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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 20 AP 850

CITY OF NEW BERLIN,

Plaintiff-Respondent,

vs.

ERIC JOHN DREHER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED
ON FEBRUARY 11, 2020, IN THE CIRCUIT COURT
FOR WAUKESHA COUNTY, THE HONORABLE
PAUL BUGENHAGEN, PRESIDING

Respectfully Submitted,

ERIC JOHN DREHER,
Defendant-Appellant.

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STATEMENT OF THE ISSUES

- I. Whether the City of New Berlin Police unlawfully stopped Mr. Dreher on suspicion of Traffic Violations.

TRIAL COURT ANSWERED: NO

- II. Whether the City of New Berlin proffered sufficient evidence at the Motion Hearing to support a finding of a lawful stop on suspicion of Traffic ordinance infractions.

TRIAL COURT ANSWERED: YES

STATEMENT ON PUBLICATION

Defendant-appellant does not request publication.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from trial court's denial of Mr. Dreher's motion, in which he moved to suppress the results of any evidence garnered after the unlawful stop.¹

On Sunday, January 28, 2018, at approximately 2:23am, Officer Johannik observed a Lexus travelling southbound on South Moorland Road in the city of New Berlin, WI.² Officer Johannik observed the Lexus make a wide turn while crossing three lanes of traffic.³ He observed the Lexus end the turn into the lane closest to the median.⁴ Officer Johannik then observed that the Lexus appeared to rapidly accelerate westbound on Greenfield Avenue. Subsequently, Johannik began accelerating to catch up and noticed that in his attempt to catch up to the vehicle previously observed, he was traveling in excess of 70 MPH. Officer Johannik believed that despite traveling in excess of 70 MPH to catch up to the vehicle he did not appear to be gaining on it.⁵ There was no radar or verifiable estimation of speed performed to establish this conclusion.⁶

While attempting to gain on the vehicle, Officer Johannik observed the vehicle cross the lane divider with approximately one-third of the vehicle into the northern lane of traffic.⁷ The Lexus then heavily braked and proceeded to make a left turn to go south bound on South 165th street. Officer Johannik noted that the

¹ R.17; R.21.

² R.21 at 5-6.

³ R.21 at 6.

⁴ R.21 at 7.

⁵ Id. at 7-8.

⁶ See id.

⁷ Id.

Lexus made the turn with a portion of the vehicle in the southern lane of traffic and the remainder of the vehicle in the left turn lane.⁸

Subsequently, Officer Johannik effectuated a traffic stop and pulled the vehicle over.⁹ The vehicle came to a stop, and Officer Johannik eventually identified the driver by Wisconsin Driver's License as Eric Dreher.¹⁰ Following this, Officers eventually arrested Eric Dreher for Operating a Motor Vehicle While Intoxicated, First Offense.¹¹

This case was first tried in the City of New Berlin Municipal court on April 17, 2019, wherein Mr. Dreher was convicted of Operating While Intoxicated First Offense. Subsequently, on April 25, 2019, it was appealed to Circuit Court.¹²

On October 2, 2019, Mr. Dreher's attorney filed a Motion to Suppress, challenging the basis for the stop.¹³ On November, 2019, Judge Paul Bugenhagen Jr. presided over the hearing.¹⁴ At the hearing, the city called Officer Johannik as its only witness.¹⁵ At the hearing Officer Johannik testified that he believes that the turn made by Dreher was an 'improper right turn.'¹⁶ Further he testified that when he drove in excess of 70 MPH to catch up to the vehicle, the speed limit in that

⁸ Id.

⁹ R.21 8-9.

¹⁰ R.1 at 9.

¹¹ R.21 at 11.

¹² R.1

¹³ See R. 5.

¹⁴ R. 21 at 1.

¹⁵ R.21 at 3-4.

¹⁶ R.21 at 7.

particular area is 40 MPH.¹⁷ When the city inquired as to the road conditions, Officer Johannik replied, “I remember really being the only cars out on the road.”¹⁸ When asked if Dreher signaled for any of his turns or lane shifting, Officer Johannik replied that he did not recall.¹⁹

During cross examination, Officer Johannik confirmed that his and Mr. Dreher’s vehicles were the only vehicles on the road that night.²⁰ Further, Officer Johannik confirmed that the turns which he described did not impede or affect traffic in any way.²¹ Officer Johannik never used a radar or any method to confirm the speed of which Dreher was travelling; he stated his opinion was based upon his training and experience from driving on the road.²² Lastly, Officer Johannik confirmed that the basis for the stop was three fold: (1) improper right turn, (2) imprudent speed and (3) unsafe lane deviation.²³

Mr. Dreher’s attorney argued that there were no specific articulable facts that substantiated any statutory violation and that Officer Johannik, at best, estimated a speed without more.²⁴ The circuit court relied upon the Officer’s testimony that he observed an improper turn, lane deviation and a straddling of lanes which *en toto* amounted to reasonable suspicion.²⁵ The court also noted that it had no indication

¹⁷ R.21 at 7.

¹⁸ R.21 at 8.

¹⁹ *Id.*

²⁰ R.21 at 13.

²¹ *Id.*

²² *Id.*

²³ R.21 at 14.

²⁴ R.21 at 16.

²⁵ R.21 at 17.

that the officer wrote any ticket to substantiate his observations. Further, the court noted that the officer did not confirm a speed but used his ‘judgement and observation.’”²⁶ Ultimately the circuit court denied Mr. Dreher’s motion to suppress.²⁷

Mr. Dreher proceeded to court trial.²⁸ The trial court found him guilty of Operating While Intoxicated First Offense.²⁹ Mr. Dreher now appeals the circuit court’s order denying his motion to suppress.³⁰

²⁶ Id.

²⁷ R.21 at 17.

²⁸ See R.20.

²⁹ R.21.

³⁰ R.17.

ARGUMENT

I. THE CIRCUIT COURT INCORRECTLY DENIED MR. DREHER'S MOTION TO SUPPRESS.

A. Standard of Review

Whether a stop is valid under the Fourth Amendment is a question of constitutional law reviewed *de novo*.³¹ Appellate courts uphold findings of facts unless they are clearly erroneous.³²

B. The City failed to proffer sufficient and reliable evidence to substantiate reasonable suspicion to stop Mr. Dreher.

Mr. Dreher was stopped, detained, and arrested without a warrant.³³ Under such circumstances, the city bears the burden of demonstrating that the requisite level of cause was demonstrated for every infringement of the detainee's liberty.³⁴ If an officer conducts a traffic stop on the suspicion of impaired driving, then the officer must have reasonable suspicion to believe that the defendant is, in fact, driving while impaired.³⁵ If however, the officer conducts a traffic stop based on a specific traffic violation, such as unsafe lane deviation, speeding, etc., then the officer must have probable cause to believe that the specific violation occurred.³⁶ A determination of probable cause requires a finding that guilt is more than a mere

³¹ *State v. Guzman*, 166 Wis. 2d 577 (1992).

³² *State v. Robinson*, 327 Wis. 2d 302, 786 N.W.2d 483 (Wis. 2010).

³³ See R.21.

³⁴ *See State v. Cheers*, 102 Wis.2d 367, 306 N.W.2d 676 (1981).

³⁵ *State v. Post*, 301 Wis. 2d 1; 733 N.W.2d 634 (2007).

³⁶ *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (1999).

possibility.³⁷ The City did not demonstrate that the officer had the probable cause or reasonable suspicion needed to affect a traffic stop for a specific traffic violation.³⁸

Further, the city did not proffer a sufficiency of evidence to bolster the claim that Dreher was speeding. The officer's visual estimation, from an unknown distance, without more, lacked any probative value and was unreliable. Courts have required when a witness is in no position to judge speed or the time of observation is too short upon which to base a probative estimation of speed, the testimony may lack probative value or be inadmissible.³⁹ But if there is a reasonable basis upon which speed can be judged, the weight or probative value of the opinion will depend upon the factors of position, length of observation, existence of reference points, the experience of the witness in judging speed and other relevant facts, none of which the city provided in Mr. Dreher's case.⁴⁰ The City provided a dearth of information to support the claim that Mr. Dreher was speeding.⁴¹ With regard to speeding, the Officer stated:

Q. Okay. Now, you indicated that the vehicle you believe was traveling at a high rate of speed. Did you have an opportunity to utilize radar or laser or anything of that extent to make a determination as to Mr. Dreher's speed?

A I did not use any radar or laser, what I can say from training and experience and driving that road numerous times, he was one of the faster cars that I have ever seen driving on Greenfield Avenue.

³⁷ *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (1971).

³⁸ See R.21 at 8.

³⁹ See *City of Milwaukee v. Berry*, 44 Wis.2d 321 (1969).

⁴⁰ See *id.*

⁴¹ See R.21 at 9.

Q. And the basis for your stop was for the speeding or for the turn or was it a combination of those issues, sir?

A. ...I also felt it was an unreasonable and imprudent speed, due to how fast he was going.⁴²

This officer did nothing more than observe the vehicle from an unknown distance for an unknown amount of time and intimate that Mr. Dreher was speeding. There was no testimony as to how long he remained behind the vehicle or if he was ever able to pace the vehicle to determine speed.⁴³ Beyond the officer stating that the officer escalated his speed to 70 MPH in a 40 MPH zone and not catching up to the vehicle, the officer gave no information to substantiate the claim of speeding. A generic speed estimate is insufficient to establish reasonable suspicion without more to substantiate the reliability of that observation.⁴⁴ This is because such a characterization as “it was an imprudent speed” is too indefinite and is subjective rather than an objective observation upon which reasonable suspicion can be posited.⁴⁵

Under both the United States and Wisconsin Constitutions, the stop of a defendant’s vehicle must be based upon an objectively reasonable suspicion that the occupant of the vehicle had committed or was committing an offense.⁴⁶ Further, officers can only temporarily stop and detain an individual when they “have a

⁴² R.21 at 14.

⁴³ See R.21.

⁴⁴ *Berry*, 44 Wis.2d 321 (1969).

⁴⁵ *City of Chippewa Falls v. Hein*, 327 2d. 800 (2010).

⁴⁶ See: *Terry v. Ohio*, 392 U.S.1 (1968); *Delaware v. Prouse*, 440 U.S. 648 (1979); *State v. Howard*, 171 Wis. 2d 743, 492 N.W.2d 371 (Ct. App. 1992).

reasonable suspicion, grounded in specific and articulable facts” that an individual has committed a crime or is about to commit a crime.⁴⁷ “Police are not entitled to detain a person for questioning based on only a hunch.”⁴⁸

The officer testified that he saw Mr. Dreher (1) deviate from his designated lane.⁴⁹ Wis. Stat. §346.13(1) provides that “[t]he operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.”⁵⁰ Further, the Officer testified that Mr. Dreher made an improper right turn in violation of Wisconsin Statute Section 346.31(2), which states in part, “(2) Right turns. Both the approach for a right turn and the right turn shall be made as closely as practicable to the right-hand edge or curb of the roadway. If, because of the size of the vehicle or the nature of the intersecting roadway, the turn cannot be made from the traffic lane next to the right-hand edge of the roadway, the turn shall be made with due regard for all other traffic.”⁵¹ Lastly, the officer testified that Mr. Dreher was driving at an imprudent speed in violation of Wisconsin Statute Section 346.57(2). This section states in pertinent part “No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard

⁴⁷ *United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).

⁴⁸ *United States v. Lopez*, 907 F.3d 472, 478 (7th Cir. 2018) (see *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Wimbush*, 337 F.3d 947, 949–50 (7th Cir. 2003).

⁴⁹ R.21 at 14

⁵⁰ Wis. Stat. §346.13(1).

⁵¹ Wisconsin Statute Section 346.31(2).

for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.⁵²

The purported violations are only traffic violations if the driver impedes traffic or drives in a matter that is unsafe for others on the road.⁵³ No traffic was affected by Mr. Dreher's driving.⁵⁴ Officer Johannik repeatedly and clearly asserted that there were no cars on the roadway, and he could not even recall whether Mr. Dreher ever used his signal when he turned.⁵⁵ Thus, the prosecution did not meet its burden as to that suggested reason for the stop. Officer Johannik also could not confirm what speed Mr. Dreher was actually driving, only the speed that it took him to catch up to Mr. Dreher.⁵⁶ Therefore, the city could not prove that (1) traffic was ever impeded, (2) Mr. Dreher failed to signal before a turn, thereby impeding traffic and making his driving unsafe or (3) Mr. Dreher was speeding.⁵⁷ Normally imprudent speed is a charge that is issued when there are hazardous conditions, and no such conditions were proven by the prosecution here. There is no case or statute that permits officers to cite for that violation based solely upon the speed they go to catch up to a car driving further along a roadway. There is no case that permits a

⁵² Wisconsin Statute Section 346.57(2).

⁵³ See Wis. Stat. Sect. 346.

⁵⁴ See R. 21 at 13.

⁵⁵ See R. 21 at 8.

⁵⁶ R.21 at 13.

⁵⁷ See R.21.

stop based upon pure speculation on the officer's part as to speed. Even visual estimates require testimony as to length of observation, existence of reference points, the experience of the witness in judging speed and other relevant facts.⁵⁸ The City failed to proffer any of the aforementioned to substantiate speeding as a basis for the stop.

Wisconsin traffic laws do not demand perfection.⁵⁹ Rather, they are specific codifications that “merely restate the common law standard of prudent conduct.”⁶⁰ Here, because Mr. Dreher did not actually commit any traffic violations, Officer Johannik did not have an objectively reasonable suspicion that Mr. Dreher had committed an offense. Accordingly, any evidence seized after the traffic stop was initiated should have been suppressed.

The city failed to show through Officer Johanniks's testimony that given the absence of any traffic (by which to impede), the inability to confirm speed or inability to recall whether a signal was even used, an objective basis by which to pull Mr. Dreher over ever existed.⁶¹ For these reasons, given the surrounding circumstances, Officer Dreher did not possess an objectively reasonable suspicion that Mr. Dreher had committed a traffic violation. All evidence derived from the traffic stop should have been suppressed. Without the evidence derived from the

⁵⁸ *See Berry*, 44 Wis.2d 321 (1969).

⁵⁹ *Millonig v. Bakken*, 112 Wis. 2d 445, 455, 334 N.W.2d 80 (1983).

⁶⁰ *Id.*

⁶¹ See R.21.

unlawful stop, the City would not have been able to prove its case at trial which would have resulted in Mr. Dreher's acquittal.

CONCLUSION

For the reasons stated above, Mr. Dreher respectfully requests that this Court reverse the circuit court's order denying the suppression motion and remand the matter for further proceedings.

Dated at Madison, Wisconsin, September 11, 2020.

Respectfully submitted,

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I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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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; and
- (3) 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

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