RECEIVED
07-12-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent

V.

DAVID L. MILLER,

Defendant-Appellant

Case No. 2017AP000685-CR
Court Case No. 2016CT76

BRIEF & APPENDIX OF DEFENDANT APPELLANT

Appeal from a Judgment of Conviction Entered
In the Circuit Court for Waupaca County
The Honorable Vicki L. Clussman Presiding
Trial Court Case Nos. 2016CT76

JOHN MILLER CARROLL LAW OFFICE

John Miller Carroll
State Bar No. 1010478

Tyler T. Fredrickson
State Bar No. 1101665

Attorneys for Defendant- Appellant

ADDRESS:
226 South State Street
Appleton, WI 54911
Telephone: (920) 734 4878

TABLE OF CONTENTS

TABLE OF AUTHORITIES……..…..……ii-iii

ISSUE PRESENTED FOR REVIEW…….1

STATEMENT ON ORAL ARGUMENT…….…...……..1

STATEMENT ON PUBLICATION…….……..1

STATEMENT OF THE CASE……...……1

STATEMENT OF THE FACTS……..…..…..……....2-3

STANDARD OF REVIEW…….……3-8

ARGUMENT…….……8-16

CONCLUSION……...…….…….……17

CERTIFICATION OF FORM AND LENGTH….……..18

CERTIFICATION OF ELECTRONIC BRIEF…….18

TABLE OF AUTHORITIES

Cases

State v. Young,
2006 WI 98, ¶ 21, 294 Wis.2d 1, 717 N.W.2d 729……...4, 8

State v. Waldner,
206 Wis.2d 51, 56, 556 N.W.2d 681 (1996)……..…….4, 8

State v. Walli,
2011 WI App 86, ¶ 10, 334 Wis.2d 402,
799 N.W.2d 898…….4, 8, 13, 14, 16

In re Ambroziak,
2015 WI App 82, ¶ 7, 365 Wis. 2d 349, 871 N.W.2d 693…4

State v. Pepin,
110 Wis. 2d 431, 328 N.W.2d 898 (Ct. App. 1982)……5

In re Mechler's Will,
246 Wis. 45, 16 N.W.2d 373 (1944)……5

Martwick,
231 Wis.2d 801, 604 N.W.2d 552, 2000 WI 5 at ¶ 16……5

State v. Phillips,
218 Wis.2d 180, 189, 577 N.W.2d 794 (1998)……..……..6

State v. Hajicek,
2001 WI 3, ¶ 15, 240 Wis. 2d 349, 358, 620 N.W.2d 781,
785 ……. 6

Orvis v. Higgins,
180 F.2d 537 (CA2 1950)……...…….6,7, 8, 13

Lydle v. United States,
635 F.2d 763, 765, n. 1 (CA6 1981)……..…….6.7, 13

Swanson v. Baker Industries, Inc.
615 F.2d 479, 483 (CA8 1980)…….6,7

Pullman-Standard v. Swint, 456 U.S. 273,
102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)……...……7, 8

Anderson v. City of Bessemer, 470 U.S. 564, 575…….7, 14

Berkemer v. McCarty , 468 U.S. 420, 436 (1984)…….. 9

Florida v. Royer , 460 U.S. 491, 501 (1983)……...9

Terry v. Ohio , 392 U.S. 1, 21-22 (1968)…….9, 13

State v. Jackson , 147 Wis.2d 824, 834, 434 N.W.2d 386 (1989)...9

State v. Guzy , 139 Wis.2d 663, 680, 407 N.W.2d 548 (1987).....10

State v. Popke, 2009 WI 37, ¶ 26, 317 Wis. 2d 118, 133-34, 765 N.W.2d 569, 577…….10, 11

U.S. v. Lyons, 7 F.3d 973, 974 (10th Cir.1993)…….12

United States v. Colin, 314 F.3d 439, 446 (9th Cir.2002)…….....12

State v. Post, 2007 WI 60, ¶ 20, 301 Wis. 2d 1, 12, 733 N.W.2d 634, 639-40……13

Swanson v. Baker Industries, Inc. 615 F.2d 479, 483 (CA8 1980) ……...13

State ex rel. Sieloff v. Golz, 80 Wis.2d 225, 241, 258 N.W.2d 700 (1977)…….15

De Lap v. Inst. of Am., Inc., 31 Wis.2d 507, 510, 143 N.W.2d 476 (1966)…….15

Kailin v. Rainwater, 226 Wis.2d 134, 147, 593 N.W.2d 865 (Ct.App.1999). ……15

Cohn v. Town of Randall, 2001 WI App 176, ¶ 7, 247 Wis. 2d 118, 125, 633 N.W.2d 674, 678……...15

State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000)……16

Statutes

Wis. Stat. § 968.24…….....9
Wis. Stat. § 346.63……..…...….2

Fourth Amendment United States Constitution.…….……8

ISSUES PRESENTED FOR REVIEW

Did the Circuit Court err by ruling that the defendants Motion challenging stop be denied?

The Circuit Court answered: No.

The Defendant-Appellant Submits: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested.

Publication is requested, as the case presents a nexus between two established yet unique standards of Appellate review when concerning cases with memorialization of facts in the record. Publication of this record in necessary as it will settle a conflict in existing precedent.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction, entered in Waupaca County Circuit Court, the Honorable Vicki Clussman presiding, in which the Defendant-Appellant, David Miller (Miller), was found guilty, upon no contest plea, following the denial of his motion to suppress evidence, of

Operating While Intoxicated contrary to Wis. Stat. § 346.63 (1)(a). (R. 3)

STATEMENT OF THE FACTS

On March 18, 2016, the State filed a Complaint in Waupaca County Circuit Court charging Miller with, Operating While Intoxicated – 3rd Offense, contrary to Wis. Stat. § 346.63 (1)(a). (R. 3). Miller Moved the Circuit Court in Waupaca County to Suppress Evidence citing as grounds that the arresting officer lacked Reasonable Suspicion at the time of the seizure to perform a traffic stop. (R. 11, R. 17) In support of its motion Miller jointly with the District Attorney, submitted evidence to the Circuit Court in the form of a DVD video recording of the stop. (R. 43) Defense counsel sought the admission of this evidence because it is a recording of the events. The trial court marked, admitted and reviewed the exhibit. The prosecution stipulated to the accuracy of the video. (R. 39) After receiving the exhibit, the Court reviewed the DVD video and made a finding of fact based on the review of the recorded video that the video evidenced "Weaving within the lane, that Mr. Miller was traveling on what's frequently referred to as the fog line, and also

traveling on or over the centerline", and then concluded that Reasonable Suspicion to stop Millers Vehicle existed. (R. 39) Having heard and denied the motion for the suppression of un-constitutionally obtained evidence Miller entered into a Plea Agreement and on March 13th , 2017, Miller entered a Plea of No Contest, Millers plea was accepted and he was adjudicated guilty.(R. 21, R. 41) This Appeal follows.

APPLICABLE STANDARD OF REVIEW

A review of published Wisconsin Case law on the issues presented in this appeal indicates a split in authority between the line of authority under Walli and cases in support of the Documentary Evidence Exception where facts are contained within the record.

Because this case presents a unique issue of fact and law with a memorialization of the facts contained within the record, it is unclear under current precedent whether the clearly erroneous standard of review as supported by Walli should be applied or the De Novo standard under the Documentary evidence exception.

I. Review of Constitutional issues requires the application of a Denovo Review

"Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis.2d 1, 717 N.W.2d 729. The reasonableness determination involves an objective and common sense test. *State v. Waldner*, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996). "Whether reasonable suspicion exists is a question of constitutional fact." *State v. Walli*, 2011 WI App 86, ¶ 10, 334 Wis.2d 402, 799 N.W.2d 898. Therefore, we apply a two-step standard of review. *Id.* First, we uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* We then review de novo whether those facts give rise to reasonable suspicion. *Id.* In re Ambroziak, 2015 WI App 82, ¶ 7, 365 Wis. 2d 349, 871 N.W.2d 693

II. Review of Documentary Evidence requires De Novo review

However, where evidence of facts is contained within the record itself or where there is a stipulation as to the facts in a case the Appellant Courts in Wisconsin have applied the Documentary Evidence Exception and reviewed the

memorialized facts in the record De Novo. *See Pepin*, 110 Wis. 2d at 435,378, N.W.2d at 900 and *Mechler*, 246 Wis. At 55-56, 16 N.W.2d.

The agreed upon facts contained and memorialized in video that was properly admitted into evidence positions the Court of Appeals to be in the same position as the trial court to determine the facts at issue in this case. For that reason the application of the Documentary Evidence Exception is applicable. Further the Appellant is raising a question of Constitutional Fact; the facts at issue are memorialized.

Therefore the court should apply the Documentary Evidence Exception in this case, review the facts contained within the record and recordings therein to review a new the issues presented by this appeal.

III. The review of the Seizing Officers Video that Encompasses the Stop is grounds to apply the Documentary Evidence Exception

A question of constitutional fact presents a mixed question of fact and law that is reviewed with a two-step process. *Martwick*, 231 Wis.2d 801, 604 N.W.2d 552, 2000 WI 5 at ¶

16; *State v. Phillips*, 218 Wis.2d 180, 189, 577 N.W.2d 794 (1998). First, an appellate court reviews the circuit court's findings of historical fact under the clearly erroneous standard. *Martwick*, 231 Wis.2d 801, 604 N.W.2d 552, 2000 WI 5 at ¶ 18. Second, an appellate court reviews the circuit court's determination of constitutional fact de novo. *State v. Hajicek*, 2001 WI 3, ¶ 15, 240 Wis. 2d 349, 358, 620 N.W.2d 781, 785

Various Courts of Appeal have on occasion asserted the theory that an appellate court may exercise de novo review over findings not based on credibility determinations. See, e.g. *Orvis v. Higgins*, 180 F.2d 537 (CA2 1950); *Lydle v. United States*, 635 F.2d 763, 765, n. 1 (CA6 1981); *Swanson v. Baker Industries, Inc.* 615 F.2d 479, 483 (CA8 1980). Because the entirety of the officer's testimony offered in person to the Trial Court pertained to the reliability of the recording in the record, the Court of Appeals should apply the Documentary Evidence Exception and review De Novo the record, to then review issues Constitutional Law.

IV. The Review of Video Evidence where the Court of Appeals is in the Same Position as the Trial Court to Review the Evidence Requires the Court of Appeals to Clarify the applicability of the Documentary Evidence Exception

The most significant and dispositive part of the record in this case is a video recording of the incident itself.(R 43, Exhibit I) The United States Supreme Court states that circuit courts cannot insulate their factual findings by denominating them credibility determinations because "documents or objective evidence may contradict the witness' story." *Anderson v. City of Bessemer*, 470 U.S. 564, 575. Thus the evidence in this case (R. 43) that is preserved in the record and that the Court of Appeals is in the same exact position to review as the Trial Court must be reviewed by application of the Documentary Evidence Exception, *de novo.*

Various Courts of Appeals have on occasion asserted the theory that an appellate court may exercise de novo review over findings not based on credibility determinations. See, e.g. *Orvis v. Higgins*, 180 F.2d 537 (CA2 1950); *Lydle v. United States*, 635 F.2d 763, 765, n. 1 (CA6 1981); *Swanson v. Baker Industries, Inc.* 615 F.2d 479, 483 (CA8 1980). This theory has an impressive genealogy, having first been

articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand, see *Orvis v. Higgins*, supra. *Pullman–Standard v. Swint*, 456 U.S. [273] at 287, 102 S.Ct. 1781 [1789], 72 L.Ed.2d 66 [1982].

The review of the video recording of the events in question in this case certainly qualifies as a finding of question of fact that is not based on credibility determinations. This is exactly the type of evidence the Court should have the authority to review de novo. The video of the stop is a recording that has been memorialized and accurately depicts the events in question. (R. 43)

ARGUMENT

I. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANTS MOTION FOR THE SUPPRESSION OF EVIDENCE BECAUSE AT THE TIME OF COMENSING THE SEIZURE THE OFFICER LACKED REASONABLE SUSPICION TO STOP THE DEFENDANT.

A. A review of the record in this case illustrates an error in a finding of fact based nearly exclusively on objective, authenticated and memorialized evidence.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. The detention of a motorist by a law enforcement officer constitutes a

"seizure" within the context of the Fourth Amendment. *Berkemer v. McCarty* , 468 U.S. 420, 436 (1984). If a detention is illegal and violative of the Fourth Amendment, all statements given and items seized during this detention are inadmissible. *Florida v. Royer* , 460 U.S. 491, 501 (1983). An investigative detention is not unreasonable if it is brief in nature and justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. *Berkemer* , 468 U.S. at 439; see also Wis. Stat. § 968.24.

According to *Terry v. Ohio* , 392 U.S. 1, 21-22 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be premised on specific facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be in the works and that action is appropriate. *Id* . "The question of what constitutes reasonable suspicion is a common sense test. Under all facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Jackson* , 147 Wis.2d 824, 834, 434 N.W.2d 386 (1989). This test is designed to balance the personal intrusion into a suspect's privacy generated by the

stop against the societal interests in solving crime and bringing offenders to justice. *State v. Guzy* , 139 Wis.2d 663, 680, 407 N.W.2d 548 (1987)

Here, the Trial Court admitted into evidence and reviewed a video of the stop. After reviewing the video, Judge Clussman found:

"THE COURT: Well, I am prepared today to make a decision. I did - - I was obviously present for the motion hearing. Deputy Whitaker testified, he indicated that he stopped the defendant vehicle at on February 22 at 3:16 in the morning. He indicated that he observed the vehicle making choppy movements through a curve, and also testified to weaving ***within*** Mr. Millers lane.

I did observe the videotape and saw - - I could observe, by watching the videotape, weaving within the lane,

That Mr. Miller was traveling on whats frequently referred to as the fog line, and also traveling on or over the centerline.

I belive base on the testimnoy that was presented at the motion hearing, as well as the observations on the videotape - - and I take into account not just the driving behavior that was

observed, but also the time of day being 3:16 in the morning, which I think is significant as well. I will find that the Officer did have reasonable suspicion to stop Mr. Millers vehicle, so I will deny the motion. " (R. 40; 3-4)

However, in reviewing the video it is clear that there are no lane deviations. (R. 43, Exhibit I, DVD of Stop) The totality of the circumstances do not support a finding of Reasonable Suspicion.

In a similar case the Supreme Court of Wisconsin took up the issue of Reasonable Suspicion for a traffic stop. In *State v. Popke*, the seizing officer made the following observations: "over the course of approximately one block at 1:30 a.m.: The defendant was driving with three-quarters of the vehicle left of the center of the road; the vehicle then moved back into the proper lane but almost hit the curb; the defendant's vehicle then faded back towards the middle of the road and nearly struck the median." There the Supreme Court of Wisconsin Concluded: "Under the totality of the circumstances, we conclude that the accumulation of these facts gives rise to a reasonable suspicion that the defendant was operating a motor vehicle while intoxicated." *State v.*

Popke, 2009 WI 37, ¶ 26, 317 Wis. 2d 118, 133-34, 765 N.W.2d 569, 577

Unlike the *Popke* case, the facts of Millers stop are: a shift within a lane not crossing center with no lengthy observation or multiple deviations. As evidenced by the video that according to the arresting officer accurately depicts the stop. (R. 43, R. 39 page 7 at lines 8 -11) Weaving within a lane does not arise to reasonable suspicion.

In *U.S. v. Lyons*, a police officer made an investigatory stop after observing the defendant's vehicle weave three to four times within a single lane. *U.S. v. Lyons*, 7 F.3d 973, 974 (10th Cir.1993). The court recognized "the universality of drivers' 'weaving' in their lanes." *Id*. at 976. It therefore cautioned that allowing weaving to justify a vehicle stop may subject many innocent people to an investigation. "Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *Id*.; *United States v. Colin*, 314 F.3d 439,

446 (9th Cir.2002). *State v. Post*, 2007 WI 60, ¶ 20, 301 Wis. 2d 1, 12, 733 N.W.2d 634, 639-40

Having concluded that the determination of whether weaving within a single lane gives rise to reasonable suspicion requires an examination of the totality of the circumstances, we turn to the particular facts of this case. The question we must answer is whether the State has shown that there were "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. *State v. Post*, 2007 WI 60, ¶ 27, 301 Wis. 2d 1, 16, 733 N.W.2d 634, 641-42

The facts of Millers stop do not justify a stop. The video of the stop clearly shows a minor deviation left of the center of a lane while still within a lane, not crossing either the center or fog lines. (R. 43) Further there is no lengthy observation of multiple deviations crossing the centerline like in *Post*. *Id.* (R. 43) Finally and perhaps most importantly the seizing officer testified that the seizure occurred prior to an observation of a law violation. (R. 39 Page 7 lines 8-11)

Emphasis added on "When it hit the centerline I activated my emergency lights"

Simply put, the seizing officer lacked Reasonable Suspicion that criminal activity was afoot *prior* to commencing a seizure. The seizure is commenced the moment the reasonable person would not feel free to leave. In activating his emergency lights and siren prior to observing a lane violation the Officer improperly seized the defendant.

II. THE APPLICABLE STANDARD OF REVIEW OF MEMORIALIZED EVIDENCE NOT SUBJECT TO CREDIBILITY DETERMINATIONS MUST BE *DE NOVO.*

A significant and dispositive part of the record in this case is a video recording of the incident itself. (R. 43) The United States Supreme Court states that circuit courts cannot insulate their factual findings by denominating them credibility determinations because "documents or objective evidence may contradict the witness' story." *Anderson v. City of Bessemer*, 470 U.S. 564, 575.

We are in just as good a position as the trial court to make factual inferences based on documentary evidence and we

need not defer to the trial court's findings. *State ex rel. Sieloff v. Golz,* 80 Wis.2d 225, 241, 258 N.W.2d 700 (1977). Moreover, an interpretation of documentary evidence involves a question of law to be reviewed independently on appeal. See *De Lap v. Inst. of Am., Inc.,* 31 Wis.2d 507, 510, 143 N.W.2d 476 (1966). Inferences drawn from documentary evidence do not bind this court. Id. However, despite our de novo standard of review, we nonetheless value the trial court's decision. *Kailin v. Rainwater,* 226 Wis.2d 134, 147, 593 N.W.2d 865 (Ct.App.1999). Cohn v. Town of Randall, 2001 WI App 176, ¶ 7, 247 Wis. 2d 118, 125, 633 N.W.2d 674, 678 Thus the objective evidence in this case that is preserved in the record and that the Court of Appeals is in the same exact position to review as the trial court must be reviewed using a De novo Review.

"… when a court's findings of fact at a suppression hearing are based solely on evidence that does not involve issues of credibility, such as the videotape evidence in this case, the rationale underlying a more deferential standard of review is not implicated. Consequently, we must determine the standard of review for a trial court's finding of fact on a

motion to suppress when they are based on evidence that does not involve issues of credibility." *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000)

The video recording of the events in question certainly qualifies as a "finding of question of fact" that is "not based on credibility determinations". Moreover the evidence in question is testified to as being accurate and depicts the acts in question. The video of the stop is a recording that memorialized the entirety of events in question. Therefore, the appellant urges this Court to apply the Documentary Evidence Exception to enable the Court to review memorized evidence that is not subject to credibility issues in which it is in the same position as the trial court to review, De Novo.

"We leave for another day the scenario in Binette where the video recording is the only evidence of the alleged criminal conduct." Footnote 5, State v. Walli, 2011 WI App 86, 334 Wis. 2d 402, 412, 799 N.W.2d 898, 903

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court of Appeals apply the Documentary Evidence Exception, review the record and reverse decision of the Waupaca County Circuit Court denying Miller's motion to suppress.

Dated this __ day of July, 2017.

Respectfully Submitted,

JOHN MILLER CARROLL
LAW OFFICE

By: _____
John Miller Carroll
State Bar #1010478
226 S. State St.
Appleton, WI 54911

FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,596 words.

Dated this ___ day of July, 2017.

_____

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this ___ day of July, 2017.

_____

John Miller Carroll
State Bar #01010478