

FILED
08-12-2024
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2023AP000561-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY A. WRY,

Defendant-Appellant.

**ON APPEAL FROM THE DECISION AND ORDER ENTERED IN
THE CIRCUIT COURT FOR RUSK COUNTY,
CASE NO. 21 CT 03,
THE HONORABLE BEVERLY WICKSTROM, PRESIDING**

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. DEPUTY JILEK LACKED REASONABLE SUSPICION NECESSARY TO STOP WRY'S VEHICLE FOR A TRAFFIC VIOLATION.

The state did not prove that Deputy Jilek had reasonable suspicion to stop Wry's vehicle. The state notes that "[t]he facts in this case are straight forward and there is little disagreement between the parties." (State's Resp. Br. at 3). The state argues that Jilek's pre-stop observations provided him with the necessary reasonable suspicion of impairment of alcohol to make the traffic stop. (State's Resp. Br. at 4–10). The state claims that before initiating the traffic stop, Jilek had the following information:

- (1) "that an alleged drunk driver had been at the residence of the caller not once but twice";
- (2) "that upon observation of the vehicle, once encountered, that the vehicle was swerving within his lane";
- (3) "that the vehicle had almost hit some mailboxes as it travelled down the road"; and
- (4) "what when they reached Highway 27 the driver continued south out of the county while still weaving within his lane"

(State's Resp. Br. at 5).

The state, however, greatly overstates the weight of the initial citizen complaint in the reasonable suspicion calculus. While a citizen who allows his or her identity to be revealed to law enforcement is considered more reliable than an anonymous informant, there still must be some type of evaluation of the reliability of the citizen complainant. *State v. Kolk*, 2006 WI App 261, ¶ 13, 298 Wis. 2d 99, 726 N.W.2d 337. The probative value of a citizen's complaint depends on how detailed the citizen's information is. *Id.* Courts have identified the following factors as useful in assessing reasonable suspicion with respect to a citizen's information:

- (1) the particularity of the description of the offender or the vehicle in which he fled;
- (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred;
- (3) the number of persons about in that area;
- (4) the known or probable direction of the offender's flight;
- (5) observed activity by the particular person stopped; and
- (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

State v. Guzy, 139 Wis. 2d 673, 677, 407 N.W.2d 548 (1987).

Here, the only identifying details that dispatch provided to Jilek for the suspected vehicle was the complainant's limited and sweeping description of the vehicle's body style and color. (15:4, 10). Jilek confirmed he received no information as to the suspected vehicle's license plate number. (15:10).

Jilek also had no description of the driver of the suspected pickup truck other than the allegation from the complainant that the driver was "*potentially* intoxicated." (15:4) (emphasis added). Yet, the state concedes there is no evidence in the record regarding the caller's basis for thinking Wry was intoxicated. (State's Resp. Br. at 8).

Moreover, nearly half an hour had elapsed between the time that Jilek was dispatched to address the complainant's allegations and the time at which he first spotted "a dark colored vehicle which matched the description provided by the original caller" traveling east of the complainant's residence on Broken Arrow Road. (15:4–5, 9–10).

Lastly, there is no evidence in the record regarding the number of other vehicles in the area. There is likewise nothing in the record to suggest that at the

time of the traffic stop, Jilek had any knowledge of prior criminal activity committed by the driver of the suspected pickup truck.

Given the complete absence of these factors, the initial complaint is insufficient to be given much weight in the reasonable suspicion calculus. Therefore, the question of reasonable suspicion to initiate the traffic stop primarily rests on Jilek's independent observations of Wry's pickup truck.

Jilek's observation of the driver weaving within his lane likewise adds little to the reasonable suspicion calculus. To begin, the state asserts that Wry incorrectly "cites to *State v. Post*, 2007 WI 60 for the proposition that weaving within one's lane is insufficient to establish probable cause to initiate an investigative stop." (State's Resp. Br. at 5) (citing Wry's Br. 16). The state is wrong.

To begin, Wry at no point in his brief challenges Jilek's traffic stop on probable cause grounds.¹ Further, Jilek did not testify, the prosecutor did not argue, and the circuit court did not conclude that the traffic stop was justified because there was probable cause to believe Wry had committed a traffic violation. Rather, the traffic stop was argued, analyzed, and ultimately resolved by the circuit court as one supported by reasonable suspicion. The circuit court, presented with Jilek's observations of the suspected pickup truck "swerving in it's [*sic*] own lane of traffic, and narrowly miss[ing] a couple of mailboxes," concluded that Jilek merely observed "suspicious driving ... out of -- of the ordinary driving." (41:4, 7).

Moreover, in citing *Post*, Wry correctly set forth the Wisconsin Supreme Court's holding that weaving within a single traffic lane, *by itself*, does not provide *reasonable suspicion* of intoxicated driving. *See* Wry's Br. 16 (citing *State v. Post*, 2007 WI 60, ¶ 2, 301 Wis. 2d 1, 733 N.W.2d 634). Wry likewise correctly noted that the reasonableness of a traffic stop is determined based on the totality of the

¹ The state improperly interchanges "reasonable suspicion" and "probable cause" throughout its response brief. (*See* State's Resp. Br. at 9–10).

facts and circumstances. *See id.* at 12 (citing *State v. Richardson*, 156 Wis. 2d 128, 139–40, 456 N.W.2d 830 (1990)).

As for the actual driving behavior observed in this case, a closer examination of the facts in *Post* shows that the weaving here was far less suspicious. And considering the Wisconsin Supreme Court found reasonable suspicion in *Post* only after determining that the case “present[ed] a close call,” 2007 WI 60 at ¶ 27, the driving behavior observed by Jilek clearly falls below what is necessary to establish reasonable suspicion.

In *Post*, the officer observed Post driving partially in an unmarked parking lane at 9:30 p.m. 2007 WI 60 at ¶ 4. The officer further testified that when he first observed Post’s vehicle, it was “canted into the parking lane” and “wasn’t in the designated traffic lane”; Post’s vehicle was weaving approximately ten feet laterally and was within a lane that was “twice as wide as the standard single lane”; and Post’s vehicle moved in a discernible S-type pattern several times over two blocks. *Id.* at ¶¶ 35–36.

Admitting that the case “present[ed] a close call,” the Wisconsin Supreme Court concluded that the pronounced nature of Post’s weaving over a relatively short distance was enough to give rise to reasonable suspicion. *Id.* at ¶¶ 27–37. The court further noted that the time of the incident, 9:30 p.m., was of some significance, but not as significant as when poor driving takes place at or around “bar time.”² *Id.* at ¶ 36.

The court nevertheless emphasized that even repeated weaving within one’s own lane does not supply reasonable suspicion in all circumstances, such as where the weaving is minimal or occurs over a great distance. *Id.* at ¶ 19. The officer’s observation of the vehicle in *Post* being “canted” into the parking lane differs

² This Court has consistently defined “bar time” as 2:00 a.m. *See State v. Kamuchey*, 2014 WI App 16, ¶ 3, 352 Wis. 2d 575, 842 N.W.2d 537 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)).

drastically from Jilek's observation of Wry's pickup truck. Here, Jilek never saw Wry's pickup truck drive over the roadway's edge line or cross the centerline into the left lane of traffic. (15:5, 11). The only reason the defendant in *Post* did not cross a line into another lane is that the parking lane was unmarked, and he was actually weaving within a traffic lane which was twice as wide as Broken Arrow Road and Highway 27, which are both single-lane roadways. The court found the fact that Post was weaving in a double-wide traffic lane to be particularly "noteworthy," a fact that is not present here. *Post*, 2007 WI 60 at ¶ 36.

Further, the weaving in *Post* was much more pronounced and occurred over a much shorter distance than the weaving of Wry's pickup truck. Post's weaving was not just within the traffic lane but was "across the travel and parking lanes" such that the S-type driving was "covering both the traveling lane and the parking lane." 2007 WI 60 at ¶¶ 32, 37. Here, Jilek confirmed that Wry's pickup truck's weaving occurred within the vehicle's traffic lane. (15:5, 11).

Post's vehicle was also observed weaving several times over the distance of two blocks. 2007 WI 60 at ¶ 5. Here, the weaving was observed over a distance of several miles spanning Broken Arrow Road and Highway 27. (15:5–6, 11–12). Additionally, in *Post*, the suspicious weaving occurred in a city, 2007 WI 60 at ¶ 3, not on dark, country roads where some areas of the road are dirt and unmarked, (*see* 15:11). Moreover, Wry was ultimately stopped roughly an hour and a half prior to "bar time." (15:5, 7).

Finally, while Jilek testified that he observed Wry's pickup truck "almost hit some mailboxes as it traveled down" Broken Arrow Road, (*see* State's Resp. Br. at 5–7), the probative value of this observation is drastically lessened by the fact that mailboxes along Broken Arrow Road abut or even hang over the edge line of this rural roadway, as demonstrated by the pictures below.³ Thus, it only takes a slight deviation within its own lane for a vehicle to be on the road's edge line and in jeopardy of striking one of these mailboxes. *Post* may have been a "close call," but this is not.



³ This Court may take judicial notice of this fact, *i.e.*, Google Maps and its related imagery with respect to the placement of mailboxes along Broken Arrow Road because it is "not subject to reasonable dispute" in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01. Moreover, these specific Google Maps' images have a basis within the record in the circuit court, *i.e.*, Jilek's testimony from the motion hearing. (*See* 15:5).



Wry's pickup truck's alleged driving behavior on Broken Arrow Road adds nothing to the reasonable suspicion inquiry, as Jilek permitted the driver to leave the rural road and turn onto Highway 27 even after observing this driving behavior. Had Jilek reasonably believed that this driving behavior he observed on Broken Arrow Road actually gave rise to a reasonable suspicion that the vehicle's driver was intoxicated, he would have certainly initiated a traffic stop at that time. But he did no such thing. Rather, he permitted the pickup truck to continue onto Highway 27. (15:11).

Then while following the pickup truck on Highway 27, Jilek did not observe any dangerous or problematic driving, or any equipment-related traffic violations. (15:11). The driving behavior Jilek observed on Highway 27 therefore dissipated any reasonable suspicion of impairment that existed, even assuming for the sake of argument that it did exist at one point. *See State v. Newer*, 2007 WI App 236, ¶ 8, 306 Wis. 2d 193, 742 N.W.2d 923 (providing support for the proposition that even once-existing reasonable suspicion might "dissipate" depending on facts that later come to an officer's attention).

Jilek's actions (or lack thereof) on Highway 27 further support a finding that the requisite reasonable suspicion was lacking in this case. Not only did Jilek not initiate a traffic stop on Highway 27, but he stopped following the pickup truck altogether, thereby allowing the vehicle to continue on its way into Chippewa County, totally free from his surveillance. (15:6, 11–12).

The state nevertheless argues that Wry's position that any reasonable suspicion, if it existed at all, completely vanished due to the pickup truck being out of Jilek's sight for a considerable amount of time is unconvincing. Again, the state is wrong.

First, the state misstates the length of time that Jilek lost visual contact with Wry's vehicle. The state claims that Jilek only lost contact with Wry's vehicle for "ten to fifteen minutes." (State's Resp. Br. at 9). However, a closer review of the facts in the record shows that Wry's pickup truck was out of Jilek's sight for closer to 30 minutes. Jilek testified that he followed Wry's pickup truck south on Highway 27 until it entered Chippewa County, at which point he ended his pursuit. (15:6, 11–12). Jilek lost visual contact with the pickup truck as it traveled further into Chippewa County. (15:7).

Jilek therefore found himself on Highway 27 near the boundary line for Rusk County and Chippewa County. He decided at this point to run the pickup truck's license plate number. (15:12). His search returned an address in Rusk County on Dalvin Street in the Village of Sheldon. (15:6–7). Jilek then proceeded to Sheldon "in an attempt to potentially located [*sic*] the vehicle if it came back." (15:7). Upon arriving in Sheldon, Jilek parked near the corner of County Road Double V and Spur Road. (15:7).

The drive from Highway 27 near the Rusk-Chippewa county line to the corner of County Road Double V and Spur Road in Sheldon is a little over 8.5 miles

and would have taken Jilek at least 10 minutes to complete (see map of route below).⁴



Jilek testified that he then sat at the corner of County Road Double V and Spur Road for another “10 to 15 minutes or so” before observing the pickup truck that he had been following earlier head towards his location. (15:7). Thus, Wry’s pickup truck was demonstrably out of Jilek’s sight and therefore unaccounted for for closer to 30 minutes—significantly longer than the “ten to fifteen minutes” posited by the state. The state’s contention that “only minutes had elapsed” is therefore demonstrably false. (*See State’s Resp. Br.* at 9).

Further, contrary to the state’s position, the passage of nearly 30 minutes is enough to negate reasonable suspicion in this case. *See Armstrong v. United States*, 164 A.3d 102, 110 (D.C. 2017) (“[P]articulated reasonable suspicion is usually found when the passage of time between the occurrence of a crime and a subsequent

⁴ This Court may take judicial notice of this fact, *i.e.*, Google Maps and its related imagery with respect to the estimated distance and travel time for Jilek’s route, pursuant to Wis. Stat. § 902.01. This specific Google Maps’ image has a basis within the record in the circuit court. (*See* 15:6–7, 11–12).

stop is *immediate* or *within only a few minutes.*”) (emphasis added); *also compare City of Norton v. Wonderly*, 38 Kan.App.2d 797, 172 P.3d 1205, 1210 (2007) (where police received tip concerning a motorist driving while impaired, “[t]hree minutes of good driving within the city limits did not dissipate [the arresting officer’s] reasonable suspicion [of impaired driving] based on the information conveyed to him that [the defendant] had driven his truck in an [*sic*] reckless manner”), *with State v. Schneider*, 32 Kan.App.2d 258, 80 P.3d 1184, 1186, 1188 (2003) (appellate court questioned a pretextual traffic stop where officers did not stop vehicle for 15 miles after observing traffic infraction, specifically noting that “a significant amount of time passed between the alleged minor traffic violation and the ultimate stop”), and *Cauthen v. United States*, 592 A.2d 1021, 1023 (D.C. 1991) (recognizing that the passage of fifteen minutes was “considerably longer than the delay involved in [the court’s] past decisions on point”).

The circuit court in its oral ruling further outlined the compelling case for why any reasonable suspicion was negated by this lengthy passage of time:

You let him go. You let him drive down Highway 27 into Chippewa County. And you didn’t see that truck for 15, 20, 25 minutes. Anything could of happened. That drunk driver, who was not Mr. Wry, could of gone some place; and Mr. Wry got in the truck and drove home stone cold sober. So you don’t know that the driver didn’t change. You don’t know what happened.

(41:9–10).⁵ These reasonable suspicion problems are only compounded by the fact that Jilek did not observe who specifically the driver of the pickup truck was despite following the vehicle an extended period. (15:12).

These issues above are enough to dissipate any reasonable suspicion of impairment that existed, even assuming for the sake of argument that it did exist at one point. Yet, while following Wry’s pickup truck into Sheldon, Jilek did not

⁵ The state accuses Wry of mischaracterizing the circuit court’s statements. (State’s Resp. Br. at 9). Wry did no such thing. He provided the court’s remarks verbatim, beginning with the court’s clarification that it was reciting “[w]hat the defendant says.” *See* Wry’s Br. 18 (citing 41:9–10).

observe any traffic and/or equipment violations. Hence, Jilek made no observations that could give rise to reasonable suspicion during this time second encounter with Wry's pickup truck.

Therefore, Jilek's stop of Wry's pickup truck was not based upon an objectively reasonable suspicion that the vehicle's driver had committed or was committing an offense; therefore, all evidence obtained as a result of this unlawful seizure must be suppressed. *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

CONCLUSION

For the foregoing reasons, this Court should vacate Wry's conviction, reverse the order of the circuit court denying his suppression motion, and remand for further proceedings.

Dated this 12th day of August, 2024.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b), (bm) and (c) for a brief. The length of this brief is 2,940 words.

I further certify that filed with this reply brief is an appendix that complies with s. 809.19(2).

Dated this 12th day August, 2024.

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