

RECEIVED

08-28-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN :: COURT OF APPEALS - DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Appellant,

Appeal No. 2018-AP-571-CR

vs.

Trial No. 17-CT-711

EMILY J. MAYS,

Defendant-Respondent.

Appeal from order suppressing evidence entered February 5, 2018
in the Circuit Court for Kenosha County,
Honorable David M. Bastianelli, Judge, presiding

BRIEF OF DEFENDANT-RESPONDENT

JOHN T. WASIELEWSKI
Bar ID No. 1009118
Attorney for
Defendant-Respondent

Wasielewski & Erickson
1429 North Prospect Avenue
Suite 211
Milwaukee, WI 53202

(414) 278-7776
jwasielewski@milwpc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES.....	iii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	iii
STATEMENT OF THE CASE.....	1
Procedural history	1
The stop	2
Findings and decision	5
ARGUMENT	8
The trial court correctly concluded that the facts known to the officer at the time of the stop were insufficient to support a reasonable and articulable suspicion that a crime was occurring	9
CONCLUSION	20
FORM AND LENGTH CERTIFICATION.....	21
CERTIFICATE OF COMPLIANCE	21

TABLE OF AUTHORITIES

Cases

<i>Alabama v. White</i> , 496 U.S. 325 (1990)	10-12
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971).....	9
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	9
<i>In Re Anagnos</i> , 2011 WI App 118, 337 Wis.2d 57, 805 N.W.2d 722	18-19
<i>In Re Anagnos</i> , 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675	18-19
<i>State v. Post</i> , 2007 WI 60, 301 Wis.2d 1, 755 N.W.2d 634	9-10
<i>State v. Rutzinski</i> , 2001 WI 22, 241 Wis.2d 729, 623 N.W.2d 516	12-13
<i>State v. Waldner</i> , 206 Wis.2d 51, 56 N.W.2d 681 (1996)	16-17

STATEMENT OF ISSUES DISCUSSED

Whether the facts known to the officer at the time of the stop were insufficient to support a reasonable and articulable suspicion that a crime was occurring.

The trial court answered in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested in this appeal.

STATEMENT OF THE CASE

Procedural history

A criminal complaint dated September 28, 2017 charged Defendant-Respondent Emily J. Mays with three counts: operating while intoxicated, second offense, with a minor child in the vehicle in violation of Wis. Stat. §346.63(1)(a) and §346.65(2)(am)2 and (2)(f)2; operating with a prohibited alcohol concentration, second offense, with a minor child in the vehicle in violation of Wis. Stat. §346.63(1)(b) and §346.65(2)(am)2 and (2)(f)2; and, operating after revocation in violation of Wis. Stat. §343.44(1)(b) and (2)(ar)2. 1: 1-4.

On October 16, 2017 Ms. Mays filed a motion to suppress evidence obtained as a result of police stopping her vehicle; the motion asserted the stop was made without sufficient cause. 11: 1-5. On October 24, 2017 Ms. Mays filed an amended motion seeking the same relief on the same basis (but incorporating additional facts from a newly-received squad video). 12: 1-6.

On January 4, 2018 the motion came before the Honorable David M. Bastianelli for an evidentiary hearing. 27: 1-50. The court heard testimony from Officer Gary Paskiewicz. 27: 18-35. Counsel presented oral

arguments. 27: 36-41. The court reviewed a video and recordings of a 911 call and police dispatch. 27: 41. The court then issued an oral decision from the bench that the motion to suppress be granted. 27: 41-48. On February 5, 2018 the court signed an order that all evidence from the traffic stop be suppressed. 21: 1.

The State now appeals from the order granting the motion to suppress.

The stop

On July 19, 2017 at 2:51 a.m. an unnamed caller called 911 and reported that a teenage girl, the caller's employee, was riding in a blue truck driven by the girl's mother in the area of Frank School. The caller stated she knew the mother was driving drunk because the girl called her. The caller did not give a name, did not wish to speak to an officer and did not want it known that she was calling. This recorded call was played for the court at the suppression hearing prior to testimony. 27: 17; 19: exhibit S-1. The court also heard a recorded police dispatch based on the 911 call. 27: 17; 19: exhibit D-2.

Officer Gary Paskiewicz testified to receiving dispatch information, and his actions thereafter. 27: 18-35. At 2:53 a.m. on July 19, 2017 Office Paskiewicz was near

56th Street and 10th Avenue in Kenosha when a call popped up on his computer regarding a “reckless driver call” and “possible intoxicated driver.” 27: 19. The information relayed to Officer Paskiewicz was that “they had received a call from a female saying that they had gotten a call from a teenager and the teenager was saying that her mother Emily was driving drunk with them in the vehicle in the area of Frank School.” 27: 20-21. The vehicle was a blue truck. 27: 21.

As Officer Paskiewicz drove westbound on 56th Street approaching 19th Avenue, he looked north up 18th Avenue and saw a blue truck about a block ahead driving northbound on 18th Avenue. 27: 21-22. He observed no other traffic at this point. 27: 22.

Officer Paskiewicz turned northbound and followed the vehicle on 18th Avenue. 28: 22. Officer Paskiewicz observed the vehicle, which was a half block ahead, turn off 18th Avenue to drive westbound on 52nd Street. 27: 22, 23. The vehicle was not speeding and stopped for stop signs. 27: 24. Because he observed no impaired driving or violations, Officer Paskiewicz did not activate his squad camera. 27: 29.

Westbound on 52nd Street, the vehicle was in the left

of two lanes. 27: 25. Officer Paskiewicz followed in the right (curb) lane. 27: 25. He caught up with the vehicle in the 2400 block of 52nd Street. 27: 23. As he followed the vehicle westbound on 52nd Street, Officer Paskiewicz observed the vehicle get close to, but not cross, the line that separates the two lanes. 27: 22.

Immediately before Officer Paskiewicz initiated the traffic stop, he observed the vehicle pull from the left lane to the right lane without signaling. 27: 23. On direct examination, Officer Paskiewicz made a “guestimate” that he was 10 to 15 feet behind when the vehicle made this maneuver. 27: 25. On cross-examination, and after he reviewed the squad camera video, Officer Paskiewicz stated that distance may have been greater than 10 to 15 feet, although it was not 4 car-lengths, and restated his estimate of the distance: “I would estimate maybe one car can safely be in between that.” 27: 31-32. He acknowledged that his safety was not impaired by the vehicle moving from the left lane to the right lane. 27: 32. No other car’s safety was impaired. 27: 33. After following the vehicle for blocks and observing no violations, Officer Paskiewicz determined that the vehicle’s movement from the left into the right lane was

an unsafe lane deviation and executed a stop. 27: 35. Prior to the stop, Officer Paskiewicz was unable to see the driver or any passengers. 27: 27.

The squad camera video shows the final 40 seconds preceding the traffic stop from a perspective viewing forward through the squad's windshield; the on-screen clock indicates it begins at 2:57:20. 19: exhibit D - 3. When the video starts, the squad is in the left lane about a half-block behind a vehicle. As the squad closes the distance between it and the vehicle, the squad pulls into the right lane. The vehicle pulls into the right lane, ahead of the squad. The squad's siren becomes audible at 2:57:50. The vehicle pulls over and stops at 2:58:00.

Findings and decision

After the conclusion of testimony, the court heard oral argument of counsel. 27: 35-41. The court noted it had heard the testimony and reviewed the squad video and the recordings of the 911 call and dispatch. 27: 41. The court then made factual findings:

- a 911 call indicated that a particular individual may be in a vehicle being driven by the mom who may be intoxicated (27: 41);

- a dispatch to the officer advised that a 911 caller

says a daughter says her mom is driving around in a blue truck while intoxicated at a certain location (27: 41);

- an officer sees such a vehicle and follows it from near 56th Street and 18th Avenue, down 18th Avenue four blocks to 52nd Street, then west on 52nd Street to the 2400 block (27: 41-42);

- during this following, the vehicle stopped for one or more stop signs, made a proper turn from 18th Avenue onto 52nd Street, and did not commit any traffic violations (27: 42);

- at one point, the vehicle moved toward the center line while staying within its lane, but that nothing about this maneuver was “erratic per se” (27: 42); and,

- after the vehicle went from the left lane to the right lane the officer activated his lights to stop the vehicle (27: 42).

After a review of case law (27: 43-47), the court set forth two facets it found pertinent to its legal analysis:

In boils down to two facets: Were there violations of the traffic law which would allow the officer to stop the vehicle under a traffic law violation in order to conduct a continued seizure investigation of the driver of that vehicle? And secondly, was there articulable facts the officer could rely upon, even absent the non-traffic law

violations, reasonable, articulable facts to again justify an investigatory stop in these matters.

27: 27.

The court found that the videotape clearly demonstrated that no traffic violation occurred, as the operator did not fail to give regard to the safety of other vehicles, and nothing indicated the distance between the vehicles affected the safety of the officer behind the vehicle. 27: 48.

The court found no reasonable, articulable facts to conduct an investigatory stop:

There are really no criteria which were observed by the officer for an investigatory stop except he knew that a blue vehicle in that vicinity may have a drunk driver and the vehicle made a slight deviation towards the center line before staying in the left lane and then turned from the left lane into the right lane without a traffic signal. That I believe is insufficient for an investigatory stop in and of itself.

27: 47-48.

The court granted the motion to suppress. 27: 48.

ARGUMENT

Judge Bastianelli, in granting suppression of the fruits the stop of Ms. Mays' vehicle, addressed two issues: 1) whether the officer had probable cause to believe a traffic violation had occurred, and 2) whether the officer possessed facts supporting a reasonable articulable suspicion to warrant an investigatory traffic stop.

The State has abandoned the issue of probable cause of a traffic violation: "The court also held that there was not a violation of Wisconsin Statute §346.34. (The State does not contest this ruling.)" State's br. 10.

Despite abandoning one of the two issues decided by the trial court, the State's brief sets forth three issues. The first of these challenges a factual finding regarding the distance between Ms. Mays' car and the officer's squad at the time she changed lanes. State's br. 11-12. As the State acknowledges, however, this issue is subsumed in the larger question whether the officer had a reasonable articulable suspicion; thus, the State notes the argument will be further developed in the course of the third argument. State's br. 12. The State's second and third arguments both relate to whether the officer had a facts giving rise to a reasonable articulable suspicion justifying

a traffic stop, but one focuses on the information from the 911 call, while the other focusses on the observations of the officer. Ms. Mays asserts these are incorporated in a single issue:

The trial court correctly concluded that the facts known to the officer at the time of the stop were insufficient to support a reasonable and articulable suspicion that a crime was occurring

The stop of an automobile and the detention of its occupants constitute a “seizure” under of Fourth and Fourteenth Amendments to the United States Constitution. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants. *Coolidge v. New Hampshire*, 403 U.S. 443, 479 (1971). Thus, the Fourth Amendment imposes a reasonableness requirement on the discretion of law enforcement officers to safeguard the privacy and security of individuals against arbitrary invasions. *Prouse*, 44 U.S. at 653-654. The burden of proving the reasonableness of an investigative stop falls on the State. *State v. Post*, 2007 WI 60, ¶12, 301 Wis.2d 1, 755 N.W.2d 634.

The court in *Post* was asked to adopt some version of a bright-line test for traffic stops based upon observing a car weaving within a traffic lane. The State sought a rule that repeated weaving within a lane should always justify a stop. *Post*, ¶14. The defense, to the contrary, argued for a rule that weaving within a lane may justify a traffic stop only when such movements are erratic, unsafe, or illegal. *Post*, ¶22. The Court in *Post* declined to adopt any such bright-line rule, instead holding:

The determination of reasonableness is a common sense test. The crucial question is whether the facts of the case 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. This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions. The reasonableness of a stop is determined based on the totality of the facts and circumstances.

Post, ¶13 (internal citations omitted).

When police seek to justify a traffic stop where the basis of suspicion arises from an anonymous tip, courts look to the specificity and detail in the tip and the degree to which police confirm the details through independent

observation. *Alabama v. White*, 496 U.S. 325 (1990). In *White*, police received an anonymous call stating that Ms. White would leave a specific apartment at a specific address in a brown Plymouth station wagon with a broken right taillight and drive to Dobby's Motel while in possession of a brown attaché case containing an ounce of cocaine. Police surveilled the apartment and saw a brown Plymouth station wagon with a broken right taillight in the parking lot. Police observed a woman, carrying nothing, enter the Plymouth and drive the most direct route to Dobby's motel. When police stopped the car as it approached the motel, they found a brown attaché case containing marijuana.

The court in *White* found that “under the totality of the circumstances the anonymous tip, *as corroborated*, exhibited sufficient indicia of reliability to justify the investigatory stop.” *White*, 496 U.S. at 332 (emphasis added). In assessing the degree of corroboration of the tip, the court distinguished between “easily obtained facts” and predictions of future behavior. *White*, 496 U.S. at 332. The court noted that anyone could have predicted a particular car was parked in front of a particular building, as that fact presumably existed at the time of the

anonymous call. However, the general public could not know that Ms. White would leave that building, get in that car and drive the most direct route to Dobby's Motel. *White*, 496 U.S. at 332. These predictions of future behavior, once verified by police, made it "reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities." *White*, 496 U.S. at 332.

The Supreme Court of Wisconsin, in analyzing *White*, noted that predictive aspects of a tip, once verified by police, showed the informant had "inside information." *State v. Rutzinski*, 2001 WI 22, ¶24, 241 Wis.2d 729, 623 N.W.2d 516. Likewise, the caller to police in *Rutzinski* showed he had inside information, though through a different means. The caller in *Rutzinski* did not make predications of the defendant's actions, but rather gave contemporaneous information about the defendant's erratic driving as he observed it, which included observing the officer pull his squad behind the defendant and confirming he was behind the correct car. *Rutzinski*, ¶¶4-6. This gave the officer "verifiable information" indicating the caller's "basis of knowledge."

Rutzinski, ¶33.

The State relies heavily on *Rutzinski*. State's brief 12, 14-16. However, the 911 caller in Ms. Mays' case did not provide a *verifiable* basis for her knowledge. Rather, she claimed hearsay knowledge from a call from a teenager, a supposed passenger in a "blue truck" being driven by the teenager's mother Emily while drunk near Frank School. 27: 20-21. Thus, the basis of the information is the teenager. However, if the caller knew what the teenager observed that prompted her the claim her mother was driving drunk, the caller did not reveal it. Did the teenager observe her mother drinking alcohol? Did the teenager observe her mother engage in erratic or dangerous driving? Why did the teenage believe or claim her mother was driving drunk? The caller does not say. The caller merely states she knows the mother is drunk because the teenager called her. 19: exhibit S - 1.

As verification for information provided by the 911 caller, the officer indicated he first observed a blue vehicle northbound on 18th Avenue near 56th Street. 27: 21-22. This is the sole extent of the officer's ability to verify any information provided by the caller.

Of course, the crucial information provided by the

caller is that the driver of the blue truck is drunk, based on the conclusory allegation of the teenager. The officer followed the vehicle northbound on 18th Avenue from 56th Street to 52nd Street, then West on 52nd Street to the 2400 block without observing any violations or erratic driving. The vehicle was not speeding, and the driver obeyed stop signs. 27: 24. Thus, the officer's observations not only failed to verify this information, but tended to discredit it. Before executing the stop, the officer was unable confirm who the driver was, or whether other persons were in the vehicle.

The event proximate to stop was the vehicle executing a lane change from the left lane to the right lane. The officer alleged this was an unsafe lane deviation and ticketed Ms. Mays for that offense. 27: 32. However, after hearing the officer's testimony and viewing the squad video, the trial court determined that this lane change did not violate the statute, as it was executed without impairing the safety of the officer or any other person. 27: 48. This conclusion is well supported by the record. The officer initially testified that when this lane change occurred, the vehicle was only 10 to 15 feet ahead of his squad. 27: 25. However, on cross-examination, after

viewing the squad video, the officer conceded this was not accurate. 27: 31. He testified the distance was sufficient that another car could safely have been in the space between his squad and the vehicle. 27: 31-32. Most crucially, the officer testified that his safety was not impaired by the vehicle's lane change. 27: 32.

The state does not challenge the court's conclusion that the lane change did not constitute a traffic violation. State's br. 10. Nonetheless the State challenges the trial court's factual finding that the "vehicle was at least three or four car lengths at the minimum, a car length being 8 to 10 feet, when it went [from] the left to the right lane." 27: 48; State's br. 11-12. The trial court made this factual finding after hearing Officer Paskiewicz' testimony and viewing the squad video. In suggesting that this finding is clearly erroneous, the State suggests viewing the video and noting the hash lines in the roadway suggests a shorter distance. State's br. 12. However, the record does not reveal the length of the hash lines, so they do not provide a useful basis for estimating distances. The State does not specify a particular length as the correct distance that the court should have found, but merely argues the court's finding is too great. The actual distance, whether described

in feet or car-lengths, however, is merely a means of quantifying when addressing the ultimate consideration: whether the distance was so small that the officer's safety was impaired by the lane-change. Officer Pankiewicz testified his safety was not impaired, and the court so found.

The State asserts that, despite the absence of any crime or traffic violation, the officer's observations provided a basis for a traffic stop. State's br. 19-22. The State relies on *State v. Waldner*, 206 Wis.2d 51, 56 N.W.2d 681, in which the court stated: "The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." *Waldner*, 206 Wis.2d at 57. The court in *Waldner* found reasonable, articulable suspicion of criminal activity from a series of behaviors observed by the officer. Each of these, viewed in isolation, showed little. None of them were an actual violation. Viewed in aggregate, however, they warranted further investigation. The court explained:

Sergeant Annear was discharging a legitimate investigative function when he

decided to approach Waldner. He had observed Waldner go through a series of acts, each perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual nor unlawful in a car driving down the street at 12:30 a.m. in Richland Center. Nor is there anything unlawful about an individual in these circumstances driving slowly, then suddenly accelerating. Unusual perhaps, suspicious maybe, but not unlawful. Likewise, it is not unlawful for this same car to stop at an intersection before making a left turn when there is no oncoming traffic and no stop sign. Unusual? Certainly. Suspicious? Maybe. But unlawful? No. Nor is there anything unlawful about this driver stopping the car at this time of night and dumping a mixture of liquid and ice out of a plastic cup into the roadway. Unusual? Absolutely. Suspicious? Under these circumstances, certainly. Unlawful? No.

Waldner, 206 Wis.2d at 60-61. The circumstances in *Waldner* aroused reasonable suspicion, and did so in a cumulative way. With each observation, the officer's suspicions had cause to grow.

In Ms. Mays' case however, no such series of unusual behaviors was observed. Officer Paskiewicz followed the blue car not due to any driving irregularity, but rather based on an anonymous 911 caller who passed on a hearsay report of a teenager in a blue truck whose mother was driving drunk. Presumably Officer Paskiewicz

would never have followed the car but for receiving a dispatch as a result of the 911 call. However, as Officer Paskiewicz followed this car for four blocks on 18th Avenue (from 52nd to 56th Streets) and then six or more blocks on 56th Street (from 18th Avenue to the 2400 block), he observed no unusual or remarkable driving or behaviors. Only immediately before the stop did Officer Paskiewicz observe the vehicle he was following get close to, but not cross, the line separating lanes, and then switch lanes without signaling. These last two events were captured on the squad video. Had Officer Paskiewicz noted any irregular driving earlier, he could have activated his camera earlier, but he did not. 27: 29.

In reaching his decision, Judge Bastianelli did not consider the *Waldner* case. However, Judge Bastianelli cited and discussed two decisions arising from a factually similar case, *In Re Anagnos*, 2011 WI App 118, 337 Wis.2d 57, 805 N.W.2d 722, *reversed*, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675. Judge Bastianelli described the series of driving behaviors, none constituting traffic violations, leading Mr. Anagnos' stop. 27: 43. He noted that the circuit court and Court of Appeals in *Anagnos* viewed each of these driving behaviors individually and

found no justification for the stop. However, the Supreme Court reversed, finding that the lower courts had failed to view the driving behaviors in aggregate and view the totality of the circumstances. 27: 44. Judge Bastianelli then applied the standard in *Anagnos* and distinguished it from the facts in Ms. Mays' case:

And secondly, was there articulable facts the officer could rely upon, even absent the non-traffic law violations, reasonable, articulable facts to again justify an investigatory stop in these matters.

Firstly, in regard to the latter, there were no reasonable, articulable facts to conduct an investigatory stop such as you had in [*Anagnos*] where you had three different, [crossing a raised] median, fast speed and not using a signal taking into aggregate on that. You don't have that here. As a matter of fact you have just the -- just the opposite.

There are really no criteria which were observed by the officer for an investigatory stop except he knew that a blue vehicle in that vicinity may have a drunk driver and the vehicle made a slight deviation towards the center line before staying in the left lane and then turned from the left lane into the right lane without a traffic signal. That I believe is insufficient for an investigatory stop in and of itself.

27: 47. Thus, Judge Bastianelli applied the correct legal standard, considered the totality of the circumstances and

properly found that Officer Paskiewicz lacked sufficient knowledge to support a reasonable articulable suspicion justifying the stop.

CONCLUSION

Defendant-Respondent Emily J. Mays prays that this court affirm the order of the trial court granting suppression of the fruits of the traffic stop.

Respectfully submitted,

John T. Wasielewski
Attorney for Emily J. Mays

FORM AND LENGTH 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 4330 words.

John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

John T. Wasielewski