

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 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. 2014AP1494

**Cir. Ct. Nos. 2013TR6591
2013TR7322**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

V.

JEFFREY K. KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Fond du lac County: GARY R. SHARPE, Judge. *Affirmed.*

¶1 BROWN, C.J. Jeffrey K. Krueger attacks his convictions for operating a vehicle while intoxicated and with a prohibited alcohol concentration by claiming that there was no reasonable suspicion for a stop. He contends that the squad video directly contradicts the deputy's testimony that Krueger's vehicle swerved three feet over the center line while negotiating a curve in the roadway.

But the trial court found the video to be inconclusive and the deputy's testimony credible. Those findings are not clearly erroneous and we affirm.

¶2 As we indicated above, the deputy observed both driver's side tires cross the centerline by approximately three feet. WISCONSIN STAT. § 346.05(1) states that where a driver fails to operate a vehicle on the right half of the roadway, it is a traffic violation. A deputy may conduct a traffic stop when he or she has probable cause to believe that a traffic violation has occurred. *State v. Popke*, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569. Krueger cites the law regarding reasonable suspicion, but this is really a stop based on probable cause.¹

¶3 Krueger's defense, that the squad video contradicts the deputy's testimony, is subject to the standard of review adopted in *State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. There we said that "when 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 trial court's findings of fact based on that recording." *Id.* Here is what the trial court had to say:

Well, the Court [has] looked at the video and notes that the taillights went on of the vehicle operated by the defendant. You could see the defendant's vehicle negotiating the turn. But it was very difficult to discern on the video the extent to which the vehicle crossed the center line or where, in fact, the center line even was relative to the vehicle.

¹ We are convinced that there was probable cause to make the stop here. But we quote *Popke* again, just the same. "Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect 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, based upon the video, was relatively close to the vehicle. I believe he would have had a clear view of the defendant's vehicle where it sat in relation to the center line. His eyes would not have been affected like the video camera was[,] given the brake lights So I don't find that there is anything in the video that specifically discredits or is contrary to the testimony of the officer. I simply find that it is a video that shows the vehicle going around the corner but doesn't depict the location of that vehicle relative to the center line....

I do find that the observation of the officer that the defendant crossed the center line as he went around the corner was sufficient basis to stop the vehicle

¶4 There is nothing erroneous about this finding. While Krueger might have a different opinion about what the video shows, Krueger is not the fact-finder. The trial court is. The trial court point-blank found that there was nothing in the video to specifically discredit the deputy's testimony. We uphold this finding of fact.

¶5 Krueger also appears to dispute the trial court's finding that the deputy was relatively close to Krueger's vehicle. But again, the trial court saw the video and determined that it showed the deputy to be relatively close. This finding of fact is also not clearly erroneous. We affirm the order denying the motion to suppress and the judgments of conviction.

By the Court.—Judgments affirmed.

This opinion will not be published in the official reports.

