

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 12, 2016

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. 2015AP1033
2015AP1034**

**Cir. Ct. Nos. 2014TR4995
2014TR4996**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

VILLAGE OF BAYSIDE,

PLAINTIFF-RESPONDENT,

V.

RYAN ROBERT OLSZEWSKI,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Milwaukee County:
THOMAS J. MCADAMS, Judge. *Affirmed.*

¶1 BRASH, J.¹ Ryan Olszewski appeals a circuit court order of conviction after he pled guilty to operating a motor vehicle while under the

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

influence of an intoxicant as a first offense. Olszewski argues that the circuit court erred in denying his motion to suppress evidence of his intoxication because the arresting officer lacked reasonable suspicion to stop his vehicle. We disagree and affirm.

BACKGROUND

¶2 On February 16, 2014, at approximately 1:00 a.m., Officer Paul Picciolo of the Bayside Police Department was monitoring traffic in his marked squad car near the intersection of North Port Washington Road and West Brown Deer Road. Picciolo was parked in the US Bank parking lot on West Brown Deer Road, approximately 150 feet west of the intersection. At that time it was snowing and the road was partially covered with snow.

¶3 Picciolo observed a red van operated by Olszewski approach the southern part of the intersection. Olszewski's lane was marked with a white stop line and a crosswalk beyond the stop line. Olszewski's lane was controlled by traffic-control signals displayed in two places: on a traffic signal across the intersection from his vehicle and on a traffic signal in the median to his left, which was located after the stop line but before the crosswalk. Picciolo observed Olszewski stop beyond the stop line, beyond the traffic signal to Olszewski's left, and three-quarters of a car length past the crosswalk. Olszewski remained stopped at the intersection until the traffic signal turned from red to green, at which point he proceeded to turn left going westbound on Brown Deer Road towards Picciolo. Picciolo then conducted a traffic stop of Olszewski's vehicle.

¶4 Upon making contact with Olszewski, Picciolo smelled alcohol and noticed other indicators of intoxication, precipitating his commencement of field sobriety tests. Based on Olszewski's performance on these tests, Picciolo

determined that Olszewski was impaired and arrested and cited him for operating while intoxicated and for operating with a prohibited alcohol concentration.

¶5 Olszewski subsequently filed a motion to suppress the evidence gathered from the traffic stop on the grounds that, at the time of the stop, Picciolo lacked reasonable suspicion that an offense had been committed. At the suppression hearing Picciolo testified that he stopped Olszewski for failing to stop behind the stop line and crosswalk line. Picciolo testified that he observed Olszewski stop past the stoplight that was located to the left of Olszewski. Picciolo further testified that he knew the stoplight to be located between the stop line and the crosswalk line. Picciolo was the only witness to testify at the suppression hearing. A video from Department of Transportation taken from a nearby utility pole that recorded Olszewski stop at the intersection was marked as an exhibit and played for the circuit court.

¶6 At the conclusion of the suppression hearing, the circuit court ordered additional briefing on what effect the snow cover had on Olszewski's ability to observe the stop line and crosswalk lines. On September 4, 2014, the circuit court denied Olszewski's motion, finding that Picciolo had reasonable suspicion to stop Olszewski. Subsequently, Olszewski stipulated to a set of trial facts. On that stipulation, the court entered an order finding Olszewski guilty of operating a vehicle while intoxicated. This appeal follows.

DISCUSSION

¶7 When reviewing a circuit court's order to deny a motion to suppress, we will uphold a circuit court's factual findings "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 (1990). Whether an investigatory stop meets

constitutional standards is a question of law that we review independently. *See State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶8 On appeal, Olszewski argues that Picciolo made a mistake of law when he stopped Olszewski for failing to stop before the stop line and crosswalk line. Olszewski further argues that this mistake of law was unreasonable, thus making the traffic stop unconstitutional. We disagree.

¶9 A police officer may make an investigatory stop if he reasonably suspects a driver is violating a traffic law. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). Reasonable suspicion requires more than an unsubstantiated suspicion or hunch; the officer must point to specific and articulable facts that reasonably warrant the stop. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonable suspicion does not require ruling out innocent explanations. *State v. Conaway*, 2010 WI App 7, ¶5, 323 Wis. 2d 250, 779 N.W.2d 182. If any reasonable inference of wrongful conduct can be objectively discerned, the officer may temporarily detain the driver. *Id.*

¶10 A traffic stop based on a mistake of fact or law is not necessarily unreasonable. *Heien v. No. Carolina*, 574 U.S. ___, 135 S. Ct. 530, 534 (2014). The Fourth Amendment prohibits only unreasonable searches and seizures. *Id.* As long as a mistake is objectively reasonable, it can give rise to reasonable suspicion. *Id.*; *State v. Houghton*, 2015 WI 79, ¶52, 364 Wis. 2d 234, 868 N.W.2d 143.

¶11 In applying these standards, we agree with the circuit court that Picciolo had reasonable suspicion to stop Olszewski. Picciolo articulated specific

facts that led him to reasonably believe Olszewski stopped at a red traffic signal beyond the crosswalk, in violation of WIS. STAT. § 346.37(1)(c).² At the suppression hearing, Picciolo testified that: (1) Olszewski's vehicle was controlled by traffic signals; (2) Olszewski's lane had a crosswalk; and (3) Olszewski stopped past the crosswalk and necessarily past the stop line and traffic signal to his left. Picciolo further testified that based on his observation of the intersection for the past year, he knew that Olszewski's lane was marked with a crosswalk and that the crosswalk began at the stoplight located in the median to the left of Olszewski's vehicle. Photographs of the intersection confirm Picciolo's knowledge that the crosswalk began at the stoplight.

¶12 Olszewski argues that because the intersection was partially covered in snow, he was unable to see the crosswalk and, therefore, he did not violate WIS. STAT. § 346.37(1)(c). In making this argument, Olszewski cites WIS. STAT. § 346.46(2)(c), which addresses the requirements for drivers approaching an intersection controlled by a stop sign. That statute states in relevant part:

(c) If there is neither a clearly marked stop line nor a marked or unmarked crosswalk at the intersection or if the operator cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the operator shall, before entering the intersection, stop the vehicle at such a point as will enable the operator to efficiently observe the traffic on the intersecting roadway.

² WISCONSIN STAT. § 346.37(1)(c) states in relevant part:

Red. 1. Vehicular traffic facing a red signal shall stop before entering the crosswalk on the near side of an intersection, or if none, then before entering the intersection or at such other point as may be indicated by a clearly visible sign or marking and shall remain standing until green or other signal permitting movement is shown.

WIS. STAT. § 346.46(2)(c). From Olszewski's perspective, if the crosswalk was snow covered, there effectively was no crosswalk, and he was required only to stop before entering the intersection. Because he did just that, Olszewski asserts that Picciolo's suspicion that Olszewski violated a traffic law was a mistake of law. We disagree.

¶13 First, there was no testimony from Olszewski that he could not see the crosswalk. Nor did Picciolo testify that the crosswalk was snow covered, but rather that he could not tell the condition of the Olszewski's lane. Footage from the Department of Transportation shows part of the intersection snow covered and part of it clear. Although this footage does show the crosswalk is visible in some lanes of the intersection, it does not show the crosswalk area of Olszewski's lane. Consequently, Olszewski's argument is based primarily on argument, not evidence in the record.

¶14 Nevertheless, even if Olszewski did not see the crosswalk his argument fails. The question is not whether Olszewski actually violated a traffic law; it is whether Picciolo reasonably suspected that Olszewski violated a traffic law. Reasonable suspicion exists even where no traffic violation occurred as long as the officer can point to facts that led him to reasonably believe that a traffic violation had occurred. *Conaway*, 2010 WI App 7, ¶5; *State v. Griffen*, 183 Wis. 2d 327, 333, 515 N.W.2d 535 (Ct. App. 1994) ("Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop."). Accordingly, we conclude that Picciolo did not make a mistake of law when he reasonably suspected Olszewski of violating WIS. STAT. § 346.37(1)(c).

¶15 Even if Picciolo made a mistake of law, however, we would still affirm the ruling below. WISCONSIN STAT. § 346.37 applies to vehicles controlled

by traffic-control signals. WIS. STAT. § 346.37(1). Olszewski's vehicle was controlled by traffic-control signals. WISCONSIN STAT. § 346.46 applies to vehicles approaching a stop sign. WIS. STAT. § 346.46(1). Olszewski was not approaching a stop sign. There is nothing in the traffic statutes or any relevant case law that instructs an officer to apply WIS. STAT. § 346.46 rather than WIS. STAT. § 346.37 when snow might be covering a crosswalk or stop line at an intersection controlled by traffic-control signals.

¶16 Officers confront situations in the field about which they must make quick decisions when the application of a statute is unclear. *Heien*, 135 S. Ct. at 539. Even if the officer ultimately was mistaken on the law, the stop is lawful if the mistake was objectively reasonable. *Id.* at 534; *Houghton*, 2015 WI 79, ¶¶70-71 (holding that a traffic stop was not invalid based on the officer's mistake about what the law required because it was reasonable given the ambiguity of two competing provisions in the statute and there had yet to be an interpretation resolving that ambiguity). Similar to *Houghton*, here the application of WIS. STAT. § 346.37 when it is snowing has not been addressed by Wisconsin appellate courts. Furthermore, although the circuit court concluded that it probably would not have found that Olszewski violated WIS. STAT. § 346.37(1)(c) if that had been the issue before the court, it still found that there was reasonable suspicion. Picciolo made a decision in the field regarding whether Olszewski violated WIS. STAT. § 346.37(1)(c). To the extent that he was mistaken, we conclude that this mistake would have been reasonable.

¶17 The circuit court found Picciolo's testimony to be credible. The circuit court also viewed the video from the Department of Transportation – showing Olszewski's vehicle come to a stop beyond the traffic signal – numerous times. We conclude that Picciolo's experience and knowledge, taken together

with his observation of where Olszewski's vehicle stopped in relation to the intersection on the night of February 16, 2014, gave rise to reasonable suspicion.

¶18 For all the foregoing reasons, we affirm.

By the Court.—Order affirmed.

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

