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DISTRICT III

September 10, 2024

To:

Hon. Jay R. Tlusty
Reserve Judge

Thomas S. Barker
Clerk of Circuit Court
Lincoln County Courthouse
Electronic Notice

Kristopher R. Ellis
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Teuta Jonuzi
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Tracey A. Wood
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You are hereby notified that the Court has entered the following opinion and order:

2022AP976-CR State of Wisconsin v. Benjamin Eaton Wurl-Koth
(L. C. No. 2020CT1)

Before Hruz, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Benjamin Eaton Wurl-Koth appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), as a second offense. Wurl-Koth argues that the officer who stopped his vehicle lacked reasonable suspicion for the stop. He therefore contends that the circuit court erred by denying his suppression motion. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. For the reasons that follow, we summarily affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Following a traffic stop, the State charged Wurl-Koth with OWI and operating with a prohibited alcohol concentration (PAC), both as second offenses. Wurl-Koth moved to suppress all evidence obtained after the stop, arguing that the stop was not supported by reasonable suspicion.

The circuit court held a suppression hearing, during which Deputy Logan Lange of the Lincoln County Sheriff's Office was the sole witness. Lange testified that at about 12:25 a.m. on November 23, 2019, he was dispatched to a reckless driving complaint on State Highway 86. Dispatch informed Lange that a citizen witness—who had provided her name to dispatch—had called to report a "possibly intoxicated driver" who was "driving in a reckless manner" and was "all over the road." At some point during the call, dispatch lost contact with the witness. When dispatch reestablished contact with her, she reported that she had located the vehicle in question stopped on the roadway on Highway 86 near East Island View Road. The witness approached the vehicle on foot and identified the driver, who was passed out in the driver's seat, as Wurl-Koth. When the witness woke Wurl-Koth, he "took off at a high rate of speed," struck her vehicle, and then continued east on Highway 86. The witness originally told dispatch that Wurl-Koth's vehicle was a truck and was "possibly" red.

After receiving this information, Lange proceeded to Highway 86, where he encountered a black truck driving eastbound. Dispatch then advised that the witness had provided additional information about the truck she saw, describing it as "dark in color, possibly black, with LED headlights." Lange followed the black truck until it turned onto South Tomahawk Road and pulled into a driveway. At that point, he made contact with the truck's driver, who was not Wurl-Koth.

While Lange was speaking to the driver of the black truck, dispatch provided him with a partial license plate for the vehicle that the witness had observed. Lange then saw a second truck, which was dark in color with LED headlights, driving on South Tomahawk Road. The truck slammed on its brakes, squealed its tires, came to a complete stop at the end of the driveway where Lange was speaking to the other driver, and then "took off at a high rate of speed."

Lange got into his squad car and followed the second truck onto Highway 86. He was not able to take a radar reading of the truck's speed. He testified, however, that in order to pass his radar training, he was required to determine vehicle speeds using his "naked eye" within a window of three miles per hour. Based on his training and experience, and given the distance that the truck covered, Lange believed that the truck was traveling at eighty to ninety miles per hour—well in excess of the posted speed limit of fifty-five miles per hour. He further testified that in order to catch up to the truck, he had to accelerate to a speed "in excess of a hundred miles an hour."

Lange testified that it took him "some[ ]time" to catch up to the second truck. During the pursuit, Lange turned on his vehicle's emergency lights and siren. As Lange closed the distance between his vehicle and the truck, he was able to provide its license plate number to dispatch, and he learned that the plate number "matched" the partial plate provided by the witness. The truck subsequently turned onto East Island View Road and pulled over, and Lange identified Wurl-Koth as its driver.

Following briefing by the parties, the circuit court issued a written decision denying Wurl-Koth's suppression motion. First, the court concluded that "the tip provided by the known

citizen informant … contained sufficient indicia of reliability along with significant other information conveyed to law enforcement so as to support a reasonable suspicion for an investigatory stop." Second, the court concluded that Lange's observations following his stop of the first truck, combined with the citizen informant's information, provided "a reasonable and articulable suspicion to stop [Wurl-Koth's] vehicle."

After the circuit court denied his suppression motion, Wurl-Koth entered a no-contest plea to the OWI charge, pursuant to a plea agreement, and the PAC charge was dismissed and read in. Wurl-Koth now appeals from his judgment of conviction, arguing that the court erred by denying his suppression motion.

A traffic stop is constitutionally permissible when the officer has reasonable suspicion to believe that a crime or traffic violation has been or will be committed. *See* ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. "[T]he officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). "The legal determination of reasonable suspicion is an objective test: 'What would a reasonable police officer reasonably suspect in light of his or her training and experience.'" ***State v. Anagnos***, 2012 WI 64, ¶60, 341 Wis. 2d 576, 815 N.W.2d 675 (citation omitted).

The existence of reasonable suspicion for a traffic stop presents a question of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We will uphold the circuit court's findings of historical fact unless they are clearly erroneous, but "we review the determination of reasonable suspicion de novo." ***Id.***

On appeal, Wurl-Koth argues that Lange lacked reasonable suspicion to stop his vehicle because: (1) the information provided by the citizen witness was not sufficiently particularized to support reasonable suspicion for the stop; and (2) even if the citizen witness's information could be considered, Lange still lacked reasonable suspicion. We need not address Wurl-Koth's argument regarding the sufficiency of the citizen witness's information. Even without considering that information, we conclude that Lange had reasonable suspicion to stop Wurl-Koth's vehicle for speeding. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (explaining that the court of appeals need not address all issues raised by the parties if one is dispositive).

As noted above, at the suppression hearing, Lange testified that while he was speaking to the driver of the first truck, he saw Wurl-Koth's vehicle come to an abrupt stop at the end of the driveway and then drive away at a high rate of speed. Based on his training and experience, Lange believed that Wurl-Koth's vehicle was traveling at eighty to ninety miles per hour in a fifty-five-miles-per-hour zone. Lange further testified that he needed to drive at over one hundred miles per hour to catch up to Wurl-Koth's vehicle. The circuit court accepted Lange's testimony on these points when making its factual findings, implicitly finding Lange's testimony to be credible. Lange's testimony shows that he had reasonable suspicion to believe that a traffic violation had occurred—namely, speeding—and therefore had reasonable suspicion to stop Wurl-Koth's vehicle. *See* ***Popke***, 317 Wis. 2d 118, ¶23; *see also* ***State v. Houghton***, 2015 WI 79, ¶¶28, 30, 364 Wis. 2d 234, 868 N.W.2d 143 (holding that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops" and rejecting the defendant's argument that a traffic stop for an "observed violation" must be based on probable cause).

Wurl-Koth relies on ***State v. Powers***, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869, to support his argument that Lange lacked reasonable suspicion to stop his vehicle. In ***Powers***, we clarified that in Wisconsin, a driver is not seized when a pursuing officer activates his or her vehicle's emergency lights. ***Id.***, ¶8. Instead, "to effect a seizure, an officer must make a show of authority, and the citizen must actually yield to that show of authority." ***Id.*** (citation omitted). Thus, no seizure occurred in ***Powers*** until the defendant "pulled off the public street, into a parking lot, and parked in front of a restaurant." ***Id.*** Consequently, in determining whether the officer had reasonable suspicion to stop the defendant's vehicle, we could consider everything that happened until the defendant yielded to the officer's show of authority by parking in front of the restaurant. ***Id.***

Wurl-Koth's reliance on ***Powers*** is inapt. Again, Lange testified that he observed Wurl-Koth speeding, and the circuit court credited his testimony on that point. Wurl-Koth asserts that he yielded to Lange's show of authority—i.e., to Lange's activation of his squad car's emergency lights and siren—when he slowed his vehicle and turned onto East Island View Road. Based on Lange's testimony at the suppression hearing, Lange's observation of Wurl-Koth's speeding clearly occurred before that time. As such, under ***Powers***, we may consider that observation in our reasonable suspicion analysis.

Wurl-Koth also argues that his speeding "may not factor into the reasonable suspicion analysis" because Lange did not observe it until after he had already decided to stop Wurl-Koth's vehicle. This argument fails because, as noted above, the legal determination of reasonable suspicion is an objective test. *See* ***Anagnos***, 341 Wis. 2d 576, ¶60. "As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal." ***State v. Baudhuin***, 141 Wis. 2d 642, 651,

416 N.W.2d 60 (1987). Thus, an officer's subjective intent to stop a vehicle for one reason "does not alone render [the stop] illegal, as long as there were objective facts that would have supported a correct legal theory to be applied and as long as there existed articulable facts fitting the traffic law violation." ***Id.*** Here, there were sufficient articulable facts to support a reasonable suspicion that Wurl-Koth was speeding, regardless of Lange's subjective motivation for initiating the stop.

Finally, Wurl-Koth argues that Lange's testimony about his speed was "not credible" because the distance between South Tomahawk Road and East Island View Road is 0.8 miles, and Lange testified that it took him "some[ ]time" to catch up to Wurl-Koth's vehicle. Wurl-Koth asserts that if he had been driving at eighty to ninety miles per hour, "he would have exceeded 0.80 miles in distance, given the time it took for Lange to approach the vehicle."

"When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. As such, we must accept the circuit court's credibility determinations "unless the testimony relied upon is incredible as a matter of law." ***State v. Jacobs***, 2012 WI App 104, ¶17, 344 Wis. 2d 142, 822 N.W.2d 885.

Lange's testimony about Wurl-Koth's speed is not incredible as a matter of law. As an initial matter, we note that no evidence was introduced at the suppression hearing regarding the distance between South Tomahawk Road and East Island View Road. Thus, there was no basis

for the circuit court to conclude that Lange's testimony about Wurl-Koth's speed was incredible based on that alleged distance.[2]

Regardless, even if evidence regarding the alleged 0.8-mile distance had been introduced at the suppression hearing, it would not have rendered Lange's testimony incredible as a matter of law. Although Lange testified that it took him "some[ ]time" to catch up to Wurl-Koth's vehicle, he did not clarify—and was not asked to clarify—the amount of time that elapsed. Without additional information about the time that it took Lange to catch up to Wurl-Koth's vehicle, Lange's vague testimony that "some[ ]time" elapsed is not inherently inconsistent with his testimony that Wurl-Koth was traveling at eighty to ninety miles per hour, even assuming that the distance between South Tomahawk Road and East Island View Road is 0.8 miles.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[2] After the circuit court denied his suppression motion, Wurl-Koth moved to reopen the evidence. In his brief in support of that motion, Wurl-Koth argued for the first time that Lange's testimony about his speed was incredible because the distance between South Tomahawk Road and East Island View Road is 0.8 miles. The court denied Wurl-Koth's motion to reopen, and Wurl-Koth does not challenge that decision on appeal.