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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

01-12-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2016AP1933-CR

THOMAS M. GIBSON,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying
Defendant's Motion to Suppress Evidence Entered by the Honorable Ralph
M. Ramirez, Circuit Judge, Branch 3, Waukesha County

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

QUESTION PRESENTED

Did the circuit court err in finding that Sergeant Bautz had reasonable suspicion a traffic violation occurred and denying Thomas M. Gibson's pre-conviction motion to suppress evidence based upon an unlawful stop?

BRIEF ANSWER

No. The circuit court correctly held that Sergeant Bautz had reasonable suspicion Thomas M. Gibson violated a traffic law, and properly denied

Mr. Gibson's motion to suppress evidence.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent (“State”) submits that oral argument is unnecessary because the issues can be set forth fully in the briefs.

Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

On August 15, 2015, at approximately 1:06 p.m., Sergeant Bautz performed a traffic stop on Thomas M. Gibson's vehicle, which subsequently led to Mr. Gibson's arrest for driving while intoxicated. (R.34:6, 8). At the time, Sergeant Bautz was parked perpendicular to Lac La Belle Drive, which has a notably low posted speed limit of 15 miles per hour. (*Id.*:6).

While parked on Lac La Belle Drive, Sergeant Bautz observed Mr. Gibson's vehicle traveling at what he visually estimated as 25 miles per hour. (*Id.*:7). Sergeant Bautz activated his stationary handheld radar device and pointed it at the vehicle. (*Id.*:7). The radar read Mr. Gibson's speed as 26 miles per hour, only one mile per hour above Sergeant Bautz's visual estimation. (*Id.*:7). Based on Sergeant Bautz's visual estimation and the result of the radar, Sergeant Bautz believed Mr. Gibson's vehicle was traveling about ten miles over the speed limit, and Sergeant Bautz initiated a traffic stop. (*Id.*:8). Neither the radar gun nor Sergeant Bautz's visibility was obstructed in any way, as Sergeant Bautz had a clear line of sight at that location, and there were no other vehicles driving on that portion of Lac La Belle Drive at the time. (*Id.*:8, 10).

Sergeant Bautz has been an officer for 17 years, and at the time of arrest had 14 years of patrol-related experience, either as a patrol officer or a patrol sergeant. (*Id.*:5) Specifically, before Mr. Gibson's arrest, Sergeant Bautz had been a patrol officer for the Town of Oconomowoc and Washington County Sheriff's Office for 5 years. (*Id.*:5). In his time as a law enforcement officer, Sergeant Bautz has conducted thousands of traffic stops, and a majority of those traffic stops were for speeding. (*Id.*:17).

Common to many law enforcement officers, at the beginning of his career, Sergeant Bautz attended a radar certification school where he learned to visually estimate the speeds of vehicles. (*Id.*:6). There, he was trained to estimate speeds of vehicles within plus or minus five miles an hour of the actual speed of the vehicle. (*Id.*:6-7).

The radar gun used by Sergeant Bautz on August 15, 2015 had not been calibrated since 1994, but Sergeant Bautz performed the internal test of the gun on the date of the arrest. (*Id.*:4, 13). Sergeant did not test the radar gun with a tuning fork prior to use on the date of the arrest. (*Id.*:14). Rather, consistent with Wisconsin standards, he tested the gun with two tuning forks after the arrest. (*Id.*:16).

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED MR. GIBSON'S MOTION TO SUPPRESS.

On March 16, 2016, the Honorable Ralph M. Ramirez, presiding over the Waukesha County Court, denied the Defendant-Appellant Thomas M. Gibson's motion to suppress evidence based upon an unlawful traffic stop. The court asked the defense for the standard of reasonableness in calibrating a radar gun, to which the defense replied that there is "nothing in the State of Wisconsin that requires in writing that [a radar gun] has to be . . . calibrated at any significant time." (R.9: 26, 27). The State noted to the court that the correct standard of the motion to suppress is whether "the officer had a reasonable suspicion to believe that a traffic violation had occurred," and the State was not solely relying on the radar gun result. (*Id.*:31). The court based its decision "on what the radar gun said," and found that there was nothing on the record that would indicate the radar gun was not operating properly. (*Id.*:32, 34).

On May 17, 2016, the Honorable Ralph M. Ramirez reconsidered his denial of the motion to suppress evidence, and affirmed his decision. The defense offered the Wisconsin standard for reliability of radar devices, which is whether the machine is in proper working order, and "[radar devices] are subject, or should be, to such testing and servicing to assure

property working condition.” (R.13:3). The State again reiterated that the standard for a lawful traffic stop is whether an officer has reasonable suspicion that a traffic violation has occurred, and the State is not required to prove, by clear and convincing evidence, that the radar device was in proper working order. (*Id.*:4, 5). The circuit court held that although it found the fact that the radar gun had not been recently calibrated bothersome, there was nothing improper or wrong with the radar gun at the time, and there is no legal requirement to have radar devices calibrated during a specific amount of time. (*Id.*:6, 7).

Mr. Gibson subsequently pled guilty to operating a motor vehicle under the influence of an intoxicant (OWI), second offense, contrary to Wis. Stat. § 346.63(1)(a). Mr. Gibson now appeals from the judgment of conviction, again asserting that the circuit court erred in denying his pre-conviction motion to suppress evidence based on an unlawful traffic stop. Mr. Gibson argues that Sergeant Bautz lacked reasonable suspicion to stop Mr. Gibson because the stop was based upon an unreasonable reliance on a radar device, which was not calibrated until after the arrest.

When reviewing a circuit court’s denial of a motion to suppress evidence, this court will uphold the court’s factual findings unless clearly erroneous, but will review the court’s application of the facts to constitutional principles de novo. *State v. Stout*, 2002 WI App 41, ¶9, 250

Wis. 2d 768, 641 N.W.2d 474. The existence of reasonable suspicion is a question of both law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. This Court should uphold the factual findings concerning the existence of reasonable suspicion unless clearly erroneous, and review de novo the application of these factual findings to constitutional principles.

Here, Mr. Gibson’s arguments fail because they are based upon an incorrect application of the pertinent constitutional principles and law. The circuit court properly denied Mr. Gibson’s motion to suppress, and this court should affirm the judgment of conviction.

I. SERGEANT BAUTZ HAD REASONABLE SUSPICION TO PERFORM A TRAFFIC STOP; CALIBRATION OF THE RADAR DEVICE BEFORE THE TRAFFIC STOP IS NOT DETERMINATIVE OF WHETHER OF NOT SERGEANT BAUTZ HAD REASONABLE SUSPICION TO PERFORM THE STOP.

The circuit court correctly held that Sergeant Bautz had reasonable suspicion a traffic violation occurred to perform a traffic stop on Mr. Gibson’s vehicle. Reasonable suspicion is “more than a police officer’s inchoate and unparticularized suspicion or hunch; rather, the officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *State v. Post*, 301 Wis.2d 1, 8, 733 N.W.2d 634, 637 (2007).

Determining the reasonableness of a traffic stop is a “common-sense” test,

in which “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.” *Id.* at Wis.2d 9, 733 N.W.2d 638. This test is based upon the totality of the facts and circumstances. *Id.* at Wis.2d 9, 733 N.W.2d 638.

On appeal, Mr. Gibson does not dispute whether or not he was drinking or speeding on the date in question. Mr. Gibson merely argues that Sergeant Bautz’s reliance on a radar gun that had not been calibrated since 1994 was not reasonable. However, this is not the standard the State bears the burden to prove; the proper standard is whether Sergeant Bautz had reasonable suspicion to perform a traffic stop. Mr. Gibson’s argument improperly focuses on one factual circumstance out of the totality of the circumstances and does not account for all of the resources available to Sergeant Bautz at the time of the traffic stop.

The State believes the circuit court did not adequately consider Sergeant Bautz’s experience in visual calculation of vehicle speed and the totality of the circumstances of this particular stop. Sergeant Bautz is a trained officer who has been a law enforcement officer for 17 years. (R.34:5). Fourteen of those years were spent on patrol, and five years were spent as a patrol officer in the jurisdiction where Mr. Gibson’s arrest occurred. (R.34:5). He has performed thousands of traffic stops during his time as a patrol officer,

and a majority of those stops were for speeding. (R.34:17). Thus, Sergeant Bautz had conducted a visual calculation of a vehicle's speed on thousands of occasions before stopping Mr. Gibson's vehicle.

On the date in question, Sergeant Bautz visually calculated the speed of Mr. Gibson's vehicle. (R.34:7). He reasonably believed at the time, and he testified under oath, that Mr. Gibson was traveling at 25 miles per hour. (R.34:7). The posted speed limit was 15 miles per hour, so Sergeant Bautz calculated that Mr. Gibson was traveling 10 miles per hour over the speed limit. Sergeant Bautz was trained to estimate a vehicle's speed within five miles per hour of actual speed, and had conducted this visual calculation thousands of times. (R.34:6-7). Hypothetically, even if Sergeant Bautz had miscalculated by five miles per hour and believed Mr. Gibson was traveling at 20 miles per hour, this is still five miles over the posted speed limit in this area. Additionally, both Sergeant Bautz and Mr. Gibson testified to Sergeant Bautz's familiarity with this jurisdiction and particularly Lac La Belle Drive. It is reasonable for a highly experienced officer, who is familiar both with an area and the notably low speed limit in that area, to rely on his visual calculation of a vehicle's speed. Here, Sergeant Bautz calculated Mr. Gibson's speed within one mile per hour of the radar gun result.

The State believes the standard for reliability of the radar gun was given too much weight in the circuit court's decision to deny Mr. Gibson's

motion to suppress. The State is only required to prove that Sergeant Bautz had gained reasonable suspicion that Mr. Gibson violated a traffic law. Under the reasonable suspicion standard, the State is not required to prove that the radar gun was in proper working order, as it is merely one factual circumstance at the time of the traffic stop. The court must look at the totality of the circumstances to determine whether Sergeant Bautz gained reasonable suspicion to stop Mr. Gibson, which may or may not include an accurate radar gun result. Thus, recent calibration of the radar gun is not necessary to prove Sergeant Bautz had reasonable suspicion Mr. Gibson was speeding.

On the date in question, Sergeant Bautz reasonably relied on his 17 years of experience, 14 years of patrol experience, and five years of experience in the jurisdiction in question to visibly estimate that Mr. Gibson's vehicle was driving 10 miles per hour over the posted speed limit. Further, the radar gun indicated Mr. Gibson was driving 11 miles per hour over the posted speed limit. There were no external factors, such as weather, time of night, or other vehicles on the road that could have obstructed Sergeant Bautz's visibility or the result of the radar gun. Thus, considering the totality of the circumstances available to Sergeant Bautz, a reasonable officer would believe Mr. Gibson was traveling over the posted speed limit, and the traffic stop of Mr. Gibson's vehicle was lawful.

II. THE CALIBRATION OF THE RADAR DEVICE BEFORE THE TRAFFIC STOP IS NOT DETERMINATIVE OF THE RELIABILITY OF THE RADAR DEVICE.

As mentioned above, whether or not the radar device was recently calibrated is not determinative of whether or not Sergeant Bautz had gained reasonable suspicion that Mr. Gibson was speeding to perform a lawful traffic stop. Even further, in the State of Wisconsin, recent calibration and/or calibration of a radar device before a traffic stop is not determinative of the reliability or proper functioning order of the device. *See State v. Kramer*, 99 Wis.2d 700, 704, 299 N.W.2d 822, 884-85 (1981). Therefore, the circuit court correctly held that the radar gun was functioning properly in light of Wisconsin standards for radar devices.

According to *State v. Kramer*, periodic testing of a radar device by someone other than the operator of the device is not necessary to assure its accuracy. *Id.* Rather, the only requirement in Wisconsin regarding radar devices and their accuracy states that radar devices should be expertly tested “within reasonable proximity following arrest,” and “such testing [should] be done by means that which do not rely on [a] radar device’s own internal calibrations.” Wisconsin courts have held that testing by an external tuning fork, 25 minutes after the defendant’s arrest for speeding, and completed by the arresting officer will satisfy the *Kramer* requirement of external testing within a reasonable proximity following arrest. *See State v. Mills*, 99 Wis.2d 697, 299 N.W.2d 881 (1981).

Further, a prima facie presumption of accuracy sufficient to support a traffic stop for speeding will be accorded to a radar device if the arresting officer testifies that: (1) the officer operating the device had adequate training and experience in its operation, (2) the radar device was in proper working condition at the time of arrest, (3) that device was used in an area where road conditions were such that there was limited or no likelihood of distortion, (4) the input speed of patrol car was verified, and (5) the device was expertly tested within a reasonable proximity following arrest by means which that do not rely on the radar device's own internal calibrations. *See State v. Hanson*, 85 Wis.2d 233, 270 N.W.2d 212 (1978).

Here, the circuit court was correct in holding that the radar gun was accurate, and the record was devoid of any evidence that would suggest the radar gun was inaccurate. Sergeant Bautz was certified and trained in the operation of the radar gun, and used this device on thousands of occasions. (R.34:6). Sergeant Bautz internally calibrated the radar gun when he turned on the device, and this calibration did not indicate the gun was not working properly. (R.34:13). Additionally, Sergeant Bautz testified that there were no limitations in his visibility, and no obstructions that would distort the radar gun reading (such as other vehicles on the road). (R.34:8, 10). Sergeant Bautz was stationary in his vehicle, so input speed could not be verified by his patrol car.

Lastly, Sergeant Bautz tested the radar gun with two tuning forks following Mr. Gibson's arrest. (R.34:16). Although there was no testimony on the exact time he completed the tuning fork testing, if this was completed within a reasonable time after the arrest, this testing would fulfill the sole requirement for radar gun accuracy in the State of Wisconsin.

As the defense has previously indicated, the State of Wisconsin does not require external calibration of radar devices to assure accuracy. In the testing and calibration performed by Sergeant Bautz, there was no indication that the radar gun was not properly functioning on the date of Mr. Gibson's arrest, and the circuit court was correct in holding the radar gun result was accurate. Therefore, the radar gun result serves as another factor in support of finding Sergeant Bautz gained reasonable suspicion to perform the traffic stop.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that the Court affirm the circuit court's decision denying the defendant's motion to suppress.

Dated this 10th day of January, 2017.

Respectfully,

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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced with proportional font. The length of this brief is 2,678 words long.

Dated this 10th day of January, 2017.

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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 Wis. Stat. § 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 certification 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 January, 2017.

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