COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0772-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL B. ILKKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

DEININGER, J.[1] Michael Ilkka appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI). *See* § 346.63(1)(a), STATS. He claims the trial court erred in denying his motion to suppress evidence gathered following his stop by a police officer because the

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

officer lacked a proper basis to stop his vehicle. We reject Ilkka's arguments and affirm his conviction.

BACKGROUND

A Waunakee police officer was dispatched to a convenience store in the village in mid-afternoon to check on the occupant of a station wagon who was reported to be "sweating and bobbing his head" and possibly in need of medical attention. "No more than two minutes" elapsed between the officer's receipt of the dispatch and his arrival at the store. Upon arriving at the store's parking lot, the officer saw a green station wagon head toward one exit, turn sharply and leave quickly via a different exit. There were no other station wagons on the premises when he arrived. The officer followed the station wagon. His squad car was positioned about three car lengths behind the station wagon, with two other cars between them. The driver of the station wagon was later identified as Ilkka.

As he followed for about two blocks before stopping the station wagon, the officer observed Ilkka's vehicle travel "over the center of the road." In response to the prosecutor's question whether "the vehicle's tires [were] all actually over the center line," the officer answered yes. During cross-examination, the officer clarified that the driver's side of Ilkka's vehicle had been approximately two feet over the "normal center line of the road." He also acknowledged that his police report had indicated the vehicle was driving "on the center line." On re-direct, the officer explained further that the vehicle itself was on the center line, with its tires "actually over the center line."

Ilkka made an offer of proof at the suppression hearing that the dispatch tape would show that the dispatcher referred to a blue station wagon at the convenience store and made no mention of a green one.

The trial court determined that the officer had reasonable suspicion to stop Ilkka's vehicle. It concluded that the observation of the vehicle traveling "either on the center line or over the center line for a period of two blocks" was sufficient in that it constituted a traffic violation. The court also concluded that the officer was performing a valid "community caretaker function" in responding to the call to check on an individual who may need medical attention, and that the discrepancy in the color of the station wagon was not significant given that the officer had arrived at the store within two minutes and observed only one station wagon at that location.

After the court denied his suppression motion, Ilkka pled no contest and was convicted of OMVWI. He now appeals. *See* § 971.31(10), STATS.

ANALYSIS

When reviewing a trial court's determination regarding the suppression of evidence, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether an investigative stop meets statutory and constitutional standards is a question of law which we review de novo. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Under ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968), the police must possess sufficient information to form a reasonable suspicion of illegal activity to justify an investigative stop. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834 (quoting ***Terry***, 392 U.S. at 21). Reasonableness is measured against an

objective standard, taking into consideration the "totality of the circumstances." *See* ***id***. at 139-40, 456 N.W.2d at 834. It is "a common sense question, [one] which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions." *See* ***State v. Jackson***, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989).

Ilkka's principal claim in this appeal is that the officer's testimony was incredible because, being three car lengths back and with two cars between them, he could not have seen whether the tires of Ilkka's vehicle were over the center line. According to Ilkka, the officer's credibility is further undermined because of the discrepancies in his testimony relating to the vehicle being "on" or "over" the center line, and whether its tires were "all" over the line or only the driver's side tires were over the line. (Ilkka would have us interpret the officer's response to the prosecutor's question as meaning that the officer testified that Ilkka's entire vehicle was over the line.) From this, Ilkka concludes that "the trial court essentially ruled that it didn't really matter what the facts were."

We conclude that it is Ilkka's analysis of the testimony presented at the suppression hearing that is unreasonable. The officer's testimony was consistent that the station wagon he followed for two blocks had its driver's side tires over the center line of the road. We agree with the State that the officer's response to the question regarding whether the tires were "all" over the line, taken in context, is most reasonably interpreted as meaning that the driver's side tires were entirely over the line, not that all four of the vehicle's tires had crossed it. And, it cannot be said that the officer's observations from a vantage point three car lengths behind Ilkka on a village street were "inherently incredible," as Ilkka argues. If anything, the presence of the two cars between them would make it easier, not more difficult, to determine that Ilkka was driving left of center, given

that his vehicle would have protruded markedly from the left side of the line of cars ahead of the officer's squad.

A trial court's factual finding will not be disturbed on appeal unless it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* § 805.17(2), STATS. When a trial court sits as trier of fact, it determines issues of credibility. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). It is for the trier of fact, and not this court, to assess witness credibility. *See* ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974). Moreover, we may not conclude that evidence is incredible unless it is "'in conflict with the uniform course of nature or with fully established or conceded facts.'" ***Id***. (quoted source omitted). Thus, we accept the facts as found by the trial court and reject Ilkka's attack on the officer's credibility.

We also conclude, as did the trial court, that the officer had a reasonable suspicion that a traffic law was being violated when he stopped Ilkka's vehicle. Section 346.05(1), STATS., provides that, except under certain circumstances not shown in the record to be applicable here, "the operator of a vehicle shall drive on the right half of the roadway."

Furthermore, even if it were not so clear from the record that the officer observed Ilkka commit a traffic violation, as we and the trial court have concluded, the officer may still have been justified in stopping Ilkka's vehicle. As we noted in ***Krier***, 165 Wis.2d at 678, 478 N.W.2d at 65, "[s]uspicious activity justifying an investigative stop is, by its very nature, ambiguous." An officer has the right to temporarily detain an individual for the purposes of inquiry "if any reasonable inference of wrongful conduct can be objectively discerned." ***State v.***

Anderson, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990). The officer had a report of a driver in possible need of medical attention and observed, at a minimum, erratic, if not illegal, driving in both the parking lot and on the village street. These circumstances would justify the investigative stop even if no conduct clearly constituting a traffic violation had been observed.

Ilkka also complains that the trial court relied in part on the "community caretaker function" to sustain the reasonableness of the officer's action in stopping his vehicle, despite the possible discrepancy regarding the color of his station wagon from that given by the dispatcher. While we do not disagree with the trial court's conclusions in this regard, we deem it unnecessary to discuss the issue further because, as we have noted, the stop was justified by the observed traffic violation.

CONCLUSION

For the reasons discussed above, we affirm the judgment convicting Ilkka of OMVWI.

By the Court.—Judgment affirmed.

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