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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2019AP001908-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.

ANTHONY FRANCEN HARRIS,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from the Judgment of Conviction Entered in
Brown County Circuit Court,
the Honorable William M. Atkinson, presiding
Trial Court Case No. 18CF508

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ISSUE FOR REVIEW

Whether there was a reasonable suspicion for a traffic stop, based on the totality of the circumstances, which included officer's observation of erratic driving and a mistaken belief that the registered owner of the vehicle did not have a valid driver's license.

The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As this is a one-judge case, the State of Wisconsin believes the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

Anthony Francen Harris was pulled over and arrested for operating while intoxicated and possession of THC and possession of drug paraphernalia. After being charged with the same (as well as an a subsequent charge of operating with a prohibited alcohol concentration), Harris filed a motion to suppress all evidence obtained after his vehicle was stopped by law enforcement, alleging that the stop was conducted unlawfully. The circuit court held an evidentiary hearing on the matter and denied Harris' motion. The court found that

the rookie police officer made a mistake when running the license plate of the vehicle Harris was driving, but this mistake was made in good faith. The court also held that regardless of the mistake, the officer had reasonable suspicion to conduct a traffic stop based on the observed erratic driving behaviors, the time of night, and the fact that there are a number of bars in the area where the vehicle was stopped. Harris subsequently entered no contest pleas to operating a motor vehicle while intoxicated (3rd offense) and possession of THC. The other charges were either dismissed or dismissed and read-in for the sentencing court's consideration. Harris then filed this appeal.

STATEMENT OF FACTS

On March 30, 2018, at approximately 2:26 a.m., Officer Dan Skenandore of the Green Bay Police Department, while riding with his Field Training Officer, Jeremy Bilskey, observed a black SUV traveling westbound in the left lane on Lombardi Avenue in the City of Green Bay, Brown County, Wisconsin. (R.11:3). Officer Skenandore stated that he indexed the vehicle and observed that the registered owner did not have a valid driver's license. (R.11:3). As he followed the vehicle, Officer Skenandore stated that he observed the vehicle cross the center line on Lombardi Avenue and then continue to weave

inside its lane of traffic. (R.11:3). Officer Skenandore initiated a traffic stop by turning on his emergency lights near Ridge Road, but the vehicle continued down Lombardi Avenue and travelled into the left turn lane with the vehicle's turn signal on before the vehicle came to a complete stop at the intersection. (R.11:3). The vehicle then remained at a complete stop in the left turn lane for approximately one second while the green turn arrow was illuminated. (R.11:3). After turning, the vehicle stopped on Marlee Lane going southbound.[1] (R.11:3). Officer Skenandore stated that he approached the driver's side door and told the driver that the registered owner of the vehicle did not have a valid driver's license, and the driver just slowly repeated what Skenandore had said. (R.11:3). Officer Skenandore stated that the driver of the vehicle, later identified as Anthony Francen Harris, exhibited slurred speech, had glossy eyes, and Skenandore could smell the odor of intoxicants emitting from the vehicle. (R.11:3). Harris kept asking several times who the registered owner of the vehicle was and Officer Skenandore stated he did not remember but he would check. (R.11.3). Officer Skenandore asked Harris for his driver's license but

[1] When Harris turned left from Lombardi Avenue onto Marlee Lane he left the City of Green Bay and entered the Village of Ashwaubenon, Brown County, Wisconsin.

Harris continued to repeatedly ask about the registered owner of the vehicle. (R.11:3). Officer Skenandore asked Harris where he was coming from and Harris slowly repeated what Skenandore said, but then said he came from down the street. (R.11:3). Officer Skenandore asked Harris if he would submit to standardized field sobriety tests (SFSTs) and Harris said he would not. (R.11.3). Officer Skenandore asked Harris to step out of the vehicle, asked whether Harris had any weapons on him, and asked for permission to pat Harris down, but Harris said Officer Skenandore could not pat him down. (R.11:3). Officer Skenandore then placed Harris under arrest for operating while intoxicated and asked him if he would submit to a preliminary breath test (PBT), which Harris also refused. (R.11:3). Officer Skenandore stated that while searching Harris' person incident to arrest he located a baggie with a green, leafy substance that smelled like marijuana in Harris' front pants pocket. (R.11:3). A scale with a green, leafy substance on it was later found inside the SUV Harris had been driving by Officer Thoreson of the Green Bay Police Department. (R.11:3).

The State of Wisconsin filed a criminal complaint on March 30, 2018, charging Harris with three counts: count 1-possession of tetrahydrocannabinols (THC), repeater; count 2-operating a motor

vehicle while intoxicated-3rd offense, repeater; and count 3-possession of drug paraphernalia, repeater. (R.1). On April 2, 2018, the State filed an amended criminal complaint, amending the first count to a felony possession of THC-2nd and subsequent offense, repeater. (R.8). A preliminary hearing was conducted on April 25, 2018, and Harris was bound over for trial. (R.53). The State then filed an Information, which added a count of operating with a prohibited alcohol concentration-3rd offense, repeater. (R.12).

A hearing on Harris' motion to suppress the traffic stop was conducted on October 22, 2018, and was then concluded on October 24, 2018. (R.59; R.60). At the motion hearing, Officer Skenandore first explained that on March 30, 2018, he was in phase four of the field training program—which is where he was acting as if he were a solo officer, doing 100% of the work, and his Field Training Officer was just observing. (R.59:5-6). Skenandore then testified that it was the driving behavior of the SUV Harris was operating that caught his attention in the early morning hours of March 30, 2018, specifically that the SUV crossed the center line and was weaving within its lane. (R.59:6). When asked to clarify what he meant by the "center line," Skenandore explained that it was the dotted line dividing the two westbound lanes

of Lombardi Avenue. (R.59:7). Skenandore testified that both the front and rear passenger side tires crossed over this dividing line, into the right westbound lane, before correcting back into the left westbound lane. (R.59:8). When asked if his squad car's dash cam captured the SUV crossing into the right lane, Skenandore explained that it did not, as their dash cams kick in when the officer activates the squad's emergency lights and then only record the last 30 seconds leading up to the lights being activated. (R.59:12). Skenandore stated the SUV had crossed the dividing line more than 30 seconds before Skenandore initiated the traffic stop by activating his emergency lights. (R.59:12). Skenandore then clarified that that when he reviewed his dash cam video prior to testifying, he did observe Harris' SUV driving on top of the center dividing line between the two westbound lanes, but it did not cross over the line into the right lane again, like he had initially observed. (R.59:13). Skenandore testified that the SUV was also weaving within its lane of travel, although it did not cross the center line again. (R.59:8). Officer Skenandore also testified that while following the SUV Harris was operating, he ran its license plate through his squad car's computer (MDT), and his MDT showed that the registered owner did not have a valid driver's license. (R.59:11-12).

Skenandore explained that when he runs a registration check on his MDT the information from earlier registration checks remains on the MDT screen, and a few lines of new "data come up, and you have to select and then start scrolling through the different lines of data to grab the information that you need. (R.59:10, 27). It was only after the traffic stop and Harris' arrest that Officer Skenandore realized he had inadvertently looked at the wrong data on his MDT—data from an earlier registration check. (R.59:10).

After reviewing the evidence submitted during the course of the motion hearing, including watching the pertinent portions of the dash cam video requested by the parties, the circuit court denied Harris' motion. (R.60:12-14). The circuit court found that Officer Skenandore's mistake had been made in good faith, and that he genuinely believed the registered owner of the SUV did not have a valid driver's license. (R.60:12). The circuit court then continued its findings that, despite the mistake made by the officer regarding the registration check, the traffic stop was reasonable due to Harris' driving behavior observed prior to the traffic stop and crossing over the center line. (R.60:13-14). The circuit court specifically found Officer Skenandore's testimony to be credible because he had a field training

officer observing him and because the 30 seconds of video captured prior to Skenandore initiating the traffic stop supported his testimony, specifically the weaving within the lane and the SUV driving on the center dividing line. (R.60:13, 14). While the court felt it was unfortunate that the video did not capture the SUV crossing the center dividing line that occurred more than 30 seconds before Skenandore activated his emergency lights, it felt that Skenandore's testimony in this regard was credible. (R.60:13, 14). The circuit court also noted that the reasonable suspicion for the traffic stop was further supported by the time of night and the stop occurred in the stadium district, which is known to have many taverns. (R.60:14).

On November 5, 2018, Harris entered pleas to, and was convicted of, 3rd offense operating while intoxicated and misdemeanor possession of tetrahydrocannabinols (THC), while the 3rd offense operating with a prohibited alcohol concentration was dismissed, and the possession of drug paraphernalia was dismissed and read-in. (R.38; R.41; R.62).

STANDARD OF REVIEW

A motion to suppress a traffic stop presents a question of constitutional fact to which the appellate court applies a two-step standard of review, first reviewing "the circuit court's findings of historical fact under the clearly erroneous standard," and independently reviewing "the application of those facts to constitutional principles." *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634 (citations omitted).

ARGUMENT

I. OFFICER SKENANDORE'S MISTAKEN BELIEF THAT HARRIS' CAR WAS REGISTERED TO AN UNLICENSED DRIVER WAS A REASONABLE MISTAKE OF FACT AND ANY EVIDENCE OBTAINED BY LAW ENFORCEMENT AFTER THE STOP IS THEREFORE ADMISSIBLE.

The Fourth Amendment provides "the right of people to be secure in their persons…against unreasonable searches and seizures." U.S. Const., Amend. IV. The ultimate touchstone of the Fourth Amendment is reasonableness, not perfection. *Heien v. North Carolina*, 574 U.S. 54, 60-61 (2014) (citing *Brendlin v. California*, 551 U.S. 249, 255-59 (2007)). "To be reasonable is not to be perfect, and

so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

"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, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citations omitted).

The United States Supreme Court noted that "[w]hen a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation." *Herring v. United States*, 555 U.S. 135, 139 (2009); see also, *Illinois v. Rodriguez*, 497 U.S 177, 183-86 (1990) (the warrantless search of a residence remained lawful where the person who consented to the search reasonably appeared to be a resident but was not in fact a resident); *Hill v. California*, 401 U.S. 797, 802-05 (1971) (the seizure and search of

an arrestee was lawful where officers mistakenly arrested an individual matching the suspect's description).

Of course the limit to this concept is that the mistake must be reasonable. *Heien*, 574 U.S. at 61. The reasonableness of the officer's action must be viewed "in light of his or her training and experience." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

Here, the circuit court held that Officer Skenandore made a mistake in good faith. (R.60:12). But the circuit court did not find Skenandore's mistake unreasonable. (R.60). Perhaps the mistake was due to Skenandore being a rookie. But perhaps it was just a mistake that any officer could have made in that situation. There was also a very experienced field training officer sitting right next to Skenandore, observing Skenandore, who did not realize Skenandore scrolled back too far when looking at the MDT display, until after Harris' arrest. (R.59:46). Officer Skenandore was driving a squad car, observing Harris' driving behaviors, entering a license plate number into the computer, and trying to read the results all at the same time. (R.59:9). Despite Harris' assertion to the contrary, this was not a situation where Skenandore was looking at the wrong screen; he was looking at the

correct screen, but all the lines of data from previous registration checks he had done also remained on the screen. (R.59:10).

"*To be reasonable is not to be perfect*, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Heien* , 574 U.S. at 60–61 (emphasis added). Officer Skenandore's mistake in scrolling back too far when looking at lines of data on his squad car's computer, while simultaneously driving and observing Harris' driving behavior, cannot be said to so unreasonable as to warrant the suppression of any evidence obtained after the traffic stop. The purpose of the exclusionary rule is "to deter deliberate, reckless, or grossly negligent conduct," and that conduct was not the case here. *Herring*, 555 U.S. at 144.

II. THE TOTALITY OF THE CIRCUMSTANCES SUPPORT A REASONABLE INFERENCE THAT HARRIS HAD COMMITTED, WAS COMMITTING, OR WAS ABOUT TO COMMIT A CRIME OR TRAFFIC VIOLATION.

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. *Popke*, 317 Wis.2d 118, ¶ 23 (citations omitted). While repeated

weaving within a single lane *alone* does not give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle, such weaving can indeed be one of the factors supporting a reasonable suspicion for a traffic stop. *Post*, 301 Wis.2d 1, ¶¶ 26-28. It is a "well-established principle that reviewing courts must determine whether there was reasonable suspicion for an investigative stop based on the *totality of the circumstances*." *Id*. at ¶ 26 (emphasis added).

Here the circuit court held, after reviewing all the evidence, that Officer Skenandore's mistaken belief that the registered owner of the vehicle did not have a valid driver's license "didn't wipe out the fact that (Harris) had deviated from his lane of traffic and crossed the center line." (R.60:14). Indeed, Officer Skenandore testified that even if he had not believed the registered owner of the SUV did not have a valid driver's license, he would have initiated a traffic stop on the SUV Harris was operating, due to the erratic driving behaviors he observed. (R.59:36).

The erratic driving behavior displayed by this SUV gave Officer Skenandore (and his field training officer, Officer Bilskey) reasonable suspicion that Harris was committing a traffic violation, regardless of the driving status of the SUV's registered owner. As Officer

Skenandore testified, the SUV had crossed over the line dividing the two westbound lanes and was weaving within its lane, but this was not captured on the video because it occurred more than 30 seconds before he activated his emergency lights. (R.59:7-8, 12). Then *after* Skenandore's squad cam video kicks in there was some additional erratic driving—the SUV's passenger-side tires were now riding on top of the center dividing line, although it did not go completely over the line again, and some additional weaving within its lane. (R.59:13).[2] The circuit court found that Officer Skenandore description of this and the timing of the video kicking in was consistent with what he saw on the video and, the court believed, credible, all things considered. (R.60:13).

The circuit court also found there were a couple of other factors that supported the officer's reasonable suspicion to perform a traffic stop, as well as the court's decision: the time of night at which this incident occurred, at approximately 2:26 a.m., and the "obvious" fact

[2] Harris attempts to characterize this testimony as inconsistent, or "alternative," descriptions (Defendant-Appellant's brief, p. 12), but a thorough and complete reading of Skenandore's testimony, rather than a selective reading, shows that he was referring to two separate instances—the SUV crossing the center dividing line prior to the video kicking in and the SUV touching the center dividing line, but not crossing it, after the video kicks in. (R.59:7-8, and 12-13).

that there are a lot of bars in the stadium district.[3] (R.60:14). See, *In re Refusal of Anagnos*, 2012 WI 64, ¶ 58, 341 Wis.2d 576, 815 N.W.2d 675 (time of day is a legitimate factor in formulating a reasonable suspicion of impairment).

While any of these factors alone might not support a reasonable suspicion upon which to perform a traffic stop, when taken cumulatively, these building blocks—observing a vehicle cross over the center dividing lane into the other lane and return to its original lane, weave within its lane of travel, and then touch the center dividing line a second time, at 2:26 a.m., in an area known to have many taverns—there was ample reasonable suspicion to perform a traffic stop. See, *Waldner*, 206 Wis.2d at 58.

CONCLUSION

Officer Skenandore's mistake when looking at the vehicle registration information on his squad car's computer was made in good

[3] Harris asserts that the court may not take judicial notice of how many bars are in a particular area of town (Defendant-Appellant's brief, p. 14), citing *State v. Sarnowski*, 2005 WI App 48, 280 Wis.2d 243, 694 N.W.2d. 498. However that is not what that case stands for. *Sarnowski* dealt with a trial judge rendering a verdict at bench trial on a criminal non-support of children case, basing her decision on her personal experience in trying to get carpenters to work on her house, rather than the evidence presented at trial. This is quite different that a judge using common knowledge about the proximity of many taverns to Lambeau Field—knowledge shared by most of the community, if not a significant portion of the State's population—in deciding whether to grant or deny a motion to suppress.

faith and was not unreasonable, and the traffic stop of Harris' SUV was therefore reasonable. And even if Skenandore's mistake had not been reasonable or in good faith, the totality of the circumstances present in this case justified the traffic stop of Harris' SUV. Therefore, the State of Wisconsin respectfully requests that this court uphold the circuit court's denial of Harris' motion to suppress and the Judgement of Conviction.

Respectfully submitted this 27th day of February, 2020.

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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: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3037 words, including footnotes.

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 Rule 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; 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.

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 copes of this brief filed with the court and served on all opposing parties.

Dated this 28th day of February, 2020.

Signed:

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