

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1190-CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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 AND SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE FACTS.....	1
STANDARD OF REVIEW.....	2
ARGUMENT.....	3
I. THE CIRCUIT COURT CORRECTLY GRANTED CAMPBELL’S MOTION TO DISMISS WHEN IT HELD THAT SERGEANT MAYER LACKED REASONABLE SUSPICION TO INITIAT A TRAFFIC STOP.....	3
A. The evidence in the squad video shows Sergeant Mayer veering to the right shoulder when met by every passing car in the oncoming lane before meeting Respondent’s vehicle.....	4
B. Sergeant Mayer’s testimony regarding Respondent’s vehicle shaking back and forth rises to nothing more than a mere hunch and does not give rise to reasonable suspicion.....	5
C. The circuit court correctly found that there were not enough specific and articulable facts to make rational inferences to warrant the traffic stop.....	7
II. THE APPELLANT INCORRECTLY ASSERTS A NEW ISSUE OF LAW THAT WAS NOT ARGUED IN FRONT OF THE CIRCUIT COURT.....	8
CONCLUSION.....	10
CERTIFICATION.....	11
CERTIFICATION OF COMPLIANCE WITH WIS. STAT. 809.19(12)	12
CERTIFICATION OF MAILING.....	13
APPENDIX	
CERTIFICATION OF APPENDIX	

TABLE OF AUTHORITIES

CONSTITUTION

U.S. Const. amend. IV	4
Wis. Const. art. I, § 11	4

STATUTES

Wis. Stat. § 346.05	9
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CASES

<i>Cappon v. O’Day</i> , 165 Wis. 486, 162 N.W. 655 (1917)	8
<i>State v. Arias</i> , 2008 WI 84, 311 Wis.2d 358, 752 N.W.2d 748	4
<i>State v. Blatterman</i> , 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26	4
<i>State v. Hajicek</i> , 2000 WI 3, 240 Wis.2d 349, 620 N.W.2d 781	3
<i>State v. Martwick</i> , 2000 WI 5, 231 Wis.2d 801, 604 N.W.2d 552	3
<i>State v. Popke</i> , 2009 WI App 37, 317 Wis.2d 118, 765 N.W.2d 125	3
<i>State v. Post</i> , 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634	6, 7, 8
<i>State v. Powers</i> , 2004 WI App 143, 275 Wis.2d 456, 685 N.W.2d 869	2, 3
<i>State v. Richardson</i> , 456 N.W.2d 830 (Wis. 1990)	4
<i>State v. Rutzinski</i> ,	

241 Wis.2d 729, 623 N.W.2d 516 (Wis. 2001).....	4
<i>State v. Sutton</i> , 2012 WI App 7, 338 Wis.2d 838, 808 N.W.2d 411.....	6
<i>Terpstra v. Soiltest, Inc.</i> , 63 Wis.2d 585, 218 N.W.2d 129 (1974)	9
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	4
<i>State v. Waldner</i> , 206 Wis.2d 51, 556 N.W.2d 681 (1996).....	5, 8
<i>State v. Williams</i> , 2002 WI App 306, 258 Wis.2d 395, 655 N.W.2d 462.....	3, 4

STATEMENT OF THE FACTS

On September 30, 2017 at approximately 9:17 pm, Sergeant Travis Mayer (“Sergeant Mayer”) of the Dunn County Sheriff’s Department (“Sheriff’s Department”) was traveling west bound on County Highway 12 enroute to an incident developing on the south end of the city of Menomonie (R-APP. 2). While traveling west bound, Sergeant Mayer passes two vehicles traveling east bound (P-APP. at 2: 18). While passing the two vehicles, Sergeant Mayer frequently crosses the fog line (P-APP. 2: 18). Neither vehicle appears to swerve toward the center line at any point (P-App. 2: 18). Sergeant Mayer was behind another vehicle traveling west bound and observed a vehicle approaching east bound, later determined to be Campbell’s. During this time, Sergeant Mayer only observed the vehicle appearing to come closer to the center line as it passed him (R-App. 2). The west bound vehicle Sergeant Mayer was trailing did not swerve toward the center line as Campbell’s vehicle approached and passed it (P-App. 2: 18). As the vehicle passed Sergeant Mayer, it had not crossed the center line (R-App. 2). Sergeant Mayer then turned around and caught up to the vehicle (R-App. 2).

Once Mayer caught up to the vehicle, he only noticed the vehicle drifting back and forth within its own lane of travel (R-App. 2). As Sergeant Mayer continued to follow Campbell, he observed Campbell put her turn signal on to turn south onto 850th Street, and for a short time before turning the vehicle, appeared to go onto the shoulder (R-App. 2).

As Sergeant Mayer continued to follow Campbell south bound on 850th street, the vehicle appeared to go into the north bound lane very close to the shoulder (R-App. 2).

Sergeant Mayer also observed that there are no center or fog lines on that stretch (R-App. 2).

At this point, Sergeant Mayer activated his squad lights and Campbell pulled over immediately (R-App. 2). Sergeant Mayer explicitly stated in his official report that he had already radioed Deputy Josh Christenson (“Deputy Christenson”) before he conducted the stop because he “[W]asn’t sure what I was stopping” (R-App. 2).

Sergeant Mayer approached the vehicle and immediately recognized her as Denise Campbell (R-App. 2). Sergeant Mayer continued to detain Campbell requesting her driver’s license (R-App. 2). Sergeant Mayer asked Campbell where she was coming from and she responded, and asked Sergeant Mayer if he had his microphone turned on. (R-App. 2). Sergeant Mayer then realized his microphone had not been turned on before he approached the vehicle, and attempted to turn it on. (R-App. 3).

Not until after his driver’s license request and his attempt to turn his microphone on did Sergeant Mayer report noticing slurred speech and bloodshot and glossy eyes (R-App. 3). Following these observations and several additional questions regarding where she was driving from, Sergeant Mayer conducted the routine sobriety tests. (R-App. 3).

Following the field sobriety tests, Campbell was arrested and transported to Mayo-Menomonie, where she agreed to submit to a blood test, and then was transported to Dunn County Jail, booked, and cited for OMVWI- 1st Offense (R-App. 5-6).

STANDARD OF REVIEW

State v. Powers, 685 N.W.2d 869 (Wis.App. 2004) described the standard this Court uses when reviewing the trial court’s decision in determining reasonable suspicion.

This Court stated that the determination of reasonable suspicion for an investigatory stop is a question of constitutional fact. *State v. Powers*, 685 N.W.2d 869, 871 (Wis.App. 2004) (citing *State v. Williams*, 623 N.W.2d 106 (Wis.App. 2002)). The court applies a two-step standard of review to questions of constitutional fact. *Id.* First, this Court reviews the trial court's findings of historical fact and upholds them unless they are clearly erroneous. *Id.* Second, this Court reviews the determination of reasonable suspicion de novo. *Id.* A question of constitutional fact is one whose determination is decisive of constitutional rights. *State v. Martwick*, 604 N.W.2d 552, 556 (Wis.App. 2000). In addition, applying a de novo review to determine reasonable suspicion will allow appellate courts to maintain control of, and to clarify, the legal principles. *State v. Hajicek*, 620 N.W.2d 781, 785 (Wis. 2001).

A police officer may conduct a traffic stop when he or she has probable cause to believe that a traffic violation occurred. *State v. Popke*, 765 N.W.2d 569, 574 (Wis. 2009). Probable cause exists when there is a “quantum of evidence that would lead a reasonable police officer to conclude that a traffic violation occurred. *Id.* A police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has reasonable suspicion that a crime or traffic violation has been or will be committed. *Id.* at 576.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY GRANTED CAMPBELL'S MOTION TO DISMISS WHEN IT HELD THAT SERGEANT MAYER LACKED REASONABLE SUSPICION TO INITIATE A TRAFFIC STOP.

The Fourth Amendment of the U.S. Constitution and Wis. Const. art. I. § 11 prohibit unreasonable seizures. A warrantless seizure must be supported by probable cause or reasonable suspicion. *State v. Blatterman*, 362 Wis. 138, 162 (Wis. 2015). When an officer pursuant to a traffic stop detains a motorist, the motorist is seized within the meaning of the federal and state constitutions. *State v. Arias*, 311 Wis.2d 358, 377 (Wis. 2008).

A *Terry* stop requires that a law enforcement officer must reasonably conclude, in light of his or her experience, that criminal activity has or is taking place. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The officer must be able to point to specific and articulable facts that objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot. *State v. Rutzinski*, 623 N.W.2d 516, 521 (Wis. 2001). The determination of reasonableness is a commonsense test based on the totality of the facts and circumstances known to the officer at the time of the stop which strikes a balance between the interests of society in solving a crime and the members of that society to be free from unreasonable intrusions. *State v. Richardson*, 456 N.W.2d 830, 834 (Wis. 1990); *State v. Williams*, 655 N.W.2d 462, 466 (Wis. 2002).

A. The evidence in the squad video shows Sergeant Mayer veering to the right shoulder when met by every passing car in the oncoming lane before meeting Respondent's vehicle.

The circuit court discussed at the evidentiary hearing that Sergeant Mayer had a feeling that he needed to go to the right to possibly avoid Respondent's vehicle coming at him, and that the vehicle might cross the center line. (P-App. 19: 20-24). However, the

circuit court stated there was no testimony that Respondent's vehicle crossed the center line while it passed him. (P-App. 19: 24-25). Sergeant Mayer noted in his police report that as the vehicle passed him, it had not crossed the center line. (R-App. 2).

The evidence in the squad video shows Sergeant Mayer not only veering to the right of the fog line for Respondent's vehicle, but also for two other vehicles before Respondent passed him. (P-App. 2: 18). In addition, the evidence in the squad video shows Sergeant Mayer pulling up directly behind a vehicle before Respondent passed him. (P-App. 2:18). The video shows that as the Respondent passes the vehicle in front of Sergeant Mayer, that vehicle does not veer anywhere near the right side of the road to avoid a collision. (P-App. 2:18).

The question of what constitutes reasonableness is a common sense test. *State v. Waldner*, 556 N.W.2d 681, 684 (Wis. 1996). What would a reasonable police officer reasonably suspect in light of his or her training and experience *Id.* A reasonable police officer would suspect any vehicle to veer to the right shoulder if there was an oncoming vehicle about to cross a center line. The evidence in the squad camera video fails to show this.

Therefore, the circuit court correctly stated the evidence that Sergeant Mayer's *feeling* was in fact, only a feeling, and does not have enough weight to help form the basis for reasonable suspicion to stop the Respondent.

B. Sergeant Mayer's testimony regarding Respondent's vehicle shaking back and forth rises to nothing more than a mere hunch and does not give rise to reasonable suspicion.

The circuit court pointed out that Sergeant Mayer discussed an abrupt jerking movement of Respondent's vehicle. (P-App. 20: 6-7). However, the circuit court noted that these motions were not observable on the video to the judge. (P-App. 20: 10-11). Investigate stops must be based on more than an officer's inchoate and unparticularized suspicion or hunch. *State v. Post*, 733 N.W.2d 634, 637 (Wis. 2007). Rather, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. *Id.* Sergeant Mayer testified that he "wasn't sure if there was going to be a domestic dispute or a fight in the vehicle or an OWI or what it was going to be." (P-App. 11: 20-22). He also testified that "I've seen numerous times where there's arguments in vehicles where it starts to shake the vehicle as well." (P-App. 11: 24-25). These remarks are nothing more than inchoate suspicions that something else may happen. Nothing in the evidence shows that criminal activity was afoot, and these motions were not observable in the evidence brought to the circuit court at the evidentiary hearing. In *State v. Sutton*, 808 N.W.2d 411, 414 (Wis.App. 2011), the police officer stated concern for rocking motions of a car. The officer told this Court, due to her training and experience she knows the movement to be one of someone who may be trying to retrieve or conceal a weapon, which causes alarm for the officer's safety. However, *Sutton* is distinct from this case because Sergeant Mayer claims he observed rocking motions in the vehicle as Respondent was driving, not while it was already stopped. It is reasonable for an officer to conclude that while a vehicle has been stopped, someone would try and hide or stash weapons and contraband from the police. However, it is hard to make that argument for a vehicle while in motion.

Like in *Post*, it can be argued that if failure to follow a perfect vector down the highway or moving in your vehicle enough to make it rock were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy. 733 N.W.2d at 640.

Therefore, the lack of evidence in the squad video showing these rocking motions are not enough to give rise to the level of reasonable suspicion to stop Respondent.

C. The circuit court correctly found that there were not enough specific and articulable facts to make rational inferences to warrant the traffic stop.

In *State v. Post*, 733 N.W.2d 634 (Wis. 2007), the Court declined to adopt a bright-line rule that repeated weaving within a single lane alone gives a police officer reasonable suspicion to make an investigatory stop. The court reasoned the rule that weaving within a single lane may alone give rise to reasonable suspicion fails to strike the appropriate balance between the State's interest in detecting, preventing, and investigating crime with the individual's interest in being free from unreasonable intrusions. *Id* at 639. Repeated weaving within a single lane is a malleable enough standard that it can be interpreted to cover much innocent conduct. *Id*. Because weaving is a type of conduct that many innocent drivers commit, it may subject a substantial portion of the public to invasions of their privacy, and adopting it would allow essentially unfettered discretion and permit the arbitrary invasions of privacy by government officials addressed by the Fourth Amendment of the U.S. Constitution and Article 1 Section 11 of the Wisconsin Constitution. *Id*.

The circuit court noted that Sergeant Mayer testified that the vehicle drifted within its own lane of travel, and there may have been a time where the vehicle touched the center line. (P-App. 20: 2-5). However, the circuit court reasoned that based on the totality of the circumstances, there is not enough evidence to give rise to the level of reasonable suspicion. The circuit court stated there was no testimony about inconsistent speeds or speeding, no testimony about fleeing, and the turn Respondent made on 850th was signaled and appeared to be proper. (P-App. 21: 8-12). It is clear under *Post* the court concluded that driving need not be illegal in order to give rise to reasonable suspicion. 733 N.W.2d at 641. However, based on the conclusions of the circuit court, the facts, taken together under the totality of the circumstances, do not give the cumulative effect that these factors give rise to reasonable suspicion. A point is reached where the sum of the whole is greater than the sum of its individual parts. *State v. Waldner*, 556 N.W.2d at 685. However, the sum of the whole is not greater in this case.

Therefore, when taking all of the factors together cumulatively, there is not enough evidence to show that Sergeant Mayer had reasonable suspicion to stop the Respondent.

II. THE APPELLANT INCORRECTLY ASSERTS A NEW ISSUE OF LAW THAT WAS NOT ARGUED IN FRONT OF THE CIRCUIT COURT.

One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. *Cappon v. O'Day*, 162 N.W. 655, 657 (Wis. 1917). The reason for the rule is plain. If the question had been raised below, the

situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court. *Id.*

In this case, Appellant has presented this Court with a new issue and law. Appellant cites Wis. Stat. § 346.05, which discusses that vehicles must be driven on the right side of the roadway. Appellant argues that Sergeant Mayer could have cited Respondent with this particular violation, and in doing so would alone give rise to probable cause to stop. Such an argument is erroneous. The adoption of a new rule of law on appeal when the question was not raised at trial might well work hardship on the adversary. *Terpstra v. Soiltest, Inc.*, 218 N.W.2d 129, 133 (Wis. 1974). It would also deprive this court of the informed thinking of the trial judge on the matter. *Id.* Like in *Terpstra*, Appellant never raised this issue or question of this law in the trial court evidentiary hearing. (P-App. 4-12). Nor did Appellant raise the argument in their Response to Defendant-Respondent's Motion to Dismiss. (R. 21, 1-3). This issue was also not raised in the police report by Sergeant Mayer. (R-App. 1-3). Had Appellant raised the issue with the trial court, Respondent would have had the opportunity to consider and prepare for that issue. The court stated in *Terpstra*, the practice of this court is not to consider an issue raised for the first time on appeal. 218 N.W.2d at 133.

Therefore, Appellant erroneously included a new issue of law for this Court to

consider that was not argued in front of the circuit court, and therefore should not be considered as giving rise to reasonable suspicion to stop Respondent.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court affirm the circuit court's grant of Campbell's motion to dismiss.

Dated this 26th day of September, 2018.

Respectfully Submitted,

Electronically signed by Timothy T. Sempf

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3145 words.

Electronically signed by Timothy T. Sempf
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and filed with the court and served on all opposing parties.

Dated: 9/27/18

s/Timothy T. Sempf
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