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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Trial Case No. 16-CM-123

Appeal No. 2017AP12CR

JESSE U. FELBAB,

Defendant-Appellant.

Reply Brief of Jesse U. Felbab On Appeal from a Judgment of Conviction, Both Entered in Winnebago County Circuit Court, The Honorable Thomas J. Gritton, presiding.

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ARGUMENT

I. THE TRIAL COURT INITIALLY GRANTED THE MOTION TO SUPRESS BECAUSE THE STATE HAD FAILED TO PROVIDE SUFFICIENT PROOF OF THE LENGTH OF TIME TAKEN TO CONDUCT THE STOP, NOT ON THE GROUNDS OF REASONABLE SUSPICION.

In its brief, the State argues that Deputy Schoonover had a reasonable suspicion to conduct a traffic stop of the Felbab vehicle, and as a consequence, the evidence seized during the stop of the Felbab vehicle should not have been suppressed initially by the Trial Court (State's brief, Pages 10-11).

However, that is not the basis for the Trial Court initially granting the motion to suppress. Judge Gritton indicated there was insufficient evidence of the time taken to conduct the stop (R-29, Page 34, Lines 9-24). Because the State had not proven the amount of time taken to temporarily detain Mr. Felbab was reasonable, the motion to suppress was granted.

Mr. Felbab's motion to suppress offered two grounds for exclusion of the evidence obtained during the traffic stop – because the stop was unreasonably long and the stop was improperly expanded beyond its original purpose (R-4).

A temporary detention of an individual during a stop of a vehicle by police is considered a seizure under the Fourth Amendment. **State v. Popke**, 2009 WI 37, 317 Wis. 2d 118, 765 N.W. 2d 569. Therefore, a traffic stop is subject to constitutional standards of reasonableness. A temporary stop is unreasonable and impermissible if the officer lacks a reasonable suspicion that a traffic or law violation has been or will be committed. **State v. Post**, 2007 WI 60, 301 Wis. 2d 1, 733 N.W. 2d 634. Additionally, a stop is unreasonable and impermissible if the detention takes longer than necessary to effectuate the purpose of the stop. **Florida v. Royer**, 460 U.S. 491 (1983).

In Mr. Felbab's case, he challenged in part the length of time taken to conduct the traffic stop of his vehicle (R-4).

Judge Gritton correctly noted the State did not present evidence to indicate how long the stop took to complete (R-29, Page 34, Lines 9-24). The State has the burden to prove the reasonableness of the stop, **Post**, 2007 WI 60, ¶ 12. The State did not offer proof as to the time taken to conduct this traffic stop. Accordingly, the motion was granted. The record clearly supports Judge Gritton's decision to initially grant the motion to suppress.

The State suggests that Judge Gritton erred because he "reframed the issue" (State's brief, Page 16). Mr. Felbab disagrees. The State seeks to focus its attention only on the grounds to initiate a stop. However, the reasonableness requirements of the Fourth Amendment extend to more than just the grounds for initiating the traffic stop. Those standards of reasonableness also apply to the time taken to perform the stop. **Florida v. Royer**, 460 U.S. 491 (1983). Because the State did not present evidence on the length of time taken to detain Mr. Felbab, the State failed to meet its burden of proof. The record supports Judge Gritton's decision to grant the motion to suppress.

II. MR. FELBAB MAINTAINS THE RECORD IS NOT ADEQUATE TO SUPPORT THE TRIAL COURT'S EXERCISE OF DISCRETION TO ALLOW ADDITIONAL TESTIMONY.

What troubles Mr. Felbab is the record does not contain a sufficient statement to demonstrate the Trial Court examined the facts relevant to this case, considered the pertinent factors in favor of and against admission of additional testimony, and reviewed applicable case law.

In his motion to suppress, Mr. Felbab raised two grounds for challenging the stop, one of which was to contest the amount of time the stop took to complete. Certainly, the State had adequate notice of the need to provide testimony on April 6, 2016 (the first motion hearing).

Mr. Felbab argues the record does not contain a statement from the Trial Court summarizing the facts which were considered in deciding to allow additional testimony. In

other words, Judge Gritton does not discuss the reasons why this testimony was not offered by the State at the first hearing, such as insufficient time or other cause for the testimony not being offered then. Deputy Schoonover was obviously present at the first hearing and presumably able to testify on this matter.

Furthermore, the record does not contain a discussion from the Trial Court of the various factors which supported and those which opposed admission of more testimony, such as prejudice or hardship to the defense if additional testimony was allowed.

And there is no summary of the law in the matter. On April 6, 2016, Judge Gritton made reference to the **Young** case (**State v. Young**, 2006 WI 98, 294 Wis. 2d 1, 717 N.W. 2d 729) and the **Colstad** case (**State v. Colstad**, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W. 2d 394), but those cases were mentioned as they pertained to the legality of the traffic stop of the Felbab vehicle, not to the law on allowing additional testimony.

These are the matters pertinent case law expects a Trial Court to consider and place on the record to demonstrate a proper exercise of discretion. Mr. Felbab contends the record does not contain sufficient mention of these matters to support Judge Gritton's decision to allow additional testimony.

III. MR. FELBAB CONTENDS REASONABLE SUSPICION DID NOT EXIST TO WARRANT A TRAFFIC STOP FOR AN OWI INVESTIGATION.

Mr. Felbab believes the State's brief may be read to suggest that Deputy Schoonover's observations of the Felbab vehicle were sufficient to form a reasonable suspicion to conduct a traffic stop to investigate possible impaired driving. Mr. Felbab respectfully disagrees.

During his testimony, Deputy Schoonover made a few observations of the Felbab vehicle prior to conducting the traffic stop – variation of speed (traveling between 40 – 60 MPH in a posted 65 MPH zone), activation and deactivation of

the right turn signal, and traveling on the shoulder (R-29, Pages 5-7).

Mr. Felbab maintains that these observations, taken collectively or individually, do not establish a reasonable suspicion of impaired driving and warrant a traffic stop for an OWI investigation.

As defense counsel argued at the motion hearing, all of these observations can be explained away as a driver who is not familiar with the area and is searching for the correct exit (R-29, Pages 24 and 26).

More importantly, these observations do not establish a reasonable suspicion of impaired driving. To begin with, there is no collateral information, such as a call in to dispatch from a witness of a possibly impaired driver.

Next, in **State v. Hogan**, 2015 WI 76, 364 Wis. 2d 167, 868 N.W. 2d 124, the officer had far more information of impairment to establish a reasonable suspicion, including personal observations of the appearance and behavior of the defendant. Nevertheless, the **Hogan** court considered that case a close call as to reasonable suspicion of impairment. With substantially less to go on as to impairment, specifically observations about the speed of the vehicle, use of a turn signal, and crossing the fog line on the road, one cannot conclude the Hogan case supports the position that Deputy Schoonover had a reasonable suspicion of impaired driving at the time he initiated the traffic stop.

Finally, the observations of Deputy Schoonover regarding the operation of the Felbab vehicle do not establish a pattern of weaving while driving which was repeated several times over the course of two blocks, to be similar to the observations of the investigating officer in **State v. Post**, supra, or a similar pattern of driving as noted in **State v. Popke**, supra. Therefore, Mr. Felbab believes neither the **Post** case nor the **Popke** case support the conclusion Deputy Schoonover had a reasonable suspicion of impaired driving when he initiated the stop.

CONCLUSION

Mr. Felbab believes the Trial Court erred in allowing additional testimony concerning the traffic stop. On this issue, case should be remanded to the Trial Court with instructions to exercise its discretion consistent with any order from the Court of Appeals.

Next, Mr. Felbab argues only the record from the April 6, 2016 hearing should be considered in reviewing the ruling on a motion to suppress. That record, Mr. Felbab maintains, is insufficient to determine if the time taken to perform this traffic stop was reasonable. Based on the record from the April 6, 2016 hearing, the motion to suppress should have been granted.

Finally, Mr. Felbab contends the record does not support a finding of a reasonable suspicion to expand the traffic stop to include an impaired driver investigation. For this reason, as well, the motion to suppress should have been granted.

Dated this _____ day of April, 2017.

_____

Attorney Daniel R. Goggin II
SPD Appointed Appellate Counsel for
Jesse U. Felbab

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum 60 characters per full line of body text. The length of this brief is 1,547 words.

_____

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ELECTRONIC FILING CERTIFICATION

I, Attorney Daniel R. Goggin, II, hereby certify that (1) the electronic copy of this brief or no merit report is identical to the text of the paper copy of the brief or no merit report, and an electronic copy of the brief has been filed.

Dated this _____ day of April, 2017.

_____

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