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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP2236-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS C. WEGNER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR
CALUMET COUNTY, THE HONORABLE
JEFFREY S. FROELICH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

A law enforcement officer who was driving a squad car in a roundabout had to brake sharply to avoid colliding with a pickup truck driven by Wegner when the truck entered the roundabout. The officer stopped the truck and arrested Wegner for operating a motor vehicle with a prohibited alcohol concentration. Was the traffic stop justified by reasonable suspicion that Wegner violated a traffic law by failing to yield the right-of-way to the officer's squad car?

The circuit court answered "yes," and denied Wegener's motion to suppress evidence.

This Court should answer "yes," and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

INTRODUCTION

Nicholas C. Wegner is challenging the circuit court's conclusion that the stop of his pickup truck was justified by the officer's reasonable suspicion that Wegner violated a traffic law by not yielding the right of way to the officer's squad car. Wegner argues that the circuit court decision was incorrect because a valid traffic stop requires probable cause that a person violated a traffic law, not reasonable suspicion. He also argues that the officer was driving at an unlawful speed, and therefore forfeited the right-of-way under Wis. Stat. § 346.18(1).

This Court should affirm the judgment of conviction because all of Wegner's arguments fail. First, a traffic stop is justified if an officer has reasonable suspicion that a driver has violated a traffic law. Second, the officer in this case was

not driving at an unlawful speed. Third, the general right-of-way provisions in § 346.18(1), including the provision that a vehicle traveling at an unlawful speed forfeits the right-of-way, do not apply in this case. This was not a standard intersection, and the squad car and Wegner's vehicle did not enter the intersection at approximately the same time. Wegner's vehicle approached what is functionally an uncontrolled "T" intersection, and Wegner was required to yield to traffic continuing through the intersection from his left. The squad car—which had already entered the roundabout, was continuing through the intersection. Wegner thus failed to yield, in violation of § 346.18(3m). The circuit court properly concluded that the officer had reasonable suspicion that Wegner violated a traffic law and properly denied Wegner's motion to suppress evidence. Accordingly, this Court should affirm the judgment of conviction.

STATEMENT OF THE CASE AND FACTS

Calumet County Sheriff's Deputy Trevor Coleman drove his squad car through a roundabout on December 13, 2016. (R. 63:5, 29.) While the squad car was in the roundabout, a pickup truck driven by Wegner entered the roundabout. (R. 63:7, 29.) Deputy Coleman applied his squad car's brakes to avoid colliding with Wegner's truck. (R. 63:7, 29.) The deputy observed that the truck's front and rear driver's side tires went over the center roundabout embankment. (R. 63:7–8.) The deputy followed the truck out of the roundabout, activated his car's emergency lights, and stopped the truck. (R. 63:9.) Deputy Coleman testified that he stopped the truck because it failed to yield the right-of-way and drove over the center embankment. (R. 63:9–10.)

Deputy Coleman made contact with Wegner and learned that Wegner had four prior OWI convictions.

Wegner therefore could not legally drive with a blood alcohol concentration exceeding .02. (R. 1:2.) Wegner told the deputy he had consumed one beer. (R. 1:2.) Wegner agreed to a preliminary breath test, which registered a blood alcohol concentration of .047. (R. 1:2.) The deputy placed Wegner under arrest for operating a motor vehicle with a prohibited alcohol concentration (PAC). (R. 1:3.) Wegner submitted to a request for a blood sample, and test of his blood revealed a blood alcohol concentration of .03. (R. 1:3.)

The State charged Wegner with PAC as a fifth offense. (R. 1.) Wegner moved to suppress the blood test result, arguing that the traffic stop was unlawful because Deputy Coleman did not have reasonable suspicion that Wegner violated a traffic law. (R. 14.) The circuit court, the Honorable Jeffrey S. Froelich presiding, denied Wegner's motion after a hearing at which Deputy Coleman testified and the court viewed the squad car video of the incident. (R. 63:30.)¹

The court found that while Deputy Coleman's squad car was in the roundabout, Wegner's truck entered the roundabout and "quite obviously did not yield to the officer in the roundabout." (R. 63:29.) The court found that Deputy Coleman was driving at 18 to 19 miles per hour, and determined "that doesn't seem like an overly reckless speed to be traveling at when navigating the roundabout." (R. 63:30.) The court concluded that Deputy Coleman had reasonable suspicion that Wegner violated a traffic law by failing to yield the right-of-way, justifying the stop of Wegner's truck. (R. 63:30.) The court therefore denied Wegner's motion to suppress evidence. (R. 63:30.)

¹ Wegner has not included the squad car video in the appellate record.

Wegner moved for reconsideration, asserting that there was a sign in front of the roundabout establishing a 15 miles-per-hour speed limit in the roundabout, and that by driving 18 to 19 miles per hour, Deputy Coleman forfeited the right-of-way. (R. 65.) The circuit court denied the motion, concluding that the 15 miles-per-hour sign is not a speed limit sign but an advisory speed plaque, and that the deputy did not drive unlawfully or unreasonably at 18 to 19 miles per hour. (R. 65:6.) The court also affirmed its earlier findings that Deputy Coleman was in the roundabout first, and then Wegner entered the roundabout and failed to yield the right-of-way. (R. 65:6.)

Wegner pled no contest to PAC, and the court sentenced him for a fifth offense. (47; 66:3–4, 9.) Wegner now appeals the judgment of conviction.

STANDARD OF REVIEW

Whether an officer had reasonable suspicion to justify a traffic stop presents a question of constitutional fact. *State v. Walli*, 2011 WI App 86, ¶ 10, 334 Wis. 2d 402, 799 N.W.2d 898. This Court reviews questions of constitutional fact using a two-step standard of review. *Id.* This Court applies the “clearly erroneous” standard of review to factual findings at a suppression hearing made from a combination of live testimony and evidence preserved on a dashboard video. *Id.* ¶ 1. *See also* Wis. Stat. § 805.17(2). Then, based on the circuit court’s fact-finding, this Court reviews de novo whether reasonable suspicion justified the stop. *Walli*, 334 Wis. 2d 402, ¶ 10.

Whether a court properly interprets and applies a statute is a matter of law that an appellate court reviews de novo. *State v. Houghton*, 2015 WI 79, ¶ 18, 364 Wis. 2d 234, 868 N.W.2d 143.

ARGUMENT

The circuit court properly denied Wegner’s motion to suppress because the traffic stop was based on reasonable suspicion that Wegner violated a traffic law.

A. Applicable legal principles.

A law enforcement officer may make an investigatory traffic stop when he or she has reasonable suspicion to believe a crime or traffic violation has occurred or is occurring. *Walli*, 334 Wis. 2d 402, ¶ 9; *State v. Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 765 N.W.2d 569. “[R]easonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops,” including those for “observed violation[s].” *Houghton*, 364 Wis. 2d 234, ¶¶ 28, 30.

B. Deputy Coleman had reasonable suspicion that Wegner violated a traffic law by failing to yield the right-of-way to the deputy’s squad car.

The general rule for right-of-way is that “when 2 vehicles approach or enter an intersection at approximately the same time, the operator of the vehicle on the left shall yield the right-of-way to the vehicle on the right.” Wis. Stat. § 346.18(1) provides the rules for right-of-way. But the general rule does not apply in this case, because the squad car and the pickup truck did not arrive at the roundabout at “approximately the same time,” and because this was not a standard intersection.

The circuit court found as fact that Deputy Coleman’s squad car was in the roundabout first, and Wegner then drove his truck into the roundabout. (R. 63:29–30; 65:6.) Wegner does not dispute this finding. The squad car was not required to yield to the truck, even though the truck was to

the squad car's right, because the vehicles did not enter an intersection at the same time.

In addition, the intersection at issue in this case is not a standard intersection at which the general rule that a vehicle on the left must yield to a vehicle on the right applies. All vehicles entering a roundabout are required to yield to vehicles on the left that have already entered the roundabout. See *Roundabouts*, Wis. Dep't of Transp., <http://wisconsindot.gov/Pages/safety/safety-eng/roundabouts/works.aspx>. (last visited April 4, 2018). (Drivers are to “[y]ield to all lanes of traffic on your left before entering.”) As Wegner’s defense counsel acknowledged at the suppression hearing, every road approaching a roundabout has a yield sign. (R. 63:12.) And as Deputy Coleman affirmed, “if you have a yield sign and there’s somebody already in the roundabout, you have a duty to yield.” (R. 63:12.)

The State does not dispute that a yield sign required Deputy Coleman to yield to traffic in the roundabout. But there was no traffic in the roundabout when he entered it. Wegner does not dispute that a similar sign required him to yield to traffic in the roundabout. Deputy Coleman’s squad car was in the roundabout when Wegner reached the intersection. (R. 63:29–30; 65:6.) Wegner was therefore required to yield to the squad car. He failed to do so. The court therefore correctly concluded that Deputy Coleman had reasonable suspicion that Wegner violated a traffic law by failing to yield the right-of-way to Deputy Coleman’s squad car. (63:30.)

On appeal, Wegner does not dispute the circuit court’s findings of fact. But he argues that the court erred in applying the reasonable suspicion standard rather than the probable cause standard to those facts to conclude that the traffic stop was justified.

Wegner argues that under *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), a traffic stop is justified only if the officer has probable cause that the driver violated a traffic law. (Wegner’s Br. 9–10.)

Wegner is wrong. In *Houghton*, 364 Wis. 2d 234, ¶ 30, the Supreme Court of Wisconsin rejected *Longcore*’s probable cause standard, concluding that “reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.” The circuit court applied the correct standard in this case.

Wegner also argues that the court erred in concluding that the officer had reasonable suspicion that he violated a traffic law. He asserts that Deputy Coleman forfeited the right-of-way under Wis. Stat. § 346.18(1) because he was driving at an unlawful speed, so Wegner did not violate the law by not yielding to the squad car. (Wegner’s Br. 10–12.)

Again, Wegner is wrong. Deputy Coleman had the right-of-way, he was not driving at an unlawful speed, and he did not forfeit the right-of-way regardless of the speed he was driving.

As explained above, the circuit court correctly did not apply subsection (1) of § 346.18, because that subsection does not apply when two vehicles do not arrive at the intersection at approximately the same time, and cannot apply to roundabouts.² If it did, any vehicle in a roundabout would have to yield for any vehicle entering the roundabout

² Subsection (8) of Wis. Stat. § 346.18 applies to large vehicles (40 or more feet long or 10 or more feet wide) in roundabouts. It does not apply to the squad car and pickup truck in this case.

from the right. The roundabout would not operate as a roundabout.

A roundabout does not function as a standard intersection. It instead functions as an uncontrolled “T” intersection, governed by Wis. Stat. § 346.18(3m), “Uncontrolled “T” intersection, which provides that where there is no official traffic control device or traffic officer, “the operator of a vehicle approaching the intersection on a highway which terminates at the intersection shall yield the right-of-way to any vehicle approaching the intersection on a highway which continues through the intersection.”

A vehicle approaching a roundabout is approaching the equivalent of an uncontrolled “T” intersection. A vehicle already in the roundabout is on a road that continues through the intersection. A vehicle that approaches the roundabout is required to yield the right-of-way to a vehicle that is already in the roundabout and continuing through the intersection.

Here, Wegner was required by both Wis. Stat. § 346.18(3m) and a yield sign, to yield to the squad car that was already in the intersection. He failed to do so, in violation of the law.

Wegner argues that Deputy Coleman forfeited the right-of-way because he was driving at 18 to 19 miles per hour, above the posted limit of 15 miles per hour for the roundabout. (Wegner’s Br. 10–11.) He points out that under § 346.18(1), “[t]he operator of any vehicle driving at an unlawful speed forfeits any right-of-way which he or she would otherwise have under this subsection.” (Wegner’s Br. 11.)

Wegner is wrong for two reasons. First, Deputy Coleman was not driving at an unlawful speed. As the circuit court found as fact, the sign saying “15 MPH” (R. 24:5), was not a speed limit sign, but an “advisory speed

plaque.” (R. 65:6.) The deputy did not violate the law by driving at 18 to 19 miles per hour through the roundabout. And as the circuit court concluded, the deputy was not driving at a reckless or imprudent speed. (R. 63:30; 65:6.)

Second, even if Deputy Coleman had been driving at an unlawful speed, he would not have forfeited the right-of-way. Wegner relies on § 346.18(1), but that subsection applies to the general rules for right-of-way, stating, “The operator of any vehicle driving at an unlawful speed forfeits any right-of-way which he or she would otherwise have *under this subsection.*” Wis. Stat. § 346.18(1) (emphasis added.)

Subsection (1) did not apply, both because the squad car and pickup truck did not arrive at the intersection at approximately the same time, and this was a roundabout, not a normal intersection. A vehicle in a roundabout obviously does not forfeit the right-of-way to a vehicle entering the roundabout. The general rule that a vehicle on the left must yield to a vehicle on right does not apply. Accordingly, the rule that a vehicle travelling at an unlawful speed forfeits the right-of-way also does not apply.

The circuit court made factual findings that Wegner does not challenge, properly applied the law to those facts, and correctly concluded that Deputy Coleman had reasonable suspicion that Wegner violated a traffic law by failing to yield the right-of-way in a roundabout. The court’s decision was correct, and this court should affirm.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the judgment convicting Wegener of PAC as a fifth offense.

Dated this 12th day of April, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,380 words.

Dated this 12th day of April, 2018.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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 12th day of April, 2018.

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