

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2018-AP-1956
Circuit Court Case No. 2018-TR-129

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

FAITH A. PARAFINIUK,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

AN APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT OF GREEN LAKE
COUNTY, THE HONORABLE MARK T. SLATE,
PRESIDING

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STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

Oral argument is unnecessary because the issue on appeal can be fully developed in briefs. Publication is not requested.

ARGUMENT

- I. Officer Downs had probable cause to perform the traffic stop.

On September 14, 2018, a hearing was held in circuit court to determine whether Faith A. Parafiniuk had unreasonably refused to submit to a chemical test requested by Officer Christopher Downs of the Princeton Police Department, pursuant to Wis. Stat. § 343.305(9)(a)5. Parafiniuk did not contest that the officer properly read the Informing the Accused form to her or that she refused to take the chemical test, but she did contest whether the officer had a legal reason to stop her vehicle in the first place.

At approximately 6 pm on February 14, 2018, a vehicle driven by Parafiniuk and a patrol vehicle driven by Officer Downs each turned to travel eastbound on Old Green Lake Road in Princeton at about the same time (20:4-5). Officer Downs turned from Highway 23 onto Old Green Lake Road, a location at one end of Old Green Lake Road (20:19). Parafiniuk exited from a nearby school parking lot and turned directly onto Old Green Lake Road (20:5). These locations were not far apart (20:18). According to Officer Downs, Parafiniuk’s “vehicle came out of the City of Princeton school parking lot in front of [him]” and was so close that he “was forced to hit [his] brakes to avoid a collision” of the two vehicles (20:5-6). It was clear that as he completed his turn onto Old Green Lake Road, Parafiniuk’s vehicle was in his path on the roadway.

Parafiniuk argues that she was not required to yield the right-of-way to Officer Downs because he was not yet traveling on Old Green Lake Road when she turned onto that roadway. App. Br. at 11. Wis. Stat. § 346.18(4) requires a vehicle operator to “yield the right-of-way to all vehicles

approaching on the highway which the operator is entering.” Parafiniuk contends that Officer Downs was still on Highway 23 and had not yet begun traveling on Old Green Lake Road when she exited the parking lot, and thus she had no obligation to yield the right-of-way to him.

The process of entering a roadway takes a period of time. The operator of an entering vehicle maintains the obligation to yield the right-of-way to other vehicles that approach on the highway during the time it takes to make the entry. The operator of an entering vehicle—such as the one driven by Parafiniuk—must anticipate whether an approaching vehicle could be occupying the roadway by the time of the entry, even if the approaching vehicle is not yet on that same roadway. Therefore, even if Officer Downs had not yet begun to travel on Old Green Lake Road when Parafiniuk pulled on to the roadway, by the time Downs reached the location of Parafiniuk’s entry, he was indeed on Old Green Lake Road. He thereby qualified as a vehicle “approaching on the highway,” as specified by Wis. Stat. § 346.18(4). Since Parafiniuk had allocated insufficient time to complete her turn before Officer Downs arrived at the location of her turn, she thereby failed to yield the right-of-way to him.

A police officer may conduct a traffic stop when he or she has probable cause to believe that a traffic violation has occurred. *State v. Popke*, 317 Wis. 2d 118, ¶13, 765 N.W.2d 569 (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.*, ¶14. Failing to yield the right-of-way in this manner violates Wis. Stat. § 346.18(4). This driving behavior provides an officer with probable cause that a violation occurred.

However, even if there is a gap in the Wisconsin traffic code leaving ungoverned the issue of who yields the right-of-way when two vehicles turn on to the same roadway nearly simultaneously, there was still legal authority for the officer to make a traffic stop. Without probable cause, 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.*, ¶23.

In *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868 (1968), the United States Supreme Court determined that in appropriate circumstances, “reasonable suspicion” could justify a brief detention “for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” Adopted in Wisconsin in *State v. Post*, 301 Wis. 2d 1, ¶11, 733 N.W.2d 634 (2007), the reasonable suspicion standard can also be found in Wis. Stat. § 968.24.

In evaluating whether an investigatory traffic stop is supported by reasonable suspicion, the officer must have more than an “inchoate and unparticularized suspicion or hunch.” *Post*, 301 Wis. 2d 1, ¶10. 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 traffic stop. *Id.* This determination is based on “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.” *Id.*, ¶13.

In this case, there was reasonable suspicion of unlawful activity when Parafiniuk’s vehicle pulled out onto the street directly in front of the approaching marked police squad car. It then quickly pulled into the parking lot of a gas station. This driving behavior, which included the risk of a collision of the vehicles, is suspicious when considered in its totality. Therefore, Officer Downs had reasonable suspicion to stop the vehicle and investigate further.

II. Officer Downs had legal authority to detain Parafiniuk in order to administer field-sobriety testing.

The issue of whether Officer Downs had the requisite level of suspicion to detain Parafiniuk for field-sobriety testing was not raised before the trial court.

The issues in dispute were described by Parafiniuk’s attorney at the beginning of the hearing on September 14, 2018, as the “stop and arrest” (20:4). Following the conclusion of testimony, Parafiniuk’s attorney argued to the trial court that “the evidence isn’t sufficient for probable cause to arrest her

for being impaired” (20:34). The argument continued with references to the field-sobriety testing: “she passes the horizontal gaze nystagmus, she passes the Romberg balance test” (20:34). Parafiniuk’s argument to the trial court was that the officer had an insufficient basis to effect an arrest, an event that took place after the completion of field-sobriety testing.

On appeal, Parafiniuk now argues that the officer did not have the requisite level of suspicion to continue to detain her for field sobriety testing. App. Br. at 12. She now claims a fault in an earlier stage of the investigation, i.e., that the officer did not have enough evidence to justify “an extension of the stop for field sobriety tests.” App. Br. at 13. Because this issue was not raised before the trial court, it is waived. *See Preuss v. Preuss*, 195 Wis. 2d 95, 105, 536 N.W.2d 101 (Ct. App. 1995) (issues not raised before the trial court are generally waived).

But even if the issue has not been waived, Officer Downs’ decision to detain Parafiniuk in order to continue the investigation into whether Parafiniuk was under the influence was reasonable. After the traffic stop, Officer Downs made initial contact with Parafiniuk through the driver’s side window of her vehicle (20:7). He observed her to be talking very quickly, to exhibit exaggerated expressions and body behavior, and to be acting with abnormal behavior, compared with his previous encounters with her (20:7, 32). Downs returned to his squad car before re-approaching her and asking her to step out of the vehicle (20:7-8).¹ After she stepped out, he noticed that her eyes were bloodshot with dilated pupils, she seemed confused with difficulty understanding why the officer had made contact with her, and she had increased movement (20:8). Officer Downs then confirmed his suspicions about Parafiniuk’s behavior by using field-sobriety tests, both standardized and unstandardized, which led to an increasing number of incriminating observations and her eventual arrest for operating while under the influence (20:9-15).

¹ Officers are permitted to order a driver out of a vehicle following a traffic stop for safety reasons. *Pa. v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330 (1977).

Officer Downs also kept in mind how Parafiniuk had pulled out onto Old Green Lake Road right in front of him, necessitating his use of the brakes to avoid a collision (20:9). Under all of these circumstances, Downs' suspicions that Parafiniuk could be under the influence were reasonable. Further investigation was warranted even though that meant Parafiniuk had to be temporarily detained.

It should further be noted that the State's burden of proof at a refusal hearing is "substantially less than at a suppression hearing." *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). At a refusal hearing, the State is required to "present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Therefore, the trial court need only ascertain that the officer's account is plausible. *Id.* at 36.

CONCLUSION

The trial court ruled, within the context of a refusal hearing, that there was sufficient legal basis to stop and detain Faith A. Parafiniuk and ultimately arrest her for operating while under the influence. The trial court's ruling should be affirmed.

Dated this 7th day of January, 2019.

Respectfully submitted,

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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 1652 words, excluding the table of contents, table of authorities, and certifications.

Dated this 7th day of January, 2019.

Andrew J. Christenson

ELECTRONIC FILING CERTIFICATION

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 the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 7th day of January, 2019.

Andrew J. Christenson