

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2010

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 Nos. 2009AP1789-FT
2009AP1790-FT
2009AP1791-FT**

**Cir. Ct. Nos. 2009TR2075
2009TR2076
2009TR2077**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

FOND DU LAC COUNTY,

PLAINTIFF-RESPONDENT,

V.

JENNIFER E. BEATY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ In her appeal from a conviction for operating a motor vehicle with a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b), Jennifer E. Beaty challenges the arresting officer’s traffic stop for operating her vehicle left of center. She contends that her slight swerve over the center line for two or three seconds does not constitute erratic driving that would support a traffic stop. We disagree, because a slight swerve over the center line is enough to provide the arresting officer with probable cause to believe that Beaty was operating left of center.

¶2 Sheriff Deputy Panagiotis Vergos was on routine patrol in the town of Osceola, in Fond du Lac county, around 3:30 a.m. when he observed a car approaching him. He testified that the car was “weaving in between the lane, as the road curved into a certain direction [the driver] would drift [to] the opposite end of the lane.” Vergos turned his squad around and began to follow the driver, “because it looked like she was weaving in her lane and driving close to the centerline.” The deputy followed her for approximately fourteen minutes and stopped her after he

observed the vehicle’s driver side tires cross the centerline of the road, I would say by a matter of inches, the tires were over. I observed that there was nothing in the road that would keep her from not having to cross the centerline. There was like no animals, no construction, nothing like that that I could see. The road was relatively straight. Um, I couldn’t think of any reason as to why [the driver] would commit that violation other than inattentiveness or possibly being intoxicated.

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

The deputy issued Beaty uniform traffic citations for operating while intoxicated, operating with a prohibited alcohol concentration, and operating left of center.

¶3 Beaty filed a motion to suppress, challenging the reasonable suspicion or probable cause to support the traffic stop. The trial court denied the motion. The court acknowledged that the entire incident was recorded by a camera in the sheriff's squad, and a DVD from the camera was played in the courtroom. Because the DVD was not a clear or crisp picture of the events, the court relied upon the testimony of the deputy and ruled:

[S]o in my view the officer's testimony is reliable and accurate. Citing the DVD imperfections I'm satisfied she did cross the centerline with her two left tires for a time of about two to three seconds as the Officer so testified.

¶4 On appeal, Beaty continues her challenge to the reasonableness of the stop.

¶5 When reviewing a trial court's denial of a suppression motion, an appellate court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether a search or seizure passes statutory and constitutional standards, however, is a question of law which this court reviews de novo. *Id.* at 137-38.

¶6 Probable cause exists when, under the circumstances, the arresting officer's knowledge at the time of the arrest would lead a reasonable deputy to believe that the defendant probably committed a crime. *See State v. Woods*, 117 Wis. 2d 701, 710, 345 N.W.2d 457 (1984). Thus, when a deputy observes unlawful conduct, the observation of unlawful conduct itself gives the officer

probable cause for a lawful arrest. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Under the lower reasonable suspicion standard, the law does not require a deputy to observe criminal conduct; rather, under the totality of the circumstances, the deputy must consider all the facts together and, “as they accumulate,” draw “reasonable inferences about [their] cumulative effect.” *Id.* at 58. So long as there are specific and articulable facts which yield reasonable inferences which, in turn, reasonably warrant a suspicion that an offense has occurred or will occur, there is reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

¶7 This case is factually indistinguishable from *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569. A police officer was following Popke and, in less than one block, he observed Popke swerve over the center line—three-quarters of the vehicle was left of center—and then move back into the right lane. *Id.*, ¶4. The officer stopped Popke and arrested him for his third offense drunk driving. *Id.*, ¶5. The circuit court denied Popke’s motion to suppress, finding that the officer had probable cause that a traffic code violation had occurred when Popke crossed the center line. *Id.*, ¶7.

¶8 The court of appeals reversed. The supreme court explained the court of appeals decision:

The court of appeals reasoned that the defendant’s “conduct did not constitute driving down the wrong side of the road within the meaning of [WIS. STAT.] § 346.05” because the defendant crossed the center of the road only “momentarily.” In addition, the court of appeals concluded that the officer did not have reasonable suspicion that a traffic or criminal code violation had occurred. The court of appeals reasoned that, under the totality of the circumstances, the State did not show “specific and articulable facts” that warranted this intrusion. The

appellate court determined that it was not uncommon for vehicles to momentarily cross the center of the road, there was no testimony to establish how close the defendant came to striking the curb, and that no erratic driving was recounted by the officer. Therefore, the court of appeals concluded that the traffic stop did not comport with constitutional protections, and as a result, the motion to deny suppression was reversed and the judgment of conviction vacated.

Popke, 317 Wis. 2d 118, ¶8.

¶9 The supreme court accepted the State’s petition for review and reversed the court of appeals. Popke argued that the officer did not have probable cause because he only crossed the center line momentarily. *Id.*, ¶12. The supreme court rejected Popke’s argument; in so doing, it repeated a question the State posited: if Popke was not driving in the left lane, what was he doing? *Id.*, ¶18. Referring to WIS. STAT. § 346.63(3)(a), the supreme court held that “drive” means “the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.” *Id.* Just as the supreme court concluded Popke was “driving” left of center, we conclude that Beaty was “driving” left of center.

¶10 Beaty’s attempts to distinguish *Popke* are of no avail. While Popke’s driving may have been more erratic, the supreme court focused on the momentary swerve over the center line and not his erratic driving after returning to the correct lane. Also, Beaty’s ability to stay in the correct lane for fourteen minutes on a road with curves does not excuse her crossing the center line, even if only for two or three seconds.

¶11 The principles of *Popke* control and we conclude that the officer had probable cause to believe that Beaty operated left of center in violation of WIS. STAT. § 346.05 and properly conducted a traffic stop. Because the officer had

probable cause to conduct a traffic stop, we do not have to decide if he had reasonable suspicion to believe that Beaty was operating while intoxicated.²

By the Court.—Judgment affirmed.

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

² However, if we did address reasonable suspicion, we would conclude that under the totality of the circumstances, the deputy had specific and articulable facts—that accumulated over the fourteen minutes he followed her and observed her driving—to conclude Beaty was operating while intoxicated. See *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

