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DISTRICT IV

May 31, 2024

To:

Hon. Lynn M. Rider
Circuit Court Judge
Electronic Notice

Nancy A Dowling
Clerk of Circuit Court
Crawford County Courthouse
Electronic Notice

Daniel Key
Electronic Notice

Luke Steiner
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP2191 County of Crawford v. Steven Todd McManamy
(L.C. # 2023TR209)

Before Nashold, 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).

Steven Todd McManamy appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI). McManamy contends that the circuit court erroneously denied his motion to suppress evidence derived from the stop of his vehicle. On this

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

court's own motion, this appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1).[2] I reject McManamy's arguments and affirm.

At the suppression hearing held in this matter, the law enforcement officer testified as follows. At approximately 1:00 a.m. on February 24, 2023, the officer was on patrol in his squad car on a highway in Crawford County. The officer encountered a car driven by McManamy and followed it approximately five miles. He observed McManamy's car repeatedly swerve within its lane and eventually cross the centerline. The officer conducted a traffic stop. After an investigation, the officer issued McManamy a citation for OWI.

The County brought this action for first-offense OWI, and McManamy moved to suppress all evidence derived from the traffic stop, arguing that the stop was not supported by reasonable suspicion. At the suppression hearing, the circuit court admitted into evidence dash camera video of the encounter from the officer's squad car. The County argued that the video showed McManamy's car crossing the centerline, and that this lane violation justified the stop. *See* ***State v. Popke***, 2009 WI 37, ¶18, 317 Wis. 2d 118, 765 N.W.2d 569 (driving "left of the center of the road" is generally a violation of WIS. STAT. 346.05(1)). McManamy argued that the video showed that his car's tires touched, but did not cross, the centerline. After viewing the video, the court said that the video showed McManamy's car "moving in [its] lane," with the tires appearing to touch the centerline on one or two occasions. The court said that it "did not see" any point at which the tires crossed the centerline, but the video was "dark" and did not give a "perfect view."

[2] WISCONSIN STAT. RULE 809.21(1) provides that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily."

The circuit court determined that there was reasonable suspicion for the stop based on the driving conduct shown in the video, considered together with the late hour of the encounter, at which time "impaired driver[s]" are more likely to be on the road. Accordingly, the court denied McManamy's suppression motion. McManamy pled guilty to OWI under WIS. STAT. § 346.63(1)(a), and the court entered a judgment of conviction, which McManamy appeals.

An officer may make an investigatory stop of a vehicle if the officer reasonably suspects that the driver has committed or is about to commit a crime, or reasonably suspects that a person is violating a noncriminal traffic law. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). Weaving within a single lane may, considered as part of the totality of the circumstances, contribute to reasonable suspicion that a person is operating a motor vehicle while intoxicated. *See* ***State v. Post***, 2007 WI 60, ¶37, 301 Wis. 2d 1, 733 N.W.2d 634.

Whether a traffic stop is reasonable is a "mixed question of law and fact." ***Id.***, ¶8. This court upholds the circuit court's findings of fact unless "clearly erroneous," and reviews de novo "the application of those facts to constitutional principles." ***Id.***

McManamy argues that the traffic stop was not supported by reasonable suspicion either for a lane violation or for OWI.[3] McManamy's argument relies in large part on the dash camera

[3] Although the parties do not address this issue, I note that McManamy waived this challenge by pleading guilty. "[A] plea of guilty, knowingly and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights." ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). There is a statutory exception to this rule: "Under WIS. STAT. § 971.31(10), a defendant who pleads guilty does *not* waive the right to appeal an order denying a motion to suppress evidence." ***State v. Abbott***, 2020 WI App 25, ¶40, 392 Wis. 2d 232, 944 N.W.2d 8. However, this statutory exception does not apply "to guilty or no contest pleas in civil cases." ***Smith***, 122 Wis. 2d at 435. McManamy pled guilty to first-offense OWI, which is a civil offense to which § 971.31(10) does not apply, and he has therefore waived his challenge to the lawfulness of the stop. *See* ***id.*** at 434-38. However, "an appellate court may review [waived] non-
(continued)

video, which, according to McManamy, contradicts the officer's testimony. However, that video was not made a part of the record on appeal. Accordingly, I must assume that this video supports the circuit court's determination that the stop was supported by reasonable suspicion. *See* ***Schaidler v. Mercy Med. Ctr. of Oshkosh, Inc.***, 209 Wis. 2d 457, 470-71, 563 N.W.2d 554 (Ct. App. 1997) (it is "the appellant's responsibility to insure that the record includes all documents pertinent to the appeal," and "[w]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling").

McManamy contends that the video "discredit[s]" the officer's testimony that he crossed the centerline. Because the video is not in the appellate record, this argument cannot prevail. McManamy also relies on what he calls the circuit court's "finding," based on its review of the video, that McManamy's car "did not cross the center line." It is not clear, however, that the court made such a finding. As noted above, the court said that, although it "did not see" McManamy's car cross the centerline, the video was "dark" and did not give a "perfect view," suggesting that the video may not necessarily contradict the officer's testimony. Further, the court did not explicitly state whether it did or did not credit the officer's testimony that the car crossed the centerline; instead, the court stated that it did not "need to make [the] finding" that McManamy's car crossed the centerline to conclude there was reasonable suspicion. Consistent with this, the County contends that "[t]he trial court made no explicit finding" as to whether McManamy's car crossed the centerline. McManamy does not reply to this contention, and I

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jurisdictional errors in the exercise of its discretion." *See* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243. Because the County does not raise the issue of waiver, I exercise my discretion to address McManamy's arguments.

deem it conceded.[4] *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (a respondent's failure to respond to an argument may be taken as a concession).

Moreover, even assuming that the video shows that McManamy did not commit a lane violation, the traffic stop could nevertheless be lawful if it was supported by reasonable suspicion of OWI. As noted above, the circuit court determined that McManamy's driving conduct, considered alongside the fact that 1:00 a.m. is a particularly likely time for an impaired driver to be on the road, together gave rise to reasonable suspicion. McManamy contends that "some intra-lane navigation" and "a touch of a tire (possibly twice) on the centerline of a curving country road" does not amount to reasonable suspicion, but this argument fails for at least the following two reasons.

First, to the extent that McManamy argues that his "intra-lane navigation" was too minimal to be suspicious, this argument cannot prevail because, as noted above, the dash camera video is not in the appellate record. I must instead assume that the driving conduct shown in the video supports the circuit court's reasonable suspicion determination. Second, reasonable suspicion requires consideration of the totality of the circumstances, and McManamy fails to explain why his driving conduct, considered together with the time of day, would not give rise to reasonable suspicion. *See* ***Post***, 301 Wis. 2d 1, ¶¶36-37 ("weaving" within a single lane, taken together with facts including "that the incident took place at night," gave rise to reasonable suspicion of OWI). McManamy suggests that the time of day is immaterial because "[c]onstitutional rights" do not "end or commence at a given (or arbitrary) time of day."

[4] McManamy submitted no reply brief in this appeal.

However, it is a well-established legal principle that the time of day may contribute to a reasonable suspicion determination. *See, e.g.*, ***id.***, ¶37; ***State v. Allen***, 226 Wis. 2d 66, 77, 593 N.W.2d 504 (Ct. App. 1999). To the extent that McManamy intends to challenge this principle, I reject his argument because it is undeveloped, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), and because this court is bound by precedent, *see* ***In re Court of Appeals of Wisconsin***, 82 Wis. 2d 369, 371, 263 N.W.2d 149 (1978).

For all of these reasons, I affirm the judgment of conviction.[5]

IT IS ORDERED that the judgment of the circuit court is summarily affirmed.

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

Samuel A. Christensen
Clerk of Court of Appeals

[5] The parties have failed to comply with certain rules of appellate procedure. The County failed to timely file a respondent's brief, and it did not file a brief until this court issued an order warning the County that failure to file a brief within five days would result in the sanction of summary reversal. *See* ***Raz v. Brown***, 2003 WI 29, ¶36, 260 Wis. 2d 614, 660 N.W.2d 647. The County offered no explanation for its delay. I admonish the County for its lack of diligence, which has delayed the resolution of this appeal.

McManamy's appellate brief does not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). This rule was amended in 2021, *see* S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021), because briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for e-filing. As our supreme court explained when it amended the rule, the new pagination requirement ensures that the numbers on each page of a brief "will match … the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief. S. CT. ORDER 20-07 cmt. at x1.