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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2020AP001526
(Buffalo County Case No. 18TR248 & 18TR277)

COUNTY OF BUFFALO,

Plaintiff-Respondent,

V.

KEVIN J. RICH,

Defendant-Appellant.

**Appeal From The Judgment of Conviction, and
in the Circuit Court for Buffalo County,
Case No. 18TR248 & Case No. 18TR277**

The Honorable Rian W. Radtke, Circuit Judge

**BRIEF AND APPENDIX OF
PLAINTIFF-RESPONDENT**

THOMAS BILSKI
District Attorney
Buffalo County District Attorney's Office
State Bar No. 1017113
407 South Second Street
PO Box 8
Alma, WI 54610

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Circuit Court erroneously failed to suppress evidence based upon lack of reasonable suspicion to stop defendant Kevin Rich's vehicle.

The Honorable Rian W. Radtke did not err when he denied Defendant's Motion to Suppress. Deputy Mitchell Zastrow testified at the suppression hearing that he observed Defendant's vehicle second in line stopped at a stoplight. The light turned green. The first car left. The Defendant, after remaining for a brief period of time, followed the first car. Defendant revved his engine when he took off. Defendant turned onto a four-lane divided highway with two lanes going in the same direction of travel. Both the Defendant and the first vehicle were in the right lane. Defendant sped up to the first vehicle and got to a quarter vehicle length behind the first vehicle just before the two lanes merged to one lane. Deputy Zastrow observed the Defendant's vehicle jolt into the left lane to pass. There was not enough room to pass. Defendant then jolted his vehicle back into the original lane. Based upon Deputy Zastrow's observations as testified, the Court found the officer had reasonable basis for the stop.

II. Whether the Circuit Court erroneously failed to suppress evidence based on lack of reasonable suspicion to extend the traffic stop and request Defendant to perform field sobriety tests.

Judge Radtke did not err when he denied Defendant's Motion to Suppress when he found that Deputy Zastrow had reasonable suspicion of impairment by alcohol as opposed to mere consumption of alcohol prior to requesting the field sobriety tests. Deputy Zastrow testified to a strong odor of intoxicants and an admission by the Defendant of drinking two beers prior to the stop by the Defendant. With a strong odor of intoxicants and admission of drinking, along with the Deputy's testimony regarding the problematic and unusual driving, the Court found reasonable suspicion to justify requesting field sobriety tests.

III. Whether the Court erroneously failed to suppress the second evidentiary breath test because there was no voluntary consent.

Judge Radtke did not err when he denied Defendant's motion to suppress the second breath test. The Court found that Deputy Zastrow read the Informing the Accused form to the Defendant which reads, "law enforcement will be requesting one or more samples of breath, etc." The Defendant consented to providing a breath sample and did not revoke his consent. As such, the Court found that law enforcement's search of Defendant's breath did not go beyond the scope of the consent.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not appropriate in this case under Wis. Statute (Rule) 809.22, as the briefs fully present and meet the issue on appeal and fully develop the theories and legal authority on each side that oral arguments would be of such marginal value that it would not justify the additional expenditure of court time or cost to the litigant.

Publication is not requested under Wis. Statute (Rule) 809.23.

STATEMENT OF THE CASE

A suppression hearing was held before the Honorable Rian W. Radtke on December 2, 2019. After the evidentiary hearing, the Court set a briefing schedule for the parties. The Court issued an Oral Ruling denying Defendant's motion to suppress evidence on February 24, 2020. The parties then agreed to resolve this matter on a Stipulated Facts Trial. Pursuant to the Stipulated Facts Trial, Judge Radtke found in favor of Buffalo County and found Kevin J. Rich guilty of OWI and PAC in 18TR248 and 18TR277 and ordered a civil forfeiture pursuant to Wis. Stat. §346.65; 6-month driver's license revocation; and court-ordered driver assessment and safety plan.

STATEMENT OF FACTS

Buffalo County Deputy Mitchell Zastrow was monitoring traffic in the early morning hours of February 18, 2018. He was parked in Spur Lane lot at the intersection of State Highways 54 and 35. (TR. 5:15-6.6). Deputy Zastrow observed the defendant, Kevin Rich's red Jeep stopped at a red light behind the sedan. When the light turned green, the sedan turned left on northbound Highway 35. The Jeep remained at the stoplight for a brief period of time. Then, the Jeep took off in a manner revving its engine loud enough to be heard through closed windows in the squad car. The engine revving continued until the Jeep was approximately a quarter of a car length behind the sedan (*Id.* at 6:6-16)

Both vehicles were in the right lane of the two northbound lanes (*Id.* 6-17). Defendant Rich remained behind the sedan in the right lane until Rich jolted his

vehicle into the left lane just before the two lanes merged into one (*Id.* 7:8-25). When it came down to the end of the two lanes, the Jeep jolted back into the right lane behind the sedan and continued to follow the sedan at a quarter of length behind it. After viewing this erratic, unusual and illegal driving, Deputy Zastrow conducted a traffic stop (*Id.* 8:1-5)

Kevin Rich identified himself after the stop. There were no passengers in the Jeep (*Id.* 8:9-15).

Deputy Zastrow noted a strong odor of intoxicants emitting from Mr. Rich's breath, Mr. Rich admitted that he knew it was a bad idea to pass the sedan, and acknowledged that he was driving too close to the sedan (*Id.* 8:18-28). Defendant then admitted to consuming two beers that day (*Id.* 8:24-25; 9:1).

After Mr. Rich completed field sobriety tests, Deputy Zastrow placed Mr. Rich under arrest for operating while intoxicated. While waiting for the tow truck, Deputy Zastrow read the Informing the Accused form to Mr. Rich and he consented to submit a sample of his breath (*Id.* 10:10-13). At the jail, Deputy Zastrow reviewed the breath test procedure. At no point did Mr. Rich revoke consent for a breath test (*Id.* 10:14-21). After a 20-minute observation, Mr. Rich blew into the intoximeter which resulted in a deficient sample for the first series of two samples. Mr. Rich completed a second test sequence which provided an adequate test result. Deputy Zastrow testified that Mr. Rich did not revoke his consent to blow into the intoximeter for the second test sequence (*Id.* 15:4-5).

ARGUMENT

I. The Circuit Court properly found that Deputy Zastrow had reasonable suspicion necessary to stop Mr. Rich's vehicle for a traffic violation.

a. Standard of Review

In reviewing a trial court denial of a motion to suppress, the Circuit Court's findings of fact are upheld unless clearly erroneous. *State v. Popp*, 2014 WI App 100, 91, 13, 359 Wis. 2d 696, 855 N.W.2d 471. The application of constitutional principles to the facts are reviewed de novo. *Id.*

b. Reply

Defendant argues that Deputy Zastrow stopped him without possessing an objectively reasonable suspicion that he had committed a traffic violation. In this case, the facts go beyond reasonable suspicion to probable cause to believe a traffic violation had occurred. See *State v. Krier*, 16 v. 5 Wis. 2d 673, 678, 478 N.W.2d 63, 65 (Ct. App. 1991) which states that an initial stop of a motorist is reasonable if the officer had probable cause to believe a traffic violation had occurred. Here, Deputy Zastrow wrote the Defendant a citation for following an automobile too closely in violation of Wis. Stat. §346.14(1m). Also, Deputy Zastrow issued a warning for unnecessary acceleration.

At the suppression hearing, Deputy Zastrow testified that he observed the Defendant remain stopped on a green light after the sedan in front turned left after they both initially stopped for a red light. Then, the Defendant revved his engine loudly which included catching up to the sedan. The Defendant moved in the right

lane of two northbound lanes on State Highway 35. He closed to within one-quarter of a car length to the sedan after which he jolted his vehicle into the left lane to pass. After realizing that the two lanes were merging into one lane, the Defendant jolted his vehicle back behind the sedan and continued to follow the sedan within 5-6 feet behind the vehicle. While there was no testimony regarding the speed of either vehicle, this was on a state highway with a speed limit of 55 mph. Following any vehicle on a state highway within 5-6 feet is unreasonable and a violation Wis. Stat. §346 14(1m).

Defendant cites *Hibner v. Lindaver*, 18 Wis. 2d 451, 456, 118, N.W.2d 873 (1963) to provide guidance how the trier of fact is to apply the statutory factors in determining “too close,” “including speed, amount of traffic, road conditions, and opportunities for clear vision.” Defendant argues that his vehicle closed within 5-6 feet of the sedan only to pass the sedan. The testimony was that the Defendant remained within one-quarter car length behind the sedan after the failed pass attempt when he jolted his vehicle back behind the sedan. (TR 7:14-21)

Applying the Hibner standard to the facts, it was early morning on March 22, 2018, on State Highway 35 with a 55 mph speed limit. Head lights were presumably on in both vehicles. Judge Radtke found that:

“Defendant’s argument is that the close following was normal when passing really makes no sense to the Court as there were two lanes traveling in the same direction and the --- there was no reason why the Defendant couldn’t have utilized the passing lane to pass without having to reach such short distance or close proximity to the vehicle in front, and so based on these facts – that the -- -- that law enforcement observed, the Court finds that law enforcement had the requisite reasonable suspicion to believe that the

Defendant had committed or was committing an offense to justify the traffic stop. "OR 5:17-25; 6:1-5)

Taking into account passing lane, night-time headlights, and this was on a state highway with a speed limit of 55 mph, following a vehicle at a distance of 5-6 feet is not reasonable and prudent. It is very dangerous. Perhaps, the close distance was why he jolted his vehicle into the passing lane and jolted back into the right lane with his failed passing attempt. No doubt there were traffic signs signaling a merge of the two lanes to one which apparently the Defendant failed to see prior to the attempted pass.

Deputy Zastrow also issued a warning citation to the Defendant for unnecessary acceleration in violation of the Buffalo County traffic ordinance TR101.62(2)(1). The Deputy testified that after pausing at a green light, the Defendant then revved his engine in a manner where he could hear the engine through the closed window of his squad car and proceeded to continue revving his engine until it was approximately a quarter of a car length behind the sedan. (TR 6:11-16). Defendant attempts to deflect the unnecessary engine revving as gaining speed to pass. Defendant could have simply followed the sedan when the lights turned green and turned into the left lane and passed the sedan without revving his engine; without following too closely and without jolting his vehicle back and forth between lanes.

Also, Deputy Zastrow had reasonable suspicion to conduct an investigatory stop for impaired driving. This Court addressed the issue of reasonable suspicion,

“The question of what constitutes reasonable suspicion is a common-sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience [?]” *State v. Colstad*. 2003 WI App 25, 91, 8, 200 Wis. 2d 400, 659, N.W.2d 394. Here, defendant’s bad driving justified an investigatory stop for impaired driving.

II. Deputy Zastrow had reasonable suspicion to justify expanding the scope of the traffic stop for the performance of field sobriety tests.

In the Defendant’s brief, “the defense reiterates that no driving behavior indicating impairment existed in this case; therefore, other indicators of impairment must be more substantial,” citing *County of Sauk v. Leon* (Brief page 12). This is the crux of their argument that strong order of an intoxicant and an admission of alcohol consumption is not sufficient to justify field sobriety tests. Defendant argues that Deputy Zastrow’s observation amounted to mere consumption of alcohol rather than impairment.

Contrarily, Judge Radtke found; “Also, the law enforcement observed problematic driving behavior in that the Defendant had been revving his engine when leaving a stoplight, which was unusual or at least it seems unusual to the Court; also, the Defendant was following a vehicle at a distance a quarter length of a vehicle and was changing lanes in a jolting manner. I think all of these facts combined satisfy reasonable suspicion to justify requesting the standard field sobriety tests in this matter.”

(OR. 06:13-25)

Judge Radtke's findings are not erroneous. They match the testimony of Deputy Zastrow. They are simply contrary to the defense view that there was no bad driving.

The "problematic driving behavior" on its own is an indicator of impairment. An officer is "not required to rule out the possibility of innocent behavior" in his investigation. *State v. Anderson* 155 Wis. 2d 77, 84 454 N.W.2d 763 (1990).

An officer needs probable cause to believe that a driver of a vehicle was driving while impaired in order to expand his investigation. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999), states that the phrase "probable cause to believe" in Wis. Stat. 343.303 refers "to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop... but less than the level of proof required to establish probable cause for arrest." The *Renz* court outlined an example of an OWI investigation. First, if after making the lawful investigatory stop, the officer makes observations that cause the officer to suspect that the driver is driving while drunk but that do not provide sufficient basis to "establish probable cause for arrest for an OWI violation, the officer may request the driver to perform field sobriety tests."

In this matter, Deputy Zastrow observed an odor of intoxicants and was told by the Defendant that he had drank two beers that night. Based on Deputy Zastrow's training and experience, and Mr. Rich's driving behavior, he suspected that Mr. Rich was impaired and therefore expanded the scope of the stop, which is reasonable in light of all of the circumstances.

III. Deputy Zastrow did not exceed the scope of Mr. Rich's consent to submit a breath sample.

Deputy Zastrow testified he read Mr. Rich the Informing the Accused form. Mr. Rich consented to provide a breath sample which he did. It took the Defendant six attempts to complete one breath test. The Defendant consented and did not revoke his consent. Judge Radtke's findings are supported by the evidence presented at the suppression hearing:

“And the defendant finally argues that law enforcement conducted an illegal search because law enforcement went beyond the scope of the Defendant's consent. The Defendant argues that he only consented to one breath sample or one sequence of samples. There were no facts presented to the Court to support such a conclusion. Law enforcement read the Informing the Accused, which says, “Law enforcement will be requesting one or more samples of breath...” The Defendant consented and did not revoke his consent. Six samples were provided, which resulted in a completed breath test. There are no facts to suggest that the Defendant intended to limit his consent to the breath tests in any way. As such, the Court finds that law enforcement's search of the breath of the Defendant did not go beyond the scope of consent received by the Defendant; and in summary here, the Defendant's motion to suppress is hereby denied.”

(OR. 07:1-22)

CONCLUSION

For the foregoing reasons, Buffalo County respectfully requests that this Court affirm the Circuit Court to decision to find the Defendant guilty of operating while intoxicated and operating with a prohibited alcohol concentration.

Dated this 25th day of June, 2021.

Respectfully submitted,

Electronically signed by:

THOMAS BILSKI

District Attorney

Buffalo County District Attorney's Office

State Bar No. 1017113

Attorney for
Plaintiff-Respondent

BRIEF CERTIFICATION

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

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,656 words.

Dated: June 25, 2021

Respectfully submitted,

Electronically signed by:

THOMAS BILSKI

District Attorney

Buffalo County District Attorney's Office

State Bar No. 1017113

Attorney for
Plaintiff-Respondent

CERTIFICATION OF MAILING

I, Thomas Bilski, a licensed Wisconsin Attorney, hereby certify that copies of Plaintiff- Respondent's Brief and Appendix in Appeal No. 2020AP001526 were placed in the U.S. Mail, with proper postage affixed this 25th day of June, 2021, addressed to the following as indicated below:

Clerk of the Wisconsin Court of Appeals (10)
P.O. Box 1688
Madison WI 53701-1688

Attorney Adam P. Nero (3)
Attorney Robert Paul Maxey
811 First St, Ste. 101
Hudson, WI 54016

Attorney General(3)
Wisconsin Department of Justice
P.O. Box 7857
Madison WI 53707-7857

CERTIFICATE OF COMPLIANCE

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 this 25th day of June, 2021.

Respectfully submitted,

Electronically signed by:

THOMAS BILSKI

District Attorney

Buffalo County District Attorney's Office

State Bar No. 1017113

Attorney for
Plaintiff-Respondent

RULE 809.19(12) ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copies of the brief and appendix are identical to the text of the paper copies of the brief and appendix.

Dated: June 25, 2021

Respectfully submitted,

Electronically signed by:

THOMAS BILSKI

District Attorney

Buffalo County District Attorney's Office

State Bar No. 1017113

Attorney for
Plaintiff-Respondent