

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2010

A. John Voelker
Acting 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. 2009AP163

Cir. Ct. No. 2008TR17625

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN A. RHYNE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Kevin Rhyne appeals a circuit court order revoking his motor vehicle operating privileges for unlawfully refusing to submit

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.21(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

to a chemical breath test, in violation of Wisconsin's implied consent law, WIS. STAT. § 343.305(9). Rhyne argues that officers lacked a legal basis for the traffic stop that led to the subsequent refusal charge, and appears to argue that evidence gathered after the stop supporting the court's finding that probable cause existed to believe that he was operating a motor vehicle while intoxicated should be suppressed. We conclude that officers had a legal basis for the stop because probable cause existed to believe that Rhyne had committed a traffic violation by driving straight from a turn-only lane, contrary to WIS. STAT. § 346.31(1).² We therefore affirm.

¶2 In the early morning hours of August 24, 2008, University of Wisconsin Police Officer Tanner Gerstner was travelling westbound on University Avenue and noticed Rhyne's vehicle because of the "significantly increased rate of speed" at which it turned southbound onto North Lake Street. The officer followed the vehicle onto North Lake Street and observed its left turn signal become activated as the vehicle approached the intersection with West Johnson Street and entered the lane marked left turn only. The operator of the vehicle then abruptly deactivated the turn signal, and the officer observed the vehicle drive straight through the intersection from the left turn-only lane. The officer conducted a traffic stop and, upon making contact with the driver, Kevin Rhyne,

² WISCONSIN STAT. § 346.31(1) provides as follows:

Where state or local authorities have placed markers, buttons or signs within or adjacent to an intersection directing traffic turning at such intersection to follow a particular course, the operator of a vehicle turning at such intersection shall comply with such directions. In the absence of such markers, buttons or signs, the operator of a vehicle intending to turn at an intersection shall do as provided in subs. (2) to (4).

observed several indicia of intoxication. The officer administered the standard field sobriety tests, which Rhyne failed. Rhyne was arrested for operating a motor vehicle while intoxicated (OWI), and was read the Informing the Accused statement at the police station. Rhyne refused to submit to an evidentiary chemical breath test when asked by the officer.

¶3 A Notice of Intent to Revoke Operating Privilege was filed, and Rhyne requested a refusal hearing. Rhyne's refusal hearing and the trial on his first-offense OWI and turn-lane violations were scheduled to be held in the same proceeding. At the beginning of the proceeding, the State moved to dismiss Rhyne's OWI and turn-lane citations, and proceeded on the refusal charge. Following the refusal hearing, the circuit court found that Rhyne unlawfully refused to submit to an evidentiary chemical breath test in violation of WIS. STAT. § 343.305. Rhyne now appeals.

¶4 The elements of a refusal charge under WIS. STAT. § 343.305(9)(a)5 are as follows. First, the State must prove that the officer had probable cause to believe the person was operating a motor vehicle while under the influence of an intoxicant. WIS. STAT. § 343.305(9)(a)5. Second, the State must prove that the officer complied with WIS. STAT. § 343.305(4), which requires that the officer read the Informing the Accused form to the person. *Id.* Third, the State must prove that the person refused to permit the test, and that refusal was not due to physical inability. *Id.*

¶5 Rhyne's sole argument on appeal is that the investigating officer lacked a legal basis for the stop that led to the refusal charge. Rhyne argues that, contrary to the police report and the officer's testimony, he did not increase his speed when he turned onto Lake Street, and the video of the traffic stop does not

show other signs of impaired driving. Rhyne appears to argue that the alleged illegality of the stop precluded the State from using evidence gathered pursuant to the stop to prove the OWI probable cause element of the refusal charge. In response, the State argues that proof that the stop was valid is not an element of a refusal charge, and therefore evidence collected after an illegal stop should not be suppressed at a refusal hearing.

¶6 It appears that no published Wisconsin case has addressed the question of whether evidence gathered pursuant to an illegal stop may be used to prove the OWI probable cause element of a refusal charge. We need not decide this issue here, however, because we conclude that the officer had a legal basis to stop Rhyne when he observed Rhyne's vehicle drive straight through the intersection from a clearly marked turn-only lane, contrary to WIS. STAT. § 346.31(1).

¶7 “An officer may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred.” *State v. Popke*, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569 (citing *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)). Here, Rhyne did not contest the officer's assertion at trial that he drove straight through the marked left turn only lane. Rhyne even states in his brief that he “attempted to go straight from the left lane.” Rhyne's driving was in violation of WIS. STAT. § 346.31(1), which provides that, where markers or signs direct traffic at an intersection to follow a particular course, “the operator of a vehicle turning at such intersection shall comply with such directions.” Accordingly, we conclude that the stop was valid,

and thus reject Rhyne's suggestion that the evidence used to prove the OWI probable cause element of the refusal charge should have been suppressed.³

By the Court.—Order affirmed.

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

³ In the Statement of Facts section of his brief, Rhyne argues that the video evidence of the field sobriety tests was not consistent with the testimony of the arresting officer, and that some of the field sobriety tests were conducted out of visual range of the video recorder. We normally do not address arguments made in the fact section of a brief, but we will do so here because Rhyne appears *pro se*. Nonetheless, Rhyne does not argue which testimony of the officer was contravened by video evidence or what bearing the failure to video record some of the field sobriety tests should have on our analysis. Rhyne does not even argue that the result of these alleged errors was that probable cause did not exist to prove that he had been operating a motor vehicle while intoxicated. Accordingly, we reject these arguments.

