

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2100

Cir. Ct. Nos. 2013TR709
2013TR787

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF CALUMET,

PLAINTIFF-RESPONDENT,

V.

LISA L. DOLAJECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County:
JEFFREY S. FROEHLICH, Judge. *Affirmed.*

¶1 REILLY, J.¹ Lisa Dolajeck appeals her conviction for operating a motor vehicle while intoxicated (OWI). Dolajeck argues that police did not have reasonable suspicion to stop her vehicle and that the officer's failure to make a videotape recording of the events leading up to her arrest warranted dismissal of the charges against her. We affirm Dolajeck's conviction.

BACKGROUND

¶2 Calumet County Deputy Sheriff Denny Galipo was operating his patrol car shortly after 2:00 a.m. when he observed a vehicle driven by Dolajeck "drift" about one foot over the center line of the two-lane highway on which it was traveling. The vehicle then drifted right until both passenger-side tires were on the white fog line before traveling left again, crossing one half-foot over the center line, and then drifting back to the right fog line "with a back-and-forth motion." Galipo decided to pull over the vehicle on the suspicion that Dolajeck might be impaired or falling asleep.

¶3 Following a "short conversation," field sobriety tests, and a preliminary breath test, Dolajeck was arrested for drunk driving. Neither Dolajeck's driving nor her interactions with Galipo up to the time of her arrest were videotaped. Galipo later testified that he had mistakenly pressed the "zoom button" on his patrol car's camera rather than the record button when he observed her cross the center line. Although a veteran law enforcement officer, Galipo was new to patrol duties in Calumet County and had only finished field training within the previous week.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Dolajeck filed a motion to dismiss on the basis that Galipo did not have reasonable suspicion that a crime was being committed to justify the stop of her vehicle and that the absence of a recording deprived her of evidence material to her defense in violation of due process. The court denied the motion, finding that Galipo had reasonable suspicion to investigate the reason for the lane deviations made by Dolajeck’s car and that the failure to make a recording prior to the arrest did not violate Dolajeck’s due process rights. Dolajeck subsequently pled no contest to the OWI charge. Dolajeck appeals.

DISCUSSION

¶5 As a threshold matter we must consider whether by pleading no contest to a noncriminal charge, Dolajeck waived her right to appeal the denial of her motion. *See County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 275, 542 N.W.2d 196 (Ct. App. 1995). She argues that we should exercise our discretion to decide the merits of her case for many of the same reasons that we declined to apply the waiver rule in *Quelle*. *See id.* at 275-76. The County does not address any of Dolajeck’s arguments regarding waiver. Accordingly, we decide Dolajeck’s appeal on its merits.

Reasonable Suspicion

¶6 A law enforcement officer may stop a person for the purpose of conducting an investigation if the officer reasonably suspects a traffic violation has occurred or will occur. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. The test for reasonable suspicion is objective and requires that an officer be able to point to “specific, articulable facts and reasonable inferences from those facts” to support the stop. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted). Whether an officer has reasonable

suspicion to support a lawful traffic stop is a question of constitutional fact. *Popke*, 317 Wis. 2d 118, ¶10. We review the circuit court’s findings of fact for clear error, but review de novo the application of those facts to constitutional principles. *Id.*

¶7 Dolajeck’s primary challenge to her stop focuses on the fact that as there were no “other vehicles approaching from the rear” per WIS. STAT. § 346.13(1), there was not reasonable suspicion to stop her due to her vehicle’s lane deviations. She also contests the court’s finding that the lane deviations provided reasonable suspicion that she was driving while intoxicated, relying on *State v. Post*, 2007 WI 60, ¶¶20-21, 301 Wis. 2d 1, 733 N.W.2d 634, where our supreme court stated that “weaving within a single lane ... alone” could not support an officer’s reasonable suspicion of intoxicated driving. We reject Dolajeck’s arguments as well as her challenge to Galipo’s credibility regarding his observations of her driving behavior. *See State v. Flynn*, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979) (credibility of police officers testifying at suppression hearings are determined by the circuit court).

¶8 The driving at issue was not a simple matter of Dolajeck moving from one lane to another without concern for whether she was cutting off another driver nor did it solely concern her weaving within her own lane of traffic. Galipo observed Dolajeck drift over the center line of a highway into the lane for oncoming traffic by about one foot, drift back to the edge of the other side of her lane, drift again one-half foot over the center line, and drift back to the extreme edge of her lane before he decided to stop her. The driving at issue concerned Dolajeck failing to control her vehicle sufficiently such that she could prevent it from drifting into the lane for oncoming traffic, thereby violating WIS. STAT. § 346.13(3). In addition, these specific, articulable facts gave rise to a reasonable

inference that Dolajeck was impaired to the extent that her condition warranted further investigation as to whether she was driving while intoxicated in violation of WIS. STAT. § 346.63. The court properly found reasonable suspicion for the stop.

Failure to Videotape

¶9 Dolajeck next argues that Galipo's failure to make a videotape recording of the events prior to her arrest requires either dismissal of the charges or suppression of the evidence regarding the traffic stop, preliminary breath test, field sobriety tests, and blood alcohol test. We disagree.

¶10 Dolajeck mistakenly equates Galipo's failure to make a recording with the failure to preserve evidence. Absent a statutory requirement or other mandatory duty, police have no duty to create documentary evidence and the failure in this case to make a recording is, at best, a topic for the defense's cross-examination of Galipo.² Even where such a duty to record exists, the failure to record does not automatically trigger evidence suppression or the more drastic remedy of dismissal. *See, e.g., State v. Jerrell C.J.*, 2005 WI 105, ¶57 n.14, 283 Wis. 2d 145, 699 N.W.2d 110. Dolajeck points to no cases on point to support her argument that the failure to make a videotape recording of a traffic stop mandates the dismissal of charges or suppression of evidence. Dolajeck's argument fails legally and logically.

² This is not a case in which the police destroyed evidence—the evidence never existed.

By the Court.—Judgment affirmed.

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

