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OF WISCONSIN**

COURT OF APPEALS
District III
Appeal No.: 2016AP001427 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRENCE L. PERKINS,

Defendant-Appellant.

**DEFENDANT-APPELLANT'S
REPLY BRIEF**

On Appeal From Decisions Entered
on March 12, 2015, and September 3, 2015, in the Marathon
County Circuit Court, the Honorable Michael K. Moran,
Presiding,
Case No. 2014 CM 1589

Respectfully Submitted,

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ARGUMENT

I. INTRODUCTION

The State in its brief makes four arguments in support of its position in this appeal. First, that the fact that the video was not introduced at the original motion hearing and that the court and defense counsel were improperly led to believe that the video was no longer playable “does not matter”. Second, that the court’s skepticism expressed at the original motion hearing about the plausibility of Officer Stetzer’s testimony regarding the reasons the video did not confirm any of his observations should be ignored by this court. Third, that the trial court did not find that Officer Stetzer lied when he testified five times that he observed the defendant’s vehicle travel without stopping into the “middle of the intersection”, rather the court just registered some “confusion as to what Stetzer actually meant”. Lastly, the State argues that Judge Moran’s decision was properly based on Officer Stetzer’s testimony and the squad video that “bolstered” Officer Stetzer’s testimony.

The record reveals that Judge Moran based his decision on the testimony of Officer Stetzer whose credibility he clearly questioned after finding that the most critical part of his testimony was unsupported by the evidence and not credible. The Court’s decision was based on clearly erroneous findings of fact that are contradicted by the video evidence. The court failed to hold the State to its burden to establish that

the stop of the defendant's vehicle satisfied Fourth Amendment's guarantees against unreasonable seizures and detentions.

II. THE CIRCUMSTANCES SURROUNDING THE VIDEO EVIDENCE DO MATTER AND THE COURT DID FIND OFFICER STETZER LIED

The State argues in their brief that the credibility issues surrounding Officer Stetzer's testimony and the failure to produce the video evidence at the initial motion hearing are of no consequence and should be ignored by this court. The State argues in their brief that "it does not matter if the video was originally damaged and resupplied by the State, fixed or never actually damaged" (Plaintiff-Respondent's Brief:6). The State argues that Judge Moran did not find that Officer Stetzer lied, rather the court registered "some level of confusion" as to Officer Stetzer's testimony. (Plaintiff-Respondent's Brief:7).

The defendant here does not mean to suggest that counsel for the State did anything improper by not playing a video he must have been told by Officer Stetzer no longer was playable at the original motion hearing. Officer Stetzer's failure to advise the State that the video could have been available was especially troubling after the court made it clear that the absence of the video forced him to rely on the officer's testimony alone – testimony after viewing the video Judge Moran found to be incredible. In any event, it is simply unreasonable for the State to argue here that the absence of the

video did not matter. The failure to produce the video at the original motion hearing obviously mattered to Judge Moran when he stated in his decision after hearing Officer Stetzer's testimony:

It's not clear to me if Mr. Perkins pulled out and went – proceeded westbound on Sherman or not, but that's what I have. I have the testimony of the officer. I have not seen the video.

Then the court went on to state:

We are looking at 30 seconds of time. Admittedly, that's a long period of time. But I have to look at the evidence in front of me. I don't have any evidence in front of me that necessarily refutes what the officer's testimony is.

(R:22:13,14)(App:1:13,14). Counsel for the defendant at one point reminded the court:

The testimony that I heard was not only did my client allegedly blow a stop sign, but he proceeded into the middle of the intersection, and from that position, backed up.

(R:22:14)(App:1:14). The court responded:

It's possible that could have happened, although the timing seems awfully odd. But I have not heard anything otherwise. Based on that, I have to deny the motion to suppress. That's the order of the court.

(R:22:15)(App:1:15). After viewing the video supplied to him by the defendant's new counsel, Judge Moran concluded it was no longer "possible" that the defendant had driven into the middle of the intersection as Officer Stetzer had testified to five times at the original motion hearing (R:22:4,7,8,9)(App:1:4,7,8,9). The court specifically stated that Officer Stetzer's credibility was being questioned, not that his testimony was confusing:

If you are a little into it or a lot into it, it makes a difference. It may make a difference as far as credibility.

I find it hard to believe Mr. Perkins was in the middle of the street. I don't think that happened. I think that's clear.

(R:58:5-6)(App:2:5-6).

It is abundantly clear that at the motion hearing Judge Moran was troubled by the absence of the video and advised the parties numerous times that he was forced to rule based solely on Officer Stetzer's testimony given the absence of other evidence. After viewing the video Judge Moran reversed himself on that critical evidentiary finding of fact. The State's argument here that the absence of the video "does not matter" even if it was "never actually damaged" – meaning the court was purposefully misled – violates every element of fairness at the core of our system of justice. It speaks volumes as to the quality and character of the evidence introduced by the State to meet its burden to establish that Mr. Perkins' Fourth Amendment rights were not violated. One can only assume that Judge Moran would have ruled differently had he been advised the video was "never actually damaged" and that the Court and the defense had been misled by Officer Stetzer.

The State's argument that the court did not find Officer Stetzer's testimony was untruthful is simply wrong. Judge Moran did find after seeing the video that what Officer Stetzer testified to five times did not happen. This fact is all the more troubling when the court was misadvised at the original motion hearing that the video was unplayable and Judge

Moran was forced to decide the case at that time without the video evidence because there was “nothing that refute[d]” Officer Stetzer’s testimony. (R:22:14)(App:1:14).

III. THE COURT’S DID NOT HOLD THE STATE TO ITS BURDEN OF PROOF AND THE COURT’S FACTUAL FINDINGS WERE NOT SUPPORTED BY THE CREDIBLE EVIDENCE

Having found Officer Stetzer’s testimony that the vehicle proceeded through the intersection and into the “middle of the intersection” not credible, the court could not make a specific finding as to how far into or beyond the crosswalk Mr. Perkins’ vehicle traveled because there was no credible evidence in the record to establish that fact. Instead, the court stated:

I have to find Mr. Perkins was at least to some point into the intersection. How far, I don’t know, and realizing that backed up into an area that would have been legal.

(R:58:6)(App:2:6).

In deciding the motion, the court clearly engaged in speculation and articulated only hunches based on the testimony of someone he had found to have testified untruthfully. Even though the court had found Officer Stetzer’s testimony that Mr. Perkins’ vehicle crossed into the middle of the intersection “clearly” unsupported by the evidence, the court none the less concluded that an officer “could have found” that there was a “potential violation” by the vehicle proceeding into the crosswalk, “how far, I don’t know”.

(R:58:6)(App:2:6). To make that finding that Mr. Perkins could have committed the stop sign violation, Judge Moran did no more than guess as to the one essential element of the one and only violation that formed the basis for the stop.

For a stop to be found constitutional, it stands to reason that the court must be able to point to the same specific and articulable facts which objectively warranted a reasonable officer to believe that a traffic violation had occurred in the first place. See: *Terry v. Ohio*, 392 U.S. 1 (1968), at 22-24, *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987), *State v. Dunn*, 158, Wis. 2d 138, 146, 462 N.W. 2d 538 (Ct. App. 1990). More than a mere hunch that Mr. Perkins had violated a traffic law is necessary and an “inchoate” and “unparticularized suspicion” does not pass constitutional muster when determining if the State has met its burden to uphold the validity of the stop. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996); *State v. Post*, 301 Wis. 2d 1 733 N.W.2d 634 (2007).

The court essentially denied the Motion to Suppress because Mr. Perkins “could have” or “potentially” entered only a matter of inches into the crosswalk. Judge Moran’s decision that the State had met its burden to establish by a preponderance of the evidence that a violation occurred based on speculation that was the product what had been determined to be untruthful testimony by Officer Stetzer and a video of the events which should have– but did not – show any violation of the law is clearly erroneous.

IV. THE COURT'S FINDING THAT THE VIDEO EVIDENCE SUPPORTED ITS DECISION TO DENY THE MOTION TO SUPPRESS WAS CLEARLY ERRONEOUS.

At the foundation of the court's decision denying the Motion to Suppress is the court's finding of fact that at the start of the video Mr. Perkins' vehicle can be seen backing up from the stop sign, not that he was legally stopped at the stop sign as was argued by Mr. Perkins' counsel. The Court stated:

When I watch the tape, it's very clear to me that Mr. Perkins is backing up. I don't think that's a stretch to see that because –and I say that because I can see the car backing up, and I can see the car, when it backs up it shakes a little bit and pulls forward. I think that's pretty clear to me.

(R:58:4)(App:2:4). The court then went on to state:

...I don't agree in the motion that at the time of the stop Mr. Perkins was at a complete stop, and a legal complete stop. I don't think it bears with the video itself, and I have watched it...

(R:58:6)(App:2:6). The court's finding that the video establishes that Mr. Perkins' vehicle had backed up is clearly erroneous. The video provided to Mr. Perkins' counsel on this appeal does not show Mr. Perkins' vehicle backing up from the stop sign. The video begins with Mr. Perkins' vehicle stopped at the stop sign waiting for the oncoming vehicle to pass. As the squad car approaches Fourth Avenue the angle of the camera alters the view of Mr. Perkins' vehicle but the video

does not in any way make it “clear” that Mr. Perkins backed up from an illegal position.

Furthermore, given officer Stetzer’s own testimony as to where he was when he first observed Mr. Perkins’ vehicle, it is clear from the video that he not only lied as to seeing the vehicle proceed without stopping into the middle of the intersection as found by Judge Moran, but also that he could not have seen the vehicle commit any violation to support a traffic stop. Officer Stetzer testified that he first observed Mr. Perkins’ vehicle after turning onto Sherman Street from Third Avenue. He testified that he observed the violation while he drove without stopping between Third Avenue and Fourth Avenue before turning around to stop Mr. Perkins’s vehicle.

Q. And all of this is taking place during the time when you turned off of Third Avenue and onto Sherman Street; is that correct?

A. That is correct.

Q. Your vehicle was continuing to move up traveling westbound on Sherman Street, was it?

A. Correct.

Q. You didn’t come to a stop?

A, No.

Q. It’s your testimony that all of this is taking place - - you make the first observation of Mr. Perkins not stopping at the stop sign, proceeding into the middle of the intersection, reversing it, going back to the stop sign, allowing the vehicle to pass, and all during the time you are proceeding up – perhaps you are still

proceeding westbound on Sherman Street; is that Correct?

A. Correct. I passed Fourth Avenue and Sherman and had to turn around to go and conduct the traffic stop.

Q. But all of that took place in the one block that you say that you were traveling westbound on Sherman?

A. Correct.

(R:22:9)(App:1:9).

The video clearly establishes that the block between Third Avenue and Fourth Avenue is very short and that it took both Officer Stetzer and Mr. Perkins a matter of some seconds to cover the entirety of the distance. When the video begins recording Officer Stetzer has just made the turn onto Sherman Street from Third Avenue. According to Officer Stetzer's own testimony, the camera therefore necessarily would have caught virtually everything the officer would have been able observe from the moment Mr. Perkins vehicle would be in his view. There is simply no way to reconcile the video evidence and all that it does not capture with Judge Moran's finding that the State satisfied its burden to prove Mr. Perkins committed a traffic violation. The video was enough for Judge Moran to correctly find that it was "clear" that most of what Officer Stetzer testified to did not happen. The Court's finding thereafter that "Mr. Perkins was at least to some point in the intersection" is unsupported by the evidence, based on mere guess work and clearly erroneous. (R:58:6)(App:2:6)

The State's final argument in their brief that defense counsel's offer of proof establishing the physical impossibility

that officer Stetzer could have seen what he testified to was “not in evidence” is wrong. The Court denied defense counsel’s request for additional testimony at the Motion to Reconsider only after counsel was asked by the court to give him an offer of proof “as to what area you want from an evidentiary hearing”, and counsel responded “I have made all my arguments in my motion”. (R:58:3)(App:2:3).

In his motion, Counsel made the following offer of proof which establishes the implausibility of Officer Stetzer’s testimony and undermines the findings of fact made by the court in support of its decision.

When the video starts, it appears the squad car is located on Sherman St. next to the back driveway for the building at 840 South 3rd. Ave., which building houses Floral Magic. This would place the squad car about 75 feet west of 3rd. Avenue. (See Exhibit A). The Floral Magic Building at the Northwest corner of South 3rd Ave and Sherman Street until they are already Sherman St. (See Exhibit B.) The officer testified that he saw the defendant’s vehicle go past the stop sign, and allow a vehicle to pass all before the squad video turned on. To be accurate, this would have to happen with the squad car travelling only 75 feet if it is not shown on the video. That timing is implausible.

The squad car is traveling at a regular speed on Sherman when the video is turned on. ...If the squad car was traveling at 25 MPH, it would cover the estimated 75 feet in 2.0 seconds. Even if the squad was going 15 MPH, the 75 feet would be covered in 3.4 seconds. That is not enough time for the officer to observe the defendant’s vehicle go past the stop sign, come to a complete stop in the middle of the intersection, reverse back to the stop sign, and stop again (as the video shows the defendant’s car stopped at first).2-3

(R:35:2-3). The video establishes that the defendant’s vehicle was at a complete stop at the intersection at the time Officer

Stetzer, according to his own testimony, would have been able to first observe it having just turned onto Sherman Ave. Contrary to the Court's findings as to the video, it does not begin with the defendant's vehicle backing up at all. The video establishes that Officer Stetzer could not possibly have observed what he testified to at the motion hearing. The court's conclusion that "it makes perfect sense" that the video would not have caught the traffic violation is clearly erroneous.

CONCLUSION

The fact that the court was misled as to the existence of exculpatory evidence which ultimately established the State's only witness had lied as to at least one critical fact bearing on the controversy at issue does matter and is contrary to the principles of fairness and justice that lay at the foundation of the constitutional protections embodied in the Fourth Amendment. There was no credible evidence that Mr. Perkins committed any traffic violation. The video evidence and the totality of the record in this case establishes that the court's findings of fact were clearly erroneous and the State did not meet their burden of proof to establish that a traffic violation had occurred prior to stopping Mr. Perkins's vehicle. The stop of the vehicle, the seizure and arrest of Mr. Perkins were all illegal and all evidence obtained as a result of those illegalities should have been suppressed.

Dated this 23rd day of January, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this document conforms to the rules contained in '809.19(8)(b) and (c), Wis. Stats., for a reply brief produced with a proportional serif font. The length of this document is 2,873.

I further certify that the text of the electronic copy of this document is identical to the text of the paper copy.

Dated this 23rd day of January, 2017.

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CERTIFICATION OF MAILING

Pursuant to Wis. Stat. ' 809.80(3)(b), I hereby certify that on the 23rd day of January, 2017, I mailed in a properly enclosed postage-paid envelope the original and nine copies of the Defendant-Appellant's Reply Brief addressed to the following named person(s) at the proper post office address, to-wit:

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