05AP2778

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2005AP2778-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ROBERT E. POST,

Defendant-Appellant.

ON REVIEW OF A COURT OF APPEALS' DECISION REVERSING A JUDGMENT OF CONVICTION ENTERED IN SAUK COUNTY CIRCUIT COURT, HONORABLE PATRICK J. TAGGART, PRESIDING

BRIEF-IN-CHIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

Page

CASES CITED

Page

Page

STATUTES CITED

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INTRODUCTION

This case is before the court on the State's petition for review of an adverse court of appeals' decision. The court of appeals reversed a trial court ruling that had denied Defendant Robert E. Post's motion to suppress evidence derived from a traffic stop and arrest of Post for drunk driving (fifth offense). As outlined below, the issue presented concerns the existence of reasonable suspicion for the traffic stop.

ISSUE PRESENTED

DOES DRIFTING OR WEAVING OF A MOTOR VEHICLE WITHIN A SINGLE TRAFFIC LANE SEVERAL TIMES OVER TWO BLOCKS GIVE AN EXPERIENCED PATROL OFFICER REASONABLE SUSPICION TO MAKE AN INVESTIGATORY STOP FOR POSSIBLE DRUNK DRIVING?

Trial court. The trial court denied Post's suppression motion, concluding that the traffic stop was lawfully based on reasonable suspicion of possible drunk driving (16; P-Ap. 104-105).

Court of appeals. The court of appeals disagreed, finding insufficient evidence of reasonable suspicion for an investigatory stop. *State v. Robert E. Post*, No. 2005AP2778-CR (Wis. Ct. App. Dist. IV Aug. 10, 2006), slip op. at ¶ 4 (*see* P-Ap. 101-103).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case already has been scheduled for oral argument. As in most cases accepted for Wisconsin Supreme Court review and full briefing, publication also appears warranted.

STATEMENT OF THE CASE

Original charges.

By complaint filed March 25, 2004, in Sauk County Circuit Court, Defendant Post was charged with three crimes (*see* 1):

- Count 1: Operating a motor vehicle while intoxicated, as a fifth offense, contrary to Wis. Stat. § 346.63(1)(a) and § 346.63(2)(e) and (2)(g)2.;

- Count 2: Operating a motor vehicle while having a prohibited blood-alcohol concentration, as a fifth offense, contrary to Wis. Stat. § 346.63(1)(b) and § 346.63(2)(e) and (2)(g)2.; and

- Count 3: Operating a motor vehicle after license revocation, contrary to Wis. Stat. § 343.44(1)(b) and (2)(b).

The charges stem from a traffic stop of Post in Sauk City at approximately 9:30 p.m. on February 19, 2004, and the subsequent discovery that Post had a blood-alcohol concentration of 0.212 percent, more than twice the legal limit (1).

Post was bound over for trial at the close of a preliminary hearing on July 16, 2004 (*see* 6:20), at which time the State filed an information repeating the three charges of the complaint (5).

Suppression ruling.

By pretrial motion, Post challenged the legality of the traffic stop, seeking to suppress all evidence derived from the stop (9). On October 26, 2004, Judge Patrick J. Taggart conducted an evidentiary hearing on the motion (24), and by decision of January 13, 2005, he denied the motion (16).

Plea agreement.

On July 1, 2005, pursuant to a plea agreement with the State, Post pled no contest to Count 2, operating a motor vehicle with a prohibited blood-alcohol concentration, as a fifth offense (25:2-3). The State agreed to seek dismissal of the other two charges, and the parties jointly

recommended a three-year term of probation, sentence withheld, conditioned on twelve months in jail (25:2-3).

Judge Taggart accepted the plea agreement and imposed the requested, three-year term of probation, sentence withheld, conditioned on twelve months in jail (25:3-9). Judge Taggart also stayed the sentence pending appeal (25:2-3, 9-10). Judgment of conviction was filed July 5, 2005 (22).

On Post's direct appeal, in a per curiam decision, the court of appeals reversed the suppression ruling and remanded. *Post*, slip op. at 3 (P-Ap. 103).[1]

STATEMENT OF FACTS

On October 26, 2004, the trial court conducted an evidentiary hearing on Post's challenge to the validity of the investigatory traffic stop (24). Only the officer who made the stop – Sauk Prairie Police Sergeant Joshua Sherman – testified at the hearing.

Sergeant Sherman said he has been a Sauk Prairie police officer for six years, including four years as a sergeant (24:2; P-Ap. 107). He testified that in his eight-hour daily shift as sergeant, "approximately six hours of the shift I am on the road," observing driving behavior (24:5, P-Ap. 110).

Sergeant Sherman said that while on "[r]outine patrol" in his squad car at 9:30 p.m. on February 19, 2004, he "observed two vehicles traveling northbound [in the 400 block] on Water Street" (24:3; P-Ap. 108). He said "[t]he second vehicle was cant[ed] into the parking lane," explaining that the second vehicle "[w]asn't traveling in the designated traveling lane, traveling closer into the

[1]Although Post pled no contest to one count of operating a motor vehicle with a prohibited blood-alcohol concentration, he can obtain review of the suppression ruling pursuant to Wis. Stat. § 971.31(10).

parking lane" (24:4; P-Ap. 109). The first vehicle was "a Saturn" by make, while the second vehicle was "a Chevy Cavalier" (24:5; P-Ap. 110). Defendant Post was driving the Cavalier (24:8; P-Ap. 113).

Sergeant Sherman described Water Street as a two-lane street with a yellow center line separating traffic moving in opposite directions (24:8-9; P-Ap. 113-114). He estimated each lane of traffic to be "22 to 24 feet" wide (24:6; P-Ap. 111). He said vehicles can park alongside the curb, but that the parking lane is not specifically marked (24:4, 9; P-Ap. 109, 114).

Sergeant Sherman said that after observing the second of the two vehicles – Post's Cavalier – traveling within the parking lane, he decided to follow the vehicles in his squad car "to observe the driving behavior of both vehicles" (24:4; P-Ap. 109). Sergeant Sherman described the movement of Post's Cavalier on Water Street as follows:

> [Post's Cavalier] continued to travel northbound, traveling in an S type manner, from the parking lane to the yellow center l[i]ne.
>
> The motion that the vehicle was making wasn't jerky. It was a smooth motion toward the right part of [the] parking lane and back towards the center line.

(24:5; P-Ap. 110 (brackets added); *see also* 24:11; P-Ap. 116).

Sergeant Sherman said Post's Cavalier would drift five feet toward the curb, coming within six to eight feet of the curb (24:7; P-Ap. 112), and then over-correct and, instead of traveling in the middle of the traffic lane, would drift five feet toward the center line, coming "within 12 inches" of the center line (24:5, 12; P-Ap. 110, 117). Sergeant Sherman said Post's Cavalier made this S-shaped drifting pattern "[s]everal times within [a span of] two blocks" (24:14; P-Ap. 119).

Sergeant Sherman said Post's Cavalier was not speeding and did not come close to striking another vehicle (24:9; P-Ap. 114). Sergeant Sherman said he believes that a motorist may drive in the parking lane without committing a traffic violation, "[a]s long as no vehicles are parked there" (24:9, 10; P-Ap. 114, 115). He did not recall seeing any parked vehicles in the path of Post's Cavalier (24:9; P-Ap. 114).

Sergeant Sherman said he followed the two vehicles for five blocks on Water Street before the vehicles turned left onto Broadway (24:10; P-Ap. 115). He said that when the driver of the first vehicle, the Saturn, signaled for a left turn, so did Post in the Cavalier (24:12-13; P-Ap. 117-118). Sergeant Sherman said the Saturn turned left into the wrong lane of traffic – "the eastbound lane instead of the westbound lane" (24:13; P-Ap. 118). The sergeant said he then activated the lights on his squad car, and both vehicles stopped (24:13-14; P-Ap. 118-119). Sergeant Sherman said he stopped Post's Cavalier, believing that "the drifting was a clue [Post] may be intoxicated" (24:14; P-Ap. 119; *see also* 24:7; P-Ap. 112).

Trial court's ruling. In denying Post's suppression motion, the trial court concluded that the traffic stop was lawful, stating in relevant part as follows:

> The court finds that based on the training and experience of Officer Sherman, drifting even within one[']s own lane gives a suspicion that the driver may have been intoxicated.

(16:2; P-Ap. 105.)

ARGUMENT

BECAUSE THE TRAFFIC STOP OF POST WAS BASED ON REASONABLE SUSPICION OF DRUNK DRIVING, THE TRIAL COURT PROPERLY DENIED POST'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM THE STOP.

A. Summary of State's position.

For alternative reasons summarized here and developed with supporting authorities in the subsections that follow, this court should conclude that the traffic stop was lawful.

First, this court should join the majority view among courts elsewhere and hold that ***repeated*** "drifting" or "weaving" of a motor vehicle within a single traffic lane – absent any obvious innocent explanation for it – gives an experienced patrol officer reasonable suspicion to make an investigative stop for possible drunk driving.

The present case is a prime example of this proposition. An experienced patrol officer observed Post's car "drift[]" back and forth (24:11; P-Ap. 116) "in an S type manner, from the parking lane to the yellow center l[i]ne" (24:5; P-Ap. 110), "[s]everal times within . . . two blocks" (24:14; P-Ap. 119). This information was enough, without more, to constitute reasonable suspicion of drunk driving to permit an investigatory traffic stop. In fact, drifting in and out of an unmarked parking lane reasonably could be construed as drifting outside of a single lane – even if, technically, it may not constitute a traffic law violation for lane deviation under Wis. Stat. § 346.13(1).

Second, even if something more is required for reasonable suspicion of drunk driving, that "something more" was present in this case. Because Post's car appeared to be traveling in tandem with another car whose

driver made a left turn into the wrong traffic lane, the officer, who by then had observed Post's erratic driving, reasonably could conclude that *both* drivers were impaired for the *same* reason (intoxication), rather than for *independent* reasons. The officer made these observations, moreover, at 9:30 p.m., when most businesses, other than restaurants and taverns, normally would be closed. No evidence suggested poor weather or road conditions.

Finally, the State does *not* argue, alternatively, for application of the "community caretaker" doctrine to justify the traffic stop. When, as in this case, the officer who made the traffic stop provides no reason for making the stop other than to investigate suspected drunk driving (24:7, 14; P-Ap. 112, 119), case law suggests that a "community caretaker" justification for the stop is not available. *See State v. Fields*, 2000 WI App 218, ¶ 12, 239 Wis. 2d 38, 619 N.W.2d 279 ("community caretaking functions must be 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute'" (quoting *State v. Anderson*, 142 Wis. 2d 162, 166, 417 N.W.2d 411 (Ct. App. 1987) (which quotes *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973))).[2]

B. General standard of review.

The Fourth and Fourteenth Amendments to the federal constitution and Art. I, § 11 of the state constitution guarantee Wisconsin citizens freedom from

[2]The "reverse" situation, however, is not true. "[C]haracterizing law enforcement's presence [in a residence] . . . as a 'community caretaking/peacekeeping' function does not preclude an officer, once he has probable cause to arrest [or reasonable suspicion to detain], from acting accordingly." *State v. Sykes*, 2005 WI 48, ¶ 29, 279 Wis. 2d 742, 695 N.W.2d 277. Thus, while the subjective motivation of an individual officer generally does *not* determine the objective reasonableness of a search or seizure, *see Whren v. United States*, 517 U.S. 806, 813 (1996), such motivation apparently does play a threshold role in determining whether the "community caretaker" doctrine is available to justify the search or seizure.

"unreasonable searches and seizures." *See State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106.

Wisconsin courts consistently follow the United States Supreme Court's interpretation of the search-and-seizure provision of the federal constitution in applying the same provision of the state constitution. *See State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis. 2d 729, 623 N.W.2d 516. These constitutional provisions also have been codified in Chapter 968 of the Wisconsin Statutes.

Whether a search or seizure has occurred, and if so, whether it passes constitutional muster are questions of law, subject to independent review. *See id.*, ¶ 12. A trial court's underlying findings of evidentiary or historical fact must be upheld, however, unless they are clearly erroneous. *See Williams*, 241 Wis. 2d 631, ¶ 20.

Principles governing investigatory traffic stops are discussed in the subsections that follow.

C. Analysis: Sergeant Sherman lawfully stopped Post's car on reasonable suspicion of drunk driving.

1. Principles governing investigatory traffic stops.

"[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *see also Williams*, 241 Wis. 2d 631, ¶ 21.

A valid investigatory stop, in simplest terms, requires a law-enforcement officer reasonably to suspect, in light of experience, that a particular person has com-

mitted, was committing or was about to commit a crime. *See Terry,* 392 U.S. at 27, 30; *see also* Wis. Stat. § 968.24 (codifying *Terry*). Such a stop is a "seizure" subject to the constitutional standard of reasonableness. *See Terry*, 392 U.S. at 20-22; *Rutzinski*, 241 Wis. 2d 729, ¶ 14.

Reasonable suspicion for an investigatory stop must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry*, 392 U.S. at 21; *Rutzinski*, 241 Wis. 2d 729, ¶ 14. Such facts must "be judged against an *objective* standard: would the facts available to the officer at the moment of the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry*, 392 U.S. at 21-22 (citation omitted; emphasis added). Stated another way: "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

The constitutional focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of the circumstances known to the investigating officer. *See Williams*, 241 Wis. 2d 631, ¶ 23. "It is a common sense question, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions." *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

The circumstances articulated by the investigating officer "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see also Rutzinski*, 241 Wis. 2d 729, ¶ 14.

The foregoing principles apply to investigatory stops of motor vehicles. *See, e.g., Alabama v. White*, 496 U.S. 325, 329-31 (1990); *Rutzinski*, 241 Wis. 2d 729, ¶ 14.

2. ***Repeated*** "drifting" or "weaving" of a motor vehicle within a single traffic lane – absent any obvious innocent explanation for it – gives an experienced patrol officer reasonable suspicion to make an investigatory stop for possible drunk driving.

a. Introduction.

Wisconsin law is clear that "an officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation." *State v. Colstad*, 2003 WI App 25, ¶ 11, 260 Wis. 2d 406, 659 N.W.2d 394; *see also Berkemer v. McCarty*, 468 U.S. 491, 493 (1984).

This proposition does *not* mean, however, that reasonable suspicion of a traffic violation is a prerequisite for an investigatory stop of a motorist based on reasonable suspicion of drunk driving. Logically, reasonable suspicion of drunk driving can exist in the absence of reasonable suspicion of some other traffic violation. *See, e.g., Roberts v. State*, 732 So. 2d 1127, 1128 (Fla. Dist. Ct. App. 1999); *State v. Huckin*, 847 S.W.2d 951, 954-55 (Mo. Ct. App. 1993). More broadly, as the Wisconsin Court of Appeals has recognized:

> The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot.

Waldner, 206 Wis. 2d at 57.

Rather, the primary question in the present case is whether ***repeated*** "drifting" or "weaving" of a motor vehicle within a single traffic lane – absent any obvious

innocent explanation for it – gives an experienced patrol officer reasonable suspicion to make an investigatory stop of the vehicle on the belief that the driver may be intoxicated. For the reasons that follow, this court should joint the apparent majority of courts elsewhere that answer this question "yes."[3]

b. Supporting case law.

In the present case, to reiterate, the stop of Post's car is based primarily on the unrefuted testimony of an experienced patrol officer who saw Post's car "drift[]" back and forth (24:11; P-Ap. 116), "in an S type manner, from the parking lane to the yellow center [l]ine" (24:5; P-Ap. 110), "[s]everal times within . . . two blocks" (24:14; P-Ap. 119).

As discussed below, the "repeated single-lane weaving" is not the only factor bearing on reasonable suspicion for the investigatory stop of Post's car. However, as a threshold matter, the State maintains that such conduct alone gives rise to reasonable suspicion, as an apparent majority of jurisdictions have held.

All of the following jurisdictions (compiled alphabetically by state and numerically by federal circuit) have upheld traffic stops on the proposition that repeated single-lane weaving, absent an obvious innocent explanation for it, constitutes reasonable suspicion of drunk driving.

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[3]The terms "drifting," "weaving, "swerving" and "veering" appear to be used interchangeably in the case law that follows, even where the suspect's car never deviates from its own lane. In the present case, no evidence was introduced to suggest that Sergeant Sherman's choice of the term "drifting" is based on any established law-enforcement definition as opposed to being simply a personal word choice. In any event, descriptive elaboration of the vehicle's movement, the number of occurrences and the distance traveled will be more valuable information than a single word choice.

Alaska

- *Ebona v. State*, 577 P.2d 698, 699-701 n.12 (Alaska 1978) (while following suspect's car "for a few blocks," officer observed the car "weave back and forth a few times while on two different streets though remaining in its lane of traffic").

Arizona

- *State v. Superior Court, County of Cochise*, 718 P.2d 171, 173, 175 (Ariz. 1986) (suspect's car had been "meandering within its lane" or "weaving in its lane" for unspecified distance).

Arkansas

- *Piercefield v. State*, 871 S.W.2d 348, 351 (Ark. 1994) (at "a late hour," officer attempted to stop suspect's motorcycle, which was "weaving from the centerline of the highway to the shoulder" for unspecified distance).

California

- *People v. Bracken*, 99 Cal.Rptr.2d 481, 482 (Cal. App. Dep't Super. Ct. 2000) (officer with five and one-half years' experience and drunk-driving expertise observed suspect's vehicle "weaving within its own lane for a distance of approximately one-half mile").

- *People v. Perez*, 221 Cal. Rptr. 778 (Cal. App. Dep't Super. Ct. 1985) ("pronounced weaving [of a vehicle] within a lane provides an officer with reasonable cause to stop [the] vehicle on suspicion of driving under the influence where such weaving continues for a substantial distance" – in this case, at 2:15 a.m. in May, officer saw suspect's vehicle "weaving [in its lane] for about three quarters of a mile" on the Interstate, *id.* at 776).

Connecticut

- *State v. Harrison*, 618 A.2d 1381, 1384 n.4 (Conn. App. Ct. 1993) ("weaving of a vehicle in its own lane provides reasonable and articulable suspicion to justify an investigative stop" for possible drunk driving – in this case, officer first saw unoccupied car near bar at 11:00 p.m. "with a signal light turned on" and later saw same car "weaving in its lane," "swaying from side to side within the lane," *id.* at 1382-84), *aff'd*, 638 A.2d 601 (1994)).

Florida

- *Roberts*, 732 So.2d at 1128 ("continuous weaving, even if only within [the suspect's] lane, during [unspecified] time that [suspect's vehicle] was being followed [by officer] presented an objective basis for suspecting that [suspect] was under the influence" – stop occurred at 2:00 a.m., and videotape showed that suspect's vehicle did not cross any lane lines).

Georgia

- *Veal v. State*, 614 S.E.2d 143, 145 (Ga. Ct. App. 2005) ("[t]he police can stop drivers who engage in erratic driving behavior, even if it is simply weaving within a lane" – in this case, at 7:30 p.m. in December, suspect's vehicle was "weaving within his lane and traveling 30 mph below the posted speed limit," *id.*, and although weaving occurred on parts of highway without white lines, officer's videotape depicted vehicle "'hitting where the white line would be,'" *id.* at 144).

- *Smith v. State*, 512 S.E.2d 19, 21 (Ga. Ct. App. 1999) (observing in support of the proposition that single-lane weaving may support a traffic stop that "the law has become increasingly less tolerant of intoxicated drivers" – in this case, at 8:00 p.m. in November, suspect's vehicle had been "'weaving erratically back and forth' within his

lane" during period of heavy traffic after conclusion of an automobile race).

Illinois

- *People v. Greco*, 783 N.E.2d 201, 205 (Ill. App. Ct. 2003) ("[o]ur research reveals a general consensus that weaving within a single lane may be a basis for a valid traffic stop" – in this case, suspect's car "swerved two or three times from the center of the road towards the curb," *id.* at 206, over an unspecified distance at 12:40 a.m. in October, *id.* at 202 (collecting cases at 204-05)).

- *People v. Loucks*, 481 N.E.2d 1086, 1087 (Ill. App. Ct. 1985) ("[w]eaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop," and in this case, like Post's Cavalier, suspect's car "was weaving within its own lane of travel continuously for a distance of about two blocks").

Iowa

- *People v. Tompkins*, 507 N.W.2d 736, 737, 739 (Iowa Ct. App. 1993) ("a police officer's observations of a vehicle weaving within its own lane of traffic gives rise to reasonable suspicion justifying [an investigatory] stop" (collecting cases) – in this case, suspect's car "weave[d] from the center line to the right side boundary several times," never crossing either line, while the officer followed "for approximately one mile," *id.* at 737; *modified by State v. Otto*, 566 N.W.2d 509, 511 (Iowa 1997) ("weaving within one's own lane of traffic will [not] always give rise to reasonable suspicion" but should be examined case-by-case).

Kansas

- *State v. Field*, 847 P.2d 1280, 1285 (Kan. 1993) ("the repeated weaving of a vehicle within its own lane may constitute sufficient suspicion for an officer to stop and investigate the driver of the vehicle" – in this case, suspect's car "'weaved from the middle of its lane to outside of the lane, to the inside of the lane and back to the middle'" four times over five blocks at 2:00 a.m., *id.* at 1281-82).

Louisiana

- *State v. Waters*, 780 So.2d 1053, 1057 (La. 2001) ("[a] vehicle need not leave its lane to provide reasonable suspicion by reason of its erratic movements that the driver may be impaired or intoxicated" – in this case, at 3:10 a.m., officer saw suspect's car "drift or veer to the right and make contact with the fog line running along the shoulder," *id.* at 1055, "but did not cross it," *id.* at 1056).

Minnesota

- *State v. Dalos*, 635 N.W.2d 94, 96 (Minn. Ct. App. 2001) ("continuous weaving within one's own lane is sufficient by itself to create a reasonable articulable suspicion of criminal activity to support a traffic stop" – in this case, after 2:00 a.m., trooper observed suspect's vehicle "weave continuously for a distance of approximately [0].5 miles," *id.*).

- *State v. Ellanson*, 198 N.W.2d 136, 137 (Minn. 1972) (proper traffic stop where officer saw suspect's car "weaving within its [highway] lane" over an unspecified distance in the afternoon, even though officer "did not feel that this constituted a violation of the traffic laws").

Missouri

- *State v. Malaney*, 871 S.W.2d 634, 637 (Mo. Ct. App. 1994) ("'weaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop of a motor vehicle'" (citation omitted; collecting cases) – in this case, at 3:30 p.m., officer saw suspect's car "weave toward the center line and . . . correct and then go back toward the white line" three times over "a mile or maybe a little bit more," *id.* at 635).

- *Huckin*, 847 S.W.2d at 955 ("reasonable suspicion, on which a valid traffic stop may be made, may arise from an observation of conduct not constituting a traffic violation" (collecting cases) – in this case, officer saw suspect's car "drift toward the center line, the tire would hit the center line and drift back toward the shoulder of the road," occurring "four times" over an unspecified distance "in the early morning," *id.* at 953).

Nebraska

- *State v. Thomte*, 413 N.W.2d 916, 919 (Neb. 1987) ("a vehicle weaving in its own lane of traffic provides an articulable basis o[f] reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition" (collecting cases) – in this case, at 11 p.m., officer saw suspect's car "twice weaving within its lane of traffic," *id.*, over a distance of sixteen blocks, *id.* at 917).

New Jersey

- *State v. Washington*, 687 A.2d 343, 344 (N.J. Super. Ct. App. Div. 1997) ("[e]ven while maintaining one's lane of travel, a driver that weaves a car down a highway, . . . engenders reasonable grounds to conclude that the vehicle is a potential safety hazard . . . and that there is . . . something wrong with the driver, with the car, or both" – in this case, at 12:20 a.m., over the distance of a quarter-mile to a half-mile, suspect's car was "'weaving

within his lane of travel,'" once touching the shoulder, and traveling nine m.p.h. below the speed limit, *id.* at 343).

New York

- *People v. McCoy*, 699 N.Y.S.2d 131, 133-34 (N.Y. App. Div. 1999) (in "the early morning hours" in December, suspect's car was "weaving within its own lane" and "traveling slower than the posted speed limit").

North Carolina

- *State v. Watson*, 472 S.E.2d 28, 30 (N.C. Ct. App. 1996) (at 2:30 a.m., near a nightclub officer saw suspect's vehicle "driving on the centerline and weaving back and forth within [its] lane for 15 seconds").

- *State v. Jones*, 386 S.E.2d 217, 219, 221 (N.C. Ct. App. 1989) (at noon on Interstate, suspect's car was traveling 20 m.p.h. below the speed limit, and experienced trooper observed suspect's car "weave from the white line next to the shoulder of the road to the center line of the highway within its lane of travel").

North Dakota

- *State v. Dorendorf*, 359 N.W.2d 115, 116 (N.D. 1984) ("the observation of a vehicle weaving within its own lane of traffic gives rise to probable cause to stop [the] vehicle for investigation" – in this case, officers with seven and nine years' experience saw suspect's car make "smooth, continuous weave within [its] own lane of traffic" on highway at 1:00 a.m. over unspecified distance, *id.* at 117).

Ohio

- *State v. Hodge*, 771 N.E.2d 331, 338 (Ohio Ct. App. 2002) ("weaving entirely within a lane may be reasonable suspicion to make an investigatory stop" depending on such factors as "the nature of the weaving[,]

. . . community patterns of behavior [and] the time of day," distinct from "[a] slight deviation" – in this case, however, the suspect's car actually crossed partially into a parallel lane on a five-lane-wide section of road at 1:00 a.m.).

- *State v. Gedeon*, 611 N.E.2d 972, 973 (Ohio Ct. App. 1992) ("weaving within one's lane alone presents a sufficient scenario for an officer to conduct an investigative stop" – in this case, officer saw suspect's vehicle "weave within his lane" four times over unspecified distance and, as an additional safety concern, "did not know whether having a snow-covered [rear] window violated a specific ordinance," *id.* at 973).

Oregon

- *State v. Bailey*, 624 P.2d 663, 664 (Or. Ct. App. 1981) ("observation of a vehicle weaving within its own lane for a substantial distance gives rise to probable cause" to stop and investigate for drunk driving – in this case, officer saw suspect's car "weave within its own lane" for "about 4-5 blocks" at 11:30 p.m.).

Texas

- *Dowler v. State*, 44 S.W.3d 666, 670 (Tex. Ct. App. 2001) (officer saw suspect's truck "weave or drift within his lane of traffic, touching the outside white line more than once and once crossing into an onramp" of a state highway in the afternoon).

Virginia

- *Neal v. Commonwealth*, 498 S.E.2d 422, 425 (Va. Ct. App. 1998) ("weaving within a single traffic lane is an articulable fact which may give rise to a reasonable suspicion of illegal activity" when it is more than "[a]n isolated instance of mild weaving" – in this case, officer saw suspect's vehicle "for twenty-five seconds weaving

repeatedly within its lane between five and ten times over a distance of a half-mile" (collecting cases)).

Federal cases

- *United States v. Perez*, 37 F.3d 510, 513 (9th Cir. 1994) (troopers saw suspect's van "weave back and forth across the fog line" an unspecified number of times over an unspecified distance – for comparison to the present case, crossing a "fog line" is similar to driving in a cognizable, though unmarked, parking lane).

- *United States v. Ozbirn*, 189 F.3d 1194, 1199 (10th Cir. 1999) (trooper saw motor home "drift onto the [highway] shoulder twice within a quarter mile without any adverse circumstances like road or weather conditions to excuse or explain the deviation" – for comparison to the present case, a highway "shoulder" is similar to driving in a cognizable, though unmarked, parking lane).

- *United States v. Harrison*, 103 F.3d 986, 989 (D.C. Cir. 1997) (trooper saw suspect's car "'touch the right lane marking, and then touch the left lane marking'" of the highway), *cert. denied*, 522 U.S. 846 (1997).

- *United States v. Banks*, 971 F.Supp. 992, 993, 996 (E.D.Va. 1997) (on a summer morning on the Interstate, trooper saw suspect's car "traveling [five to seven m.p.h.] slower than the posted speed limit and weaving within its own lane, both possible signs of intoxication or extreme fatigue and both valid bases for a traffic stop").

Because the "reasonable suspicion" standard is universally traceable to *Terry v. Ohio*, the sheer number of jurisdictions upholding an investigatory traffic stop for drunk driving based solely on repeated single-lane

weaving of a motor vehicle reflects the persuasiveness of the proposition.[4]

c. Supporting rationale.

Beyond numbers of cases, the rationale for the proposition that repeated single-lane weaving provides reasonable suspicion of drunk driving for an investigatory traffic stop is also persuasive. One succinct expression of the supporting rationale is the following:

> There is a reasonable inference that something is wrong when a vehicle weaves [repeatedly within its own lane] while it is being followed by a law enforcement officer and that the cause may be a driver under the influence of alcohol or drugs.

Bracken, 99 Cal.Rptr.2d at 483 (brackets added).

An adult in Wisconsin may lawfully operate a motor vehicle with alcohol in the bloodstream if the percentage is below statutorily proscribed levels – generally 0.08 percent. *See* Wis. Stat. § 346.63(1)(b) and (2m); and Wis. Stat. § 885.235. However, even relatively low levels of alcohol consumption can slow reaction time,

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[4]Not every court has subscribed to the proposition that repeated single-lane weaving, by itself, permits an investigatory traffic stop. *See, e.g., People v. Culcross*, 706 N.Y.S.2d 605, 607 (N.Y. Cty. Ct. 2000); *Commonwealth v. Gleason*, 785 A.2d 983, 985-89 (Pa. 2001); *State v. Binette*, 33 S.W.3d 215, 219 (Tenn. 2000); *State v. Arriaga*, 5 S.W.3d 804, 807 (Tex. Ct. App. 1999); *United States v. Colin*, 314 F.3d 439, 441-46 (9th Cir. 2002); *United States v. Lyons*, 7 F.3d 973, 974-76 (10th Cir. 1993). It appears, however, that this is a minority view. Also, other cases are distinguishable on the ground that they involve a *single* instance of veering, rather than repeated conduct, and sometimes with curving roads or windy conditions. *See, e.g., State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004); *State v. Gullett*, 604 N.E.2d 176, 177-78 (Ohio Ct. App. 1992); *Hernandez v. State*, 983 S.W.2d 867, 870 (Tex. Ct. App. 1998); *United States v. Freeman*, 209 F.3d 464, 465-66 (6th Cir. 2000); *United States v. Gregory*, 79 F.3d 973, 975-78 (10th Cir. 1996).

impair judgment and "'dull the senses of perception.'" *Baker v. Herman Mutual Ins. Co.*, 17 Wis. 2d 597, 606, 117 N.W.2d 725 (1962) (citation omitted). For example, at a BAC of 0.05 percent, "impairment occurs consistently in eye movements, glare resistance, visual perception, reaction time, certain types of steering tests, information processing and other aspects of psychomotor performance." *United States v. Sauls*, 981 F. Supp. 909, 923 (D.Md. 1997); *see also Baker v. Gourley*, 98 Cal. App. 4th 1263, 1273 (Cal. Ct. App. 2002).

Moreover, the prospect that an officer ultimately may prove wrong in any particular case in reasonably suspecting drunk driving from a vehicle's repeated drifting or weaving within a single traffic lane should not invalidate such an investigatory stop:

> The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allow[s] police officers to stop a person when they have less than probable cause. Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.

Waldner, 206 Wis. 2d at 59. Needless to say, "erratic driving" for any reason, including a non-criminal one, can be "very dangerous" and warrant an investigatory stop. *Rutzinski*, 241 Wis. 2d 729, ¶ 35 n.10. Repeatedly weaving entirely within one lane of traffic is not necessarily less dangerous than weaving across lanes.

More on point, in the balance of reasonableness for an investigatory traffic stop based on suspicion of drunk driving, the societal interest is substantial:

> The significant dangers to persons or property that can possibly result when the operator's capacity to control a motor vehicle is impaired are [readily] apparent. A vehicle out of control, even on a

> relatively deserted street, poses a significant threat to properly or individuals in proximity to the vehicle.

Ebona, 577 P.2d at 701. Stated another way, "the threat to public safety posed by a person driving under the influence of alcohol is as great as the threat posed by a person illegally concealing a gun." *Superior Court, County of Cochise*, 718 P.2d at 176. Or, in the borrowed words of this court: "'[A] drunk driver is not at all unlike a "bomb," and a mobile one at that.'" *Rutzinksi*, 241 Wis. 2d 729, ¶ 35 (citation omitted).

Although not insignificant, the individual privacy interest implicated in a traffic stop for possible drunk driving pales by comparison. Thus, the United States Supreme Court has held, for example, that "the magnitude of the drunken driving problem [and] the States' interest in eradicating it" outweighs individuals' rights to be free from traffic stops at sobriety check-points – a situation where individualized suspicion is unnecessary to validate the stop. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451-55 (1990).

Summary. In advocating the general proposition that repeated "single-lane weaving" of a motor vehicle – absent any obvious innocent explanation for it – gives an experienced patrol officer reasonable suspicion to make an investigatory stop for possible drunk driving, the State does not mean to suggest an immutable rule, but rather a guidepost.

Such factors as the number of the vehicle's erratic movements, the distance traveled, the time of day, the volume of traffic, the weather conditions and the road conditions all remain relevant under a "totality" analysis of "reasonable suspicion" for a traffic stop. Indeed, in Fourth Amendment analysis, each case effectively states its own proposition based on the peculiar facts involved.

Nevertheless, in light of the majority view and the supporting rationale outlined above, repeated "single-lane weaving" of a motor vehicle – absent any obvious

innocent explanation for it – generally should suffice for a valid traffic stop based on observations of an experienced patrol officer. The present case is exemplary.

3. Reasonable suspicion in the present case.

a. Repeated "drifting."

First, if this court concludes that ***repeated*** "drifting" or "weaving" of a motor vehicle within a single traffic lane – absent any obvious innocent explanation for it – gives an experienced patrol officer reasonable suspicion to make an investigative stop for possible drunk driving, then it also should conclude that the present case readily fulfills that proposition.

Sergeant Sherman, who made the traffic stop of Post's car, qualifies as an "experienced" patrol officer. Sergeant Sherman said he has been a Sauk Prairie police officer for six years, including four years as a sergeant (24:2; P-Ap. 107). He testified that in his eight-hour daily shift as a patrol sergeant, "approximately six hours of the shift I am on the road," observing driving behavior (24:5; P-Ap. 110).

Sergeant Sherman observed Post's car "drift[]" back and forth (24:11; P-Ap. 116) "in an S type manner, from the parking lane to the yellow center l[i]ne" (24:5; P-Ap. 110), "[s]everal times within . . . two blocks" (24:14; P-Ap. 119). In his experience, such behavior constituted "unusual driving conduct" (24:6; P-Ap. 111).

Characterizing the S-shaped "drifting" movement of Post's car as "smooth" rather than "jerking abruptly back and forth" (24:11; P-Ap. 116) does not truly make it any less erratic – especially in light of the fact that Post drifted both right and left of a straight line of travel, indicating that Post was repeatedly over-correcting. *See,*

e.g., Dorendorf, 359 N.W.2d at 117 (upholding traffic stop where experienced officers saw suspect's car make "smooth, continuous weave within [its] own lane" over an unspecified distance).

The record suggests no adverse weather conditions or adverse road conditions that would have given Sergeant Sherman an obvious explanation for Post's erratic driving.

In fact, drifting in and out of an unmarked parking lane, as Post was observed doing, reasonably could be construed as driving outside of a single lane – even if, technically, it may not constitute a traffic law violation for lane deviation under Wis. Stat. § 346.13(1). This provision states:

> **346.13 Driving on roadways laned for traffic.** . . .
>
> **(1)** The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.

One evident concern about driving in and out of an unmarked parking lane – even if no parked cars are present – is the uncertainty that it creates for drivers in trailing vehicles, who cannot be sure if the driver in the parking lane intends to stop and park.

b. Other factors giving rise to reasonable suspicion.

Moreover, even if something more is required for reasonable suspicion of drunk driving than the repeated drifting that Post's car displayed, that "something more" was present in this case.

Post's car appeared to be traveling in tandem with another car whose driver made a left turn into the wrong traffic lane – "the eastbound lane instead of the westbound lane" (24:13; P-Ap. 118). Thus, Sergeant Sherman, who by then had observed Post's erratic driving, reasonably could conclude that *both* drivers were impaired for the *same* reason (intoxication), rather than for *independent* reasons. *Cf. State v. Seibel*, 163 Wis. 2d 164, 181-82, 471 N.W.2d 226 (1991) (when the suspect and another person or persons are "traveling together" in an apparent "joint venture," evidence of a companion's intoxication may add to reasonable suspicion of the suspect's intoxication).

Sergeant Sherman made these observations, moreover, at 9:30 p.m., when most businesses, other than restaurants and taverns, normally would be closed.

Taken together, the foregoing circumstances provided more than enough "reasonable suspicion" that Post may driving while intoxicated to enable Sergeant Sherman to make a valid stop to investigate Post's erratic driving. But for the officer's ensuing, and immediate, discovery that Post had a "[h]eavy odor of intoxicants" and "bloodshot" and "glassy" eyes, as the officer testified at the preliminary hearing (6:13), Post would have been free to drive away in short order. Instead, the reasonable suspicion quickly blossomed into probable cause to arrest Post for drunk driving.

CONCLUSION

For the reasons set forth, the State respectfully asks this court to reverse the court of appeals' decision and reinstate the judgment of conviction, thereby affirming the trial court's determination that the investigatory stop of Post's car was constitutionally sound.

Dated at Madison, Wisconsin: November 7, 2006.

Respectfully submitted,

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BRIEF CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 6,514 words.

James M. Freimuth
JAMES M. FREIMUTH

APPENDIX

APPENDIX OF PETITIONER -- INDEX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;
(2) court of appeals' decision;
(3) the findings or opinion of the trial court;
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated November 7, 2006.

James M. Freimuth

JAMES M. FREIMUTH

COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2778-CR

Cir. Ct. No. 2004CF94

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT E. POST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Reversed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Robert Post appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration, as a fifth offense. The issue is whether the police violated Post's constitutional right to be free from unreasonable searches and seizures when the police stopped Post while

he was driving. We conclude that the stop violated the Fourth Amendment. Therefore, we reverse.

¶2 "A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. For a traffic stop to comport with the Fourth Amendment, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***Id.*** The determination of whether Post has been subjected to a seizure in violation of the Fourth Amendment is an issue we review de novo. ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834.

¶3 The arresting officer testified at the suppression hearing that Post drifted from the right part of his lane toward the left side of his lane and back several times. The officer testified that Post stayed in his lane, but moved back and forth approximately five feet in either direction. The officer also testified that Post was never closer than one foot to the center line and never closer than eight feet to the curb. Finally, the officer testified that Post did not jerk back and forth, did not drive erratically, did not speed and did not otherwise commit any traffic violations.

¶4 Based on the officer's testimony, we conclude that the police did not have a reasonable suspicion that Post was violating the law that would justify a traffic stop. Post's slight deviations within one lane of travel, with nothing more, does not, in our view, reach that quantum of evidence necessary to make the officer's hunch that Post might be intoxicated reasonable under the Fourth Amendment. The State argues that we should consider the fact that Post appeared

to be traveling in tandem with the car in front of him and *that* car committed a traffic offense while turning. The State contends that the other car's violation justifies the stop of both vehicles. In evaluating the reasonableness of the decision to stop Post, however, we will not consider other than Post's actions.

¶5 Because the police violated the Fourth Amendment in stopping Post, any evidence flowing from Post's illegal seizure must be suppressed. We reverse the appealed judgment and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

STATE OF WISCONSIN | CIRCUIT COURT Branch 1 | SAUK COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

ROBERT E. POST,

Defendant.

MEMORANDUM DECISION ON MOTION TO SUPPRESS

Case No. 04 CF 94

FACTS

On February 19, 2004, Sauk Prairie Police Sergeant Josh Sherman was traveling southbound on Water Street when he passed two vehicles driving north. The trailing vehicle, a Chevy Cavalier, appeared to be canted or moving between the roadway centerline and parking lane. Water Street is a street with one lane of traffic going in each direction with no lane marker separating the traffic lane from the parking lane for northbound traffic. The officer acknowledged that no law prohibits the driver from driving in portions of the roadways where cars sometime park.

Officer Sherman stopped defendant's car as it was drifting with no sudden, jerky, or violent movement.

The sole question before the court is whether the facts set forth on the record by Officer Sherman provided him with a reasonable suspicion to stop the defendant.

Both the State and defense cite the case of State v. Waldner, 206 Wis.2d 51, 556 N.W.2d 681 (1996). The State cites Waldner as follows:

> "We agree that these acts by themselves were lawful and that each could well have innocent explanations. But that is not determinative. Waldner's argument is contrary to well-settled law. When an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure. If Waldner were correct in his

JAN 7 2004

assertion of the law, there could never be investigative stops unless there were simultaneously sufficient grounds to make an arrest. That is not the law. Waldner, 206 Wis.2d at 59.

The defense argues that none of the facts in the case at bar provide the reasonable suspicion necessary to stop as in Waldner. The court finds that based on the training and experience of Officer Sherman, drifting even within ones own lane gives a suspicion that the driver may have been intoxicated. He further testified that drifting, even in ones lane, is a clue of intoxication and in his experience unusual driving.

Based on Officer Sherman's testimony that his training and experience tell him that drifting and unusual driving as he observed in the case at bar may be evidence of impairment, defendant's motion to suppress is denied.

Dated this 13th day of January 2005.

BY THE COURT:

Patrick J. Taggart, Circuit Judge

C: Kevin Calkins, 515 Oak Street, Baraboo, WI 53913
T. Christopher Kelly, 145 West Wilson Street, Madison, WI 53703

I certify that on 1-13-05
I mailed copies of the within document to the parties listed.
/s/ Sandy Harrison, Judicial Assistant
Sauk County Circuit Court, Branch 1

STATE OF WISCONSIN CIRCUIT COURT SAUK COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

ROBERT E. POST,

Defendant.

MOTION

Case No. 04 CF 94

Hearing held in the above matter on October 26, 2004, before the Honorable Patrick J. Taggart.

APPEARANCES:

Kevin Calkins, Assistant District Attorney, representing the State of Wisconsin;

T. Christopher Kelly, Attorney at Law, representing the Defendant;

Robert E. Post, Defendant, present in person.

THE COURT: This is the State of Wisconsin versus Robert Post. State appears by Assistant District Attorney Kevin Calkins. The defendant appears personally with Attorney Christopher Kelly. The matter was set today for a motion to suppress.

State ready to proceed?

MR. CALKINS: State does designate Josh Sherman as court officer in the matter.

THE COURT: Your witness.

MR. CALKINS: State calls Josh Sherman to the stand.

JOSHUA SHERMAN, called as a witness herein, after having been first duly sworn, under oath was examined and testified as follows:

DIRECT EXAMINATION by MR. CALKINS:

Q. Would you state your name, please.
A. Joshua Sherman.
Q. What is your occupation?
A. Patrol sergeant.
Q. For what agency?
A. Sauk Prairie Police Department.
Q. How long you been a sergeant with the Sauk Prairie Police Department?
A. Four years.
Q. How long have you been an officer with Sauk Prairie?
A. Six years.
Q. What are your duties, generally, as a patrol sergeant?
A. Patrol functions standard to a police officer, along with administrative duties.
Q. Prior to becoming sergeant, what was your rank?
A. Patrol officer.
Q. Similar duties, except for administration?
A. Exactly.

Q. Directing your attention to February 19th, 2004, were you on duty that date?
A. Yes.
Q. What hours did you work?
A. 7 p.m. to 3:30 a.m.
Q. On February 19th, approximately 9:30, where were you?
A. Approximately the 400 block Water Street, Sauk City.
Q. What were you doing at that time?
A. Routine patrol.
Q. What direction were you traveling at that time?
A. Southbound.
Q. Did something occur as you were traveling southbound on Water Street that brought you in contact with the defendant, Robert Post?
A. Yes.
Q. Was is it that you saw or observed at that time?
A. I observed two vehicles traveling northbound on Water Street at that location. The second vehicle was cantered into the parking lane.
Q. Where were the vehicles in relationship to your vehicle when you first saw them?
A. They were within a half block ahead of me, and they passed my location.
Q. You said the second of the two vehicles was canted. What do you mean by that?

A. Wasn't traveling in the designated traveling lane, traveling closer into the parking lane.
Q. Are there any markings in the parking lane?
A. No, there is not.
Q. What did you do after you saw those two vehicles?
A. I turned around to follow the vehicles.
Q. Did the vehicles pass your location as you were turning around?
A. They already passed me at that time.
Q. Did you lose sight of the vehicles at any time then?
A. No, I did not.
Q. Were you able to catch up to the vehicles again?
A. Yes.
Q. Approximately where?
A. Water Street and Grand Avenue.
Q. How far is that from where you first saw the two vehicles?
A. Approximately 6 or 7 blocks.
Q. Did you note whether or not, at that time, whether or not there were vehicles parked along Water Street?
A. I don't recall at this time.
Q. Why did you turn around to follow those vehicles?
A. I wanted to observe the driving behavior of both vehicles.
Q. Do you recall what type of vehicles the two were?

A. I believe the first one was a Saturn. The second vehicle was a Chevy Cavalier.
Q. And with respect to the Chevy Cavalier, as you were following it, what did you observe concerning the driving conduct?
A. The vehicle continued to travel northbound, traveling in an S type manner, from the parking lane to the yellow center lane.
Q. You say S type manner. What do you mean?
A. The motion that the vehicle was making wasn't jerky. It was a smooth motion toward the right part of parking lane and back towards the center line.
Q. Using the driver's side front door tire as your point of reference, how far did the vehicle go from right to left within that lane?
A. Approximately ten feet.
Q. How many times did it do that?
A. I don't have a specific number of times. Approximately two blocks worth.
Q. Continued to do that for two blocks?
A. Yes.
Q. In your six years as a patrol officer how much time, actually, do you spend viewing car driving conduct?
A. As sergeant, my eight hour shift, approximately six hours of the shift I am on the road.

Q. Did that strike you as being unusual driving conduct?
A. Yes.
Q. Why was that?
A. Most vehicles travel straight down the road near the center line.
Q. Was the first car in -- of the two, the Saturn, also traveling in that same manner?
A. Not at that time, no.
Q. How far, total, did you follow the two vehicles?
A. I would have to say it would probably be a mile from the one block of Water Street to the location of the stop.
Q. Did you note any other unusual driving of the Cavalier at that time?
A. Other than the drifting, no, I did not.
Q. Did the Cavalier ever cross the center line?
A. No.
Q. Was there a clearly marked center line on Water Street?
A. Yes.
Q. Do you know approximately how wide the lane is on Water Street?
A. I would say 22 to 24 feet.
Q. How close did the vehicle come to the center line?
A. At times, within 12 inches.
Q. And what would be on the right side away from the

center line area? Away from the center line is there curb and gutter at that location?

A. I'm sorry, past the parking lane there is curb and gutter.

Q. How close did the vehicle come to the curb on the right side?

A. Within approximately 6 to 8 feet.

Q. Where did you stop that vehicle?

A. Park Avenue and Broadway Street, Prairie du Sac.

Q. Why did you stop the vehicle at that time?

A. I did believe the operator of the vehicle may be intoxicated.

Q. How did you stop the vehicle?

A. I activated my emergency lights.

Q. And did the driver of that vehicle immediately respond to your emergency lights?

A. Yes.

Q. Did both vehicles pull over at that time?

A. Yes.

MR. CALKINS: Your Honor, I believe the motion deals only with the stop. So, I think the State's done with its portion.

THE COURT: Ah, State is finished?

MR. CALKINS: Correct.

THE COURT: Cross.

MR. KELLY: Your Honor, the motion does deal only with the stop. I assume we are in agreement that's all of the evidence that was derived, derived from the stop.

THE COURT: I don't know who was stopped or who was in the car that was stopped. A Cavalier was stopped.

MR. CALKINS: Actually, the observations he made that led to the stop of the defendant.

THE COURT: I didn't hear that.

MR. CALKINS: One of my first questions, so --

THE COURT: Everyone admitted that he was in the Cavalier?

MR. KELLY: We will concede Mr. Post was the driver of the Cavalier.

THE COURT: I could have missed that also. Any questions?

MR. KELLY: Yes

CROSS-EXAMINATION by MR. KELLY:

Q. Sergeant Sherman, just to be clear here, Water Street is one lane of traffic in each direction north and south, is that correct?

A. Correct.

Q. Okay. There is a striped center line or some lane marking on Water Street?

A. Correct.
Q. But there is no other lane divider, correct?
A. Correct.
Q. When you were talking about parking lane, you are not talking about a lane designated by a lane divider?
A. Correct.
Q. You are talking about an area where cars can park if they choose to, right?
A. Yes.
Q. You would agree with me, it is not a traffic violation to pull over by the curb, right?
A. I would agree with that, yes.
Q. If somebody wanted to drive down the area of Water Street that is closest to the curb, that wouldn't be a traffic violation, true?
A. As long as no vehicles are parked there.
Q. Okay. And there weren't any vehicles parked there that you recall?
A. Not that I recall.
Q. And the Cavalier didn't strike any vehicles, right?
A. Correct.
Q. Didn't come close to striking any vehicles?
A. No.
Q. It wasn't speeding?
A. No.

Q. And you didn't observe any kind of traffic violations as the Cavalier was driving down Water Street?
A. As far as?
Q. Anything you could write a ticket for.
A. No.
Q. Okay. Water Street kind of curves around as you are driving north on it? It would be curving toward the west, is that right?
A. Correct.
Q. And you first observed the Cavalier at the intersection of roughly of Washington, would that be right?
A. Yes, just south of intersection.
Q. Okay. And you went past it, turned around and drove back toward it, is that right?
A. Correct.
Q. And when you caught up with it again, it was at Grand Avenue, is that right?
A. Yes.
Q. So you are talking about 1, 2, 3, 4, about 5 blocks maybe?
A. Approximately, yes.
Q. And as you followed the vehicle, you followed it for another two blocks before it executed a left turn on to Broadway, is that correct?
A. Correct.

Q. And during that entire time you never saw the vehicle commit a traffic violation, true?
A. Other than the drifting, correct.
Q. And what you are calling drifting was a slow smooth movement, true?
A. True.
Q. You are not talking about jerking abruptly back and forth?
A. Correct.
Q. You not talking about weaving from one side of the road to the other, true?
A. Depending on your explanation of weaving.
Q. It didn't go over and touch the curb at any point, did he?
A. No.
Q. In fact, he didn't even get within maybe eight feet of the curb, true?
A. Correct.
Q. And how wide is the Cavalier?
A. Good question. Probably eight feet.
Q. So, on a 22 foot wide road, he didn't come closer than a foot to the center line, right?
A. Correct.
Q. And didn't come maybe any closer than 8 foot and the curb?

A. Correct.
Q. His vehicle is eight feet wide?
A. Approximately, yes.
Q. So that's only leaving a five foot space during which he's drifting?
A. True. Everything is approximate.
Q. He couldn't have drifted more than five feet to another location on the road, right?
A. Everything is approximate. Everything is approximate, yes.
Q. Your best estimate, he wouldn't have drifted more than five feet?
A. Correct.
Q. He didn't ever do that abruptly or sharply?
A. I'm sorry.
Q. He didn't do it abruptly, sharply, or jerking, or anything like that?
A. Correct.
Q. He never fully went into the area you are calling the parking lane?
A. Not that I believe, no.
Q. And the Cavalier appeared to be following a Saturn, is that right?
A. Correct.
Q. When the Saturn signaled a left turn on Broadway, the

Cavalier also signaled a left turn on to Broadway?
A. Correct.
Q. And the Cavalier -- strike that. When the Saturn turned west on to Broadway, it made a turn actually into the on-coming lane of traffic, the eastbound lane instead of the westbound lane, correct?
A. Correct.
Q. So you saw the Saturn commit a traffic violation?
A. Yes.
Q. When the Cavalier followed it in making that turn on to Broadway, it did not commit that traffic violation, correct?
A. Correct.
Q. It turned appropriately?
A. Correct.
Q. After signaling the turn?
A. Correct.
Q. Then you followed these two vehicles what, about three blocks before the Saturn signaled the turn on to Park?
A. Yes.
Q. And did you activate your lights on Broadway or on Park?
A. On Broadway.
Q. That was right before the Saturn turned on to Park?
A. Correct.

Q. And your reason for activating the lights was because you wanted to stop both vehicles, is that right?
A. Yes.
Q. So you were actually behind both vehicles when you activated your lights?
A. Yes.
Q. And both of the vehicles stopped?
A. Yes, they did.
Q. And you did that, even though you never saw the Cavalier commit a traffic violation?
A. I believed the drifting was a clue he may be intoxicated.
Q. Okay. And you can't give us an estimate of the number of times that you think the Cavalier moved, perhaps as much as five feet, in its lane of traffic, right?
A. No, I can't.
Q. Don't have any estimate at all?
A. Several times within the two blocks.
Q. Could it be a few times?
A. I'm sorry?
Q. Could it be a few times?
A. Again, our words could be the same, a few and several.

MR. KELLY: Okay. Nothing further.

THE COURT: Anything else?

MR. CALKINS: Nothing, Your Honor.

THE COURT: You may step down.

(Witness excused)

THE COURT: Any witnesses?

MR. KELLY: No, Your Honor.

MR. CALKINS: Nothing further, Your Honor.

THE COURT: Argument.

MR. KELLY: Your Honor, if you would like us to submit briefs on the issue. This is felony case and I think a significant issue in the case.

THE COURT: Well, if you want to do that, that's certainly fine with me. I would also hear the argument, but if you want to file a brief, that's fine.

When can you have yours done? Do you want do them both at the same time?

MR. KELLY: Doesn't matter to me.

THE COURT: Why don't you do both at the same time unless you want to give your argument today, Mr. Calkins, and let him file a brief.

MR. CALKINS: I will file a brief as well, Your Honor.

THE COURT: Pick a date. Thirty days. I know it's the time of year when we have lot of holidays and things.

MR. KELLY: That works for me, but I will defer to Kevin.

THE COURT: Do you have your calendar?

MR. CALKINS: Due the week of Thanksgiving.

THE COURT: How about deer hunting season?

MR. CALKINS: Doesn't bother me.

MR. KELLY: Nor me.

THE COURT: Let's say by November 30th.

MR. CALKINS: Okay.

MR. KELLY: Great.

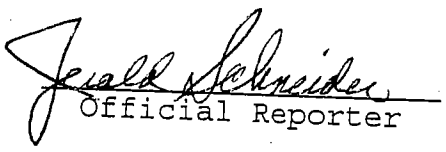
THE COURT: Court's adjourned.

(Which concludes hearing for the day)

STATE OF WISCONSIN)
) SS
COUNTY OF SAUK)

I, Jerald Schneider, Official Court Reporter in and for Sauk County Circuit Court, Branch 1, State of Wisconsin, do hereby certify that the foregoing transcript is a true and correct copy of my shorthand notes and is the whole thereof.

I further certify that the transcript was ordered on September 8, 2005, and completed by me on September 13, 2005.



Official Reporter

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

Appeal No. 05 AP 2778 CR

ROBERT E. POST,

Defendant-Appellant.

ON REVIEW OF A COURT OF APPEALS' DECISION REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR SAUK COUNTY, HON. PATRICK TAGGART, PRESIDING

Response Brief **OF DEFENDANT-APPELLANT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Other Authorities

QUESTION PRESENTED

Does the traffic stop of the driver's vehicle for drifting laterally within its own lane of traffic, when the totality of the driving is neither dangerous nor erratic, violate the driver's Fourth Amendment right to be free from unreasonable seizures?

STATEMENT OF FACTS

On February 19, 2004, Sauk Prairie Patrol Sergeant Joshua Sherman was driving south on Water Street. There is one lane of traffic in each direction (north and south) on Water Street. Sherman saw two cars approaching him in the northbound lane. The trailing vehicle, a Cavalier, appeared to be "canted," meaning the car was "traveling closer into the parking lane." What Sherman considers the "parking lane," however, is not a lined traffic lane. No lane marker separates a "traffic lane" from a "parking lane" for northbound traffic on Water Street. Sherman used the phrase "parking lane" to describe an area where cars are allowed to park. On the evening in question, no cars were parked in that area of the roadway. Sherman acknowledged that no law prohibits a driver from driving in the portion of Water Street where cars are permitted to park. (R. 24: 3-5, 8-9)

Sherman reversed course so he could follow the two cars and observe "the driving behavior of both vehicles." He caught up with the cars after they traveled another six or seven blocks. During that time, he kept the cars in view. (R. 24: 4)

Sherman never saw the Cavalier commit a traffic violation. The driver was not speeding and did not come close to striking any vehicles. Sherman saw nothing in the behavior of the Cavalier's driver that would have justified the issuance of a traffic citation. (R. 24: 6, 9-10)

The northbound lane of Water Street curves toward the west in the blocks where Sherman followed the Cavalier. Sherman characterized the Cavalier as "drifting" within the northbound traffic lane as it traveled for two blocks, but the "motion that the vehicle was making wasn't jerky." Rather, the car made a "slow smooth movement" that he could not characterize as weaving. Sherman could not say how many times the vehicle changed its position on the roadway as it "drifted." The driver may have changed position "several" times or just "a few" times. (R. 24: 5, 10-11, 14)

The Cavalier is about eight feet wide. It was always at least eight feet from the curb, and at least one foot from the center line. The Cavalier never drifted laterally more than five feet. The car's movement was always smooth, never abrupt or jerky, and the car never fully

entered the part of the road that Sherman thinks of as the "parking lane." (R. 24: 6, 11-12)

The Cavalier appeared to be following a Saturn. As the two vehicles approached the intersection with Broadway, both drivers signaled a left turn. The Saturn's driver committed a traffic violation by encroaching into the oncoming lane of traffic as it turned left. The Cavalier's driver, however, made an appropriate turn that violated no traffic law. (R. 24: 12-13)

Sherman followed the cars onto Broadway. After they traveled another three blocks, he activated his emergency lights to stop both vehicles. Both cars stopped immediately. During the entire time he followed the Cavalier, Sherman never saw the driver violate any traffic law. Sherman testified that the Cavalier's drifting was nonetheless a "clue" that the driver might be intoxicated, and he stopped the Cavalier for that reason. (R. 24: 7, 12-14)

Robert Post was the driver of the Cavalier. (R. 24: 8)

ARGUMENT

A TRAFFIC STOP BASED ON MINOR DRIFTING WITHIN A LANE VIOLATES THE RIGHT TO BE FREE FROM UNREASONABLE SEIZURES

Standard of review: Whether an individual has been subjected to a seizure that is governed by the Fourth Amendment is reviewed *de novo*. *State v. Williams*, 2002 WI 94, ¶ 17, 255 Wis.2d 1, 646 N.W.2d 834. When, as here, the facts are undisputed, whether a seizure meets the constitutional standard of reasonableness is also reviewed *de novo*. *State v. Rutzinski*, 2001 WI 22, ¶ 12, 241 Wis.2d 729, 623 N.W.2d 516.

A. Traffic stops must be supported by a reasonable suspicion that a law has been or is being violated

When an officer stops a vehicle, "even though the purpose of the stop is limited and the resulting detention quite brief," a seizure occurs that is governed by the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). "A seizure, especially in the traffic stop context, is a serious intrusion on an individual's liberty and must be objectively reasonable by Fourth

Amendment standards." *State v. Olson*, 2001 WI App 284, ¶ 15, 249 Wis.2d 391, 639 N.W.2d 207.

A traffic stop is unreasonable, in violation of the Fourth Amendment, unless the officer conducting the stop has a reasonable, articulable, particularized, and objective suspicion that the individual being stopped has violated or is violating the law. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *State v. Gammons*, 2001 WI App 36, ¶ 6, 241 Wis.2d 296, 625 N.W.2d 623. The suspicion must be reasonable in light of the totality of the evidence. *Cortez*, 449 U.S. at 417; *State v. Waldner*, 206 Wis.2d 51, 58, 556 N.W.2d 681 (1996). The burden of establishing that a stop is reasonable falls on the government. *State v. Taylor*, 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973).

B. Traffic stops give rise to serious constitutional concerns

The degree to which any particular impaired driver poses a threat to public safety depends upon the facts of the case, but society's concern about the harm an impaired driver might cause does not justify a lax application of the Fourth Amendment to traffic stops.

The Wisconsin legislature has classified a first offense impaired driving charge as a civil forfeiture while making a second, third, or fourth offense a misdemeanor. Wis. Stats. § 346.65(2)(am). This incremental approach to the punishment of repeat offenders signals a legislative belief that impaired driving is not as harmful to society as most other offenses for which the police may arrest. See *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984) (Wisconsin's classification of some impaired driving cases as noncriminal belies claim that police had an exigent need to enter home to seize driver without a warrant).

Traffic stops are the most common cause of face-to-face encounters between police officers and members of the public. U.S. Dept. of Justice, Bureau of Justice Statistics, *Contacts Between the Police and the Public, 2002*, iv (April 2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf>. Traffic stops are therefore the time at which an ordinary citizen's liberty is at greatest risk.

The freedom to travel without governmental interference is at the core of our constitutional values. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). The right to move

freely is no less significant when traveling by car. "[P]eople are not shorn of all Fourth Amendment protection ... when they step from the sidewalks into their automobiles." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

> Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Id. at 662-63.

It is no trivial thing to be stopped and detained by the police, even momentarily. Traffic stops are a significant infringement upon a motorist's right to travel without government interference. They subject drivers to "a possibly unsettling show of authority." *Id.* at 657. Traffic stops "interfere with freedom of movement, are inconvenient, and consume time," and they "may create substantial anxiety." *Id.* A traffic stop entails a "major interference in the lives of the occupants" of the car. *Coolidge v. New Hampshire*, 403 U.S. 443, 479 (1971).

The detention of a motorist cannot be dismissed as a constitutionally insignificant event. The State's assertion that "the individual privacy interest implicated in a traffic stop ... pales by comparison" to the need for expanded police powers is inconsistent with the more respectful view of the Fourth Amendment articulated by the Supreme Court in the decisions discussed above. *See* State's brief at 23.

Nor can the Fourth Amendment be diminished in favor of a standard deemed more likely to prevent injuries caused by impaired driving.[1] Courts are the guardians of the Constitution and of the people's right to be free from unreasonable restraints of their liberty. Traffic stops have become so ubiquitous that they risk being viewed as uneventful. Yet if motorists can be detained for driving behavior that, while imperfect, violates no traffic regulation and poses no danger to other drivers, "virtually

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[1] Wisconsin law prohibits driving under the influence of an intoxicant "to a degree which renders [the driver] incapable of safely driving." Wis. Stat. § 346.63(1)(a). The State's assertion that a *legal* blood alcohol content of 0.05 percent can impair brain functioning and psychomotor performance misses the point. *See* State's brief at 22. The slight impairment that might be caused by a 0.05 BAC will not usually be sufficient to justify a stop because it will not usually render the driver incapable of safe driving.

every vehicle traveling on our highways would be subject to being stopped. While the Fourth Amendment may provide less protection to persons in their vehicles than is afforded citizens in their homes, its coverage is not so illusory as to justify this step." *State v. Williams*, 619 N.E.2d 1141, 1144-45 (Ohio App. 1993).

C. The Consensus of Reasoned Opinion Permits a Traffic Stop Only When an Officer Observes Erratic Driving or a Traffic Violation

Most traffic stops result from a police officer's observation that a traffic law is being broken: the officer sees an illegal turn or records an illegal speed on radar. In those instances, the officer has probable cause to stop the motorist. *See Whren v. United States*, 517 U.S. 806, 810 (1996) (observation of traffic violation provides probable cause to support a traffic stop). An officer may prolong the detention to investigate a suspicion of impaired driving if his observations (*e.g.*, slurred speech and glassy eyes) provide an objectively reasonable basis for the suspicion. *State v. Betow*, 226 Wis.2d 90, 94-95, 593 N.W.2d 499 (Ct.App. 1999).

Sometimes the totality of circumstances may justify a traffic stop even when the officer has not seen a driver violate a specific traffic law. When a police officer stops a driver who has violated no traffic regulation to investigate a suspicion of impaired driving, courts must assure that the stop strikes an appropriate balance between an individual's right to travel without police interference and society's interest in apprehending impaired drivers. When a traffic stop is based on driving behavior that violates no traffic regulation, most courts have protected drivers from unwarranted detentions by invalidating traffic stops unless the officer observed erratic driving — the kind of driving that poses a danger to other drivers.

This approach is consistent with Wisconsin statutes, which proscribe impaired driving only when a driver is under the influence of an intoxicant "to a degree which renders [the driver] incapable of safely driving." Wis. Stat. § 346.63(1)(a). Observably dangerous driving raises a reasonable suspicion that a driver is incapable of driving safely. Driving that is imperfect but not dangerous provides no reason to suspect that a driver is incapable of driving safely.

No published Wisconsin case addresses a traffic stop based solely on a driver's legal movement within a lane. The issue arises frequently in other jurisdictions, and a consensus rule can be derived from the decisions that have given the question serious attention. Most of the well-reasoned decisions draw a distinction between weaving, characterized by swerving or moving abruptly from one boundary of the lane to the other, and drifting, characterized by the smooth lateral movement of a car within its lane. Weaving constitutes the kind of erratic driving that justifies a reasonable suspicion of impaired driving, while drifting is too frequently a part of normal driving to justify a traffic stop. If there is nothing erratic or unsafe about a motorist's drifting, and if no traffic law has been violated, an officer cannot have an objectively reasonable suspicion that a driver is under the influence of alcohol. *See, e.g., State v. Arriaga,* 5 S.W.3d 804, 806-07 (Tex. App. 1999).

While courts have concluded that weaving within a lane justifies a traffic stop if the vehicle's movement is "exaggerated or pronounced," *People v. Greco*, 783 N.E.2d

201, 205 (Ill. App.Ct. 2003), they have also concluded that less significant drifting within a lane does not constitute erratic driving and therefore does not warrant a driver's detention. "Most courts that have reviewed this narrow question have held that minor weaving without leaving the lane of travel does not give grounds for a stop." *Village of New Lebanon v. Blankenship,* 640 N.E.2d 271, 273 (Ohio Misc. 1993). *See, e.g., Warrick v. Comm'r of Public Safety,* 374 N.W.2d 585, 586 (Minn. App. 1985) (minor but repeated lateral movement within lane did not justify traffic stop); *Salter v. North Dakota Dept. of Transportation,* 505 N.W.2d 111, 113-14 (N.D. 1993) (officer's description of "weaving" within a lane did not justify traffic stop where there was no evidence of "erratic movement" or "sharp veering"); *City of Mason v. Loveless,* 622 N.E.2d 6, 6-7 (Ohio Ct.App. 1993) (drifting approximately one-half car length, nearly striking curb, then moving away from curb was not "sufficient bad driving" to create a reasonable suspicion that driver was under the influence of alcohol).

Even drivers who drift over a fog line do not make themselves targets of police detentions because such

minor deviations from perfect driving do not sustain a reasonable suspicion that the driver is impaired. *United States v. Colin,* 314 F.3d 439, 445 (9th Cir. 2002) (touching fog line on right side of lane and touching yellow line on left of the left lane about ten seconds later did not provide reasonable suspicion of driver impairment where car drove consistently within speed limit and signaled turns properly); *United States v. Gregory,* 79 F.3d 973, 978 (10th Cir. 1996) (briefly crossing into emergency shoulder lane does not create a reasonable suspicion of driver impairment); *United States v. Ochoa,* 4 F.Supp.2d 1007, 1011-12 (D. Kan. 1998) (briefly drifting onto shoulder did not justify traffic stop); *Crooks v. State,* 710 So.2d 1041, 1042 (Fla.App. 1998) ("drifting" three times over "right-hand line on the edge of the right lane" did not create a reasonable suspicion that justified a traffic stop); *State v. Tague,* 676 N.W.2d 197, 205-06 (Iowa 2004) (crossing edge line of roadway does not give rise to a reasonable suspicion of intoxication); *Rowe v. State,* 769 A.2d 879, 886-90 (Md. 2001) ("momentary crossing of the edge line ... and later touching that line" is not sufficient to justify a suspicion of impaired driving);

State v. Williams, 619 N.E.2d 1141, 1144 (Ohio App. 1993) (crossing edge line while negotiating curve and while making left-hand turn do not justify investigatory stop); *State v. Gullett,* 604 N.E.2d 176, 180-81 (Ohio App. 1992) (when vehicle crossed an edge line twice, with no "erratic driving or other conduct" to indicate impairment, "the balance is in favor of the right to privacy and against the need for a stop"); *State v. Binette*, 33 S.W.3d 215, 218-19 (Tenn. 2000) (movement within a lane of traffic justifies a traffic stop only if officer observes pronounced weaving that brings the car close to both the inside and outside boundaries of the lane); *State v. Tarvin,* 972 S.W.2d 910, 912 (Tex. App. 1998) (weaving can justify a traffic stop if it is erratic or unsafe, but merely crossing white line on side of road does not provide a reasonable suspicion of criminal activity).

The distinction between erratic driving and ordinary movement within a lane is based on "common sense and experience. There are myriad reasons why the wheels of a vehicle might drift slightly ...." *Hernandez v. State,* 983 S.W.2d 867, 870 (Tex. App. 1998). A driver's deviation from a perfectly straight path is such a common

sight that society is not prepared to regard it as "suspicious enough to warrant police intrusion." *Id.* *Accord, Binette*, 33 S.W.3d at 219-20 (only the rare motorist can avoid fluctuations in speed, lateral movement within a lane, and other minor imperfections in driving; these imperfections do not give the police license to stop motorists at will).

Allowing the police to stop a motorist for drifting within a lane would eviscerate the Fourth Amendment. *See United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993) ("if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy."). The Fourth Amendment does not permit such an expansive view of an officer's power to infringe on the liberty and privacy interests of drivers.

The rule to be distilled from these cases is this: when an officer sees no abrupt or extreme movement from one side of the lane to the other, and sees no other driving that can fairly be characterized as erratic or

dangerous, the Fourth Amendment does not permit the officer to infringe on the driver's liberty simply because the driver drifts within his lane.

D. The State's Argument Relies on Cases of Erratic Driving, While Post Was Not Driving Erratically

Many of the cases upon which the State relies illustrate the rule that lawful driving does not create an objectively reasonable suspicion of wrongdoing unless it is erratic. In *People v. Greco*, 783 N.E.2d 201, 204 (Ill. App.Ct. 2003), the Appellate Court of Illinois considered the law "well-accepted" in Illinois that "erratic driving, including weaving within a single lane," justifies a traffic stop. The court recognized that "a vehicle cannot be driven in a perfectly straight line," *id.*, and distinguished cases of erratic driving, including "swerving all over the roadway," from those in which the vehicle's lateral movement "is neither pronounced nor exaggerated," *id.* at 205. The court concluded that Greco's driving was erratic because Greco "swerved two or three times from the center of the road to the curb." *Id.* at 203.

Post's gradual movement on a curved road was much different from the erratic driving described in the cases cited by the State. Cases that examine extreme or sudden changes of position within a lane, or driving on a lane divider before moving to the opposite side of the lane, are therefore inapposite. *See United States v. Harrison,* 103 F.3d 986, 989 (D.C. Cir. 1997) (car touched right lane marker, then swerved to touch left lane marker); *Ebona v. State,* 577 P.2d 698, 699 (Alaska 1978) (officer observed car "swerving, going from the center line to the righthand edge"); *State v. Tompkins,* 507 N.W.2d 736, 737 (Iowa App. 1993) (vehicle touched the center line and the right boundary line from three to six times as it weaved from side to side; two dissenting judges nonetheless noted that "[n]obody ever drives perfectly straight in his or her own lane of travel," *id.* at 740 (Sackett, J., dissenting)); *State v. Field,* 847 P.2d 1280, 1281-82 (Kan. 1993) (vehicle was repeatedly weaving from outside of lane to inside of lane); *State v. Huckin,* 847 S.W.2d 951, 955 (Mo. Ct.App. 1993) (officer described driving as "erratic," driver moved between center lane divider and shoulder four times); *State v. Thomte,* 413 N.W.2d 916, 917 (Neb. 1987)

(driver "made a sharp weave from right to left" followed by another "weave"); *State v. Watson,* 472 S.E.2d 28, 29 (N.C. Ct.App. 1996) (vehicle drove on center line before "weaving back and forth"); *Neal v. Commonwealth*, 498 S.E.2d 422, 423 (Va. Ct.App. 1998) (vehicle weaved "constantly" from side to side, crossed into an adjacent lane and touched edge line on other side; officer stopped car to investigate "erratic driving"). The erratic driving that justified the stops in these cases was absent in Post's case.

The State relies on other cases in which an officer observed "weaving" (although the weaving is not usually described in detail) in combination with suspicious or illegal driving behavior. *See United States v. Banks,* 971 F.Supp. 992, 993 (E.D. Va. 1997) (officer "observed a vehicle traveling 5 to 7 miles slower than the posted speed limit ... and weaving to the right of its lane"), *aff'd* 162 F.3d 1156 (1998); *Piercefield v. State,* 871 S.W.2d 348, 351 (Ark. 1994) ("arresting officer noticed the motorcycle weaving from the centerline of the highway to the shoulder ... to say nothing of the fact that ... Piercefield had been observed driving far in excess of the

speed limit"); *State v. Harrison*, 618 A.2d 1381, 1384 (Conn.App. 1993) (officer saw car driving in car's parking lot with turn signal on, then saw car "weaving" on road), *aff'd on other grounds,* 638 A.2d 601 (1994); *Veal v. State,* 614 S.E.2d 143, 145 (Ga. App. 2005) (vehicle was driving 30 mph under the speed limit and was "weaving"); *State v. Dalos*, 635 N.W.2d 94, 95 (Minn.App. 2001) (continuous weaving for a half mile by car that was driving well under speed limit); *People v. McCoy*, 699 N.Y.S.2d 131, 133 (N.Y. App. 1999) (vehicle was "weaving" at unusually slow speed; officer believed vehicle posed a hazard); *State v. Jones,* 386 S.E.2d 217, 219 (N.C. Ct.App. 1989) (vehicle was driving 20 mph below speed limit; officer saw it "weave from the white line next to the shoulder of the road to the center line of the highway"); *State v. Gedeon,* 611 N.E.2d 972, 972 (Ohio Ct.App. 1992) (driver's "rear window was completely covered with snow and ... he was weaving within his own lane"). None of the additional factors that justified a traffic stop in these cases are present in Post's case.

The facts underlying the traffic stop in several other cases cited by the State are not described in any detail,

and the courts' analysis is cursory. *See State v. Superior Court, County of Cochise,* 718 P.2d 171, 175-76 (Ariz. 1986) (driver had been "weaving"; court characterized driving as "erratic"); *People v. Bracken,* 99 Cal.Rptr.2d 481, 482-83 (Cal. Super. 2000) (driver was "weaving"); *People v. Perez,* 221 Cal.Rptr. 776, 777 (Cal.Super. 1985) ("pronounced weaving" over a significant distance can be the kind of "eccentric driving" that justifies a traffic stop); *Roberts v. State,* 732 So.2d 1127, 1128 (Fla.App. 1999) (driver was "weaving significantly from side to side"); *Smith v. State,* 512 S.E.2d 19, 21 (Ga.App. 1999) (driver was "weaving erratically back and forth" and officer characterized driving as "unsafe" in light of heavy traffic in adjacent lanes),[2] *rev'd on other grounds*, 526 S.E.2d 59 (2000); *People v. Loucks*, 481 N.E.2d 1086, 1087 (Ill. App. 1985) (driver was "weaving"; court notes that "erratic driving," including "weaving across a roadway," justifies a traffic stop); *State v. Ellanson,* 198 N.W.2d 136, 137

[2] As the State's brief notes, this decision relies on the proposition that "the law has become increasingly less tolerant of intoxicated drivers." *Smith*, 512 S.E.2d at 21. The operative "law" here is the Fourth Amendment. Its application does not depend upon society's waxing or waning "tolerance" of particular conduct.

(Minn. 1972) (describing driver as "weaving" and driving as "unusual"); *State v. Dorendorf,* 359 N.W.2d 115, 117 (N.D. 1984) (officer saw vehicle "weaving" and described driving as "erratic"); *State v. Bailey,* 624 P.2d 663, 664 (Or. Ct.App. 1981) ("weaving ... for a substantial distance"). The cursory analysis in these cases is of little value, but they share in common the characterization of the vehicle's movement as "weaving" or "erratic," not as "drifting."

The State also relies on cases involving drivers who, unlike Post, drove outside of their traffic lane. *United States v. Ozbirn,* 189 F.3d 1994, 1196 (10th Cir. 1999) (vehicle twice crossed into shoulder); *United States v. Perez,* 37 F.3d 510, 513 (9th Cir. 1994) (officer saw vehicle "weave back and forth across the fog line"); *State v. Waters,* 780 So.2d 1053, 1055-56 (La. 2001) (defendant veered to right and crossed fog line); *State v. Malaney,* 871 S.W.2d 634, 635 (Mo.Ct.App. 1994) (officer saw driver "weave toward center line" then back to the white line on the other side of the road, then "all of a sudden his brake lights came on and he pulled over to the shoulder"); *State v. Washington,* 687 A.2d 343, 344 (N.J.

Super. 1997) (tires crossed onto shoulder; vehicle was traveling well below speed limit; court relied on community caretaker exception); *Dowler v. State,* 44 S.W.2d 666, 668-69 (Tex. App. 2001) (after receiving tip that driver might be intoxicated, officer saw vehicle move "from side-to-side," saw that it at least twice "touched the solid white line defining the outer edge of the highway," and "crossed the broken line separating its lane from an onramp"). Unlike all those drivers, Post didn't drive outside of his traffic lane.

In *State v. Hodge,* 771 N.E.2d 331, 333 (Ohio Ct.App. 2002), the driver was stopped for a trio of reasons: speeding, "failure to signal before partially drifting into the adjacent lane," and weaving from one lane into another lane. In *dicta,* the court recognized the possibility that weaving within a lane might justify a stop. *Id.* at 338. The court cautioned, however, that it did not intend its "decision to stand for the proposition that movement within one lane is a per se violation giving rise to reasonable suspicion, nor does inconsequential movement within a lane give law enforcement carte blanch opportunity to make an investigatory stop." *Id.*

Only weaving that amounts to "erratic driving" justifies a stop in the absence of some other observed violation of a traffic law. *Id.* at 338-39.

For the most part, the cases relied upon by the State embrace the same rule: erratic or dangerous driving, which might include abrupt movements or pronounced weaving from one side of the lane to the other, justifies a stop, while gradual drifting within a portion of the lane does not.

E. The Record Supports the Court of Appeals' Decision

1. *Post violated no law*

Sherman candidly admitted that Post violated no traffic law. (R. 24: 10) Sherman recognized that no law is violated when the driver moves within a lane. (R. 24: 9)

Sherman's view of the law is correct. Changing position within a lane of traffic violates no statute. Rather, the statute that governs movement on roadways laned for traffic requires a driver not to deviate from a "clearly indicated lane" unless the deviation can be made safely. Wis. Stat. § 346.13(1). Water Street has only one

lane divider, separating northbound from southbound traffic. (R. 24: 8-9) Post never deviated from the northbound lane. (R. 24: 11)

The State's suggestion that Post may have violated Wis. Stat. § 346.13(1) because he did not "drive as nearly as practicable entirely within a single lane" is remarkable given that Post *did* drive entirely within a single lane. The State's contention that Post drove within "an unmarked parking lane" (even though he remained 8 feet from the curb) has no bearing on § 346.13, which by its terms applies to "roadways laned for traffic." *See* State's brief at 25. In any event, § 346.13(1) permits a deviation from the lane provided that "such movement can be made with safety to other vehicles approaching from the rear," and there is no evidence that Post's movement within his lane was unsafe to any other driver.

2. *Application of the Fourth Amendment depends upon the totality of the circumstances*

Because Post violated no traffic law, the question is whether Sherman had an objectively reasonable suspicion that Post was driving under the influence of an intoxicant. A reasonable suspicion must be based on the

totality of the circumstances known to the officer. *Cortez,* 449 U.S. at 417-18.

A leading Wisconsin case addressing traffic stops recognizes the need for an officer to assess all the facts before making a decision to detain. *State v. Waldner*, 206 Wis.2d 51, 556 N.W.2d 681 (1996). Waldner stopped at an uncontrolled intersection for no apparent reason, then turned and accelerated at a high rate of speed. Despite this unusual driving behavior, the officer acknowledged that no laws were broken, and the officer didn't make a traffic stop solely on the basis of Waldner's driving. *Waldner,* 206 Wis.2d at 53.

After parking, Waldner opened his door and poured a mixture of liquid and ice out of a plastic cup and onto the road. The officer walked over to see what Waldner was doing, and Waldner walked away. Only then did the officer stop Waldner. *Id.* at 53-54.

None of those facts, viewed in isolation, provided a reasonable suspicion to stop Waldner. *Id.* at 58. However, the totality of the circumstances justified an investigative stop. Drivers do not usually stop at uncontrolled intersections (a sign of confusion). More

importantly, they don't usually pour out a drink with ice onto the roadway after spotting a police officer. While Waldner's driving behavior did not support a traffic stop, all of the officer's observations, taken together, made it reasonable to suspect that Waldner had been drinking while driving. Thus, it was the totality of the circumstances that created a reasonable suspicion that justified the stop. *Id.*

While disclaiming its intent to do so, the State asks this court to replace the "totality of the circumstances" test with a bright line rule that would permit a police officer to stop any vehicle that changes position within a lane at least twice, regardless of any other circumstances. The State's extraordinarily lax view of the Fourth Amendment would give an officer standardless discretion to stop any driver who more than once deviates by an unspecified distance from an imagined straight line down the middle of a traffic lane, even if the road isn't straight. That standard is not faithful to the Fourth Amendment.

The trial court did not examine the totality of the evidence, but focused solely on Post's minor drifting within his lane. Yet a totality of the circumstances

inquiry requires the court to consider a "rich tapestry of factors." *State v. Kyles*, 2004 WI 15, ¶ 29, 269 Wis.2d 1, 675 N.W.2d 449. Any suspicion that Post's ability to drive safely was impaired cannot be objectively reasonable when the totality of the facts known to Sherman demonstrated that Post was driving safely.

3. *The totality of the circumstances did not justify a reasonable suspicion of impaired driving*

The totality of Post's driving did not suggest that he was impaired. In fact, the officer's observations, taken together, made it unreasonable to stop Post.

The circumstances known to Sherman were:

- Post did not violate any traffic law. (R. 24: 10)
- Post drove at an appropriate speed. (R. 24: 9)
- Post always stayed within his own lane of traffic. (R. 24: 11)
- Post drifted, but he did not weave from one side of the road to the other. (R. 24: 11)
- Post's lateral movement was smooth, not jerky or abrupt. (R. 24: 11, 12)

- Post did not come closer than eight feet to the curb and was always at least a foot from the center line. (R. 24: 11)

- Post did not come close to striking any vehicles. (R. 24: 9)

- Post was driving on a curved section of the road. (R. 24: 10)

- Post signaled his turn. (R. 24: 12-13)

- Post made a careful turn into the correct lane of traffic, even though he was following a driver who turned into the wrong lane. (R. 24: 13)

Other than minor drifting, Sherman saw nothing abnormal about the balance of Post's driving. Far from being erratic, the totality of Post's driving demonstrates that Post was driving safely and normally.

It is of critical importance (although neglected in the State's analysis) that Post was negotiating a curve in the road. (R. 24: 10) If the police cannot stop a vehicle because it fails to drive in a perfectly straight line, *Lyons*, 7 F.3d at 976; *Hernandez,* 983 S.W.2d at 870, they cannot stop a vehicle for failing to stay at a fixed distance from the centerline while rounding a curve. Gradual

corrections of position while following a curve are normal, and no reasonable officer who honored the Fourth Amendment could regard them as suspicious.

Despite the State's attempt to portray Post as driving in a wildly serpentine path, this is not a case about "weaving." Sherman described the movement of Post's vehicle as a smooth and gradual drift. (R. 24: 5, 11) As importantly, Sherman acknowledged that Post's car didn't change its position very much at all. The lane of traffic was 22 feet wide, and the car was never closer to the curb than eight feet, and never closer to the centerline than a foot. (R. 24: 11-12) Subtracting the nine feet of roadway that Post's car never entered from the lane's 22 foot width leaves a 13 foot wide area within which Post's vehicle moved. The car is about eight feet wide. (R. 24: 12) Post's car therefore could not have moved more than two-and-a-half feet in either direction from a midpoint position. This is less than half the car's width, a fairly insignificant change of position. A drift from one extreme (left wheels one foot from the centerline) to the other extreme (right wheels eight feet from the curb) would only move the car five feet, a little more than half its width.

Such minor, gradual deviations from a straight line cannot be the basis for a reasonable suspicion of impaired driving.

The State's focus on the "repeated" nature of Post's drifting might have greater currency in a different case, where an officer describes pronounced and repeated weaving for a substantial distance on a straight road. On a curved road, repeated course corrections are common. No driver should be subjected to a detention for failing to maintain an unwavering distance from the centerline on a curving road. Moving a couple of feet in each direction from a midpoint while following a curve creates no objectively reasonable suspicion that a driver is impaired.

The State notes that Post was driving at 9:30 p.m. when most businesses would be closed. The people who operate those businesses, who shop at them until 9:00 p.m., who clean them after they close, who work second shift, who have dinner in a restaurant without drinking alcohol, who go to the opera or who work out at a gym in the evening, and who have thousands of other legitimate reasons to be driving at 9:30 p.m. should not have to

worry that an officer will view them with suspicion simply because they are driving after dark.

The State's final argument indulges in wild speculation. The State contends that "Post's car appeared to be traveling in tandem with another car" and suggests that the lead car's bad driving should be imputed to Post because Sherman "reasonably could conclude that both drivers were impaired for the same reason (intoxication), rather than for independent reasons." State's brief at 26. The fact that two cars on the same road turn at the same intersection provides little support for the assumption that the two cars are traveling together. More importantly, Sherman had no evidence that Post was impaired, and his observation that *the car ahead of Post* made an illegal turn could not possibly create a reasonable suspicion that *Post* had been drinking. The court of appeals correctly held that it would "not consider other than Post's actions" in deciding whether the stop of Post was reasonable. (State's appx. at 102-03, ¶ 4) If anything, Post's ability to turn legally when the driver in front of him cut the turn short shows

that Post wasn't blindly following the path of another car, as an intoxicated driver might.

The question is not whether Post's vehicle deviated from a perfectly straight line more than once, as the State suggests, but whether the driving, while in compliance with traffic laws, was so erratic as to raise an objectively reasonable suspicion that Post was unable to drive safely. The court of appeals applied the law correctly when it held that the totality of Post's driving raised no such suspicion.

CONCLUSION

The State's interest in apprehending drunk drivers cannot be accommodated by weakening the Fourth Amendment. An officer must observe erratic driving before detaining a motorist who has violated no traffic law. Post was not driving erratically. The circuit court's erroneous denial of Post's suppression motion must therefore be reversed.

NOVEMBER 2006.

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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,105 words.

T. Christopher Kelly

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2005AP2778-CR

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Plaintiff-Respondent-Petitioner,

v.

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Defendant-Appellant.

ON REVIEW OF A COURT OF APPEALS' DECISION REVERSING A JUDGMENT OF CONVICTION ENTERED IN SAUK COUNTY CIRCUIT COURT, HONORABLE PATRICK J. TAGGART, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

The State respectfully asks this court to hold that a motorist's "drifting" back and forth (24:11) "in an S type manner, from the parking lane to the yellow center l[i]ne" (24:5), "[s]everal times within . . . two blocks" (24:14), without any obvious innocent explanation for such driving, gives an experienced patrol officer reasonable suspicion to make a investigatory stop for possible drunk driving. These are the salient facts of the present case, and such a holding would align Wisconsin with the apparent majority of courts elsewhere that have addressed the question.

ARGUMENT

BECAUSE THE TRAFFIC STOP OF DEFENDANT ROBERT POST WAS BASED ON REASONABLE SUSPICION OF DRUNK DRIVING, EVIDENCE DERIVED FROM THE STOP WAS ADMISSIBLE AGAINST POST.

A. The constitutional reasonableness of an investigatory traffic stop depends on a balancing of interests that, in cases of suspected drunk driving, favors the government interest in public safety.

Reasonableness is the linchpin for determining the constitutionality of an investigatory stop, and it embodies a balancing of interests:

> When reviewing a set of facts to determine whether those facts could give rise to a reasonable suspicion [for an investigatory stop], courts should apply a commonsense approach to strike a balance between the interests of the individual being stopped to be free from unnecessary or unduly intrusive searches and seizures, and the interests of the State to effectively prevent, detect, and investigate crimes.

State v. Rutzinski, 2001 WI 22, ¶ 15, 241 Wis. 2d 729, 623 N.W.2d 516.

The State respectfully reaffirms its assertion at page 23 of its brief-in-chief that the individual privacy interest in an investigatory traffic stop pales by comparison to the need to remove drunk drivers from the road.

On the individual motorist's side of the balance, "while there is a constitutional right to travel, there is no constitutional right to operate a motor vehicle." *State v. Wintlend*, 2002 WI App 314, ¶ 9, 258 Wis. 2d 875, 655 N.W.2d 745.

Moreover, contrary to Post's characterization at pages 7 to 9 of his brief, an investigatory traffic stop, at its inception, is a minimal intrusion on individual privacy and the right to travel. Like sobriety checkpoint stops of motor vehicles, for which individualized suspicion is not even required, "the 'objective' intrusion, measured by the duration of the seizure and the intensity of the investigation, [i]s [no less] minimal" at the outset of an investigatory traffic stop for possible drunk driving. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (brackets added); s*ee also Frette v. City of Springdale*, 959 S.W.2d 734, 743 (Ark. 1998) ("[t]his court has previously recognized the magnitude of the State's interest in eliminating drunk driving in comparison to relatively minimal intrusions on motorists"). Unless the driver shows telltale intoxication signs of alcohol odor, slurred speech or bloodshot eyes – all of which are quickly discernible, especially by an experienced traffic officer – the duration of the stop will be relatively brief and largely anonymous, with no requirement that the driver even exit the vehicle. *See, e.g., State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

By comparison, on the government side of the balance, the need to remove drunk drivers from the road as a matter of public safety is undeniably substantial:

> The United States Supreme Court has long recognized a state's desire to detect, eliminate and prevent certain hazardous conditions to public health as sufficiently compelling to justify an intrusion on privacy occasioned by suspicionless searches or seizures . . . . If such is the case with suspicionless activity, imagine the government's right when there is [reasonable suspicion of drunk driving.] Intoxicated driving on our highways is a hazardous condition to public health. The high volume and inherent mobility of motor vehicles indicates that the threat by intoxicated drivers is very real. Thus, there is a compelling need to get intoxicated drivers off the highways and keep them off until they have, hopefully, learned their lesson.

Wintlend, 258 Wis. 2d 875, ¶ 18 (brackets added).

Despite concerted legislative, law-enforcement and educational efforts in recent years, drunk driving remains a major American health problem, as a recent commentary reports:

> An estimated thirty percent of Americans will be involved in an alcohol-related automobile accident at some point in their lives. According to the National Highway Traffic Safety Administration ("NHTSA"), almost 18,000 citizens per year, or nearly fifty people per day, are killed as a result of accidents involving impaired drivers. Aside from the cost in human life, the economic effects of such accidents are large as well, as the estimated cost to the public caused by these crashes in 2000 was $114.7 billion.

Rick M. Grams, *Walking the Line of Admissibility: Why Maryland Courts Should Reexamine the Admissibility of Field Sobriety Tests*, 34 U. Balt. L. Rev. 365, 365 (2005).

Over the past three years, the NHTSA reports the following statistics: for 2005, 16,885 alcohol-related traffic deaths (39% of all traffic deaths); for 2004, 16,694 alcohol-related traffic deaths (39% of all traffic deaths); and for 2003, 17,106 alcohol-related traffic deaths (40% of all traffic deaths). *See* http://www.nhtsa.dot.gov.[1]

Although reasonable suspicion for a particular investigatory stop depends on the totality of the circumstances of the case, judicial line-drawing in close cases of traffic stops for possible drunk driving appropriately "'tips the balance in favor of public safety.'" *Frette*, 959 S.W.2d at 743 (citation omitted).

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[1]In its 1990 decision in *Sitz*, 496 U.S. at 451, the Supreme Court observed that "'[d]runk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage'" (citation and footnote omitted).

B. In the present case, Sergeant Sherman lawfully stopped Post's car on reasonable suspicion of drunk driving.

1. Introduction.

Although an officer lawfully may make a traffic stop based on reliable information from others, *see, e.g.*, *Rutzinski*, 241 Wis. 2d 729, ¶ 16 *et seq.* (informant's tip), the State agrees with Post that, generally, "reasonable suspicion" for a traffic stop derives from an officer's firsthand observation of "erratic driving or a traffic violation" (Post's brief at 10; boldface and capitalization removed).

The parties disagree, however, on whether the essential undisputed facts of the present case constitute "erratic" driving. That is, does an experienced patrol officer have reasonable suspicion to make a traffic stop for possible drunk driving after observing a motorist "drifting" back and forth (24:11) "in an S type manner, from the parking lane to the yellow center l[i]ne" (24:5), "[s]everal times within . . . two blocks" (24:14), without any obvious innocent explanation for such driving? Stated in shorthand form, does such "repeated single-lane weaving" (or "drifting") justify an investigatory traffic stop?

Contrary to Post's assessment, the State respectfully maintains that most courts to have expressly addressed the question – an apparent majority of such courts, as set forth at pages 13 to 20 of the State's brief-in-chief – have answered the question affirmatively.

The case law does not turn on the semantic difference, if any, between "drifting" and "weaving" within a single lane of traffic, as Post suggests at page 12 of his brief, or on such adjectives as "erratic" or "eccentric" driving, as Post suggests at pages 18 to 24 of his brief. Rather, the case law rests on such

commonsense, tangible factors as the nature and number of the vehicle's "drifting" or "weaving" movements within the traffic lane, the distance over which the movements occurred, the time of day, the volume of traffic, the weather conditions and the road conditions.

2. Post's cases.

As the State acknowledged at page 21, footnote 4 of its brief-in-chief, some courts have rejected the proposition that so-called "repeated single-lane weaving," by itself, permits an investigatory traffic stop.[2]

However, for the reasons that follow, other cases cited by Post at pages 13 to 16 of his brief are readily distinguishable from the present case.

Single instance of "weaving"

Several of the cases cited by Post are readily distinguishable from the present case, because they involved a single instance of the suspect's car drifting or weaving within its lane. They include:

- *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004) ("single incident of [vehicle] crossing the edge line for a brief moment" is insufficient to stop for traffic violation of failing to drive within single lane).

- *City of Mason v. Loveless*, 622 N.E.2d 6, 7 (Ohio Ct. App. 1993) (suspect vehicle "making one small weave within [its] lane of travel" is insufficient to stop for suspicion of drunk driving).

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[2]The State's footnote lists six such cases, including four cases cited by Post at pages 12 to 16 of his brief – *State v. Binette*, 33 S.W.3d 215, 219 (Tenn. 2000); *State v. Arriaga*, 5 S.W.3d 804, 807 (Tex. Ct. App. 1999); *United States v. Colin*, 314 F.3d 439, 441-46 (9th Cir. 2002); *United States v. Lyons*, 7 F.3d 973, 974-76 (10th Cir. 1993).

- *Hernandez v. State*, 983 S.W.2d 867, 870 (Tex. Crim. App. 1998) ("a single instance . . . of crossing a lane dividing line by 18 to 24 inches . . . into a lane of traffic traveling the same direction" is insufficient for traffic stop where officer never even testified that he suspected drunk driving).

- *United States v. Gregory*, 79 F.3d 973, 978 (10th Cir. 1996) ("an isolated incident of a vehicle crossing into the emergency lane of a roadway" is not a traffic law violation of failing to drive within single lane, especially where "[t]he road was winding, the terrain mountainous and the weather condition was windy").

- *United States v. Ochoa*, 4 F.Supp.2d 1007, 1011 (D.Kan. 1998) (no traffic law violation of failing to drive within single lane where car "momentarily drifts one and one-half to two feet onto the right shoulder of the road and then gets right back into its lane; it has not drifted previously, nor does it drift again" – also noting driver's concern with tailgating vehicle and appearance of patrol car, *id.* at 1012).

Other distinguishing features

Other cases cited by Post are distinguishable from the present case for additional reasons.

- *Crooks v. State*, 710 So.2d 1041, 1042-43 (Fla. Dist. Ct. App. 1998) (at 2:30 p.m., over unspecified distance, trooper saw suspect's car on Interstate marginally drift three times over the right-hand line into the emergency lane, but even the trooper admittedly "did not think that [the suspect] was intoxicated or otherwise impaired"). *Compare Roberts v. State*, 732 So.2d 1127, 1128 (Fla. Dist. Ct. App. 1999) ("continuous weaving, even if only within [the suspect's] lane, during [unspecified] time that [suspect's vehicle] was being followed [by officer] presented an objective basis for suspecting that [suspect] was under the influence").

- *Rowe v. State*, 769 A.2d 879 (Md. 2001) (during the early morning on the Interstate, the suspect's vehicle momentarily crossed the white shoulder line eight inches and subsequently "touch[ed]" the shoulder line a second time, *id.* at 881). Although the trooper mentioned the possibility of drunk driving, *id.*, the stop in *Rowe* – unlike the stop in the present case – was made for the statutory violation of "'failing to drive in a single lane,'" *id.* at 884, for which the court found insufficient evidence. *Id.* at 884-89.

- *Warrick v. Commissioner of Public Safety*, 374 N.W.2d 585, 585 (Minn. Ct. App. 1985) (no reasonable suspicion for stop at 1:45 a.m. on a highway, "where, over a five-mile stretch, [officer] observed [suspect's pick-up truck] weaving slightly [or "'*subtl[y]*'"] within [its] lane and varying [its] speed, principally from 40 to 45 miles per hour, *on a windy night when there was impaired visibility*," apparently due to fog (emphasis added)). In the present case, no such adverse weather conditions could have impaired Post's driving ability. *Compare also State v. Dalos*, 635 N.W.2d 94, 96 (Minn. Ct. App. 2001); *State v. Ellanson*, 198 N.W.2d 136, 137 (Minn. 1972); both of which are synopsized at page 16 of State's brief-in-chief.

- *Salter v. North Dakota Dept. of Transportation*, 505 N.W.2d 111 (N.D. 1993) (no reasonable suspicion to stop suspect for "'erratic'" driving at 3:00 a.m. on a rural road, *id.* at 113, where vehicle was traveling fifteen to twenty miles per hour below the speed limit with a "'slight movement back and forth' within [its] lane," *id.* at 112). Unlike the officer in the present case, the officer in *Salter* "repeatedly characterized the weaving as 'slight' or 'minimum,' and he apparently did not consider it significant enough to include in his initial written report of the incident." *Id.* at 113.

- *State v. Gullett*, 604 N.E.2d 176, 177-78 (Ohio Ct. App. 1992) (no reasonable suspicion to stop suspect's truck for traffic violation at 2:30 a.m. on state highway for twice crossing "the white edge line," once while making a

turn – especially since deputy did not further elaborate, *id.* at 180).

- *Village of New Lebanon v. Blankenship*, 640 N.E.2d 271, 272-73 (Montgomery County Ct. Ohio 1993) (insufficient basis for traffic stop for "weaving" where there was "no center line" and "no testimony concerning the length of time or distance involved in the defendant's [driving and] no indication of the erraticism of the defendant's [driving]").

- *State v. Williams*, 619 N.E.2d 1141, 1142-44 (Ohio Ct. App. 1993) (insufficient basis for traffic stop at 11:16 p.m. on federal highway where, *over a two-mile stretch*, suspect's vehicle "move[d] about one tire width into the left lane *when going around a curve*," and then did so a second time shortly before "mov[ing] completely into the left lane" and making a proper left turn, *id.* at 1142 (emphasis added).

- *State v. Tarvin*, 972 S.W.2d 910 (Tex. Crim. App. 910) (insufficient basis for traffic stop at 2:00 a.m. for tires going over right-hand white line "two or three" times over unspecified distance, *id.* at 911, especially where officer did *not* "testify to suspecting any criminal activity other than weaving out of the lane").

The driving behavior at issue in the foregoing cases is qualitatively different from Post's driving behavior of "drifting" back and forth (24:11) "in an S type manner, from the parking lane to the yellow center l[i]ne" (24:5),

"[s]everal times within . . . two blocks" (24:14), without any obvious innocent explanation for such driving.[3]

Characterizing the S-shaped "drifting" movement of Post's car as "smooth" rather than "jerking abruptly back and forth" (24:11) does not truly make it any less erratic – especially in light of the fact that Post drifted both right and left of a straight line of travel, indicating that Post was repeatedly over-correcting. *See, e.g., State v. Dorendorf*, 359 N.W.2d 115, 117 (N.D. 1984) (upholding traffic stop where experienced officers saw suspect's car make "smooth, continuous weave within [its] own lane" over an unspecified distance); *Blankenship*, 640 N.E.2d at 273 (observing that even "large and winding and repeated weaving could cause a danger to a vehicle, pedestrian, or animal appearing in the road").

Moreover, while Post's erratic driving behavior would arouse suspicion of drunk driving even in a layperson, the trial court also properly credited Sergeant Sherman's patrol experience in identifying possible drunk-driving behavior (16:2). "[T]raining and experience enables law enforcement officers to perceive and articulate meaning that would not arouse suspicion in an untrained observer." *State v. Fields*, 2000 WI App 218, ¶ 22, 239 Wis. 2d 38, 619 N.W.2d 279.

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[3]Post's suggestion at page 29 of his brief that he "was driving on a curved section of the road" is of questionable significance. It is based solely on the following question that defense counsel asked Sergeant Sherman on cross-examination at the suppression hearing:

> Q. Okay. Water Street kind of curves around as you are driving north on it? It would be curving toward the west, is that right?
>
> A. Correct.

(24:10.) This testimony does not describe the nature of the curve in the road, nor does it indicate that Sergeant Sherman observed Post's "weaving" behavior on that specific stretch of road, as opposed to some other two-block stretch of the five blocks for which the officer followed Post's vehicle (24:10).

3. The State's cases.

Lastly, the State respectfully stands by the thirty-three cases cited at pages 13 to 20 of its brief-in-chief as support for the proposition that "repeated single-lane weaving" under facts comparable to the present case provides reasonable suspicion to make an investigatory traffic stop for possible drunk driving.

To the extent that any particular case may reflect a factual variation from the present case, the State has sought to include such variation in the case synopsis. Moreover, to the extent there is such a factual variation, it does not appear legally indispensable to the court's fundamental holding that "repeated single-lane weaving" – comparable to the S-type nature of Post's "drifting" back forth over a distance of two city blocks – amounts to reasonable suspicion of possible drunk driving.

CONCLUSION

For the reasons set forth in this reply brief and the State's brief-in-chief, the State respectfully asks this court to reverse the court of appeals' decision and reinstate the judgment of conviction, thereby affirming the trial court's determination that the investigatory stop of Post's car was constitutionally sound.

Dated at Madison, Wisconsin: December 8, 2006.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,848 words.

James M. Freimuth

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