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STATE OF WISCONSIN

COURT OF APPEALS -- DISTRICT III

Case No. 2019AP001908-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY F. HARRIS,

Defendant-Appellant.

On Appeal from an Order
Denying Suppression and a Judgment of Conviction
Entered in the Brown County Circuit Court,
the Honorable William M. Atkinson Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is a stop based on an officer mistakenly looking at the wrong set of data on his license plate indexing equipment reasonable under the Fourth Amendment?

The circuit court found the officer made the mistake in "good faith" but did not make a determination regarding whether the mistake was reasonable under the Fourth Amendment.

2. Under the totality of the circumstances, does the act of crossing the dotted white line that divides a multilane one-way street plus a single "weave" within the lane in the early morning hours of a weekday create a reasonable suspicion that criminal activity is afoot?

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested but would be welcomed if the court would find it helpful in resolving this case. Publication is likely unwarranted, as the issues presented can be decided on the basis of well-established law.

STATEMENT OF THE CASE

Harris was pulled over and arrested for operating while intoxicated and possession of THC and drug paraphernalia. (1). After being charged with the same (as well as operating with a prohibited alcohol content), Harris filed a motion to suppress arguing that he was unlawfully stopped and therefore all evidence obtained as a result of the unlawful stop must be suppressed. (24). The circuit court held an evidentiary hearing and denied Harris's motion. Harris subsequently pleaded no contest to the operating while intoxicated (3rd) and possession of THC charges, as a repeater. (60). This appeal follows.[1]

STATEMENT OF FACTS

In the early hours of the morning on March 30, 2018, Harris was traveling in the left westbound lane on Lombardi Avenue in Green Bay. (49:5, 7). Lombardi Avenue is a divided highway, with three lanes going west, three lanes going east and a raised median in between. (59:7; 32). At 2:26 am, Officer Dan Skenandore of the Green Bay police department pulled Harris over. (59:6). Skenandore explained to Harris that he had pulled him over because the registered owner of the vehicle he was driving did not have a valid driver's license. (59:14, 33). In fact, the officer had made a mistake – when he indexed the registration, he had "scrolled back too far into the

[1] An order denying a motion to suppress evidence may be reviewed on appeal notwithstanding a no contest or guilty plea. Wis. Stat. § 971.31(10).

other vehicle that I had ran earlier." (59:27). In other words, he had "look[ed] at the wrong set of data." (59:10). The registered owner of Harris's vehicle did in fact have a valid driver's license. (59:15).

At the evidentiary hearing, Skenandore testified that in addition to the unlicensed driver issue, another basis for the stop was observed bad driving. Skenandore testified that he observed Harris's vehicle once cross over the dotted white line to the right of the vehicle that separated two westbound lanes of traffic. Although the vehicle never approached the median nor crossed over a line dividing traffic traveling in opposite directions, Skenandore referred to this as the vehicle crossing the "center line." (59:6). Skenandore explained that he observed both "the front and rear tires" cross over the line to the right of the vehicle. (59:7, 8, 20, 24). At another point, he remembered it differently, testifying that he "observed the vehicle appear to drive over the "center line" with its passenger side rear tires [only] and then move back into the left portion of the left lane." (59:13). Skenandore's contemporaneous description of what he observed in the narrative section of his police report simply stated he "observed the vehicle cross the center line" and says nothing about what tires or how much of the vehicle crossed the line. (59:20; 30).

Skenandore also testified that he observed the vehicle weaving within the lane. (59:6, 8). Skenandore explained that he observed the car "move from the left portion of the lane of travel to the

right portion." (59:8). Officer Skenandore offered no further description of what kind or how much weaving he saw.

The dash cam of Skenandore's squad car captures 32 seconds of Harris's driving before Skenandore initiated the stop. (59:12; 32). The dash cam does not show Harris's vehicle crossing the "center line." (32). Skenandore explained that the crossing of the dotted line occurred before the dash cam was activated. (59:12).

The dash cam did capture the weaving within the lane component of the bad driving observed by Skenandore. (59:36). The prosecutor confirmed with Skenandore that "the driving behavior is what we see on the video ... as far as the weaving within the lane". (59:36). When the dash cam video begins, it shows Harris's vehicle hugging the right side of the lane of travel, with the tires touching the dotted white line. (32: 0:00 – 0:09) After about 9 seconds, there is a slight bend in the road and Harris's vehicle moves towards the center of the lane, where it generally stays until Skenandore initiated the traffic stop. (32: 0:10-0:32). At one point it is left of center, but the vehicle never goes all the way to the left or touches the left side lane lines. (32: 0:10-0:32).

After reviewing the evidence, the circuit court determined that Skenandore had reasonable suspicion to initiate the traffic stop. With respect to the unlicensed driver issue, the circuit court stated "the officer made a mistake in good faith. …[H]e believed the registered owner of that car didn't have a valid driver's license." (60:12; App. 102). With

respect to the bad driving issue, the court found that Harris's vehicle "had deviated within his lane and crossed the center line." (60:13; App. 103). The court stated:

> I think he felt he had the superior position of being a nonlicensed registered owner and thought that was the absolute guarantee of correctness in a traffic stop, and he was unfortunately incorrect because he had misread his screen which obviously is a rookie mistake, but he's a rookie. But he also had the weaving within his lane, the crossing the center line. You've got the time of night, obviously in that area you've got bars in Ashwaubenon in the football district area, a lot of taverns there, and the smell of alcohol when he comes in.
>
> But I realize he didn't have that before the traffic stop. So the issue is whether or not he had sufficient reasonable suspicion to pull him over. Did he see a traffic violation? He saw a traffic violation. He saw him weaving within his lane and he saw him cross the center line, and I think he was honest.

(60:14; App. 104). The court explained that Skenandore's incorrect belief that the registered owner of the vehicle did not have a valid driver's license "didn't wipe out the fact that he had deviated from his lane of traffic and crossed the center line." (60:14; App. 104). The court denied Harris's motion to suppress. (60:14; App. 104).

ARGUMENT

Officer Skenandore Lacked Reasonable Suspicion or Probable Cause to Initiate the Stop of Harris's Vehicle; Therefore, All Evidence Obtained as a Result of the Seizure Must Be Suppressed.

A. Introduction, Legal Principles and Standard of Review.

Neither of the two alleged bases for the stop of Harris's vehicle – a nonlicensed registered owner of the vehicle or observed driving behaviors suggesting criminal activity was afoot – pass constitutional muster. If it were true that Harris was driving a vehicle that was registered to an unlicensed driver, this would have been a valid basis for an investigative traffic stop. But that was not the case here. The officer's inability to properly use his equipment when he indexed the license plate is not a reasonable mistake and therefore does not provide a constitutional basis for the stop.

Similarly, if the officer had observed driving behaviors that under the totality of the circumstances were indicative of drunk driving, the officer would have had reasonable suspicion criminal activity was afoot and the stop would have been valid. But the observed driving behaviors were not in violation of any traffic statute, nor under the totality of the circumstances did they objectively suggest the driver had committed a crime. Because neither proffered reason for the stop created a constitutional basis to seize a citizen, Harris's seizure was invalid under the Fourth Amendment.

The Fourth Amendment provides "the right of the people to be secure in their persons … against unreasonable searches and seizures." U.S. CONST., AMEND. IV. "A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed." *State v. Popke,* 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 ¶11 (citations and quotations omitted). The state bears the burden of establishing the reasonableness of the stop. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, ¶12. The remedy for a Fourth Amendment violation is exclusion of the evidence obtained therefrom. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

"Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." *Popke*, 2009 WI 37, ¶10 (citations omitted). Constitutional facts consist of the application of historical facts to constitutional principles. *Id.* The circuit court's findings of historical facts are upheld unless clearly erroneous. *Id.* However, when the reviewing court and circuit court are on equal footing, review of factual conclusions is *de novo*. *See e.g. Weinberger v. Bowen,* 2000 WI App 264, ¶7, 240 Wis. 2d 55, 622 N.W.2d 471 (*de novo* review of documentary evidence) and *State v. Jimmie R.R.,* 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (*de novo* review of video evidence); *cf. State v. Walli,* 2011 WI App 86, 334 Wis. 2d 402, 799 N.W.2d 898 (applying the clearly erroneous standard to factual findings made from a combination of live testimony and video evidence). The application

of historical facts to constitutional principles is always reviewed *de novo*. *Popke*, 2009 WI 37, ¶10.

B. Harris's Vehicle Was Registered to a Licensed Driver; Skenandore's Mistaken Belief That It Was Not Is an Unreasonable Mistake of Fact.

Officer Skenandore mistakenly believed that the registered owner of the vehicle Harris was driving did not have a valid driver's license. This mistaken belief was based solely on Officer Skenandore's improper, careless, or negligent use of the computer in his squad car. Accordingly, Officer Skenandore's mistake was unreasonable and cannot support a finding of reasonable suspicion.

Searches and seizures based on mistakes of fact are upheld if the mistake of fact was reasonable. *Illinois v. Rodriguez,* 497 U.S. 177, 185-86 (the Fourth Amendment commands "not that [officers] always be correct, but that they always be reasonable"). And while law enforcement officers are given "fair leeway for enforcing the law," "the Fourth Amendment tolerates only objectively reasonable mistakes." *Heien v. North Carolina*, 574 U.S. 54, 66, (2014) (adopting the same standard for reasonable mistakes of law) (quoting *Brinegar v. United States*, 338 U.S. 160, 176, (1949). The subjective actions and understandings of the particular officer involved in the mistake are not relevant to the Fourth Amendment analysis. *Heien*, 574 U.S. at 66; *see also Whren v. United States,* 517 U.S. 806, 813 (1996).

The decision to seize must be "judged in accordance with 'the factual and practical

considerations of everyday life on which reasonable and prudent [law enforcement agents] … act'" *Id.* at 805 (quoting *Brinegar*, 338 U.S. at 175). In order for a mistake to be reasonable under the Fourth Amendment, it must be a mistake that any reasonable prudent officer might have made under the circumstances. The objective reasonableness standard necessarily encompasses the diligence and due care standards of the profession. *See Post,* 301 Wis. 2d 1, ¶10 (citing professional "training and experience" as guide for reasonable officer standard). Mistakes that are the result of officer inexperience, negligence or ineptitude cannot be objectively reasonable as this would incentivize shoddy police work and allow for wholly unreasonable search and seizures. Indeed, in *Heine*, the Supreme Court specifically noted mistakes that are the result of subpar policing efforts cannot support a Fourth Amendment search or seizure. *Heien*, 574 U.S. at 67. Just as "an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce," there can be no Fourth Amendment advantage to sloppy investigations of the facts. *Id.*

This court has provided an example of the type of objectively reasonable mistake of fact that can support a finding of reasonable suspicion. In *State v. Reierson,* 2010AP596-CR unpublished slip op. (Ct. App. April 11, 2001), the officer mistakenly ran the wrong license plate numbers because, the officer testified, a bolt or screw had obscured his view of the last numeral making a "6" look like an "8". *Id.,* ¶¶ 2-3. The results of this erroneous indexing revealed that the vehicle was unregistered and so the officer

made a stop. *Id.,* ¶4. The court of appeals held the stop was lawful because "the stop was predicated on the officer's reasonable, good-faith mistake of fact." *Id.,* ¶11.

In upholding the stop, the court of appeals effectively found that any reasonable officer might have made the mistake at hand. While the parties disputed whether the last numeral was in fact obscured, the court of appeals determined that the circuit court had made implicit findings about the officer's credibility and thus credited the officer's testimony that the numeral had been obscured. *Id.,* ¶11 n.3. It follows then that any reasonable officer implementing the due care and diligence the profession demands might have mistaken a partially obscured 6 for an 8. The seizure was thus based on a reasonable mistake of fact was therefore reasonable under the Fourth Amendment.

Here, the mistaken belief that there was a violation was entirely a product of Officer Skenandore's subjective inexperience and/or negligence in using the licensing database equipment. The mistake was not the result of any portion of Harris's license plate being obscured or any other circumstances that might objectively lead a reasonably prudent officer to misread the numbers. Officer Skenandore did not testify that any exigent circumstances arose that impacted his ability to use due care in using his computer equipment. A reasonable, prudent officer under these circumstances would look at the correct screen to determine whether to initiate a Fourth Amendment intrusion. As such, Skenandore's mistaken belief that

Harris may have been an unlicensed driver was not a product of a reasonable mistake and therefore did not create a constitutional basis for the seizure.

The trial court made a finding Officer Skenandore's mistake was made in "good faith." But whether Officer Skenandore's mistake was made in good faith has no bearing on whether the mistake was reasonable. *Hill v. California*, 401 U.S. 797, 803–04 (1971) ("subjective good-faith belief would not in itself justify either the arrest or the subsequent search"); *see also State v. Houghton,* 2015 WI 79, ¶¶72-78, 346 Wis. 2d 234, 868 N.W.2d 143 (2015) (evaluating the reasonableness, not the subjective good-faith, of the officer's mistake in fact). It is undisputed that Officer Skenandore made a good faith mistake when he "looked at the wrong set of data" and that his belief that Harris's vehicle was being driven by an unlicensed driver was a product of that mistake. A mistake made in good faith, however, does not support reasonable suspicion to perform a traffic stop when it is objectively unreasonable.

C. The Totality of the Circumstances Do Not Support a Reasonable Inference That Harris Had Committed, Was Committing, or Was About to Commit a Crime.

In addition to the registration issue, Officer Skenandore testified that he pulled Harris over because of the driving behaviors he observed – crossing the white dotted line and a weave. The observed driving here however, was not suspicious or

suggestive that a crime or traffic violation was occurring. As such, there was no reasonable suspicion and the alleged bad driving cannot justify the stop.

A police officer may conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569 (citations omitted). 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." An "officer's inchoate and unparticularized suspicion" however, will not give rise to reasonable suspicion. *Id.,* (citations and quotations omitted).

Repeated weaving within a single lane with nothing more does not give rise to reasonable suspicion of drunk driving. *Post,* 301 Wis. 2d 1, ¶14. A review of the dash cam video, which captured the entirety of the alleged weaving, shows that to the extent there was weaving, it was very slight and definitely not repeated – Harris's vehicle moved from touching the right side dotted line to just left of center, one time. (59:36; 32: 0:00 – 0:32). Indeed, if the word "weave" implies a repeated zigzag action, this finding is clearly erroneous.

The cross of the dotted white line was similarly subtle. In describing the cross of the dotted white line, Skenandore alternatively stated the front and back tires crossed the line or just the back tires crossed the line. (59:7, 8, 13, 20, 24). The fact that Skenandore could not offer a consistent description of

what he had seen shows that the cross was not very notable and certainly not suggestive of criminal activity being afoot. In fact, the dash cam video suggests the single cross of the line occurred just before the alleged "weaving" and that the weave was actually an attentive correction to having been too far to the right. (32).

Notably, in crossing the dotted white line to the right of his vehicle, Harris did not violate Wis. Stat. § 346.05 or any other traffic statute. Crossing the centerline of a divided roadway violates Wis. Stat. § 346.05's requirement that vehicles must be driven on the right side of the roadway. The Wisconsin Supreme Court has held that even a momentary crossing of the centerline is sufficient for probable cause to believe Wis. Stat. § 346.05 has been violated. *Popke*, 2009 WI 37, ¶¶17-18; *see also State v. Puchacz,* 2010 WI App 30, ¶¶16-17, 323 Wis. 2d 741, 780 N.W.2d 536. But Harris's vehicle did not cross a centerline. In the instant case, there was a center median, not line and Harris's vehicle, legally traveling in the left most lane, briefly crossed to the right into another same direction one-way lane. No traffic violation occurred.

One slight drift across the dotted line of a one-way multilane road and back would not lead a reasonable officer to conclude that the driver was intoxicated. *See United States v. Lyons*, 7 F.3d 973, 996 (10th Cir. 1993) ("if failure to follow a perfect vector down the highway. . . [was] sufficient reason[] 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"). Officer

Skenandore did not use the words veer, swerve, cant or anything else to suggest that he had observed something suspect or concerning about Harris's driving. Furthermore, cases in which a lane deviation has supported reasonable suspicion have involved far more egregious driving and suspicious facts. *See e.g. Post,* 2007 WI 60, ¶¶4-5, (vehicle canted between unmarked parking and traffic lanes and traveled in a repeated smooth "S-type" pattern for at least two blocks, moving ten feet from right to left); *Popke*, 2009 WI 37, ¶¶17-18 (three-fourths of the vehicle was left of the center of the road (in violation of Wis. Stat. § 346.05) and the car "almost hit the curb" and then "nearly struck the median"). Nothing like that happened here.

Moreover, the court's finding that "obviously in that area you've got bars in Ashwaubenon in the football district area, a lot of taverns there" is clearly erroneous. (60:14; App. 104). The state presented no evidence regarding the number of bars in the location Harris was arrested or that Harris might have been coming from one. A court may not take judicial notice of how many bars are in a particular area of town. *See State v. Sarnowski*, 2005 WI App 48, 12, 280 Wis. 2d 243, 694 N.W.2d 498 (court could not take judicial notice of facts in his personal experience). Judicial notice is for "limited areas-'fact[s] generally known within the territorial jurisdiction of the trial court," or "fact[s] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' *Id.*; Wis. Stat. § 902.01(2)." A court may not take judicial notice unless the parties have had an opportunity to be heard. Wis. Stat. § 902.01(5).

Even if the court's assertion were true, without testimony from the officer and an opportunity for the defense to cross examine, the significance of the purported bars could be reasonably questioned. For example, it is not self-evident that bars in the football district would be open on weekday in the off-season. (The National Football League's season ends in February, so the weekday in March of Harris's arrest clearly was not a Packer game day).

The only other fact that could possibly contribute to reasonable suspicion of drunk driving is the fact that the driving took place in the early morning hours. Again, the officer offered no testimony that this was a significant fact, or that it led him to suspect the driver was intoxicated. And this fact alone is certainly not suspicious. When put together with the other articulable facts – one slight cross of the dotted white line that continued into a "weave" to the middle of the lane – it is still not enough to create reasonable suspicion of intoxicated driving. There was no evidence that the cross was significant or repeated and or that the driving was otherwise zigzagged, erratic, illegal or unsafe. Under the totality of the circumstances, the observed driving here was not enough to lead a reasonable officer to believe that Harris was driving under the influence of an intoxicant or committing any other crime. As such, Harris's alleged bad driving did not create a constitutional basis for the search.

CONCLUSION

For the reasons stated in this brief, Harris respectfully requests that this court vacate his judgment of conviction and remand to the circuit court with directions that all evidence derived from the unlawful seizure be suppressed.

Dated this 30th day of December, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,602 words.

CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 30th day of December, 2019

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 one or more initials or other appropriate pseudonym or designation 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 30th day of December, 2019.

Signed:

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