

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2018AP000151
Washington County Circuit Court Case Nos.2017CV353

CITY OF WEST BEND,

Plaintiff-Respondent,

v.

ERIK J. WILLE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND OF THE TRIAL COURT'S RULING
DENYING THE DEFENDANT'S MOTION FOR
SUPPRESSION OF EVIDENCE IN THE CIRCUIT
COURT FOR WASHINGTON COUNTY, THE
HONORABLE TODD K. MARTENS, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT ERIK J. WILLE**

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STATEMENT OF THE ISSUES

Did City of West Bend Officer Behagen possess the requisite level of suspicion to stop Mr. Wille's based solely on a report a caller saw an open beer can in the vehicle?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Erik J. Wille, (Mr. Wille) was charged in the City of West Bend, Washington County, Wisconsin, with having operated a motor vehicle while under the influence of an intoxicant and operated a motor with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on November 10, 2016. The case originally started in Mid-Moraine Municipal Court. Mr. Wille, by counsel, having entered a not guilty plea on December 19, 2016. A court trial and motion hearing were held in municipal court on June 9, 2017, the Court, the Honorable Steven Cain, Judge, Mid-Moraine Municipal court, presiding. On that date, the Court denied the defendant's suppression motion and found Mr. Wille guilty of both the operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration. By counsel on June 12, 2017, Mr. Wille filed a Notice of Appeal of the municipal court's decision to the Washington County Circuit Court, paid the appropriate fees, and requested a de novo review. (R.1:1-3). On July 19, 2017, the defense filed a motion challenging the stop and detention. (R.23:1-2). A hearing on said motion was held on September 13, 2017, the Honorable Todd K. Martens, Judge, Washington

County Circuit Court, presiding. For reasons stated on the record, the court denied the defendant's suppression motion. (R.45:12-14/App.7-9). A written order denying Mr. Wille's motion was signed and filed on January 19, 2018. (R.37:1/App.1). A trial to the court was held on January 10, 2018. On that date, the Court, the Honorable Todd K. Martens, Judge, presiding, found Mr. Wille guilty of both operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration in violation of Wis. Stat. §§346.63(1)(a) and (b), respectively.

Mr. Wille timely filed a Notice of Appeal on January 19, 2018. The appeal stems from the judgment of conviction, and the court order denying Mr. Wille's motion for suppression of evidence.

The pertinent facts to this appeal were adduced at the September 13, 2017 motion hearing through the testimony of West Bend police officer Timothy Behagen. Officer Behagen testified that he had been an officer with the City of West Bend for two years and eight months. Behagen testified that on November 10, 2016 at approximately 7:55 p.m., he received a call from an employee at the Wendy's in the city of West Bend

indicating that two individuals had open beers in a vehicle in the drive-thru. (R.45:4-5/App.2-3). The caller described the vehicle as a blue Honda Civic.

Officer Behagen responded to the Wendy's, and observed Mr. Wille's vehicle. The vehicle was slightly pulled forward from the final drive-thru window. The vehicle was running. Officer Behagen then parked his squad and exited and walked toward the Honda Civic. (R.45:8/App.4). Behagen walked toward the vehicle, and shined his flashlight at the vehicle. *Id.* As he initially walked toward the vehicle, he gave no commands. However, as he was approaching, the vehicle started to move approaching a curve in the drive-thru. *Id.*

As the vehicle started to move, Officer Behagen yelled "stop the vehicle". (R.45:8/App.4). At first the driver did not respond. Officer Behagen once again commanded the driver to stop the vehicle. The second time, Mr. Wille and Behagen "locked eyes" in the rear view mirror and Mr. Wille stopped the vehicle. (R.45:9/App.5).

This was the extent of the testimony at the motion hearing. The City did not produce the citizen witness, and aside from the report of an open beer can in the vehicle, there was no testimony as to the location of the can, whether the occupants

were drinking out of the can or whether the can was full, partially full or empty.

Defense counsel argued the evidence adduced was insufficient to establish a violation of the open intoxicant statute, and insufficient to stop Mr. Wille's vehicle. (R.45:12/App.7). The City argued that the officer had ample information to initiate the stop. (R.45:11/App.6). The Court found that reasonable inferences that could be drawn were sufficient to justify the stop. (R.45:12-14/App.7-9). The court denied the motion. *Id.* A written order denying the motion was entered on January 19, 2018. (R.37:1/App.1).

Mr. Wille timely appealed after the Court found him guilty of both operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration in violation of Wis. Stat. §346.63(1)(a) and (b), respectively. The appeal herein stems from the court Order denying Mr. Wille's motion for suppression of evidence. Mr. Wille timely filed a Notice of Appeal on January 19, 2018.

STANDARD OF REVIEW

“Investigative traffic stops, regardless of how brief in duration, are governed by [the] constitutional reasonableness requirement” under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution. *State v. Rutzinski*, 2001 WI 22, ¶¶ 12-14, 241 Wis.2d 729, 623 N.W.2d 516. Review of a circuit court’s denial of a suppression motion presents a mixed question of fact and law. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis.2d 86, 700 N.W.2d 899. The court employs the clearly erroneous standard when reviewing the trial court’s findings of historical fact. *State v. Smith*, 2018 WI 2, 379 Wis.2d 86, 905 N.W.2d 353. However, whether a seizure has occurred, and, if so, whether it passes statutory and constitutional muster are questions of law subject to de novo review. *Id* at ¶9

ARGUMENT

A. OFFICER BEHAGEN DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO STOP MR. WILLE’S VEHICLE BASED SOLELY ON A REPORT ALLEGING AN OPEN BEER IN THE VEHICLE

The Fourth Amendment of the United States Constitution and Article I sec 11 of the Wisconsin Constitution protect

individuals against unreasonable seizures. An officer must possess reasonable suspicion that a traffic law has been or is being violated to justify a stop. *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis.2d 234, 868 N.W.2d 143. To pass constitutional muster, an investigative stop must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. A “seizure” of “person” within the meaning of the Fourth Amendment occurs when an officer temporarily detains an individual during a traffic stop. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). An investigatory stop passes constitutional muster if the police possess reasonable suspicion that a violation has been committed, is being committed, or is about to be committed. *State v. Waldner*, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996). This standard requires that the stop be based on something more than an “inchoate and unparticularized suspicion or ‘hunch.’” *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

To constitutionally effectuate a traffic stop, an officer’s suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts,

reasonably warrant the intrusion." *Id.* at 21. "The determination of reasonableness is a common sense test. The crucial question is whether the facts 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." *State v. Post*, 2007 WI 60, ¶ 301 Wis.2d 1, 733 N.W.2d 634 *citing State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). The plaintiff bears the burden of establishing that an investigative stop is reasonable. *State v. Taylor*, 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973).

Wis. Stat. §346.935 makes it unlawful among other things to (1) drink alcohol in a vehicle "when the vehicle is upon a highway", and (2) "...possess on his or her person, in a privately owned motor vehicle upon a public highway, any bottle or receptacle containing alcohol beverages or nitrous oxide if the bottle or receptacle has been opened, the seal has been broken or the contents of the bottle or receptacle has been partially removed or released." Highway is defined in Wis. Stat. §340.01(22) and does not include the parking lot or drive-thru of a business that is open to the public for use of the motor vehicles. (Wis.Stat. §346.61 would include in the definition of highway all premises held out to the public for use of their

motor vehicle, but that section is only applicable to Wis. Stat. §§346.62 to 346.64).

Thus, one could not violate the open intoxicant statute in the Wendy's parking lot area. The area is not a public highway. More importantly, the record is silent as to where the open beer cans were located (Were they in the cupholders, on the floor, in the back seat, in the occupants hands or in other close proximity to the driver (A shot glass in close proximity to the driver, with other indicators gave the officer reasonable suspicion that the defendant was committing a violation. *State v. Bons*, 2007 WI App 124, 301 Wis.2d 227, 731 N.W.2d 367). The record is unclear if the occupants actually were drinking from the cans, or if the citizen witness simply observed cans in the car. Furthermore, the record is silent as to whether the cans were empty or if the cans had part of the contents removed.

Additionally, there were no other suspicious relevant factors that might have suggested impaired driving. The contact occurred at 7:55 p.m., not near bar close. See *State v Lange*, 2009 WI 49, ¶32, 317 Wis.2d 383, 766 N.W.2d 551 (time of night is a relevant factor in an OWI investigation.) Furthermore, the caller did not report that the driver appeared impaired, or observe erratic driving.

The City has the burden to establish that the investigative stop is reasonable. Here, the record is insufficient to support Officer Behagen's stop of Mr. Wille's vehicle. Based on the evidence in the record, a reasonable officer in Officer Behagen's position would not have believed that Mr. Wille was probably driving a vehicle on a highway with an open container in violation of Wis. Stat. §346.935. Officer Behagen did not have the requisite reasonable suspicion to stop Mr. Wille as he had nothing more than an unparticularized and inchoate hunch. Because of this, the stop does not pass constitutional muster.

CONCLUSION

Because Officer Behagen did not possess the requisite level of suspicion to stop Mr. Wille's vehicle, the trial court erred in denying Mr. Wille's suppression motion. The Court should vacate the judgment of conviction and reverse the trial court's order.

Dated this 9th day of May, 2018.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 19 pages. The word count is 3476.

Dated this 9th day of May, 2018.

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**CERTIFICATION 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 s. 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 9th day of May, 2018.

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of May, 2018.

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APPENDIX