

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III**

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**Appeal No. 2016AP001534
Door County Circuit Court Case No. 2015TR002449**

In the matter of the refusal of Nicholas W. Stern

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS W. STERN,

Defendant-Appellant.

**AN APPEAL FROM THE ORDER OF THE COURT
FINDING THE DEFENDANT REFUSED TO SUBMIT TO
CHEMICAL TESTING BEFORE THE HONORABLE
ROBERT HAWLEY, RESERVE JUDGE DOOR COUNTY
CIRCUIT COURT**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT NICHOLAS W. STERN**

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STATEMENT OF THE ISSUES

Did the Officer Albertson possess the requisite level of suspicion to stop Mr. Stern's vehicle?

Answer: 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, Nicholas W. Stern (Mr. Stern) was charged with operating a motor vehicle while under the influence of an intoxicant Wis. Stat. § 346.63 (1)(a) and unlawfully refusing to submit to chemical testing a violation of Wis. Stat. §343.305(9) on November 21, 2015. Mr. Stern by counsel, timely filed a Request for Refusal Hearing on November 23, 2015. A hearing on said refusal was held on June 28, 2016, the Honorable Robert Hawley, Reserve Judge, Door County Circuit Court presiding.

On that date, the court found that Mr. Stern unlawfully refused to submit to chemical testing, the court specifically found that the arresting officer did have the requisite level of suspicion to stop Mr. Stern's vehicle. (R.18:18/ App. 12). A written order consistent with the finding was filed on September 9, 2016. (R.22:1/ A.App. 1).

The defendant timely filed a Notice of Appeal on November 1, 2016. (R. 10:1-2).

The appeal herein stems from the Order finding Mr. Stern refused chemical testing and specifically from the trial court finding that Officer Albertson had the requisite level of suspicion to stop Mr. Stern's vehicle. The sole issue on appeal

is whether the arresting officer had the requisite level of suspicion to stop Mr. Stern's vehicle. The facts pertinent to this appeal were received at the refusal hearing on June 28, 2016, and introduced through both the testimony of City of Sturgeon Bay Police Officer Jason Albertson, and the defense's introduction of a squad video showing the driving (R.8: attached Exhibit 1).

The following facts were adduced at said hearing. Officer Albertson testified that he has been an officer for over 15 years a little more than nine years with the City of Sturgeon Bay and more than six years in Florida. (R.18:4-5/ A.App. 2-3). On November 21, 2015 Officer Albertson was working 3rd shift. At approximately 3:00 a.m., as Albertson was crossing the Michigan Street Bridge, he claimed that he observed a vehicle, later determined to be Mr. Stern's vehicle "driving down basically the middle of the bridge." (R.18:6/ A.App. 4). Albertson testified that Mr. Stern's vehicle was driving down the center of the road, "mostly in [Albertson's] lane." (R.18:7/ A.App. 13). Albertson testified that he activated his lights on the bridge not to stop Mr. Stern's vehicle, but to warn him that he was traveling down the middle of the bridge. *Id.*

When Albertson activated his lights, his squad camera was activated. *Id.* Because the camera records back several seconds of footage before the lights were activated, the camera recorded all of the driving on the bridge. Albertson could not provide specific details as to the exact distance Mr. Stern was over the centerline, but Albertson did testify that if Mr. Stern would have continued on his line of travel, they would have collided. (R.18:8/ A.App. 6). Albertson testified that when he activated his lights, Mr. Stern moved over back into his lane. *Id.* Albertson then made a u-turn after he got to the end of the bridge and eventually stopped Mr. Albertson's vehicle.

On cross examination, Albertson testified that as he was on the bridge, he had head lights "coming right at me." (R.18:13/ A.App. 7). Albertson conceded that the only reason he stopped Mr. Stern was for operating left of center, there were no other traffic law violations. (R.18:14/ A.App. 8). The defense offered Officer Albertson's squad video of the incident. After playing the video, starting at time stamp 2:45:47, Albertson testified that the video showed that Mr. Stern was driving in a manner consistent with Albertson's testimony. (R.18:14-16/ A.App. 8-10). After video was received the

defense argued that evidence was insufficient to stop Mr. Stern. The State had no argument. (R.18:18/ A.App. 12).

The court found that the video buttressed the officer's testimony and that based on the officer's training, experience and observations, Mr. Stern was driving in the wrong lane, and thus found that Albertson had probable cause to stop Mr. Stern. The court went on to find the refusal unlawful. *Id.*

A written order was signed on September 9, 2016. (R.22:1/ A.App. 1). The defendant timely filed a Notice of Appeal on August 1, 2016.

STANDARD OF REVIEW

Whether reasonable suspicion exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis.2d 456, 685 N.W.2d 869. The court applies a two-step standard of review when reviewing questions of constitutional facts. A trial court's finding of historical fact will be upheld unless they are clearly erroneous. However, determining whether a reasonable suspicion justified the stop is reviewed de novo. *Id.* Furthermore, when there is disputed testimony from the arresting officer along with a video that shows events leading up to the traffic stop, the court applies "the clearly erroneous standard of review to the circuit court's findings.

State v. Walli, 2011 WI App 86, ¶18, 334 Wis.2d 402, 799 N.W.2d 898.

ARGUMENT

A. OFFICER ALBERTSON DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO STOP MR. STERN, AND THE COURT'S FACTUAL FINDING THAT MR. STERN CROSSED THE CENTER LINE WAS CLEARLY ERRONEOUS AS IT WAS NOT SUPPORTED BY THE VIDEO EVIDENCE

To satisfy the constitutional standard of the 4th Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, an investigative traffic 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 v. Ohio*, 392 U.S. 1, 27 (1968). To constitutionally effectuate a traffic stop, an officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* at 21. "The determination of reasonableness is a common sense test. 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*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

"The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure of 'persons' within the meaning of the Fourth Amendment." *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (citing *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). An automobile stop must not be unreasonable under the circumstances. *Gaulrapp*, 207 Wis.2d at 605, 558 N.W.2d 696 (citing *Whren*, 517 U.S. at 810, 116 S.Ct 1769). " 'A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred.' *id.*, or have grounds to reasonably suspect a violation has been or will be committed." *Gaulrapp*, 207 Wis.2d at 605, 558 N.W.2d 696 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317, (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed.2d 889, (1968).

State v. Popke, 2009 WI 37, ¶ 11, 317 Wis.2d 118, 126, 765 N.W.2d 569 citing to *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct.App. 1996)

Here, Officer Albertson testified that he stopped Mr. Stern's vehicle because Mr. Stern was traveling down the center of the roadway across the centerline as he approached the officer on the Michigan Street Bridge in Sturgeon Bay. (R.18:6/

A.App. 4). Albertson testified that he observed Mr. Stern's vehicle "driving down basically the middle of the bridge." *Id.* Albertson continued by saying had Mr. Stern maintained his course, they would have had "a collision on the bridge." (R.18:8/ A.App. 6). Defense counsel introduced squad video evidence of Mr. Stern as he crossed the bridge. The video contradicts Officer Albertson's testimony. At no point on the video does it appear that Mr. Stern's vehicle was traveling halfway over the centerline as he traversed the bridge. A review of the video shows that Mr. Stern maintained his lane as he traveled across the bridge, and was in his lane of travel as he approached and passed the officer's squad.

Other than the claim that Mr. Stern was traveling halfway across the centerline on the bridge, there were no other observations of erratic driving. Albertson conceded that there were no other traffic violations. (R.18:14/ A.App. 8).

Defense counsel argued that the video evidence showed that it was improper to stop Mr. Stern's vehicle. The court found that the video "buttressed" the officer's testimony concerning his observations, and concluded that Officer Albertson had "probable cause" to stop Mr. Stern.

The court specifically found that Mr. Stern was in the wrong lane as he traveled from the east side of the bridge to the west. (R.18:18/ A.App. 12). Mr. Stern argues that the squad video directly contradicts the court's finding, and thus, the court's finding is clearly erroneous. The defendant contends it is clear from the video that he was not traveling down the middle of the road, with one half of his vehicle across the center line as he crossed the bridge. Contrary to the court's findings, the video did not buttress the officer's observations. Thus, Officer Albertson did not have probable cause to believe that Mr. Stern committed a traffic law violation. Furthermore, the evidence adduced at the hearing did not reveal sufficient fact justifying the stop on reasonable suspicion grounds. Aside from the claim that Mr. Stern crossed the centerline, the State put forth no additional evidence that Mr. Stern was driving erratically.

CONCLUSION

Because the video shows that Mr. Stern did not violate a traffic law, the trial court's factual findings were clearly erroneous, and the trial court erred in finding that Mr. Stern unlawfully refused chemical testing. The Court should reverse and vacate the trial court's order.

Dated this 10th 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 20 pages. The word count is 3262.

Dated this 10th day of October, 2016.

Respectfully Submitted

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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 10th 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 10th day of October, 2016.

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APPENDIX