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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2016AP0001471
Marathon County Circuit Court Case Nos. 2015TR005650

COUNTY OF MARATHON,

Plaintiff-Respondent,

v.

ARMIN JAMES BALZAR,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION AND THE DECISION OF THE TRIAL COURT DENYING THE DEFENDANT-APPELLANT'S MOTION FOR SUPPRESSION OF EVIDENCE IN THE CIRCUIT COURT FOR MARATHON COUNTY, THE HONORABLE GREGORY HUBER, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT ARMIN JAMES BALZAR

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STATEMENT OF THE ISSUES

Did Deputy Bean have sufficient reasonable suspicion to conduct a stop of Mr. Balzar's vehicle?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Armin James Balzar (Mr. Balzar) was charged in the Marathon County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) occurring on November 11, 2015. On December 17, 2015, Mr. Balzar, by counsel, entered a not guilty plea to the charges, and filed a motion for suppression of evidence challenging among other things, the stop of Mr. Balzar. A hearing on said motion was held on March 11, 2016. The court issued an oral ruling on said motion on June 9, 2016 denying the defendant's motion, the Honorable Gregory Huber, judge, Marathon County Circuit Court presiding. (R.24:2-5/ A.App. 14-17). A written Order denying the defendant's motion was filed on July 14, 2016.

A jury trial was held on June 15, 2016. The jury found Mr. Balzar guilty of both charges.

On July 18, 2016, the defendant timely filed a Notice of Appeal. The appeal stems from the Judgment of Conviction and the Court's Order denying Mr. Balzar's motion for suppression of evidence.

Facts in support of this appeal were adduced at the motion hearing held on March 11, 2016 and were introduced through the testimony of Marathon County Sheriff Deputy Cassandra Bean. Deputy Bean testified that that she was a three year veteran with the Marathon County Sheriff's Department, and she was working as a deputy on November 11, 2015. Bean testified that as she was traveling northbound on State Road 13 in Marathon County, she observed a vehicle, driven by Mr. Balzar approaching her. (R.23:5/ A.App. 4). As the vehicle passed her, she testified that it gradually swerved one foot over the fog line and then back into its lane. (R.23:7-8/ A.App. 6-7). She conceded that she would not have stopped the vehicle for that movement, and observed no other erratic driving as she observed the vehicle. (R.23:5, 8-9/ A.App. 7-8).

After the vehicle passed her, Bean testified that she followed the vehicle for approximately two miles. (R.23:5/ A.App. 4). Bean then observed the vehicle pulled into the parking area of the Bear Creek Canvas business, which happened to be closed. Bean testified she followed the vehicle into the lot and "initiated a traffic stop on the vehicle for pulling into the closed business." (R.23:6/ A.App. 5). Deputy Bean pulled into the parking lot "right after" Mr. Balzar had pulled in,

Bean then activated her emergency lights. (R.23:6/ A.App. 5). Mr. Balzar attempted to exit his vehicle, but Deputy Bean ordered him back into his vehicle. Mr. Balzar complied with Deputy Bean's order. (R.23:9/ A.App. 8).

By written argument, Mr. Balzar, by counsel, contended that Deputy Bean did not have the requisite level of suspicion to initiate the stop of Mr. Balzar's vehicle or to detain him. (R.15:1-2). The County by written argument claimed that the initial and continued detention were justified. (R.14:1-2).

On June 9, 2016, the court issued an Oral ruling denying Mr. Balzar's motion for suppression of evidence. The court found that the Deputy Bean had sufficient suspicion to conduct a ***Terry*** stop on Mr. Balzar's vehicle. (R.24:2-5/ A.App. 14-17). The court relied on the unpublished case submitted by the County.

A written Order denying said motion was filed on July 14, 2016. Mr. Balzar timely filed a Notice of Appeal on July 14, 2016.

STANDARD OF REVIEW

On appeal, the circuit court's factual findings are reviewed pursuant to the clearly erroneous standard. The appellate court will uphold those factual findings unless they are clearly erroneous. ***State v. Popke,*** 2009 WI 37, ¶10, 317 Wis.2d 118, 765 N.W.2d 569. However, applying those facts to constitutional principles is a question of law that is reviewed *de novo.* ***Id.***

ARGUMENT

A. DEPUTY CASSANDRA BEAN DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO CONDUCT A *TERRY* STOP OF MR. BALZAR'S VEHICLE

Officer Bean had nothing more than an inchoate and unparticularized hunch when she stopped Mr. Balzar's vehicle. Because of this, the seizure violated Mr. Balazar's right under the 4th Amendment of the United States Constitution and Article I , Section 11 of the Wisconsin Constitution. To satisfy the constitutional standard of the 4th Amendment and an investigative stop must be supported by a reasonable suspicion. ***State v. Rutzinski,*** 2001 WI 22, ¶12-14, 241 Wis.2d 729, 623 N.W.2d 516. ***Terry v. Ohio,*** 392 U.S. 1, 30 (1968).

This standard requires that the stop be based on something more than an "inchoate and unparticularized suspicion or hunch." ***Terry*** at 27. For a stop to be valid, an officer's suspicion must be based on "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrants the intrusion." ***Id.*** at 21. The crucial question is whether 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" ***State v. Post,*** 2007 WI 60, ¶ 301 Wis.2d 1, 733 N.W.2d 634 *citing* ***State v. Anderson***

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. ***Whren v. United States,*** 517 U.S. 806, 809-10 (1996), ***State v. Post***, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under Fourth Amendment jurisprudence. ***Id.*** at 810. If an officer has probable cause to believe a traffic violation has

occurred, an officer may conduct a traffic stop. ***State v. Gaulrapp,*** 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996).

"The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young,*** 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997). To meet this test, the officer must show specific and articulable facts, which taken together with rationale inferences from those facts, reasonably warrant the officer's intrusion. ***Terry v. Ohio***, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968).

Officer Bean acknowledged, that the only reason she stopped Mr. Balzar's vehicle was because "she found it suspicious he was pulling into a closed business at 1:30 in the morning." (R.23:7/ A.App. 6). Contemporaneously with Mr. Balzar pulling into the lot, Officer Bean pursued Mr Balzar into the lot and activated her lights. Mr. Balzar stopped his vehicle and opened his door to exit his vehicle. Officer Bean ordered Mr. Balzar to get back into his vehicle, and Mr. Balzar complied.

In its letter brief, the County relied on an unpublished case, ***City of Mequon v. Cooley,*** unpublished, 332 Wis.2d 318,

appeal no. 2010 AP 2142, February 23, 2011, in arguing that Officer Bean had the requisite level of suspicion to stop Mr. Balzar's vehicle. (R.24:3/ A.App. 2). In ***Cooley,*** the officer was following a vehicle that pulled into the lot of a closed business and parked. The officer thought it was suspicious that a vehicle would pull into the parking lot of a closed movie theatre. The officer made a u-turn and drove back to the parking lot. When the officer arrived in the lot, he observed the vehicle parked in a parking stall with only its running lights on. ***Id.*** The court found that the officer had sufficient suspicion to initiate the traffic stop.

Mr. Balzar's case is easily differentiated from ***Cooley.*** Here, Officer Bean immediately pulled into the lot behind Mr. Balzar's vehicle and contemporaneously initiated the traffic stop. The stop was not made because Mr. Balzar parked in the lot or remained in the lot. Furthermore, the parked vehicle in ***Cooley*** extinguished all lights but for the running lights. Officer Bean, by her own admission, stopped Mr. Balzar simply because he turned into the lot. There is no evidence that Mr. Balzar extinguished his lights.

The issue is whether the act of simply turning into a closed business parking lot, without more, provides an officer with sufficient suspicion to conduct a ***Terry*** stop. The above

facts provide nothing more than an inchoate and unparticularized hunch that criminal activity might be afoot. To effectuate a valid ***Terry*** stop, an officer needs more. Thus, the trial court erred in denying Mr. Balzar's motion for suppression of evidence.

CONCLUSION

Because Officer Bean did not possess sufficient reasonable suspicion to conduct a ***Terry*** stop of Mr. Balzar's vehicle, the trial court erred in denying his motion for suppression of evidence. The Court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 24th day of October, 2016.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 17 pages. The word count is 2907.

Dated this 24th day of October, 2016.

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CERTIFICATION 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 s. 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 24th day of October, 2016.

Respectfully submitted,

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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 s. 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.

I further certify that if this appeal is taken from a circuit court order or a 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.

Dated this 24th day of October, 2016.

Respectfully submitted,

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APPENDIX

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