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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 2018AP555**

CITY OF WATERTOWN,

Plaintiff-Respondent,

v.

JEFFREY DONALD PERSCHKE,

Defendant-Appellant.

**BRIEF AND SUPPLEMENTAL APPENDIX OF
PLAINTIFF-RESPONDENT CITY OF WATERTOWN**

Appeal from a Final Judgment of 17CV392
Jefferson County Circuit Court,
the Honorable William F. Hue Presiding

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent does not believe that oral argument will assist the Court in resolving the issue presented. Publication is unnecessary because the issues in the appeal involve no more than the application of well-settled rules of law and the issues may be decided by controlling precedent. Wis. Stat. § 809.23(1)(b)2; 3. Additionally, the case is an appeal pursuant to Wis. Stat. § 752.31(2) and should not be published. Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF FACTS

I. Statement of the Facts

Additional facts beyond those presented by Appellant are necessary for the Court to decide this appeal.

Defendant-Appellant Jeffrey Perschke (“Perschke”) filed a suppression motion at the Circuit Court level to challenge the traffic stop by Officer Lochowitz. [R.28:3, R-App 3.] Specifically, Perschke raised concerns about the functionality of the stationary radar that was used to detect his speed prior to the stop. [R.28:4, R-App 4.]

The stationary radar that Officer Lochowitz used to detect Perschke's speed showed the speed of the radar's object [*See* R.28:5-6, R-App 5-6; R.29:10, R-App 29.] Additionally, the radar was integrated into Officer Lochowitz's squad car dash cam video. [R.28:7-8, R-App 7-8.] The integration allows the radar reading to be "mirrored" onto the dash cam video. [R.28:11, R-App 11.] Therefore, the speed from the radar would have shown up in two places – on the radar itself and on the dash cam video. [R.28:10-11, R-App 10-11.] The two devices are separate, however, and there is no evidence that the stationary radar functionality was dependent on the dash cam video, or that the dash cam video mirror function had an impact on the radar's functionality.

When Officer Lochowitz used the stationary radar to detect Perschke's speed on the night in question, the speed of Perschke's car that was shown on the radar did not mirror onto the dash cam video. [R.28:10, R-App 10.] Officer Lochowitz, who had previously used the radar device, could not explain why the radar speed did also not show up on the dash cam video. [R.28:5-6, R-App 5-6.] The

City's attorney represented to the Court that sometimes, the mirror feature malfunctions and the speed from the radar simply does not also show up on the dash cam video. [R.28:11, R-App 11.] Officer Lochowitz did, however, testify that he relied on the radar device itself and found Perschke to have been traveling at 38 miles per hour (in a 25 miles per hour zone) prior to the stop. [R.28:5-6, R-App 5-6.]

The Circuit Court held a second hearing to elicit supplementary testimony to support the traffic stop beyond the testimony related to the dash cam video. At the second hearing on January 12, 2018, Officer Lochowitz testified that the radar reported Perschke's speed prior to the stop and that Officer Lochowitz relied upon the radar prior to stopping Perschke. [R.29:10, R-App 29.] Additionally, the City entered the calibration record for the radar used by Officer Lochowitz into evidence. [R.29:6-7, R-App 25-26.] Officer Lochowitz testified that he previously received training for the radar device that he used. [R.29:9, R-App 28.] He also testified that he performed a self-test

prior to using the radar to establish Perschke's speed prior to his arrest. [R.29:8-9, R-App 27-28.] Judge Hue also took notice at the hearing that the radar was listed in the Administrative Code as being presumptively accurate. [R.29:10, R-App 29.]

Judge Hue found that the mirror function on the dash cam video malfunctioned, but that reasonable suspicion for the stop existed based on the radar device reading. [R.29:10-11, R-App 29-30.] Specifically, Judge Hue found that the radar was operable and mechanically sound, that Officer Lochowitz was qualified to administer the device, that the device was tested before and after the stop, and that the device is presumptively accurate under the Administrative Code. [R.29:11, R-App 30.]

II. Summary of the Argument

This Court should affirm the Circuit Court decision finding that Officer Lochowitz possessed reasonable suspicion to stop Perschke's vehicle. First, the Circuit Court made a factual finding that the radar was functioning and operable and that finding is supported by the great weight and clear preponderance of the evidence. Second, based upon a reading of the radar, Officer

Lochowicz observed Perschke violating Wis. Stat. § 346.57(4), which provided reasonable suspicion to stop Perschke.

STANDARD OF REVIEW

Whether there was reasonable suspicion for an investigatory stop presents a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869 (citing *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106). A reviewing court applies a two-step standard of review for constitutional fact questions. *Id.* First, the appellate court reviews the trial court's findings of fact and upholds them unless they are clearly erroneous. *Id.* This standard "requires the reviewing court to uphold the circuit court's findings unless they go 'against the great weight and clear preponderance of the evidence.'" *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶ 55, 319 Wis. 2d 1, 768 N.W.2d 615 (quoting *State v. Arias*, 2008 WI 81, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748). Second, the court reviews the determination of reasonable suspicion *de novo*. *Id.*

ARGUMENT

I. Officer Lochowitz Possessed Reasonable Suspicion to Stop Perschke Because the Stationary Radar Showed Perschke was Speeding.

The evidence presented to the Circuit Court demonstrated that Lochowitz observed Perschke driving 38 miles per hour prior to the stop—well in excess of the posted limit of 25 miles per hour. After the City produced evidence of the functionality of the stationary radar that recorded Perschke’s speed as well as evidence of Officer Lochowitz’s ability to use the stationary radar, the Circuit Court correctly held that Officer Lochowitz had reasonable suspicion to pull Perschke over based upon the radar reading.

a. Legal standard for “reasonable suspicion”

Traffic stops are “subject to the constitutional reasonableness requirement.” *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634 (citations omitted). Reasonableness “is a common sense test.” *Id.* The question of reasonableness is “whether the facts of the case would warrant a reasonable 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 (citing *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990)). This determination requires consideration of all facts known to the officer under a totality of the circumstances analysis. *Powers*, 2004 WI App 143, ¶ 7.

b. The Circuit Court’s findings regarding the functionality of the stationary radar were supported by the evidence and must be upheld.

The Circuit Court correctly determined that the stationary radar was functional prior to Perschke’s stop based on the evidence presented at the trial. The Court also correctly rejected Perschke’s argument that the stationary radar was inoperable because the speed from the radar was not mirrored on the dash cam video. There was ample evidence presented to confirm that the radar itself was operable despite the radar speed not mirroring on the dash cam video. After considering all of the evidence, including the evidence regarding the mirror feature malfunction, the Circuit Court correctly found that the radar was operable.

Perschke argues on appeal that the stationary radar was inoperable because the speed shown on the stationary radar was not mirrored on the dash cam video. [App. Br., p. 8.] However, the Court's factual finding that the stationary radar was operable was not clearly erroneous. Indeed, the Court's finding is based solidly in fact and should not be disturbed. The City presented the following evidence at trial regarding the functionality of the stationary radar:

- The stationary radar was calibrated approximately five months prior to stopping Perschke. [R.29:7, R-App 26.]
- Officer Lochowitz performed a self-test on the radar prior to stopping Perschke and the radar passed the test. [R.29:8-9, R-App 27-28.]
- Officer Lochowitz had used this same stationary radar prior to stopping Perschke, and had received training on the specific radar model. [R.29:9, R-App 28.]
- When Officer Lochowitz relied upon the radar prior to stopping Perschke, there were no environmental anomalies

that would have affected the radar's accuracy. [R.29:9-10, R-App 28-29.]

- Perschke's vehicle was the only target in the radar's field. [R.29:10, R-App 29.]
- The Wisconsin Administrative Code lists the stationary radar as being presumptively accurate.¹ [R.29:10, R-App 29.]
- There was "no doubt in [Officer Lochowitz's] mind [that] Peschke's speed was what was being reported by the radar device." [R.29:10, R-App 29.]

The evidence conclusively showed that the radar was working. Although there was evidence presented that the mirror feature on the dash cam video malfunctioned, there was no evidence that the mirror feature on the dash cam video had any

¹ Stationary radars, as used by Officer Lochowitz in this instance, also automatically receive a presumption of accuracy under common law. *Wauwatosa v. Collett*, 99 Wis. 2d 522, 524, 299 N.W.2d 620 (Ct. App. 1980).

impact on the stationary radar itself. Indeed, the Court rejected that argument. [R.28:14, R-App 14.]

The finding that the stationary radar was functional is supported by the “great weight and clear preponderance of the evidence” and is not clearly erroneous. *Phelps*, 2009 WI 74, ¶ 55 (citation omitted). Therefore, the Court should uphold the trial court’s factual finding.

c. The facts presented at trial demonstrate that Officer Lochowitz possessed reasonable suspicion that Perschke was speeding.

Officer Lochowitz utilized the functioning stationary radar and observed Perschke violating a traffic law prior to the stop. Officer Lochowitz had specific and articulable facts to believe that Perschke was violating Wis. Stat. § 346.57(4) when he observed, through use of the stationary radar, that Perschke was driving 38 miles per hour in an area with a 25 mile per hour limit. [R.28:5-6, R-App 5-6; R.29:10, R-App 29.] As such, Officer Lochowitz possessed reasonable suspicion that Perschke was committing a crime and the stop was lawful.

CONCLUSION

Based upon the foregoing, this Court should affirm the decision of the Jefferson County Circuit Court wherein Judge Hue concluded that Officer Lochowitz possessed the reasonable suspicion to stop Perschke's car.

Dated this 7th day of September, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a brief and appendix produced with a proportional serif font (Century 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief, including the statement of the case, the argument, footnotes, and the conclusion (and excluding other content) is 1,608 words.

Dated this 7th day of September, 2017.

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ELECTRONIC FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f), that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with § 809.19(3)(b) that contains a table of contents, a copy of any unpublished opinion cited under § 809.23(3)(a) or (b), and a signed certification that the appendix complies with the confidentiality requirements under § 809.19(2)(a) in a form substantially similar to the confidentiality provision under sub. (2)(b).

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.

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ELECTRONIC FILING OF APPENDIX CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(13)(f), that the text of the electronic copy of the Appendix is identical to the text of the paper copy of the same.

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