RECEIVED
11-14-2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.: 2019-AP-000318

CHRIS K. FELLER,

Defendant-Appellant.

APPEAL OF JUDGMENT FROM
WAUSHARA COUNTY CASE NO. 18-TR-2889
HONORABLE GUY D. DUTCHER PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

MICHAEL D. HUITINK
State Bar No. 1034742
Email: mhuitink@sbrlaw.us
Attorney for Defendant-Appellant,
Chris K. Feller

SORRENTINO BURKERT RISCH LLC
675 N. BARKER ROAD, SUITE 300
BROOKFIELD, WI 53045
(262) 513-3315

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WISCONSIN STATE CASES PAGE

ARGUMENT

The issues here must be precisely defined. Feller was found guilty of traveling 81 mph in a 70 mph speed limit zone – not of any other offense. (R. 12 at 32-33) Feller admitted to accelerating to 81 mph, but testified he did so to avoid an accident. (R. 12 at 22) The trial court did *not* hold that speeding to avoid an accident is an unjustified defense. (R. 12 at 32-33) Rather, the trial court rejected Feller's claim he accelerated to 81 mph to avoid an accident, instead finding that Feller was "probably the lead car" in a two-car speeding caravan and then discovered "Oh shit. There is a cop." (R. 12 at 32-33)

The trial court's finding was not supported by the evidence at trial, and nothing in Respondent's brief changes that fact. The trial court's judgment should be reversed.

I. WHETHER FELLER WAS TRAVELING "72 MPH" TO INITIALLY PASS A CAR IS IRRELEVANT.

Respondent argues the evidence supported the trial court's decision because, before Feller was clocked doing 81 miles per hour, Feller admitted to speeding to pass another vehicle that was traveling the speed limit:

> First of all, the vehicle that you indicate you were passing was going the speed limit….It was going 70 miles an hour, which was the posted speed limit, and you made a decision to pass that vehicle.

(Respondent's Br. at 13) (citing R. 12 at 30) The trial court, in fact, relied on this fact in finding Feller guilty. (*Id.* at 31-32) ("It's a little hard for me to embrace

the fact that you were in an emergency situation, when you were passing a vehicle going the speed limit in the first place"). That factual statement by the trial court was erroneous and, in any event, is completely irrelevant to Feller later being clocked at 81 mph – the offense for which he is charged.

The car Feller initially passed was not traveling the speed limit. Feller's uncontradicted testimony at trial was that the car was fluctuating from the speed limit to ***below*** the speed limit, which is why he passed him:

> I was going around him, slowly passing him slowly, because, actually, he was slowing down and speeding up. His speed was not rate at 70. He was slowing ***down to, like, 68***, then 72, ***then 68***, so I pulled around that car to pass him.
>
> * * * *
>
> That car was probably going 67, 70, something like that, kind of varying back and forth … So he was going, like ***slower than the speed limit***, then the speed limit, ***then slower***.

(R. 12 at 16) (emphasis added); (*Id.* at 26) (emphasis added)

Second, the issue is irrelevant. Feller testified he accelerated to 72 mph to pass the car (*Id*. at 26); however, Feller is not charged with traveling 72 mph. He is charged with accelerating to 81 mph. He is not charged with speeding at the time he initially passed the car "maybe going, like 72." (*Id.* at 26) He was clocked with a radar gun at a later point in time – per his testimony, ***after*** he initially passed the car at 72 mph, he accelerated to 81 mph to avoid an accident because a driver recklessly speeding driver came up virtually on top of his rear-end.

If Feller was charged convicted of traveling 72 mph in a 70 mph zone, Respondent's argument may have merit. In this case, the argument is irrelevant, and the trial court's reliance on an erroneous finding warrants reversal of its judgment.

II. FELLER'S TESTIMONY ABOUT WHY HE ACCELERATED TO 81 MPH IS UNCONTRADICTED.

Respondent argues that "Trooper Glick's testimony" rebutted Feller's claim he accelerated to 81 mph to avoid an emergency. (Resp. Br. at 14) It did not.

Feller's account of why he accelerated was clear and uncontradicted. Upon pulling into the passing lane, another car came up very quickly behind him. (R. 12 at 16-17) When Feller "got about halfway around the car" he was trying to pass, the car "coming up behind me was already on my bumper." (R. 12 at 16-17) The car was about "two feet away" from Feller's bumper, "basically telling [Feller] to get out of his way; he was very aggressive." (R. 12 at 17) Feller then accelerated to avoid an accident, getting past the car in the right lane, returning safely to the right lane, and reducing his speed:

> And I felt as though, if I didn't speed up and get around this guy, he was actually going to rear-end me, because he was speeding up at me, going back, weaving back and forth when I was in the passing lane. And, yes, at that point, I got scared because I thought he was going to rear-end me. I sped up to 81 miles an hour. I moved back over in front of the car quick, and I slowed back down.

(R. 12 at 17) The car that had been tailgating Feller then proceeded to come up next to Feller "at a rapid rate." (R. 12 at 17)

Trooper Glick did not contradict Feller's very specific testimony about the tailgating car. He simply did not see the vehicle behind Feller. (R. 12 at 12-13) He even admitted "it is possible" the vehicle was tailgating Feller so tightly that he would not have seen it. (R. 12 at 12-13) That is simply not sufficient to contradict Feller's testimony. (R. 12 at 16-17)

III. THE TRIAL COURT'S DECISION WAS CLEARLY ERRONEOUS BECAUSE IT WAS BASED ON FACTS THAT WERE INACCURATE.

Even under the clearly erroneous standard, a trial court must base its decision on an accurate view of the facts. *See Jagodzinski v. Jessup,* 215 Wis.2d 241, 249, 572 N.W.2d 515, 518 (reversing and remanding a trial court's decision and findings of fact under a "clearly erroneous" standard). As the *Jagodzinski* court noted, the trial court cannot base its conclusion on an inaccurate version of the facts. *Id.* ("While it is certainly within the discretion of the trial court to award less than that amount as compensation for the Jessups, the court must do so under an accurate view of the facts. We therefore remand this issue for further proceedings.").

In this case, the trial court based its decision on erroneous facts and unsupported speculation:

> Well, first of all, that begs the question "If there was an emergency, what were you doing passing the silver vehicle in the first place?" You don't confront a situation that necessitates the type of action that you purport to have taken unless the oncoming vehicle is traveling at breakneck speed probably off of the radar screen, and there is no indication that that occurred.

> It's a little hard for me to embrace the fact that you were in an emergency situation, ***when you were passing a vehicle going the speed limit in the first place***, and that you suddenly found yourself in a position where you needed to travel ten miles an hour over the speed limit in order to avoid someone who suddenly was on your rear. It just doesn't add up.
>
> * * * *
>
> He has not presented evidence which the Court finds credible as an explanation for an emergency, and I do not accept his explanation of what occurred. What is the far more logical explanation of what occurred is that he was involved in a pretty significant pass. And I do note the officer saw your vehicle coming up from the rear well before he conducted the radar analysis. You are in the passing lane. ***I'm sure there was somebody probably going 85, 81, whatever everybody was going in that lane that was with you. You were probably the lead car. You get around the silver vehicle, and you say, "Oh shit. There is a cop,"*** and you pull over, and the other guy keeps right on going. That's what happened, and you are the one that got caught. That's what happened here.

(R. 12 at 32-33) (emphasis added). There is no evidence that Feller and the car behind him were together, that Feller was the "lead car" in a speeding caravan, or that Feller got around the vehicle and said "Oh shit. There is a cop." There is no reliable evidence to contradict Feller's account that the car passed was fluctuating below the speed limit. Feller gave a firsthand account of the car coming up behind him and posing a danger, and there is no evidence that Feller was doing 81 mph prior to that time.

The trial court was not allowed to speculate and invent facts such as the "lead car" and "oh, shit" moment on which it based its decision. As such, its findings of fact were clearly erroneous.

IV. FELLER WAS LEGALLY JUSTIFIED IN SPEEDING TO AVOID HARM.

The trial court at least implicitly concluded that necessity could be used as a defense to the speeding charge – it evaluated Feller's claim on the facts, and did not reject it as a matter of law. (*See, generally*, R. 12) Respondent did not raise the issue at trial, but argues on appeal that the defense fails as a matter of law. (Resp. Br. at 15-18)

This issue was addressed in Feller's opening brief. This defense should be recognized under the same rationale of *State v. Brown*, 107 Wis.2d 44, 52, 318 N.W.2d 370 (1982). The parties agree the issue was expressly not ruled upon in that case, and have set forth their arguments as to why or why not the *State v. Brown* rule should be applied here. (App. Br. at 7-8); (Resp. Br. at 15-18) For the reasons set forth in Feller's opening brief, speeding to avoid potential harm or death should be recognized as a legal defense to and justification for exceeding a speed limit. (*See, e.g.,* R. 12 at 22) (Feller accelerated to 81 to avoid bodily harm or getting "possibly killed").

CONCLUSION

For the foregoing reasons, Defendant-Appellant Chris K. Feller requests the judgment of the Circuit Court be reversed.

Respectfully submitted this 13th day of November, 2019.

SORRENTINO BURKERT RISCH LLC

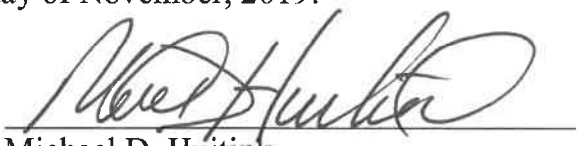
Michael D. Huitink
State Bar No. 1034742
Attorneys for Defendant-Appellant, Chris K. Feller

CONTACT INFORMATION:
675 N Barker Road, Suite 300
Brookfield, Wisconsin 53045
Phone: (262) 513-3315
Fax: (262) 513-3318
Email: mhuitink@sbrlaw.us

CERTIFICATION OF FORM AND LENGTH OF BRIEF

I certify that this reply brief conforms to the rules contained in section 809.19(8)(b) and (c), Stats., for a brief produced using the following font: proportional serif font; 200 dots per inch; 13-point body text; 11-point quote and footnote text; double spaced; 1.5 margins on the left side and 1-inch margins on the other 3 sides. The length of this brief is 7 pages and 1,713 words.

Respectfully submitted this 13th day of November, 2019.



Michael D. Huitink
State Bar No. 1034742

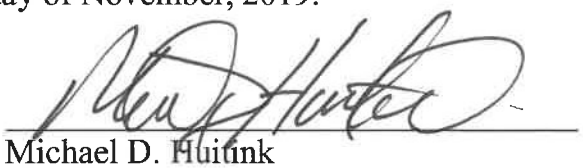
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. 809.19(2), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the reply brief filed as of this date.

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

Respectfully submitted this 13th day of November, 2019.

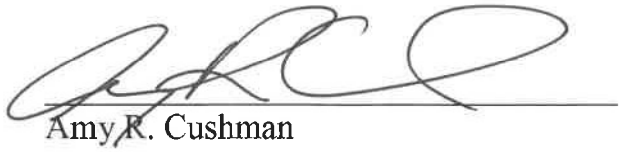


Michael D. Huitink
State Bar No. 1034742

CERTIFICATION OF MAILING

I certify that on November 13, 2019, this reply brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by Federal Express mail, on November 13, 2019. I further certify that the brief was correctly addressed and postage was prepaid.

Respectfully submitted this 13th day of November, 2019.



Amy R. Cushman