

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 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 Nos. 2014AP816
2014AP817
2014AP818**

**Cir. Ct. Nos. 2013TR184
2013TR185
2013TR192
2013TR193**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK C. THOMAS, III,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Monroe County:

J. DAVID RICE, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ In these consolidated appeals, Frederick C. Thomas III appeals judgments of conviction for operating a motor vehicle while

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

under the influence of an intoxicant (OWI), first offense, operating a motor vehicle with a prohibited alcohol concentration (PAC), first offense, unsafe lane deviation, and failure to signal a turn. Thomas contends the circuit court erred in denying his motion to suppress because the officer who stopped him did not have reasonable suspicion to stop his vehicle, unlawfully extended the stop to administer field sobriety tests, and did not have probable cause to administer a preliminary breath test (PBT). For the reasons discussed below, I affirm.

BACKGROUND

¶2 Thomas was charged with OWI, first offense, PAC, first offense, unsafe lane deviation, and failure to signal a turn, in violation of WIS. STAT. §§ 346.63(1)(a), 346.63(1)(b), 346.13(1), and 346.34(1)(b), following a traffic stop on January 15, 2013. Thomas moved to suppress evidence obtained from the traffic stop on the basis that there was no reasonable suspicion for the initial stop and the extension of the stop to administer field sobriety test, and there was no probable cause to administer the PBT.

¶3 At the hearing on Thomas's motion, the sole witness to testify was Wisconsin State Patrol Trooper Jason Holtz. Trooper Holtz testified that at approximately 8:30 p.m. on January 15, 2013, he was traveling eastbound in the right-hand lane of Highway 21, a four-lane divided highway. Trooper Holtz testified that as he began passing a vehicle that was traveling in the left-hand lane, the vehicle "entered [his] lane" without signaling the lane change. Trooper Holtz testified that he initiated a traffic stop of the vehicle based on the driver of the vehicle's "failure to stay in [his] designated lane" and "failure to utilize [his] turn signal indicating a lane change."

¶4 Trooper Holtz testified that upon making contact with Thomas, who was driving the vehicle, Thomas indicated that he had not realized that Holtz’s vehicle was there. Trooper Holtz testified that he “detected the unmistakable odor of alcohol,” observed that Thomas’s “eyes appeared glassy,” and Thomas admitted that he had consumed “a couple” of drinks. Trooper Holtz testified that he asked Thomas to exit his vehicle to perform standardized field sobriety tests. Trooper Holtz testified that he administered the horizontal gaze nystagmus test and that he observed that Thomas’s eyes “lacked smooth pursuit” and displayed “nystagmus ... prior to 45 degrees in both eyes,” which Holtz testified are indicators of impairment. Trooper Holtz testified that after Thomas performed the HGN, Thomas submitted to a preliminary breath test (PBT), which indicated that Thomas’s blood-alcohol level was 0.164. Thomas was then placed under arrest.

¶5 The circuit court denied Thomas’s motion to suppress. Following the denial of Thomas’s motion, the matter proceeded to a trial before the court, which found Thomas guilty of all charges. Thomas appeals.

DISCUSSION

¶6 Thomas contends the circuit court erred in denying his motion to suppress. Thomas argues that Trooper Holtz lacked reasonable suspicion to stop his vehicle, unlawfully extended the stop, and lacked probable cause to administer the PBT.

A. Reasonable Suspicion to Stop Thomas’s Vehicle

¶7 Whether reasonable suspicion exists to stop a vehicle is a question of constitutional fact, *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569, which presents a mixed question of fact and law on review. *State v.*

Post, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. This court will review the circuit court’s factual findings under the clearly erroneous standard, but will review independently the application of those facts to constitutional principles. *Id.*

¶8 In order for an investigatory stop to be constitutionally valid, an officer must have reasonable suspicion to believe that a crime or traffic violation has been or will be committed. *Popke*, 317 Wis. 2d 118, ¶23. The officer’s reasonable suspicion must be particularized and objective, and is viewed in light of the totality of the circumstances. *State v. Walli*, 2011 WI App 86, ¶8, 334 Wis. 2d 402, 799 N.W.2d 898. In determining whether an officer has reasonable suspicion to support a lawful traffic stop, this court accepts the circuit court’s factual findings unless they are clearly erroneous, but independently determines whether those facts meet the applicable legal standard. *Popke*, 317 Wis. 2d 118, ¶10.

¶9 The State asserts that the initial stop of Thomas’s vehicle was constitutionally valid because Trooper Holtz observed Thomas’s vehicle change lanes on the highway without using a turn signal and without checking to see if there were any vehicles in his destination lane, and in doing so “almost hit” Trooper Holtz’s vehicle, which the State argues was a violation of WIS. STAT. § 346.34(1)(b). Section 346.34(1)(a)(3) provides: “No person may ... [t]urn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety.”

¶10 Thomas contends that his changing of lanes in front of Trooper Holtz’s vehicle did not violate WIS. STAT. § 346.34(1)(a) because at the time he switched lanes, he “was not on reasonable notice that another vehicle [was] ... present” on the roadway. Thomas argues that Trooper Holtz’s vehicle was

“difficult to notice under the circumstances” because Trooper Holtz’s headlights were difficult to see and Trooper Holtz “lingered in [] Thomas’s blind spot at a low speed.” Thomas asserts that Trooper Holtz’s driving was such that it was foreseeable that Trooper Holtz would be “cut off” and Thomas characterizes his own driving as avoiding a possible collision with Trooper Holtz.

¶11 Whether the evidence was or was not sufficient to convict Thomas for violating WIS. STAT. § 346.34(1)(a) is not the test for reasonable suspicion to stop. In order for the stop to be constitutionally valid, Trooper Holtz need only have reasonably suspected that Thomas had committed or was committing the violation of law. *Popke*, 317 Wis. 2d 118, ¶23. Trooper Holtz testified that Thomas’s vehicle entered Holtz’s lane of traffic, without any type of signal, while Holtz’s vehicle was passing Thomas’s vehicle. I conclude that under these circumstances, Trooper Holtz could reasonably have suspected that Thomas had made a lane change when it was not reasonably safe to do so, in violation of § 346.34(1)(a).²

B. Expansion of the Stop

¶12 Thomas contends that Trooper Holtz did not have reasonable suspicion to extend the traffic stop to administer field sobriety tests and the PBT.

² The State also argues that Trooper Holtz had reasonable suspicion to stop Thomas’s vehicle for a violation of WIS. STAT. § 346.34(1)(b), because Holtz observed that Thomas failed to utilize his turn signal when Thomas switched lanes. Because I conclude that the stop was otherwise justified, I do not reach this issue. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate court not required to address every issue when one is dispositive).

¶13 A traffic stop may be lawfully extended to allow for additional investigation if, during the stop, an officer becomes aware of facts supporting a reasonable suspicion that a separate crime is afoot. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. In this case, Trooper Holtz could lawfully extend Thomas’s initial detention if Holtz “discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [Thomas] was driving while under the influence of an intoxicant.” *Id.*

¶14 Trooper Holtz testified that when he made contact with Thomas, he detected the odor of intoxicants, Thomas’s eyes appeared glassy, and Thomas admitted to having consumed “a couple” of alcoholic drinks. Any of these facts considered individually, would not lead to a reasonable suspicion that Thomas had been driving under the influence of an intoxicant. However, when the facts are examined in their totality with rational inferences from those facts, I conclude that Trooper Holtz had the requisite reasonable suspicion to extend the stop. *See, e.g., State v. Hughes*, No. 2011AP647, unpublished slip op. (WI App Aug. 25, 2011) (the odor of alcohol, defendant’s admission to consuming alcohol, and the defendant’s glassy eyes provided reasonable suspicion to extend a stop to administer field sobriety tests).

¶15 Relying on an unpublished opinion from this court, *State v. Kolman*, No. 2011AP1917, unpublished slip op. (WI App Jan. 12, 2012), Thomas argues that this court should consider only the odor of alcohol and Thomas’s statement that he had consumed a couple of alcoholic drinks when determining whether Trooper Holtz had reasonable suspicion to extend the stop. Thomas points out that in *Kolman*, the officer observed that defendant in that case had “bloodshot and

glassy eyes” and that the officer explained the significance of that observation. Thomas asserts that because Thomas was only observed to have “glassy eyes” and because Trooper Holtz did not “explain the meaning or significance of that observation,” that observation should be disregarded. Nothing in *Kolman* supports this assertion, and a quick search reveals that “glassy eyes” without any indication of redness has provided a basis for reasonable suspicion that a defendant has driven while under the influence. *See, e.g., State v. Harris*, No. 2014AP965, unpublished slip op. (WI App Oct. 8, 2014); *State v. Hughes*, No. 2011AP647, unpublished slip op. (WI App Aug. 25, 2011).

C. Probable Cause to Administer a Preliminary Breath Test

¶16 Thomas contends that Trooper Holtz did not have requisite level of probable cause to administer the PBT.

¶17 In order to request a PBT, an officer must have probable cause to believe that the person is or was, operating a motor vehicle while under the influence of an intoxicant. WIS. STAT. § 343.303. This court has explained that “probable cause to believe” is a “quantum of proof greater than the reasonable suspicion necessary to justify an investigatory stop ... but less than the level of proof required to establish probable cause for arrest.” *State v. Felton*, 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871 (quoted source omitted). Whether an officer has probable cause to administer a PBT “is a legal issue that we decide *de novo*, accepting the [circuit] court’s findings of fact unless they are clearly erroneous.” *Id.*

¶18 “In determining whether probable cause exists, the court applies an objective standard.” *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671

N.W.2d 660. Probable cause is “assessed on a case-by-case basis, looking at the totality of the circumstances.” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. This court must consider the information available to the officer from the standpoint of one versed in law enforcement, and must take the officer’s training and experience into account. *Kutz*, 267 Wis. 2d 531, ¶12. “When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.” *Id.*

¶19 Here, I agree with the circuit court that the facts, the odor of alcohol, Thomas’s admission that he had consumed a “couple” of alcoholic beverages, Thomas’s glassy eyes, and the results of Thomas’s HGN test, support the conclusion that at the time Trooper Holtz requested the PBT, there was probable cause to believe that Thomas was operating a motor vehicle while intoxicated.

CONCLUSION

¶20 For the reasons stated above, I affirm.

By the Court.—Judgments affirmed.

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

