

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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Appellate Case No. 2019AP000927-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL T. MARTELL,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONENT

Appealed from a Judgment of Conviction Entered in
the Circuit Court for Vilas County,
the Honorable Neal A. Nielsen, III Presiding
Trial Court Case No. 2018CT0000021

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STATEMENT ON ORAL ARGUMENT

The Plaintiff-Respondent believes oral argument is not necessary in this case pursuant to Rule 809.22(2)(b) Wis. Stats. The briefs will fully develop and explain the issue, therefore, oral argument would be of little value and would not justify the expense of court time. It is applying common facts to established case law.

STATEMENT ON PUBLICATION

The Plaintiff-Respondent believes publication of this case would not be necessary pursuant to 809.23(1)(b)1, 4 Wis. Stats., as this case concerns the application of law to

a common fact situation.

STATEMENT OF THE CASE

Michael T. Martell was stopped and arrested for an OWI on February 14, 2018. On November 26, 2018 a motion hearing to suppress evidence was held before the Honorable Neal A. Nielsen, Circuit Court Judge for Vilas County. After testimony the court made an oral ruling denying the defendant's motion. On April 22, 2019 the defendant plead to OWI and the appeal of the motion hearing ruling followed.

STATEMENT OF THE FACTS

On February 14, 2018 at approximately 7:30 am Lt. Jeff Schaub, a 19 year law enforcement veteran, was on duty for the Vilas County Sheriff's Department when an identified civilian made a report of erratic driving by a vehicle traveling south on Highway 51 near the town of Arbor Vitae in Vilas County. (Transcript Page 3-Line 16, 4-1, 4-3, 4-7, 4-10, 4-13, 7-8) The civilian reported the vehicle in question was a black SUV with either Michigan or Minnesota license plates which began GLY. (Tr. 5-1) Lt. Schaub was south of the vehicle in question so he found a location to wait for the vehicle to pass him. (Tr. 4-21) When a vehicle matching the description appeared Lt. Schaub pulled out behind it to observe the driving behavior. (Tr. 5-12) Lt. Schaub observed the vehicle drive off the paved surface to the right onto the gravel shoulder on three occasions. (Tr. 6-7, 6-10) Lt. Schaub observed the vehicle apply its brakes hard (which caused a following vehicle to have to brake hard also), drive off the side of the

road to the right, return to the road and accelerate all in a jerky fashion. (Tr. 5-25, 12-5, 16-1) Lt. Schaub also observed the vehicle weave within its own lane repeatedly and fluctuate in its speed to as slow as 25 mph in a 45 zone. (Tr. 6-25, 7-1, 7-5) Following his own observations and what had been reported by the identified civilian regarding the driving behavior of the vehicle in question Lt. Schaub had concerns regarding the SUV driver's ability to safely operate a vehicle and conducted a traffic stop. (Tr. 17-4) Lt. Schaub identified the driver as Michael Martell and following SFST's placed him under arrest for criminal OWI.

ISSUE

DOES A LAW ENFORCEMENT OFFICER HAVE ENOUGH SUSPICION BASED ON SPECIFIC AND ARTICULABLE FACTS FROM WHICH TO MAKE A REASONABLE INFERENCE REGARDING AN INDIVIDUALS ABILITY TO OPERATE A MOTOR VEHICLE LEGALLY WHEN THAT SUSPICION IS BASED UPON A REPORT OF ERRATIC DRIVING FROM AN IDENTIFIED FELLOW DRIVER, THAT OFFICER OBSERVES THE DRIVER REPEATEDLY SWERVE IN HIS OWN LANE, JERKILY BRAKE CAUSING ANOTHER DRIVER TO BRAKE QUICKLY THEN ACCELERATE, BE UNABLE TO MAINTAIN A CONSISTENT SPEED AND DRIVE OFF THE ROAD MULTIPLE TIMES.

ANSWER. YES.

ARGUMENT

In reviewing a trial court's ruling on a motion to suppress, a reviewing court will uphold the trial court's finding of fact unless they are clearly erroneous. See *State v. Fields*, 239 Wis.2d 38, 42 (Ct. App. 2000). The trial court here found that a call from an identified civilian at 7:00 am reporting concerns about the driving behavior of another raises suspicions. (Tr. 27-14) The trial court also found that a vehicle traveling at substantially less than the posted speed limit and fluctuating in speed could provoke an

officer's suspicion. (Tr. 28-9, 28-12) Most importantly for the trial court was the vehicle leaving the road and going into the gravel. (Tr. 29-3) The trial court believed based on the totality of the circumstances Lt. Schaub had enough specific and articulable facts to form the reasonable suspicion that a violation of law was afoot. The application of constitutional principle to the facts of a case is a question of law to be decided without deference to the trial court's ruling. *Fields* at 42.

To execute a valid investigatory *Terry* stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of illegal activity has taken or is taking place. *Id* at 42. This has been codified in Wisconsin Statute 968.24. The question of whether an officer's suspicion is reasonable is a common sense test: Was the suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime. *Id* at 43. An inchoate and unparticularized suspicion or hunch will not suffice. *Id* at 43. However, an officer is not required to rule out the possibility of innocent behavior. *Id* at 43.

An officer is not required to sit idly by, waiting until probable cause presents itself before making an investigatory stop. In *State v. Richardson*, the Wisconsin Supreme Court quoted with approval, a U.S. Supreme Court explanation for a *Terry* stop.

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response... A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining

more information, may be most reasonable in light of the facts known to the officer at the time.

See *State v. Richardson*, 156 Wis. 2d, 138- 139, 456 N.W. 2d 830 (1990) [citing *Adams v. Williams*, 407 U.S. 143, 145- 146 (1972)]. When Lt. Schaub made the decision to stop Martell's vehicle, he had made several observations. He observed the vehicle to go onto the gravel shoulder 3 times, be unable to maintain a consistent speed, brake erratically causing another vehicle to have to brake, repeatedly swerve in his lane and upon leaving the road, jerkily come back on the road and accelerate. He also had the report of erratic driving from the identified civilian.

Each of these observations act as building blocks, which as they accumulate, allow reasonable inferences about the event to form. See *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W. 2d 681 (1996). Lt. Schaub could very reasonably conclusion based on these observations and the identified civilian's report that the driver of the suspect vehicle was having a very difficult time controlling the vehicle and it may be due to unlawful activities such as being impaired or texting while driving which pose traffic safety issues.

The argument that each of the individual observed acts in and by themselves are not illegal, doesn't remove them from forming the basis for reasonable suspicion. *Id* at 59. The whole concept behind the investigatory stop is that the officer has not observed unlawful activity but still needs to gather information. If the officer observed unlawful activity there would be probable cause for a seizure and the investigatory stop is not

needed. *Id* at 59. In order to do this investigatory stop most effectively the officer needs to hold the situation constant; thus performing the stop.

Reasonable suspicion is also not negated because the observed actions may have only been of a civil forfeiture-type violation. See *State v. Krier*, 165 Wis. 2d, 673, 678, 478 N.W. 2d 63 (Ct. of App. 1991). If an officer observed criminal activity he or she would have probable cause to seize, therefore, the actions observed for an investigatory stop almost by definition need to be lawful or of a minor type. One is reminded that all of the actions of the defendant in the seminal *Terry* case were perfectly legal.

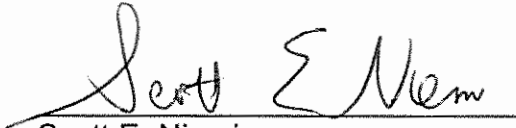
CONCLUSION

At the time Lt. Schaub decided to conduct an investigatory stop of the Martell vehicle he had made numerous observations and had a report of driving behavior which in their individual segments may have been legal but were specific and articulable enough that the inferences which he could derive from them could suggest to a reasonable officer that the driver was or was about to commit a violation of the law regarding traffic control.

THEREFORE, based on these foregoing law and arguments, the Plaintiff-Respondent request this court to deny the Defendant-Appellant request to overturn and vacate the decision of the Trial Court.

Dated this 13th day of September, 2019.

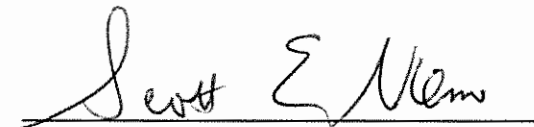
Respectfully submitted,

A handwritten signature in cursive script, reading "Scott E. Niemi", written over a horizontal line.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional spaced font. The length of the brief is 6 pages containing 1,864 words.

A handwritten signature in cursive script, reading "Scott E. Niemi", written over a horizontal line.

Scott E. Niemi
Attorney for the Plaintiff-Respondent