COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0163-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH J. HOEFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DECHAMBEAU, Judge. *Affirmed.*

EICH, J.[1] Kenneth Hoefer challenges the validity of a traffic stop which led to his conviction for driving while intoxicated.[2] He argues that the

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

[2] He pled no contest to the charge, reserving his right to appeal the trial court's denial of his motion to suppress his "stop" by the arresting officer. His appeal is from the judgment of conviction.

arresting officer lacked a reasonable suspicion to believe that he had violated any traffic law. We disagree and affirm his conviction.

The arresting officer, Oregon Police Officer Craig Sherven, testified that, while driving his patrol car south on Main Street in Oregon at 1:20 a.m., he noticed Hoefer's car, which was traveling immediately in front of Sherven, "weave[] over to the right portion of the lane and dr[i]ve into an area … marked off as parking stalls," drive through that area and return to the center of the lane. Following Hoefer into the 200 block of South Main Street, Sherven saw his car veer to the left, crossing the center line with the left-side tires and continuing on in that manner for several seconds before moving back into its own lane. According to Sherven, as they continued down the street Hoefer's car "drift[ed]" to the right, nearly striking the curb, and then returned to the centerline, and this occurred approximately five times. Sherven said Hoefer was "drifting from one side to the other of th[e] lane" for approximately three blocks. After stopping (properly) at a stop sign, Hoefer continued ahead, veering to the left and driving on the centerline once or twice more. At that point, Sherven decided to stop Hoefer "to check on his condition," and because by this time they were apparently near Hoefer's residence, he eventually contacted Hoefer in the driveway to his home.

On cross-examination, Sherven testified that he first observed Hoefer cross the centerline as he was coming to the end of the 100 block and entering the 200 block of South Main Street, and that he stayed over the line for approximately four seconds. He acknowledged that he wrote in his incident report that "on five more occasions in the 200 block of South Main Street [he] saw this vehicle drift slowly to the far right, then back to the center, and then to the left, striking the center line with its driver's side front and rear tires." He then stated,

again referring to his report, that the next time Hoefer crossed the centerline "would have been in the four to 500 blocks."

Hoefer testified that, while he veered to the left once (in the area of the 100 block of South Main) to avoid a bump in the street, his driving was otherwise entirely proper that evening. He said he never veered or weaved on the pavement, and never touched or crossed the centerline. He acknowledged drinking "about half a dozen beers" in the preceding three or four hours. Hoefer also stated that, because the 200 block of South Main Street is very short, it would be "physically impossible" for him to cross the centerline for four seconds, return to his lane, then weave back and forth from the curb to the centerline five times—as Sherven reported—in the brief time it would take to drive the block at his conceded speed of 25 miles per hour.

The latter statement, together with Sherven's testimony on the subject on cross-examination, forms the heart of Hoefer's argument on appeal. In addition to emphasizing that his initial "swerve" was simply to avoid a bump in the road, he argues that Sherven's testimony with respect to the back-and-forth movements must be discounted because the block in which he said it occurred is only 200 feet long. He says that the "laws of physics" demonstrate the untruth of Sherven's statements and, as a result, Sherven had no grounds to stop him.

Even if we were to discount Sherven's testimony about the "200 block,"[3] he did state that he saw Hoefer swerve to the right, into the curbside

[3] While Sherven's testimony on cross-examination may be characterized as acknowledging that the multiple swerving incidents did take place in the 200 block, his direct testimony may be just as validly characterized as reporting Hoefer's swerving over a three- or four-block route. He began by stating that he noticed Hoefer cross the line "as we approached the 200 block," remaining there for approximately four seconds. Then, when asked what happened "once [the car] got back into its own lane," he responded:

(continued)

parking stalls in the 100 block, and weave back and forth in the lane, striking or crossing the centerline, on one or two occasions in the 400 or 500 block. Hoefer explains the initial swerve as an attempt to avoid a bump in the road. Sherven testified, however, that he noticed no impediments or obstructions in the roadway that would have forced Hoefer to maneuver around them.[4] Finally, Hoefer states

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> I continued following it southbound. It did straighten out in the center of its lane, and then I noticed, as we proceeded southbound, [on] about five occasions the vehicle would drift over to the right part of the lane almost striking the curb and then back over to the left, and then would center itself again, and just kept on with that type of motion back and forth in the lane from the far right portion to the far left portion.

He was then asked:

> Q. And you say it was drifting from one side to the other of th[e] lane?
>
> A. Yes.
>
> Q. How far did that continue?
>
> A. It continued on through the three, four and 500 blocks of South Main…

To the extent there may be said to be a conflict in the testimony, it is for the trial court to resolve the conflict, or any questions relating to the credibility of the testimony. ***State v. Garcia***, 195 Wis.2d 68, 75, 535 N.W.2d 124, 127 (Ct. App. 1995). And we agree with the State that the trial court's remarks at the conclusion of the hearing may be interpreted as assigning greater credibility to Sherven's testimony than Hoefer's because of Hoefer's consumption of alcoholic beverages that evening.

[4] We note in this regard that a defendant's lawful explanation for some of his or her conduct does not, by itself, make the stop unreasonable.

> Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. If a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

State v. Waldner, 206 Wis.2d 51, 60, 556 N.W.2d 681, 686 (1996).

that he could not have struck or crossed the "centerline" in the 500 block of South Main Street because there is no centerline in that block. It is true that there is no painted centerline in that block, but Sherven testified—and Hoefer's own photographic exhibits bear this out—that there is a demarcation in the pavement running down the approximate center of the road in that location, and that demarcation is what he was referring to in his report and in his testimony.

A police office may stop a vehicle when he or she has a reasonable suspicion to believe the driver has committed or is committing a traffic violation. ***State v. Griffin***, 183 Wis.2d 327, 330-31, 515 N.W.2d 535, 537 (Ct. App. 1994). It is a "common sense" test: "Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

The 200 block aside, there was evidence of Hoefer's erratic driving in the 100 and 500 blocks of South Main Street. Additionally, as the trial court noted: (1) it was "bar-closing time"—a time known to experienced police officers as one when impaired drivers are more likely to be traveling the streets; and (2) Hoefer acknowledged consuming a considerable quantity (by his own admission approximately seventy-two ounces) of beer in the hours preceding the incident—a factor that could well impair not only his conduct but his powers of observation. In contrast, as the court also noted, "there [was] no evidence of any impairment on [Officer Sherven's] part," and, by reason of his job, he is a trained and experienced observer. We cannot disagree with the trial court's observation that this is a close case. But neither can we disagree with the court's resolution of the issues. Our independent review of the record and the applicable law satisfies us

that, while perhaps narrowly so, the "reasonable suspicion" test was met in this case.

By the Court.–Judgment affirmed.

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