STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

APPEAL NO. 2017AP820 CR
CIRCUIT COURT CASE NO. 2016CT126

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER C. BOUCHETTE,

Defendant-Appellant.

ON APPEAL FROM FINAL ORDER ENTERED ON JULY 14, 2016, IN THE CIRCUIT COURT FOR WOOD COUNTY, THE HONORABLE GREGORY J. POTTER, PRESIDING, DENYING DEFENDANT-APPELLANT'S SUPPRESSION MOTION

BRIEF OF PLAINTIFF-RESPONDENT

Submitted by:

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary and the issues should be fully presented by the briefs and well settled case law. Publication is not necessary or appropriate and the State is not seeking publication.

ARGUMENT

OFFICER ANDERSON WAS IN FRESH PURSUIT OF DEFENDANT-APPELLANT BOUCHETTE WHEN THE TRAFFIC STOP WAS CONDUCTED

The circuit court found that Officer Anderson was acting lawfully in fresh pursuit when he pursued the defendant-appellant. Because this ruling had a lawful basis and was not erroneous, the plaintiff-respondent requests that this order be affirmed.

Long ago, Wisconsin codified the doctrine of fresh pursuit making it lawful for an officer who observes any violation that that officer is authorized to enforce of a civil ordinance, traffic, or criminal law violation to pursue such violator outside of the officer's jurisdictional boundary anywhere within the state and arrest any person for these violations, so long as the officer is acting in *fresh pursuit*. Wis. Stat. § 175.40(2). In *Collar,* this court adopted Colorado's definition of *fresh pursuit*, because our statute does not offer a definition. *City of Brookfield v. Collar*, 148 Wis. 2d 839, 842 (Wis. Ct. App., 1989). Quoting *Charnes*, this court held the three criteria in determining fresh pursuit are: "first, the officer must act without unnecessary delay; second, the pursuit must be continuous and uninterrupted, but there need not be

continuous surveillance of the suspect; and third, the relationship in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect is important (the greater the length of time, the less likely it is that the circumstances under which the police act are sufficiently exigent to justify an extra jurisdictional arrest)". *City of Brookfield* at 643; *Charnes v. Arnold,* 198 Colo. 362, at 66 (1979).

Here, the Wood County Dispatch Center received an anonymous call around midnight on the Friday night of January 28,2016, that a vehicle was traveling at a high rate of speed eastbound on Washington Street near 48th Street in the Town of Grand Rapids, Wood County, Wisconsin. (R. 5:5-15). Officer Anderson was close by, and in a short time confirmed that he too had seen a vehicle meeting this description traveling at least 10-15 mph over the 45 mph posted speed limit eastbound on Washington Street, which was later determined to having been driven by the defendant-appellant. (R.6:2-25). Officer Anderson began to follow this vehicle, and then observed this vehicle to drift into the oncoming lane of traffic. (R.6:17-25). Due to the speed of the

vehicle, it took Officer Anderson a short time to catch up to the defendant-appellant and, as he was catching up, Officer Anderson did not see the defendant's brake lights illuminate at the stop sign on Washington Street near 80th Street. Officer Anderson testified that, despite the darkness, he saw the vehicle itself at that stop sign, and the vehicle did not stop as required. (R. 9:12-25; 10:1-7). All three of these traffic violations occurred in the Town of Grand Rapids, Wood County, Wisconsin, a jurisdiction Officer Anderson is authorized to enforce.

It is undisputed that Officer Anderson activated his emergency lights at the intersection of Washington Street and 80th Street, which is the Wood/Portage County line, shortly after observing the traffic violations in an attempt to stop the defendant-appellant. Officer Anderson maintained visual on the defendant-appellant's vehicle, which did not immediately pull over. (R. 10:19-25). Officer Anderson only momentarily lost sight of the defendant-appellant's vehicle just over the county line at a "T" intersection at 90th and Washington Streets. (R. 11:1-10). Because the defendant-appellant made no attempt to pull over, Officer Anderson

activated his siren, which was met with no heeding response from the defendant-appellant. (R. 12:2-5). Officer Anderson saw this vehicle again cross into the oncoming lane of traffic along 90th street, before it crashed into the ditch. (R. 12:5-10). The defendant-appellant was subsequently arrested for operating while intoxicated, second offense, with a staggering blood alcohol concentration of .264 g/100mL.

Applying the fresh pursuit *Collar* factors to the facts of this case; first, Officer Anderson must act without unnecessary delay: Officer Anderson observed three distinct traffic violations, all occurring in the Town of Grand Rapids, Wood County, Wisconsin. Because the defendant-appellant was speeding, it took Officer Anderson approximately five minutes to catch up to him, and make contact with him as he entered the ditch about a mile over the county line in Portage County. Because a distance of approximately 3/4 of a mile to one mile had elapsed between Officer Anderson and the defendant-appellant's vehicle, Officer Anderson activated his lights at a time the Officer believed the defendant-appellant would see them, and pull over accordingly. The last traffic violation occurred at the very

intersection Officer Anderson activated his lights near, right on the county line. There was little to no delay in this traffic stop. Much of the delay came from the defendant-appellant not properly pulling over upon seeing the emergency lights. Perhaps at a .267% BAC, the defendant-appellant was not able to pay as careful attention as required, and did not notice the bright red and blue lights. The defendant-appellant also did not pull over upon hearing the siren. There has been no information that the defendant-appellant lacks the ability to hear. One can only speculate that perhaps the defendant-appellant was trying to evade law enforcement's attempts to more quickly make contact with him, or perhaps his senses and reaction time to properly respond to law enforcement were impaired by alcohol. Much of the delay from the time Officer Anderson saw the very first traffic violation, to the time that the defendant-appellant crashed into the ditch, was due to the defendant-appellant not pulling over. Officer Anderson is not required by law to immediately pull a vehicle over upon seeing one traffic violation. Depending on the nature of the violation, an Officer may choose to wait to see if the driver will

exhibit any other violations. Officers do this for a variety of reasons, sometimes, if the officer sees only one minor infraction the officer may choose to let the person go. Or, perhaps, the Officer is investigating whether a motorist is evidencing signs of impairment. Either way, Officer Anderson had the lawful discretion to observe the defendant-appellant's vehicle, and this is exactly what transpired. Officer Anderson, upon seeing what he described as a third violation, quickly pursued the defendant, closing the gap, and upon doing so, activated his emergency lights, while crossing over the Portage County Line. The total time that elapsed from the time that Officer Anderson first observed the defendant-appellant's vehicle, to the time the vehicle went into the ditch was no more than five minutes, where both Officer Anderson and the defendant-appellant traveled a total distance of approximately 2.5 miles.

Second, the pursuit must be continuous and uninterrupted and the officer need not maintain sight on the vehicle continuously. It is without dispute that Officer Anderson continued pursuing the defendant-appellant from the time that Officer Anderson saw the vehicle speeding until the time that the defendant-

appellant crashed into the ditch. The officer wasn't called away, and didn't make an unrelated traffic stop. He didn't drive out of the area. Officer Anderson traveled the same route that the defendant-appellant traveled while pursuing him, and upon seeing the third violation, as soon as the distance closed, activated his emergency lights in an attempt to pull the defendant-appellant over. Due to a T intersection, Officer Anderson lost sight of the vehicle for a brief moment, but then immediately regained a visual on the vehicle. This pursuit was properly continuous and uninterrupted.

Lastly, the relationship in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect is important. A total time of approximately five minutes elapsed between Officer Anderson seeing the first traffic violation and the time the defendant-appellant went into the ditch, a distance of about 2.5 miles. Officer Anderson immediately began to pursue the defendant-appellant after the first violation was observed. Officer Anderson properly exercised discretion, and observed this vehicle for a short time

before making the determination to pull it over. Officer Anderson put on his emergency lights at a time that the defendant-appellant was most likely to see the lights, but the defendant-appellant, for whatever reason, did not pull over. Instead, the defendant-appellant drove for a period of time, and crashed into the ditch. This factor weighs heavily in favor of a lawful fresh pursuit.

Officer Anderson was acting in fresh pursuit when observing traffic violations, immediately pursuing the defendant-appellant, and making contact with the defendant-appellant as soon as he was able. Therefore, the state asks that you affirm the circuit court ruling that this was a lawful traffic stop.

THE DOCTRINE OF FRESH PURSUIT DOES NOT REQUIRE THAT AN OFFICER HAVE PROBABLE CAUSE TO STOP MOTORISTS, AND EVEN IF IT DID, PROBABLE CAUSE EXISTED

It has long been established throughout the United States, by the United States Constitution, the U.S. Supreme Court, and Wisconsin Law that a police officer may detain a person whom the officer reasonably believes has, is, or is about to commit a violation of the law, so long as that belief is supported by

reasonable suspicion. U.S. Const. Amend IV, *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *State v. Post*, 2007 WI 60, ¶10; Wis. Stat. § 968.24. Reasonable suspicion has been defined consistently time and time again by the courts as when, under the totality of the circumstances, an officer has specific and articulable facts, which taken together with rational inferences from those facts, give rise to the reasonable suspicion necessary for an investigative stop. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *State v. Post,* 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. "'The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.'" *Id.* at ¶13.

The Wisconsin Supreme court has held that reasonable suspicion that a traffic law has been or is being violated is sufficient to justify **all stops**. *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234. Additionally, Wisconsin courts have gone on to conclude that if an officer acting in fresh pursuit has reasonable suspicion that a traffic violation has

occurred within the jurisdiction that that officer is authorized to enforce, and that officer conducts a traffic stop properly outside of his or her jurisdiction in fresh pursuit, if that officer develops reasonable suspicion during the traffic stop of another crime, for example, that the motorist may be impaired, the officer can reasonably extend the traffic stop to investigate the new suspected offense. *State v. Haynes*, 2001 WI App 266,¶9-10, 248 Wis. 2d 82, 732; *State v. Bestow*, 226 Wis. 2d 90, 93 (Wis. Ct. App. 1999).

Wisconsin's fresh pursuit statute does not create a higher standard (probable cause) required for an officer to conduct a proper traffic stop; if that were the case, the result would be absurd. The statute authorizes an officer to cross the sometimes invisible county, or municipality lines to stop a suspect who the officer reasonably believed committed a law violation in that officer's territory, and to make an arrest if the situation calls for that. How would officers enforce traffic violations that occur right on the county line in situations where it would be physically impossible to stop the motorist before they cross the line, if the officer now must have probable cause to

arrest, rather than reasonable suspicion that a traffic violation had occurred. An officer has the authority under the statute to enforce any law the officer is authorized to enforce, and to cross municipality lines so long as the officer is acting in fresh pursuit. An officer has lawful authority to stop motorists to investigate whether there has been a law violation if the officer has the requisite reasonable suspicion.

The state finds it remarkable that the defense, during its entire motion hearing in this case, which was litigated by the defendant-appellant's appellate attorney (on July 14, 2016), argued the reasonable suspicion standard to Judge Potter, and argued that Officer Anderson lacked reasonable suspicion to pursue and stop the defendant-appellant, not that he lacked probable cause. Then, six and a half months later, on January 30, 2017, in its motion for post-conviction relief argues that the standard is probable cause under the fresh pursuit statute.

In this case, Officer Anderson observed three distinct traffic violations within his jurisdiction. The first, Officer Anderson, relying on his years of training and experience observed the defendant-

appellant speeding at least 10 mph over the posted 45 mph zone. Officer Anderson is trained in determining vehicle's speed, and observes traffic every day. It is obvious when a vehicle is exceeding the speed limit. Officer Anderson did not use his RADAR, nor is he required to. Instead, he based his conclusion that the vehicle was speeding on his training and experience. During the motion hearing, the defense asked Officer Anderson if he based this conclusion on mathematics or science, which as we all know, is not required. The officer replied that he just knew the vehicle was speeding. Judge Potter took judicial notice of Officer Anderson's training and experience, and found Officer Anderson's conclusion to be credible.

Officer Anderson did not stop the defendant-appellant based solely on the vehicle's speed. Officer Anderson pursued the vehicle, and observed the vehicle travel dangerously into the oncoming lane. Though the defense tried to cast some doubt on what the officer observed by mentioning foliage, and obstacles that may have been along the road, the testimony was uncontroverted that Officer Anderson saw, with his own eyes, the defendant-appellant cross into the oncoming

lane, in violation of Wisconsin Statute § 346.14(1). Despite Attorney Kaehne's colorful language on page 19 of the defendant-appellant's brief about the workings of the human eye, there was no defense expert, nor investigator that examined the roadways at night in this particular area that testified in this case which contradicted the officer's testimony. Officer Anderson clearly and unequivocally told the court that this violation occurred prior to the stop sign at 80th street on Washington Street. As we already know, 80th Street serves as the border between the counties. Because the defendant-appellant was traveling eastbound toward Portage County when he crossed the centerline, and this took place prior to the stop sign at the county line, this traffic violation had to have occurred in Wood County. Judge Potter found that Officer Anderson's testimony was credible and that the defendant-appellant did cross the centerline. Because Officer Anderson personally observed this violation, he had both reasonable suspicion and probable cause that the defendant-appellant committed this traffic violation.

Officer Anderson continued following the defendant-appellant's vehicle, and when this vehicle

came to the stop sign at 80th Street, Officer Anderson did not see the vehicle's brake lights illuminate, which would have occurred if the defendant did in fact stop for this stop sign. So, either the defendant-appellant's vehicle did not have working brake lights, in violation of Wisconsin Statutes, or the defendant-appellant did not stop at the stop sign. Officer Anderson testified that he saw the vehicle the entire time prior to the "T" intersection at 90th Street. Because there was no evidence that the vehicle had in fact stopped, but it did so during a time in which Officer Anderson lost sight of it, coupled with Officer Anderson testifying that he saw the vehicle approach 80th street near the stop sign, and proceed through the intersection with no brake lights illuminating, only one of two reasonable conclusions can be drawn: the brake lights weren't working, or the defendant-appellant did not stop.

These three traffic violations, coupled with the time of morning, approximately 12:07 a.m., primary drinking time on an early Saturday morning in Wisconsin, along with Officer Anderson's training and experience, under the totality of circumstances, gave

Officer Anderson reasonable suspicion that laws he is authorized to enforce were being violated by the defendant-appellant. Additionally, based on his own personal observations, Officer Anderson had probable cause to believe that the defendant-appellant committed several traffic violations within the Town of Grand Rapids, Wood County, Wisconsin.

Though it is interesting that in the Wisconsin Law Enforcement Handbook, officers are instructed by the Department of Justice to have probable cause for the fresh pursuit statute to apply, I think we can all agree that this handbook is not the law. It is equally interesting that the defendant-appellant in this case deems this handbook to be the “most persuasive” authority that shows that probable cause is required for an officer to pursue a violator out of county.

CONCLUSION

Therefore, the state requests this court to affirm the judgment of the Wood County Circuit Court, the reasoning of which was not clearly erroneous, but based on the law and on reason, and find that this traffic stop was lawfully conducted within the meaning of the fresh pursuit statute.

Dated this 18th day of August, 2017.

Respectfully submitted:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 16 pages.

Dated this 18th day of August, 2017.

Respectfully submitted:

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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 18th day of August, 2017.

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