

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2012

Diane M. Fremgen
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. 2011AP2467-CR

Cir. Ct. No. 2010CT192

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL E. MINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
WILLIAM DOMINA, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Michael Mings appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

(OWI), fourth offense. He contends that the circuit court erred in denying his motion to suppress evidence because the arresting officer did not possess the reasonable suspicion necessary to conduct an investigatory stop of his vehicle. We reject Mings' argument. We conclude that, under the totality of circumstances, the officer had reasonable suspicion to justify the stop. We uphold the circuit court order denying Mings' motion to suppress. We affirm the judgment.

BACKGROUND

¶2 In the early morning hours of February 3, 2010, Officer Lukas Hallmark of the City of Waukesha Police Department was providing backup at a traffic stop on Tenny Avenue when he observed a car behind him “almost come to a complete stop in its lane of traffic.” The car then passed unusually slowly, traveling approximately ten to fifteen miles per hour. The car, driven by Mings, passed the traffic stop so far to the left that it appeared to Hallmark “that the vehicle was going to strike the curb and cause an accident.” According to Hallmark, the pavement was clear of snow and debris.

¶3 After the car nearly struck the curb, Hallmark decided to follow the vehicle. When Hallmark caught up to the vehicle, he observed it on College Avenue, turning left onto Oakland Avenue without activating its turn signal. At that time, Hallmark also observed vehicles coming south on Oakland Avenue and he “believed that this traffic would be affected if the operator of th[e] vehicle did not use his signal.” Hallmark then performed a traffic stop on the vehicle as it was turning into a driveway. He made contact with Mings and observed his speech to be “stuttered,” his eyes “very glassy,” and a strong odor of alcohol emanating

from the vehicle. Mings initially denied that he had been drinking but then stated he had consumed two or three drinks.

¶4 Upon observing Mings' behavior, Hallmark performed field sobriety exercises, all of which Mings had difficulty performing. Based upon Mings' performance on the field sobriety testing, Hallmark believed Mings was under the influence of intoxicants. Hallmark administered a preliminary breathalyzer test and then placed Mings under arrest. Mings was taken to Waukesha Memorial Hospital where a blood draw was taken and indicated a blood alcohol content of .194 percent.

¶5 Mings was subsequently charged with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), each as a fourth offense and with an alcohol fine enhancer. He filed a motion to suppress the evidence resulting from the stop of his vehicle, claiming that his actions in passing the traffic stop were not illegal and disputing Hallmark's observation that he failed to use a turn signal.

¶6 Following a motion hearing at which both Mings and Hallmark testified, the circuit court denied Mings' motion to suppress. The circuit court found Hallmark's testimony credible as to Mings' failure to use a signal. The circuit court determined that whether Hallmark would have stopped Mings but for his failure to use his traffic signal was of little relevance because the failure to use a traffic signal alone is "clearly a violation of the law" and, as such, an "articulable reason to stop an individual."

¶7 Mings appeals.

DISCUSSION

¶8 Mings argues, as he did before the circuit court, that his behavior when encountering the first traffic stop reflected an effort to comply with WIS. STAT. § 346.072, which requires a driver to slow his or her vehicle when passing an emergency vehicle displaying its lights. Mings further argues that his failure to use a turn signal as required by WIS. STAT. § 346.34² did not warrant a traffic citation because no other vehicles were affected. Mings contends that the totality of circumstances failed to establish a reasonable suspicion for Hallmark to perform a traffic stop. We reject Mings' arguments and affirm.

¶9 Whether a traffic stop is reasonable is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. A question of constitutional fact presents a mixed question of law and fact. *Id.* We review the circuit court's findings of fact under the clearly erroneous standard, but we review independently the application of those facts to the constitutional principle. *Id.*

¶10 A police officer may conduct an investigative stop if he or she is “able to point to specific and articulable facts which, taken together with inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.*, ¶10 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The intrusion is warranted if the officer reasonably believes the person is committing, is about to commit or has committed a crime. WIS. STAT. § 968.24; *Post*, 301 Wis. 2d 1, ¶13. The

² WISCONSIN STAT. § 346.34(1)(b) provides in relevant part that “[i]n the event any other traffic may be affected by the movement, no person may turn any vehicle without giving an appropriate signal.”

reasonableness of the stop is determined by the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶13.

¶11 First we address Hallmark’s observations as Mings passed the initial traffic stop on Tenny Avenue. Hallmark testified:

I observed a vehicle with its headlights on behind me. I observed this vehicle actually almost come to a complete stop in its lane of traffic, which drew my attention to the vehicle.... As it proceeded past me, I observed it almost deviate out of its lane, almost striking the curb area past the blacktop, almost onto the concrete area near the curb as it continued past me very slowly. I’d estimate the speed to be approximately 10 to 15 miles per hour.

While Hallmark acknowledged that the law requires a driver to slow down when passing an emergency vehicle with its lights activated, he maintained that Mings’ behavior was unusual.

¶12 Hallmark testified that he has completed many traffic stops in his three years as a police officer and that “most innocent public, motoring traffic, don’t usually pass ... at that slow of speeds, especially when the lane is that wide and clear of traffic.” Hallmark explained that the vehicle conducting the initial traffic stop had pulled into a driveway and that Hallmark’s vehicle was in the parking lane on Tenny Avenue. There would be no need for a vehicle to “go around” his vehicle—“[t]here’s a clear lane of traffic.” As to Mings’ contention that he was simply trying to obey traffic laws in passing Hallmark, we note that an officer is not required to rule out the possibility of innocent behavior before initiating a brief stop. See *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

¶13 Next we turn to Hallmark’s observation that Mings failed to signal at the intersection of College and Oakland. Mings asserts, without citation, that

“[t]he use or non-use of a vehicular turn signal is not to signal to a perpendicularly traveling vehicle,” but is “instead to notify a trailing vehicle that the vehicle will be slowing and turning” or to notify oncoming traffic that the vehicle may be turning in front of it. However, the circuit court found credible Hallmark’s testimony that when he observed Mings turning onto Oakland Avenue, he also saw vehicles heading south on Oakland Avenue that could reasonably be affected by Mings’ vehicle.³ This court has held that “when a person’s activity can constitute either a civil forfeiture or a crime, a police officer may validly perform an investigative stop.” *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991). Here, Mings’ failure to use his vehicular turn signal constituted a traffic violation and, thus, Hallmark was entitled to perform an investigative stop.

CONCLUSION

¶14 Based on the totality of the circumstances, we conclude that Hallmark had reasonable suspicion to justify stopping Mings’ vehicle. In addition to Mings’ failure to use a turn signal, Hallmark observed Mings stop, slow and swerve in an unusual manner while passing the traffic stop. We affirm the circuit court’s denial of Mings’ motion to suppress and affirm the judgment.

³ Mings contends that, because College Avenue dead-ends into Racine Avenue and Oakland Avenue, there could be no “oncoming traffic.” We note that a map of the intersection confirms that College Avenue dead-ends at the intersection at issue; however, the map also indicates that the intersection receives traffic from the west (College Avenue), the northwest (North Racine Avenue), the north (Oakland Avenue) and the southeast (East Racine Avenue). See <http://maps.google.com/maps> (last visited Mar. 21, 2012). While Hallmark’s testimony is sufficient to support the circuit court’s findings, we nevertheless observe that while there may not be direct “oncoming traffic,” traffic approaching the intersection of College Avenue and Oakland Avenue from either the right or the left could be affected by the use of a traffic signal, which is what the statute requires.

By the Court.—Judgment affirmed.

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

