

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2018AP1190-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DENISE CAMPBELL,

Defendant-Respondent.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND
AN ORDER GRANTING A MOTION TO DISMISS CITATIONS,
ENTERED IN THE DUNN COUNTY
CIRCUIT COURT, THE HONORABLE
MICHAEL A. SCHUMACHER, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUE

Did Dunn County Sergeant Mayer have reasonable suspicion to initiate a traffic stop at 9:17 p.m. on a Saturday evening when he observed Campbell drive with her headlights canted towards him, drive on the center line of a highway, weave within her lane, and cross over the center of another road, all in addition to Mayer calling for backup because the vehicle was shaking back and forth?

The circuit court ruled “No.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. The issue may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Campbell was cited with Operating a Motor Vehicle While Under The Influence of An Intoxicant and Operating a Motor Vehicle With a Prohibited Alcohol Concentration. (R. 2.) On April 13, 2018, Campbell submitted a motion to dismiss. (R. 18.) On June 7, 2018, the circuit court held an evidentiary hearing. (R. 24.) Dunn County Sergeant Travis Mayer, who has sixteen years’ experience as a full-time law enforcement officer, was the sole witness. (R. 24, 4:17-20.) The circuit court issued an oral ruling in which it granted Campbell’s motion to dismiss. (R. 24, 22:1.) The State filed a notice of appeal. (R. 23.)

STATEMENT OF THE FACTS

On Saturday, September 30, 2017, at approximately 9:17 p.m., Sergeant Mayer was driving on Hwy 12 en route to a domestic incident. (R. 24, 5:16-17, 22-24; 13:10.) He observed a vehicle approach him with its headlights canted towards his vehicle then drift towards the center line, which made him nervous enough to drive towards the shoulder. (R. 24, 6:1-6.) Subsequently, Mayer turned around and followed the vehicle, and observed the vehicle drifting back and forth within its lane of travel and observed its wheels touch the centerline as the vehicle met another oncoming vehicle. (R. 24, 6:10-16.)

When the vehicle was about to turn right on 850th, Mayer observed that the vehicle was shaking back and forth. (R. 24, 11:18-20.) He wasn't sure if there was a domestic dispute, a fight, or an OWI occurring. (R. 24, 11:20-22.) Therefore, he called for backup because, in his experience, he seen numerous times where there were arguments in vehicles, which caused the vehicles to shake. (R. 24, 11:23-25, 12:1.)

While on 850th, Mayer observed the vehicle drive across what would be the center of the road; however, the road did not have any traffic markings on the center of the road. (R. 24, 12:7-9.) The circuit court received two exhibits, both of which were video from Mayer's squad camera.

The circuit court stated that when a vehicle drifts, "I'm thinking almost always when I see that, somebody's on their cell phone." (R. 24, 21:17-20.) The circuit court noted it did not hear any testimony about inconsistent speeds,

speeding, or fleeing. (R. 24, 21:8-10.) The circuit court held that the State failed to meet its burden. (R. 24, 21:24-25.)

ARGUMENT

I. The circuit court erroneously granted Campbell’s motion to dismiss when it held Mayer lacked reasonable suspicion to initiate a traffic stop.

The State challenges the circuit court’s decision that Sergeant Mayer lacked reasonable suspicion to initiate a traffic stop because it: (1) misstated the evidence, which affected its decision; (2) erroneously implied that lack of speeding refutes reasonable suspicion, and (3) failed to consider the other five factors that Mayer articulated, in addition to Campbell weaving within her lane, to support his decision to initiate a traffic stop.

A. Relevant Law and Standard of Review

The Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. An investigatory stop is a seizure that is permitted when the officer has reasonable suspicion, based on the totality of the circumstances, that the person stopped has committed, is committing, or is about to commit a crime or violation. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The Court later extended the reasoning in *Terry* to include investigatory traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Wisconsin has similarly codified *Terry* and permits law enforcement to

temporarily detain and question a person with adequate reasonable suspicion. Wis. Stat. § 968.24.

A court reviewing the legality of a stop is not limited to the basis cited by law enforcement for effecting the stop. *Whren v. United States*, 517 U.S. 806, 813 (1996). The essential inquiry is whether law enforcement's actions were reasonable under all the facts and circumstances present. *State v. Williams*, 2002 WI App 306, ¶ 12, 258 Wis. 2d 395, 655 N.W.2d 462 (citation omitted). "It is a common sense inquiry, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions." *Id.* (quotations and citations omitted).

Whether law enforcement violated a defendant's constitutional protection against unreasonable searches and seizures is an issue of constitutional fact subject to a mixed standard of review. *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869. The trial court's findings of fact will be upheld unless they are clearly erroneous. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. The court reviews independently the application of those facts to constitutional principles. *Id.*

B. The circuit court misstated the evidence that the State presented, which in turn adversely effected its ruling.

The circuit court misstated three different pieces of key evidence when making its decision that the State did not meet its burden of proof.

1. Mayer did not *only* “have a feeling” to move right when he met Campbell’s vehicle; Mayer veered to the right shoulder and turned around when he met Campbell’s vehicle.

The circuit court noted that “Sergeant Mayer talked about a – a feeling that he need to go to the right to avoid the possibility of this vehicle coming at him.” (R. 24, 19:19-22.) However, Sergeant Mayer testified that he “went toward the shoulder.” (R. 24, 6:6.) It was more than just “a feeling” that he needed to veer to the right to avoid a possible collision.

What would a reasonable police officer reasonably suspect in light of his or her training and experience? *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681, 684 (1996). Here, sixteen-year veteran Sergeant Mayer veered to the right and made a conscious decision to turn around and follow Campbell’s vehicle when an oncoming vehicle’s headlights were canted towards his vehicle. Additionally, he ceased his route to the original call he was on. Sergeant Mayer had more than a “feeling” he needed to move to the right to avoid a collision. His action, by veering to the right to—in his opinion—avoid a collision, was only the original indicator that Campbell was engaged in criminal activity. He did not initiate a traffic stop until there were other factors to support reasonable suspicion.

2. Campbell’s vehicle crossed the center of the road, not “may have.”

The circuit court found “there may have been a time where the vehicle touched the centerline.” (R. 24, 20:3-5.) However, Sergeant Mayer testified “the wheels touched the centerline.” (R. 24, 6:15-16.) Exhibits 1 and 2 both clearly show

that the driver-side tires drove on the center line when the vehicle was traveling on Hwy 12 with an oncoming vehicle. Sergeant Mayer also testified that after the vehicle turned on 850th, “it goes across what would be the center of the road” although the road did not have a painted centerline. (R. 24, 12:7-9.)

A police officer may conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696, 699 (Ct. App. 1996). “Vehicles to be driven on right side of roadway; exceptions,” more commonly known as “operating left of center,” provides that “[u]pon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway.” Wis. Stat. § 346.05. The road need not have a painted center line. See *State v. Popke*, 2009 WI 37, ¶ 8, 317 Wis. 2d 118, 125, 765 N.W.2d 569, 573 (three-fourths of the defendant’s vehicle momentarily crossed the center of the road, which had a black strip of tar). “[E]ven a momentary incursion into the oncoming lane, that does not affect other vehicles or drivers, is sufficient to provide probable cause to believe that a left-of-center traffic violation has occurred.” *State v. Puchacz*, 2010 WI App 30, ¶ 19, 323 Wis. 2d 741, 752, 780 N.W.2d 536, 542.

Mayer could have cited Campbell with operating left of center because he believed that the vehicle crossed over the center of the road. Therefore, he had probable cause that a left-of-center violation occurred, and the stop was justified.

3. The circuit court inappropriately discounted Sergeant Mayer's testimony regarding the vehicle shaking back and forth.

After viewing the video one time, the circuit court noted Sergeant Mayer “talked about an abrupt jerking movement of that vehicle, and with the video I can’t tell that.” (R. 24, 20:6-7.) It wasn’t something that the court was able to observe on the video. (R. 24, 20:10-11.) However, Mayer testified that “the vehicle appeared to be shaking back and forth....I had already called for a backup officer at that point.” (R. 24, 11:19-20, 23-24.) He’s “seen numerous times where there’s arguments in vehicles where it starts to shake the vehicle.” (R. 24, 11:24-25, 12:1.) On cross-examination, Mayer testified that he included the vehicle shaking in his written police report. (R. 24, 13:5-6.) The circuit court indicated:

And the question can be asked should he have waited for more evidence and let something else happen, then make the stop? I don’t know. That’s his call.

(R. 24, 21:1-4.) The circuit court then stated “I think that the sergeant made his call, and I have no quarrel with that....” (R. 24, 21:22-25.)

Additionally, the circuit court noted “I’m glad the stop happened. I’m glad that there was nothing more that happened as a result of that....”

(R. 24, 21:5-7.) The circuit court further stated that:

I think that Sergeant Mayer did really good police work in making observations that led him to conclude that something’s going on here, and he took it upon himself to do what he thought was necessary, I think, to avoid the possibility of accident, somebody else getting hurt.

(R. 24, 20:20-25.)

It is not abnormal that when a vehicle makes rocking motions, it causes officers' concern. See *State v. Sutton*, 338 Wis. 2d 338, 2012 WI App 7, 808 N.W.2d 411 (Ct. App. 2011) (officer had legitimate reason for concern that there may be a weapon when a conversion van made a rocking motion).

Here, Mayer testified that in his sixteen years of experience as a full-time law enforcement officer, he thought there may have been a domestic dispute, fight, or OWI happening. The vehicle shaking caused him enough concern to call for backup at the time and then later annotate it in his written report. The circuit court indicated: it was *his* call. See *Waldner*, 206 Wis. 2d at 56 (What would a reasonable police officer reasonably suspect in light of *his or her* training and experience? (emphasis added)) Just because the circuit court could not see the vehicle shaking on the video does not mean it should discount the officer's testimony and obvious concern that there was something illegal occurring inside the vehicle.

The above statements made by the circuit court contradict its decision in finding that Sergeant Mayer lacked reasonable suspicion to initiate a traffic stop. The circuit court's statements actually support that Mayer had reasonable suspicion to initiate a traffic stop because there was legitimate concern for citizen safety—whether the citizens were inside the vehicle or on the road in another vehicle.

4. The circuit court erroneously implied that a lack of speeding refuted reasonable suspicion for a traffic stop.

The circuit court found that although it was “glad the stop happened,” there was no testimony regarding inconsistent speeds, speeding, or fleeing. (R. 24, 21:5-

10.) However, speeding is not needed to justify a traffic stop. “[D]riving need not be illegal in order to give rise to reasonable suspicion.” *Post*, 301 Wis. 2d 1, ¶ 24. A driver’s actions need not even be erratic or unsafe. *Id.* “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.

Here, the reasonable inference that Mayer drew from his observations of the vehicle drifting, driving on the center line, shaking, crossing the center of the road, and canting its headlights at 9:17 p.m. on a Saturday evening, was that criminal activity was afoot. He did not need to observe inconsistent speeds, speeding, or fleeing to make that inference.

5. Sergeant Mayer articulated at least five factors in addition to Campbell’s vehicle “weaving within her lane” that led to his decision to initiate a traffic stop.

Mayer articulated the facts supporting reasonable suspicion that Campbell was driving while intoxicated when he observed (1) Campbell’s headlights were canted towards his vehicle, which caused him to veer right, (2) Campbell drove on the centerline on Hwy 12, (3) Campbell’s vehicle shook back and forth, (4) Campbell drove over the center of 850th, and (5) it was 9:17 p.m. on a Saturday evening. In addition, the exhibits showed that Campbell’s vehicle tires touched the gravel on the right shoulder of 850th, and the vehicle excessively braked throughout the course of travel.

The circuit court opined that when a vehicle is drifting, it usually gives rise that someone is on their cellphone. However, Mayer did not need to rule out innocent explanations for Campbell's driving behavior where there were reasonable inferences that favor reasonable suspicion for the stop. *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125. "Suspicious conduct by its very nature is ambiguous," however, "the principal function of the investigative stop is to quickly resolve that ambiguity." *Waldner*, 206 Wis. 2d at 60.

Post held that weaving within a single traffic lane does not automatically give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle. *Post*, 301 Wis. 2d. 1, ¶ 2. But in *Post*, the arresting officer testified that the driver's intra-lane movements were "smooth," and that the car came within a certain number of inches from the center lane and a certain number of feet from the curb. *Id.* at ¶ 5. Conversely, Mayer testified that Campbell (1) drove on the yellow-painted centerline with an oncoming vehicle, and (2) drove over the center of the road that did not have painted centerline. Those two facts combined with Mayer's observation that Campbell's headlights were canted towards his vehicle and that her vehicle was shaking negate any reasonable belief that Campbell was driving smoothly like in *Post*.

However, like *Post*, the time of day was relevant. Mayer observed Campbell's unusual driving on a Saturday evening at approximately 9:17 p.m. *Id.* at ¶ 36 (viewing the time of night, 9:30 p.m., as a factor that contributed to the conclusion that reasonable suspicion existed). The time of day combined with the

other four factors previously discussed, in addition to Campbell's vehicle weaving within its lane of travel, rose to the level of reasonable suspicion.

Ultimately, would the above facts available to Mayer permit a person of reasonable caution in the belief that the action taken was appropriate? *Terry*, 392 U.S. at 21-22. The foregoing evidence supports reasonable suspicion to initiate a traffic stop. The circuit court's conclusion is clearly erroneous.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court reverse the circuit court's grant of Campbell's motion to dismiss and remand to the circuit court for further proceedings.

Dated this ___ day of August, 2018

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,568 words.

//s//

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E-FILE CERTIFICATION

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

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