

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2018 AP 000555
Jefferson County Circuit Court Case Nos.2017CV000392

CITY OF WATERTOWN,

Plaintiff-Respondent,

v.

JEFFREY DONALD PERSCHKE,

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 JEFFERSON COUNTY, THE HONORABLE
WILLIAM F. HUE, PRESIDING JUDGE**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT JEFFREY D. PERSCHKE**

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STATEMENT OF THE ISSUES

Did Officer Lochowitz possess the requisite level of suspicion to stop Mr. Perschke's 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, Jeffrey D. Perschke, (Mr. Perschke) was charged in Jefferson County with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on February 12, 2017. By counsel on February 28, 2017, Mr. Perschke entered written not guilty pleas to both charges in the City of Watertown Municipal Court. A court trial was held in the City of Watertown Municipal Court on September 13, 2017. The Court found Mr. Perschke guilty of both of the above charges. Mr. Perschke, by counsel, timely appealed the decision of the municipal court to Jefferson County Circuit Court on September 21, 2017. Additionally, on November 1, 2017, Mr. Perschke, by counsel, filed a motion for suppression of evidence challenging the stop of his vehicle. A hearing on said motion was started on January 2, 2018, and continued to January 12, 2018. The Court denied the defendant's motion. A written order denying the motion was filed on March 19, 2018. (R.23:1/App. 1). A court trial was held on February 9, 2018, the Honorable William F. Hue, judge, presiding. On that same date, the court found Mr. Perschke guilty of both offenses.

Mr. Perschke timely filed a Notice of Appeal on March 19, 2018. The appeal stems from the judgment of conviction, and the Court Order denying Mr. Perschke's motion for suppression of evidence.

The pertinent facts to this appeal were adduced at the motion hearing held on January 2, 2018 (and continued to January 12, 2018) and through the testimony of City of Watertown police officer Officer Matthew Lochowitz. (The parties agreed to limit the motion to reasonable suspicion to stop Mr. Perschke's vehicle (R.28:3/App.2). Officer Lochowitz provided the following testimony: Officer Lochowitz, a three year veteran of the Watertown Police Department, testified that he stopped Mr. Perschke for speeding on February 12, 2017. In determining Mr. Perschke's speed, Lochowitz relied on a radar device. Lochowitz alleged that Mr. Perschke traveled 38 miles per hour in a 25 mile per hour zone. (R.28:6/ App.3). Lochowitz testified that he used stationary radar. *Id.* He specifically testified that the radar device is integrated into his squad car. (R.28:7/ App.4). On cross-examination, Lochowitz testified that he had a video camera in his vehicle. *Id.* The video has a heads-up display showing a box for both the target vehicle and the squad speed. (R.28:8/ App.5). After viewing the video in the

courtroom, Lochwitz acknowledged that the radar speed he alleged he detected on Mr. Perschke's vehicle did not show on the heads-up video display. (R.28:9/ App.6). As Mr. Perschke travels past the officer in the video, the radar speed remains at zero. *Id.* However, there is also a box on the video display that shows the speed of the officer's patrol vehicle. *Id.* Lochowitz confirms that as soon as his squad starts to move, the speed on the video display starts to increase. (R.28:10/ App.7). The speed reaches 38 miles per hour, but Lochowitz confirms that said 38 mile per hour speed is the speed of his vehicle. *Id.* Lochowitz could not explain why the speed that he alleged Mr. Perschke's vehicle had traveled was not shown on the video. Furthermore, Lochowitz did not testify that he made a visual estimate of Mr. Perschke's speed as he passed the officer's location and prior to activating his radar. The City acknowledged that the video screen is "supposed to be a mirror, you know, reflection of what the radar's doing and what the squad's doing..." (R.28:11/App.8). The City continued by saying that the officer is not competent to explain why the interface was not working properly.

After the hearing on January 2, 2018, the Court referring to the evidence presented at said hearing said "If all they had

was this, I wouldn't give it to them, but if they have the independent stuff, well then I'll look at that." (R.28:15/ App.9). The Court continued the motion hearing to January 12, 2018 so that the City could put in additional evidence regarding the radar device's accuracy.

At the January 12, 2018, hearing, the City introduced certificates of accuracy for the radar device dated September 13, 2016. Lochowitz testified that the radar device was calibrated on September 13, 2016, and he was unaware of any subsequent calibration. (R.29:7/App.10). Lochowitz testified that the radar device used herein was a self-testing system. (R.29:8/ App.11). He described the process for the self-testing. (R.29:8-9/ App.11-12). Lochowitz testified he was trained to use the Stalker Dual DSR radar unit. *Id.* He further testified that the device was working properly both before and after the traffic arrest. *Id.*

The Court eventually denied the suppression motion. While the Court acknowledged the heads up display failed, the Court found the radar device was in mechanically sound condition, Lochowitz was properly trained to operate the device, and the device was tested before and after the traffic stop. (R.29:11/ App.13).

A court trial was held on February 9, 2018 the Court found Mr. Perschke guilty of both citations. Mr. Perschke timely filed a notice of appeal on March 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. Johnson*, 2007 WI 32, ¶13, 299 Wis.2d 675, 729 N.W.2d 182. 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 829, 434 N.W. 2d 386 *citing State v. Guzy*, 139 Wis.2d 663, 407 N.W.2d 548 (1987). *State v. Richardson*, 156 Wis.2d 128, 137-8, 456 N.W.2d 830 (1990), *State v. Kasian*, 207 Wis.2d 611, 621, 558 N.W.2d 687 (Ct.

App. 1996) *see also State v. Begicevic*, 2004 WI App 57, ¶3, 270 Wis.2d 675, 678 N.W.2d 293.

ARGUMENT

A. **BASED ON THE EVIDENCE ADDUCED AT THE MOTION HEARING, OFFICER LOCHOWITZ DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO STOP MR. PERSCHKE FOR SPEEDING**

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 State 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).

Here, Officer Lochowitz's reliance on stationary radar is the sole reason for the stop. There is nothing in the record that Lochowitz observed any deviant or erratic driving, and nothing suggesting that Lochowitz made a visual estimation of Mr. Perschke's speed prior to stopping his vehicle. Thus, the sole reason for the stop, according to Lochowitz, is based on what he alleges was the reading from his squad's radar device. The defense concedes that it is well established that a trial court must give stationary radar a prima facie presumption of accuracy. *City*

of Wauwatosa v. Collett, 99 Wis.2d 522, 524, 299 N.W.2d 620 (Ct.App. 1980).

However, here, the evidence is that the radar device was integrated into Officer Lochowitz's squad car. The evidence is also clear that the integrated device was not functioning properly. The City conceded that the integrated function in the squad was supposed to mirror what the radar and the squad was doing. (R.28:11/ App.8). The device did not do that here. The video introduced into evidence showed that as Mr. Perschke passed Officer Lochowitz's squad, Lochowitz's radar device did not produce any result. The City claims that the radar device was working but the integration was not. However, soon after Mr. Perschke passed, and Officer Lochowitz pursued Mr. Perschke's vehicle, the integrated system showed Officer Lochowitz's speed. This shows that the integrated system was indeed working. Interestingly, the top speed that Lochowitz's squad achieved during the pursuit according to the integrated system was 38 miles per hour. It seems that had Mr. Perschke actually been traveling 38 miles per hour as he passed Lochowitz, it would have required Lochowitz to achieve speeds greater than 38 miles per hour as he attempted to catch Mr. Perschke. Even the trial court acknowledged that the video

evidence and testimony initially offered at the January 2, 2018 motion hearing would not have been sufficient to justify the stop. (R.28:15/App.9). At the continuation of the motion hearing, the City offered the certificates of accuracy. However, the defense is not challenging the underlying accuracy of the scientific principles of the machine. Certificates of accuracy do not establish that the radar device worked properly on the given date. The City has the burden to establish that the radar device was working properly on the date of the stop. The evidence presented at the motion hearing established just the opposite. Contrary to the officer's testimony, the evidence showed the integrated radar device did not function properly. As this was the only reason for the stop (Lochowicz did not testify that he made a visual estimation of speeding), the evidence does not establish sufficient suspicion for the traffic stop.

CONCLUSION

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

Dated this 9th day of July, 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 20 pages. The word count is 3595.

Dated this 9th day of July, 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 July, 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 July, 2018.

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APPENDIX