COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1883

Cir. Ct. Nos. 2010TR1389
2010TR1390

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS R. PAULICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Thomas R. Paulick appeals his conviction for operating a vehicle while intoxicated, first offense. While Paulick's argument is

[1] This appeal was decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

somewhat confusing, for reasons we will soon relate, we deem the issue to be whether there was reasonable suspicion for the state trooper to stop him. We conclude that there was and affirm.

¶2 On January 30, 2010, at or about 7:40 p.m., a state patrol officer was driving his squad car west on Scott Street in the city of Fond du Lac. He observed a silver SUV in the left lane of Scott Street, going east near Hickory Street. He saw that the SUV was following "extremely close to the car in front of it." At this point, the SUV made a sudden lane change into the right lane of Scott Street, cutting off a vehicle that was also driving in the right lane. The SUV then began to speed up and proceeded to pass a line of vehicles that had been in front of the SUV, traveling in the left lane. The trooper was about one hundred feet from the SUV when he observed this. The trooper testified that the driving was performed in an aggressive manner. The trooper kept sight of the vehicle by viewing the incident in his rearview mirror. During this episode, the trooper "observed him exceeding the thirty mile per hour speed limit" both as the vehicle passed and also by viewing the vehicle in his rearview mirror. The calculation was made based on his training and experience as a trooper for four years. The trooper approximated that the SUV was travelling "between five to ten miles an hour over the thirty mile an hour speed zone."

¶3 Based on this behavior, the trooper decided to turn around and pursue the SUV. The trooper accelerated to catch up to the SUV and made the stop. The stop soon evolved into citations for operation of a vehicle while intoxicated and operating a vehicle in excess of the minimum blood alcohol content. Paulick moved to suppress all evidence obtained by the seizure. The trial court found reasonable suspicion for the trooper to believe that Paulick was

speeding and denied the motion. Subsequently, he was convicted of operating while intoxicated.

¶4 In his brief, Paulick's theme is that the trooper's opinion as to speed, made visually through a rearview mirror, is an insufficient factual basis for a law enforcement officer to stop a vehicle for speeding. This is especially so, he contends, when the trooper had only four years of experience. That contention, standing alone, is not confusing. But in applying these facts to the law, Paulick gives us two different strains of thought. At the outset of his brief-in-chief, he asserted that the issue is as follows: "Did the arresting officer have reasonable suspicion to stop the defendant?" But in the argument section of both his brief-in-chief and reply brief, he contends that we must assess the facts under the rubric of whether the officer had probable cause to believe that a traffic violation had occurred. So, we are confused about what he is contending. Is he asserting that the trooper lacked reasonable suspicion or that he lacked probable cause?

¶5 We gather that Paulick is arguing the latter. In his reply brief, he cites ***State v. Longcore***, 226 Wis. 2d 1, 6, 8, 594 N.W.2d 412 (Ct. App. 1999), *affirmed by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620, for the proposition that if an officer does not know for sure that a particular offense has been or will soon be committed, but the officer has reasonable suspicion that a crime has been committed, then the officer may make an investigative stop to resolve any ambiguity. But if the officer relates facts to a specific offense and makes the stop based on this offense, then the standard is probable cause. See ***id***. at 8-9.

¶6 We first note that Paulick never showed us that he raised this probable cause issue before the trial court. So, it is waived. *See* ***Preuss v. Preuss***,

195 Wis. 2d 95, 105, 536 N.W.2d 101 (Ct. App. 1995) (issues not raised before the trial court are generally waived). And even if there was no waiver, we are not sure that ***Longcore*** controls this case. We note that the trooper did not pull Paulick over just because he witnessed a speeding violation. Rather, the trooper testified that: "With the violations I observed, him following too close and exceeding the speed limit, I decided to pursue this silver SUV… and stop the vehicle *for his driving behavior*." (Emphasis added.) Indeed, the State argued to the trial court that the stop was justified because Paulick was observed to have followed too closely, deviated from the traffic lane without first ascertaining that it could be done safely and because Paulick was speeding. That the trial court found insufficient evidence of the first two is of no moment. It makes no difference whether the State proved all the elements of improper lane deviation and following too closely at the suppression hearing. The focus is on the facts known to the trooper, not the precise elements of the law known to the trooper. The question is whether the facts known to the trooper gave rise to reasonable suspicion that Paulick's driving behavior was in violation of the law. *See* WIS. STAT. § 968.24. We hold that such facts existed.

¶7 The question presented in ***Longcore*** was whether the officer had probable cause to make an arrest despite the officer's misunderstanding of the law. ***Longcore***, 226 Wis. 2d at 9. The officer in that case stopped the vehicle for what he thought to be a specific violation of the law regarding safety glass, not because of reasonable suspicion of driving behavior. ***Id.*** at 4. In this case, Paulick was stopped because of his overall driving behavior, and the speeding was part and parcel of reasonable suspicion that a crime may have been committed. So, we would apply the reasonable suspicion test here.

¶8 But even if we were to apply the probable cause test, Paulick would lose. His contention seems to be that a trooper with four years' experience cannot have probable cause that there was speeding when that trooper based it on a visual while looking in his rear view mirror. The law is otherwise. In ***City of Milwaukee v. Berry***, 44 Wis. 2d 321, 171 N.W.2d 305 (1969), a defendant appealed his speeding conviction on a similar basis. The supreme court noted that the officer had four years' experience, was in position to estimate Berry's rate of speed because he had a clear view for one city block and had sufficient time to observe and calculate the speed. ***Id.*** at 323. He also had reference points to aid him. ***Id.*** Of particular importance, ***Berry*** also involved a visual estimate of speed. The supreme court held that the evidence was sufficient to uphold the trial court's finding that guilt was determined by clear, satisfactory and convincing evidence. ***Id.*** at 325. Here, we have another visual, another four-year veteran, a trooper who likewise had a clear view of Paulick's driving conduct, and who was able to watch Paulick from Scott and Hickory Streets until he passed multiple cars near the intersection with Highway 45. If the supreme court could uphold a finding of guilt, we can certainly find probable cause that a speeding violation was committed, based on similar facts. And it goes without saying that there is more than sufficient evidence of reasonable suspicion, which we believe is the proper standard. We affirm.

By the Court.—Judgment and order affirmed.

This case will not be published in the official reports. *See* WIS. STAT RULE 809.23(1)(b)4.