COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-0422-FT
03-0423-FT

Cir. Ct. Nos. 02TR002930
02TR002946

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONAN T. HEANEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 BROWN, J.[1] Ronan T. Heaney appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI). The sole issue

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

on appeal is whether the trial court erred when it denied Heaney's motion to suppress evidence obtained subsequent to a traffic stop. Heaney seeks relief on the ground that the arresting officer lacked reasonable suspicion to stop his vehicle. He argues that the trial court's findings of fact are clearly erroneous and the evidence presented does not otherwise demonstrate that the stop was constitutional. We conclude that the trial court's findings of fact were not clearly erroneous and the stop was constitutional. We affirm.

¶2 The pertinent facts are as follows. On the night of May 4, 2002, State Trooper Mike Smith pulled Heaney over for failing to change lanes while an emergency vehicle was parked on the side of the road in violation of WIS. STAT. § 346.072.[2] As a result of this stop, Heaney was charged with OWI. Following

[2] WISCONSIN STAT. § 346.072, provides in pertinent part:

> 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 or machinery 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 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.

his arrest, Heaney filed a motion to suppress all evidence seized as a result of the stop, arguing that the traffic stop was unconstitutional.

¶3 On October 9 and November 19, 2002, evidentiary hearings were held on Heaney's motion to suppress. At the hearings, Smith; Deputy Michael Lambert, a ride-along officer in the squad car; Heaney; and Mary McNamara-Heaney, Heaney's wife and a passenger in the car, testified to the circumstances surrounding the stop.

¶4 Smith testified that prior to the incident he was completing a traffic stop on Highway 12, a four-lane highway, located in Walworth county. His squad car was parked on the side of the right-hand lane of traffic, within one foot of the white fog line, with the emergency lights activated. Smith testified that he was in the habit of carrying a flashlight during traffic stops in the dark. Upon returning to his squad car, Smith testified that he saw a black Lincoln Navigator approaching in the right lane. He testified that he could not recall as to whether he waved a flashlight at the Navigator. Smith then stated that the Navigator passed in the right lane, approximately four feet from his vehicle. Smith testified that there were no obstructions that would have prohibited the Navigator from going into the other lane. After Smith returned to the squad, he proceeded to pull over the Navigator for failing to move to the left lane. Based on his observation that Heaney exhibited several indicia of intoxication and on Heaney's performance on field sobriety tests, Smith arrested Heaney for OWI and took him to the police department where Heaney refused to submit to an evidentiary chemical test of his breath.

¶5 Lambert, the ride-along officer, testified that he also witnessed the Lincoln Navigator pass the squad car from his position inside the vehicle.

Lambert testified that Smith waved his flashlight, warning the approaching vehicle to move over into the opposite lane of traffic. Lambert testified that he did not notice any traffic either behind or alongside the Navigator that would have prevented it from moving into the left lane.

¶6 Mary McNamara-Heaney, a passenger in the Navigator, presented testimony that differed from the State's account of the incident. She testified that she and her husband were returning from a friend's house, where they each had consumed two beers. She said that she saw the trooper waving the Navigator down with the flashlight. She also testified that there was traffic in both lanes that prevented the Navigator from moving into the left lane. In fact, she testified that they were "leading a pack of cars." However, McNamara-Heaney testified that neither she nor her husband told Smith that traffic prevented them from moving into the left lane.

¶7 Heaney also testified to the circumstances surrounding the traffic stop. He said that he saw the trooper wave his flashlight and that he understood that as a signal to pull over; however, he admitted that he had never heard of an officer using a flashlight to conduct a traffic stop. He testified that while he was unable to change lanes due to other traffic, he did slow down as he approached the squad car, and immediately pulled over in front of the squad car.

¶8 After hearing all of the testimony, the trial court made the following findings of fact: Smith had stopped another vehicle and, for the purpose of the stop, he was outside his squad car. When Smith finished with the stop, he was returning to his car and was close to traffic. At this point, he shined his light at an oncoming vehicle to warn it of his presence. Lambert, the ride-along officer, saw the trooper shine the light and looked back. Lambert saw a car approaching;

however, he did not see any traffic in the left lane that would have prohibited Heany's car from moving over. At that point Smith got in the squad car, the Navigator passed in the right lane, and Smith proceeded to pull over the Navigator. Consistent with Lambert's and Smith's testimony, the Heaneys saw the flashlight. The Heaneys construed it as being signaled down. However, Heaney did not move over, and instead passed the squad car, and this was a violation of the statute.

¶9 Based on its findings, the trial court denied Heaney's motion to suppress the evidence obtained during the stop on May 4, 2002. The court subsequently found him guilty of OWI. This appeal followed.

¶10 On review of a denial of a suppression motion, the trial court's findings of fact will be upheld unless they are clearly erroneous. WIS. STAT. § 805.17(2); *see also* ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts is a question of law we decide without deference to the trial court's decision. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

¶11 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). Stopping an automobile and detaining its occupants constitutes a seizure under the Fourth Amendment and, consequently, must meet the constitutional requirement of reasonableness. ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). An officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a noncriminal traffic violation. ***State v. Colstad***, 2003 WI App 25, ¶¶10-13, 260 Wis. 2d 406, 659 N.W.2d 394, *review*

denied, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (Wis. Apr. 22, 2003) (No. 01-2988-CR).[3]

¶12 On appeal, Heaney claims that the trial court's findings of fact are clearly erroneous. In his view, Smith's testimony is internally inconsistent and generally inconsistent with the testimony of the other witnesses. He claims the trial court reconciled the various testimonies, creating a "third version" of the facts not found in the record in order to support its conclusion that Smith had probable cause to believe that Heaney had committed a traffic violation and, therefore, the stop was constitutional.

¶13 Our inspection of the record demonstrates that the evidence sustains the factual findings of the trial court. Although Smith did not recall whether he waved his flashlight at the Navigator, Lambert testified that he did. Lambert said that as Heaney's vehicle was approaching, Smith waved the flashlight he was carrying to signal the vehicle to get over into the opposite lane of traffic. Upon returning to his squad, Smith testified that he saw a black Lincoln Navigator in the right lane pass approximately four feet from his vehicle. Lambert testified that he observed the Navigator pass within five feet of Smith and the squad car without moving over into the left lane. Lambert further testified that he did not notice any traffic surrounding Heaney's vehicle, either behind or alongside of it, that would have prevented the vehicle from pulling into the opposite lane of traffic.

[3] The parties vacillate between the terms "reasonable suspicion" and "probable cause" in terms of the standard used to measure the reasonableness of the traffic stop. Although traffic stops often are based on probable cause, as the State argues was the case here, they also may be based on reasonable suspicion of a civil traffic violation. *See* ***State v. Colstad***, 2003 WI App 25, ¶¶10-13, 260 Wis. 2d 406, 659 N.W.2d 394, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (Wis. Apr. 22, 2003) (No. 01-2988-CR).

¶14 In making its findings of fact, the trial court simply heard the conflicting testimony and made a judgment based on the credibility of the witnesses. When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony and an appellate court must give due regard to the trial court's opportunity to make an assessment of the credibility. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; ***Jacquart v. Jacquart***, 183 Wis. 2d 372, 386, 515 N.W.2d 534 (Ct. App. 1994). In this case, the trial court reasonably relied on Smith's and Lambert's testimony, and found that Heaney's and McNamara-Heaney's testimony was not credible. Furthermore, when the evidence is conflicting, it is the function and duty of the finder of fact to determine where the truth lies. ***Garstka v. Russo***, 37 Wis. 2d 146, 152, 154 N.W.2d 286 (1967). In other words, the trier of fact may choose some testimony of one witness, reject some testimony of the same witness, take some testimony of still another witness and arrive at the truth about what happened as the trier of fact sees fit. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985) ("It's certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent."). Heaney's claim that a trial court may not arrive at a "third version" is simply contrary to the law in Wisconsin. A trier of fact may do just that so long as it is supported by the record. Accordingly, we conclude that the trial court's findings of fact are not clearly erroneous.

¶15 Further, based on its findings of fact, it is clear that the trial court properly concluded that Smith had probable cause to believe that Heaney had committed a traffic violation by failing to comply with the requirements of WIS. STAT. § 346.072 and, therefore, the stop was constitutional. Heaney does not

dispute on appeal that if the stop was constitutional, Smith had probable cause to arrest him. Therefore, we uphold the trial court's denial of Heaney's motion to suppress and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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