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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case Nos. 2021AP1006, 2021AP1620-CR

In the matter of the Refusal of Joshua John Hansen

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JOSHUA JOHN HANSEN,

Defendant-Appellant.

ON APPEAL FROM ORDER ENTERED ON MAY 7, 2021
AND CONVICTIONS ENTERED ON AUGUST 12, 2021
IN THE CIRCUIT COURT FOR DODGE COUNTY,
BRANCH 4, THE HON. KRISTINE A. SNOW PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was there reasonable suspicion to stop a vehicle when the officer observed a blue colored light on the registration plate of the vehicle?

This Court should answer: Yes.

Was there reasonable suspicion to pursue an impaired driving investigation after the traffic stop?

This Court should answer: Yes

Was the traffic stop unnecessarily prolonged by the officer's questions regarding the driver's consumption of alcohol?

This Court should answer: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the arguments should be fully developed in the parties' briefs. Publication of this Court's opinion is not warranted, since it does not qualify under this Court's publication operating procedures.

STATEMENT OF THE CASE

On November 5, 2020 at 9:31 p.m. Mayville Police Department Officer Scott Petrack, a police officer with over 18 years of traffic patrol experience and hundreds of OWI arrests, was on patrol in the City of Mayville, Dodge County,

Wisconsin, in a fully marked Ford Explorer police car. (Mot. Hrg. Tr. 6, 7) Officer Petrack observed a motor vehicle being driven westbound on Dayton Street that had **a rear license plate lamp that was blue in color**. (Tr. 8)

Officer Petrack attempted to catch up to the suspect vehicle as it drove from Dayton Street to School Street and then from School Street to Williams Street. (Tr. 9) The suspect vehicle then drove in a "zigzagging" manner and eventually got back onto School Street where Officer Petrack got behind it. (Tr. 9) Given that Wis. Stats. Section 347.07(2)(b) prohibits a person from driving on a highway a vehicle "that has displayed thereon **any color of light other than red on the rear**" (emphasis added) Officer Petrack activated the emergency lighting on his marked police vehicle. (Tr. 10)

The suspect vehicle, however, did not yield to the emergency lights. (Tr. 10) The suspect vehicle continued driving on School Street, stopped at a stop sign and then turned east onto Dayton Street. (Tr. 10) There was sufficient room available on School Street for the suspect vehicle to stop at that location. (Tr. 24-25) There was sufficient room at the

stop sign (a "lawful parking space right there by the stop sign") where the suspect vehicle could have stopped and pulled over. (Tr. 25) The suspect vehicle did not yield, however, and continued driving. The suspect vehicle drove half a block before turning and driving into a Kwik Trip parking lot that had six or seven open slanted parking stalls available for the driver to use. (Tr. 10) Rather than stop in an available parking stall, however, the suspect vehicle continued to the gas pumps where it stopped. (Tr. 10) The driver of the suspect vehicle **drove for more than 30 seconds** after Officer Petrack activated the emergency lights on his marked police vehicle. (Tr. 26)

This manner of driving struck Officer Petrack as "weird" and it caught his attention. (Tr. 14) Officer Petrack testified that he could be heard saying on the video "what is he doing?" while watching the continued driving rather than yielding to the police vehicle. (Tr. 14) Most people, according to Officer Petrack, would have yielded to the marked squad car's emergency lighting by the time they pulled onto Dayton Street. (Tr. 14) Most drivers would have pulled into a marked

parking stall rather than pull up by one of the gas pumps. (Tr. 15)

Officer Petrack spoke with the driver (Hansen) of the stopped vehicle and observed that Hansen's eyes were red, glassy and bloodshot. (Tr. 12) Officer Petrack smelled an odor of intoxicants on Hansen's breath. (Tr. 12) Officer Petrack heard slurred speech while speaking with Hansen. (Tr. 12) Officer Petrack asked Hansen if he had consumed any alcohol to which Hansen said that he had consumed four drinks in the past hour: two shots and two beers. (Tr. 13) During this brief (a minute and a half) conversation Hansen claimed that he was driving home but later said his destination was a bar. (Tr. 27)

Officer Petrack later had Hansen perform field sobriety tests to verify it was safe for him to drive. Hansen did not perform well on the tests and submitted a preliminary breath test result of 0.228. After being read the Informing the Accused form, Hansen refused to give a yes or no answer to submitting to a chemical test of his blood. A warrant was obtained and the chemical test was completed.

Hansen's alleged improper Refusal to Take a Chemical Test for Intoxication was assigned Dodge County Case number 2020 TR 5071. Hansen was also charged with Operating a Motor Vehicle While Intoxicated – 3rd Offense, Operating with a Prohibited Alcohol Concentration – 3rd Offense, Operating a Firearm While Intoxicated, Carrying a Concealed Weapon, and Possession of THC in Dodge County Case number 2021 CT 38. This case was filed February 12, 2021 and arose from the November 5, 2020 incident, as well.

Hansen requested a refusal hearing in the 2020 TR 5071 case and on March 15, 2021 filed a Motion to Suppress Fruits of Illegal Search and Seizure in both 2020 TR 5071 and 2021 CT 38. Hansen argued that there was not enough reasonable suspicion to stop his vehicle. An evidentiary hearing was held on April 30, 2021 where exhibits were introduced and Officer Petrack testified. After the hearing concluded, the Circuit Court orally denied Hansen's motion to suppress. The Circuit Court ruled Officer Petrack's observation of the blue light on the registration plate was enough reasonable suspicion to stop Hansen's vehicle. The Circuit Court also ruled the traffic stop was not unlawfully

extended. Officer Petrack's questions regarding drinking were asked before he completed the initial traffic stop duties and were de minimus intrusions.

The Circuit Court ultimately ruled Hansen's 2020 TR 5071 refusal was improper and entered an order on May 7, 2021. Hansen then entered no contest pleas on August 12, 2021 in 2021 CT 38 to Operating While Intoxicated – 3rd Offense and Operating a Firearm While Intoxicated. The Circuit Court sentenced Hansen to probation with conditions to include conditional jail on Count 1.

Hansen filed appeals in both 2020 TR 5071 and 2021 CT 38 with a motion to consolidate the appeals being granted.

STANDARD OF REVIEW

Whether a traffic stop was reasonable is a question of constitutional fact. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634 (2007); *State v. Knapp,* 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 (2005). The reviewing court applies a two-step standard of review when determining a question of constitutional fact because it is a mixed question of law and fact. *State v. Post*, 2007 WI 60; *State v. Martwick,* 2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 552 (2000). "We review the

circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles." *State v. Post*, 2007 WI 60, ¶ 8; *State v. Martwick,* 2000 WI 5*; State v. Payano–Roman,* 2006 WI 47, 290 Wis. 2d 380, 714 N.W.2d 548 (2006). The State carries the burden of proving that a traffic stop was reasonable. *State v. Post*, 2007 WI 60.

ARGUMENT

The correct legal standard for performing any traffic stop is reasonable suspicion. The Supreme Court of Wisconsin, in *State v. Houghton,* 364 Wis.2d 234, 868 N.W.2d 143, 2015 WI 79, (2015) held that an officer's reasonable suspicion that a motorist is violating or has violated a traffic law is sufficient for the officer to initiate a stop of the offending vehicle.

I. OFFICER PETRACK HAD REASONABLE SUSPICION TO STOP HANSEN'S VEHICLE BASED ON A LIGHT VIOLATION.

Officer Petrack had reasonable suspicion to believe Hansen violated Wis. Stats. Section 347.07 when he observed the blue rear license plate lamp. This statute states:

347.07 Special restrictions on lamps and the use thereof.

> (1) Whenever a motor vehicle equipped with headlamps also is equipped with any adverse weather lamps, spotlamps or auxiliary lamps, or with any other lamp on the front thereof projecting a beam of intensity greater than 300 candlepower, not more than a total of 4 of any such lamps or combinations thereof on the front of the vehicle shall be lighted at any one time when such vehicle is upon a highway.
> (2) Except as provided in sub. (3), or as otherwise expressly authorized or required by this chapter, **no person shall operate any vehicle or equipment on a highway which has displayed thereon**:
> (a) Any color of light other than white or amber visible from directly in front; or
> (b) **Any color of light other than red on the rear**; or
> (c) Any flashing light.
> (Emphasis added)

In his appellant brief Hansen argues that Officer Petrack was obligated to first "search Hansen's vehicle information" prior to performing the traffic stop. (Def.'s Br. 21) This search would allow Officer Petrack to rule out the possibility that Hansen was driving an undercover police vehicle. Officer Petrack was under no such obligation.

Officer Petrack could reasonably suspect that Hansen's vehicle was not used in police work or by a fire department. Officer Petrack was an experienced police officer with the Mayville Police Department and has performed traffic patrol duties for over 18 years. Officer Petrack has knowledge regarding police force vehicles and fire department vehicles. It is reasonable to believe Officer Petrack had more than a

"hunch" that Hansen's vehicle was not being used in police work or fire safety. Officer Petrack used articulable facts and reasonable inferences required for a lawful traffic stop. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) He knew it was a violation for a vehicle to display a blue colored light to the rear unless it was a law enforcement vehicle. Officer Petrack knew the likelihood of Hansen's vehicle being used for law enforcement was slim to none because **law enforcement vehicles do not display blue lights in the area Hansen's vehicle had an illuminated blue light.** Officer Petrack testified at the April 30, 2021 motion hearing:

> Q: What did you notice about the car?
> A: As it passed me and it stopped at Dayton and Henninger, I noticed that the rear license plate lamp was blue in color.
> Q: What caught your eye about the nature of the light?
> A: Blue isn't authorized – or only authorized on law enforcement vehicles.
> Q: And have you – where would a blue light be located on a law enforcement vehicle?
> A: Either on the roof, on the dash, bumpers, mirrors, on the top windshield inside the car, the portion area.
> Q: Would that blue light be part of the red and blue light for emergency lighting?
> A: Correct.
> **Q: Have you ever seen a police vehicle with a blue light that's used to light up a license plate?**
> **A: No.**
> (Tr. 9-8) (Emphasis Added)

In the Circuit Court's ruling, the Judge noted the following:

> "The only exception for blue on the back of the vehicles is with respect to the law enforcement vehicles. **The blue is in an area that law enforcement vehicles do not display blue light.**" (Tr. 99) (Emphasis added)

Additionally, an unmarked police vehicle would not want to be marked in any specific way to indicate it was a police vehicle. That would defeat the very purpose of being unmarked and indistinguishable from other civilian vehicles.

The purpose of any stop by an officer is to temporarily freeze the situation so that the officer can question the suspect as to his/her behavior. The questioning following the stop enables the officer to confirm or dispel the suspected violation(s) of law. In this case, Officer Petrack was permitted to stop Hansen's vehicle and question him about the blue light. If Hansen could provide a reasonable explanation as to why the registration light was blue, then the officer would most likely allow Hansen to be on his way. Officer Petrack's interactions with Hansen, however, led to an arrest for impaired driving.

II. OFFICER PETRACK HAD REASONABLE SUSPICION TO PURSUE AN IMPAIRED DRIVING INVESTIGATION.

Officer Petrack had reasonable suspicion to believe Hansen was an impaired driver. First, as Officer Petrack attempted to catch up to Hansen's vehicle he noticed some zigzagging type driving. When Officer Petrack activated the emergency lights of his marked police vehicle to perform the traffic stop, Hansen did not immediately pull over. Officer Petrack was right behind Hansen in a marked police vehicle with activated emergency lighting, yet Hansen continued to drive for over 30 seconds: Hansen drove to a stop sign, turned right, and drove down that street for half a block until driving into a Kwik Trip and parking at the gas pumps. Hansen drove right past designated parking spaces to park by the gas pump. This driving behavior would lead a reasonable police officer to suspect that the driver is inattentive or, more likely given the more than 30 seconds of failing to yield, impaired. Failing to pull over for more than 30 seconds, despite being followed at nighttime with the bright emergency lighting from a Ford Explorer police squad, would cause one to suspect that the

driver does not even know that there is a police squad car behind him.

During Officer Petrack's initial conversation with Hansen Officer Petrack observed multiple possible indications of intoxication – Hansen had red, glassy, bloodshot eyes, the odor of intoxicants, slurred speech. The next logical question for any police officer in this scenario is to ask how much have you had to drink tonight.

Officer Petrack provided specific and articulable facts that, under the totality of the circumstances, give rise to a reasonable suspicion that the driver is impaired. All of the clues Officer Petrack heard, smelled and observed led him to logically and reasonably pursue an impaired driving investigation.

III. OFFICER PETRACK DID NOT EXTEND THE TRAFFIC STOP BY ASKING HANSEN IF HE HAD CONSUMED ALCOHOL.

Officer Petrack asked one question ("how much have you had to drink tonight") that was clearly permissible when looking at the totality of the conversation and circumstances. Officer Petrack, after observing Hansen fail to yield for over 30 seconds and then smelling alcohol, hearing slurred speech

and observing red, bloodshot, glassy eyes during his initial conversation with Hansen, was permitted to ask how much alcohol had been consumed.

This one question about drinking took just seconds to ask and was done in the course of his initial conversation with Hansen. The Court determined that this question in no way extended the traffic stop:

> "The background questions that the officer asked after he pulled over the defendant here are pretty standard questions." (Tr. 99)

And, again, at page 104:

> "The questions about the drinking prolonging the stop, first of all, **I don't think they did prolong the stop**. Under the circumstances here **they were de minimus questions** at the beginning of his inquiry and the beginning of the stop before he'd even gone back to run the plate and do the ticket." (Tr. 104) (Emphasis added)

CONCLUSION

Based on the above argument, this Court should affirm the circuit court's final order and convictions against Hansen. Officer Petrack had reasonable suspicion to stop Hansen's vehicle and perform an impairment investigation. There was no undue extension of the traffic stop. The final order and judgment of the trial court should be affirmed.

Dated this 13 day of January, 2022.

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) for a brief produced with a proportional serif font. The length of this brief is 2976 words.

Dated this 13 day of January, 2022.

GILBERT G. THOMPSON
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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.

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 13 day of January, 2022.

GILBERT G. THOMPSON
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