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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 20 AP 850

CITY OF NEW BERLIN

Plaintiff-Respondent,

v.

ERIC JOHN DREHER

Defendant-Appellant.

ELECTRONIC BRIEF OF PLAINTIFF-RESPONDENT

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

CITY OF NEW BERLIN
Plaintiff - Respondent

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STATEMENT REGARDING PUBLICATION

Plaintiff-Respondent does request publication in this matter, as this decision will add to the body of law regarding reasonable suspicion.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Respondent does not request oral argument in this matter.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of Mr. Dreher's motion to suppress evidence gathered during a traffic stop. (R. 21: 1).

On January 28, 2018, at approximately 2:23 a.m., Officer Thomas Johannik¹ of the City of New Berlin Police Department observed a vehicle traveling southbound on South Moorland Road at a high rate of speed. (R. 21: 6, PR-App. 2). Officer Johannik observed the vehicle make a right turn to proceed from southbound Moorland Road onto westbound Greenfield Avenue. (Id.) Greenfield Avenue, at that location, is three lanes across, before narrowing to two lanes. (Id.) Officer

¹ Thomas Johannik was subsequently promoted to, and currently holds the rank of, Detective with the City of New Berlin Police Department. However, to maintain consistency with his rank at the time of the incident and the record, this brief shall refer to him as "Officer Johannik."

Johannik observed the vehicle, as it made the right turn onto Greenfield Avenue, cross all three lanes in one motion, ending the turn in the lane closest to the median. (R. 21: 6-7, PR-App. 2-3). Officer Johannik believed that motion represented an improper right turn. (R. 21: 7, PR-App. 3). After making this initial observation of the turn, Officer Johannik followed the vehicle westbound along Greenfield Avenue. (Id.)

Officer Johannik then observed the vehicle accelerate rapidly as it continued westbound along Greenfield Avenue, and Officer Johannik accelerated his vehicle to "catch up" to the other vehicle. (Id.) The posted speed limit in that section of Greenfield Avenue is 40 miles per hour. (Id.) Officer Johannik testified that, while following the vehicle, he glanced at his speedometer once and noted his own vehicle's speed was approximately 70 miles per hour. (Id.) Despite traveling at this speed, Officer Johannik's vehicle did not close the gap in distance between it and the vehicle he observed. (Id.)

After traveling several blocks, with both Officer Johannik's squad car and the observed vehicle in the southerly westbound lane of Greenfield Avenue (the inside lane), Officer Johannik observed the other vehicle suddenly swerve to the right into the northerly westbound lane of traffic (the outside lane). (R. 21: 7-8, PR-App. 3-4). Approximately

one third of the vehicle entered into the northerly lane before correcting itself by swerving immediately to the left back into the southerly lane. (R. 21: 8, PR-App. 4).

The vehicle then braked heavily and made a left turn from Greenfield Avenue to head southbound on South 165th Street. (Id.) Officer Johannik observed the vehicle, as it made this turn, "split" the left turn lane with the other westbound lane closest to the median on Greenfield, essentially utilizing parts of both lanes in accomplishing a turn onto southbound 165th Street. (Id.) Officer Johannik further testified that he did not recall other vehicles on the road at the time he made his observations. (Id.)

Officer Johannik testified that the vehicle he observed during this period of time conducted "some of the worst driving that [he] had observed in over 250 drunk driver arrests." (Id.) He also noted, based on his training, experience, and driving on Greenfield Avenue many times, that the vehicle was "one of the faster cars that I have ever seen driving on Greenfield Avenue." (R. 21: 14, PR-App. 7).

Taking together his observations (1) of the initial turn from Moorland onto Greenfield being an improper right turn, (2) of unreasonable and imprudent speed while traveling westbound on Greenfield, and (3) of the vehicle's lane deviations, Officer Johannik suspected, based on his training

and experience, that this "poor" driving indicated the driver may have been impaired. (R. 21: 8, 14-15, PR-App. 4, 7-8). Based upon this suspicion, Officer Johannik conducted a traffic stop. (R. 21: 8-9, PR-App. 4-5). Based upon Officer Johannik's observations and evidence garnered during the traffic stop, Mr. Dreher was ultimately placed under arrest for operating a vehicle while impaired. (R. 21: 12).

Following a trial in the City of New Berlin Municipal Court on April 17, 2019, Mr. Dreher was convicted of Operating While Intoxicated First Offense. (R. 1). Mr. Dreher appealed the Municipal Court's decision to Waukesha County Circuit Court on April 25, 2019. (R. 1). On October 2, 2019, Mr. Dreher filed a motion to suppress all evidence garnered from the traffic stop based upon a theory that Officer Johannik lacked reasonable suspicion to conduct the traffic stop. (R. 5). The trial court held a hearing on the motion on November 18, 2019. (R. 21). Officer Johannik was the only witness to testify during the hearing; Mr. Dreher did not testify. (R. 21). After hearing testimony and making certain factual findings, the trial court denied Mr. Dreher's motion to suppress. (R. 21).

On February 11, 2020, a trial to the court was held before the Honorable Paul Bugenhagen, Jr., Mr. Dreher having waived the opportunity for a jury trial. (R. 20). The trial

court found Mr. Dreher guilty of Operating a Vehicle While Intoxicated. Mr. Dreher now appeals the trial court's denial of his motion to suppress.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED MR. DREHER'S MOTION TO SUPPRESS.

A. Standard of Review

When reviewing a motion to suppress, the reviewing court will uphold the lower court's findings of fact unless they are clearly erroneous. State v. Eckert, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). Application of those facts to determine whether an investigatory stop was justified, however, is a question of law the reviewing court decides without deference to the decision of the lower court. See State v. Patricia A.P., 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995); State v. Krier, 165 Wis. 2d 673, 676, 487 N.W.2d 63, 65 (Ct. App. 1991).

B. The Trial Court's Findings of Fact Were Not Clearly Erroneous.

A circuit court's findings of fact are clearly erroneous when the finding is against the great weight and clear preponderance of the evidence. Wassenaar v. Panos, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983). Under this standard, even

if "the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." Reusch v. Roob, 2009 WI App 76, ¶ 8, 234 Wis. 2d 270, 610 N.W.2d 168. The reviewing court searches the record not for evidence opposing the decision of the circuit court, but for evidence supporting it. Mentzel v. City of Oshkosh, 146 Wis. 2d 804, 808, 432 N.W.2d 609, 611 (1988).

At the conclusion of the hearing on Mr. Dreher's motion to suppress, the trial court made the following findings of fact:

(1) That Officer Johannik observed Mr. Dreher's vehicle make a right-hand turn crossing three lanes rather than completing the turn as closely practicable to the right-hand edge or curb of the roadway, per Section 346.31(2), Wis. Stats.;

(2) That Officer Johannik observed Mr. Dreher's vehicle travel at a high rate of speed on Greenfield Avenue. Officer Johannik used his judgment and observation to estimate this speed at greater than 70 miles per hour; and

(3) That Officer Johannik observed Mr. Dreher's vehicle deviate between two lanes of traffic and further straddle the left turn lane and the inside lane while accomplishing a left turn onto South 165th Street.

(R. 21: 16-17, PR-App. 9-10).

These findings are not clearly erroneous. The trial court's findings were based entirely on the uncontroverted

testimony of Officer Johannik. (R 21: 17, PR-App. 10). Mr. Dreher did not testify at the motion hearing, nor did he offer any other witnesses. (R. 21). Mr. Dreher offered no evidence to contradict the evidence proffered by the City in the form of Officer Johannik's testimony. The Court must review the record for evidence supporting the circuit court's decision, not evidence opposing it. Mentzel, 146 Wis. 2d at 808. Thus, without contrary evidence in the record, there is no basis to argue the trial court's factual findings were erroneous. The trial court's findings of fact should be upheld.

C. The Trial Court Properly Found Reasonable Suspicion Existed for Officer Johannik to Conduct the Traffic Stop.

An investigatory traffic stop does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures when an officer has reasonable suspicion to believe a traffic violation has been or will be committed by a vehicle's occupants. See State v. Houghton, 2015 WI 79, ¶ 21, 364 Wis. 2d 234, 868 N.W.2d 143. "Reasonable" suspicion is just that; the test is one of reasonableness. State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548, 554 (1987). It requires more than the officer's "inchoate and unparticularized suspicion or hunch." Terry v. Ohio, 392 U.S. 1, 27 (1968).

Reasonable suspicion is based on the totality of specific and articulable facts, taken together with reasonable inferences from those facts. State v. Post, 2007 WI 60, ¶¶ 14-17, 37, 301 Wis. 2d 1, 733 N.W.2d 634 (citing State v. Waldner, 206 Wis. 2d 51, 58, 556 N.W.2d 681, 685 (1996)); Terry, 392 U.S. at 21. It can be found even in instances where there is no probable cause to make an arrest, see Terry, 392 U.S. at 22, and in instances where the driver's actions are not necessarily "erratic, unsafe, or illegal", Post, 301 Wis. 2d 1, ¶13, but where reasonable inferences of wrongful activity can still be drawn, Waldner, 206 Wis. 2d at 56.

This common sense test asks the "crucial question [of] whether the facts of the case would warrant a reasonable police officer in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." Post, 301 Wis. 2d 1, ¶ 13. The answer to that crucial question in this case is "yes." Officer Johannik offered testimony as to three distinct behaviors that, based on his training and experience, aroused his suspicion regarding Mr. Dreher's driving: an improper turn onto Greenfield Avenue, a high rate of speed while traveling on Greenfield Avenue, and a deviation and/or straddle between two lanes of traffic while traveling on

Greenfield. (R. 21). While Mr. Dreher would have this Court review each of these observations in isolation, precedent requires they be viewed in their totality. See Post, 301 Wis. 2d, ¶¶ 14-17, 34; Waldner, 206 Wis. 2d at 58.

While Officer Johannik observed Mr. Dreher's vehicle, he observed three distinct, suspicious actions when, taken together, led to Officer Johannik's conclusion that it was some of the worst driving he had witnessed in over 250 drunk driving arrests. (R. 21: 8, PR-App. 4). Officer Johannik clearly made his observations, applied his training and past experience as a traffic patrol officer to them, and in light of that training and experience, suspected the driver of the vehicle may have been impaired. (R. 21: 8, PR-App. 4); see Post, 301 Wis. 2d 1, ¶13. Given the totality of his observations, and his reasonable application of his training and experience and inferences, Officer Johannik's suspicion was reasonable.

Mr. Dreher, on the other hand, mischaracterizes the reasonable suspicion standard as one of probable cause. (Defendant-Appellant Brief: 10, 13-14). Mr. Dreher suggests that, if Officer Johannik did not possess probable cause to believe a "specific violation" occurred, then he could not have possessed reasonable suspicion to conduct a traffic stop in the first place. (Defendant-Appellant Brief: 10). He

further suggests that, if Mr. Dreher did not actually commit any traffic violations, Officer Johannik could not form a reasonable suspicion that Mr. Dreher may have been operating the vehicle while impaired. (Defendant-Appellant Brief: 15). However, that is not the law applied by Wisconsin courts. Indeed, Mr. Dreher's approach has been rejected by the Supreme Court in State v. Waldner:

When an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure. If Waldner were correct in his assertion of the law, there could never be investigative stops unless there was simultaneous grounds to make an arrest. That is not the law. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allows police officers to stop a person when they have less than probable cause.

206 Wis. 2d at 58-59.

Mr. Dreher's assertion that Officer Johannik must have probable cause for specific traffic violations in order to justify an investigatory stop is, thus, incorrect. Reasonable suspicion is not the same standard as probable cause. Houghton, 364 Wis. 2d 234, ¶¶ 29-30. It is not an "either/or" standard; reasonable suspicion is sufficient to justify all traffic stops. Id. Mr. Dreher's suggestion that Officer Johannik must possess probable cause to cite Mr. Dreher for

specific traffic violations before conducting a traffic stop goes beyond what is required for reasonable suspicion. The law only requires an officer possess "specific and articulable" facts that, in totality, would lead a reasonable officer to suspect a traffic violation is occurring. Officer Johannik testified to specific, articulable facts regarding his observations of Mr. Dreher's driving and why Officer Johannik found them suspicious. (R. 21: 6-9, PR-App. 2-5). Officer Johannik stated the following:

Q. And what, if anything, did you observe at that time in that location?

A. I was traveling westbound on West Greenfield Avenue, which is the north side of the road. I observed a white sedan traveling southbound on South Moorland Road out of the City of Brookfield. I saw the vehicle appeared to be traveling at a high rate of speed. The vehicle proceeded to make a right turn to go from southbound Moorland to westbound Greenfield Avenue, and at that point, there are three lanes. When the vehicle made the right turn, it crossed all three lanes in one motion and wound up in the lane closest to the median. So he cut across three lanes in one motion.

Q. After making this observation, what, if anything, did you do?

A. I believe it was an improper right turn under State statute. I continued to travel westbound and I observed that the vehicle, upon completing the turn, rapidly increased its speed as it continued to travel westbound on Greenfield Avenue and I accelerated to catch up.

Q. How fast did you have to go to keep up with that vehicle?

A. The one time that I glanced down at my speedometer, I saw I was going at approximately 70 miles per hour, and it did not appear that I was really closing the gap with the white sedan in front of me.

...

Q. What, if anything, did you observe after that?

A. Only -- approximately several blocks later, as it continued to travel westbound, the vehicle then swerved to my right, which would be to the north and to the other lane of traffic, with approximately a third of the vehicle -- it almost immediately corrected by swerving to the left. While heavily braking, I could actually see the front end of the car start to go down and at that point it was making a left turn to go southbound on South 165th Street from West Greenfield Avenue, and I could see that the vehicle was essentially splitting the left turn lane with the other straight westbound lane that was closest to the median.

(R. 21: 6-8, PR-App. 2-4). These specific and articulable facts, taken in totality, are sufficient under the law to establish reasonable suspicion justifying an investigatory stop, even if these facts fall short of probable cause. See Waldner, 206 Wis. 2d at 58-59; see also Houghton, 364 Wis. 2d 34, ¶30.

Against the backdrop of this incorrect interpretation of the reasonable suspicion standard, Mr. Dreher seeks to undermine the sufficiency of the evidence proffered by the

City as to reasonable suspicion. For example, he challenges the existence of reasonable suspicion due to the absence of any other traffic and Officer Johannik's supposed inability to confirm Mr. Dreher's speed. (Defendant-Appellant Brief: 15).

Mr. Dreher argues Officer Johannik's observations and estimation of Mr. Dreher's excessive speed lack probative value. (Defendant-Appellant Brief: 11-12). Yet, Mr. Dreher offered no evidence at the motion hearing to counter Officer Johannik's testimony or to dispute its probative value. (R. 21). Further, Mr. Dreher misinterprets the standard required for reasonable suspicion, suggesting the City must meet a burden of proof similar to the one needed for conviction of unreasonable and imprudent speed in order to demonstrate reasonable suspicion. (Defendant-Appellant Brief: 12).

Mr. Dreher places undue weight on the lack of testimony as to pacing, distance, reference points, length of observation, etc. However, in doing so, he fails to recognize the difference between evidence needed for a conviction of a traffic citation and the facts needed to justify reasonable suspicion for an investigatory stop. Mr. Dreher was not cited, and was not tried, for unreasonable and imprudent speed. (R. 20). Thus, his reliance on City of Milwaukee v. Berry is misplaced. 44 Wis. 2d 321, 171 N.W.2d 305 (1969). The Berry

court reviewed whether the trial court's finding and conviction on speeding was against the great weight and clear preponderance of the evidence needed for conviction. 44 Wis. 2d at 322. That case had nothing to do with reasonable suspicion standards.

However, the City would point out the Berry court's conclusion on the probative value of an officer's speed estimation actually favors the City in this case. Mr. Dreher has challenged the supposed "dearth" of information regarding Officer Johannik's observations on Mr. Dreher's speeding. (Defendant-Appellant Brief: 11). In Berry, the court frowned upon characterizations of speed such as that a defendant was going "real fast". 44 Wis. 2d at 324. Instead, that court required a more definite, objective standard for probative value, noting the officer's estimate of the defendant's speed at "conservatively in excess of 50 miles per hour" was indeed probative and relevant. Id.

Officer Johannik's testimony regarding his estimate of Mr. Dreher's speed meets the probative standard set forth in Berry. Officer Johannik's characterization of Mr. Dreher's speed is "definite" based upon Officer Johannik's observation of his own speedometer and his observation that he could not catch up to Mr. Dreher while traveling at a speed of 70 miles per hour. (R. 21: 7, PR-App. 3); see Berry, 44 Wis. 2d at

324. The observation as to Mr. Dreher's speed can and should be taken into this Court's analysis of the totality of the circumstances observed by Officer Johannik on the question of reasonable suspicion.

The only question here is whether, under the totality of the circumstances, Officer Johannik had formed a reasonable suspicion necessary to initiate the traffic stop. Mr. Dreher's demands for pacing, distance, and points of reference exceed what the City is required to demonstrate with respect to reasonable suspicion. Officer Johannik's observations as to Mr. Dreher's speed are only part of the equation this Court examines. See Post, 301 Wis. 2d 1, ¶¶ 14-17; Terry, 392 U.S. at 21-22. Mr. Dreher concedes Officer Johannik testified that he "escalated his speed to 70 MPH in a 40 MPH zone and not catching up with the vehicle." (Defendant-Appellant Brief: 12). That testimony, taken together, with his other observations of the Mr. Dreher's driving, indicated poor driving and led Officer Johannik to reasonably suspect the driver may have been impaired. See Waldner, 206 Wis. 2d at 58-59; see also Houghton, 364 Wis. 2d 34, ¶30.

Finally, Mr. Dreher uses a significant portion of his initial brief setting forth the statutory requirements for traffic violations of improper right turns, unreasonable and

imprudent speed, and unsafe lane deviation. (Defendant-Appellant Brief: 10-13). He suggests that, because no vehicles other than Officer Johannik's were in the vicinity at the time, the respective statutes dictate there could have been no traffic violation, and, thus, no reasonable suspicion to stop Mr. Dreher. (Defendant-Appellant Brief: 14). Again, this is not the standard determinative of whether reasonable suspicion exists. "The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." Waldner, 206 Wis. 2d at 57.

Even if Mr. Dreher's driving was "lawful," a point which the City does not concede, Officer Johannik was justified in conducting an investigatory traffic stop. The combination of a turn crossing three lanes of traffic in one motion; speed likely exceeding 70 miles per hour in a 40 mile per hour zone; swerving between two lanes; and using portions of two lanes to accomplish a left turn led Officer Johannik to conclude that the driver may have been impaired. (R. 21: 8, PR-App. 4). Officer Johannik's observations were specific, and inferences drawn from them were justified and reasonable. Given the totality of the circumstances, Officer Johannik's observations were sufficient to constitute reasonable

suspicion justifying an investigatory stop. See Waldner, 206 Wis. 2d at 58-59; see also Houghton, 364 Wis. 2d 34, ¶30.

CONCLUSION

For foregoing reasons, the City respectfully requests that this Court affirm the circuit court's order denying Mr. Dreher's motion to suppress.

Dated this 6th day of October, 2020.

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CERTIFICATION OF FORM, LENGTH AND ELECTRONIC COPY

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. §809.19(8) (b) and (c), Wis. Stats. for a brief and appendix produced with a mono-spaced font; 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margin on the other 3 sides. The length of this brief is seventeen (17) pages.

I further certify that the text of the electronic copy of the brief that I filed using the electronic filing system under Section 801.17, Stats., is identical to the text of the paper copy of the brief.

Dated this 6th day of October, 2020.

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