

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP536-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

DENNIS L. ZEMANOVIC,
Defendant-Appellant.

**ON APPEAL FROM THE JUDGMENT OF CONVICTION
FILED ON SEPTEMBER 30, 2016, AND THE DECISION
DENYING THE DEFENDANT'S MOTION TO SUPPRESS,
IN THE WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MICHAEL P. MAXWELL, PRESIDING.
WAUKESHA COUNTY CASE No. 2016CT553**

**DEFENDANT-APPELLANT'S BRIEF AND
SHORT APPENDIX**

Respectfully submitted:

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STATEMENT OF THE ISSUE

Whether the officer had an objectively reasonable suspicion that Zemanovic was driving while intoxicated where, at around 3:30 a.m., he believed that Zemanovic was driving the wrong direction home, he observed Zemanovic weave briefly within his lane on a curved road, and then touch the fog line?

The circuit court concluded yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Zemanovic would welcome oral argument if it would assist the panel to understand the issue presented or answer any unanswered questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Zemanovic does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well-settled rules of law and controlling precedent, with no call to question or qualify said precedent.

STATEMENT OF THE CASE

Dennis Zemanovic entered a guilty plea to a second offense of operating while intoxicated. (16:1; App. 1); (38:13; App. 3). During a traffic stop, Ortiz noticed signs that led him to believe that Zemanovic was intoxicated, including bloodshot glassy eyes, slow and slurred speech, and the odor of intoxicants. (10:2-3). The circuit court sentenced Zemanovic to 25 days of jail, fines, costs, and other alcohol related conditions. (16:1-2; App. 1-2); (39:11; App. 6).

Before pleading guilty, Zemanovic filed a motion to suppress evidence. (4:1-2). Zemanovic

argued that the officer lacked the necessary objectively reasonable suspicion or probable cause to stop Zemanovic. (4:1-2). Accordingly, he argued that the evidence obtained during the traffic stop, including the facts relating to the charged offenses, should be suppressed. (4:1-2). The court held a hearing on the motion, and the following facts were presented at that hearing. (36:2-32; App. 7-37).

On April 17th, 2016, Officer Jose Ortiz was on patrol in Mukwonago during the overnight shift. (36:4-5; App. 9-10). Around 3:30 a.m., he observed a car coming off of Highway 43, which was later determined to be driven by Zemanovic. (36:4-5; App. 9-10).

Ortiz “ran his plates” into his computer and noticed that the car was registered to Eagle, Wisconsin. (36:6; App. 11). Ortiz believed that Zemanovic was driving a way to Eagle that was “kind of weird” because it was headed towards “the lake,” not Eagle. (36:6-7; App. 11-12). Ortiz admitted though that he had no idea which route Zemanovic regularly decides to drive home, and when he decided to follow Zemanovic, the car was headed to Eagle. (36:15-16; App. 20-21).

Ortiz turned his vehicle around and caught up with Zemanovic’s car again by Highway LO. (36:6-7, 9; App. 11-12, 14). Ortiz activated the video camera on his squad car and followed him to observe his driving. (36:9; App. 14). At the hearing, the State played the video taken by Ortiz’s squad car camera. (36:9; App. 14); (34:1). The video captures the entirety of Ortiz following Zemanovic, which was about a mile and lasted about one minutes and 45 seconds. (36:14; App. 19); (34:1, 3:37:33 – 3:39:30). The video shows that the stretch of roadway is a standard width, with curves and hills. (36:14; App. 19); (34:1, 3:37:33 – 3:39:30).

Officer Ortiz agreed that Zemanovic never crossed the center yellow line. (36:13; App. 18). He observed him veering in the lane from left to right, but Zemanovic stayed in his lane the entire time. (36:6, 13-14; App. 11, 18-19); (34:1, 3:38:04). Ortiz also agreed that Zemanovic's driving was never erratic or "jerky." (36:16; App. 21).

Ortiz claimed that Zemanovic "veered over the fog line a few times" and "was actually riding the shoulder for a bit" before he turned on his lights. (36:6; App. 11); (34:1, 3:38:45-3:39:02). Importantly, after the video of what Ortiz observed was played during the hearing, Ortiz agreed that Zemanovic never crossed the white fog line. (36:13; App. 18). When Officer Ortiz did activate the light on his squad car, Zemanovic immediately complied and pulled over safely when he could. (36:15; App. 20); (34:1, 3:39:06-30).

At the end of hearing, the court made the following findings. (36:30-32; App. 35-37). The court noted that while the video may be different than what the officer was able to observe, the video depicted an instance of veering before the ultimate stop was done and then clearly right before the stop was made. (36:30-31; App. 35-36). The court found that at the moment just before the stop, Zemanovic's car was over the white line and into the shoulder. (36:31; App. 36). When these observations were combined with time of the morning and the route Zemanovic took, it was a "close call," but enough to form a reasonable suspicion. (36:31-32; App. 36-37).

After the court denied the motion, Zemanovic entered his guilty plea and was sentenced. (16:1; App. 1); (38:13; App. 3); (39:11; App. 6). This appeal follows.

ARGUMENT

THE OFFICER LACKED AN OBJECTIVELY REASONABLE SUSPICION THAT ZEMANOVIC WAS INTOXICATED WHERE THE ONLY FACTS RELIED UPON WERE HIS OBSERVATION THAT ZEMANOVIC BRIEFLY WEAVED WITHIN HIS LANE AND TOUCHED THE FOG LINE, THE TIME, AND HIS BELIEF THAT ZEMANOVIC WAS DRIVING THE WRONG DIRECTION.

In this case, Officer Ortiz did not have an objectively reasonable suspicion when he stopped Zemanovic. Instead, while patrolling in the early morning hours, he made several inferential leaps that led him to believe the Zemanovic was under the influence. Aside from the time, which was about 3:30 a.m., Ortiz believed Zemanovic was driving the wrong direction home, and observed Zemanovic weaving within his lane and touch the fog line. (36:6-7, 9-10; App. 11-12, 14-15). But Ortiz's belief about driving the wrong way, based only on the car's registration, was complete speculation. As for what Ortiz observed, the video shows that Zemanovic was never driving erratically or jerky, but drifted briefly on a winding road, and at the end, touched the fog line without going over. (36:13-16; App. 18-21); (34:1, 3:37:33 – 3:39:30). Thus, all Ortiz had when he stopped Zemanovic was the hunch of intoxication, and therefore this Court should reverse the denial of Zemanovic motion to suppress.

Both the United States and Wisconsin Constitutions guarantee the right of person to be free from unreasonable searches and seizures. U.S. Const. Amend. IV; Wis. Const. Art. I, § 11. A traffic stop, even if it is brief and for a limited purpose, is a seizure subject to constitutional protections. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis.2d 118, 765 N.W.2d 569, quoting *State v. Gaulrapp*, 207 Wis.2d 600, 605, 588 N.W.2d 696 (Ct. App. 1996). An officer's decision

to conduct a traffic stop is constitutional only if the officer has a reasonable suspicion that a law has been violated. *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis.2d 234, 868 N.W.2d 143.

Whether an officer's suspicion is reasonable is an objective standard. *State v. Richardson*, 156 Wis.2d 128, 139-40, 456 N.W.2d 830 (1990). A court assesses whether a reasonable officer, in light of his or her training and experience, could suspect that the individual has committed a crime. *State v. Post*, 2007 WI 60, ¶13, 301 Wis.2d 1, 733 N.W.2d 634 (citations omitted). The officer must point to specific and articulable facts which, taken together with rational inferences from those facts, constitute reasonable suspicion sufficient to justify the stop. *Houghton*, 2015 WI 79, ¶21, *citing Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968). A stop may be justified even when the officer observes wholly lawful conduct, so long as the inferences drawn from the conduct are reasonable. *State v. Waldner*, 206 Wis.2d 51, 58-59, 556 N.W.2d 681 (1996). However, an officer's unsubstantiated hunch or suspicion cannot support a stop. *Post*, 2007 WI 60, ¶10, *citing Terry*, 392 U.S. at 27.

When a defendant contends that his constitutional rights were violated by a seizure, the burden is on the government in the circuit court to show that it was reasonable. *Post*, 2007 WI 60, ¶12. The court considers the totality of the facts and circumstances when determining the propriety of an investigatory stop. *Id.* at ¶13. On appeal, the appellate court determines whether the government met its burden with a dual standard of review. *State v. Phillips*, 218 Wis.2d 180, 189-90, 577 N.W.2d 794 (1998). The circuit court's findings of fact are upheld unless they are clearly erroneous. *State v. Williams*, 2002 WI 94, ¶17, 255 Wis.2d 1, 646 N.W.2d 834; *State v. Walli*, 2011 WI App 86, ¶14, 334 Wis.2d 402, 799 N.W.2d 898 (applying same standard to court's

reliance on video evidence when the facts are in dispute). The circuit court's conclusions about whether constitutional violation occurred under those facts is reviewed de novo. *Williams*, 2002 WI 94, ¶17.

In this case, the State failed to meet its burden below. Ortiz claimed that three things led him to form a reasonable suspicion. (36:9-10; App. 14-15). First was the hour of the stop, which was around 3:30 a.m. (36:8; App. 13). Courts have recognized the relevance that the time of day plays in whether circumstances can add up to a reasonable suspicion of driving while intoxicated. *In re Smith*, 2008 WI 23, ¶¶31-32, 308 Wis.2d 65, 746 N.W.2d 243, *citing State v. Swanson*, 164 Wis.2d 437, 453-54, 475 N.W.2d 148 (1991). But the time of the stop is not enough on its own to form a reasonable suspicion. *See In re Smith*, 2008 WI 23, ¶¶31-32 (time of the incident was just one factor), *citing Swanson*, 164 Wis.2d at 453-54 n.6. More facts must be present other than time, and the necessary "more" is not present here when considering the facts relied upon by the officer.

Second, Officer Ortiz suspected that Zemanovic was going a "weird" way because initially, he was not headed in the direction of the car's registered address. (36:6-7; App. 11-12). But this it is entirely untethered to anything related to a traffic violation. It is not conceivably related to impairment or evading the officer. On the scale of how much weight to give a factor, this fact is essentially weightless.

Third, Officer Ortiz relied upon his observations of Zemanovic's driving. (36:6, 9; App. 11, 14). This of course is more directly relevant to forming a reasonable suspicion, but even when considering the other factors that Ortiz relied upon, it falls short. Ortiz followed Zemanovic for about a minute and 45 seconds along a winding road. (36:14; App. 19); (34:1, 3:37:33 – 3:39:30). Unlike other cases involving impairment, Zemanovic did not commit a

traffic violation or cross any lines. *Compare Popke*, 2009 WI 39, ¶26 (in addition to the time of the stop, three-quarters of the car was driving over the center of the road, then overcorrected). He was not driving in a jerky or erratic manner. (36:16; App. 21). The video also depicts that the speed was normal and steady throughout Ortiz’s observation. (34:1, 3:37:33 – 3:39:30).

Ortiz claimed that Zemanovic was weaving, but it is not the weaving that other cases have found to signify impairment. The Wisconsin Supreme Court has made clear that weaving within a lane is not *per se* evidence of intoxication. *Post*, 2007 WI 60, ¶¶18-21 (noting the “universality of drivers’ ‘weaving’ in their lanes”). In this case, it was not significant either. As the circuit court found, the video shows one instance of weaving. (36:31; App. 36). At most he briefly drifted between the center and fog line at one point. (34:1, 3:38:04). It was minimal too. The road upon which Zemanovic travelled was not straight and it was standard width. (36:14; App. 19). It was not sustained weaving. Ortiz also agreed that Zemanovic was not driving in a jerky or erratic manner. (36:16; App. 21). In short, it was not atypical driving. *Compare Post*, 2007 WI 60, ¶¶29, 36 (the weaving was not a slight deviation, but a discernable S-pattern for blocks, in a lane twice the size of a standard lane).

In addition to a weave, Ortiz observed Zemanovic touch the white fog line. (36:9; App. 14). Initially, Ortiz testified that Ortiz was in the shoulder, but after the video was shown during the hearing, he agreed during cross examination that Zemanovic never went over the white fog line. (36:6, 9, 13; App. 11, 14, 18). In other words, he only touched the line, he never crossed it.

To the extent the circuit court found that Zemanovic was into the shoulder, that is clearly

erroneous in light of Ortiz's testimony and the video. While Ortiz suggested initially that Zemanovic went over the fog line and into the shoulder, he made clear during cross-examination that Zemanovic never crossed the fog line. (36:6, 9, 13; App. 11, 14, 18). Likewise, the video shows at most that Zemanovic touched the fog line, but did not cross it. (34:1, 3:38:45-3:39:02).

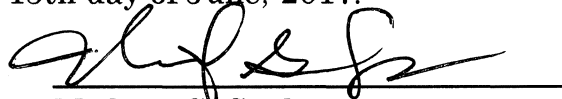
Thus, the observations of Zemanovic's driving consisted of legal minimal drifting within his lane at one point, and touching the fog line once. When considering that this driving occurred on a winding road with hills, these observations remain relegated to the realm of speculation of intoxication, which of course cannot support a legal stop.

Ortiz was a hammer looking for a nail, which led to an overzealous effort to stop Zemanovic without the requisite reasonable suspicion. The noble purpose to stop drunk driving must nonetheless be consistent with the fundamental principles protecting citizens from unreasonable searches and seizures. When Zemanovic appeared to touch the fog line, Ortiz did not hesitate; he activated his light and pulled Zemanovic over. But he did so without a reasonable basis to do so, but just a hunch. Accordingly, the seizure was unreasonable, and all the evidence flowing from it should have been suppressed.

CONCLUSION

For these reasons, Zemanovic asks this Court to reverse the denial of his motion to suppress and to remand for further proceedings consistent with so holding.

Dated this 13th day of June, 2017.



Michael G. Soukup
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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2300 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 13th day of June, 2017.



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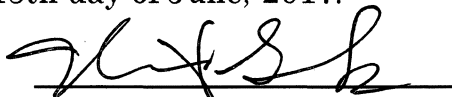
CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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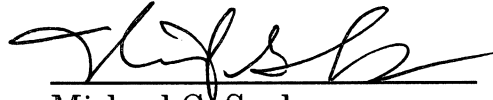


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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on the 13th day of June, 2017. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 13th day of June, 2017.

A handwritten signature in black ink, appearing to read 'M. Soukup', written over a horizontal line.

Michael G. Soukup
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