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**DISTRICT III**

October 11, 2023

*To*:

Hon. Tammy Jo Hock
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Meranda JoAnn Hillmann
Electronic Notice

Jennifer Lohr
Electronic Notice

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

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2022AP435-CR State of Wisconsin v. Curtis R. Rowen (L.C. No. 2020CT107)

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).**

Curtis Rowen appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as second offenses. Rowen contends that the officers who stopped his vehicle lacked reasonable suspicion for the stop. He therefore asserts that the circuit court erred by denying his motion to suppress evidence. Based upon our review of the briefs and record, we conclude that

[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.

this case is appropriate for summary disposition, and we summarily affirm Rowen's judgment of conviction.[2] *See* WIS. STAT. RULE 809.21.

At the suppression hearing, Officer Scott Delsart testified that on November 8, 2019, at about 1:47 a.m., he was dispatched to perform a welfare check at a Kwik Trip on East Mason Street in Green Bay. A caller had reported that a man who appeared to be intoxicated had "stumbled" out of the Kwik Trip into a running blue vehicle. The caller provided a Wisconsin license plate number, which "came back to a Ford Escape."

Delsart testified that he and Officer Nicholas Walvort located a blue Ford Escape matching the caller's description not far from the Kwik Trip. Delsart was in his squad car on Main Street, near the "Abrams/Newberry" intersection, when he saw Walvort's squad car "get behind the vehicle at the intersection." The Ford Escape then "passed through eastbound across Main Street, through the intersection, with Officer Walvort following it." As the vehicle crossed the intersection, Delsart observed that it did not have a front license plate.

[2] Rowen was found guilty of both OWI and PAC following a jury trial, based on acts arising out of the same incident or occurrence. If a person is found guilty of both OWI and PAC for acts arising out of the same incident or occurrence, "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under [WIS. STAT. §§] 343.30(1q) and 343.305." WIS. STAT. § 346.63(1)(c). Rowen's judgment of conviction shows that he was convicted of both offenses and that his sentence on Count 2—the PAC charge—was the "[s]ame as count one"—the OWI charge. Nevertheless, Rowen does not raise any argument on appeal regarding this issue. Accordingly, we will not address it further. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (we will not abandon our neutrality to develop arguments for a party).

Additionally, we note that in the circuit court, Rowen argued, as an alternative basis for his suppression motion, that law enforcement lacked probable cause to arrest him. Rowen does not renew that argument on appeal, and we therefore do not address it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (an issue raised in the circuit court, but not on appeal, is deemed abandoned).

Delsart turned off of Main Street onto Newberry Avenue, so that he was following Walvort, who was following the Ford Escape. The Ford Escape subsequently turned onto Henry Street, and the two officers followed. According to Delsart, the Ford Escape was traveling "much faster than the speed limit while on Henry Street." Delsart testified that, "based on pacing with our calibrated speedometers," he estimated the Ford Escape to be traveling at about forty miles per hour in an area where the speed limit was only twenty-five miles per hour.

Walvort then initiated a traffic stop, with Delsart in "close proximity" behind him. After the Ford Escape pulled over, Walvort approached the driver's side of the vehicle, and Delsart approached the passenger's side. The officers identified Rowen, the vehicle's registered owner, as the driver. Rowen was subsequently placed under arrest for OWI.

On cross-examination, Delsart conceded that he had paced Rowen's vehicle for less than thirty seconds while driving on Henry Street. Delsart also testified on cross-examination that he was "about a block north on Main Street" when Walvort first located Rowen's vehicle.

In addition to Delsart's testimony, a dashboard camera video from Walvort's squad car was introduced into evidence at the suppression hearing. The video shows that, upon initially making contact with Rowen, Walvort stated that he had stopped Rowen's vehicle because of its speed on Henry Street and because it was missing a front license plate.

At the conclusion of the suppression hearing, the circuit court stated, "I think from the testimony that's been presented and my review of the video, there's clearly reasonable and articulable suspicion for the traffic stop." In support of that conclusion, the court noted, "You could hear on the video this other officer indicating that he stopped [Rowen] because of traveling

at a high rate of speed and for not having a front license plate." The court therefore denied Rowen's suppression motion. A jury subsequently found Rowen guilty of both OWI and PAC.

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. ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. "The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion" of the stop. ***State v. Young***, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997). "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***Id.*** at 424.

Whether there was reasonable suspicion for a traffic stop is a question of constitutional fact, to which we apply a two-step standard of review. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. ***Id.***

On appeal, Rowen argues that the circuit court erred by concluding there was reasonable suspicion for the stop of his vehicle because "the officer who initiated the stop did not testify and the testimony of the second officer on the scene was contradicted by the video evidence presented." We disagree. Rowen makes much of the fact that Walvort did not testify at the hearing, and he therefore asserts that the court could not rely on Walvort's "hearsay statements" in the dashboard camera video. It is clear, however, that in making its decision, the court also relied on Delsart's testimony. The court expressly stated: "I think *from the testimony that's*

*been presented* and my review of the video, there's clearly reasonable and articulable suspicion for the traffic stop." (Emphasis added.) Although Rowen emphasizes that Walvort, not Delsart, initiated the traffic stop, it is clear from Delsart's testimony that his vehicle was immediately behind Walvort's at the time of the stop, and the dashboard camera video shows Walvort and Delsart approaching Rowen's vehicle at the same time. Under these circumstances, the fact that Walvort—the officer who initiated the stop—did not testify at the suppression hearing is immaterial.

Delsart's testimony, standing alone, provided two separate grounds to conclude that the officers had reasonable suspicion to stop Rowen's vehicle. First, Delsart's testimony shows that the officers had reasonable suspicion to stop Rowen's vehicle for speeding. Delsart testified that he observed Rowen's vehicle traveling "much faster than the speed limit while on Henry Street." He explained that, after pacing the vehicle for less than thirty seconds, he estimated that it was traveling at about forty miles per hour in a twenty-five-miles-per-hour zone. It is clear from the circuit court's decision that, after hearing Delsart's testimony and viewing the dashboard camera video, the court implicitly found credible Delsart's testimony that Rowen's vehicle was speeding. *See* ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844 (stating that when a court fails to make express credibility findings, "we assume it made implicit findings on a witness's credibility when analyzing the evidence"). We must accept the court's credibility determinations "unless the testimony relied upon is incredible as a matter of law." *See* ***State v. Jacobs***, 2012 WI App 104, ¶17, 344 Wis. 2d 142, 822 N.W.2d 885.

Rowen argues that Delsart's testimony about his vehicle's speed was incredible, as a matter of law, because the dashboard camera video shows that Delsart was not following Rowen's vehicle long enough to pace its speed, because the video shows that Rowen braked

shortly after turning onto Henry Street, and because the video shows that Walvort accelerated to catch up to Rowen's vehicle. We have reviewed the video, and nothing in it convinces us that Delsart's testimony about the vehicle's speed was incredible, as a matter of law. The circuit court's implicit credibility finding regarding Delsart's testimony about the vehicle's speed was not clearly erroneous. *See* ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 ("[W]hen evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the [circuit] court's findings of fact based on that recording.").

Second, Delsart's testimony shows that the officers had reasonable suspicion to stop Rowen's vehicle based on its lack of a front license plate. Delsart specifically testified that, as Rowen's vehicle crossed Main Street, he saw that the vehicle did not have a front license plate. Again, it is clear that the circuit court implicitly found Delsart's testimony on this point to be credible. *See* ***Quarzenski***, 305 Wis. 2d 525, ¶19.

Rowen does not dispute that if Delsart actually observed that Rowen's vehicle lacked a front license plate, that observation would have provided reasonable suspicion for the traffic stop. Instead, Rowen asserts that Delsart's testimony that he observed the absence of a front license plate was incredible, as a matter of law, because Delsart also testified that he was "about a block north on Main Street" when Walvort first located Rowen's vehicle. Rowen contends that if Delsart was one block away, it would have been impossible for him to see that Rowen's vehicle did not have a front license plate as Rowen "drove perpendicular to [Delsart's] direction." We disagree. There is nothing in the record to indicate the length of the "block" between Delsart's and Rowen's vehicles. In addition, there is no evidence as to the angle at which the roads where Rowen and Delsart were driving converge at the relevant intersection.

Absent such evidence, we cannot conclude that Delsart's testimony that he observed the absence of a front license plate on Rowen's vehicle was incredible, as a matter of law.

In summary, Delsart's testimony at the suppression hearing—which the circuit court implicitly found to be credible—provided two separate grounds to conclude that the officers had reasonable suspicion to stop Rowen's vehicle. Accordingly, the court did not err by denying Rowen's suppression motion.

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.

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*Samuel A. Christensen*
*Clerk of Court of Appeals*