

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2009

David R. Schanker
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. 2008AP714-CR

Cir. Ct. No. 2007CT161

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS W. HOFFMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Curtis Hoffman appeals an order denying his motion to suppress evidence obtained pursuant to a traffic stop.² Hoffman argues

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² This court granted leave to appeal a nonfinal order on March 24, 2008.

the circuit court violated his rights to due process and to a meaningful appeal. He further argues the record does not support a finding of reasonable suspicion to initiate the stop. We reverse the order, remand, and direct the circuit court to grant Hoffman a new evidentiary hearing.

BACKGROUND

¶2 At the motion hearing, Shawano Police Officer Ryan Atkinson testified he was dispatched to investigate a complaint at a local bowling alley. An anonymous caller reported it appeared Hoffman possibly wanted to start a fight. Atkinson testified that while en route to the bowling alley, he recognized Hoffman driving his motorcycle. Atkinson immediately turned around and activated his emergency lights. He stated he then observed Hoffman cross over the center line and Hoffman appeared shaky on the motorcycle. Hoffman was eventually arrested for operating while intoxicated.

¶3 Hoffman and two other witnesses testified Hoffman neither crossed the centerline nor had any difficulty controlling his motorcycle. The motion hearing was continued to allow further presentation of evidence. At the next hearing, the State revealed there was a single video recording from an officer's vehicle at the traffic stop. That hearing was then continued to allow Hoffman to view the video tape. Later, on the State's motion, and following Hoffman's motion to dismiss for discovery violations, the circuit court conducted an in camera review of the audio recording of the anonymous caller's conversation with dispatch.

¶4 Prior to the scheduled third hearing, the circuit court issued a written decision denying Hoffman's suppression motion. In its decision, the court also ruled the defense could not listen to the recorded phone call from the anonymous

caller. The court indicated it had reviewed the audio recordings of the calls to dispatch and from dispatch to Atkinson, and video recordings from two different police vehicles.³ The court also revealed it had visited the site of the traffic stop and measured distances.⁴ The court further determined precisely where the traffic stop occurred, based on its visit and the video recordings. The court then made credibility determinations by comparing witness testimony with the video recordings and the court's distance measurements and on-site observations.

¶5 Hoffman petitioned to appeal the circuit court's nonfinal order. In its response, the State conceded Hoffman's first issue, that the circuit court erred by conducting its own fact finding outside the presence of the parties and without notice. However, the State objected to review of Hoffman's second issue, which disputed the circuit court's reasonable suspicion finding.

¶6 After we granted leave to appeal, Hoffman raised both issues in his appellate brief. The State then moved for summary disposition, based on its concession. The State requested we vacate the circuit court's order and remand for a new evidentiary hearing, before a new judge.⁵ Hoffman opposed the motion because he desired a ruling on the reasonable suspicion issue. We denied the State's motion and the parties completed their briefing, addressing only the remaining issue.

³ Apparently, another unknown person had called prior to the anonymous complaint. The first caller merely inquired whether there was a warrant out for Hoffman's arrest. There was not. Additionally, contrary to the State's representation at the second hearing, it appears there was a second video of the traffic stop.

⁴ The language used in the decision suggests the court made multiple visits to the site.

⁵ The State advised us Judge Habeck had already recused himself from the case, pursuant to a request by Hoffman's trial counsel.

DISCUSSION

¶7 In his initial brief, Hoffman presented several legal theories as to why the circuit court's order should be reversed based on the court's independent investigation. We need not specifically address those arguments because the State concedes the order should be reversed based on the holdings in *State v. Sarnowski*, 280 Wis. 2d 243, 251, 694 N.W.2d 498 (2005) (“[B]y using her specific experience as a substitute for ... evidence [that] was not subject to judicial notice, the trial judge became, in essence, an impermissible surrogate witness for that evidence.”), and *American Family Mutual Insurance Co. v. Shannon*, 120 Wis. 2d 560, 564, 356 N.W.2d 175 (1984) (“The judge, in making an unrequested, unannounced, unaccompanied and unrecorded view of the scene, gathers evidence used to determine the credibility of witnesses that is not part of the record, and, therefore, is an error of law.”). We agree the order should be reversed in its entirety because the circuit court exceeded its authority.

¶8 Although we rejected the State's motion for summary disposition, after reviewing the briefs and record, we conclude we cannot resolve the reasonable suspicion issue. Hoffman argues that, even accepting Atkinson's version of events, the record fails to establish reasonable suspicion for the stop. The record, however, is inadequately developed. Given the circumstances, it would be inappropriate to rely on any of the circuit court's factual findings. Further, the State's reasonable suspicion analysis does not rely solely on Atkinson's alleged observations of Hoffman's driving after Atkinson initiated the traffic stop. Rather, the State also relies in part on the anonymous tip. The various audio and video recordings were not introduced as exhibits at the motion hearings and none are present in the record on appeal. We cannot decide legal issues in a factual vacuum.

¶9 In his response opposing the State's motion for summary disposition, Hoffman asserted it would be inequitable to simply remand and not resolve the reasonable suspicion issue, because he had already fully briefed the issue and incurred concomitant costs. This result, however, was of Hoffman's own doing. He could have simply moved for summary disposition after the State conceded error in its response to the petition for leave to appeal. *See* WIS. STAT. RULE 809.21. Hoffman also contended the State already had an opportunity to make its record and should not be afforded a second chance to establish reasonable suspicion. The State, however, did not induce the circuit court to conduct its own investigation. The circuit court issued its decision and cancelled the continued evidentiary hearing without notice to *either* party.

By the Court.—Order reversed and cause remanded with directions.

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

