COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2127-CR **Cir. Ct. No. 2004CT103**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHAD A. DEMERATH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Reversed and cause remanded.*

¶1 CANE, C.J.[1] The State of Wisconsin appeals an order suppressing evidence obtained during a traffic stop. The State contends the circuit court erred

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

by finding that a faulty radar reading was a negligent misrepresentation by the State and thus justified suppressing evidence obtained during the stop. This court concludes the evidence should not have been suppressed and reverses the order.

FACTS

¶2 On November 6, 2004, Forest County sheriff's deputy Jeffrey Marvin noticed a truck pulling a trailer that appeared to be speeding. Using radar, Marvin clocked the truck at forty-four miles per hour. The speed limit was twenty-five. Marvin caught up with the truck, which he noticed was weaving within its lane and had crossed the centerline. He suspected the driver was under the influence of intoxicants. After stopping the vehicle, Marvin identified the driver as Chad Demerath, who smelled of intoxicants, slurred his speech, and had glossy eyes. After Demerath performed poorly on field sobriety tests, Marvin arrested him for operating while intoxicated. A Breathalyzer test later indicated that Demerath's blood alcohol content was .13%.

¶3 Demerath filed a motion to dismiss the case because Marvin lacked probable cause to stop or arrest him and, as a result, any evidence obtained from the stop must be suppressed. The court heard evidence on Demerath's motion at two hearings. At the first hearing, Demerath testified that prior to being stopped, he was leaving the corner of North Branch and Cecil Streets, which is approximately 450 feet from where Marvin was parked. Demerath testified there was no way he could have been going forty-four miles per hour by the time Marvin clocked him at that speed with radar.

¶4 Demerath offered the testimony of his mechanic, Mark Wilson, who helped Demerath perform tests on his truck and trailer. Wilson testified that he stood outside while Demerath drove the truck. When Demerath reached forty-four

miles per hour, he signaled Wilson, who marked the truck's location. They then measured the distance between the starting point and the point where Demerath reached the above speed. Wilson testified that it took 1150 feet for Demerath to reach forty-four miles per hour.[2]

¶5 After hearing this testimony, the court granted a continuance to allow Demerath to have more scientific tests performed. At the second hearing, Demerath presented the testimony of an engineer, Donald Marty. Marty testified that he performed several tests and concluded the truck and trailer could attain a speed of forty-four miles per hour in approximately 1090 feet. Marty performed his tests using sophisticated equipment, but noted the truck and trailer were heavily loaded. He stated that the bed of the pickup truck had a "pretty good" load of sand and the trailer contained bags of concrete.

¶6 The circuit court found that the radar reading was incorrect and attempted to compare this case, by analogy, to cases involving search warrants. The court noted that evidence may be suppressed where a warrant is premised on intentional or reckless misrepresentations of fact, referring to ***Franks v. Delaware***, 438 U.S. 154 (1978). Here, the court concluded the radar reading was a negligent misrepresentation of fact. The court then referred to ***United States v. Caceres***, 440 U.S. 741 (1979), where the Supreme Court declined to suppress evidence when the Internal Revenue Service failed to follow its own procedures. From ***Caceres***, the circuit court concluded that suppression may be appropriate even where there

[2] Given Demerath's testimony that it was approximately 450 feet to the point at which Marvin was parked and Marvin's testimony that he clocked Demerath with his radar approximately 150 feet past where he was parked, the parties estimated that Demerath was clocked approximately 600 feet after beginning to accelerate.

is no intentional or reckless misrepresentation. The court then weighed the State's negligent misrepresentation against Demerath's conduct. The court determined Demerath was cooperative during the stop, which weighed in his favor, and therefore concluded any evidence obtained from the stop should be suppressed. The State appeals.

DISCUSSION

¶7 When reviewing a motion to suppress evidence, this court will uphold a circuit court's findings of fact unless clearly erroneous. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. However, application of constitutional principles to those facts is a question of law we review without deference to the circuit court. ***Id.***

¶8 A traffic stop by law enforcement is a "seizure" under the Fourth Amendment and must be reasonable under the circumstances. ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). A traffic stop is reasonable if the officer has probable cause to believe a traffic violation has occurred, or has grounds to reasonably suspect a violation has been or will be committed. ***Id.*** Probable cause exists where the totality of the circumstances within the officer's knowledge at the time would lead a reasonable officer to believe a violation has occurred. ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). A reasonable suspicion exists where the suspicion is premised on specific, articulable facts and reasonable inferences from those facts. ***Fields***, 239 Wis. 2d 38, ¶10.

¶9 Before attempting to unravel the circuit court's reasoning for suppressing evidence obtained during the traffic stop, this court applies the relatively simple standards outlined above. When Marvin stopped Demerath,

Marvin not only had reasonable suspicion to investigate whether Demerath was driving while intoxicated, but also had probable cause to arrest him for speeding. The relevant inquiry for probable cause focuses on all the facts and circumstances available to the officer *at the time*. *See* ***Nordness***, 128 Wis. 2d at 35. When Marvin first spotted Demerath's truck, he believed, based upon his experience, that Demerath was speeding. His radar then indicated Demerath was traveling forty-four miles per hour where the speed limit was twenty-five. The circuit court's finding that the radar reading was inaccurate was not available to Marvin as he sat in his squad car. Marvin did not see Demerath's point of origin, so he could not have second-guessed his radar based upon the distance Demerath had traveled or the load he was carrying. After obtaining the radar reading, Marvin could reasonably believe Demerath was speeding and therefore had reasonable suspicion to stop, and probable cause to arrest, him for speeding.

¶10 Once stopped, Marvin obtained probable cause to arrest Demerath for operating while intoxicated because Demerath smelled of alcohol, slurred his speech, had glossy eyes, and performed poorly on field sobriety tests. As such, the stop and arrest were appropriate, and the evidence obtained after the stop should not have been suppressed.

¶11 The circuit court's ruling was premised on its finding that the radar reading was incorrect. The court characterized the incorrect radar reading as a negligent representation of fact, which the court imputed to the State. The court referred to ***Franks***, where the United States Supreme Court concluded that a defendant could challenge the veracity of affidavits supporting a search warrant. ***Franks***, 438 U.S. at 171. In ***Franks***, the Court concluded that intentional and reckless misrepresentations of fact supporting a search warrant could trigger the exclusionary rule. ***Id.*** Here, the circuit court viewed the question of whether a

negligent misrepresentation of fact could justify excluding evidence obtained in a traffic stop as an issue of first impression, which is why the court weighed the misrepresentation against Demerath's conduct.

¶12 This court first rejects the notion that the reasoning in ***Franks*** has any application in this context. The Supreme Court's conclusion that the veracity of affidavits supporting a search warrant may be challenged was premised on the language of the "warrant clause" of the Fourth Amendment. ***Id.*** at 164. That clause states, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend. IV. Here, where the issue was an officer's reasonable suspicion to stop or probable cause to arrest, the language of the warrant clause was not applicable.

¶13 This court also rejects the circuit court's reasoning that ***Caceres*** lends support to its conclusion. In ***Caceres***, 440 U.S. at 744, the Supreme Court refused to apply the exclusionary rule as a method of enforcing an agency's regulations where an agency obtained evidence in violation of those regulations.[3] The circuit court seemingly read ***Caceres*** to extend ***Franks*** by implying that the exclusionary rule may apply beyond circumstances where evidence is obtained based on an intentional or reckless misrepresentation of fact. However, this court concludes that ***Caceres*** has absolutely no application to this case. The Supreme Court explicitly stated that there was no Fourth Amendment issue in ***Caceres***. ***Id.***

[3] In ***Caceres***, the IRS obtained evidence using a recorder concealed on one of its agents that was not authorized by superiors in accordance with regulations. ***United States v. Caceres***, 440 U.S. 741, 743 (1979).

The Court was only deciding whether to apply the exclusionary rule as a mechanism for enforcing an agency's regulations. ***Id.*** at 743.

¶14 Moreover, the major purpose of the exclusionary rule cannot be served here. In ***Elkins v. United States***, 364 U.S. 206, 217 (1960), the Supreme Court noted the exclusionary rule is designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." ***Id.*** Unlike the intentional or reckless misrepresentations the Supreme Court sought to deter in ***Franks***, negligent misrepresentations are not so amenable to deterrence. Even in the context of search warrants, the Court in ***Franks*** explicitly expressed its reluctance to extend its holding to "instances where police are merely negligent in checking or recording facts relevant to a probable-cause determination." ***Franks***, 438 U.S. at 170. Especially here, where no one was alleged to be negligent, there was not even arguably any conduct to deter. In fact, there was no negligence at all in this case. There was no finding that the radar device was negligently operated or maintained. The circuit court found the radar device itself to be negligent, but this court is unaware of any precedent for imposing a duty of care upon a machine.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.