

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

RECEIVED

10-20-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appellate Case No. 2016AP001534

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 ENTERED IN THE DOOR COUNTY CIRCUIT
COURT, THE HONORABLE ROBERT HAWLEY
PRESIDING.

BRIEF AND APPENDIX OF
PLAINTIFF-RESPONDENT
STATE OF WISCONSIN

RAYMOND L. PELRINE
Door County District Attorney
State Bar No. 1016681

Door County District Attorney's Office
1215 S. Duluth Avenue
Sturgeon Bay, WI. 54235
(920)746-2284
(920)746-2381 (Fax)
Raymond.pelrine@da.wi.gov

QUESTION PRESENTED

I. Did the arresting officer possess reasonable suspicion justifying his stop of Mr. Stern's vehicle?

>>The trial court answered "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

The State requests neither oral argument nor publication. This case involves only the application of established legal principles to the facts presented.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State offers supplementary facts and procedural history, beyond that presented by the defendant in his brief, where appropriate.

At the hearing on the defendant's refusal to submit to chemical testing held on June 28, 2016, (R-18), Sturgeon Bay police officer Jason Albertson testified as to the defendant's driving behavior that led him to perform a traffic stop on the defendant's vehicle. In his testimony officer Albertson described observing the defendant's vehicle driving left of the center line on at least nine different occasions during his direct testimony (R-18:6 at line 1-3; R-18:7, at lines 1-4, 6-8, 13-17, 19-24; R-18: 8, at lines 1-6, 12-16; and R-18: 11 at lines 1-7, 13-18). During his cross-examination officer Albertson described observing the defendant's car over the centerline on at least seven different occasions (R-18: 12 at lines 3-5, 8-19; R-18: 13 at lines 20-22; R-18: 15 at lines 10-12; R-18: 16 at lines 1-12, 15-18; and R-18: 16, 17 at lines 25, 1-3). In its decision, the trial court indicated that both the

officer's direct testimony, as well as the video evidence observed during the hearing, supported the fact and legal conclusion that Stern's car was operating left of center, thus justifying the traffic stop (R-18, at lines 5-7, 7-11).

No evidence was presented to the court to contradict any of the testimony by the officer, or the video observed in support of that testimony. The defendant offered no testimony to contradict his testimony. Instead, all the defendant offered the trial court was the following:

"Just the argument is that I don't agree, that's enough to stop him, your honor" (R-18:18, at lines 3-4).

STANDARD OF REVIEW

The defendant is correct in asserting that an officer must possess reasonable suspicion that a violation of law has occurred in order to justify a traffic stop of a motorist. *State v. Popke*, 2009 WI 37, 317 Wis.2d 118, 765 N.W.2d 569. *State v. Puchacz* 2010 WI App. 30, 323 Wis.2d 741, 780 N.W.2d 536. Great deference is to be given a trial court's findings of fact, which are only to be set aside if the reviewing court finds them to be clearly erroneous *Id.* Constitutional facts, those which provide the basis for determining whether or not the officer possessed reasonable suspicion to perform a traffic stop, are reviewed de novo. *Id.*

ARGUMENT

I. OFFICER ALBERTSON HAD REASONABLE SUSPICION TO STOP MR. STERN, AND THE TRIAL COURT'S FACTUAL FINDINGS SUPPORTING THIS WERE THE ONLY EVIDENCE PRESENTED.

"Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact". *State v. Puchacz* 2010 WI App. at paragraph 14, 323 Wis.2d at 749, 780 N.W.2d at 540, *State v. Popke*, 2009 WI 37, paragraph 10, 317 Wis.2d 118, 765 N.W.2d 569. As indicated above, the circuit court's findings of facts are to be reviewed under the "clearly erroneous standard". The

application of such facts to the constitutional principles stated here, is reviewed de novo. *Id.*

At the refusal hearing of June 28, 2016, the only witness to testify, Officer Jason Albertson, testified clearly, repeatedly, and unequivocally that he observed the defendant's car crossing the center line. His observations included the following: "I observed a vehicle coming in the opposite direction, basically driving down the center of the road" (R-18: 7, lines 2-4). The defendant's car was not just momentarily, a bit over the line, the defendant was driving significantly into the approaching lane of travel while crossing an enclosed steel bridge. It was officer Albertson's observation that unless the officer did something "we would have had a collision on the bridge" (R-18:8, line 16). In addition to these firsthand observations of the officer about the defendant's driving, he also testified to the defendant's admission of such behavior: "I do ask, you know, 'do you know why I stopped you?' and he actually acknowledged the fact that he was in my lane, he was over the center line in my lane. He actually agreed to me stating this". (R-18:11, lines 1-5). Finally, when the defendant attempted to challenge these observations, by showing video of some of his driving behavior to the officer, the officer did not budge at all. While defense counsel is playing video recording of the defendant's driving as he approached the officer's squad car the officer gives running commentary to what he, defense counsel, and the court are seeing on the video: "that is the bridge. Right now, he is in the lane of my travel. And I hit my lights and he moves back real..." (R-18:15, lines 10-12). A moment later, as the video is still playing, the officer states "right there he's over the center line" (R-18:16, line 8).

Against this testimony, the defendant offered no evidence whatsoever. In fact, the only argument made by the defendant seemed to admit the driving behavior described by the officer, but asserted that that described behavior was insufficient to justify the stop. At the conclusion of the evidence the only argument advanced by the defendant was "just the argument is that I don't agree that's enough to stop him, your honor"(R-18:18, lines 3-4).

After reviewing the uncontroverted evidence the court concluded that "well, the officer testified based upon his training and experience, he's on the midnight shift, his observations, and the video tape I think buttressed that, that theyour client, Mr. Stern was in the wrong lane, Nicholas Stern was in the wrong lane of

travel coming from the east side here to the west side. And I'm satisfied that the officer had enough probable cause to stop him and fortunately there wasn't an accident there" (R-18:18, lines 5-13).

Whether characterized as simple facts, historical facts, or constitutional facts, the facts are all uncontroverted in this case. The arresting officer observed the defendant driving well over the center line, and driving in a fashion that presented a menace to other motorists, including the arresting officer. After making these observations the officer performed a traffic stop. Since the defendant had already conceded that the only issue for argument at the refusal hearing was whether or not the officer possessed sufficient cause to make that stop, this evidence led the court to find the defendant's refusal unreasonable. The defendant's claim before this court that "contrary to the court's findings, the video did not buttress the officer's observations" has no support in the record. There is nothing in the transcript of the refusal hearing, or even in the defendant's own arguments before the trial court, to support this assertion. Contrary to the defendant's claim before this court, the only evidence that was put before the trial court supported the conclusion that the defendant was driving left of center as he crossed the bridge, and the officer was justified in stopping his car.

CONCLUSION

Because all of the evidence advanced at the refusal hearing supported the trial court's factual findings that the defendant was driving left of center and the officer was justified in stopping him, there is no basis to question those factual findings by the trial court, or to reverse the trial court's order. Therefore, this court should affirm those findings and that order.

Dated this ____ day of October, 2016

Respectfully submitted,

Raymond L. Pelrine
District Attorney
State Bar # 1016681

Attorney for Plaintiff-Respondent

Door County District Attorney
1215 S. Duluth Avenue
Sturgeon Bay, WI 54235
(920) 746-2284
(920) 746-2381 (Fax)
raymond.pelrine@da.wi.gov

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of 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, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 1677 words.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 _____ day of October, 2016.

Raymond L. Pelrine
District Attorney

SUPPLEMENTAL APPENDIX

**TABLE OF CONTENTS
TO
SUPPLEMENTAL APPENDIX**

	page
June 28, 2016 Refusal Hearing Transcript.....	101-120
September 9, 2016 Order Door County Case No: 2016-TR-2449.....	121

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	1
POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT’S OPINION.	1
STATEMENT OF THE CASE: FACTS AND PROCEEDURAL HISTORY.....	1-2
STANDARD OF REVIEW.....	2
ARGUMENT.....	2-4
CONCLUSION.....	5
CERTIFICATION.....	6
INDEX TO APPENDIX.....	100

CASES CITED

State v. Popke,

2009 WI 37, 317 Wis.2d 118,

765 N.W.2d 569,6.....

State v. Puchacz

2010 WI App. 30, 323 Wis.2d

741, 780 N.W.2d 536.....

STATUTES CITED

Wisconsin Statutes

§809.19(3)(a)2.....	1
---------------------	---