COURT OF APPEALS
DECISION
DATED AND FILED

FEBRUARY 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3419-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JOHN W. KNOPPE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

ANDERSON, J. The State of Wisconsin appeals from an order dismissing its drunk driving action against John W. Knoppe. The sole issue on appeal is whether the state trooper had reasonable suspicion to conduct an investigatory stop of Knoppe. The trial court's findings of historical fact are supported by credible and probative evidence and we conclude that the isolated

touching of the fog line by Knoppe's tires is insufficient to serve as a reasonable suspicion to justify an investigatory stop. Therefore, we affirm.

Knoppe was cited for operating a motor vehicle while intoxicated, § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited blood alcohol concentration, § 346.63(1)(b), by State Trooper Dean R. Luhman. Knoppe filed a motion seeking to suppress an illegal arrest on the grounds that there was a lack of a reasonable suspicion to support Luhman's investigatory stop. At the evidentiary hearing, Luhman was the only witness. The trial court granted Knoppe's motion holding that there was an absence of reasonable grounds to support the investigatory stop. The State appeals the resulting order dismissing the two citations.

The question of whether an investigatory stop was legally justified presents a question of law that we decide de novo. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). The trial court's findings of historical fact will not be reversed unless they are "clearly erroneous." *See* ***State v. Angiolo***, 186 Wis.2d 488, 494, 520 N.W.2d 923, 927 (Ct. App. 1994).

In a hearing on a motion to suppress, the trial court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. It necessarily determines the credibility of the witnesses, *see* ***State v. Pires***, 55 Wis.2d 597, 602-03, 201 N.W.2d 153, 156 (1972), and we give deference to that determination because of the court's superior opportunity to gauge the persuasiveness of their testimony. *See* ***Johnson v. Merta***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). The court then finds the historical facts and determines whether probable cause exists on the basis of those facts. *See* ***State v. Wille,*** 185 Wis.2d 673, 682, 518 N.W.2d 325, 329 (Ct. App. 1994).

The only witness at the suppression hearing was Luhman. In making the findings of fact, the trial court started by commenting that "what concerns me is that the testimony here is not unequivocal. There is a great deal of absence of preciseness respecting all that was seen." The court also voiced that "the concern the Court has for this particular matter is the generalness with respect to the testimony." In concluding, the court remarked "frankly the vague recollection of the officer concerning many of the events he testified and was asked about that evening" was troubling. We are bound by the court's conclusion that the trooper's testimony had scant probative weight because of its lack of particulars. *See* ***Lac La Belle Golf Club v. Village of Lac La Belle***, 187 Wis.2d 274, 289, 522 N.W.2d 277, 283 (Ct. App. 1994) (the weight of the evidence and the credibility of the witness are matters entirely within the province of the trier of fact).

The court found that Luhman followed Knoppe for four and one-half miles. During that time, Luhman saw Knoppe's right tires touch the fog line one or two times. The court was disturbed because the trooper never precisely described Knoppe's weaving or swerving within his lane of travel and found that Knoppe "maintained a straight path generally speaking for four and a half miles." Based upon Luhman's testimony, the court found that Knoppe did not operate the vehicle in an unsafe manner. The court also found that Knoppe safely exited the interstate and properly stopped his vehicle when Luhman activated his emergency lights. Finally, the court found that Knoppe's conduct did not constitute a violation of the motor vehicle code.

We have reviewed the transcript of the evidentiary hearing and conclude that the trial court's findings are supported by credible and substantial evidence. Briefly, at approximately 12:02 a.m., the Knoppe vehicle was some

distance ahead of Luhman who observed Knoppe drift to the right and his right tires cross the fog line. Luhman pulled a little closer to the Knoppe vehicle and observed a drifting back and forth in its lane of travel for four and one-half to five miles. Luhman could not recall the number of times the vehicle drifted over the fog line. The trooper also testified that Knoppe was not traveling in excess of the posted speed limit. The trooper testified that he stopped Knoppe because "I was concerned for his safety, number one, and the safety of the others on the road. In my experience, people who would drift off the road and wander in their lane, there is a potential that they may be tired or they may be possibly intoxicated."

We now turn to our de novo application of the law to the historical facts. Although we do not owe any deference to the legal conclusions of the trial court, our decision is facilitated by the thorough and well-reasoned analysis of the learned trial judge. The court began its legal analysis with the observation that the principal reason Luhman stopped Knoppe was because he was exiting the interstate. In its bench decision the court said:

> Now, perhaps one might consider the possibility that Mr. Knoppe may have been drinking that evening, but I frankly think that the Constitution requires something more than that and that people need to be free from unreasonable stops. This may not be the best case on which to decide that issue in favor of the defendant, but frankly other than that apparent operation of the vehicle and the so-called swerving which, in its lane which on this record has yet to be described for me, frankly the vague recollection of the officer concerning many of the events he testified and was asked about that evening, and apparently his recollection consists solely of the review of the report here today which has not been made in evidence, I can't frankly find that reasonable suspicion has been met here ….

On appeal, the State asserts that whether the investigatory stop of Knoppe was reasonable is an objective test that focuses on the reasonableness of

Luhman's intrusion into Knoppe's freedom of movement. The State relies upon ***State v. Waldner,*** 206 Wis.2d 51, 60, 556 N.W.2d 681, 686 (1996), to justify the investigatory stop:

> [W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.

We agree with the State to a point. The test for validity of an investigatory stop of a motor vehicle is one of reasonableness. *See* ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987). The lawfulness of the investigatory stop is analyzed in a "common sense" way under the "totality of the facts." *See* ***Waldner***, 206 Wis.2d at 56-57, 556 N.W.2d at 684. Reasonable suspicion exists where the officer, at the time of the investigatory stop, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to suspect that the person may be committing or has committed an offense. *See* ***County of Dane v. Sharpee,*** 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). Reasonable suspicion does not involve a technical analysis; rather, it invokes the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *See* ***id***. A court must look to the totality of the circumstances to determine whether the officer reasonably suspected that the defendant had committed an offense. *See* ***id.***

However, the conclusion of ***Waldner*** does not support the State's argument in this case. In ***Waldner***, the officer encountered Waldner's vehicle at 12:30 a.m. The officer observed Waldner's vehicle stop briefly at an intersection where there were no stop signs and then accelerate abruptly. Waldner then pulled over and dumped a mixture of liquid and ice onto the road. *See* ***Waldner,*** 206

Wis.2d at 53, 556 N.W.2d at 683. The Wisconsin Supreme Court concluded that "these facts, looked at together, formed a reasonable basis for [the officer's] suspicion that this driver was impaired and very well could have been intoxicated. Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together." ***Id***. at 58, 556 N.W.2d at 685.

In this case, the "totality of the facts" are that at approximately 12:02 a.m. Luhman observed Knoppe traveling at or below the posted speed limit and during the course of four and one-half to five miles Knoppe's right tires touched the fog line once or twice. Luhman testified that in all other respects Knoppe operated his vehicle safely. We agree with the trial court that when all of the credible and probative facts are taken together and viewed objectively, in an everyday way, and with common sense, that the touching of the fog line is insufficient to form the reasonable suspicion required to support the investigatory stop of Knoppe.[1]

By the Court.—Order affirmed.

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

[1] In its bench decision the trial court observed:

> When is the line to be drawn respecting suspected criminal activity and how far can officers go? Certainly, the officers are out there to protect us all from each other and from, sometimes, oftentimes, the persons, themselves …. There comes a point in time, frankly, where I think the needs of the citizen to be protected from [an] unreasonable stop comes directly into conflict with what officers may believe to be unlawful activity …. [B]ut I frankly think that the Constitution requires something more than that and that people need to be free from unreasonable stops.