

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**CLERK OF COURT OF APPEALS
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**Appeal No. 2018AP001437 CR
Washington County Circuit Court Case No. 2017CM001361**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN IAN END,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING DEFENDANT-APPELLANT'S
MOTION FOR SUPPRESSION OF EVIDENCE IN THE
CIRCUIT COURT FOR WASHINGTON COUNTY, THE
HONORABLE ANDREW T. GONRING, JUDGE,
PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT KEVIN IAN END**

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STATEMENT OF THE ISSUES

Did the information in the tip coupled with the observations of Office Albea provide the requisite level of suspicion to stop Mr. End?

The trial court answered yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Kevin Ian End (Mr. End) was charged in Washington County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration both as second offenses on February 27, 2017, contrary to Wis. Stat. §346.63(1)(a) and Wis. Stat. §346.63(1)(b). Mr. End, by counsel, filed a motion for suppression of evidence, alleging an unlawful stop on February 5, 2018. (R12:1-2). A hearing on said motion was held before the Honorable Andrew T. Gonring, Judge, on March 30, 2018. On said date, the Court orally denied the defendant's motion. A written order was signed and filed on April 3, 2018. (R.20:1 / A.App.1). On May 30, 2018, a jury trial was held. The jury found Mr. End guilty of both violations. The Court sentenced Mr. End to a period of jail, fine and revocation of operating privileges. The defendant timely filed a Notice of Appeal on July 27, 2018. The appeal hearing stems from the Court's order denying his motion for suppression of evidence.

The pertinent facts are as follows and were adduced at the motion hearing held on March 30, 2018, and through the testimony of City of Hartford Police Officer Adam Albea.

Officer Albea testified he had been employed with the City of Hartford Police Department for just under two years, he went through basic recruit academy, and was trained and certified as a police officer. (R.53:5/ A.App. 2). Albea testified he was on duty on February 27, 2017.

On that date, at approximately 10:12 p.m., he received a dispatch concerning a driving complaint in the City of Hartford on Highway 60 near Goeman's Rapid Mart. (R.53:5/ A.App. 2). The complainant reported a vehicle swerved into their lane and had difficulty with speed control. (R.53:6/ A.App. 3). The only identifying information provided was that the vehicle was a white Chevy Tahoe. Albea could not recall if a registration plate was provided. *Id.* At the moment of the call, Albea was not in the area of the call, but was further into the city. (R.53:6/ A.App. 3). Albea proceeded to the area. Albea indicated that he observed a vehicle traveling on Highway 60. Albea followed the vehicle, and when it traveled through an intersection, it changed lanes without a turn signal. (R.53:8/ A.App. 4). The officer provided no testimony regarding if other traffic was affected, or even if other traffic was in the area. Albea also said the vehicle had no, or very limited, registration lamps. *Id.* Albea followed the vehicle for three to five minutes. (R.53:9/

A.App. 5). Albea further observed the vehicle cross the centerline just prior to the intersection of Grand Ave. However, the officer thought this was only because of the manner in which cars were parked on the side of the road. Albea implied the vehicle would have to go left of center to get around the vehicles parked on the roadside. (R.53:9/ A.App. 5).

Albea said the vehicle made a complete stop at Grand Ave. southbound, signaled a left turn, and then turned left. *Id.* A cd-video of the driving was introduced into evidence. (R.29:1). After the left turn, Albea conducted the traffic stop. The vehicle responded appropriately to Albea's lights.

On cross-examination, Albea testified the only vehicle identifying information he received is the vehicle was a white vehicle, and he did not recall receiving a license plate. (R.53:14/ A.App. 6). Also, Albea testified the citizen caller was not in the area, and he did not speak with the citizen complainant. (R.53:15/ A.App. 7). Furthermore, there is nothing in the record suggesting the citizen caller gave contemporaneous updates of the vehicle's location, or that the citizen caller was even following Mr. End's vehicle. Likewise, there is nothing in the record suggesting the caller advised law enforcement that Officer Albea had stopped the correct vehicle.

Initially, without entertaining argument, the Court found that Ablea possessed the requisite level of suspicion to stop Mr. End's vehicle. However, the defense asked the Court to rule on whether the officer had stopped the correct vehicle, and whether the information provided by the caller sufficiently identified the vehicle, and if Mr. End's vehicle was the actual vehicle called in. The defense argued the description of the vehicle alone would not have provided the requisite level of suspicion to stop Mr. End. Mr. End was driving a silver, not white vehicle. (R.53:19/ A.App. 9). Further, defense argued without a registration plate, the stop would not be justified based on the call alone. *Id.* The Court then ruled even without the call, the observations made by the officer would have justified the stop. (R.53:20/ A.App. 10). The State made no argument.

A written order was signed on April 3, 2018. Mr. End, by counsel, timely filed a Notice of Appeal on July 27, 2018. The appeal in this matter stems from the Court's order denying Mr. End's motion for suppression of evidence. The sole issue on appeal is whether Officer Albea had the requisite level of suspicion to stop Mr. End's vehicle.

STANDARD OF REVIEW

In determining whether an investigatory stop was justified by reasonable suspicion an appellate court will uphold the trial court's finding of fact unless those findings are clearly erroneous. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis.2d 456, 685 N.W.2d 869. *State v. Martwick*, 2000 WI 5, ¶21, 23 Wis.2d 801, 604 N.W.2d 552. However, whether an investigatory stop was justified by reasonable suspicion, involves questions of law, which are reviewed de novo. *Id.*

ARGUMENT

A. THE INFORMATION PROVIDED FROM THE TIP WAS INSUFFICIENT TO IDENTIFY MR. END'S VEHICLE AS THE OFFENDING VEHICLE, AND THUS THE TIP DID NOT PROVIDE REASONABLE SUSPICION TO STOP MR. END

To satisfy the constitutional standard of the 4th Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, an investigative traffic stop must be supported by a reasonable suspicion. *State v. Rutzinski*, 2001 WI 22, ¶¶12-14, 241 Wis. 2d 729, 623 N.W.2d 516. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). This standard requires that the stop be based on something more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry v.*

Ohio, 392 U.S. 1, 27 (1968). To constitutionally effectuate a traffic stop, an officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* at 21. "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." *State v. Post*, 2007 WI 60, ¶ 301 Wis.2d 1, 733 N.W.2d 634 citing *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

"The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure of 'persons' within the meaning of the Fourth Amendment." *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (citing *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). An automobile stop must not be unreasonable under the circumstances. *Gaulrapp*, 207 Wis.2d at 605, 558 N.W.2d 696 (citing *Whren*, 517 U.S. at 810, 116 S.Ct. 1769). " 'A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred.' *id.*, or have grounds to reasonably suspect a violation has been or will be committed." *Gaulrapp*, 207 Wis.2d at 605, 558 N.W.2d 696 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317, (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed.2d 889, (1968).

State v. Popke, 2009 WI 37, ¶ 11, 317 Wis.2d 118, 126, 765 N.W.2d 569.

Here, the caller complained about the driving regarding a white Chevy Tahoe. The caller provided no license plate number, but only provided a direction of travel. Officer Albea found the vehicle driven by Mr. End. A silver vehicle. The person who made the call was not following Mr. End's vehicle. Furthermore, the caller did not make contemporaneous updates concerning the vehicle's driving or the vehicle's direction of travel. Finally, there is nothing in the record suggesting the caller advised Officer Albea he had stopped the correct vehicle. The description of the vehicle was not particular but very general. The caller did not provide a license plate. The particularity and description of an offending vehicle is important in establishing "specific and articulable" suspicion. See *State v. Guzy*, 139 Wis.2d 663, 407 N.W.2d 548. Here, the information provided was a general description of a vehicle, without more, the officer was not justified in stopping Mr. End's vehicle based on the caller's complaint.

B. THE OBSERVATIONS MADE BY OFFICER ALBEA DID NOT PROVIDE OFFICER ALBEA WITH REASONABLE SUSPICION TO STOP MR. END

The second issue is whether the personal observations made by Officer Albea provided sufficient justification for the traffic stop. Officer Albea indicated Mr. End's vehicle failed to signal a lane change, operated left of center and drove on top of the curb. Albea used these collectively as an independent basis for the stop. However, an examination of each shows none of the above would justify the traffic stop. First, Wis. Stat. §346.34 prescribes the manner in which an individual should change lanes. A turn signal is not necessary except for when movement to the right or left may affect other traffic. The record does not establish Mr. End's movement to the left affected other traffic, thus the officer could not have stopped Mr. End's vehicle for failing to use his turn signal.

Second, according to Albea, he followed Mr. End for approximately three to five minutes. As he was following Mr. End, he observed Mr. End travel left of the center of the road. However, the officer acknowledged he thought this occurred because Mr. End had to pass vehicles parked on the right side of the road. A review of the video clearly shows this movement

occurred only when Mr. End moved from the side of the road. (R29:1). Wis. Stat. §346.05(1)(d) allows a vehicle to travel outside of the right half of the roadway when passing obstructions on the right half of the roadway. Here, it is clear from the video that the parked vehicles were obstructing a portion of the right half of the roadway, thus, Mr. End would have to move to the left as he passed the vehicles. Further, according to the video, he made the maneuver with no difficulty. Thus, the action of leaving the right side of the road to pass vehicles parked on that side would not be sufficient justification for the traffic stop.

Finally, Officer Albea testified after Mr. End made a proper stop at Grand Ave., he turned left onto Grand Ave, and while doing so, he drove up onto the curb. A review of the video shows this did not happen. At no point after making the turn, did Mr. End's vehicle hop off or drive up over the curb. The Court found Officer Albea had three reasons to stop Mr. Albea's vehicle (1) changing lanes without signaling, (2) crossing the centerline before turning onto Grand Ave, and (3) striking the curb after making the turn onto Grand Ave. (R.53:18/ A.App. 8). As indicated *supra* there is no indication in this record suggesting the lane change affected other traffic,

and the movement across the yellow line, by the officer's own admission, was to avoid vehicles parked on the right side of road. Thus, these reasons are insufficient justification for the traffic stop. Finally, the Court found Mr. End's vehicle did travel upon or hit the curb. The video evidence does not support the Court's finding. When reviewing whether video evidence supports the Court's factual determination, an appellate court must uphold the lower court's factual finding unless they are clearly erroneous. *State v. Walli*, 2011 WI App 86, ¶14, 334 Wis.3d 402, 799 N.W.2d 898. Here, the trial court's ruling is clearly erroneous. The Court made its factual finding largely based on the video evidence introduced. In fact, the Court found "I certainly noticed him strike the curb by watching the video after turning from Grand..." (R.53:18/ A.App.8). However, a careful examination of the video clearly shows Mr. End's vehicle never struck the curb, and contrary to Officer Albea's testimony did not drive upon the curb. In light of the video evidence, a ruling finding Mr. End hit or drove upon the curb is clearly erroneous. It did not happen.

Thus, the independent observations made by Officer Albea did not provide sufficient justification for stopping Mr. End's vehicle.

CONCLUSION

Because the caller provided only a general not particularized description of the vehicle the call would not have provided sufficient justification to stop Mr. End. Further, because the independent observations made by Officer Albea did not provide sufficient justification for the stop, the court erred when it denied Mr. End's motion for suppression of evidence. The court should reverse the trial court's ruling and the judgment of conviction.

Dated this 15th day of October, 2018.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 21 pages. The word count is 3863.

Dated this 15th day of October, 2018.

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**CERTIFICATION OF COMPLIANCE WITH 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 s. 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 15th day of October, 2018

Respectfully submitted,

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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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 15th day of October, 2018.

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APPENDIX