

RECEIVED
11-11-2020
CLERK OF WISCONSIN
COURT OF APPEALS

COURT OF APPEALS
DISTRICT II

Appeal No. 20 AP 850

CITY OF NEW BERLIN,

Plaintiff-Respondent,

vs.

ERIC JOHN DREHER,

Defendant-Appellant.

REPLY 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.

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant-Appellant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: JOSHUA HARGROVE
State Bar No. 1086823
joshua@traceywood.com

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	2
Table of Authorities	3
<u>Argument</u>	4
I. The findings made by the trial court were indeed erroneous.	4
Conclusion	9
Certification	10

TABLE OF AUTHORITIES

Cases

Millonig v. Bakken, 112 Wis. 2d 445, 455, 334 N.W.2d 80 (1983)..... 7

State v. Cheers, 102 Wis.2d 367, 306 N.W.2d 676 (1981)..... 4

Terry v. Ohio, 392 U.S. 1, 30 (1968) 7

United States v. Hensley, 469 U.S. 221, 229, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)
..... 7

United States v. Lopez, 907 F.3d 472, 478 (7th Cir. 2018) 7

United States v. Wimbush, 337 F.3d 947, 949–50 (7th Cir. 2003) 6

Statutes

Wisconsin Statute Section 346.57(2)5

The City argues that it proffered sufficient evidence of reasonable suspicion and that Dreher seeks to conflate the standards of reasonable suspicion and probable cause. Dreher contends that he does not endeavor to conflate the standards but to simply illustrate that the City failed to provide the necessary evidence to substantiate the alleged basis for the stop. Specifically, the City was unable to adduce evidence to bolster a reasonable suspicion that Dreher had violated any traffic provisions and, thus, the Court's findings to the contrary are erroneous.

I. The findings made by the trial court were indeed erroneous.

Mr. Dreher was stopped, detained, and arrested without a warrant.¹ 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.² In Dreher's case the trial court found that the City proffered sufficient evidence to justify the stop. Tantamount to such, the court made these findings:

1. Officer Johannik observed Dreher's vehicle make a right-hand turn crossing three lanes rather than completing the turn as closely as practicable to the right-hand edge of curb of the roadway in violation of *Wis. Stat. Sec. 346.31(2)*.

¹ See R.21.

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

2. Officer Johannik observed Dreher's vehicle travel at a (imprudent) high rate of speed on Greenfield Avenue in violation of *Wis. Stat. Sec. 347.56(2)*.
3. Officer Johannik observed Dreher's vehicle deviate between two lanes of traffic and further straddle the left turn lane in violation of *Wis. Stat. 346.31(1)*.³

Dreher contends that the City did not demonstrate that the officer had the probable cause or reasonable suspicion needed to effect a traffic stop for a specific traffic violation and therefore the judge's findings were erroneous.⁴ The aforementioned traffic violations notwithstanding (2), pursuant to the applicable statutes are only violations if the driving impedes traffic or creates an unsafe condition for those on the roadways.

With regard to the findings (1) and (3), the officer testified that Mr. Dreher made an improper right turn and that Dreher deviated between two lanes. However, it is uncontroverted that no traffic was affected by Mr. Dreher's driving.⁵ 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.⁶

Further, the officer testified that Mr. Dreher was driving at an imprudent speed. Pursuant to *Wisconsin Statute Section 346.57(2)*. "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be

³ R.21: 16-17

⁴ See R.21 at 8.

⁵ See R. 21 at 13.

⁶ See R. 21 at 8.

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.⁷ To bolster this claim the officer could only engage in conjecture and could not confirm what speed Mr. Dreher was actually driving, only the speed that it took him to catch up to Mr. Dreher.⁸ The officer's visual estimation, from an unknown distance, without more, lacked any probative value and was unreliable.

The City is correct in stating that this was not a trial on 'imprudent speed;' however, the syllogism fails. The City endeavors to state that since this was not a trial on imprudent speed, it does not have to prove any facts that substantiate such a claim and, therefore, the fact that it was not proved that Dreher was speeding is of little value. This is not the law. Reasonable suspicion requires a recitation of specific and articulable facts within the possession of the officer, which under the totality of circumstances would lead a reasonable officer to conclude that a traffic violation is occurring. There was no traffic to impede, and thus no unsafe deviation, and no realization of even a lack of use of a signal when turning. Further, there was no clear basis to believe that Dreher was speeding. While the officer's assertions are specific and he articulated them, they are not articulable facts that gave rise to a belief of traffic infractions under these circumstances.

Simply put, under no reasonable review of this testimony is this bare assertion of a traffic violation, without more, a specific and articulable fact. Thus, the prosecution did not meet its burden as to that suggested reason for the stop.

⁷ *Wisconsin Statute Section 346.57(2)*.

⁸ R.21 at 13.

While the City’s definition of reasonable suspicion is accurate, it fails to demonstrate how under the scant testimony of the officer it met even this low bar. Officers can only temporarily stop and detain an individual when they “have a reasonable suspicion, grounded in specific and articulable facts” that an individual has committed a crime or is about to commit a crime.⁹ “Police are not entitled to detain a person for questioning based on only a hunch.”¹⁰ Therefore, reasonable suspicion has to be grounded in articulable facts regarding the commission of a crime—not simply the bare assertion.

Wisconsin traffic laws do not demand perfection.¹¹ Rather, they are specific codifications that “merely restate the common law standard of prudent conduct.”¹² Here, Officer Johannik did not have an objectively reasonable suspicion that Mr. Dreher had committed any traffic offense. Based upon the testimony of the officer, the best the City could adduce was a “hunch,” and Courts have repeatedly declared that a hunch is far less than what has been defined as reasonable suspicion and, therefore, insufficient to override Fourth Amendment protections.¹³

The City failed to show through Officer Johannik’s testimony that given the absence of any traffic (by which to impede), the inability to confirm speed or inability to recall

⁹ *United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).

¹⁰ *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).

¹¹ *Millonig v. Bakken*, 112 Wis. 2d 445, 455, 334 N.W.2d 80 (1983).

¹² *Id.*

¹³ *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).

whether a signal was even used, there was an objective basis by which to pull Mr. Dreher over.¹⁴ Therefore, the Court's findings to the contrary of the aforementioned alleged violations are erroneous.

For these reasons, given the surrounding circumstances, the officer 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 unlawful stop, the City would not have been able to prove its case at trial. Mr. Dreher would, thus, have been acquitted.

¹⁴ See R.21.

CONCLUSION

For the reasons stated herein and Mr. Dreher's original brief, 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, November 11, 2020.

Respectfully submitted,

ERIC JOHN DREHER,
Defendant-Appellant

TRACEY WOOD & ASSOCIATES
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300



BY: _____

Joshua Hargrove
State Bar No. 1086823
joshua@traceywood.com

CERTIFICATION

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:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2934 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated: November 11, 2020.

Signed,

BY: Electronically signed by JOSHUA HARGROVE
JOSHUA HARGROVE
State Bar No. 1086823