STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2020AP001526

COUNTY OF BUFFALO,

Plaintiff-Respondent,

v.

KEVIN J. RICH,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR BUFFALO COUNTY, CASE NOS. 18 TR 248 AND 18 TR 277, THE HONORABLE RIAN W. RADTKE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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This Court should vacate Mr. Rich's convictions, reverse the order of the circuit court denying his suppression motions, and remand for further proceedings for three reasons, in addition to those raised in his brief-in-chief. First, Officer Zastrow's stop of Mr. Rich's vehicle was not based upon reasonable suspicion, let alone probable cause, that the vehicle's driver had committed or was committing an offense. Second, Officer Zastrow lacked reasonable suspicion of impairment of alcohol to justify expanding the scope of the traffic stop to have Mr. Rich perform field sobriety tests. Finally, this Court should not abandon neutrality and consider the County's undeveloped argument devoid of legal authority that Deputy Zastrow did not exceed the scope of Mr. Rich's consent to submit a breath sample.

I. Officer Zastrow's stop of Mr. Rich's vehicle was not based upon reasonable suspicion, let alone probable cause, that the vehicle's driver had committed or was committing an offense.

A traffic stop is generally reasonable if the officer has probable cause to believe that a traffic violation has occurred, or has grounds to reasonably suspect a violation has been or will be committed. *See* ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996); ***Terry v. Ohio***, 392 U.S. 1 (1968); ***Berkemer v. McCarty***, 468 U.S. 420, 439 (1984).

"Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that a traffic violation has occurred." ***State v. Popke***, 2009 WI 37, ¶ 14, 317 Wis. 2d 118, 765 N.W.2d 569 (citing ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)).

Even if no probable cause exists, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed. ***Id***. ¶ 23.

The County's claim that "the facts go beyond reasonable suspicion to probable cause to believe a traffic violation had occurred" is erroneous. (Brief of Plaintiff-Respondent at 7.) Officer Zastrow alleges that he stopped Mr. Rich's Jeep because he heard its engine revving and witnessed it following the sedan with an approximated one fourth car length gap when attempting to pass the sedan. (R. 120 at 6:12–16.)

However, in weighing the considerations established in ***State v. Hibner***, 18 Wis. 2d 451, 456, 118 N.W.2d 873 (1963), it is clear that Mr. Rich was not violating sec. 346.14(1). As explained by the ***Hibner*** court, distance alone is not enough to conclude that Mr. Rich was violating sec. 346.14(1). 18 Wis. 2d at 456. Rather, what constitutes "too close" a distance "will ordinarily be a question of fact." ***Id***.

Officer Zastrow first observed Mr. Rich's Jeep legally stopped behind the sedan at a red light. (R. 120 at 5:15–6:6.) Vehicles which have been collectively stopped by a red light proceed through the green light in close proximity to each other. Therefore, both the sedan and Mr. Rich's Jeep were in close proximity to each other due to the fact that both vehicles had been collectively stopped by the red light. Once that light turned green, both vehicles then began traveling together in the same direction at this same close proximity to each other.

Mr. Rich's Jeep was further proceeding on a highway where it was legally permissible for vehicles to use the left lane as a passing lane. (*Id*. at 22:20–23); *see also* Wis. Stat. § 346.08(2) ("The operator of a vehicle may overtake and pass another vehicle … [u]pon a street or highway with unobstructed pavement of sufficient width to enable 2 or more lines of vehicles lawfully to proceed, at the same time, in the direction in which the passing vehicle is proceeding …").

Moreover, Officer Zastrow provided a logical and rational explanation for why he observed the distance between Mr. Rich's Jeep and

the sedan decrease to approximately a quarter of a car length as Mr. Rich was attempting to pass. Specifically, Officer Zastrow confirmed the incontrovertible fact that acceleration is necessary in order for one vehicle to successfully pass another vehicle when both vehicles are traveling in the same direction and have been maintaining the same speed generally. (R. 120 at 23:7–19.) He further confirmed that as a result of the one vehicle's acceleration, the distance between those two vehicles will decrease. (*Id*.) Likewise, there is a logical and rational explanation for why Officer Zastrow heard Mr. Rich's Jeep revving when he observed it attempting to pass the sedan. Specifically, as a vehicle accelerates, the speed of revolution of its engine increases, resulting in the engine becoming audibly louder. As such, what Officer Zastrow observed and heard pertaining to Mr. Rich's Jeep when it legally attempted to pass the sedan was not only normal, but what is expected when such an act is undertaken. Thus, any claim that Mr. Rich engaged in "unnecessary engine revving" is erroneous. (Brief of Plaintiff-Respondent at 8.)

Additionally, Officer Zastrow did not observe Mr. Rich's Jeep: (1) weaving or swerving across lane lines, (2) straddling a lane line, (3) drifting, (4) turning with a wide radius, (5) unreasonably varying its speed, (6) driving conspicuously under the speed limit, or (7) unjustifiably accelerating or decelerating. Rather, Officer Zastrow witnessed Mr. Rich's Jeep deliberately and appropriately decelerate and return back to the right lane of travel out of an abundance of caution as there was not going to be enough roadway to safely complete a passing of the sedan. (*Id*. at 21:23–12 and 23:2–6.) While talking with Officer Zastrow, Mr. Rich further confirmed that he made the decision not to pass the sedan because he did not believe a successful passing could be safely achieved prior to the highway narrowing to a single lane of travel. (*Id*. at 22:6–10.) As such, the County's claim that Mr. Rich engaged

in "bad driving" is contradicted by the facts. (Brief of Plaintiff-Respondent at 9.)

Ultimately, Officer Zastrow's testimony that he observed the distance between Mr. Rich's Jeep and the sedan decrease to approximately a quarter of a car length as Mr. Rich was attempting to pass is insufficient to establish probable cause that Mr. Rich's vehicle was following too closely. (R. 120 at 6:15–16.) Considering all the facts in this case, this distance is neither unreasonable nor imprudent.

Accordingly, Officer Zastrow's stop of Mr. Rich's vehicle was not based upon reasonable suspicion, let alone probable cause, that the vehicle's driver had committed or was committing an offense, specifically, following too closely, in violation of sec. § 346.14(1). Thus, all of the evidence obtained as a result of this unlawful seizure must be suppressed. ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963); ***State v. Carroll***, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1; *see also* ***Mapp v. Ohio***, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

II. Officer Zastrow lacked reasonable suspicion of impairment of alcohol to justify expanding the scope of the traffic stop to have Mr. Rich perform field sobriety tests.

Before pulling Mr. Rich out of his car for standardized field sobriety tests SFSTs, Officer Zastrow only noticed an odor of alcohol. (R. 120 at at 8:22–23.) Mr. Rich confirmed that he had been drinking. (*Id*. at 8:24–9:1.) While the County argues this is "two facts," they really just prove one fact because each is merely evidence that Mr. Rich had consumed alcohol. He showed no signs of impairment from that consumption, such as slurred speech, fumbling with documents, rolling down the wrong window, and so forth. This is not enough.

During a valid traffic stop, "[a]n expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion." ***State v. Hogan***, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop. ***Id.*** Here, Officer Zastrow alleges that Mr. Rich had a strong odor of intoxicants emitting from his breath. (R. 120 at 8:22–23.) When asked how much he had to drink that day, Mr. Rich informed Officer Zastrow that he had consumed two beers. (*Id*. 8:24–9:1.)

The Defense reiterates that no driving behavior indicating impairment existed in this case. *See* ***Hibner***, 18 Wis. 2d at 456. As such, other indicators of impairment must be more substantial. ***County of Sauk v. Leon***, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). "When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial." ***Id***. at ¶ 20. Officer Zastrow saw no swerving, weaving, or other driving indicating the lack of a steady hand. What Officer Zastrow saw was good driving. While directly behind the sedan, Mr. Rich was unable to see that the highway narrowed to a single lane a short distance ahead. However, once in the passing lane, Mr. Rich gained a clear view of what lay ahead as the sedan was no longer obstructing visibility. Seeing now that the left, passing lane of the highway was coming to an end a short distance ahead, Mr. Rich determined that a successful passing could not be safely achieved prior to the highway narrowing to a single lane of travel. He therefore deliberately and appropriately decelerated and returned back to the right lane of travel. (*Id*. at 21:23–12 and 23:2–6.) Such actions do not offer proof of impairment. Rather, Mr. Rich's decision to decelerate and move back into the non-passing lane demonstrates apt and astute driving.

After the traffic stop, Officer Zastrow observed only one or possibly two indicators of alcohol consumption. However, he saw no signs of the requisite impairment by alcohol. He noted an odor of alcohol. Mr. Rich's confirmation that he had consumed a legal and appropriate amount. "Not every person who has consumed alcoholic beverages is 'under the influence.'" ***State v. Gonzalez***, 2014 WI App 71, ¶ 13, 354 Wis. 2d 625, 848 N.W.2d 905 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). He never saw: (1) glossy or blood shot eyes, (2) soiled clothing, (3) open containers, (4) drugs or paraphernalia, or any other unusual actions. He never heard (1) slowed or slurred speech, (2) inconsistent responses, or (3) unusual statements. Mr. Rich was responsive to Officer Zastrow's questions. Nor did Officer Zastrow witness Mr. Rich fumble with his documents or have difficulty controlling his vehicle. As such, the record lacks any evidence that Mr. Rich had issues with his fine motor skills. Again, in weighing the considerations established in ***Hibner***, it is clear that Mr. Rich was not violating sec. 346.14(1). Further, Mr. Rich returned to the right lane of travel in a deliberate and appropriate manner.

Therefore, when Officer Zastrow expanded the scope of the stop, any evidence indicating actual impairment – as opposed to mere consumption – was slight at best, and had questionable reliability. Accordingly, there were insufficient facts to lead a reasonable police officer to believe that Mr. Rich had consumed a sufficient amount of alcohol to cause him to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle. ***State v. Resch***, 2011 WI App 75, ¶ 16, 334 Wis. 2d 147, 799 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Thus, all of the evidence obtained as a result of the unlawful extension must be suppressed. ***Carroll***, 2010 WI 8 at ¶ 19; ***Wong Sun***, 371 U.S. at 484; *see also* ***Mapp***, 367 U.S. at 655.

III. This Court should not consider the County's undeveloped argument devoid of legal authority that Deputy Zastrow did not exceed the scope of Mr. Rich's consent to submit a breath sample.

The County baldly states, without any citation to law, that "Deputy Zastrow did not exceed the scope of Mr. Rich's consent to submit a breath sample." (Brief of Plaintiff-Respondent at 14.) As such, the County's argument is wholly undeveloped.

This Court will not consider inadequate arguments or arguments that lack sufficient references to legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Nor will it develop an argument for the County. ***Indus. Risk Insurers v. Am. Eng'g Testing, Inc.***, 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82 ("we will not abandon our neutrality to develop arguments" for the parties); *see also* ***State v. Anker***, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 855 N.W.2d 483 ("We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission that there was no probable cause for Anker's arrest.").

Accordingly, this Court should not consider the County's undeveloped argument devoid of legal authority that Deputy Zastrow did not exceed the scope of Mr. Rich's consent to submit a breath sample.

CONCLUSION

For the foregoing reasons, Mr. Rich respectfully requests that this Court vacate his convictions, reverse the order of the circuit court denying his suppression motions, and remand for further proceedings.

Dated this 12th day of July, 2021.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2,252 words.

Dated this 12th day of July, 2021.

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