STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2022AP157-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

MICHAEL P. RUDOLF,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, BRANCH VII, THE HONORABLE MARK G. SCHROEDER PRESIDING, TRIAL COURT CASE NO. 20-CT-663

BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & SINGH, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court of Appeals Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

STATEMENT OF THE ISSUE

WHETHER A REASONABLE SUSPICION EXISTED TO DETAIN MR. RUDOLF'S VEHICLE?

Trial Court Answered: YES. The trial court concluded that Mr. Rudolf's operating across the fog line "six or seven times" established a reasonable suspicion to detain him. R31 at pp. 4-7; D-App. at 106-09.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents questions of law based upon an uncontroverted set of facts which can be addressed by the application of legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue before this Court is premised upon the unique facts of the case and is of such an esoteric nature that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE CASE

Mr. Rudolf was charged in Outagamie County with Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on August 6, 2020. R1; R2; R4.

Mr. Rudolf retained private counsel who entered a plea of Not Guilty on his behalf to both of the foregoing counts. R12 & R14. Thereafter, counsel for Mr. Rudolf filed, *inter alia*, a pretrial motion challenging whether a reasonable suspicion existed to detain him. R20.

An evidentiary hearing was held on Mr. Rudolf's motion on May 17, 2021, before the Outagamie County Circuit Court, the Honorable Mark Schroeder presiding. R28. The State offered the testimony of two witnesses, Officer Joshua Kislewski and Lt. David Maas of the Grand Chute Police Department. R28 at pp. 7-33 & 37-58, respectively.

At the conclusion of the hearing, the court ordered the parties to submit supplemental briefs. R28 at 59:3 to 60:13; R29; R30. Thereafter, on September 7, 2021, the court issued a written decision denying Mr. Rudolf's motion. R31.

Subsequent to the court's decision, Mr. Rudolf changed his plea to one of No Contest upon which he was found guilty and sentenced on January 24, 2022. R40 & R41.

It is from the adverse decision of the lower court that Mr. Rudolf appeals to this Court by Notice of Appeal filed on January 31, 2022. R47.

STATEMENT OF FACTS

On August 6, 2020, Mr. Rudolf was stopped and detained in the Town of Grand Chute, Outagamie County, by Officer J. Kislewski of the Grand Chute Police Department for allegedly operating outside of his designated lane of travel by crossing the fog line with his passenger tires on six or seven occasions. R28 at 8:12-14. At the evidentiary hearing in this matter, Officer Kislewski conceded that his squad was equipped with a working video camera and that he could have turned it on manually to capture a record of Mr. Rudolf's alleged crossing of the fog line, however, he elected not to activate his camera. R28 at 25:18 to 26:1.

When his squad camera was *finally* activated, Officer Kislewski admitted that the portion of Mr. Rudolf's driving which was captured on his camera was *not* "consistent with the driving that [he] alleged took place before the recording began." R28 at 21:12-16. Officer Kislewski conceded that the driving which was recorded did not "depict any traffic violations." R28 at 21:17-20; D-App. at 104. He further testified that the perfect driving behavior which was recorded occurred over a distance of approximately three-quarters of a mile. R28 at 22:18-21.

Officer Kislewski made additional admissions at the hearing regarding Mr. Rudolf's compliance with, and obedience to, the "rules of the road." He stated that Mr. Rudolf: (1) was driving "at an appropriate speed";[1] (2) stopped appropriately for a red light;[2] (3) properly signaled a left turn and executed the turn without any problems;[3] and (4) exhibited "no abnormalities whatsoever in his driving behavior."[4] D-App. at 104. Nevertheless, Officer Kislewski elected to stop and detain Mr. Rudolf for his earlier, unrecorded crossing of the fog line with his passenger tires after Mr. Rudolf had pulled into a parking lot. R28 at 19:1-4.

After being detained, Mr. Rudolf submitted to a battery of field sobriety tests and was ultimately arrested for, and charged with, Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R4.

STANDARD OF REVIEW ON APPEAL

The question presented to this Court relates to whether the law enforcement officer in the instant matter lacked a reasonable suspicion to detain Mr. Rudolf's vehicle in violation of the Fourth Amendment to the United States Constitution. This is a question of law based upon an undisputed set of facts, and therefore, merits *de novo* review by this Court. *State v. Jahnke*, 2009 WI App 4, ¶ 4, 316 Wis. 2d 324, 762 N.W.2d 696.

ARGUMENT

I. INTRODUCTION TO THE ISSUES PRESENTED.

The case at bar presents two underlying questions for this Court. The first of these is whether Mr. Rudolf's tires crossing the fog line of the road on which he was operating his motor vehicle constitutes a cognizable violation of the law. If the first question is answered in the negative, the second question concerns whether his driving behavior in general gave rise to a reasonable suspicion that he was operating

[1]R28 at 21:21-23.

[2]R28 at 21:24 to 22:4.

[3]R28 at 22:11-17.

[4] R28 at 22:22-25.

his vehicle while under the influence of an intoxicant. If this second question is answered in the negative as well, then no reasonable suspicion could have existed under the Fourth Amendment to detain him. Each of these issues is examined in turn below.

II. OFFICER KISLEWSKI'S DETENTION OF MR. RUDOLF'S VEHICLE REQUIRED A "REASONABLE SUSPICION" UNDER THE FOURTH AMENDMENT.

A. Investigatory Detentions in General.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Within the ambit of the Fourth Amendment, there are recognized three levels of encounter, namely: (1) the "simple encounter" for which the individual is afforded no constitutional protection because his or her movement is not restricted; (2) the investigatory detention, or *Terry* stop, for which the officer must have a reasonable suspicion to detain the person, *see Terry v. Ohio*, 392 U.S. 1 (1968); and (3) the custodial arrest which requires probable cause. *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982); *Henry v. United States*, 361 U.S. 98 (1959).

For purposes of determining whether Officer Kislewski's actions constituted an illegal detention of Mr. Rudolf's person under the Fourth Amendment, the inquiry in this case involves the second level of encounter described above, the "investigatory detention." An investigatory detention may only be premised upon a reasonable suspicion that illegal activity is afoot. *Terry*, 362 U.S. at 30. This requires the reviewing court to ascertain whether the officer's actions were reasonable under the "totality of the circumstances."

Whether an investigatory detention is constitutionally reasonable turns upon:

> 'a particularized and objective basis' for suspecting the person stopped **[is engaged in] criminal activity**. *Ornelas v. United States*, 517 U.S. 690, 696, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996)(citation omitted; emphasis added). When determining if the standard of reasonable suspicion [is] met, those facts known to the officer must be considered together as a totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

State v. Powers, 2004 WI App. 143, ¶ 7, 275 Wis. 2d 456, 685 N.W.2d 869.

The United States Supreme Court emphasized the need for an objective suspicion of wrongdoing in *United States v. Cortez*, 499 U.S. 411 (1981). In *Cortez*, the Supreme Court explained that the totality of the circumstances:

> must raise a suspicion that the particular individual being stopped **is engaged in wrongdoing**. Chief Justice Warren, speaking for the Court in *Terry v. Ohio, supra*, said '[that] this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'"

Cortez, 499 U.S. at 418 (emphasis in original in part, added in part), citing *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

The "totality of the circumstances" test for determining the constitutionality of an investigative stop is not a subjective test, but rather, is an objective test of reasonableness. *Terry,* 392 U.S. at 20-21.

> The test is an objective test. Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. An inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(internal quotations omitted); *United States v. Pavelski*, 789 F.2d 485, 489 (7th Cir. 1986).

The notion that an investigatory detention is constitutionally justifiable is premised upon there being an objective basis for suspecting that the person who is detained *is engaged in some illegal activity*. *Ornelas*, 517 U.S. at 696. This requires

that there be some nexus between the officer's action in detaining a suspect and the suspect actually committing a violation. Absent a nexus between the officer's actions and the potential violator, a detention is constitutionally unreasonable under the Fourth Amendment because it would be tantamount to nothing more than an officer casting a "wide net" in the hope that it might sweep up someone who committed a violation. It is this aspect of the Fourth Amendment's reasonableness standard which requires more than "mere suspicions" but "particularized and objective facts" which is at issue in the case at bar.

B. Operating Over a Fog Line Is Not a Cognizable Violation of the Law.

The initial question which must be answered in this case is whether the crossing of the fog line by a motor vehicle operator constitutes a cognizable violation of Wisconsin's Traffic Code. If it does not, then no particularized and objective basis can exist under a theory that Mr. Rudolf violated a state law.

Contrary to popular belief, it is *not* a violation of Wisconsin's Traffic Code to operate a vehicle on or across a fog line. Three is no Wisconsin statute which expressly prohibits the operation of a motor vehicle on or over a fog line. The closest thing to a "fog line" statute is § 346.13, which provides that the "operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety . . . ." Wis. Stat. § 346.13(1) (2021-22). No part of Chapter 346—Wisconsin's Traffic Code—states that the part of a roadway to the right of and including the fog line is outside of a designated lane. Neither "lane" nor "fog line" is defined by statute. *See generally*, Wis. Stat. §§ 340.01 & 346.01(1) (2021-22). Wisconsin Statute § 340.01(54) comes the closest to providing a definition of a lane, but it merely designates that a "roadway" is "that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm of shoulder." No portion of this statute suggests that vehicles are *prohibited* from travelling upon an improved highway to the right of the fog line.

Based upon the plain and unambiguous language found in Wisconsin's Traffic Code, the crossing of the fog line does not constitute a violation of any statute. Because there is no evidence of any *wrongdoing* in this case—a requirement

established by the Courts in *Ornelas, Cortez, Powers, et al.*, as noted above—there was no reasonable suspicion to detain Mr. Rudolf's vehicle *per se*.

C. Mr. Rudolf's Driving Behavior in General.

If a cognizable violation of the traffic code does not occur when a vehicle crosses the fog line, there still remains the question of whether the non-illegal conduct which was observed rises to the level of establishing a reasonable suspicion to detain under the Fourth Amendment. Under the facts of the instant case, Mr. Rudolf posits that his driving conduct *in total* did not rise to this level.

Courts which have addressed the issue of whether weaving while driving is sufficient grounds upon which to base the stop of a motor vehicle have adopted a common-sense approach. It has long been recognized that "if [the] failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993); *United States v. Colin*, 314 F.3d 439, 446 (9th Cir. 2002). Human beings are just that: human. As such, we are incapable of bisecting our lanes of travel perfectly every second of every minute we are upon a roadway as the *Lyons* and *Colin* courts recognized.

What should not be lost on this Court, however, is that the common-sense approach described above is *not* where the inquiry ends. As noted in Section I.A., *supra*, the true test is a *totality* of the circumstances test. *Powers*, 2004 WI App. 143, ¶ 7; *Richardson*, 156 Wis. 2d at 139-40. In the instant case, an examination of Officer Kislewski's testimony reveals that when *all* (otherwise referred to as the *totality*) of Mr. Rudolf's driving is considered, no reasonable suspicion to detain him existed. Officer Kislewski admitted that the portion of Mr. Rudolf's driving which was captured on his squad video was *not* "consistent with the driving that [he] alleged took place before the recording began." R28 at 21:12-16. He further conceded that the driving which was recorded did not "depict any traffic violations." R28 at 21:17-20. Moreover, Officer Kislewski testified that the perfect driving behavior which was recorded occurred over a distance of approximately three-quarters of a mile. R28 at 22:18-21.

More specifically, Officer Kislewski admitted that Mr. Rudolf: (1) was

driving "at an appropriate speed"; (2) stopped appropriately for a red light; (3) properly signaled a left turn and executed the turn without any problems; and (4) exhibited "no abnormalities whatsoever in his driving behavior." *See* Statement of Facts, at pp. 6-7, *supra*; D-App. at 104.

As part of its decision, the lower court found that the reason Mr. Rudolf's video-recorded driving was without fault was because "Mr. Rudolf was aware than [*sic*] officer was behind him, ..." R31 at p.6; D-App. at 108. Not only does the lower court provide no citation to the record for its assertion, but its conclusion is based upon pure speculation. There is simply no way in which the court could have known what Mr. Rudolf was thinking, whether he even saw the officer in his rearview mirror, or how he could have "instantly sobered up" even if he did see an officer in his mirror.

It is well known that the effect of ethanol intoxication is not something which can, or does, "turn itself on and off." That is, an impaired individual cannot in one moment display difficulty with his mentation and coordination and then in the next instant display the perfect skills necessary to exercise the clear judgment and steady hand necessary to safely operate a motor vehicle simlply if they try hard enough. Frankly, such a facile belief betrays an utter misunderstanding of what it means to be impaired by alcohol. The fact that Deputy Kislewski admitted that Mr. Rudolf safely, appropriately, and flawlessly drove his motor vehicle for three-quarters of a mile—including coming to a safe stop at a controlled intersection, signaling a turn appropriately, and otherwise remaining obedient to the rules of the road—indicates that he was not impaired. It is all of these things, taken together, which establish the *totality* of the circumstances in this case.

Beyond the legal issue regarding whether an individual can be detained for crossing a fog line, it is worth noting that when the lower court questioned Officer Kislewski, a telling fact was revealed. During the court's examination, it learned that the first alleged crossing of the fog line observed by Officer Kislewski was one he made in his "rearview mirror." R28 at 34:17-20. As any person who has even minimal experience driving a motor vehicle knows, observations made in a rearview mirror are not the best representations of reality in that distances and speeds become more difficult to assess and the *positions* of vehicles are difficult to gauge relative to the roadway—not to mention that all of these assessments were being made at

night[5] which itself acts to limit a person's ability to perceive events. Considering this fact, along with the aforementioned facts, Mr. Rudolf proffers that Officer Kislewski had no reasonable suspicion to detain him.

D. Other Considerations.

In closing, it is worth emphasizing that the parties to this appeal are *not* "starting on a level playing field." That is, from the first instance the scales in the instant matter are heavily weighted in Mr. Rudolf's favor because it is well-settled that Fourth Amendment "provisions for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(citation omitted; emphasis added). It has been said of the Fourth Amendment's protections that "[a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973)(emphasis added).

Because proof of any wrongdoing is absent in this case, this Court has a "duty" to "liberally construe" the Fourth Amendment to guard Mr. Rudolf against "stealthy encroachments" on his right to be free from unreasonable searches and seizures, and should, therefore, reverse the decision of the lower court. After all, when assessing whether the conduct of law enforcement officers is constitutional under the Fourth Amendment, "the 'touchstone of the Fourth Amendment is **reasonableness**.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)(emphasis added), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The Wisconsin Supreme Court has similarly stated that an action is "reasonable" under the Fourth Amendment "'as long as the circumstances, viewed objectively, justify [the] action.'" *State v. Howes*, 2017 WI 18, ¶ 21, 373 Wis. 2d 468, 893 N.W.2d 812, citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006), quoting *Scott v. United States*, 436 U.S. 128, 138 (1978). Mr. Rudolf proffers that he has submitted more than enough proof that Officer Kislewski's actions were constitutionally unreasonable under the Fourth Amendment.

[5]The events observed in this case occurred at 10:40 p.m.. R28 at 7:19-21.

CONCLUSION

Mr. Rudolf respectfully requests that this Court reverse the decision of the court below on the ground that Officer Kislewski lacked a reasonable suspicion to detain Mr. Rudolf's vehicle on August 6, 2020, in violation of his right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution.

Dated this 25th day of April, 2022.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant
Michael P. Rudolf

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 4,164 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 25, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 25th day of April, 2022.

MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant
Michael P. Rudolf