COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0670-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEAN P. LENZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

VERGERONT, J.[1] Dean Lenz appeals his judgment of conviction for driving while under the influence of an intoxicant in violation of § 346.63(1), STATS.,[2] and possession of THC in violation of § 961.41(3g)(e), STATS. He

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c) and (f), STATS.

[2] It is not clear from the record whether Lenz was convicted of a violation of para. (a) of § 346.63(1), STATS., operating while intoxicated, or para. (b), prohibited alcohol content, but that does not affect our decision.

contends the trial court erred in denying his motion to suppress evidence because the deputy lacked reasonable suspicion to make an investigatory stop. We conclude the deputy had the requisite reasonable suspicion and therefore affirm.

The charges arose out of an incident that occurred on March 29, 1998, at approximately 2:45 a.m. when Deputy Sheriff Paul Arneson of Wood County stopped the vehicle Lenz was driving. Deputy Arneson testified on direct examination at the hearing on Lenz's motion to suppress evidence as follows. He was traveling westbound on County Trunk E when he saw two vehicles in front of him, also traveling west, and the vehicle in the rear was weaving in its lane of traffic. The rear vehicle crossed the white fog line twice and drove left of the centerline once, then turned right onto County Trunk X, making a short turn, and in the process driving onto the centerline going northbound on County Trunk X. After the deputy saw the vehicle cross the fog line twice, he activated the video camera in his squad car. The deputy pulled the vehicle over, and the driver, Lenz, identified himself with a Wisconsin driver's license. The deputy asked Lenz to step out of the car. He noticed a strong odor of intoxicants coming from the car and that Lenz's eyes were glassy and bloodshot and his speech was slurred. After administering field sobriety tests, the deputy arrested Lenz.

On cross-examination, Deputy Arneson acknowledged that he had no independent recollection of the events to which he testified, but was relying on his report and the videotape. When he first saw Lenz's vehicle, it was a quarter to one-third of a mile ahead of him. He acknowledged that he did not write in his report that Lenz was weaving on County Trunk E and on County Trunk X, but it was nevertheless his testimony that Lenz was weaving. The deputy could pinpoint on a map the spot where Lenz's vehicle touched the fog line the first time on County Trunk E, but not where it touched the fog line the second time, or the spot

where it crossed the centerline on E or touched the centerline on County Trunk X. He explained that after seeing Lenz touch the fog line the first time, he followed him about a mile and a half to the intersection of County Trunks E and X, about a mile on County Trunk X until the intersection with Highway 13, and then about a half mile on Polish Road before he stopped him. He described the short turn Lenz made onto County Trunk X as a turn "very close to the shoulder of the roadway," although he conceded Lenz had stopped at the stop sign. Deputy Arneson acknowledged that he did not notice any equipment violations, did not clock Lenz for speeding, and that no regulation or statute prohibited a vehicle from touching the fog line. Lenz presented no witnesses at the hearing but did show the videotape.

The trial court denied Lenz's motion to suppress evidence because it concluded that Deputy Arneson had reasonable suspicion to stop the vehicle, even before it crossed Highway 13. The trial court accepted the deputy's testimony that Lenz's vehicle was weaving in its own lane of traffic and crossed the centerline on County Trunk E and touched the centerline on County Trunk X. The court acknowledged that, in viewing the videotape, one could not see that the vehicle was weaving on County Trunk E, and could not see the vehicle to the left of the centerline or an abrupt movement in that direction. However, the court determined that the deputy was able to see more than one could see from viewing the videotape. The court explained that the deputy's voice was recorded on the videotape stating that he was observing that there was only one driver in the vehicle, but one watching the video at that point could not see how many people were inside the vehicle. The deputy's observation was then verified when the deputy stopped the vehicle and only Lenz was in it. The court found, based on the deputy's testimony and on what the videotape showed, that after the vehicle turned

onto County Trunk X, it probably crossed the centerline making the turn, and then was weaving in its own lane, touching the centerline on a couple of occasions.

Lenz contends on appeal that the evidence does not establish the specific and articulable facts necessary to support an investigative stop because Deputy Arneson's testimony was contradictory and incredible and not substantiated by the videotape. He contends the facts found by the trial court are against the great weight and clear preponderance of the evidence and are therefore clearly erroneous.

To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture. ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968).

The trial court's findings of fact in the matter are upheld unless they are clearly erroneous. *See* ***State v. Mitchel***, 167 Wis.2d 672, 682, 428 N.W.2d 364, 368 (1992); § 805.17(2), STATS.[3] The trial court is the ultimate arbiter of the credibility of witnesses appearing before it, and an appellate court will accept the inferences drawn by the trial court in considering their testimony. ***Rivera v.***

[3] The "great weight and clear preponderance of the evidence standard," which both parties refer to, is essentially the same as the "clearly erroneous" standard. ***State v. Mitchell***, 167 Wis.2d 672, 682 n.1, 428 N.W.2d 364, 368 (1992).

Eisenberg, 95 Wis.2d 384, 388, 290 N.W.2d 539, 541 (Ct. App. 1980). However, whether the trial court's factual findings meet the constitutional standard is a question of law, which this court reviews de novo. ***Krier***, 165 Wis.2d at 676, 478 N.W.2d at 65.

We conclude that the facts as found by the trial court are supported by the record and are not clearly erroneous. We acknowledge that, in summarizing Deputy Arneson's testimony, the trial court stated that he "first saw the vehicle cross the centerline when he first observed the vehicle," whereas the deputy's testimony was that he first observed the vehicle when it crossed the fog line. However, the trial court's later comments make clear that it understood that Deputy Arneson testified that he observed Lenz's vehicle cross the centerline once on County Trunk E and touch the centerline on County Trunk X, and that it was accepting this testimony as credible. Whether the trial court misspoke in saying "centerline" rather than "fog line," or whether it misunderstood the deputy's testimony is not significant, because the exact location where the deputy observed that the vehicle crossed the centerline on County Trunk E was not significant to the trial court's analysis. The significant point was that the deputy testified that he saw Lenz cross the centerline on County Trunk E.

We do not agree with Lenz's contention that Deputy Arneson "recanted" his testimony that he saw Lenz's vehicle cross the centerline on County Trunk E. The portion of the transcript that Lenz refers to in support of this contention is Deputy Arneson's testimony on cross-examination that on County Trunk E Lenz crossed the centerline, although he could not state exactly where, and that Lenz touched the centerline on County Trunk X, but, again he could not

say exactly where.[4] This testimony is consistent with the deputy's testimony on direct examination. On direct, he testified, after being questioned on the painted centerline and fog line on County Trunk E, "The vehicle crossed the white fog line twice. And it drove left of the centerline once." He also observed that "when [Lenz] made the turn [onto County Trunk X], he drove onto the centerline going northbound on County Trunk X." The deputy's testimony on cross-examination that he was not certain where on County Trunk E Lenz crossed the centerline is

---

[4] The following is the portion of the transcript Lenz referred to:

> Q And then you noted in that report, Deputy, that the vehicle then dropped—excuse me—drove left of the yellow center line once?
>
> A Yes.
>
> Q And where did he—you can set that down. Thank you, Deputy.
>
> Can you mark on the map for us, please, where Mr. Lenz crossed the yellow line?
>
> A I can't do that. I don't know exactly where.
>
> Q So you're not certain where he did, but you testified he has?
>
> A Yes.
>
> Q Was that —
>
> You remember whether that was on County Highway "E?"
>
> A I would say, yes, it was on County Trunk "E."
>
> Q How about County Highway "X?"
>
> A If I remember correctly, he didn't—he didn't cross the centerline at all. He touched it once, but he never crossed it.
>
> Q Where did he touch it?
>
> A On County Trunk "X."
>
> Q Can you tell us—can you mark on here where it was?
>
> A No, I cannot.

not a recantation or a contradiction of his direct testimony, because Lenz did not, on direct, identify the spot at which Lenz crossed the centerline on County Trunk E, and he repeated on cross-examination his testimony that Lenz had crossed the centerline on County Trunk E and touched the centerline on County Trunk X.

We also reject Lenz's argument that the trial court's findings of what it observed from the video are inconsistent. The court's statement that it looked for "an abrupt movement" toward the centerline but "couldn't see it or that the Lenz vehicle was weaving … [more than] a little bit," was made with regard to "the following by the deputy of Mr. Lenz on County Trunk 'E.'" When the court later described the videotape as showing the vehicle weaving, the court had shifted to a description of what the videotape showed "[a]fter the turn northbound onto 'X'…."

Finally, we do not agree with Lenz that the trial court had to accept what the videotape showed as the limits of what Deputy Arneson observed. The court explained in detail why it found that the deputy could observe more than one could see from looking at the videotape. Lenz does not argue that the trial court's description of the videotape is inaccurate, and the appellate record does not contain a copy of the tape.[5] Therefore we conclude the record supports the trial court's finding that the deputy called out that he was observing one person in the car while the vehicle was on County Trunk E, and that one viewing the video could not see this. For the same reasons, we conclude the videotape shows what the trial court described it showed after the vehicle turned onto County Trunk X.

[5] As the appellant, Lenz has the obligation to provide us with the record we need for our review. *See* ***State Bank of Hartland v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). We assume that any portion that is missing supports the trial court's ruling. *See* ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 642, 273 N.W.2d 233, 239 (1979).

Having concluded that the facts as found by the trial court are supported by the record and are not clearly erroneous, we further conclude that those facts are sufficient to establish a reasonable suspicion to stop the vehicle and investigate further. The facts as found by the trial court show erratic driving, and that provides a reasonable suspicion to believe the driver of the car is impaired by alcohol or another substance and is therefore violating § 346.63(1)(a), STATS.

By the Court.—Judgment affirmed.

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