

RECEIVED

12-14-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP001808 CR

Racine County Circuit Court Case No. 2015CT001080

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

BRANDON SWIECICHOWSKI,

Defendant-Appellant.

**ON APPEAL FROM JUDGMENT ENTERED ON MAY 18, 2016, IN THE
RACINE COUNTY CIRCUIT COURT, BRANCH 6, THE HONORABLE
DAVID W. PAULSON, PRESIDING**

BRIEF OF PLAINTIFF-RESPONDENT

LILLIAN V. LEWIS
Assistant District Attorney
State Bar #1086838

Attorney for Plaintiff-Respondent
Racine County District Attorney's Office
730 Wisconsin Avenue
Racine, WI 53403
(262) 636-3187
(262) 636-3346 (fax)
lillian.lewis@da.wi.gov

TABLE OF CONTENTS

ISSUES PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS	1-2
STANDARD OF REVIEW	2
ARGUMENT	3-5
CONCLUSION	6
CERTIFICATION	7
CERTIFICATION OF MAILING	8
CERTIFICATION OF ELECTRONIC FILING	9

TABLE OF AUTHORITIES

CASES CITED

<i>State v. Houghton</i> , 2015 WI 79, 364 Wis.2d 234, 868 N.W.2d 143	2
<i>State v. Popke</i> , 317 Wis.2d 118, ¶11, 765 N.W.2d 569	4
<i>State v. Iverson</i> , 2015 WI 101, ¶ 44, 365 Wis.2d 302, 326, 871 N.W.2d 661, 674	4
<i>State v. Malone</i> , 274 Wis.2d 540, ¶21, 683 N.W.2d 1 (quoting <i>Mimms</i> , 434 U.S. at 109, 98 S.Ct. 330)	4
<i>State v. Iverson</i> , 2015 WI 101, ¶ 56, 365 Wis. 2d 302, 330, 871 N.W.2d 661, 676	4
<i>State v. Popke</i> , 317, Wis.2d 118¶ 14, 765 N.W.2d 569	
<i>Johnson v. State</i> , 75 Wis.2d 344, 348, 249 N.W.2d 593 (1977)	4
<i>State v. Houghton</i> , 364 Wis.2d 234, 250, 868 N.W.2d 143 (Wis. 2015)	4-5

CONSTITUTIONAL PROVISIONS CITED

United States Constitution, Amendment 4	2
Wisconsin Constitution, Article 1, Section 11	2

WISCONSIN STATUTES CITED

Section 346.04(2)	3
-------------------	---

TABLE OF AUTHORITIES CONTINUED

OTHER CASES CITED

Federal Highway Administration	3
Manual on Uniform Traffic Control Devices, Regulatory Signs Published by U.S. Department of Transportation	3
WISCONSIN UNIFORM TRAFFIC MANUAL Section 6F.09 (R11-da, R11-4)	4

ISSUES PRESENTED

Did the Court err in denying the Appellant's motion to suppress evidence following a traffic stop where the Court found reasonable suspicion for a traffic stop that occurred at 12:49 a.m., with the driver operating his vehicle on a roadway under construction in violation of signs indicating "No Through Traffic" while the vehicle bears plates registered to a residence 7 or 8 miles away?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

On September 12, 2015, at approximately 12:49 a.m., Village of Caledonia Police Officer Buer was on duty when he observed a vehicle being operated northbound on Nicholson Rd. south of Dunkelow Rd., in the Village of Caledonia, County of Racine, State of Wisconsin. Ofc. Buer stated that the vehicle traveled past several clearly posted signs indicating that this stretch of road was closed for construction. Ofc. Buer stated that he also ran the vehicle's registration, and observed that the vehicle listed to 1305 Arthur Ave. in Racine, which is over 6 miles southeast.

Ofc. Buer stated that he initiated a traffic stop and identified the operator as Brandon Swiecichowski, the defendant. The defendant stated that he was on his way home to 3636 Lynndale Dr. Ofc. Buer stated that while speaking with the defendant, he detected a strong odor of intoxicants on the defendant's breath and body, and further observed that the defendant's eyes were glassy and bloodshot, and his speech was slow and slurred. The defendant admitted to having consumed four beers. Ofc. Buer stated that the defendant performed field sobriety tests (HGN, walk-and-turn, and one-leg stand), and that based upon his training and experience, Ofc. Buer determined that the defendant failed all three. An on-scene PBT registered a 0.89 breath-alcohol level.

Ofc. Buer stated that the defendant was conveyed to All Saints Hospital for an evidentiary blood draw, which was completed with the defendant's consent at 2:03 a.m. after the defendant was read the "Informing the Accused" form verbatim. Subsequent testing of this sample showed the defendant's blood-ethanol concentration was 0.88 g/100 mL.

STANDARD OF REVIEW

Whether reasonable suspicion or probable cause is necessary for a law enforcement officer to stop a vehicle is a question of law the Supreme Court reviews de novo. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11, *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143.

ARGUMENT

REASONABLE SUSPICION AND PROBABLE CAUSE TO CONDUCT A TRAFFIC STOP EXIST WHEN, AT 12:49 A.M., A DRIVER OPERATES A VEHICLE ON A ROADWAY UNDER CONSTRUCTION IN VIOLATION OF SIGNS INDICATING “NO THROUGH TRAFFIC” WHILE THE VEHICLE BEARS PLATES REGISTERED TO A RESIDENCE 7 OR 8 MILES AWAY.

Driving on a roadway marked “No Through Traffic” while displaying license plates registered “7 or 8 miles from the location” constitutes reasonable suspicion for an officer to conduct a traffic stop. Driving in an area marked only for local traffic, as the Appellant did here, provides an officer with the ability to determine if the vehicle is in fact part of local traffic. In this case, as the vehicle the Appellant operated bore non-local registration, this provides the basis for a violation of Wisconsin traffic statutes as the Appellant has failed to obey a traffic sign or signal.

Wisconsin Statute § 346.04(2) states in pertinent part that, “No operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer.” Pursuant to the Federal Highway Administration, “Road Closed to Through Traffic” signs “should be used where through traffic is not permitted, or for a closure some distance beyond the sign, but where the highway is open for local traffic up to the point of closure.” *See* Manual On Uniform Traffic Control Devices, Regulatory Signs, published by the U.S. Department of Transportation, Federal Highway Administration, <http://mutcd.fhwa.dot.gov>. Wisconsin follows in suit, indicating that local traffic only signs may be used at the point of closure if access beyond the closure is allowed for traffic originating within, or having destination on, the portion of the roadway closed to through traffic. *See* Wisconsin Manual on Uniform Traffic

Control Devices, Section 6F.09, Local Traffic Only Signs (R11-3a, R11-4), <http://wisconsindot.gov>.

A traffic patrol officer's traffic stop of a vehicle is a “seizure” of “persons” under the Fourth Amendment. *See State v. Popke*, 317 Wis.2d 118, ¶ 11, 765 N.W.2d 569 (citations omitted). “A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed.” *Id.* (citations and internal quotation marks omitted). *State v. Iverson*, 2015 WI 101, ¶ 44, 365 Wis. 2d 302, 326, 871 N.W.2d 661, 672 The court judges reasonableness in this context by “balance[ing] ... the public interest and the individual's right to personal security free from arbitrary interference by law officers.” *State v. Iverson*, 2015 WI 101, ¶ 50, 365 Wis. 2d 302, 330, 871 N.W.2d 661, 674, See also *State v. Malone*, 274 Wis.2d 540, ¶ 21, 683 N.W.2d 1 (quoting *Mimms*, 434 U.S. at 109, 98 S.Ct. 330).

“Probable cause refers to the ‘quantum of evidence which would lead a reasonable police officer to believe’ that a traffic violation has occurred.” *State v. Iverson*, 2015 WI 101, ¶ 56, 365 Wis. 2d 302, 333, 871 N.W.2d 661, 676, See *Popke*, 317 Wis.2d 118, ¶ 14, 765 N.W.2d 569 (quoting *Johnson v. State*, 75 Wis.2d 344, 348, 249 N.W.2d 593 (1977)). “The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that ‘the information lead a reasonable officer to believe that guilt is more than a possibility.’ ” *Id.* (quoting *Johnson*, 75 Wis.2d at 348–49, 249 N.W.2d 593).

In *State v. Houghton*, 364 Wis.2d 234, 250, 868 N.W.2d 143 (Wis. 2015), the Court adopted this rule, finding that “reasonable suspicion that a traffic law

has been or is being violated is sufficient to justify all traffic stops” and that “[w]hen weighed against the public interest in safe roads, we are satisfied that the ‘temporary and brief’ detention of a traffic stop is an ‘appropriate manner’ in which a police officer may ‘approach a person for purposes of investigating possibly criminal behavior’ and detain an individual for the purpose of inquiry. *Id.* As “[s]uspicious conduct by its very nature is ambiguous...the principal function of the investigative stop is to quickly resolve the ambiguity.” *Id.*

In this case, the arresting officer observed a vehicle traveling down the roadway in an area marked with “Road Closed to Through Traffic” at 12:49 a.m. (R-App 7-8) The vehicle’s registration plates, in plain view to the officer, registered to a municipality several miles away. (R-App 9-10) The roadway had been the source of numerous citizen complaints (R-App 7-8), and the roadway was in a state of construction, or disrepair. (R-App 7, 15) For these reasons, the officer’s objective observations provides the requisite reasonable suspicion and probable cause to effectuate a stop of the Appellant’s vehicle as found by the trial court on February 17, 2016 and again at the Appellant’s motion to reconsider, heard on May 18, 2016.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court affirm the circuit court's holding dated May 18, 2016.

Dated at Racine, Wisconsin, this December 16, 2016.

Respectfully submitted,

Attorney Lillian V. Lewis
Assistant District Attorney
State Bar No. 1086838
lillian.lewis@da.wi.gov

Office of the District Attorney
Racine County Courthouse
730 Wisconsin Avenue
Racine, Wisconsin 53403-1274
General: (262) 636-3172
Facsimile: (262) 636-3346

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Section 809.01 of the Wisconsin Statutes for a petition and memorandum produced with a proportional serif font, minimum printing resolution of 200 dots per inch, 12 point body text, leading of a minimum 2 points, maximum of 60 characters per full line of body text, and a 1.5 margin on each side pursuant to Wis. Stat. §809.81. The length of this petition and memorandum is 1,207 words, 6 pages.

Dated at Racine, Wisconsin, December 16, 2016.

Respectfully submitted,

Attorney Lillian V. Lewis
Assistant District Attorney
State Bar No. 1086838
lillian.lewis@da.wi.gov

CERTIFICATION OF MAILING

I hereby certify that this this petition for leave to appeal a non-final order was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on the 14th day of December, 2016.

Dated at Racine, Wisconsin this December 16, 2016.

Respectfully submitted,

Attorney Lillian V. Lewis
Assistant District Attorney
State Bar No. 1086838
lillian.lewis@da.wi.gov

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this BRIEF of PLAINTIFF-RESPONDENT, excluding the appendix, if any, which complies with the requirements section 809.19(12).

I further certify that this electronic petition is identical in content and format to the printed form of the petition for review filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the Court and served on all opposing parties.

Dated at Racine, Wisconsin this December 16, 2016.

Respectfully submitted,

Attorney Lillian V. Lewis
Assistant District Attorney
State Bar No. 1086838
lillian.lewis@da.wi.gov