

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 25, 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 No. 2009AP2265-CR**

**Cir. Ct. No. 2008CT4352**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SHANNON W. STATZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Affirmed.*

¶1 VERGERONT, J.<sup>1</sup> Shannon Statz appeals the judgment of conviction for operating while under the influence of an intoxicant in violation of

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a), fourth offense, and operating while revoked in violation of § 343.44(1)(b), second offense. She asserts the arresting officer did not have reasonable suspicion to stop her vehicle and therefore the circuit court erred in denying her motion to suppress evidence resulting from that illegal stop. For the reasons we explain below, we affirm.

### BACKGROUND

¶2 Statz was stopped by a City of Verona police officer, Travis Wetter, while she was driving on North Main Street in Verona at 1:30 a.m. on November 15, 2008. Officer Wetter and Statz testified at the hearing on Statz's motion to suppress.

¶3 Officer Wetter testified as follows. Just before the stop, another officer had stopped another vehicle traveling in the southbound lane on North Main Street. Officer Wetter was sitting in his squad car behind the other officer's squad car in order to provide back-up in case it was needed. The distance between the front of his squad car and the back of the other officer's squad car was approximately 10 to 15 feet. Both squad cars were parked on the shoulder of the road, were marked, and had their blue and red emergency lights activated. The squad cars were located just past the point where the two southbound lanes of North Main Street merged into one lane. The speed limit at that point was 25 miles per hour.

¶4 Statz's vehicle was traveling southbound. Officer Wetter first saw Statz's vehicle when it was "roughly past" the driver's door of his squad car. He testified that he estimated at the time that her vehicle was traveling approximately 30 miles per hour, acknowledging that his report said his estimate was 28 miles per hour. When Officer Wetter saw her vehicle, it "raised an alarm" with him

because it came very close to his squad car. The tires on the driver's side of her vehicle were about two feet from the double yellow center line. Officer Wetter believed Statz could have moved over further toward the center line and could have slowed down while she was passing the squad cars and that is why he decided to stop her. He apparently believed that WIS. STAT. § 346.072(1) required Statz to do either one of these. That statute directs what the operator of a motor vehicle should do if an emergency vehicle giving a visual signal is stopped on or within 12 feet from a roadway.

¶5 Officer Wetter testified that as soon as Statz's vehicle passed the other officer's squad car, Officer Wetter pulled into the southbound lane and attempted to stop Statz's vehicle. He accelerated to approximately 43 miles per hour in order to catch up to her vehicle, then he activated his red and blue lights and his air horn. She had her turn signal on before he activated his horn, as though she were going to pull over. About a block and a half from that point, Statz's vehicle pulled over. Officer Wetter estimated that, after he caught up to the vehicle and was going approximately the same speed, before the vehicle pulled over, the vehicle was going 26 or 27 miles per hour.

¶6 Officer Wetter acknowledged that he had written in his report that Statz did not attempt to slow down until after she had passed the other officer's squad car, and that is one of the reasons he stopped her. However, his testimony at trial, based on watching the video recording, was that he now knows his report was incorrect on this point. His trial testimony was that, as soon as he could see her tail lights as she passed his squad car, he saw that her brake lights were activated and they remained activated until she passed the other officer's squad car.

¶7 Statz testified as follows. She had her car on cruise control at 25 miles per hour, as she typically does when she drives in Verona, but as soon as she saw the officers she turned off the cruise control and lightly tapped her brakes before she passed the squad cars. She tapped her brakes about 20 feet before approaching the cars. Shortly after she passed the front squad car, she stopped braking and did not increase her speed, and she did not put her car back on cruise control. She initially estimated that she was going 25 to 26 miles per hour after she passed the squad cars but changed that to 25 miles per hour because, to the best of her recollection, she was not speeding after she passed the squad cars and was not speeding when Officer Wetter attempted to pull her over.

¶8 On cross-examination Statz testified that she saw the two squad cars when she was approximately a mile away, on the top of a hill. At that point the speed limit is 35 miles per hour. The speed limit changes to 25 miles per hour about three to five blocks from the location of the squad cars and that is when she put her car on cruise control. She estimated she hit her brakes about 50 to 100 feet before reaching the squad cars and kept them on continually until she was about 20 to 30 feet past them, a distance she agreed was approximately between 110 and 160 feet. However, she testified, she began braking intermittently as soon as she saw the cars.

¶9 On redirect Statz testified that it was possible she was going 15 to 17 miles an hour after she put her signal on and before she put her brake lights on in order to pull over. She does not recall how fast she was going when Officer Wetter's squad car turned on its lights for her to pull over, but she knows it was less than 25 miles per hour.

¶10 The circuit court denied the motion. It determined, based on its view of the video recording introduced into evidence, that Statz did not pull over further to the left to create more room between her vehicle and the squad cars and this constituted a reasonable basis for the stop. The court also found that her testimony on her speed was not credible, given her testimony on her braking and that she was going faster than the speed limit and did not reduce her speed below the speed limit when passing the squad cars.

### DISCUSSION

¶11 On appeal Statz contends that Officer Wetter did not have reasonable suspicion to believe she was violating WIS. STAT. § 346.072(1).<sup>2</sup>

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<sup>2</sup> WISCONSIN STAT. § 346.072(1) provides:

If an authorized emergency vehicle giving visual signal ... is parked or standing on or within 12 feet of a roadway, the operator of a motor vehicle approaching such vehicle ... shall proceed with due regard for all other traffic and shall do either of the following:

(a) Move the motor vehicle into a lane that is not the lane nearest the parked or standing vehicle or machinery and continue traveling in that lane until safely clear of the vehicle or machinery. This paragraph applies only if the roadway has at least two lanes for traffic proceeding in the direction of the approaching motor vehicle and if the approaching motor vehicle may change lanes safely and without interfering with any vehicular traffic.

(b) Slow the motor vehicle, maintaining a safe speed for traffic conditions, and operate the motor vehicle at a reduced speed until completely past the vehicle or machinery. This paragraph applies only if the roadway has only one lane for traffic proceeding in the direction of the approaching motor vehicle or if the approaching motor vehicle may not change lanes safely and without interfering with any vehicular traffic.

¶12 Statz contends that the statute does not require that a vehicle move into another lane where, as here, there is only one lane. Rather, she asserts, the only obligation Statz had was to “[s]low the motor vehicle, maintaining a safe speed for traffic conditions, and operate the motor vehicle at a reduced speed until completely past the vehicle ....” WIS. STAT. § 346.072(1)(b). She asserts that the evidence shows that Statz did slow down and reduce her speed until completely past the squad cars and that the evidence is insufficient to support a finding that she was traveling at a speed unsafe for conditions.

¶13 The State agrees with Statz that WIS. STAT. § 346.072(1) does not require that Statz move to another lane. Therefore, our inquiry is whether there was reasonable suspicion to believe Statz did not slow down, maintain a safe speed for traffic conditions, and operate at a reduced speed until completely past the squad cars.

¶14 The temporary detention of individuals during the stop of an automobile by the police constitutes a “seizure” of “persons” within the meaning of the Fourth Amendment.<sup>3</sup> *Whren v. United States*, 517 U.S. 806, 809-10 (1996). An automobile stop is thus subject to the constitutional imperative that it not be “unreasonable” under the circumstances. *Id.* at 810. A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, *id.*, or have grounds to reasonably suspect a violation has

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<sup>3</sup> Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. In general, the Wisconsin Supreme Court follows the United States Supreme Court’s interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the state constitution. *State v. Fry*, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986).

been or will be committed. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). The parties here both apply the reasonable suspicion analysis, and we therefore do the same.

¶15 Reasonable suspicion must be based on specific articulable facts and reasonable inferences derived from those facts. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. The question of what specifically constitutes reasonable suspicion is determined by an objective test, which asks whether under the totality of the circumstances a reasonable police officer would reasonably suspect that some type of illegal activity had taken place or was taking place. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶16 We accept the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). However, whether the facts as found by the circuit court or the undisputed facts fulfill the constitutional standard is a question of law, which we review de novo. *State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶17 Because we apply an objective standard to determine reasonable suspicion, the fact that Officer Wetter mistakenly believed that the statute required Statz to pull over further toward the center line does not require a reversal. Rather, our inquiry is whether, given the totality of the circumstances as found by the circuit court, a reasonable officer in Officer Wetter's position could believe Statz did not slow down, maintain a safe speed for traffic conditions, and operate at a reduced speed until completely past the squad cars. Similarly, although the circuit court erred in having the same mistaken view of the statute, because our

review is de novo, we may affirm on a different legal theory, accepting the circuit court's findings of fact.<sup>4</sup>

¶18 As a threshold matter we reject any suggestion that, because the evidence is uncontroverted that Statz put on her brakes before she reached Officer Wetter's squad car, it is irrelevant whether she was speeding before she applied the brakes. This is an unreasonable construction of the statute. The posted speed limit is presumably the highest speed that is safe for the area and the "reduced speed" required by WIS. STAT. § 346.072(1)(b) plainly contemplates that more than the usual care is required when emergency vehicles are parked beside the road. The only reasonable construction of the statute is that the driver is required to reduce speed below the speed limit, as well as maintaining a speed that is safe for traffic conditions.

¶19 The court as fact-finder found that Statz's testimony on her speed was incredible, and it implicitly credited Officer Wetter's testimony that she was going 28 to 30 miles per hour when she passed him. Statz objected to the admission of his testimony on this point at trial and renews her objection on appeal. However, the admission of evidence is committed to the circuit court's discretion and we affirm a discretionary decision if the court applied the correct law to the facts of record and reached a reasonable result. *State v. Doss*, 2008 WI 93, ¶19, 312 Wis. 2d 570, 754 N.W.2d 150. We conclude the officer's opportunity to observe Statz's vehicle and his testimony on his training and

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<sup>4</sup> We agree with Statz that an officer may not, consistent with the Fourth Amendment, stop a motorist without reasonable suspicion simply to tell the motorist that he or she should do something different in the future—in this case, pull over farther from parked squad cars. However, contrary to Statz's argument, we do not read the circuit court's comments here to convey that this is permissible: the court concluded there *was* reasonable suspicion.



experience in estimating speeds provide a reasonable basis for the court to admit this testimony. The weight to give this and other testimony, like the determination of witness credibility, is for the circuit court. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶20 Officer Wetter's testimony regarding his following Statz to stop her, and the video recording showing the speed of his vehicle, also provide support for the circuit court's acceptance of Officer Wetter's estimate of her speed as she passed him.

¶21 In evaluating whether Statz had reduced her speed to one that was safe for conditions, a reasonable officer could take into account the distance of Statz's vehicle from the squad cars as she passed them. This is true even though the statute did not require Statz to move into the other lane or even to move closer to the center line. The closer she is to the squad cars as she passes, the slower her speed needs to be to be safe. Officer Wetter testified to his alarm at how close her vehicle came to his, and the circuit court found, based on the video recording, that her vehicle appeared to be 2 or 3 feet from the door of the squad car as she passed.

¶22 We are satisfied that a reasonable officer could reasonably suspect that, by driving 28 to 30 miles per hour in a 25-mile-per-hour zone within 2 to 3 feet of the squad cars, Statz did not slow down, maintain a safe speed for traffic conditions, and operate at a reduced speed until completely past the squad cars, as required by WIS. STAT. § 346.072(1). Accordingly, we affirm the circuit court's order denying the suppression motion and the judgment of conviction.

*By the Court.*—Judgment and order affirmed.

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

