

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1359-CR

Cir. Ct. No. 2013CT1591

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CODY J. NOLAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Reversed.*

¶1 SHERMAN, J.¹ Cody Nolan appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, and resisting or obstructing a police officer. Nolan contends the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

arresting officer lacked reasonable suspicion to stop his vehicle. I agree and therefore reverse the judgment of conviction.

BACKGROUND

¶2 Nolan was charged with one count each of: obstructing an officer; OWI, second offense; operating a motor vehicle while revoked, second offense; and operating a motor vehicle with a prohibited alcohol concentration, second offense. Nolan moved to suppress evidence obtained from the traffic stop on the basis that the arresting officer lacked reasonable suspicion to stop Nolan's vehicle.²

¶3 At the hearing on Nolan's motion to suppress, testimony was received from Patrick Belleau, a Brown County Sheriff's Department deputy patrol officer. Deputy Belleau testified that at approximately 2:00 a.m. on October 10, 2013, he received a dispatch that at the corner of Lynwood Lane and Nellie Lane in the Village of Bellevue, "a white vehicle had hit a curb and the occupants were outside the vehicle ... [and] a small red vehicle was in the area either trying to move the white vehicle or pick up the occupants of that vehicle." Nellie Lane intersects with Lynwood Lane at two locations. Deputy Belleau testified that as he "proceed[ed] past the first intersection of Lynwood and Nellie, [he] observed ... a small red vehicle" coming toward him. Deputy Belleau testified that after he observed the red vehicle, he "turned around" and stopped the vehicle based on the dispatched information that "a red vehicle may have picked up occupants" from the white vehicle that reportedly hit a curb. Deputy Belleau testified that he made

² Nolan's motion to suppress has not been made part of the record before this court.

contact with Nolan, the driver of the red vehicle, who smelled of alcohol, had bloodshot and glossy eyes, and who slurred his words as he spoke. Deputy Belleau testified that after he stopped Nolan's vehicle, he was informed by other officers that an accident had occurred at the other intersection of Lynwood Lane and Nellie Lane. On cross-examination, Deputy Belleau testified that there had been no indication that Nolan was speeding or fleeing the scene. In response to Nolan's argument that Deputy Belleau lacked reasonable suspicion to stop Nolan's vehicle, the State argued that Deputy Belleau had reasonable suspicion to believe that Nolan was either involved in the reported curb hitting incident, which the State argued "sounds like disorderly conduct with a motor vehicle," or that Nolan was assisting someone who had been drinking in fleeing the scene of an accident (aiding and abetting the failure to report an accident).

¶4 The circuit court denied Nolan's motion to suppress. Following the denial of his motion, Nolan entered a plea of no contest to obstructing an officer and second offense OWI, and a judgment of conviction was entered by the court. Nolan appeals.

DISCUSSION

¶5 Nolan contends that Deputy Belleau lacked reasonable suspicion to stop his vehicle and that the circuit court erred in denying his motion to suppress.

¶6 Whether reasonable suspicion exists to stop a vehicle is a question of constitutional fact which presents a mixed question of fact and law on review. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. This court will review the circuit court's factual findings under the clearly erroneous standard, but will review independently the application of those facts to constitutional principles. *Id.*

¶7 In order for an investigatory stop to be constitutionally valid, an officer must have reasonable suspicion to believe that a crime or traffic violation has been or will be committed. *Id.*, ¶23. The officer’s reasonable suspicion must be particularized and objective, and is viewed in light of the totality of the circumstance. *State v. Walli*, 2011 WI App 86, ¶8, 334 Wis. 2d 402, 799 N.W.2d 898.

¶8 Nolan asserts that in determining whether Deputy Belleau had reasonable suspicion to stop Nolan’s vehicle, this court should not consider the information provided to Deputy Belleau by dispatch because no evidence was presented that dispatch received that information from a reliable source and because the information provided by dispatch was “vague and equivocal” and could not be corroborated by Deputy Belleau.

¶9 Nolan further asserts that even if the dispatch information is considered, the evidence is still insufficient to establish a reasonable suspicion that he had committed, was committing or was about to commit a crime. Nolan argues first that Deputy Belleau did not have information that a reportable accident had taken place and, therefore, Deputy Belleau could not have reasonably suspected that someone was aiding and abetting the failure to report an accident. Nolan points out that when damage is less than \$200, an accident need not be reported. He argues that because dispatch did not indicate that damage had occurred to either the curb or the white vehicle from the white vehicle hitting the curb, Deputy Belleau could not have reasonably suspected that a reportable accident occurred in that situation. Nolan also argues that the officer did not testify that he saw anyone else inside Nolan’s vehicle prior to stopping the vehicle and, therefore, any suspicion by the officer that an individual from the white vehicle was inside Nolan’s vehicle was not reasonable.

¶10 Nolan next argues that Deputy Belleau could not have reasonably suspected that Nolan's vehicle was involved in an accident with the white vehicle. Nolan points out that dispatch did not state that the small red vehicle was involved in the accident and the officer testified that he did not observe any damage to Nolan's vehicle prior to stopping it.

¶11 Finally, Nolan argues that Deputy Belleau could not have reasonably suspected that the driver of the red car was guilty of disorderly conduct with a motor vehicle under the Bellevue village code, asserting that helping move, or assist the occupants of a vehicle that hit the curb does not fall within the code's description of what constitutes disorderly conduct. *See* Village of Bellevue Code § 443-7.

¶12 The State argues that Nolan forfeited his right to challenge the information received by dispatch because Nolan failed to raise that issue before the circuit court. The State argues that even if Nolan did not forfeit that argument, the information received by the dispatcher could reasonably have been relied upon by Deputy Belleau. The State goes on to argue that Deputy Belleau had reasonable suspicion to believe that Nolan was guilty of assisting the white vehicle in fleeing the scene of an accident, was involved in the accident, or was attempting to conceal the accident in light of the following: Deputy Belleau was advised of "an accident involving a white vehicle that had hit a curb, and that a small red vehicle was possibly trying to move the white car or was picking up occupants of the white vehicle"; Deputy Belleau "observed a small red car leaving the area of the incident"; the area where the stop occurred was residential; the stop took place at approximately 2:00 a.m., when traffic was minimal; and the stop took place "only one intersection away from the accident scene."

¶13 I will assume, without deciding, that Nolan forfeited his right to challenge the information provided to Deputy Belleau by dispatch. I conclude, however, that even considering that information, the evidence was insufficient to give rise to the requisite level of reasonable suspicion necessary for an investigatory stop.

¶14 WISCONSIN STAT. § 346.70(1) requires the operator of a vehicle involved in an accident that results in “damage to state or other government-owned property, except a state or other government-owned vehicle, to an apparent extent of \$200 or more, or total damage to property owned by any one person ... to an apparent extent of \$1,000 or more” to “immediately by the quickest means of communication give notice of such accident to the police department, the sheriff’s department or the traffic department of the county or municipality in which the accident occurred or to a state traffic patrol officer.” Section 346.70(1m)(b) provides:

No person may knowingly assist an operator or occupant of a motor vehicle involved in an accident as described in sub. (1) to flee the scene of the accident unless the accident has, or the person is advised that the accident has, first been reported to a law enforcement agency, except to provide medical assistance.

¶15 The State argues that Deputy Belleau could reasonably “believe[] the situation ... was likely a reportable accident.” However, there is no evidence in the record to support such an assertion. Deputy Belleau testified that he received information from the dispatcher that “a white vehicle had hit a curb and the occupants were outside the vehicle ... [and] a small red vehicle was in the area either trying to move the white vehicle or pick up the occupants of that vehicle.” However, there is no evidence in the record that Deputy Belleau was advised by the dispatcher that either the white vehicle, or the curb, had sustained any damage,

nor is there any evidence that Deputy Belleau observed any such damage prior to stopping Nolan, let alone apparent damage to state property in excess of \$200 or apparent damage to personal property in excess of \$1,000. Nothing in the record supports the conclusion that any time any vehicle hits a curb, the vehicle will cost in excess of \$1,000 to repair or the curb (or state property) will cost in excess of \$200 to repair. Accordingly, I conclude that Deputy Belleau did not have reasonable suspicion to believe that the white vehicle was involved in a reportable accident under WIS. STAT. § 346.70(1) and, therefore, did not have reasonable suspicion to believe that someone in a red vehicle had violated § 346.70(im)(b). For the same reason, I conclude that Deputy Belleau also did not have reasonable suspicion to believe that the red vehicle was involved in a reportable accident, assuming there had been evidence that the red vehicle had been involved in any accident, which there is not.

¶16 For the reasons stated above, I reverse the judgment of conviction and remand with instructions to suppress all evidence obtained as a result of unlawful stop of Nolan's vehicle.

By the Court.—Judgment reversed.

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

