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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

2022AP000157-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Michael Pruett Rudolf,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT
COURT 7 FOR OUTAGAMIE COUNTY

The Honorable Mark G. Schroeder, Presiding

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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05/25/2022

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STATE OF WISCONSIN
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BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

QUESTIONS PRESENTED

QUESTION #1

Is swerving over out of your lane at 10:40 pm, nearly hitting the curb 6 times, over a relatively short distance; then, once you see an officer following you, parking in the lot of a closed business sufficient articulable facts from which an officer can form a reason to suspect a person is violating, has violated, or will violate a traffic law?

Circuit Court Answered Yes
This Court should Answer Yes

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POSITION ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Michael Rudolf that this case does not merit oral argument or publication.

STATEMENT OF THE CASE

On August 6, 2020, after consuming sufficient quantities of alcohol to obtain a 0.224 g/mL blood alcohol concentration, Mr. Rudolf chose to drive a vehicle on public the roads in a residential area in Outagamie County, Wisconsin. (R. 31, Decision and Order, 2; R.28, motion hearing transcript, 7:19-8:1 and 31:18; and R.4:4.) At 10:40 pm on that Thursday night, while Mr. Rudolf drove on Bluemound drive, a Grand Chute Officer observed him swerving out of his lane of traffic and "almost striking the curb about six or seven times." (R. 31, 2; and R.28, 8:12-14.) The officer conducted a u-turn, began the pre-stop records checks, and began following Mr. Rudolf. (R.31, 2; and R.28.) Once the officer caught up, the vehicle was "around West Spencer and South Bluemound." (R.31, 2; and R. 28, 20:9-10.)

Prior to the officer initiating a traffic stop, Michael Rudolf turned into the parking lot of a closed business. Once the vehicle was in the lot, the officer activated the squad's emergency lights initiating a stop.

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(R.31, 3.) Michael Rudolf parked in the middle of the lot, not in a marked stall or near the building. (R.31, 2-3; and R.29, 23:21-22 and 24:5-6.)

After the completion of Standard Field Sobriety Tests, Michael Rudolf was arrested for Operating a Motor Vehicle while Intoxicated 3rd offense. (R.31, 4.) A blood sample was collected and subsequent testing revealed a blood alcohol concentration of 0.224 g/mL. (R.4.) The State filed a criminal complaint on October 14, 2020, charging Michael Rudolf with Operating a Motor Vehicle while Intoxicated 3rd offense, and Operating a Motor Vehicle with a Prohibited Alcohol Concentration 3rd offense. (R. 4.)

On March 2, 2021, Michael Rudolf filed motions challenging the legality of the traffic stop and the asserting a Miranda violation. (See R. 20 and 21.) The Circuit Court held an evidentiary hearing on the motions on May 17, 2021. The State presented the testimony of two Grand Chute Police Officers, and the parties stipulated to the introduction of video evidence. (R. 28, 15-18.) After supplemental briefing, Judge Mark Schroeder issued a written decision denying both motions on September 7, 2021. (R. 31.) On January 24, 2022, Michael Rudolf entered a no contest plea and the Circuit Court found him guilty of

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Operating with a Prohibited Alcohol Concentration as

charged in Count 2 of the criminal complaint. (R.41.)

Michael Rudolf now appeals the circuit court ruling that the Officer had reasonable suspicion to initiate a traffic stop. (Mr. Rudolf chose to abandon the assertion of a *Miranda* violation).

STANDARD OF REVIEW

Whether there is probable cause or reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 23, 317 Wis. 2d 118, 765 N.W.2d 569. The Court of Appeals upholds the circuit court's factual findings unless they are clearly erroneous; however, the Court of Appeals independently applies those facts to constitutional principles. *Id.*

ARGUMENT

- 1. The officer observed enough specific articulable facts for a reasonable officer to believe Michael Rudolf violated a traffic law or was violating a traffic law.**

The Fourth and Fourteenth Amendments to the federal constitution and Art. I, § 11 of the state constitution guarantee Wisconsin citizens freedom from "unreasonable searches and seizures." See *State v. Williams*, 2001 WI 21,

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¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106. Wisconsin courts consistently follow the United States Supreme Court's interpretation of the search-and-seizure provision of the federal constitution in applying the same provision of the state constitution. See *State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis. 2d 729, 623 N.W.2d 516.

Whether a search or seizure has occurred, and if so, whether it passes constitutional muster are questions of law, subject to independent review. See *id.*, ¶ 12. A trial court's underlying findings of evidentiary or historical fact must be upheld, however, unless they are clearly erroneous. See *Williams*, 241 Wis. 2d 631, ¶ 20. The Appellate Court is not to substitute its judgment as to credibility of witnesses for that of the circuit court. *Triplett v. State*, 65 Wis. 2d 365, 368-369, 222 N.W.2d 689 (Wis. 1974). "The appellate court is not the place to re-argue issues of credibility." *Topar v. State*, 32 Wis. 2d 398, 403, 145 N.W.2d 782 (Ct. App. 1966).

In order to perform an investigatory traffic stop, the officer must have a reasonable suspicion that the person stopped is committing, committed, or is about to commit, a violation of the law. *State v. Colstad*, 2003 WI App 25, ¶ 11, 260 Wis. 2d 406, 659 N.W.2d 394. The officer's

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reasonable suspicion must be based on "specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). What is "reasonable" is based on the totality of the circumstances. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). Individual facts that may be insufficient to give rise to a reasonable suspicion alone, may amount to a reasonable suspicion when taken together. *State v. Waldner*, 206 Wis.2d 51, 58, 556 N.W.2d 681 (1996).

a. *State v. Post*, 2007 WI 60, ¶ 26, 301 Wis. 2d 1, 733 N.W.2d 634

In *State v. Post*, the court refused to adopt a bright-line rule that weaving within a lane of traffic must be erratic, unsafe, or illegal to give rise to a reasonable suspicion. 2007 WI 60, ¶ 26, 301 Wis. 2d 1, 733 N.W.2d 634. Likewise, the court refused to adopt a bright-line rule that weaving within a single lane of traffic, by itself, always gives rise to a reasonable suspicion for a traffic stop. *Id.*

Post requires the court to examine the totality of the circumstances. *Id.* ¶¶ 29-37. In *Post*, the court noted *Post*'s weaving constituted more than a slight deviation

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within his traffic lane. *Id.* at ¶ 29. The lane Post travelled in was between twenty-two and twenty-four feet wide, with parking along the curb. *Id.* at ¶¶ 30-32.

Within this lane, Post weaved in an “S-type manner” coming within one foot of the centerline and six to eight feet from the curb. *Id.* at ¶ 31-32. The weaving continued for two blocks, encroached on the parking area, and occurred at 9:30 p.m. *Id.* at ¶ 36. Taking all these factors into consideration, the *Post* court concluded the stop was justified by a reasonable suspicion the driver was intoxicated. *Id.* at ¶ 37.

i. Totality of Circumstances

Michael Rudolf’s driving was more aggravated than the driving in *Post*. Michael Rudolf deviated from his traffic lane, nearly hit the curb six times, and exited the roadway once the officer was following his vehicle in an apparent attempt to avoid police contact. Mr. Rudolf’s driving involved deviating from his lane of travel¹, nearly striking the curb at least six times, over a short period of time. (R.31,2; and R.28, 8:12-14.) This driving pattern is significantly more aggravated (erratic and unsafe), than

¹ Mr. Rudolf argues in his brief-in-chief that crossing what he calls “the fog line” is not a lane deviation. For the reasons discussed below, the State respectfully disagrees and argues the white line clearly delineates the lane of travel. See Wis. Stat. 346.13 (2019-2020).

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the driving in *Post* where the vehicle never got within six feet of the curb.

The driving in *Post* occurred at 9:30 p.m., which the *Post* court determined to be "at night" and a factor that weighed in favor of a reasonable stop. Mr. Rudolf's driving occurred even later at night, at 10:40 p.m., making it an articulable fact the officer can rely on in determining if a person is violating a traffic law.²

Additionally, once the officer made a u-turn and caught up to Michael Rudolf, Mr. Rudolf turned off the road into the parking lot of a closed business.³ (R.31,3 and R.28, 8:20-9:3.) The officer testified that Mr. Rudolf turning into a closed business at 10:40 at night "was odd." (R. 29, 9:3.) See *State v. Allen*, 226 Wis.2d 66, 74, 593 N.W.2d 504 (Ct. App.1999) (an officer's training and experience is another factor to consider in the totality of the circumstances equation).

As this court stated in *Waldner*, "[a]ny one of these facts, standing alone, might well be

² "While this is not as significant as when poor driving takes place at or around "bar time," it does lend some further credence to Sherman's suspicion that Post was driving while intoxicated." *Post*, 2007 WI 60 at ¶ 36.

³ Regardless of who owned the dealership, at the time of the seizure the officer did not know about Mr. Rudolf's claimed relationship to the owner. (see R.28, 9:1-3.)

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insufficient.” 206 Wis.2d at 58, 556 N.W.2d 681.

However, such facts accumulate, and “as they accumulate, reasonable inferences about the cumulative effect can be drawn.” *Id.*

Post, 2007 WI 60 at ¶ 37. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681, 685 (1996) (citing *Anderson*, 155 Wis.2d at 84, 454 N.W.2d 763.)

**ii. Deviating from traffic lane by
crossing the “fog line.”**

This prosecutor has failed to locate any published Wisconsin cases directly on point. The following cases⁴ are offered only for their persuasive value. See § 809.23(3); and see *Rutzinski*, 2001 WI 22, ¶ 13 (persuasive value of federal courts’ interpretation of seizure law). The State provides the following four unpublished Wisconsin cases and four federal 7th circuit cases as examples of the persuasive cases on point.

⁴ There are some Wisconsin Supreme Court cases that involve crossing “the fog line”, however those opinions do not address the legality of the traffic stop. See example, *State v. Alexander*, 214 Wis. 2d 628,

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1. Unpublished Wisconsin cases.

In *State v. Kind*, 2011AP1875-CR, an unpublished, signed one judge opinion, the Court found that "crossing the fog line twice" ... "without any explanation for the vehicles lateral movement across the fog line" justifies a traffic stop. *Kind* at ¶¶ 12 and 15.

In *County of Milwaukee v. Manske*, an unpublished signed one judge opinion, the Court of Appeals found "the defendant's driving gave rise to a reasonable suspicion that he was impaired, as required for officer to initiate a traffic stop. The defendant drove real close to the white fog line, drifted within his lane of traffic and upon exiting the interstate, actually crossed the white fog line." *Manske*, 2009AP1779 at ¶ 16.

In *State v. McQueen*, an unpublished, limited precedent opinion released on October 1, 2009, the Court of Appeals in a one judge signed opinion, concluded that "drifting back and forth two to three times within his line and then cross the fog line, at bar time-provided reasonable suspicion of intoxicated driving that supported the stop." *McQueen* at ¶ 3.

653, 571 N.W.2d 662, 672 (1997); and *State v. Krajewski*, 2002 WI 97, ¶ 44, 255 Wis. 2d 98, 123, 648 N.W.2d 385, 395.

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In *Village of Siren v. DeMoe*, an unpublished, limited precedent opinion released on October 20, 2009, the Court of Appeals, in a signed one judge opinion, stated that an officer's "observation of a vehicle traveling partially outside, and then on, the fog line for a significant distance shortly after bar time reasonably leads to an inference that the person is operating while intoxicated, and permits the minimal intrusion of a temporary investigative stop." *Id.* at ¶ 6.

2. Published 7th Circuit cases.

A vehicle crossing the fog line is enough to support probable cause for the traffic stop. *United States v. Bentley*, 795 F.3d 630, 634 (7th Cir. 2015). *Bentley* involved an Illinois statute that is substantially similar to Wis. Stat. § 346.13.

Whenever any roadway has been divided into 2 or more clearly marked lanes for traffic ... (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

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625 ILCS 5/11-709(a) (as quoted in Bentley, 795 F.3d at
634.)

Inability to keep a vehicle centered in the lane
suggests that the driver is impaired. *Gysan v. Francisko*,
965 F.3d 567, 571 (7th Cir. 2020).

"(I)mproper lane usage is a legitimate reason for an
investigatory stop." *United States v. Hernandez-Rivas*, 513
F.3d 753, 759 (7th Cir.2008)

Inability to keep a vehicle centered in the lane
suggests that the driver is impaired. *Gysan v. Francisko*,
965 F.3d 567, 571 (7th Cir. 2020).

The defendant's vehicle crossing "the fog line before
making an abrupt correction" is "erratic behavior" that
gave the trooper probable cause to believe that Mr. Rogers
had committed a traffic violation. *United States v. Rogers*,
387 F.3d 925, 934 n.9 (7th Cir. 2004).

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b. Unsafe Lane Deviation

The court of appeals need not address all issues raised by the parties if one is dispositive. *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716; and see also *Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (Court of Appeals decides cases on the narrowest possible grounds).

If this Court finds the stop is permitted under a *Post* totality of the circumstances analysis, it need not address the specific unsafe lane deviation analysis.

Determining whether or not crossing the fog line is an unsafe lane deviation requires the interpretation of Wisconsin's traffic statutes.

Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.

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State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58,
¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal citations
and quotation omitted).

The first question this Court must answer is whether
the white line on the right-hand side of the lane
delineates the edge of the lane. Wisconsin Stat. § 346.13
provides:

Whenever any roadway has been divided into 2 or
more clearly indicated lanes, including those
roadways divided into lanes by clearly indicated
longitudinal joints, the following rules, in
addition to all others consistent with this
section, apply:

Wisconsin Statute § 346.13 (2019-2020). The statute does
not require a specific marking or line, any clear
indication, even a longitudinal joint, is sufficient to
divide the street into lanes. A white line running down the
right-hand side of the line "clearly indicates" the edge of
the lane.

As the road on which Rudolf traveled has clear visible
markings, crossing the white line on the right-hand side of
the lane ("the fog line") is a clear lane deviation. The

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statutes do not specify how the lane is to be marked,
simply that the road markings clearly indicate lanes.

The next question for this Court is when a driver is required to remain in their lane of traffic. Several sections of ch. 346 discuss when a vehicle can deviate from its lane of travel. Three examples of these statutes are 346.05, 346.15, and 346.13.

Wisconsin Statute 346.13(1) states:

- (1) Except as provided in sub. (4), 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 to other vehicles approaching from the rear.

And as discussed above, § 346.15 prohibits a driver from deviating "from the traffic lane in which the operator is driving without first ascertaining that such movement can be made" safely. Wis. Stat. § 346.15(1).

Wisconsin statute § 346.05(1) deals with the requirement that people drive on the right side of the road (as opposed to British rules) as follows:

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346.05 Vehicles to be driven on right side of roadway; exceptions.

(1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway, except:

(a) When making an approach for a left turn or U-turn under circumstances in which the rules relating to left turns or U-turns require driving on the left half of the roadway; or

(b) When overtaking and passing under circumstances in which the rules relating to overtaking and passing permit or require driving on the left half of the roadway; or

(c) When the right half of the roadway is closed to traffic while under construction or repair; or

(d) When overtaking and passing pedestrians, animals or obstructions on the right half of the roadway; or

(e) When driving in a particular lane in accordance with signs or pavement markings designating such lane for traffic moving in a particular direction or at designated speeds; or

(f) When the roadway has been designated and posted for one-way traffic, subject, however, to the rule stated in sub. (3) relative to slow moving vehicles.

(g) If the vehicle is a wide implement of husbandry,...

Wis. Stat. 346.05 (2019-2020). None of the enumerated exceptions appear to apply to Mr. Rudolf's driving.

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And, the use of turn signals is controlled by Wis. Stat. § 346.34 (2019-2020) which requires a person to signal whenever deviating the "vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety." Subsection (B) states the signal is required "in the event other traffic may be affected by the movement." Such as when another vehicle or vehicles, including police cars, are traveling on the same road.

The facts known to the Grand Chute Officer on the night of August 6, 2020, provide a reason for the officer to believe Michael Rudolf violated any of these three statutes.

By deviating from the lane in a manner that nearly causes the vehicle to hit a traffic curb, before abruptly returning to his lane, Rudolf

- Deviated from his traffic lane in a manner that is unsafe for vehicles approaching from the rear. (R. 31, 2.) See Wis. Stat. § 346.15.
- Deviated from "a direct course...upon the roadway" without a turn signal in a manner that is not reasonably safe. See Wis. Stat. § 346.34.

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and,

- Failed to remain in the right-hand lane without meeting any of the exceptions delineated in § 346.05, stats. See Wis. Stat. § 346.05.

Any one of these three violations of chapter 346 justifies the officer's traffic stop (seizure) of Michael Rudolf. See *Popke*, 2009 WI 37, ¶13 (officer only needs reasonable suspicion that a traffic violation has been committed).

CONCLUSION

The testimony at the motion hearing, along with the exhibit, establish specific, articulable facts that, taken together with rational inferences from those facts, reasonably warrant the traffic stop.

Respectfully submitted this 25th day of May, 2022.

Electronically Signed By: Charles M. Stertz
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ASSISTANT DISTRICT ATTORNEY

STATE OF WISCONSIN - VS - Michael Pruett Rudolf

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 18 pages.

Dated: May 25, 2022

OUTAGAMIE COUNTY DISTRICT
ATTORNEY'S OFFICE

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STATE OF WISCONSIN - VS - Michael Pruett Rudolf

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Rule for Wisconsin's Appellate Electronic Filing.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties by electronic filing.

Dated this 25th day of May 2022.

Electronically signed by: Charles Stertz

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this appendix which complies with the requirements of the Rule for Wisconsin's Appellate Electronic Filing.

I further certify that:

A copy of this certificate has been served with this appendix filed with the court and served on all parties by electronic filing.

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APPENDIX

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RESPONDENT'S BRIEF 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 s. 809.19(3)(b) and that contains:

- (1) a table of contents;
- (2) copies of unpublished opinions cited under § 809.23.

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.

Dated: May 25, 2022

Electronically Signed by: Charles M. Stertz
Assistant District Attorney
Outagamie County

Note: This certification should be appended to the appendix.