

RECEIVED
05-12-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2021AP000327

STATE OF WISCONSIN,
Plaintiff-Appellant,
v.
JOHN W. LANE,
Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING
EVIDENCE IN THE CIRCUIT COURT OF PORTAGE
COUNTY, BRANCH 3, THE HON. THOMAS
FLUGAUR PRESIDING

BRIEF AND APPENDIX OF
PLAINTIFF-APPELLANT

LOUIS MOLEPSKE
District Attorney – Portage County
JEDIDIAH J. DODGE
Assistant District Attorney
State Bar #1113139
Attorneys for Plaintiff- Respondent
Office of the District Attorney
1516 Church St.
Stevens Point, WI 54481
(715) 346-1300
(715) 346-1236 (Fax)
jedidiah.dodge@da.wi.gov

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	3
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	3
STANDARD OF REVIEW.....	3
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT.....	7
CONCLUSION.....	10

TABLE OF CASES

State v. Dumstrey, 2016 WI 3, 366 Wis. 2d 64 (2016).....	7
Terry v. Ohio, 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed.2d 889 (1968).....	7, 8
In re Refusal of Anagnos, 341 Wis. 2d 576, 815 N.W. 2d 675 (2012).....	3, 8
State v. Post, 301 Wis. 2d 1, 733 N.W. 2d 634 (2007).....	3, 4, 7, 8, 9
State v. Jackson, 147 Wis. 2d 824, 434 N.W.2d 386 (1989).....	8, 9, 10
State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996).....	8, 9
State v. Krier, 165 Wis. 2d 673, 478 N.W. 2d 63 (1991).....	9

State v. Guzy, 139 Wis. 2d 663, 407 N.W. 2d 548 (1987).....	9
State v. Anderson, 155 Wis. 2d 77, 454 N.W. 2d 763 (1990).....	9

ISSUE PRESENTED

Whether the trial court erred on December 4, 2020, when it suppressed all evidence obtained and observations made by City of Stevens Point Police Department Officer Justin Klein after a traffic stop on the defendant's vehicle was conducted on August 21, 2017, because the officer lacked reasonable cause for the traffic stop.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin (State), requests neither oral argument nor publication.

STANDARD OF REVIEW

The challenge by the State is limited to the trial court's finding that the officer lacked reasonable suspicion to conduct a traffic stop on the Defendant. "Whether there was probable cause or reasonable suspicion to conduct a stop is a question of constitutional fact, which is a mixed question of law and fact to which we apply a two-step standard of review." *In re Refusal of Anagnos*, 2012 WI 64, ¶ 21, 341 Wis. 2d 576, 815 N.W. 2d 675 (2012), quoting *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W. 2d 634. "First, we review the circuit court's findings of historical fact under the clearly erroneous standard." *Id.* "Second, we

review the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court and the court of appeals.” *Id.*

STATEMENT OF THE CASE AND FACTS

The State of Wisconsin filed a criminal complaint against the defendant, John W. Lane, on September 14, 2017. (4:1-3; A-AP 001-003). The complaint alleged that on or about Monday, August 21, 2017, in the City of Stevens Point, Portage County, Wisconsin, Lane drove a motor vehicle while under the influence of an intoxicant, as a third offense, contrary to sec. 346.63(1)(a), 346.65(2)(am)3 Wis. Stats., and drove a motor vehicle with a prohibited alcohol concentration of 0.08 or more, to-wit: did have a blood alcohol level of .130, as a third offense, contrary to sec. 346.63(1)(b), 346.6(2)(am)4 Wis. Stats. (4:1; A-AP 001).

According to the complaint, on August 21, 2017, at 2:10 A.M., Officer Klein of the Stevens Point Police Department was travelling North on I-39, a four-lane highway, when he saw a motorcycle go from the right lane over the white dotted line into the left lane, then travel quickly back to the right lane, without signaling any lane changes. (4:2; A-AP-002). Klein stopped the motorcycle and identified the driver as the defendant, John W. Lane. (4:2; A-AP-002). Officer Klein immediately smelled a strong odor of alcohol and saw that Lane’s eyes were bloodshot and glassy. (4:2; A-AP-002). Lane stated that he was coming from Morey’s Bar and had consumed one beer there. Officer Klein conducted field sobriety tests, and based on observations during those tests, arrested Lane for OWI. (4:2; A-AP-002).

On April 27, 2018, Officer Justin Klein testified at a motion hearing. A portion of Officer Klein’s testimony concerned the basis for the stop of Lane’s motorcycle on August 21, 2017. Officer Klein testified that he observed Lane leave Morey’s Bar, late at night/early in the morning. (74:7; A-AP-010). Officer Klein stopped Lane’s motorcycle because he saw Lane “was initially in the right hand lane, went over

to the left-hand lane, no signal, then back over to the right hand-lane.” (74:5; A-AP-008). Klein admitted that Lane only deviated from the lane one time, and Klein admitted he saw no other concerning driving behavior. (74:6; A-AP-009). Officer Klein ultimately wrote a citation for unsafe lane deviation to Lane. (74:22; A-AP-025). Klein asked Lane where he was coming from, and Lane said he was coming from “Stevens Point.” (74:7; A-AP-010). Klein then asked Lane for a specific location, and Lane lied, saying that he was coming from the Post Office where he works. (74:7; A-AP-010). Klein said he initially observed Lane coming out of the parking lot of Morey’s Bar. (74:7; A-AP-010). Lane initially said he did not have anything to drink there, but after Klein told Lane he could smell alcohol coming from him, Lane admitted he had “one beer.” (74:8; A-AP-011). During this encounter, Officer Klein observed that Lane’s “speech was slurred,” he had “blood shot and glassy eyes,” and “I could also smell the odor of alcohol coming from his breath as he spoke to me.” (74:6; A-AP-009). These observations led Officer Klein to conduct field sobriety testing, and ultimately he arrested Lane for OWI 3rd.

The complaint also stated that Officer Klein transported Lane to St. Michael’s Hospital where Lane consented to a blood draw upon the officer’s request. Hospital staff member, Tricia Wierzba, drew two samples of Lane’s blood and placed them into the legal blood kit. Once the kit was sealed, she handed it back to Officer Klein who later sent the kit to the State Lab of Hygiene for testing. (4:2; A-AP-002).

Lane was transported to the Portage County Jail where he was booked in for OWI 3rd, and at that time he submitted to a preliminary breath test, which showed a result of .130%. (4:2; A-AP-002).

The case before the court has a lengthy procedural history. On November 22, 2017, the Defendant filed multiple Motions to Suppress. A Motion Hearing was then held on April 27, 2018. On July 24, 2018, the court granted the

Motion to Suppress Blood Test Result based on Withdrawn Consent. This ruling was appealed to the Court of Appeals where the Court reversed the circuit court and remanded the case back to the circuit court on December 3, 2019.

Lane's attorney filed motions to reconsider numerous motions on March 4, 2020. Among these was a motion to suppress evidence relating to Officer Klein's stop and arrest of Lane. (50:1-5; A-AP-052-056) This is the motion at issue in this appeal. Lane argues that because no traffic offense occurred and since no traffic offense occurred, the stop was unreasonable and any evidence from the stop should be suppressed. (50:4-5; A-AP-055-056).

The circuit court held a motion hearing regarding the motion to suppress on August 26, 2020. Testimony from Officer Klein was not taken during this motion hearing but the court viewed the video from Officer Klein's squad car prior to the hearing. (76:15; A-AP-071). The court stated that it observed the defendant driving close to the center line and make one slight lane deviation. The court stated as soon as that happened, the lights of the squad car turned on and Officer Klein conducted a traffic stop. (76:15; A-AP-071). The court stated that if the defendant brought the case to trial on an unsafe lane deviation, the defendant would be found to be not guilty. (76:18; A-AP-074). The court indicated that the law for unsafe lane deviation states that a driver is supposed to signal when the driver moves from one lane to the next and it cannot be done safely; otherwise, signaling is not required. (76:18; A-AP-074). The court heard arguments from the State and from the defendant's attorney. At the end of the motion hearing, the court asked that the parties submit briefs to the court to determine if reasonable suspicion existed to pull over Lane, without the traffic violation. (76:31; A-AP-087).

The circuit court held a decision hearing on December 4, 2020. At this decision hearing the court stated that the traffic stop of Lane, based on unsafe lane deviation, was not objectively reasonable. (77:3; A-AP-092). The court stated that Officer Klein began pursuing Lane after midnight, as

Lane left Morey's bar. (77:4; A-AP-093). Officer Klein followed Lane through several turns and onto the interstate but observed no traffic violations. (77:4; A-AP-093). The court found that Officer Klein lacked reasonable cause for the stop of lane and that all evidence derived following the stop was obtain and should be suppressed. (77:7-8; A-AP-096-097). The court held that there was no traffic violation and the mistake of law was not reasonable. (77:4; A-AP-093).

ARGUMENT

The issue presented before the court is whether the officer had reasonable suspicion to pull over the vehicle driven by John Lane on August 21, 2017. (4:2; A-AP-002). Officer Klein observed John Lane leave Morey's Bar during the early morning hours on August 21, 2017. (4:2; A-AP-002). Officer Klein followed John Lane from Morey's Bar onto I-39. (4:2; A-AP-002). While the two vehicles were on I-39, Officer Klein observed John Lane "suddenly swerve into the other lane briefly and then swerve back." (76:25; A-AP-081).

A. Reasonable Suspicion

A police officer may, under certain circumstances, temporarily detain a person for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest. *State v. Dumstrey*, 2016 WI 3, ¶ 17, 366 Wis. 2d 64 (2016). In the seminal case which has defined investigatory searches, the US Supreme Court decided "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. 1, at 22, 88 S.Ct 1868, 20 L.Ed.2d 889 (1968). In order to justify such a seizure, police must have reasonable suspicion that a crime or violation has been or will be committed; that is, "the police

officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 21. A *Terry* stop cannot be lawfully based on an officer’s bare hunch.

In determining if an investigatory traffic stop is supported by reasonable suspicion, an officer must point to specific and articulable facts, which taken together with rational inferences, reasonably warrants the traffic stop. *In re Refusal of Anagnos*, 341 Wis. 2d 576, ¶ 48, 815 N.W. 2d 675(2012), citing *State v. Post*, 301 Wis. 2d 1, ¶ 10, 733 N.W.2d 634 (2007). Reasonable suspicion is an objective test that determines what a reasonable police officer would reasonably suggest in light of his or her training and experience. *Id.* at ¶60. The Court must look at the totality of the circumstances to determine whether reasonable suspicion exists. *State v. Jackson*, 147 Wis. 2d 824, at 833-834, 434 N.W.2d 386 (1989).

The State concedes that Officer Klein testified he stopped the vehicle for unsafe lane deviation rather than Operating While Intoxicated. But the motivation or subjective reason of the stopping officer is not a relevant factor in determining the Fourth Amendment reasonableness of a traffic stop since an objective standard is used to judge the Fourth Amendment reasonableness of such a stop. An officer’s subjective reason for stopping a vehicle does not create a Fourth Amendment violation as long as there was a legally permissible justification to stop the vehicle. *Anagnos*, 2012 WI at ¶ 60.

The principal function of a *Terry* stop is to resolve the ambiguity of the defendant’s suspicious conduct and to establish whether the defendant’s suspicious activity/conduct is legal or illegal. *State v. Waldner*, 206 Wis. 2d 51, at 60, 556 N.W.2d 681 (1996); *Jackson*, 147 Wis. 2d 824, at 835. Suspicious activity justifying an investigative stop is, by its very nature, ambiguous. Unlawful behavior may be present or it may not. The behavior may be innocent. Still, officers have the right to temporarily freeze the situation so as to investigate further.

State v. Krier, 165 Wis. 2d 673, at 678, 478 N.W. 2d 63 (1991); *State v. Guzy*, 139 Wis. 2d at 676, 407 N.W. 2d 548 (1987).

The *Waldner* court pointed out that the focus is the reasonableness of the officer's intrusion into the defendant's freedom of movement. The reasonableness requirement involves a common sense test. *Waldner*, at 56 (citing *State v. Anderson*, 155 Wis. 2d 77, at 83, 454 N.W. 2d 763 (1990)). The question is "what would a reasonable police officer reasonably suspect in light of his or her training and experience." *Id.*

Many cases have addressed the facts necessary to create a reasonable suspicion. In *State v. Post*, the Wisconsin Supreme Court held that weaving within a single lane does not rise to reasonable suspicion on its own. However, the Court held that under the totality of the circumstances, including weaving within the single lane, there was reasonable suspicion to conduct an investigatory traffic stop. *Post*, 301 Wis. 2d 1, ¶ 37 (2007). The officer in *Post* observed no traffic violation, but observed the defendant's vehicle driving in an S-type pattern within the lane for about two blocks. *Id.*, at ¶¶5-6.

In *Waldner*, the officer observed the driver at a slow speed, then stop briefly where there was no stop sign, then accelerate at a high rate of speed (20-25mph). The officer then observed the driver stop and pour out a mixture of liquid and ice onto the ground. *Waldner*, at 53. The officer in *Waldner* agreed there was no traffic violation. The *Waldner* court found that under the totality of the circumstances, the officer had reasonable suspicion of OWI. *Id.*

In a non-OWI case, *State v. Jackson*, the Wisconsin Supreme Court addressed the issue of flight of a person who sees a police officer. In *Jackson*, the officer responding to a call saw a person run away upon seeing him. The officer did not catch this person, but learned from another person that the individual who fled had warrants. The officer

testified that he later stopped a person matching his description to find out “if he was the party that I had chased and possibly had warrants.” *Jackson*, at 826. The Court ruled that lawful behavior, i.e. flight from police, can create a reasonable suspicion, but that it depends on the totality of the circumstances. In this case, the Court determined that there was a reasonable suspicion that Jackson either did commit, was committing, or was about to commit a crime. *Jackson*, at 835.

Officer Klein’s traffic stop is supported by reasonable suspicion. There are specific and articulable facts, under the totality of the circumstances, which created reasonable suspicion. Lane was observed leaving a bar in the early morning hours. This alone would not create a reasonable suspicion, as not every person who has consumed alcohol is impaired. But Officer Klein could have reasonably inferred from where Lane was leaving and the time of night/morning, that there was a distinct possibility Lane had consumed alcohol. Officer Klein followed and observed Lane and only stopped him when he observed him swerve abruptly from the right lane, into the passing lane, and back into the right lane. This driving behavior create a reasonable suspicion that Lane’s “ability to safely control the vehicle” was impaired. Based on the totality of the circumstances, Officer Klein had reasonable suspicion that Lane was operating under the influence.

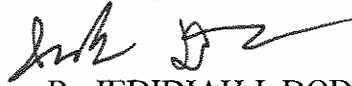
CONCLUSION

The State asserts that Officer Klein had sufficient reasonable suspicion, based on the totality of the circumstances to conduct an investigatory traffic stop on Lane’s vehicle on August 21, 2017. As a result, the State moves the Court of Appeals to reverse the circuit court’s suppression of any evidence that was obtained after the traffic stop for the reasons provided.

Dated this 5th day of May, 2021.

Respectfully submitted,

LOUIS MOLEPSKE
District Attorney – Portage County



By JEDIDIAH J. DODGE
Assistant District Attorney
State Bar #1113139

Attorneys for Plaintiff- Respondent

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3071 words.

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with the content requirements of Wis. Stat. § 809.19(2)(b); which contains at a minimum, a table of contents, the findings or opinion of the circuit court, a copy of any unpublished opinion cited under § 809.23, and portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in this appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of May, 2021.


Iddidiah I. Dodge
Assistant District Attorney

INDEX TO APPENDIX

1. Written order granting defendant's motion A-AP-001
2. Transcript of 4/27/2018 Motion Hearing A-AP-004
3. Defendant's Motions 3/4/2020 A-AP-052
4. Transcript of 8/26/2020 Motion Hearing A-AP-057
5. Transcription of 12/4/2020 Decision Hearing A-AP-090
6. Order On Defendant's Motion to Suppress A-AP-101