the oncoming traffic lane." (Trans. 4:2-4). The State did not offer evidence as to the road's actual width at any point where

Mr. Udelhofen allegedly violated a law. Nor did the State offer evidence as to what law Mr. Udelhofen violated.

The defense offered a video recording “representative of Mr. Udelhofen’s driving,” which the circuit court admitted into evidence. (Trans. 11:12-14; 12:11-12). After watching the video, the parties presented arguments. The defense argued that the stop was invalid. In doing so, the defense highlighted that, based on the video, the road appeared to be a narrow, windy, hilly, country road without any markings whatsoever, and given its configuration and lack of markings, Mr. Udelhofen appeared to drive in a normal fashion thereon. (Trans. 14: 7-16). The State countered that the traffic stop was valid because Officer Schwartz saw Mr. Udelhofen violate Wis. Stat. § 346.05 by not driving solely on the right side of the roadway. (Trans. 16:2-3). The State compared this case to State v. Popke, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569, and argued that the cases are very similar such that if reasonable suspicion and probable cause were found in Popke, it should be found here. (Trans. 17:1-24). The defense countered that the law violation observed in Popke was much clearer because the centerline was indicated. (Trans. 18:2-7). Further, the defense argued that the State failed to meet its burden of proof regarding whether Mr. Udelhofen’s driving violated Wis. Stat. § 346.05(1), because no evidence indicating the actual width of Stage Road was presented. (Trans. 18:20-23). To meet its burden, the State would need to “establish that this roadway was sufficient to accommodate Mr. Udelhofen’s entire vehicle to the right of the crown of the road, in essence.” (Trans. 18:24-19:3).

The circuit court apparently relied mostly on the squad video in issuing its ruling. It found that the video depicted Stage Road as a curvy “back road” “where it is possible for two cars to meet each other and traverse simultaneously in the opposite directions on the asphalt pavement.” (Trans. 20:3-6). As such, the circuit court ruled the roadway was “of sufficient width that the operator can drive on the right half of the roadway.” (Trans. 20:6-8). The circuit court further held that Mr. Udelhofen deviated from the right hand side of the road several times. The circuit court found three deviations unimportant to its analysis for various reasons; one was deemed “inconsequential;” one occurred while the vehicle

was following a leftward curve in the road; and one was “noticeable” but because it happened while Mr. Udelhofen’s vehicle was “coming out of a curve on an unmarked road, did not raise any concern. (Trans. 20:14-23).

The circuit court determined, however, that three “deviations” were significant enough to form a sufficient basis for the stop. (Trans. 20:9-10). The first two occurred near the sixteen and twenty-four second marks on the video. (Trans. 20:24-25). At those moments, the court found the vehicle “not being operated wholly on the right half of the road.” (Trans. 20:25-21:1). The third occurred near the video’s thirty-second mark where the court determined that Mr. Udelhofen’s vehicle was traveling down the middle of the road. (Trans. 21:7-12).

Relying on State v. Popke, 2009 WI 37, the circuit court denied Mr. Udelhofen’s suppression motion finding that Officer Schwartz had probable cause to believe Mr. Udelhofen committed a traffic violation and “reasonable suspicion to check it out, “to see whether it is just someone enjoying a leisurely drive down Stage Road and not paying any attention because they don’t particularly need to; or whether it is someone who has impairments that necessitate law enforcement intervention.” (Trans. 21: 14-23).

## **ARGUMENT**

### **I. The Circuit Court’s Ruling Should Be Reversed Because The Arresting Officer Lacked Reasonable Suspicion Or Probable Cause To Stop Mr. Udelhofen’s Vehicle.**

#### **A. Standard of Review**

Whether an officer has reasonable suspicion or probable cause to stop a vehicle is a question of constitutional fact. State v. Popke, 2009 WI 37, ¶ 10, 317 Wis. 2d 118, 765 N.W.2d 569. “A finding of constitutional fact consists of the circuit court’s findings of historical fact, which [this Court] review[s] under the ‘clearly erroneous’ standard,’ and the application of these historical facts to constitutional principles, which [this Court] review[s] de novo.” Id.

**B. The State Failed to Meet Its Burden That Officer Schwartz Had Reasonable Suspicion Or Probable Cause To Believe Mr. Udelhofen Violated a Traffic Law.**

The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution establish the right of persons to be secure from unreasonable searches and seizures. *United States Constitution, amend. IV, Wis. Const. art. 1, sec. 11*. “Traffic stops are considered seizures and thus must be reasonable to pass constitutional muster.” *State v. Brown*, 2014 WI 69, ¶19, 355 Wis. 2d 668, 850 N.W.2d 66. A lawful traffic stop may be based on probable cause or reasonable suspicion. “Probable cause exists when the officer has reasonable grounds to believe that the person is committing or has committed a crime.” *Popke*, at ¶ 14. “Probable cause requires that the information lead a reasonable officer to believe that guilt is more than a possibility.” *Id.*

“The burden is on the State to prove that a stop meets the constitutional reasonableness requirement.” *Id.* In doing so, the State must establish “specific and articulable facts” from which reasonable inferences may be drawn that the person was engaged in illegal activity. See *State v. Wheaton*, 2012 WI App. 132, ¶ 21, 345 Wis. 2d 61, 823 N.W.2d 839.

The State argued that Officer Schwartz had probable cause to believe Mr. Udelhofen violated Wis. Stat. § 346.05(1), which provides, “[u]pon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway....” Logically, for the State to have met its burden of proof that a violation likely occurred, it was required to present evidence of the statute Mr. Udelhofen allegedly violated, and evidence that Stage Road is sufficiently wide to accommodate two cars passing simultaneously throughout the duration of Mr. Udelhofen’s observed driving. The State did not meet this burden because the State merely offered evidence that Mr. Udelhofen’s vehicle “would have been at least half ... in the oncoming lane” at some point while driving on Stage Road and that, according to Officer Schwartz, Stage Road is a “two lane

road” absent any markings thereon. (Trans. 3:19-4:6). The State did not present any evidence as to the road’s actual width or what statute Mr. Udelhofen allegedly violated. Only during the State’s closing argument did it assert that Mr. Udelhofen violated Wis. Stat. 346.05(1). In light of the State’s omissions, the State has not established that Mr. Udelhofen more likely than not violated Wis. Stat. § 346.05(1). The State therefore has not established that Officer Schwartz had probable cause to stop Mr. Udelhofen.

A traffic stop absent probable cause will only pass constitutional scrutiny if it is based upon reasonable suspicion. Reasonable suspicion exists if, under the totality of the circumstances, “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.” Brown, at ¶ 20. “The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” Popke, at ¶ 23.

The State argued that Mr. Udelhofen’s driving gave rise to a reasonable suspicion to conduct a traffic stop by analogy to State v. Popke, supra, wherein Popke was seen swerving between right and left extremes on a residential roadway nearly striking a curb and median, and crossing a tar-strip centerline with about  $\frac{3}{4}$  of the vehicle. Id., at ¶ 4. These observations were made at approximately 1:30 a.m. over the course of one city block. Id., at ¶¶ 3-5. In light of these observations, the Wisconsin Supreme Court found that the arresting officer in Popke possessed a reasonable suspicion to believe Popke was violating at least one traffic law. Id., at ¶ 2.

Critical evaluation of the evidence presented here suggests a different result. Popke was seen noticeably weaving within his lane, crossing a marked centerline near bar close time. See Popke, ¶¶ 3-6. While doing so, he nearly struck a median and curb. Id. By contrast, Mr. Udelhofen was seen driving along a narrow country road around 10:00 p.m. (Trans. 2:9-11; 13:1-7). Stage Road lacked any meaningful shoulder or painted fog line, and its center was not established



by any markings or paint. (Trans. 12:19-25). Unlike Mr. Popke's nearly striking a curb and median, Mr. Udelhofen's vehicle remained thoroughly on the narrow roadway as he maneuvered the road's curves and hills. Significantly, Officer Schwartz followed Mr. Udelhofen approximately .65 miles before executing the stop whereas Popke's lane deviations were observed over the short stretch of one city block. Popke, at ¶ 5. Officer Schwartz's observations did not give rise to a reasonable suspicion that Mr. Udelhofen was committing a crime or traffic violation. At best, his observations created a hunch but a hunch is not a viable constitutional basis to conduct a traffic stop. See State v. Anagnos, 2012 WI 64, ¶ 48, 341 Wis. 2d 576, 815 N.W.2d 675, ("In evaluating whether an investigatory traffic stop is supported by reasonable suspicion, the officer must have more than an 'inchoate and unparticularized suspicion or hunch.'").

## **CONCLUSION**

The State failed to meet its burden of proof that Officer Schwartz possessed probable cause or reasonable suspicion to believe that Mr. Udelhofen had, was, or was about to commit a crime or traffic violation. The primary evidence relied upon by the circuit court in its ruling, the squad video, depicts Mr. Udelhofen's driving as normal given the road's condition. Accordingly, this Court should reverse the circuit court's ruling and find that the traffic stop was neither based on probable cause or reasonable suspicion.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2016

Respectfully Submitted,

**MELOWSKI & ASSOCIATES, LLC**

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,913 words.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

Melowski & Associates, LLC

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### **CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

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.

I further certify that a copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

Melowski & Associates, LLC

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**CERTIFICATE OF COMPLIANCE  
WITH WIS. STAT. § (RULE) 809.19(2)(b)**

I hereby certify that this brief conforms to the requirements of Rule 809.19(2)(b).

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 reproduced to preserve confidentiality and with appropriate references to the record.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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**STATE OF WISCONSIN**  
**COURT OF APPEALS**  
**DISTRICT IV**

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**APPENDIX**

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## **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, 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.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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