STATE OF WISCONSIN

COURT OF APEALS

DISTRICT IV

Case No. 2022AP1099

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. WILSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HONORABLE TROY D. CROSS, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

PEGGY A. CROOKS-MISHACOFF
Assistant District Attorney
State Bar #1027081

Attorneys for Plaintiff-Respondent

Columbia County District Attorney's Office
400 DeWitt Street
Portage, WI 53901
(608)742-9856
(608) 742-9606 (Fax)
Peggy.Crooks-Mishacoff@wi.da.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED

I. On December 6, 2018, following Michael Wilson's refusal to consent to a blood draw, a Notice of Intent to Revoke Operating Privilege document and an OWI-1st charge were incorrectly filed in the Eastern Columbia County Municipal Court – Columbus when it should have been filed in Columbia County Circuit Court due to the Defendant's prior convictions counted under Wis. Stat. § 343.307 (1). After pleading in municipal court to OWI-1st in exchange for the dismissal of the refusal citation, Wilson later filed a motion to reopen and dismiss the OWI-1st because it should have been charged in circuit court as an OWI-2nd and the refusal heard in that court. As such, the municipal court lacked competency to proceed. Wilson was then charged with the refusal in Columbia County Circuit Court.

Is the prosecution of the reopened refusal barred under the doctrine of claim preclusion?

The circuit court answered: No.

This Court should answer: No.

II. On December 6, 2018, the City of Columbus police department received a driving complaint from a concerned citizen who stated that an intoxicated driver had left a local bowling alley driving a red sedan. The caller stated that the driver of the red sedan was going south on Industrial Drive. Columbus police officer Alexander Secord spotted a red sedan a few minutes later driving on a street in an area that was consistent in terms of time and location with the details given to dispatch by the caller. Secord saw the sedan swerve in an S-

> shape, twice. Secord also saw the sedan cross the traffic line separating the vehicle lane from the bike lane.
>
> Did Officer Secord have reasonable suspicion to initiate a traffic stop on the red sedan?
>
> The circuit court answered: Yes.
>
> This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

STATEMENT OF THE CASE

The State generally agrees that Wilson's principal brief presents an accurate statement of the case. Additional facts will be provided below as necessary.

STANDARD OF REVIEW

I. "The question of whether claim preclusion applies under a given factual scenario is a question of law that this court reviews de novo." *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995) (citation omitted).

II. "'A trial court's determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact, subject to de novo review.'" *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted).

ARGUMENT

I. The circuit court correctly concluded that the Wilson's refusal citation was properly before that court because the doctrine of claim preclusion does not apply when there has been no final judgment as to the claim in a court of competent jurisdiction.

Wilson argues that the refusal citation should have been dismissed. First, he argues that the City of Columbus forfeited the right to challenge the municipal court's competence by failing to raise the issue when the citations were first addressed in municipal court. (Blue, p. 11) Wilson goes on to assert that the State is bound by the City's forfeiture as to the issue. (Blue, pp. 11-12) This first argument fails.

Wilson concedes that he did not directly raise the argument in the circuit court that the State is bound by the City's purported forfeiture of the competency issue. (Blue 11) Therefore, this Court should decline to consider this argument. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (explaining that issues not raised in circuit court will not be considered for first time on appeal).

Wilson next argues that the doctrine of claim preclusion applies here to bar the State from pursuing the refusal. (Blue, pp. 10, 12-13) However, this argument also fails because there was no final judgment on the merits by a court of competent jurisdiction as to the refusal. *See* ***Bugher***, 189 Wis. 2d 541, 550 (stating as the third mandatory element for a finding of claim preclusion that there was a final judgment as to the merits in a court of competent jurisdiction).

Given the facts here, it is indisputable that the municipal court lacked competence to adjudicate Wilson's refusal. In fact, not only is it indisputable, but it is also undisputed. Wilson admits in his principal brief that "it is true that the Columbia County Municipal Court lacked competence to adjudicate the original refusal and operating while impaired citations." (Blue, p. 10) Because the municipal court clearly lacked competence to adjudicate the refusal issue, the doctrine of claim preclusion does not apply to bar the circuit court from hearing the refusal issue.

Wilson attempts to argue that the third element of the claim preclusion test is met here, despite the fact that no court

of competent jurisdiction entered a final judgment as to Wilson's refusal prior to the circuit court doing so. (Blue, p. 13). However, Wilson does not explain how this court could possibly conclude that a court of competent jurisdiction had entered a final judgment before the circuit court held its hearing because that simply did not happen—there could not be claim preclusion because the municipal court lacked competency to proceed against Wilson regarding the refusal and OWI citations.

In addition, Wilson fails to sufficiently develop an argument explaining his theory that the third claim preclusion element was met, and he fails to cite to governing legal authority that would support his argument. Therefore, the argument fails. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

For all these reasons, the State respectfully requests that this court conclude that the circuit court properly heard the refusal and that it properly refused to dismiss the citation against Wilson.

II. The circuit court correctly concluded that the officer who initiated the traffic stop had reasonable suspicion to conduct an investigatory stop of Wilson's vehicle based on a detailed tip from a concerned citizen that Wilson was too intoxicated to be driving, coupled with the officer's own observations of poor and dangerous driving behaviors by Wilson.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures." ***State v. Adell***, 2021 WI App 72, ¶15, 399 Wis. 2d 399, 966 N.W.2d 115. "It is an unremarkable truism that a traffic stop is a seizure within the meaning of our Constitutions." ***State v. Floyd***, 2017 WI 78, ¶20, 377 Wis. 2d 394, 898 N.W.2d 560. Consequently, "[i]t is undisputed that traffic stops must be reasonable under the circumstances." ***State v. Houghton***, 2015 WI 79, ¶29, 364 Wis. 2d 234, 868 N.W.2d 143 (citing ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)).

In assessing what is reasonable, our supreme court has determined that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." ***Id.*** ¶30. "The question of what constitutes reasonable

suspicion 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. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). "The required showing of reasonable suspicion is low." *State v. Eason*, 2001 WI 98, ¶19, 245 Wis. 2d 206, 629 N.W.2d 625.

Officer Secord had reasonable suspicion to conduct an investigatory stop on Wilson's vehicle on the night in question here. Contrary to what Wilson argues, his swerving was not the sole reason that Secord has reasonable suspicion. Rather, as Wilson spells out in his principal brief: 1) a caller from the local bowling alley made a citizen complaint over the caller's concern that Wilson had left the bowling alley and was too drunk to drive (R. 26:20, 22-24); 2) the concerned caller provided a description of the car indicating its color (red), body style (sedan), location (just left the bowling alley on Industrial Drive), and direction of travel (south) such that Secord was easily able to identify the car when he saw it near the bowling alley; 3) Secord observed the sedan engaging in an S-shaped curve (going from the center line to the white line in the road

and then back) not just once, but two times; and 4) Secord observed the sedan crossing over the right line and into the bike lane at least once. Considering the totality of the circumstances, Secord had reasonable suspicion to stop Wilson's vehicle to investigate.

In determining whether an officer had reasonable suspicion to conduct a stop, our supreme court has explained that "[t]he determination of reasonableness is a common sense test. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." State v. *Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted).

Here, Secord had reason to suspect that Wilson was committing a crime—namely, OWI. Secord had information from dispatch that a citizen had seen Wilson as he was leaving the bowling alley and knew that Wilson was intoxicated. The caller had also seen the intoxicated Wilson driving—another fact that Secord relied on in initiating the stop. Not only did

Secord have credible information that Wilson was driving drunk, but Secord observed Wilson exhibiting troubling driving behavior as he was following Wilson. Secord say Wilson swerve from the center line to the right side line and back again, twice. Secord also saw Wilson cross over the right-side white line into the bike lane—lucky for Wilson that there were no bikers reported to have been in the lane at the time he crossed the line. As the court stated in *Post*:

> Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. That is what we have here.

Id. ¶16 (citation omitted). All of the factors here, while each alone may not have been enough, added up to equal reasonable suspicion for Secord to stop Wilson to investigate.

CONCLUSION

This Court should affirm the circuit court's order concluding that Wilson's refusal proceedings were not barred

by claim preclusion and that Secord had reasonable suspicion of criminal activity sufficient for him to stop Wilson's vehicle.

Dated this 7th day of March 2023.

Respectfully submitted,

ADA Peggy A. Crooks-Mishacoff

Electronically signed by:

_____

PEGGY A. CROOKS-MISHACOFF
Assistant District Attorney
State Bar #1027081

Attorneys for Plaintiff-Respondent

Columbia County District Attorney's Office
400 DeWitt Street
Portage, WI 53901
(608)742-9856
(608) 742-9606 (Fax)
Peggy.Crooks-Mishacoff@wi.da.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,815 words.

Dated this 7th day of March 2023.

Electronically signed by:

Peggy A. Crooks-Mishacoff

PEGGY A. CROOKS-MISHACOFF

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed on March 7, 2023, to:

Jeremiah W. Meyer-O'Day
Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913

Electronically signed by:

Peggy A. Crooks-Mishacoff

PEGGY A. CROOKS-MISHACOFF