COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP814-CR **Cir. Ct. No. 2013CT271**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARIK JAMES ULWELLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Arik Ulwelling appeals a judgment convicting him of operating a motor vehicle while intoxicated (OWI), third offense. Ulwelling argues the circuit court erroneously denied his motion to suppress evidence by

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

finding probable cause existed for his initial detention based on a police officer's perceived violation of WIS. STAT. § 346.14(1). That statute prohibits motor vehicle operators from following another vehicle "more closely than is reasonable and prudent"—commonly known as "tailgating."[2] We conclude the traffic stop was reasonable because the officer had probable cause to believe a violation of this statute had occurred. We therefore affirm.

BACKGROUND

¶2 The relevant facts are not disputed, and Altoona Police Department officer Bill Lindeman was the only witness to testify at Ulwelling's suppression hearing. Lindeman testified that at approximately 2:18 a.m. on April 27, 2013, he observed two vehicles driving in the right-hand westbound lane on Hillcrest Parkway. These vehicles were about 200 feet away from where Lindeman was driving his vehicle. His attention was initially drawn to the two vehicles when he noticed intermittent braking by the rear vehicle, a truck later identified as Ulwelling's. Lindeman testified that as he began watching the vehicles, he thought Ulwelling's truck was following the forward vehicle too closely.

¶3 Lindeman then increased his speed to verify his impression from a closer view. He positioned himself immediately behind the two vehicles but in the left-hand westbound lane, about forty-five degrees off the truck's rear bumper. From that vantage point, Lindeman "estimated that the vehicle was about a car length to a car and a half length apart and didn't have enough time to stop if that

[2] WISCONSIN STAT. § 346.14(1) provides, in full: "**Distance between vehicles.** The operator of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway."

vehicle in front would have braked quickly[.]" Lindeman further testified that he knows what distance between vehicles is reasonable and prudent in order to safely stop, based both on his training and experience as a law enforcement officer and his experience as a driver.

¶4 Lindeman testified that, in total, he followed the vehicles for a little over a quarter of a mile, for approximately eight to twenty seconds. The time during which he observed the vehicles from the forty-five degree angle off the truck's rear bumper was three to five seconds, covering a distance between 500 to 800 feet.

¶5 According to Lindeman, there were no inclement weather conditions or road construction. He also testified both vehicles were driving at approximately the speed limit of forty-five miles per hour, and there were no other vehicles on the road, including any that would be blocking the left-hand westbound lane. Lindeman could not discern a legitimate reason for Ulwelling's close proximity to the preceding vehicle.

¶6 As the vehicles approached an intersection, the first vehicle continued straight while Ulwelling turned right. At that point, Lindeman initiated a traffic stop, during which he cited Ulwelling for violating WIS. STAT. § 346.14(1). Lindeman arrested Ulwelling during this stop for operating while intoxicated. Ulwelling was ultimately charged with OWI and operating with a prohibited alcohol concentration (PAC), both as third offenses.

¶7 Following the suppression hearing, the circuit court concluded Lindeman had probable cause to stop Ulwelling for violating WIS. STAT. § 346.14(1) and thus denied his motion to suppress. Following a subsequent jury trial, Ulwelling was found guilty of third-offense OWI and PAC, the latter of

which count was merged upon conviction pursuant to WIS. STAT. § 346.63(1)(c). The denial of Ulwelling's motion to suppress is the only basis for his appeal.

DISCUSSION

¶8 A traffic stop, as a temporary detention, constitutes a seizure within the protections of the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. To satisfy the constitutional requirement of reasonableness, a traffic stop must be supported by reasonable suspicion or probable cause. ***State v. Brown***, 2014 WI 69, ¶¶15, 19, 355 Wis. 2d 668, 850 N.W.2d 66. Probable cause, not reasonable suspicion, is required when a law enforcement officer initiates a stop because he or she believes a traffic violation has been committed in his or her presence. ***State v. Longcore***, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999) ("[The officer] did not act upon a suspicion that warranted further investigation, but on his observation of a violation being committed in his presence. The issue is, then, whether an officer has probable cause that a law has been broken …." (Footnote omitted)). Because Lindeman initially stopped Ulwelling for violating WIS. STAT. § 346.14(1), we look to the circuit court's findings of historical facts to determine whether there was probable cause to support Ulwelling's stop.[3]

[3] We therefore reject the State's contention that the circuit court need only have found reasonable suspicion in this case. That said, we note that Ulwelling only argued at his suppression hearing the lack of reasonable suspicion, not of probable cause. Even on appeal, he reverts to making erroneous references to the issue being a lack of reasonable suspicion for an investigative stop. Regardless, the circuit court properly analyzed the issue as whether there existed probable cause that a traffic violation had occurred at the time of the stop, consistent with ***Longcore*** and our analysis herein. *See* ***State v. Longcore***, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999).

¶9 Whether a traffic stop is properly supported by probable cause is a question of constitutional fact. ***Popke***, 317 Wis. 2d 118, ¶10. We will uphold the circuit court's findings of historical fact unless they are clearly erroneous, and we independently apply those historical facts to constitutional principles. ***Id.***

¶10 Probable cause is that "'quantum of evidence which would lead a reasonable police officer to believe' that a traffic violation has occurred." ***Id.***, ¶14 (quoting ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)). We examine the totality of the circumstances to determine whether probable cause exists. ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. "In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience." ***Id.***

¶11 As one of Wisconsin's "rules of the road," *see* WIS. STAT. ch. 346, motor vehicle operators "shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway." WIS. STAT. § 346.14(1). What constitutes a reasonable and prudent distance depends on the fact finder's evaluation of "a great many considerations, including speed, amount of traffic, road conditions and opportunities for clear vision." ***Hibner v. Lindauer***, 18 Wis. 2d 451, 456, 118 N.W.2d 873 (1963). Whether an individual violated § 346.14(1) by failing to maintain a reasonable and prudent distance is ultimately a question for the fact finder. ***Id.***

¶12 The issue on appeal, however, is not whether Ulwelling actually violated WIS. STAT. § 346.14. Rather, Ulwelling must establish that the totality of the evidence considered at his suppression hearing was insufficient to show that

Lindeman could reasonably believe Ulwelling had violated § 346.14. This he fails to do.

¶13 Ulwelling's argument overemphasizes the import of the circuit court having disregarded portions of the State's evidence at the suppression hearing. These included the State's offer of Wisconsin Department of Transportation manuals regarding safe distances between vehicles, as well as the State's mathematical calculations of time and distance with respect to the night at issue. The circuit court properly disregarded this evidence on the basis that Lindeman's probable cause to stop Ulwelling was based not on contemporaneous mathematical calculations, but rather on his personal observations.

¶14 Nonetheless, Ulwelling is misguided in asserting that he should prevail because the "only relevant testimony" the State provided was officer Lindeman's statement that Ulwelling's vehicle was between one to one and one-half car lengths behind the first vehicle.

¶15 First, Lindeman's testimony regarding the distance between the two vehicles was not the "only relevant testimony" supporting probable cause. Lindeman also testified as to the speed of the vehicles, the time of day, the conditions of the road and the absence of other vehicles on the roadway. These additional, undisputed facts—especially those regarding speed and time of day—give important context to Lindeman's perceived distance between the vehicles and the resultant reasonableness and prudence of Ulwelling's distance behind the other vehicle.

¶16 Second, Ulwelling fails to explain why Lindeman's real-time observations regarding the distance between the two vehicles and his conclusions—based on his training and experience—regarding the safety of such a

distance under the circumstances could not lead a reasonable police officer to believe that Ulwelling violated WIS. STAT. § 346.14. In fact, Ulwelling does not offer any evidence to counter Lindeman's observations—he only attacks them as somehow inherently deficient, without further argument. His conclusion does not follow. Rather, Lindeman's observations, which the circuit court found credible, are a sufficient factual basis from which a court can determine the constitutional reasonableness of his stop of Ulwelling.

¶17 Indeed, we agree with the State's observation that if, as Ulwelling argues, an officer's contemporaneous observation alone is insufficient to conduct a traffic stop for violations of WIS. STAT. § 346.14, then no law enforcement officer could conduct such a traffic stop unless he or she observes the vehicles actually collide. Ulwelling calls this argument "extreme" but again fails to respond in a meaningful way. We are left wondering how Ulwelling proposes law enforcement ought to proceed with policing such violations if their observations alone are inadequate.

¶18 We find no reason to conclude the circuit court's historical and undisputed factual findings are erroneous. *See* ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977) (The circuit court, when acting as the fact finder, is the ultimate arbiter of a witness's credibility.). Applying these facts to the constitutional principles, we hold that the traffic stop was reasonable because Lindeman had probable cause to believe a traffic violation had occurred, based on his specific, articulable observations of Ulwelling's driving. Accordingly, the circuit court properly denied Ulwelling's motion to suppress.

By the Court.—Judgment affirmed.

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