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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CITY OF OSHKOSH,

Plaintiff-Respondent,

Appeal No.: 20-AP-867

-vs-

BRIAN D. HAMILL,

Winnebago Co. Cir. Ct.
Case No: 18-TR-12055

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Appeal from the Circuit Court of Winnebago County
The Honorable Karen L. Seifert, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin State Cases **Page(s)**

Statutes

Secondary Sources

I. ISSUES PRESENTED FOR REVIEW

I. Did the Defendant waive his right to an appeal by entering a no contest plea?

Decided by the trial court: Not Decided

II. Is there reasonable suspicion for a traffic stop when it was admitted by the officer that no traffic violation occurred?

Decided by the trial court: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested so that both parties can verbally present their cases to the Court. Publication is requested as this case addresses major issues with respect to reasonable suspicion and Operating While Intoxicated law.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, PROCEDURAL STATUS AND DISPOSITION IN THE TRIAL COURT

Appeal from a conviction following Appellant's no contest plea before the Honorable Karen L. Seifert on January 6, 2020. Defendant-Appellant was found guilty of OWI-1st Offense on March 19, 2020. The Trial Court heard a motion to suppress evidence challenging whether there was reasonable suspicion for the stop of the Defendant's vehicle. That motion was denied and is the basis of this appeal.

II. STATEMENT OF FACTS

On September 16th, 2018, the Defendant-Appellant was stopped on S. Main Street in the City of Oshkosh, Winnebago County. Deputy Franklin stated in his report that he observed the Defendant's vehicle traveling southbound on S. Main Street. He said the vehicle observed the vehicle move towards the dotted line in its lane of traffic as he rounded a curve in the lane. (R.33, AppApx0007-0008) He then observed the vehicle later touch the centerline without crossing it. (R.33, AppApx0009) The vehicle never was observed correcting itself away from the centerline, with all of the driving occurring within the vehicles own lane of traffic.

There is no indication in the report that the Defendant was speeding or that he crossed the center line at any time. The Defendant did not receive any traffic citations or written warnings as a result of the stop aside from the citation for Operating with PAC .10 or More (1st). (R.33, AppApx0010)

Officer Franklin testified that he observed the vehicle for 15 to 20 seconds as the vehicle was negotiating a curve. (R.33, AppApx0014) He also stated it did not cross over any lines. (R.33, AppApx0015) He testified that touching the line is not actually crossing a line. (R.33, AppApx0016) When asked about lane deviations while negotiating a curve, he said, "I wouldn't say more often than not, I would say it occurs, I've seen it happen", and that that driving did not initially give him suspicion the driver was intoxicated. (R.33, AppApx0016) He did say that the vehicle corrected itself and moved to the right after touching the centerline, which also **did not** give him suspicion that there was criminal activity afoot. (R.33, AppApx0017)

At the time Officer Franklin testified, it appeared he believed that touching the centerline was a violation of Wisconsin Statutes but could not recall the section number. (R.33,

AppApx0017) Officer Franklin said he believed that based on the totality of what he saw, that it violated the statutes, § 346.05, driving on the wrong side of the roadway. (R.33, AppApx0018) He also stated he could have been incorrect about his understanding of the statute and that he did not see a crossing of the centerline. (R.33, AppApx0019) Officer Franklin observed no other violations and did not issue any citations other than the Operating While Intoxicating. (R.33, AppApx0020) Officer Franklin was unsure whether he gave a verbal or written warning. (R.33, AppApx0021) There was no written warning in the record.

STANDARDS OF REVIEW

The question of whether a traffic stop is reasonable is a question of constitutional fact, which is a mixed question of law and fact. See State v. Post, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. Whether an investigatory stop meets constitutional standards is a question of law that is reviewed independently by the Court. See State v. Krier, 165 Wis.2d 673, 676, 478 N.W.2d 63 (Ct.App. 1991)

ARGUMENTS

I. WAS THERE A WAIVER OF RIGHT OF APPEAL

Wisconsin courts have found that Wis. Stats. § 971.31, which addresses motions to suppress evidence, apply only to criminal cases, not civil ones. The courts have found that it is in their discretion, however, to decline to apply the waiver rule. The courts have considered four factors under County of Ozaukee v. Quelle, 198 Wis. 2d 269, 542 N.W.2d 196 (Wis. Ct. App. 1995):

1. the administrative efficiencies resulting from the plea,
2. whether an adequate record has been developed;
3. whether the appeal appears motivated by the severity of the sentence, and
4. the nature of the potential issue. Quelle at 275-76

With the plea of no contest in this action the Defendant avoided the administrative inefficiencies resulting from having a trial. In matters such as these, if the motion to suppress is denied there is very little defense and the operation of a trial is costly, time consuming, and wastes the Court's resources. That satisfies the first factor. The legislation must have considered this, and the time saved by allowing appeals without requiring trials makes sense. Without it, the courts would be even more overworked than they are presently. Why there would be a distinction between civil and criminal trials when the specific "motion to suppress" mentioned in the statutes is basically a "traffic only" motion is unclear and

frankly seems to be nonsensical. This obviously would save time and money for all parties.

The second factor is whether or not an adequate record has been developed, and in this case there was a motion filed, briefing done by both sides, and testimony taken to complete a full and adequate record in this case. The transcript fully outlines the issues presented.

The third factor regarding the severity of the sentence is satisfied as well because the Defendant faced the least severe sentence possible for 1st offense OWI.

The final factor is the nature of the potential issue. The area of law that we are discussing here two highly contested and controversial areas that exist currently in this area of law involving what amounts to a reasonable suspicion based on a questionable, or in this case non-existent traffic offense, and that has been open for interpretation over many years. The nature of the offense, a stop made without a traffic violation occurring, is an issue of great question. There is a second issue that might also apply with respect to the police officer's knowledge of the situation and whether his mistake of law is something that should be considered

what could amount to reasonable suspicion. The courts have went back and forth on that matter with State v. Brown, 355 Wis.2d 668, 850 N.W.2d 66 (2014), and State v. Houghton, 364 Wis.2d 234, 868 N.W.2d 143, (2015). If the Respondent asserts that line of opposition, it will be addressed in the Reply Brief.

Because of the high important nature of those issues, Defendant believes that the Court should take up the matter. All four factors under Quelle were satisfied.

II. THE EVIDENCE OBTAINED FROM THE DEFENDANT MUST BE SUPPRESSED BECAUSE IT WAS THE PRODUCT OF AN UNLAWFUL STOP OF THE DEFENDANT'S VEHICLE

All of the evidence obtained from the Defendant by the City of Oshkosh Police must be suppressed as the fruit of an illegal stop and seizure of the Defendant. The officer made an unlawful stop of the Defendant's vehicle because he lacked a reasonable suspicion that the Defendant had committed an offense. The Wisconsin Courts have made it quite clear that the police can only stop a motorist if the investigating officer has a reasonable suspicion that the motorist has committed an offense. State v. Rutzinski, 2001 WI 22, ¶ 14, 241 Wis. 2d 729, 737, 623 N.W.2d 516, 520. A court determines whether reasonable suspicion for the

stop existed, not by the officer's perceptions at the time of the stop, but by objectively examining the articulable facts the officer presents to support his belief that an offense had occurred. Id.

In the present case, therefore, the officer must have had specific facts that lead him to believe that the Defendant was in the process of committing a traffic violation before he could interfere with the Defendant's Fourth Amendment rights. In State v. Post, the Wisconsin Supreme Court held that "weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle." 2007 WI 60, ¶ 2, 301 Wis. 2d 1, 733 N.W.2d 634. Touching the center line is not found in the traffic code as a violation of Wis. Stat. 346. The relevant statute is Wis. Stat. § 346.05, which read in pertinent part:

> "**Vehicles to be driven on right side of roadway; exceptions.**
> (1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway, except:
> (a) When making an approach for a left turn under circumstances in which the rules relating to left turns or U-turns require driving on the left half of the roadway; or
> (b) When overtaking and passing under circumstances in which the rules relating to overtaking and passing

> permit or require driving on the left half of the roadway; or
> (c) When the right half of the roadway is closed to traffic while under construction or repair; or
> (d) When overtaking and passing pedestrians, animals or obstructions on the right half of the roadway; or
> (e) When driving in a particular lane in accordance with signs or markers designating such lane for traffic moving in a particular direction or at designated speeds; or
> (e) When the roadway has been designated and posted for one-way traffic, subject, however, to the rule stated in sub. (3) relative to slow moving vehicles." State v. Puchacz, 323 Wis.2d 741, 780 N.W.2d 536, 2010 WI App 30

The statute requires motorists to drive on the right half of the roadway. Deputy Franklin testified that the Defendant veered within his own lane of traffic and briefly touched the centerline. (R.33, AppApx0007-0009) Indeed, the Defendant was not issued a citation for violating any traffic code as a result of his driving prior to being stopped. There is no specific evidence on the record, gathered either before or after the stop, to show that the officer had reasonable suspicion that a traffic violation or any other offense was occurring, making his stop of the Defendant's vehicle unlawful. Virtually all vehicular traffic does some weaving within

its own lane, and rounding a curve is certainly something that could cause a slight weave. If this traffic stop were to stand, nearly any vehicle could be stopped at any time, and the constitution should not allow that.

The Post court found that prolonged weaving, like that in City of Tomah v. Seward, where a vehicle was weaving for approximately one mile, could be considered reasonable suspicion (at P. 12). No prolonged weaving occurred here.

Post further explained as follows:

> "Repeated weaving within a single lane" may, under the totality of the circumstances, fail to give rise to reasonable suspicion. This may be the case, for example, where "weaving" is minimal or happens very few times over a great distance. Courts in a number of other jurisdictions have concluded that weaving within a single lane can be insignificant enough that it does not give rise to reasonable suspicion. In such cases, weaving within a single lane would not alone warrant a reasonable police officer to suspect that the individual has committed, was committing, or is about to commit a crime.

Post quoted U.S. v. Lyons, that recognized "the universality of drivers weaving in their lanes", and that "Indeed, if failure to

follow a perfect vector down the highway or keeping one's eyes on the road were sufficient 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." United States v. Colin, 314 F.3d 439, 446 (9th Cir.2002). In Post, the vehicle veered in its lane for two blocks before the traffic stop occurred. In Seward, it was approximately a mile. In the present case, it was a single back and forth that only took seconds. In City of West Allis v. Michaels, the Court found that accelerating quickly, swerving three times in the lane without hitting a curb and maintaining a single lane of travel was not sufficient to give rise to reasonable suspicion. In this case, less than that occurred.

III. ALL EVIDENCE OBTAINED AFTER AND AS A RESULT OF THE UNLAWFUL STOP MUST BE SUPPRESSED AS FRUIT OF THE POISONOUS TREE

All evidence gained by the officer after he stopped the Defendant's vehicle must be suppressed because it was found pursuant to the unlawful stop. In State v. Washington, the court held that evidence found pursuant to an unlawful seizure was "fruit of the poisonous tree." 2005 WI App 123 ¶ 1, 284 Wis. 2d 456, 700 N.W. 2d 305. This evidence must be suppressed if the police

cannot establish an independent means of discovering the evidence which can be sufficiently distinguished from the tainted seizure. State v. Walker, 154 Wis. 2d 158, 186, 453 N.W.2d 127, 139 (1990) (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

All of the evidence obtained in this case came as a direct result of the unlawful stop and is therefore illegal and must be suppressed. If the illegally obtained evidence is disregarded, there are no other grounds upon which the State could contend that the Defendant was driving while intoxicated, or with a blood alcohol content of greater than 0.08%. There was no reasonable suspicion for the warrantless stop of the Defendant, and because this makes the seizure of the Defendant unlawful, all evidence must be suppressed. Without such evidence, this action must be dismissed.

CONCLUSION

It is clear that this case did not involve a violation of the traffic code that resulted in the officer's stop. The officer observed the vehicle for only a few seconds, noticed one veer to the left and then a correction to the right. That in of itself is the bases for the stop here. That in of itself should not be reasonable suspicion

under the law, should not lead to a violation of the Defendant's constitutional rights, and does not meet the standards of what is considered a reasonable stop. Defendant-Appellant asks the Court to allow the case to be heard, as all four factors in Quelle regarding a waiver by plea are clearly met in this case.

Dated this 22nd day of July, 2020.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19 (8)(b) and (c), as modified by the Court of Appeals Order dated June 8, 2018, for a brief produced with a proportional serif font. The length of this Brief is 12 pages and is 2921 words (exclusive of signatures).

I have submitted an electronic copy of the brief, which complies with the requirements of Wis. § 809.19 (12). I certified that the electronic brief is identical in content and format to the paper form of the brief filed as of this date, other than the signature.

Dated this 22nd day of July, 2020.

By: *Electronically signed by Brian D. Hamill*
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