

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP715-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2014CT9

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK ALAN TRALMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
J. DAVID RICE, Judge. *Affirmed.*

¶1 BLANCHARD, J.¹ Mark Tralmer appeals the circuit court's judgment convicting him of operating a motor vehicle while intoxicated (OWI) as

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

a second offense. A police officer obtained evidence of an OWI offense after stopping Tralmer's vehicle based on the officer's belief that Tralmer violated a traffic law by unnecessarily swerving into the wrong lane of a two-way street. Tralmer entered a no contest plea to the OWI charge after the court denied his suppression motion. Tralmer now challenges the suppression ruling, arguing that the officer lacked reasonable suspicion of a traffic violation to justify the stop. For the following reasons I affirm the judgment.

¶2 At the suppression hearing, a police officer testified in substance as follows. The officer was on patrol during the early morning hours of a winter day in Tomah, Wisconsin. The officer observed a vehicle approaching from the opposite direction, which he later learned Tralmer was driving. Tralmer's vehicle did not appear to be traveling in excess of the speed limit, either when the officer first observed it or thereafter.

¶3 The road both vehicles were traveling on has no center line, but it is a two-way street. It is "a well-traveled road in Tomah," "a major corridor" within the city. Although there had been snow fall, the road is "one of the more well-maintained roads by the city plow crews."

¶4 As the car approached, the officer observed Tralmer's vehicle travel in the correct (right hand) lane and pass several cars parked along the side of the road, to Tralmer's right. However, after passing these parked cars, Tralmer's vehicle, without apparent justification, swerved to Tralmer's left, crossing "the center portion of the roadway[,] into the oncoming lane," before traveling "back

into its own lane,” “prior to coming to a stop at [a] stop sign.”² The officer “did not observe a reason” for Tralmer to “cross over the centerline towards the intersection.” When Tralmer made the unexplained swerve into the wrong lane there were no vehicles behind Tralmer and no vehicles in front of the officer.

¶5 The officer executed a U-turn and stopped Tralmer, without the officer observing Tralmer violate any other traffic rules. Both because it was around bar time and because of Tralmer’s unexplained swerve into the wrong lane, the officer believed that Tralmer might be intoxicated.

¶6 A video from the officer’s squad car that was recording at the pertinent time was played during the suppression hearing. The officer testified about what is portrayed on the video. The officer testified in part: “As you can see on the video,” the roadway at issue “is very well plowed.”

¶7 Tralmer testified at the suppression hearing. He acknowledged “veer[ing] out” at the pertinent time and place, but testified that he did so because “I was going around the parked vehicles.” Tralmer also testified that after his arrest, but sometime during the “same week,” he took photographs of the area, after a new snowfall, and made measurements of the width of the roadway

² WISCONSIN STAT. § 346.05(1) provides in pertinent part:

(1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway ..., except:

....

(d) When overtaking and passing ... obstructions on the right half of the roadway; ...

available for driving, taking into account piled up snow and parked vehicles. The defense also called a driving school instructor, who testified that he had viewed the squad car video and thought that it showed nothing unusual about Tralmer's driving.

¶8 The circuit court denied the suppression motion based on a finding that the officer had reasonable suspicion to stop Tralmer based on his apparently unjustified swerve into the wrong lane. While the court did not explicitly make findings that the officer's testimony was truthful and accurate, the court implicitly credited the officer's testimony and implicitly found that the officer's testimony was corroborated by, or at least not contradicted by, images on the squad car video. The court also implicitly discredited Tralmer's testimony that he was obligated to move into the wrong lane to safely pass parked cars, in light of conditions that included snow pile up.

¶9 Reasonable suspicion cannot rest on an "inchoate and unparticularized suspicion or 'hunch,'" but instead the officer "must be able to point to specific and articulable facts ... together with rational inferences from those facts." *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoted source omitted).

¶10 Circuit court findings of historical or evidentiary fact, including those findings made in suppression hearings, are upheld on appeal unless they are clearly erroneous. *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748.

¶11 Tralmer does not argue that swerving into the wrong lane of traffic when there is no obstruction requiring the driver to do so would not violate WIS. STAT. § 346.05(1), justifying a stop. Instead, Tralmer essentially argues that the

court clearly erred in its fact finding. Tralmer contends that the testimony given by Tralmer and the driving school instructor was so compelling that the court was obligated to discredit the officer's testimony that the officer saw no obstruction requiring Tralmer to swerve into the wrong lane. However, Tralmer fails to point to anything in the testimony of Tralmer or the driving instructor that shows clear error in the court's fact finding.

¶12 Tralmer testified that parked cars obstructed his lane. The officer testified that this was not the case. In itself, this was a credibility contest (putting aside the argument by the State that the officer made a reasonable mistake of fact about the obstruction issue, a topic that I briefly address in the final paragraph of this opinion). Circuit courts generally settle questions of credibility, and Tralmer fails to point to anything inconsistent or inherently suspect in the officer's testimony.

¶13 Tralmer also testified about photographs and measurements that he himself had allegedly taken, apparently *some days after* the event and in any case *after* a new snowfall. Tralmer fails to explain why the circuit court was obligated to place any weight on this testimony in evaluating the competing testimony of the officer and Tralmer about whether Tralmer needed to swerve to avoid hitting or coming too close to the parked cars. For one thing, there was no testimony about how much new snow had fallen, which would have rendered uncertain even timely measurements made by a person other than the accused.

¶14 As for the driving instructor's testimony, the court suggested in its decision that these opinions appeared to shed no light on the questions the court needed to decide at the suppression hearing. I agree. Tralmer fails to explain why I should conclude that the driving instructor's personal opinions about what he

observed on the video, based on his experience teaching new drivers, has any bearing on the issues before the circuit court.³

¶15 Tralmer contends that I should not affirm the circuit court's decision based on a conclusion that the court would not have clearly erred had the court found that the officer made a reasonable mistake of fact in thinking, erroneously, that Tralmer's lane was not obstructed by parked cars, because the State failed to make this reasonable-mistake-of-fact argument to the circuit court. I need not address Tralmer's argument, because I affirm based on my conclusion that the circuit court did not clearly err in finding that what the officer observed constituted an evident violation of WIS. STAT. § 346.05(1).⁴

By the Court.—Judgment affirmed.

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

³ Tralmer does not argue that images on the squad video independently undermine the court's findings of fact and the State does not argue that the video images independently support the findings. I do not address the topic of the video images further.

⁴ In light of a recently released Wisconsin Supreme Court case, *State v. Houghton*, 2015 WI 79, ___ Wis. 2d ___, 868 N.W.2d 143, Tralmer withdraws in his reply brief an argument that he advances in his principal brief, namely, that the circuit court erroneously applied the reasonable suspicion standard, and should have applied the probable cause standard. Therefore, I do not address this topic.

