WISCONSIN COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP002383

CITY OF PEWAUKEE,

Plaintiff-Respondent,

v.

JOHN JAY KENNEDY,

Defendant-Appellant.

Appeal from a Final Judgment of the Circuit Court of
Waukesha County, the Honorable Michael P. Maxwell Presiding,
Circuit Court Case No. 2016CV000121

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT, CITY OF PEWAUKEE

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STATEMENT OF THE ISSUES

Appellant's statement of the issues fully states the question before the Court for purposes of this appeal.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Oral Argument. Pursuant to Wis. Stat. § 809.22(2)(b), the Respondent does not request oral argument in this case. The issues presented can be adequately addressed through the briefing process.

Publication. Pursuant to Wis. Stat. § 752.31(2), this case will be decided by one judge, rendering the decision ineligible for publication.

STATEMENT OF THE CASE

Appellant's statement of the case is accurate as stated and is therefore adopted in respondent's brief.

STANDARD OF REVIEW

Applying undisputed facts to constitutional standards presents a question of law, which the appellate court reviews de novo. *State v. Rutzinski*, 241 Wis.2d 729 (2001). On appeal of a determination of reasonable suspicion for an investigatory stop, which presents a question of constitutional fact, the Court applies a two-step standard of review: first, it reviews the circuit court's findings of historical fact, and upholds them unless they are clearly erroneous, and second, it reviews de novo the determination of reasonable suspicion. *State v. Miller*, 341 Wis.2d 307 (2012).

ARGUMENT

I. OFFICER BECKER HAD THE REQUISITE LEVEL OF SUSPICION TO STOP MR. KENNEDY AFTER DETERMINING THERE WAS AN OUTSTANDING WARRANT FOR HIS ARREST

The temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. *State v. Harris,* 206 Wis.2d 243, 253 (1996). A police officer may, in the appropriate circumstances, approach an individual for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See Terry v. Ohio,* 392 U.S. 1, 22, 88 (1968). When police make an investigative stop of a person, it is not an arrest and the standard for the stop is less than probable cause. *State v. Allen,* 226 Wis.2d 66, 70–71 (Ct. App.1999). The standard is reasonable suspicion, "a particularized and objective basis" for suspecting the person stopped of criminal activity. *Ornelas v. United States,* 517 U.S. 690, 696, (1996). When determining if the standard of reasonable suspicion was met, those facts known to the officer must be considered together as a totality of the circumstances. *State v. Richardson,* 156 Wis.2d 128, 139–40 (1990). *State v. Powers*, 275 Wis.2d 456 (Ct. App. 2004).

While probable cause is enough to justify a traffic stop, probable cause is not required to justify a traffic stop. *State v. Haughton*, 364 Wis.2d 234 (2015). An officer's reasonable suspicion, rather than probable cause, that a motorist was violating or had violated a traffic law was always sufficient for the officer to initiate a stop of the offending vehicle. *State v. Haughton*, 364 Wis.2d 234 (2015). When weighed against the public interest in safe roads, the temporary and brief detention of a traffic stop was an appropriate manner in which a police officer could approach a person for purposes of investigating

possible criminal behavior even though there was no probable cause to make an arrest. *State v. Haughton*, 364 Wis.2d 234 (2015). Rather, police officers who reasonably suspect an individual is breaking the law are permitted to conduct a traffic stop to try to obtain information confirming or dispelling the officer's suspicions. *State v. Haughton*, 364 Wis.2d 234 (2015).

Courts judge the reasonableness of a traffic stop by balancing the public interest and the individual's right to personal security free from arbitrary interference by law officers. *State v. Iverson*, 365 Wis.2d 302 (2015). A routine traffic stop is a relatively brief encounter and is more analogous to a so-called *Terry* stop than to a formal arrest. *State v. Iverson*, 365 Wis.2d 302 (2015). For a traffic stop to be lawful as to all occupants, the State need not establish that the police had reasonable, articulable suspicion to seize the particular defendant before the court, but only that the police possessed reasonable, articulable suspicion to seize someone in the vehicle. *State v. Iverson*, 365 Wis.2d 302 (2015). The reasonableness of an investigatory stop is determined by a common sense test that asks what a reasonable police officer would reasonably suspect in light of his or her training and experience. *State v. Waldner*, 206 Wis.2d 51 (1996). This common sense approach strikes balance between individual privacy and societal interest in allowing police reasonable scope of action in discharging their responsibility. *State v. Waldner*, 206 Wis.2d 51 (1996).

A police officer may temporarily stop a suspicious vehicle to maintain the status quo while determining the identity of the driver or obtaining other relevant information. *State v. Rutzinski*, 241 Wis.2d 729 (2001). Reasonable suspicion that the driver or occupants of the vehicle have committed an offense, as basis for investigative stop, must

be based on something more than the officer's inchoate and unparticularized suspicion or hunch; at the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot. *State v. Rutzinski*, 241 Wis.2d 729 (2001).

The test to determine whether an investigatory stop was justified is an objective one, and asks whether the facts available to the officer at the moment of the seizure or the search warranted a man of reasonable caution in the belief that the action taken was appropriate. *State v. Miller*, 341 Wis.2d 307 (2012). In determining whether an investigatory stop was justified, the Supreme Court considers the totality of the circumstances leading up to the investigatory stop and focuses its analysis on the reasonableness of the officers' actions in the situation facing them. *State v. Miller*, 341 Wis.2d 307 (2012).

Appellant's sole argument, which he repeats *ad nauseam*, comes down to the fact that Officer Becker did not double check the outstanding warrant that came through on his squad computer system prior to pulling Kennedy over. Appellant supports this argument with conjecture and theory but no case law or statutory authority. Additionally, in an attempt to use the City of Pewaukee's case law against them, Appellant misstates the facts in *Newer*. In that case, contrary to Appellant's statement, the officer did not first run the plates through his squad computer and then confirm the information with dispatch. Instead, he simply called dispatch and had them run Newer's plates. When he was told that Newer's license was suspended, the officer pulled over the driver based only on that information without confirming it through his own efforts. Police officers are not required to rule out

the possibility of innocent behavior before initiating a brief stop. *State v. Waldner*, 206 Wis.2d 51 (1996).

The requirement of reasonable suspicion for a traffic stop is not a requirement of absolute certainty: sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. *State v. Newer*, 306 Wis.2d 193 (Ct. App. 2007). The officer had reasonable suspicion for a traffic stop of a vehicle based on his knowledge that the license of the owner of the vehicle was revoked, where the officer did not observe the driver of vehicle and had no reason to think that it was anyone other than vehicle's owner at any time during the stop. *State v. Newer*, 306 Wis.2d 193 (Ct. App. 2007). A reasonable suspicion inquiry, for purposes of a traffic stop, considers the totality of the circumstances. *State v. Newer*, 306 Wis.2d 193 (Ct. App. 2007). This concept is not only prevalent in Wisconsin case law but also Minnesota and Illinois as well. *See State v. Pike*, 551 N.W.2d 919 (Sup. Ct. MN 1996); (the court found that a stop based on computer check returning a revoked license was reasonable suspicion to stop vehicle). A random registration check through a data terminal that returned a revoked license was considered reasonable suspicion for a stop. *Village of Lake in the Hills v. Lloyd*, 227 Ill.App.3d 351 (Ap. Ct. Ill. 1992).

Officer Becker conducted a random registration check, as is entirely common practice for patrol officers. The check of the Department of Transportation database showed that there was an outstanding warrant for the sole owner of the vehicle within the jurisdiction of Waukesha County. (App. 3-4). Appellant's argument that every officer needs to double check or confirm DOT records prior to making a stop is not only unsupported by any precedent but also impractical in its implementation. If they are

supposed to act on the assumption that all information gleaned from their squad computer system is wrong, what is the purpose for having those systems in place at all?

Officer Becker acted as a reasonable officer under appropriate circumstances with the facts known to him at the time. He was not acting on a hunch but rather on specific, articulable facts that showed an outstanding warrant for Kennedy on file with the DOT that caused him to investigate the situation. It was common sense to catch up with the suspect, in order to pull him over and obtain information that would either confirm or dispel his suspicions. The reasonable suspicion here is clear and the case law discussed above proves as much.

CONCLUSION

For the reasons stated above, the Court should affirm the circuit court judgment of conviction finding Mr. Kennedy guilty of operating a motor vehicle with a prohibited alcohol concentration.

Dated this 10th day of April 2018

/s/ H. Stanley Riffle
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) & (c), as modified by the court's order, for a brief produced with a proportional serif font. The length of this brief is 10 pages.

I hereby further certify that I have submitted an electronic copy of this brief that complies with the requirements of s. 809.19(12) and that this 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 April 2018

/s/ Luke A. Martell
Luke A. Martell