STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

CITY OF OSHKOSH

PLAINTIFF RESPONDENT

VS.

Appeal No: 20-AP-867

Winnebago Co. Circuit Court Case No: 18 TR 12055

BRIAN D. HAMILL

DEFENDANT APPELLANT

BRIEF OF PLAINTIFF RESPONDENT

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

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ISSUES PRESENTED

I. Did Atty. Hamill waive his right to appeal the trial court's decision by entering a plea in the trial court?

No, the City concedes the four factors in Quelle weigh in favor of hearing the appeal on the merits.

II. Did the trial court appropriately find that Ofc. Franklin had reasonable suspicion to stop Atty. Hamill's vehicle?

Yes, the trial court properly found that reasonable suspicion existed when the Court found that Hamill's vehicle hit the boundary lines of his lane on three occasions at 2:38 in the morning.

In addition this Court can find that Ofc. Franklin had reasonable suspicion that Atty. Hamill violated Wis. Stat. §346.05, or that his belief that Hamill had violated that statute was objectively reasonable.

STATEMENT ON PUBLICATION

The City of Oshkosh does not request oral argument on the matter, and does not believe publication is necessary given the number of published cases regarding reasonable suspicion to stop a vehicle.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The matter before the Court comes on appeal from the Winnebago County Circuit Court where the Defendant was convicted of OWI 1st offense due to his plea of no contest. At the Circuit Court level, the Defendant filed a motion to suppress based on a lack of reasonable suspicion to stop his vehicle. The Court denied the motion to suppress. The Defendant appeals that decision.

II. FACTS

At the suppression hearing, Officer Franklin, testified that he first observed Atty. Hamill while southbound on Main Street in the City of Oshkosh at approximately 0238 AM. **R. 33-4; ResApx 4.**

Prior to this stop he had been a police officer for approximately ten years, had received training at the academy on the enforcement of OWI cases including being taught to look for traffic violations which included speeding, swerving, sign and signal violations. **R. 33-5 RespAppx - 5.** From this experience he had performed approximately 300 to 400 stops in his career. **R. 33-5; RespAppx-5.**

Ofc. Franklin testified that the road on which Hamill was operating is a straight roadway that has four lanes. **R. 33-6; RespAppx-6.** The lanes of this roadway are divided for north and southbound traffic. **R. 33-6; RespAppx-6.** He testified that he observed Hamill's vehicle from approximately 6-7 car lengths back, and that Hamill was traveling in the inside lane of the four-lane roadway. **R. 33-6&7; RespAppx-6&7.**

The first erratic driving Ofc. Franklin observed came when Hamill approached 17th Avenue where the road slightly curves to the right. **R. 33-7; RespAppx - 7.** Ofc. Franklin testified that as Hamill negotiated that curve, Hamill's tires hit and continued contact on the lane dividing line. **R. 33-7; RespAppx -7.** He further stated that Hamill maintained contact with that dotted line for approximately 20-30 feet, or three to four seconds. **R. 33-7 & 8; RespAppx 7 & 8.** Ofc. Franklin stated that this was not typical as most people drive inside the lanes. **R. 33-8; RespAppx-8.**

Ofc. Franklin further testified that he saw Hamill correct himself and go back to the center of the lane for approximately 30-40 feet followed by the vehicle then drifting on to the center line. **R. 33-8; RespAppx - 8.** He stated that both the left front and rear tires were

contacting the center line. **R. 33-8; RespAppx - 8.** Franklin testified that this continued for approximately 40 to 50 feet, for a duration of four to five seconds. **R. 33-9; RespAppx - 8.** He did not recall Hamill crossing the centerline. **R. 33-9; RespAppx - 8.**

Franklin testified that he then observed Hamill go back into the lane of travel he was operating in and almost immediately drifted toward the dividing line where Hamill's front and rear tires were contacting the line for an additional 30 to 40 feet or three to four seconds. **R. 33-9 & 10; RespAppx - 8.**

Ofc. Franklin testified that he believed based on the totality of what he observed including the unsafe lane deviations, Hamill had violated Wis. Stat. §346.05 for failing to maintain his vehicle on the right half of the roadway. **R. 33-17; RespAppx -1 17.** He was adamant about this during cross examination. **R.33 - 17, 18, & 19; RespAppx 17, 18 & 19.** He further maintained this believe after looking at the statute. **R. 33-23; RespAppx-23.** Franklin also testified however that he believed based on what he saw, and the time of day, that Hamill was possibly intoxicated. **R. 33-24; RespAppx-24.**

After the motion hearing the Court rendered its decision on March 19th, 2019 during an oral ruling.[1] The Court held that based on the holdings in *Terry v. Ohio*, and *State v. Post*, Officer Franklin had reasonable suspicion to stop Hamill's vehicle. **RespApx 35-41**. The Court found that Ofc. Franklin observed Mr. Hamill's vehicle had touched opposite lines three times at 2:38 in the morning which constituted reasonable articulable suspicion. **RespApx 35-41**.

DISCUSSION

I. The Defendant Did Not Waive His Right to Appeal.

A guilty or no contest plea creates a waiver of appellate rights in all cases. *County of Racine v. Smith*, 122 Wis. 2d 431, 362 NW 2d 439 (Ct. App., 1984). The language of Wis. Stat. §971.30 creates an exception in criminal matters, but that exception does not apply in civil matters. This Court however has discretion to review appeals on non-criminal cases. Pursuant to the holding in *County of Ozaukee v. Quelle* the Wisconsin Court of Appeals

[1] The transcript of the 3/19/19 oral ruling was not included in the original record. In this matter there were two oral rulings. The first, regarding the motion to suppress. The second, regarding the motion to reconsider after Ofc. Franklin had been terminated for his own OWI offense. Only the second oral ruling was requested and prepared for the record. The plaintiff respondent filed a motion to supplement the record which was signed by the circuit court on or about 9/18/19. Given that the oral ruling is a necessary part of the record, the Plaintiff Respondent has included it in its appendix for the Court's consideration.

held that appellate courts could grant review of such cases after considering four factors. 198 Wis. 2d 269, 542 N.W.2d 196 (Wis. Ct. App. 1995).

The four factors are as follows:

> **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. *Id.* at 275-76.**

In the case before the court, three of the four factors demonstrate Hamill did not waive his right to appeal. First, the plea lessened the use of judicial resources at the trial court level. In addition, the trial court developed an adequate record relating to the issue on appeal after the motion hearing. Third, the appeal does not appear to have been motivated by avoiding any particular penalty as the guideline penalty would have likely been the same after trial.

The fourth factor arguably weighs against waiver. The issue before the court is not one of first impression or

particular importance. Here the issues before the court will not augment case law in any significant way. The issue is simply whether reasonable suspicion of a traffic violation or criminal activity was present justifying the stop of the motor vehicle.

Unlike the issue in *Quelle*, the existence of reasonable suspicion is an area of law which has significant published guidance. Additional guidance is not needed, and therefore this factor weighs in favor of waiver. However, given that three of the four factors weigh in favor of the Defendant's ability to appeal the decision despite his no contest plea, the City of Oshkosh concedes this issue.

II. The Court Properly Denied the Defendant's Motion to Suppress

The standard this court must use to review the circuit court's decision is to determine whether the circuit court's findings of historical fact are clearly erroneous, and if not, then independently apply constitutional principles to those facts. State v. Payano-Roman, 2006 WI 47, 290 Wis. 2d 380, 714 N.W.2d 548.

A police officer may make an investigatory stop of a vehicle if he reasonably suspects a driver is violating a

traffic law, or criminal activity. *County of Jefferson v. Renz*, 231 Wis.2d 293, (1999); *State v. Hougton*, 2015 WI 79, 364 Wis. 2d 234. "The crucial question is 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." *State v. Post*, 301 Wis. 2d 1, 733 N.W.2d 634 (2007) at ¶ 13 citing State v. Anderson, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990) & Wis. Stat. §968.24. The stop of a vehicle, however, must be based on more than an officer's unsubstantiated suspicion or hunch. *Post*, 301 Wis.2d. 1, 733 N.W.2d 634 (2007). "Instead, the officer's suspicion must be grounded upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." *Terry v. Ohio*, 392 U.S. 1, at 21,88 S.Ct. 1868,(1968). This reasonable suspicion may be based on wholly lawful conduct, "so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." *State v. Waldner*, 206 Wis. 2d 51, at 57, 556 N.W.2d 681 (1996).

In the current matter there are two bases for the finding of reasonable suspicion. First, that officer Franklin had reasonable suspicion that Atty. Hamill was

operating while intoxicated. Second, Ofc. Franklin reasonably suspected that Atty. Hamill violated Wis. Stat. s. 346.05 for failing to maintain his lane.

A) *Ofc. Franklin Had Reasonable Suspicion That Atty. Hamill Was Operating While Intoxicated.*

The parties have both looked for guidance from *State v. Post* and its progeny to determine whether Ofc. Franklin had reasonable suspicion to stop, Atty. Hamill. 301 Wis. 2d 1, 733 N.W.2d 634 (2007). In *Post*, the officer observed the vehicle traveling in a smooth "S-type" pattern toward the right part of the parking lane and back toward the center line. *Id.* at ¶ 5. The distance the vehicle traveled from right to left was approximately 10 feet, and at times came within 12 inches of the centerline. *Id.* When the vehicle traveled back toward the unmarked parking lane it was between six to eight feet from the curb. *Id.*

The officer in *Post*, indicated that this had occurred several times over two blocks. *Id.* During cross examination, the officer clarified that he could not recall how many times this swerving occurred, and that the term several and a few were the same in this context. The Court in *Post* held that this conduct established a reasonable

suspicion that the driver was operating while intoxicated. *Id.*

Although *Post* is very instructive on this issue, the case that most closely resembles the scenario before the Court is that which occurred in *City of Tomah v. Seward*. 357 Wis. 2d 723, 855 N.W.2d 905 (Wis. Ct. App., 2014). In *Seward*, the defendant was observed at 11:38 PM swerving from the dotted dividing line to the fog line multiple times. *Id.* Each time he did so, his tires were touching but did not cross the line. *Id.* The Court held that this constituted reasonable suspicion of OWI. *Id.*

The Defendant Appellant cites *City of West Allis v. Michals*, 367 Wis. 2d 350, 876 N.W.2d 179 (Wis. Ct. App., 2016). **UNPUBLISHED OPINION.** This fact pattern should not be persuasive to this Court as the conduct in Michals is also less suspicious than the driving exhibited by Atty. Hamill. Michals was alleged to have "abruptly swerved" within in her lane three times after accelerating quickly towards the officer's location. *Id.* At ¶ 2. The court in Michals held that these facts did not amount to reasonable suspicion. *Id.*

What is most important from all of these cases is that there still remains no bright line rule either for or

against the finding of reasonable suspicion where a vehicle does not cross a line. *Post*, 301 Wis. 2d 1, 733 N.W.2d 634 (2007). The decision still must be based on the totality of the circumstances. *Id.*

Here the driving exhibited by Hamill in this case is indicative of intoxication. First, as testified by Ofc. Franklin this driving was not typical of most motorists that he had observed in his 10 years of experience. **R. 33-15; 33-5; RespAppx 15 & 5.** Here Franklin observed not an S pattern in a wide unmarked parking lane, or swerving three times abruptly within one lane. Franklin observed Hamill operate his vehicle in a fashion in which he drifted toward the dividing line and rode that line for approximately 20 to 30 feet, or three to four seconds. **R. 33-7 & 33-8; RespAppx-7&8.** He then observed the vehicle drift back into the middle of the lane and re-center itself for approximately 30 to 40 feet (approximately three to four seconds) in the center of the lane, only to then drift to the centerline where its front and rear tires touched the center line. **R. 33-8; RespAppx-8.** Once in contact with the centerline, Hamill remained riding on that line for 40 to 50 feet, or four to five seconds. **R. 33-9; RespAppx-9.** Hamill then almost immediately swerved from riding on the center line to riding on the divider line in the middle of

the two lanes. **R. 33-9; RespAppx-9.** He continued riding on this line for another 30-40 feet, or three to four seconds. **R. 33-10;RespAppx-10.** Ofc. Franklin further testified that these observations took place within a time frame of approximately 15 seconds to 20 seconds, and based on these movements he was afraid there could be an accident. **R. 33-14;RespAppx-10.**

While this behavior may be comparable with that in *Post*, *Michals*, and *Seward* there are important distinctions. First, in Michals the swerving within the lane is not as pronounced. *Michals*, 367 Wis. 2d 350, 876 N.W.2d 179 (Wis. Ct. App., 2016). UNPUBLISHED OPINION. This was not three abrupt swerves which were explained away as avoidance of potholes by Michals. *Id.* Hamill's driving consisted of slow pronounced acts of drifting which seem to have been intentionally corrected after he realized his vehicle was almost in the wrong lane. These acts are demonstrative of an individual who is not paying appropriate attention to the road, having trouble staying awake, or having difficulty controlling the vehicle due to intoxication.

The same can be said for that which was observed in the *Post* case. While Post may have been weaving in an S pattern, Post was not bouncing from line to line in the

manner that Hamill was in this case, nor was he riding each line, and subsequently re-centering the vehicle in at least one of the passes. *Post*, 301 Wis. 2d 1, 733 N.W.2d 634 (2007).

Most importantly however is that Hamill exhibited this driving at 2:38 in the morning whereas Post, and Seward, were driving erratically at 9:30 PM, and 11:34 PM, respectively. **R. 33-4; RespAppx-4.** The Court in *Post* definitely viewed this as a factor which lead to reasonable suspicion. 301 Wis. 2d 1, 733 N.W.2d 634 (2007). Moreover, the Court in *Seward*, found that the time period of 11:34PM on a Wednesday night was also indicative of Operating While Intoxicated. *Seward* at ¶12. What is interesting is that in all of those cases, as well as *Popke*, the time of night was a factor which the courts considered. *See*, *Popke*, 317 Wis. 2d 118, 765 N.W.2d 569(2009 *Post*, 301 Wis. 2d 1, 733 N.W.2d 634 (2007) & *Seward* 2014 WI App 110, 357 Wis. 2d 723, 855 N.W.2d 905 (Wis. Ct. App., 2014). In each of those cases the courts referenced that the time was a factor despite it not being exactly bar time. *Id*. Here, the driving is observed almost immediately after bars close in the downtown area of Oshkosh Wisconsin which makes Officer Franklin's suspicion all the more reasonable.

If the Court can envision observing Atty. Hamill's vehicle drift in the manner described above at approximately eight minutes after bar close, the initial, and reasonable suspicion, should be that the driver is intoxicated.

B. Ofc. Franklin Had Reasonable Suspicion that Hamill had violated Wis. Stat. § 346.05

Wis. Stat. § 346.05, requires that "[u]pon 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," unless an exception applies.[2]

Ofc. Franklin testified that he believed that Hamill's conduct violated the requirements of the statute. **R. 33 17-19; RespAppx-17-19.** While he admittedly did not see the Hamill cross the centerline, he believed Hamill's conduct to be a violation of the statute. R. **33-17 & 18; RespAppx 17 & 18.** Franklin maintained the fact that he thought this was a violation during cross examination, when Atty. Hamill questioned him as to whether he was mistaken about the violation. **R. 33, 17-19; RespAppx-17-19.**

[2] None of the exceptions were applicable to the scenario before the court.

This fact scenario raises an issue of what constitutes a violation of §346.05 and the meaning of "right half of the roadway". In *State v. Popke*, the court held that even a momentary incursion into the oncoming lane which does not affect other drivers is sufficient probable cause that a left of center violation has occurred. 317 Wis. 2d 118, 765 N.W.2d 569(2009).

But is an intrusion absolutely necessary? The plain language of Wis. Stat. §346.05 specifically requires drivers to remain on the "right half" of the roadway, and not actually "left of center" as its sometimes called. This begs the question as to where the right half of the roadway ends; at the line, or in the other lane?[3]

The City concedes that our caselaw has primarily addressed instances where drivers have crossed the road. *See*, *Popke*, 317 Wis.2d 118; *State v. Puchaz*, 323 Wis.2d 741, 780 N.W.2d 536, 2010 WI App 30. However, if the centerline is the line of demarcation for the end of the righthand lane, then riding on that line would constitute operating outside of that righthand lane. Any contact with

[3] Roadway is defined under Wis. Stat. §340.01 (54) as the "...portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder. In a divided highway the term "roadway" refers to each roadway separately but not to all such roadways collectively.

that line in fact crosses the boundary which marks the end of the lane. Here, when Hamill's tires rode along that line, the tires and any adjacent portion of that vehicle would be outside the lane. By that reading, Ofc. Franklin's interpretation of the statute, and his suspicion of such a violation, was reasonable.

Even if this interpretation is incorrect, the facts of this case demonstrate that Franklin's interpretation is objectively reasonable. In such a circumstance, the basis for Franklin's stop is constitutionally justified even if a mistake. *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, (2014); *State v. Hougton*, 2015 WI 79, 364 Wis. 2d 234. (Wis., 2015).

In *Heine*, a law enforcement officer stopped a motor vehicle for having one of the two stop lamps burned out. 574 U.S. 54, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014). The North Carolina statute however did not require two stop lamps, only one. *Id.* The US Supreme Court held that where the officer makes an objectively reasonable mistake of law as to an ambiguous statute, the mistaken belief can still form the basis for an investigatory stop. *Id.*

Shortly thereafter, in *State v. Hougton*, Wisconsin adopted the same rationale by holding "an officer's

objectively reasonable mistake of law may form the basis for a finding of reasonable suspicion,". 2015 WI 79, 364 Wis. 2d 234. The test for ambiguity is where the "law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view'. *Heine*, at 541 quoting *The Friendship,* 9 F.Cas. 825, at 826 (No. 5,125) (C.C.D.Mass.1812) (Story, J.)

As mentioned above, our statute is somewhat ambiguous as to what is precluded by Wis. Stat. §346.05. What constitutes the right half of the roadway could be reasonably interpreted as not only crossing into the left lane, but failing to maintain the right lane. Hamill's driving here would violate the latter of these two options, and in turn be a violation of 346.05. As Franklin testified, he did not believe that Hamill crossed the line, but was adamant that he had violated 346.05 as an unsafe lane deviation. Thus, even if he is incorrect his interpretation is reasonable.

CONCLUSION

Although the City concedes that Atty. Hamill did not waive his right to appeal this determination, the Court should affirm the Trial Court's decision that Ofc. Franklin had reasonable suspicion to stop the Defendant's vehicle. Atty. Hamill operated his vehicle from the dividing line, to the centerline, and back to the dividing line while riding each of those lines for a minimum of three seconds at 2:38 in the morning. This creates suspicion of OWI which is definitely reasonable. The Court should therefore find that reasonable suspicion exists just as the courts did in *Post*, *Popke*, & *Seward.*

Moreover, Ofc. Franklin's belief that Hamill violated §346.05 is either accurate, or an objectively reasonable mistake of law. In either scenario this establishes a reasonable basis for the stop.

Respectfully Submitted

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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 the brief is 17 pages and is 3,630 words.

I have submitted an electronic copy of the brief, which complies with the requirements of Wis. Stat. §809.19(12). I certifie 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 20th day of September, 2020.

By: _____

Kyle J. Sargent