

RECEIVED

STATE OF WISCONSIN **05-03-2018**

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

COURT OF APPEALS

DISTRICT II

Appeal No. 2017AP002236

STATE OF WISCONSIN,

Plaintiff-Respondent,

Calumet County
Case No: 2016-CF-226

NICHOLAS C. WEGNER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR CALUMET COUNTY
THE HONORABLE JEFFERY S. FROEHLICH PRESIDING

JOHN MILLER CARROLL LAW OFFICE
Attorney for Defendant – Appellant

John Miller Carroll
State Bar. No. 1010478

226 S. State St.
Appleton WI 54911
(920) 734-4878

ISSUES THAT WERE PRESENTED FOR REVIEW

Did the trial court err in denying the Defendants Motion to Suppress?

Trial Court: No

The Appellant answers: Yes

In Wisconsin does a driver forfeit the right of way when in a roundabout at a speed above the posted signage?

Trial Court Answered: No

The Appellant Answers: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested so that both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is suggested in order to give much needed guidance to the bench and bar in this state as to the interpretation of Wisconsin Statute §346.18(1) and the effect of violating the speed posted before entering a roundabout has on the determination of right of way.

STATEMENT OF CASE:

This Case presents an issue of law that is similar to the Wisconsin Court of Appeals Case: Cty. of Sheboygan v. Lane, 2011 WI App 244, ¶ 2, 332 Wis. 2d 318, 797 N.W.2d 935. There the Court of Appeals addressed the issues concerning speeding while entering and while inside of a roundabout. There the Court found that speeding into a roundabout amounted to probable cause that a traffic violation had occurred.

This case involves legal issues concerning an Officer driving at a speed above the posted signage when entering a roundabout. The issue hinges on whether the speeding of the officer impacts his ability to seize a vehicle that he encounters for a failure to yield violation.

The Defense submits that there is not reasonable suspicion on these facts that a violation of law has occurred and that under the totality of the circumstances the Officers seizure was unreasonable due to his own conduct in speeding while entering and in the roundabout.

STATEMENT OF THE FACTS:

On Tuesday, December 13, 2016, at HWY 10 near HWY 55, in the Village of Harrison, Calumet County, Wisconsin, the Defendants vehicle was seized for “failing to yield the right of

way” to Deputy Coleman of the Calumet County Sheriff’s Department. (R. 1)

On July 6th, 2017 Deputy Coleman testified that as he approached the intersection in question he was going 32 miles an hour. (R. 63; 17) similarly the Deputy testified that as he navigated the roundabout he did not brake but rather increased his speed (R. 63; 17-18)

Ultimately the best record of the events in the roundabout is memorialized in the Court Record as Exhibit I to the July 6th Motion hearing. Exhibit I shows that Deputy Coleman was traveling between 35-19 MPH while traversing the intersection.

STANDARD OF REVIEW

“The temporary detention of individuals during the stop of an automobile by the police constitutes a seizure within the meaning of the Fourth Amendment. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis.2d 118, 765 N.W.2d 569. Whether an officer has probable cause or reasonable suspicion to make an investigatory stop presents a question of constitutional fact. *Id.*, ¶ 10. As such, we will uphold the circuit court's findings of historical fact unless clearly erroneous; however, we review de novo the application of constitutional principles to these historical facts. See *id.*

“Whether reasonable suspicion or probable cause is necessary for a law enforcement officer to stop a vehicle is a question of law we review de novo. *See State v. Kramer*, 2001 WI 132, ¶ 17, 248 Wis.2d 1009, 637 N.W.2d 35. Whether a statute has been properly interpreted and applied also is a question of law we review de novo, but we do so “while benefitting from the analyses of the court of appeals and circuit court.” *118th St. Kenosha, LLC v. DOT*, 2014 WI 125, ¶ 19, 359 Wis.2d 30, 856 N.W.2d 486 (quoting *260 N. 12th St., LLC v. DOT*, 2011 WI 103, ¶ 39, 338 Wis.2d 34, 808 N.W.2d 372).

Finally, whether a defendant's constitutional rights were violated is a question of constitutional fact subject to a two-step standard of review. *State v. Phillips*, 218 Wis.2d 180, 189, 577 N.W.2d 794 (1998). First, we uphold the circuit court's findings of historical fact unless they are clearly erroneous. *State v. Williams*, 2002 WI 94, ¶ 17, 255 Wis.2d 1, 646 N.W.2d 834. Then, we review the circuit court's determination of the constitutional question de novo. *Id.* *State v. Houghton*, 2015 WI 79, ¶ 18, 364 Wis. 2d 234, 245–46, 868 N.W.2d 143, 149

Because the Defendant submits and argues that the Trial Court committed clear error in its findings of fact, the Court of Appeals should review the Video of the stop and the Transcripts concerning the stop, to make a determination of clear error. (R. 63) (Exhibit I to July 6th Motion Hearing-Squad Camera of Officer Coleman)

Further, Exhibit I to the July Motion hearing consists of a recording that documents the facts at issue as such the Court of Appeals should review the exhibit De Novo, under the Documentary Evidence Rule.

Finally, after review for clear error as to the findings of fact and in conducting is constitutional analysis of the facts the Court should apply the reasonable Suspicion Standard to the seizure at issue.

“ We conclude that reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.⁶ The prevailing case law instructs that this is so. *See, e.g., Delfin-Colina*, 464 F.3d at 396 (“the Second, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have all construed *Whren* to require only that the police have reasonable suspicion to believe that a traffic law has been broken.”) (internal quotation marks omitted) (citation omitted). *See also Berkemer*, 468 U.S. at 439, 104 S.Ct. 3138 (“the usual traffic stop is more analogous to a so-called ‘Terry stop’ than to a formal arrest”); *United States v. Ruiz*, 785 F.3d 1134, 1141 (7th Cir.2015); *United States v. Lopez-Soto*, 205 F.3d 1101, 1104–05 (9th Cir.2000) (collecting cases). As the Supreme Court has noted, “detention of a motorist *251 pursuant to a traffic stop is presumptively temporary and brief.” *Berkemer*, 468 U.S. at 437, 104 S.Ct. 3138. When weighed against the public interest in safe roads, we are satisfied

that the “temporary and brief” detention of a traffic stop is an “appropriate manner” in which a police officer may “approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” *Terry*, 392 U.S. at 22, 88 S.Ct. 1868. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 250–51, 868 N.W.2d 143, 151

ARGUMENT

THE CIRCUIT COURT ERRED IN ITS FACT FINDING

1. The Attorney General’s office has argued: “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....”, without any citation to the record. This is because the officer only had to brake due to his unlawful speed while entering and in the roundabout at issue. (R. 63) Exhibit I to July 6th, 2017 Motion Hearing, Dash cam of seizing officer
2. On July 12th, 2017 after the Circuit Court made its findings and after the Court Ordered the Defendants Motion for Suppression Denied, the Defendant through counsel filed his motion for reconsideration. (R. 24; 1-6) In the Defendants motion for reconsideration, there are many cites to the Record, highlighting the acceleration of Deputy Coleman through the roundabout, the posted signage, and the violation

of the posted speed when entering the intersection in question as well as the application of these facts under Wisconsin Statute §346.18(1).

3. Specifically the Defense challenged that the operator of any vehicle driving at an unlawful speed while entering and navigating a roundabout, forfeits any right-of-way. In line with this Courts holding in: Cty. of Sheboygan v. Lane, 2011 WI App 244, ¶ 2, 332 Wis. 2d 318, 797 N.W.2d 935
4. Therefore the defendant argues that due to the officer's speed exceeding the posted signage of 15mph, while navigating a roundabout, forfeited the right of way. As the officers own conduct cause the closing of the gap between the vehicles in question this justification for a traffic stop was unreasonable.
5. Although the trial Court found the Deputy to be exceeding the posted speed before the intersection in question he concluded that the speed traveled by the deputy was not imprudent or too fast for conditions and denied the Defendants motion. (R. 65; 6)

*READING WISCONSIN STATUTE 346.18(1) WITH
346.18(8)(a) AND 346.18(8)(b)*

6. Wisconsin Statute §346.18(1) is entitled, General rule at intersections. It reads: “Except as otherwise expressly provided in this section or in s. 346.19, 346.20, 346.215, or 346.46 (1), 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. **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.**
7. Wisconsin Statute §346.18(8) was the alleged statutory violation that Wegner was seized for. (R. 63; 11)
8. During Argument counsel for Wegner pointed out the error in application of that statute as the statute the officer had seized the Defendant for is only applicable to cars or rows of cars exceeding 40 feet.
9. Ultimately in its decision the Court applied the General Right of way Statute under §346.18 in upholding the stop. This is

not the reason the officer cited for the stop, yet the Court upheld the seizure. (R. 63)

10. Deputy Coleman testified that he was going 18-20 miles an hour while in the roundabout at issue which has a sign posted indicating 15 m.p.h. (R. 63; 17-18) Exhibit I to July 6th, 2017 Motion Hearing.
11. Although the Court Found Deputy Coleman to be braking, Deputy Coleman testified while watching the dash camera from his cruiser replayed in court, that recorded his cruisers speed, he was increasing speed through the roundabout. (R. 63; 17-18)
12. The Defendant was seized by Deputy Coleman for failing to yield the right of way under §346.18(8).
13. Simply put, if the officer wasn't exceeding all of the posted signage while entering and inside of the intersection the "failure to yield" would not have occurred.

However, "the "Rules for Driving Roundabouts" brochure issued by the Wisconsin Department of Transportation. *See Rules for Driving Roundabouts*, Wis.Dot,

<http://www.dot.state.wi.us/safety/motorist/roaddesign/roundabouts/docs/rab-brochure.pdf> (last visited Jan. 8, 2011). According to the brochure, the **first step for driving a roundabout** is to “[s]low down”; the fifth step is to “[k]eep your speed low within the roundabout.” *Id.* The DOT's Web site indicates that the smaller circle and sharper curves of modern roundabouts are **designed to slow traffic and that “[i]n urban settings, entering vehicles negotiate a curve sharp enough to slow speeds to about 15–20 mph**; in rural settings, entering vehicles may be held to somewhat higher speeds (25–30 mph).” *Roundabouts— Frequently asked questions*, Wis. Dot, <http://www.dot.wisconsin.gov/safety/motorist/roaddesign/roundabouts/faq.htm> (last visited Jan. 8, 2011). Wimmer testified that the speed limit sign preceding entry to the roundabout advises drivers to travel at **fifteen miles per hour**. Cty. of Sheboygan v. Lane, 2011 WI App 244, ¶ 9, 332 Wis. 2d 318, 797 N.W.2d 935 (Cited for persuasive value only)

14. Deputy Coleman seized the vehicle of the defendant for a violation of §346.18(8) (R. 63;11) Wisconsin Statutes §346.18(8)a and b, both concern vehicles in excess of 40 feet. The record is void of any allegation concerning vehicles of 40 feet. (R. 63)
15. Deputy Coleman admits to exceeding the posted 15 mph signage and after the Defendant entered the roundabout admits to speeding up. (R. 63; 17-18) (Exhibit I to July 6th, 2017 Hearing, Dash Camera showing speed)
16. The actions of the officer are comparable to the actions of the

defendant in Cty. of Sheboygan v. Lane a 2011 Wisconsin Court of Appeals unpublished decision.

17. In Lane, the Defendant in question was seized as he violated the postage signage preceding a roundabout. The Court upheld a finding of probable cause that a traffic violation had occurred for conduct of the defendant in speeding through the roundabout, although he did not exceed the posted “speed limit”, just the posted 15 M.P.H signage.

18. The conduct of the defendant in Cty. of Sheboygan v. Lane is very similar to that of the officer in the instant case. As such this court should find that prior to entering the roundabout at issue the officer committed a traffic violation in exceeding the speed plaques and therefore under §346.18(1) he forfeited the right-of-way as the statute plainly reads: “(1) General rule at intersections. Except as otherwise expressly provided in this section or in s. 346.19, 346.20, 346.215, or 346.46 (1), 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. **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.

A ROUNDABOUT IS NOT AN UNCONTROLLED T-
INTERSECTION

19. Similar to arguing that the Officer had to apply the brakes to avoid an accident, without including the fact that the officer was speeding while entering and while in the intersection, the Attorney General argues without reference to authority that the roundabout is the equivalent to a T-Intersection.

20. Rather than apply a statute for another type of intersection without reference to a shred of authority to do so, the Defendant is requesting this Court follow its logic and ruling in Cty. of Sheboygan v. Lane. Id

21. After reviewing the factual findings of the Trial Court and the video of the incident this Court should conclude, that the officer was speeding while entering and while in the roundabout.

22. This court should find that the officer's conduct, under the totality of the circumstance as they then existed of speeding

both before entering and while in the roundabout directly impacts the reasonableness of the suspicion of the officer in conducting a seizure for a failure to yield.

23. Further, the court should find the stop unreasonable as the Defendant would have clearly had much more room to enter the intersection, had the officer been traveling at the posted speed while navigating the hazard of this intersection as suggested under Cty. of Sheboygan v. Lane. Id.

WHEREFORE, the Defendant, by his attorney, respectfully requests this Court overturn the Order of the Calumet County Circuit Court denying the Defendants Motion for Suppression and remand the case with further instruction that due to the officers conduct the right-of-way was forfeited prior to the seizure of the defendant, as such there was not reasonable suspicion under the totality of the circumstances to seize the defendant.

DATED at Appleton, Wisconsin this 27th Day of April, 2018.

Respectfully Submitted,

**JOHN MILLER CARROLL
LAW OFFICE**

By: _____
John Miller Carroll
State Bar #0101047

PREPARED BY:
John Miller Carroll Law Office
226 S. State Street
Appleton, WI 54911
Phone: (920) 734-4878

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 2,758 words.

Dated this 27th Day of April, 2018.

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 27th day of April, 2018.

John Miller Carroll
State Bar #01010478