

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

12-OLR- 17

Paul W. Humphrey
Attorney at Law

The Respondent, Paul W. Humphrey, is a Wisconsin-licensed attorney, admitted to practice in this State on May 31, 1989.

On July 18, 2003 a woman (defendant) driving a SUV, while making a right turn in downtown Madison, Wisconsin, struck a pedestrian who was crossing the street in the crosswalk of the street into which defendant was turning. The pedestrian died about an hour later at a local area hospital.

On July 22, 2003, a Deputy District Attorney (DDA) filed a criminal complaint against the defendant for Homicide by Negligent Operation of a Vehicle. The criminal complaint included the following information:

- The defendant told a police officer, JG, that she negotiated the turn at 25-30 miles per hour (mph) and that the traffic light was yellow. The defendant told the officer she did not see any pedestrians on the sidewalk or in the crosswalk and that, as she drove through the intersection, she did not see, feel, or hear anything. She said that when people yelled at her to stop she saw the pedestrian behind her.
- A police officer, PN, interviewed four witnesses. One of the witnesses said the defendant told him, “Me not pay attention.” Another witness, CD, told PN that the defendant went through a red light and was travelling at a speed of 35-40 mph when she struck the pedestrian.

An Assistant State Public Defender (defense counsel) was appointed to represent the defendant. Respondent, an Assistant District Attorney, was assigned to prosecute the case.

On July 24, 2003, police officers JG and CJ conducted trials of negotiating the turn the defendant had made at different speeds.

The SUV used in the July 24, 2003 speed trials was similar to the defendant's SUV, but not the same make of automobile. The speed trials were videotaped by a third officer. The first trial run was completed at 25 mph. In his July 28, 2003 written report, JG, as a passenger, reported that at 25 mph he felt the tires slip slightly and heard them squeal. CJ's July 24, 2003 report stated he felt a slight loss of vehicle control and the tires squealed. CJ stated that the 25 mph turn was faster "than what I would normally complete the turn in." The second trial run was attempted at 30 mph. JG reported that CJ had to quickly decelerate to 20 mph because the tires were squealing loudly and they were drifting out of their lane. CJ reported that he was not able to maintain the 30 mph speed through the turn. CJ stated:

In my opinion, maintaining the 30 mph speed through the turn is very dangerous and would be nearly impossible. I don't believe the speed could be maintained without causing the vehicle to either overturn or to run up onto the sidewalk on the east side of [street name].

On July 28, 2003, defense counsel filed a motion to dismiss the complaint.

On July 29, 2003, the motion to dismiss was denied and the Preliminary Hearing on the complaint was held.

The Court based its denial of the motion to dismiss on a number of factors, including the fact that the complaint indicated that the defendant said she was going 25-30 mph through the turn and a witness said she was travelling at a speed of 35-40 mph.

The preliminary hearing included testimony from CD, who said he thought the defendant's speed at the time of impact was 35 mph. On cross-examination, CD conceded that it was possible the defendant was going 25mph.

Officer JG testified that he believed the speed limit at the accident location was 30 mph. JG testified that the defendant told him she was travelling through the intersection at a speed of 25 to 30 mph. JG's testimony did not include his opinion, based on the speed trials conducted by CJ and him on July 24, 2003, that it was not possible to negotiate the turn at a speed of 30 mph.

In finding probable cause, the Court stated:

Here the evidence is frankly overwhelming that this defendant's operation of this vehicle on the day in question created a huge risk of death or great bodily harm. Not only did she, according to the plausible version of guilt, drive through a red light, she did so at a high rate of speed.

When one considers that this is done in a busy downtown intersection a block off the Capitol Square and is done where her speed may not, according to her, have exceeded the speed limit if one were proceeding straight ahead but the defendant was making a turn, one does not travel the full speed limit when one is making a turn. But here, even by her own admission she was travelling 25-30 miles an hour as she made the turn. By [CD's] testimony, she was travelling 35 miles per hour. Whichever is correct, there's no question it is a very high rate of speed for a congested area.

In ruling, the Court also considered the fact the defendant was "completely inattentive" and did not even see the victim or notice that she had struck something.

On July 30, 2003, defense counsel made a Demand for Discovery and Inspection, which included a request for "All exculpatory evidence, including...police reports, or any other information within the State's possession, knowledge, or control..."

By letter dated July 31, 2003, Respondent provided defense counsel with 90 pages of discovery. According to Respondent, JG's and CJ's reports from the July 24, 2003 speed trials

were included with this original group of reports sent to defense counsel. Respondent did not provide defense counsel with copies of the videos of those speed trials at that time.

Also included with the discovery sent to defense counsel on July 31, 2003, was a report and a diagram of the scene of the accident that had been drawn by then Special Investigator, MT. Shortly after making the diagram, MT was placed on leave and subsequently left the employ of the police department. The diagram defense counsel received on July 31, 2003, along with MT's report, stated "1 inch = 20 ft." The diagram contained none of the actual measurements taken by MT.

On August 13, 2003, Respondent sent defense counsel some photographs, and stated he did not have anything new since the preliminary hearing.

By letter dated September 19, 2003, defense counsel asked Respondent for, among other things, a copy of the reconstruction test and all reports pertaining to it; measurements obtained in relation to the reconstruction; copies of all videotapes prepared during the reconstruction; traffic signal timing sequence data; and the diagram and typed addendum attached to PN's report.

On September 23, 2003, Respondent sent a handwritten case status report to a police officer, BR, which stated, "Δ has requested certain Discovery: 1) Please send up the Crash Recon, 2) the videos, 3) Repts on the sequence on the lights, 4) coroner & Autopsy Repts, 5) the diagram."

On September 26, 2003, JG retrieved the videotapes that Respondent had requested from the evidence room, so that copies could be made and sent to Respondent.

On October 17, 2003, defense counsel filed a Motion to Compel Discovery. In the motion, defense counsel stated he had received no response to his September 19, 2003 letter.

By letter dated October 21, 2003, Respondent told defense counsel he thought defense counsel's motion to compel was "strange." Respondent said, "I gave you [JG's] report, the diagram and the traffic light sequence...There are NO videos prepared in the course of crash reconstruction. I do have the videos made of driving through the intersection, but they are not yet discoverable because I am not sure if I am going to use them."

In an October 23, 2003 responsive letter to Respondent, defense counsel reiterated that he was requesting the videotapes of JG's and CJ's July 24, 2003 speed trials and the measurements for MT's diagram.

On October 23, 2003, defense counsel also made a motion to preserve "videotapes and all written or recorded logs in relation to any and all tests conducted in the investigation of the above referenced case."

On October 30, 2003, Respondent also sent an email to the District Attorney which stated, in part:

...I talked to [defense counsel] today, and he's still taking the position that this was an accident...He disputes the speed, and the timing of the lights etc...

In a November 3, 2003 typed memo to the file, Respondent stated he had spoken with defense counsel on that date about several case-related matters. Respondent stated that defense counsel said the reports showed that the defendant was not speeding. Respondent's memo further stated, "He still wants to look at those videos and one of these days after I look at them he can look at them."

The case was originally scheduled for trial on November 26, 2003 but a November 6, 2003 CCAP note indicates that the trial was to be rescheduled for January or February 2004.

By letters dated November 28, 2003, December 24 and December 31, 2003 and January 12, 2004, Respondent provided defense counsel with some additional photographs and other discovery. None of those submissions to defense counsel, however, included the July 24, 2003 videotapes or the measurements for MT's diagram.

By letter dated January 13, 2004, one week before the hearing on the motion to compel, Respondent finally provided defense counsel with the videotapes.

On January 20, 2004, a hearing was held on defense counsel's motion to compel discovery. Defense counsel informed the Court that he received the videos "last week" but that he still did not have the measurements for the police diagram. The January 20, 2004 hearing primarily involved a discussion about the availability of the diagram measurements, which were eventually found and produced subsequent to the hearing.

Sometime prior to the January 20, 2004 hearing, the trial had been rescheduled for April 12, 2004.

On January 29, 2004, Respondent and defense counsel began negotiations for a possible no contest plea by the defendant.

On April 2, 2004, the defendant pled no contest to the felony charge of homicide by negligent operation of a vehicle and was sentenced to one-year in the county jail with Huber privileges.

According to defense counsel, the defendant was placed on an immigration hold because she did not have the proper documentation to be in the United States. Defense counsel said the defendant decided to plead to the criminal charge because she was going to be deported anyway, and she wanted to get out of jail to be with her young children. The defendant was given credit for time served, and she went back to her country of origin.

Defense counsel did not believe the defendant was speeding and said the evidence was not strong that she went through a red light. Defense counsel said he was entitled to the July 24, 2003 videotapes even if Respondent was not going to use them, because they were potentially exculpatory on the issue of the defendant's speed.

According to Respondent, the videotapes did not have to be given to defense counsel unless Respondent intended to use them at trial. Nevertheless, Respondent says the videotapes of the speed trials were turned over without a court order and well before the scheduled date for the trial.

By failing, between defense counsel's initial demand for discovery on July 30, 2003 and January 13, 2004, to provide defense counsel with copies of the videotapes from the July 24, 2003 speed trials conducted by the police, despite defense counsel's multiple specific requests for them, when the videos contained potentially exculpatory evidence, and when Respondent's statement in his November 3, 2003 file memo that "one of these days" defense counsel could look at the videos indicates that Respondent did not intend to promptly comply with defense counsel's requests, Respondent violated 20:3.4(d) and former SCR 20:3.8.(d), effective prior to July 1, 2007.

SCR 20:3.4(d) states:

A lawyer shall not in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Former SCR 20:3.8(d) stated:

The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known

to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Respondent was suspended for 30 days in Case No. 2008-AP-2842-D.

In accordance with SCR 22.09(3), Attorney Paul W. Humphrey is hereby publicly reprimanded.

Dated this 28th day of November, 2012.

SUPREME COURT OF WISCONSIN

/s/ James C. Boll, Jr.
Referee James C. Boll, Jr.