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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021AP002086
LaCrosse County Cir. Court Case No. 20CT275

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TRAVIS R. BRALY,
Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION TO SUPPRESS
EVIDENCE, ENTERED BY THE LACROSSE COUNTY CIRCUIT COURT,
THE HONORABLE SCOTT L. HORNE PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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I. THE DENIAL OF THE MOTION TO SUPPRESS WAS ERROR BECAUSE IT STEMMED FROM CLEARLY ERRONEOUS FACTUAL AND LEGAL DETERMINATIONS BY THE CIRCUIT THE COURT, AND BECAUSE LAW ENFORCEMENT'S STOP, DETENTION, AND ARREST OF MR. BRALY WAS NOT JUSTIFIED

POSITION ON ORAL ARGUMENT

The relevant facts and the legal issues, positions, and arguments of this appeal should be clearly and exhaustively presented in this Brief. Counsel requests oral argument, if such were to help address this Court's outstanding questions or aid this Court's decision-making.

STATEMENT ON PUBLICATION

Publication may be warranted pursuant to Wis. Stat. § 809.23(1), because this case presents the opportunity to clarify and refine the law surrounding warrantless arrests.

STATEMENT OF THE CASE

Officer Donley unlawfully stopped Mr. Braly's vehicle in violation of the rights guaranteed all persons under the 4th, 5th and 14th Amendments to the United States Constitution; Article I, Sections 1, 9, and 11 of the Wisconsin Constitution; *Terry v. Ohio*, 392 U.S. 1 (1968); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Whren v. United States*, 517 U.S. 806 (1996); *State v. Post*, 2007 WI 60, 301 Wis. 2d 1; *State v. Guzy*, 139 Wis. 2d 663 (1987); and *State v. Johnston*, 21 Wis. 2d 411 (1963). As a result of the unlawful stop, Officer Donley obtained observations, statements, and a blood sample from Mr. Braly, all of which Mr. Braly requested be suppressed from use at trial as the product of the unlawful stop. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2D 86. The LaCrosse County Circuit Court, the Honorable Scott L. Horne Presiding, erred when it denied Mr. Braly's motion to suppress.

PROCEDURAL STATUS

On December 9, 2020, Officer Donley of the West Salem Police Department conducted a traffic stop of the defendant, Travis Braly. Officer Donley states in his report that he witnessed Mr. Braly's vehicle come to the intersection of Franklin St. W. and County Rd. M. and thought that the vehicle was not going to stop at the stop sign.

On January 7, 2021, Mr. Braly was charged with Operating a Motor Vehicle While Under the Influence/Operating With Prohibited Alcohol Concentration . (R1:1-2.).

On March 22, 2021, Defendant filed a Motion to Suppress the Unlawful Stop. (R.14. p.1-2;App.41-42)

On March 30, 2021, the Court held a hearing on the Motion to Suppress. (R.38 p.1-25 ;App.5-29)

On April 7, 2021, the Court gave its oral decision denying the Motion to Suppress. (R.37 p.1-8; App.31-38.)

On June 22, 2021, Mr. Braly pled guilty to Operating a Motor Vehicle While Under the Influence - 3rd Offense. (R.40 p.1-18)

On June 22, 2021, the Circuit Court sentenced Mr. Braly to: 125 days in the County jail; 22 days to be served on house arrest with GPS monitoring, 103 days stayed for use by the OWI court, Fines and costs totaling \$2,502, \$35 dollars to the West Salem Police Department, 27 months revocation, 27 months ignition interlock requirement, alcohol assessment, and driver's safety plan. (R.40 p.14-15)

On June 21, 2021 Mr. Braly filed a timely Notice of Intent to Pursue Postconviction Relief. (R.23 p.1-2)

On July 28, 2021, Nancy A. Dominski was appointed as appellate counsel. (R.44 p.1-2)

On November 30, 2021, Mr. Braly filed a timely Notice of Appeal. (R.45 p. 1-2.)

On January 11, 2022, the Clerk of Court filed the Index and the Transmission of record from circuit court to court of appeals. (App. p.3)

Mr. Braly now appeals the Circuit Court's order denying his Motion to Suppress. This Appellate Brief is timely if filed on or before February 21, 2022.

STATEMENT OF THE FACTS

On December 9, 2020, Officer Donley of the West Salem Police Department conducted a traffic stop of the defendant, Travis Braly, based on observations of the defendant's alleged driving conduct. Officer Donley advises in his report, that when he saw Mr. Braly's vehicle come to the intersection of Franklin St. W. and County Rd. M. he *thought that the vehicle was not going to stop* at the sign. (Emphasis added). (R.7 p.1)

In his Statement of Probable Cause, Officer Donley indicated he stopped Mr. Braly for for failure to stop at a stop sign. (R.6 p.1; App.39)

Later, Officer Donley testified that Mr. Braly entered the intersection. This is contradicted by facts and testimony, including Officer Donley's testimony that he remained in his lane as did the traffic behind him. (R.38 p.14-15; App.18-19)

Officer Donley pulled over on the right shoulder and when Mr. Braly passed, Officer Donley activated his emergency lights and initiated a traffic stop. (R.38 p.12-13; App.16-17)

Wis. Stat. §346.46 does NOT require a person to stop *prior* to a stop sign. Additionally, STOPPING and NOT HITTING a vehicle does not constitute probable cause to detain and arrest.

The court made the following factual findings and denied Mr. Braly's Motion to Suppress:

"I am finding the officer's testimony to be credible and finding that Officer Donley had a valid reason to stop Mr. Braly's vehicle as a result of the officer's perception that the vehicle had entered the intersection without coming to a stop that's required by the statute. And therefore, the court will deny the motion to suppress. (R.37 p.6 L.7-14; App.36)

STANDARD OF REVIEW

The temporary detention of individuals during a traffic stop constitutes a seizure of persons within the meaning of the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806, 809-10 (1996). An officer may perform an investigative stop if the officer reasonably suspects a person is violating a non-criminal traffic law. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (citing *State v. Griffin*, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994)); *see also State v. Colstad*, 2003 WI App 25, 13, 260 Wis. 2d 406, 659 N.W.2d 394 (investigatory stop was proper if there was reasonable suspicion to believe defendant had violated a traffic ordinance). Reasonable suspicion is based upon specific and articulable facts that together with reasonable inferences therefrom, reasonably warrant a *suspicion* that an offense has occurred or will occur. *State v. Longcore*, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

Appellate review of an order granting or denying a suppression motion presents an issue of constitutional fact. *State v. Johnson*, 2013 WI App 140, ¶6, 352 Wis. 2d 98, 841 N.W.2d 302. The appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous, and then independently review the application of constitutional principles to those facts. *Id.*

ARGUMENT

- I. THE DENIAL OF THE MOTION TO SUPPRESS WAS ERROR BECAUSE IT STEMMED FROM CLEARLY ERRONEOUS FACTUAL AND LEGAL DETERMINATIONS BY THE CIRCUIT THE COURT, AND BECAUSE LAW ENFORCEMENT'S STOP, DETENTION AND ARREST OF MR. BRALY WAS NOT JUSTIFIED.

A. The Court's finding that "Officer Donley had a valid reason to stop Mr. Braly's vehicle" is clearly erroneous.

Here the circuit court's findings may not be upheld because they were "clearly erroneous," *State v. Robinson*, 2010 WI 80, 786 N.W.2d 463, 327 Wis. 2d 302 (Wis. 2010).

Specifically, the Court misstates the law when it held: "What's required is that the officer have an honest belief that Mr. Braley's vehicle had entered the intersection without stopping as required. (R.37 p.5 L22-25; App.35). This is incorrect. What is required is reasonable suspicion that a violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (quoted source omitted). To establish reasonable suspicion, an officer "'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. "The temporary detention of individuals during a stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment.'" *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569

Furthermore, the officer initially claimed to be pulling Mr. Braly over for not stopping prior to the stop sign pursuant to his Statement of Probable Cause:

"At approximately 11:28 PM, on 12/10/20 I, Officer Donley with the Village of West Salem Police Department was patrolling within the Village limits when Mr. Braly failed to stop at a stop sign." (R.6 p.1; App. 39).

Presumably, a reasonable police officer would be familiar with the law(s) of his jurisdiction.

Ultimately, what constitutes reasonable suspicion necessary to justify an investigative stop of a vehicle 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, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (quoted source omitted).

Here, the statute does NOT require a person to stop *prior* to the stop sign:

346.46 Vehicles to stop at stop signs and school crossings.

(1) Except when directed to proceed by a traffic officer or traffic control signal, every operator of a vehicle approaching an official stop sign at an intersection shall cause such vehicle to stop before entering the intersection and shall yield the right-of-way to other vehicles which have entered or are approaching the intersection upon a highway which is not controlled by an official stop sign or traffic signal.

(2) Stops required by sub. (1) shall be made in the following manner:

(a) If there is a clearly marked stop line, the operator shall stop the vehicle immediately before crossing such line.

(b) If there is no clearly marked stop line, the operator shall stop the vehicle immediately before entering the crosswalk on the near side of the intersection.

(c) If there is neither a clearly marked stop line nor a marked or unmarked crosswalk at the intersection or if the operator cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the operator shall, before entering the intersection, stop the vehicle at such point as will enable the operator to efficiently observe the traffic on the intersecting roadway.

(2m) Every operator of a motor vehicle approaching a school crossing which is controlled by an adult school crossing guard appointed under s. 120.13

(31) or 349.215 shall follow the directions of the school crossing guard. If directed by the school crossing guard to stop, the operator shall stop the vehicle not less than 10 feet nor more than 30 feet from the school crossing and shall remain stopped until the school crossing guard directs the operator to proceed.

(3) Every operator of a vehicle approaching an official stop sign at a railroad crossing shall, before proceeding on or over such crossing, stop the vehicle immediately before crossing a clearly marked stop line. If there is no clearly marked stop line, the operator shall stop the vehicle not less than 15 nor more than 50 feet from the nearest rail.

(4)

(a) Every operator of a vehicle approaching an official stop sign or official temporary stop sign erected mid-block on or in the roadway by local authorities under s. 349.07

(6) shall cause such vehicle to stop not less than 10 nor more than 30 feet from such official sign except when directed to proceed by a traffic officer.

(b) As used in this subsection “mid-block” has the meaning given it in s. 346.33 (3).

The Court recognized that stopping prior to the sign is not required, and correctly stated:

“...the statutes place the obligation on a driver in Mr. Braly's position to stop the vehicle before entering the intersection. ***It's not necessary that he stop the vehicle prior to the stop sign itself.***” (R.37 p.4; App.34) (emphasis added.)

The Court further addressed this issue:

“As I indicated, however, it's not necessary that the vehicle stop at or prior to the stop sign; the statute requires that the vehicle stop before the intersection. (R.37 p.5, L. 5-8; App.35)

Here, the Court has correctly made clear that stopping his vehicle after the stop sign was not a traffic violation. Because there was no traffic violation, these charges should never have survived a probable cause hearing.

B. The Court's finding that Officer Donely is credible is clearly erroneous.

The Court states: “It appeared to the court that at 23:27:14 there appeared to be a slight immediate hesitation or swerve to the left as the officer was passing the intersection and then the officer immediately pulled over – pulled over.” (R.37 p. 5 L.15-19; App.35)

Contrast the Court's findings of a “slight immediate hesitation or swerve” with the officer's sworn testimony “I jerked my car to the left to avoid being struck.” (R.38 p.7 L.3; App 11), and “[Y]ou can also see it on this video how close he got to my squad after I jerked the vehicle to the left.” (R.38 p.8 L.8-10). Contrary to Officer Donely's testimony the video does not show what the Officer claims (Video:23:27:05). And the court's description of a “slight immediate hesitation or swerve” differ significantly from Officer Donely's statement that “I jerked the vehicle to the left.” (R.38 p.7 L3; App.11). At best, Officer Donely is exaggerating the facts, at worst, he is misstating them – either way he is not credible.

At Suppression Hearing on October 30, 20018, Officer Donley testified under oath to the following:

I pulled the vehicle over because it ran the stop sign and came out into the intersection of Highway M, nearly striking the side of my squad car before coming to a stop in the northbound lane of Highway M. Right before striking my vehicle. (R.38 p. 6 L19-23).

Yet, Officer Donley says nothing in the Probable Cause statement about Mr. Braly entering the intersection. (R.6 p.1; App 39). That Mr. Braly did NOT enter

the intersection and/or impede traffic is clear from Officer Donley's testimony during cross-examination.

Q. Officer Donley, just – there was also a vehicle that was behind you. Correct?

A. I believe so.

Q. And it's true that vehicle didn't swerve to the left. Correct?

A. Correct. I don't know for sure, I'm sorry, but I don't think so.

(R.38 p.14-15; App.18-19)

It is clear from the testimony of officer Donley that Mr. Braly yielded the right-of-way, as the vehicle behind the officer passed without lane deviation. (R.38 p.14-15; App.18-19) The video does NOT show Mr. Braly entering the intersection prior to stopping, nor does it show Mr. Braly failing to yield the right-of-way, as is clear from the Court's findings:

“It's – from the court's perspective, it appears likely from the speed and proximity to the intersection that Mr. Braley would have had a difficult time stopping before entering the intersection. But that view is not definitive. (R.37 p.5 L9-13; App.35)

When a witness makes conflicting and contradictory statements, they cannot be considered credible. Furthermore, the burden of establishing that an investigative stop is justified by reasonable suspicion or probable cause falls on the state. *State v. Taylor*. 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973). When the Court makes a finding, as it did here, that defendant's actions are not definitive, the state has not met that burden.

C. The Court did not make a finding that there was a violation of law which justified a stop, detention, and arrest.

Here, the court's finding is not that Mr. Braly violated the law, but that it was the officer's *perception*. This is an important distinction, and the Court clearly and erroneously mis-states the law:

“As I indicated, however, it's not necessary that the vehicle stop at or prior to the stop sign; the statute requires that the vehicle stop before the intersection. (R.37 p.5, L. 5-8; App.35)

Here, Officer Donley clearly passed the intersection before pulling over to the right, and the vehicle behind Officer Donley did not need to deviate from his lane. (R.38 p.14-15; App.18-19)

The Court did not make findings as to which elements of which portion of the statute provided the reasonable suspicion to stop, detain, and arrest Mr. Braly.

Wis. Stat. §346.46 (1) states:

Except when directed to proceed by a traffic officer or traffic control signal, every operator of a vehicle approaching an official stop sign at an intersection shall cause such vehicle to stop before entering the intersection and shall yield the right-of-way to other vehicles which have entered or are approaching the intersection upon a highway which is not controlled by an official stop sign or traffic signal.

Wis. Stat. §346.46 (2)(c) states:

If there is neither a clearly marked stop line nor a marked or unmarked crosswalk at the intersection or if the operator cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the operator shall, before entering the intersection, stop the vehicle at such point as will enable the operator to efficiently observe the traffic on the intersecting roadway.

Here, it was not necessary to stop *prior* to the stop sign, and Mr. Braly clearly “yielded the right-of-way to other vehicles” and stopped the vehicle “at such a point as will enable the operator to efficiently observe the traffic on the intersecting roadway.” as is evident from the vehicle following Officer Donley to pass unimpeded. (R.38 p.14-15; App.18-19)

An investigative stop is a “major interference in the lives of the [vehicle’s] occupant,” *Coolidge v. New Hampshire*, 403 U.S. 443, 479 (1971), which is “subject to the constitutional reasonableness requirement.” *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Temporarily detaining a person for a traffic stop constitutes a “seizure” under the Fourth Amendment of the United States Constitution and article 1, section 11 of the Wisconsin Constitution. *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct.App.1996). The burden of establishing that an investigative stop is justified by reasonable suspicion or

probable cause falls on the state. *State v. Taylor*. 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973).

An investigatory stop “must be based on more than an officer's ‘inchoate and unparticularized suspicion or hunch.’” *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634 (2007) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Simply put “I thought he wasn't going to stop.” is not enough.

Here, Officer Donley did not possess reasonable suspicion that the defendant committed any traffic violation. The initial stop and seizure of the defendant's vehicle was unlawful for lack of reasonable suspicion or probable cause. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause....” U.S. Const. Amend. IV. The United States Supreme Court carved out an exception to the probable cause requirement in *Terry*, 392 U.S. at 22, which permits, brief, warrantless detention of person for investigatory purposes when officers possess specific articulable facts supporting a reasonable suspicion that illegal activity is afoot.

Because Officer Donley did not witness the defendant commit any traffic infractions, the stop and subsequent detention of the defendant was unconstitutional and any derivative evidence gathered as a result of the unlawful stop should have been suppressed as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

The government bears the burden of showing that stop and detention of Mr. Braly were supported by reasonable suspicion that a crime was being committed. *State v. Taylor*. 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973).

Here, the evidentiary facts were insufficient to justify the stop, detention, and arrest of Mr. Braly. The state failed in its substantial burden to show there was reasonable suspicion to stop, detain, and arrest Mr. Braly. As such, the Court's was

clearly erroneous in its findings, or lack thereof, and all evidence obtained by unreasonable searches and seizures in violation of the Constitution is inadmissible in court. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961) Because the state did not meet its burden, the Court was clearly erroneous in denying defendant's motion to suppress.

CONCLUSION

Mr. Braly respectfully asks this Court to enter an order reversing the trial court's denial of his motion to suppress evidence, reversing his conviction and any judgments against him as a result of this case, and any other relief the Court deems appropriate.

Dated this 21st day of February, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b), (bm), and (c) for a brief. It is in proportional serif font, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4175 words.

Dated this 21st day of February, 2022.

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of §809.19(12).

Dated this 21st day of February, 2022.

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