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DISTRICT 4

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2018AP000700
Circuit Court Case No. 2017TR004074; 2017TR004075;
2017TR004133

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KENNETH JAY RANEY SR,
Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR GRANT COUNTY,
THE HONORABLE Craig R. Day, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

Anthony J. Pozorski Sr.
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CASES CITED

1. *Navarette v. California*
134 S.Ct 1683,1687 (2014).....pp. 4-6
2. *State v. Poellinger*
153 Wis.2d 493 (1990).....p. 8
3. *State v. Waldner*
206 Wis.2d 51 (1996).....p. 6

STATUTES CITED

None

STATEMENT ON ORAL ARGUMENT

Because the issues can be presented to the Court in briefs, oral argument is not necessary.

STATEMENT ON PUBLICATION

Publication is not appropriate. The issues in this case involve no more than the application of well-settled rules of law to a recurring fact situation.

STATEMENT OF THE CASE

On September 1, 2017, Mr. Raney was arrested and cited for Operating a Motor Vehicle While Under the Influence of an Intoxicant (R.1) After Raney's blood was tested he was cited for Operating a Motor Vehicle With a Prohibited Alcohol Concentration (OMV/PAC).(R.2)

On March 14, 2018 the trial court held a hearing on Raney's Motion to Suppress and denied the motion (R.56).

On March 23, 2018 a jury trial was held and the jury found the defendant guilty of OMVI and OMV/PAC.(R.56)

Raney appeals.

STATEMENT OF THE FACTS

On September 1, 2017 between 10:30pm and 11:00pm, Grant County Deputy Sheriff Duane Jacobson observed a vehicle being driven on Highway 151, a four lane highway. (R.57, pp. 33-34; App. 1-2) The vehicle moved within its lane of travel, crossed the white dotted line and straddled it for an extended period of time, moved into its correct lane, then crossed the dotted center line with almost all four tires. (R.57, p.34; App. 2) Deputy Jacobson stopped the vehicle and talked to Raney, who was driving. (R.57, pp. 33-35; App. 1-3)

Deputy Jacobson smelled an odor of intoxicants coming from Raney as he spoke. (R.57, p.35; App. 3) Raney admitted drinking a couple (R.57, p.35; App. 3)

With respect to the HGN test, Raney's eyes lacked smooth pursuit, exhibited nystagmus at maximum deviation and exhibited nystagmus prior to the onset of 45 degrees. (R.57, p.36-39; App. 4-7)

With respect to the nine-step walk-and-turn test, Raney took approximately 25 steps to the front of the squad car, then turned and walked back in normal fashion. (R.57, pp.39-41; App. 7-9)

With respect to the one leg stand test, Raney repeatedly put his foot down. (R.57, pp.41-42; App. 9-10)

Raney was arrested and taken to the Platteville hospital. (R.57, p.44; App. 12) Raney consented to a blood draw and blood was drawn at 11:25p.m. (R.57, pp. 45,48; App. 13, 16; R.37) The blood test result was .121 g/100mL. (R.38)

STATEMENT OF ISSUE

I. Issue: Whether an anonymous tip that Raney was all over the road and the officer's observations of Raney weaving into another same-direction lane of traffic gave rise to a reasonable suspicion justifying the stop of the vehicle.

Argument

On September 1, 2017 at 10:40pm Grant County Deputy Sheriff Duane Jacobson was patrolling Highway 151 when he was dispatched to a complaint of a reported vehicle travelling all over the road. (R.56, pp.2-3; App. 17-18). The complaining party indicated that they had their flashers on and were following behind the suspect vehicle. (R.56, p.3). Deputy Jacobson positioned himself in the median and when the vehicles showed up, Deputy Jacobson got in between Raney's vehicle and the vehicle with its flashers on. (R.56, p.3; App. 18). Deputy Jacobson saw Raney's vehicle cross the dotted white line with the

driver's side tires, return to its lane and then cross the dotted line with almost all four tires. (R.56, pp.3-4; App. 18-19). Deputy Jacobson stopped the vehicle. (R.56, p.4; App. 19).

In *Navarette v. California*, 134 S.Ct 1683,1687(2014), the Court stated, "The Fourth Amendment permits brief investigative stops - such as the traffic stop in this case- when a law enforcement officer has a 'a particularized and objective basis for suspecting the particular person stopped of criminal activity'". In *Navarette*, 134 S.Ct., at 1688, the Court stated, "These principles apply with full force to investigative stops based on information from anonymous tips. We have firmly rejected the argument 'that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation rather than on information supplied by another person.'"

The tip in this case should be considered sufficiently reliable to justify a traffic stop. The tipster must have known the location of the suspect vehicle because Deputy Jacobson positioned himself in the median to watch for the vehicles. The tipster indicated that s/he was behind the vehicle with its flashers on. Deputy Jacobson saw the

vehicle with its flashers on. The tipster was accurate as to the location and timing of the suspect's driving.

Although the law enforcement officer did not take down the tipster's license plate, the tipster would not have known that the officer would not have gotten the plate number. Although the Grant County Sheriff's Department did not take down the tipster's telephone number, the tipster would not have known whether the Grant County Sheriff's Department had caller ID. Although the officer did not flag down the tipster, the tipster did not know that the officer would not do that. All three of these factors weigh in favor of the tipster not being guaranteed of his or her anonymity. Aside from the tip, the officer also saw the suspect-vehicle being driven in a concerning way. Deputy Jacobson saw the suspect vehicle cross the dotted line with the driver's-side tires and subsequently saw the suspect vehicle cross over the dotted line with almost all four tires. That sort of driving behavior was consistent with the tipster's information and even without the tipster's information is indicative of intoxicated driving, inattentive driving or driving affected by medical problems. Based upon his observations alone, Deputy Jacobson would have been remiss in his duties as a law enforcement officer had he not stopped the suspect vehicle.

The defendant argues that he was driving exactly as he should have when another vehicle was approaching the highway off of a ramp. The law is clear that law enforcement officers do not have to rule out innocent explanations when reasonably suspecting unlawful conduct. *Navarette*, 134 S.Ct 1683, at 1691; *State v. Waldner*, 206 Wis.2d 51, 59 (1996).

II. Issue: Whether defense counsel was ineffective for failing to challenge the voluntariness of the blood draw.

Argument

A hearing has not been held in the trial court on the issue of ineffective assistance of counsel. Because Raney has by-passed the trial court with respect to that issue, we cannot tell whether the decision not to raise that issue was strategic. Therefore that issue is not ripe for appeal.

To the extent that the Court might still want to address that issue, Raney has not established that his decision to consent to a blood draw was involuntary. Deputy Jacobson went through the Informing the Accused form with the defendant word for word and the defendant consented to a blood test. (R.57, pp.44-45; App 12-13).

III. Issue: Whether the officers administration or Raney's performance on the field sobriety tests, the officer's report writing, the expert's testimony or the handling of the blood sample rendered the incriminatory evidence so insufficient in probative value that no reasonable jury could have found guilt to a reasonable certainty by evidence which is clear, satisfactory and convincing.

Argument

In *State v. Poellinger*, 153 Wis.2d, 493,507, the Court stated:

Accordingly, we hold that, in reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. See *Wilson*, 149 Wis.2d at 894. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Raney argues that the area for the field sobriety tests was not level (Defendant's brief, p.4). The

jury could see the area where the field sobriety tests were performed (R.40) The jury could therefore take into consideration the site where Raney performed the field sobriety tests and take into account those conditions.

Likewise with respect to Raney's physical condition, the jury, as a finder of fact, could take those physical conditions into account when weighing the probative value of that evidence.

With respect to swaying, Deputy Jacobson testified that he noticed that Raney was swaying slightly at different times during the interaction with the defendant (R.57,p.62)

Raney argues that the Court should not allow law enforcement officers to copy and paste while writing police reports. The jury heard the evidence regarding the cutting and pasting and was in a position to determine the weight to put on that evidence. (R.57, pp.64-72)

Raney argues that the expert testified that Raney might not have been intoxicated at the time of driving (Defendant's brief, p.6) The expert conceded that the depending on the circumstances, that at a different

time, the blood test results could have been higher or lower. (R.57, p.116)

Raney argues that his blood sample was not handled properly by the officer. The officer testified that blood was drawn, the tubes were sealed and then the blood gets taken back to the Sheriff's Department where one of the secretaries then mails it. (R.57, pp.48-49) Any questions regarding the handling of the blood sample are for the jury to consider. The jury was advised that the blood was drawn on 9/1/2017 and that it was received at the lab on 9/7/2017. (R.38)

Conclusion

Because of the anonymous tip and because of the law enforcement officer's observations of the defendant's driving, the law enforcement officer had a reasonable suspicion justifying a stop of the vehicle. Because the defendant consented to a blood test after having been read the information off of the "Informing the Accused" form, his trial attorney was not ineffective for not trying to suppress that result. Because the jury heard the law enforcement officer's testimony and the defendant's testimony the jury could have reached verdicts of guilty

and could have reached verdicts of not guilty. Because reasonable inferences could be drawn supporting guilt, the jury's verdicts of guilt should not be overturned.

Dated this 19th day of October, 2018.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 11 pages.

Dated this 19th day of October, 2018.

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APPENDIX INDEX

Appendix No.

Partial Transcript of Jury Trial.....1-16
Partial Transcript of Motion Hearing.....17-19

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 the content requirements of Wis. Stat. S (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's appendix fall into one of the categories specified in sub. (2)(a).

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 19th day of October, 2018.

Signed:

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**CERTIFICATE OF COMPLIANCE
WITH WIS STAT. §(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 Wis. Stat. § (Rule) 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 19th day of October, 2018.

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