

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RECEIVED

08-11-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. MILLER,

Defendant-Appellant.

On Appeal from Judgment of Conviction Entered in the Circuit Court for Waupaca
County, the Honorable Vicki Clussman, Presiding
Trial Court Case No. 2016CT76

BRIEF AND APPENDIX OF
PLAINTIFF-RESPONDENT

Warren D. Zier
Assistant District Attorney
State Bar ID: 1014851
Attorney for Plaintiff-Respondent

811 Harding Street
Waupaca, WI 54981
(715) 268-6444
warren.zier@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ISSUES PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT.....	1
STATEMENT ON PUBLICATION.....	1
STATEMENT ON THE CASE AND FACTS.....	1
ARGUMENT	
I. THE CIRCUIT COURT CORRECTLY DENIED THE APPELLANT’S MOTION TO SUPPRESS DUE TO AN ILLEGAL STOP, AS THE ARRESTING OFFICER HAD A REASONABLE SUSPICION THAT THE APPELLANT WAS OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT	2
II. THIS APPELLATE COURT NEED NOT REACH THE ISSUE OF DENOVO REVIEW AS POSITED BY APPELLANT AS THE MEMORIALIZED VIDEO EVIDENCE WAS ONLY PART OF THE TRIAL COURTS CALCULUS REGARDING REASONABLE SUSPICION FOR THE STOP, AND THE LAW REGARDING APPELLATE REVIEW OF DOCUMENTARY EVIDENCE IS ALREADY SETTLED.....	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases cited:

United States Supreme Court:

Terry v. Ohio, 392 U.S. 1, 21-22 (1968)2

Federal cases:

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

Wisconsin Supreme Court:

State v. Post, 2007 WI 60, 301 Wis. 2d 1, 16, 733 N.W.2d 634, 641-42 (2007)..3,,4,5

State v. Jackson, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989)..3

State v. Waldner, 206 Wis. 2d 51, 56, 556 N.W.2d 68 (1996).....4

State v. Popke, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569.....3

Wisconsin Court of Appeals

Kailin v. Rainwater, 226 Wis. 2d 134, 593 N.W.2d 865 (Ct. App. 1999).. 4

State v. Walli, 2011 WI App 86, 334 Wis. 2d 402, 412, 799 N.W.2d 898, 903..4

ISSUES PRESENTED

Did the arresting officer have reasonable suspicion to stop the Appellants vehicle?
Should the court apply a different standard of review to the Circuit Court's findings
because some of the evidence is documentary or memorialized?

STATEMENT ON ORAL ARGUMENT

The State is not requesting oral argument in this case. Rather, the State believes
that the issue can be presented and addressed adequately in written argument.

STATEMENT ON PUBLICATION

The State does not request publication. This case can be resolved by
applying well-established legal principles to the facts of the case.

STATEMENT ON THE CASE AND FACTS

As the plaintiff-respondent, the State exercises its option not to present a full
statement of the case, Wis. Stat. § 809.19(3)(a). Facts additional to those presented in
Appellant's brief will be set forth where necessary within the argument section. The
relevant facts are, that on February 22, 2016 at 3:16 a.m., Waupaca County Deputy
Sheriff Whitaker observed the defendant driving a motor vehicle, and further observed
the vehicle making choppy movements through a curve. He then observed the
defendant's vehicle weaving within the lane, travelling on the fog line, and on, or over
the centerline. A traffic stop was then conducted which resulted in the instant charges
and Appellant's conviction of which he is appealing.

(R. 40; 3-4). Appellant filed a motion to suppress evidence based on an illegal stop and detention, and a hearing was held on the motion. At that hearing the court heard the testimony of Deputy Whitaker regarding the time of the observed driving, 3:16 a.m., the choppy travel through the curve, and the in lane weaving and fog and center line crosses. The court also received as evidence a video recording of some of Appellant's driving, specifically the in lane weaving and the fog and center line intrusions. (R. 43, Exhibit 1). The circuit court after viewing the video and hearing argument found that the observations of Deputy Whitaker, specifically, the time of 3:16 a.m., the choppy travel through the curve testified to and un-contradicted, and the video evidence of in lane weaving and travel on or over the fog and center lines, constituted reasonable suspicion for the stop, and accordingly denied Appellant's motion

ARGUMENT

I. THE ARRESTING OFFICER HAD A REASONABLE SUSPICION THAT THE APPELLANT WAS OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT, WHEN HE STOPPED HIM, AND THE CIRCUIT COURT THEREFORE PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE

The standard for determining whether reasonable suspicion to stop and detain exists, was set forth by the Supreme Court in Terry v. Ohio, 392 U.S. 1, 21-22 (1968), specific facts together with rational inferences drawn from those facts that would lead a reasonable officer to believe that criminal behavior may be in the works and action is appropriate. Our Wisconsin Supreme court said what

constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present what would a reasonable officer reasonably suspect in light of his training and experience? State v. Jackson, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). The Wisconsin courts have addressed the issue of reasonable suspicion based on driving behaviors in a number of cases which involved in lane weaving, at least in part. State v. Post, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 663, State v. Popke, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569. In Post, *Supra*, the Court, while refusing to issue a bright line rule that weaving in lane constitutes reasonable suspicion, did find that the in lane weaving and the defendant's vehicle being "canted" towards the parking lane, and it being 9:30 at night amounted to reasonable suspicion for intoxicated driving. Post, *supra*, at 733 N.W.2d 634, 644.

In the instant case the Circuit Court had even more evidence to support its finding that the arresting officer had reasonable suspicion to stop Appellant. There was choppy driving through the curve, recorded in lane weaving and fog and centerline crossing, and this occurred at 3:16 a.m., after bar closing time. Those facts found by the Circuit Court are memorialized on video, and presented through un-contradicted testimony. Applying the totality of the circumstances test for reasonable suspicion as enunciated in Post, *supra*, it is clear that the Circuit Court properly denied Appellant's motion to suppress. This is not simply a case of in lane weaving only as in U.S. v Lyons, 7 F.3d 973 (10th Cir. 1993) cited by Appellant. The facts of this case are much closer, but more substantial than those

in Post, supra, where the stop was found constitutional. The facts at bar are more compelling than those found to support the stop in State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), where the defendant was seen driving slowly, then stopping briefly at an uncontrolled intersection, followed by speeding up, then legally parking and when exiting, dumping some liquid and ice. In Waldner, as in Post, no traffic laws were violated and the stop was upheld. This contravenes Appellant's emphasis on his claim that there was no law violation before his stop.

II. AS THE CIRCUIT COURT'S DECISION ON THE MOTION TO SUPPRESS WAS BASED ON UNCONTRADICTED TESTIMONY AND DOCUMENTARY EVIDENCE THIS COURT MAY REVIEW THE EVIDENCE DE NOVO BASED ON SETTLED LAW AND NEED NOT CREATE A NEW STANDARD OF REVIEW AS NO CONFLICT EXISTS AS TO THE STANDARD OF REVIEW

Whether reasonable suspicion exists is a question of constitutional fact, the appellate court upholds the Circuit Court's findings of fact unless they are clearly erroneous, and then reviews de novo whether those facts give rise to the Circuit Court's ultimate finding of reasonable suspicion for the stop or detention. State v. Walli, 2011 WI App 86, 334 Wis. 2d 402, 799 N.W.2d 898. This court need not create a new standard or settle any conflict. The law is settled in Wisconsin that when there are documentary facts and no credibility issues an appellate court reviews the Circuit Court's findings of fact de novo. Kailin v. Rainwater, 226 Wis. 2d 134, 593 N.W.2d 865, 873 (Ct.App. 1999). Respondent does not object to this Court reviewing the video evidence de novo. Respondent

submits that when the court reviews that evidence along with the un-contradicted testimony about the choppy curve negotiation, and the time of day, 3:16 a.m., and then applies the Post, totality of the circumstances test for reasonable suspicion the Court will affirm the Circuit Court's decision.

CONCLUSION

Based on the record in this case, this Court should find that the Circuit Court properly applied the law to un-contradicted facts and documentary evidence and correctly determined that the officer involved had reasonable suspicion to stop the Appellant for operating a motor vehicle under the influence of an intoxicant, and affirm the decision of the Circuit Court.

Warren D. Zier
Assistant District Attorney
Attorney for Plaintiff-Respondent
State Bar ID: 1014851

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and 3b in that it is a monospaced font, 10 characters per inch, double spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 1, 149 words.

DATED this 9th day of August, 2017.

Signed:

Warren D. Zier
Assistant District Attorney
Attorney for Plaintiff-Respondent
State Bar ID: 1014851

811 Harding Street
Waupaca, WI 54981
(715) 258-6444
warren.zier@da.wi.gov

CERTIFICATE OF COMPLIANCE WITH 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 §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of August, 2017.

Signed:

Warren D. Zier
Assistant District Attorney
Attorney for Plaintiff-Respondent
State Bar ID: 1014851
811 Harding Street
Waupaca, WI 54981
(715) 258-6444
warren.zier@da.wi.gov