

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 10, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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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. 2015AP1220-CR**

**Cir. Ct. No. 2014CT156**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**JUSTIN CARL HERMAN HEMBEL,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for St. Croix County:  
ERIC J. LUNDELL, Judge. *Affirmed.*

¶1 STARK, P.J.<sup>1</sup> The State of Wisconsin appeals an order granting Justin Hembel's motions to dismiss and to suppress evidence obtained during a

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

traffic stop. The State argues the stop of Hembel's vehicle was reasonable because the officer had probable cause to believe Hembel violated WIS. STAT. § 346.54, entitled "How to park and stop on streets." Based on the evidence introduced at the suppression hearing, we conclude the officer lacked probable cause to believe Hembel violated § 346.54. We therefore affirm.

### **BACKGROUND**

¶2 An amended criminal complaint charged Hembel with one count of second-offense operating while intoxicated and one count of second-offense operating with a prohibited alcohol concentration. Hembel moved to dismiss the charges against him and to suppress evidence obtained during the stop of his vehicle, arguing the stop was an unreasonable seizure in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution.

¶3 Officer Joseph Kastens was the only witness to testify at the suppression hearing. Kastens testified he was sitting in his squad car in a "Park and Ride" in Roberts, Wisconsin, at approximately 2:30 a.m. on June 21, 2014, when he observed a vehicle traveling west on 70th Avenue. The vehicle pulled into the parking lot of the Flying J Travel Plaza. After some time, the vehicle left the parking lot and turned onto 70th Avenue, heading east toward the intersection with Highway 65. After stopping for the stoplight at the intersection of 70th Avenue and Highway 65, the vehicle continued east on 70th Avenue.<sup>2</sup>

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<sup>2</sup> Kastens testified the vehicle did not have its headlights illuminated when it left the Flying J parking lot, but they came on while the vehicle was stopped at the intersection of 70th Avenue and Highway 65. The State does not argue that the brief, initial failure to turn on the vehicle's headlights provided a basis for Kastens to stop the vehicle.

¶4 The vehicle proceeded to the intersection of 70th Avenue and 130th Street, which is controlled by four-way stop signs. Kastens testified the vehicle “stopped for some time” at the stop sign and then “shift[ed] into park.” He explained he knew the vehicle shifted into park because he “could see the reverse lights come on as it shifted from drive to park.” Kastens stated the vehicle was positioned on the right side of 70th Avenue, centered in the lane of traffic. The road did not have a fog line, but the vehicle was parallel to the center line.

¶5 Kastens testified he drove toward the vehicle “to see if ... the driver was in need of any assistance.” After Kastens’ squad car had been sitting behind the vehicle at the stop sign for about ten seconds, the vehicle shifted from park into drive. Kastens explained he “could see the brake lights on then as it shifted.” At that point, the vehicle had been stopped at the stop sign for about forty-five seconds. As the vehicle began to pull away from the stop sign, Kastens activated his squad car’s emergency lights and stopped the vehicle. Hembel was identified as the driver. Kastens issued Hembel a written warning for improper parking.

¶6 On cross-examination, Kastens acknowledged he had no basis to stop Hembel’s vehicle before it stopped at the stop sign at the intersection of 70th Avenue and 130th Street. Kastens conceded he did not observe any other vehicles in the vicinity while Hembel’s vehicle was stopped at that intersection, and, as a result, Hembel’s vehicle was not obstructing traffic. Kastens further acknowledged that, when he made contact with Hembel, Hembel indicated he had been “operating Google maps ... looking for his friend’s house.”

¶7 Based on Kastens’ testimony, Hembel argued there was “no traffic violation,” and, accordingly, “no reason to stop [his] vehicle.” In response, the State argued Kastens “saw the vehicle shift into park and then again shift into

drive after a matter of time ... [a]nd that's the traffic violation." The following exchange then took place between the circuit court and the State:

THE COURT: Well, let's get this straight. You can't text and drive, correct?

[THE STATE]: Correct.

THE COURT: You can't probably use Google maps and drive, right?

[THE STATE]: Correct.

....

[THE STATE]: But if you are at the Flying J you could use your Google maps then.

[THE COURT]: Well, you go a mile and then you look at the map again. I think we're—we are discouraging people from driving and texting and using data, etc. So I can't see what this young man did wrong.

[THE STATE]: If he had pulled over along the side of the road that would have—

[THE COURT]: This is a rural area. All right. There's no—there's not a—well, it is a rural area. I am not even sure if it is in the Village of Roberts. I assume it is because then it would become an issue. But, no, this—I can't let this go. So I agree with [defense counsel].

The court therefore granted Hembel's motions to dismiss and suppress. This appeal follows.

## DISCUSSION

¶8 When reviewing a circuit court's ruling on a suppression motion, we accept the court's findings of fact unless they are clearly erroneous. *State v. Maddix*, 2013 WI App 64, ¶12, 348 Wis. 2d 179, 831 N.W.2d 778. However, the application of constitutional principles to the facts is a question of law that we review independently. *Id.*

¶9 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. *Id.*, ¶13. A traffic stop is a seizure within the meaning of the Fourth Amendment. *See State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. The State asserts, and Hembel agrees, that Kastens’ stop of Hembel’s vehicle was reasonable if Kastens had probable cause to believe Hembel committed a traffic violation.<sup>3</sup> *See State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). Probable cause refers to the quantum of evidence that would lead a reasonable officer to believe a traffic violation had occurred. *Popke*, 317 Wis. 2d 118, ¶14 (citing *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)). “In other words, probable cause exists when the officer has ‘reasonable grounds to believe that the person is committing or has committed a crime.’” *Id.* (quoting *Johnson*, 75 Wis. 2d at 348).

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<sup>3</sup> Wisconsin courts have traditionally stated that traffic stops are reasonable if the officers have probable cause to believe a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed. *See, e.g., State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (citing *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)). In an opinion issued July 14, 2015, our supreme court rejected a defendant’s argument that this dual standard means “an investigative stop may be based on reasonable suspicion, but a stop for an observed violation must be based on probable cause.” *State v. Houghton*, 2015 WI 79, ¶28, 364 Wis. 2d 234, 868 N.W.2d 143. The court instead held “that reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.” *Id.*, ¶30.

Because Kastens stopped Hembel based on what Kastens believed was an observed violation of a traffic law, and because the stop occurred before *Houghton* was decided, the parties contend probable cause is the applicable standard for determining whether the stop was reasonable. Consistent with the parties’ framing of the issue, we therefore address whether Kastens had probable cause to believe Hembel violated a traffic law. Regardless, even applying reasonable suspicion, we would nevertheless conclude the State failed to carry its burden at the suppression hearing to demonstrate Kastens had a reasonable suspicion Hembel violated WIS. STAT. § 346.54.

¶10 The State argues Kastens had probable cause to believe Hembel violated WIS. STAT. § 346.54. As a threshold matter, we observe that WIS. STAT. § 346.54 sets forth the requirements for parking “[u]pon streets where stopping or parking is authorized or permitted.” *See* § 346.54(1). The State did not introduce any evidence at the suppression hearing indicating that stopping or parking was permitted on 70th Avenue, the street where Hembel’s vehicle was stopped, and the circuit court did not make any factual findings on that issue.<sup>4</sup> The parties and the court simply assumed that stopping or parking was permitted on 70th Avenue, such that § 346.54 applied. Presumably, if stopping or parking were not permitted on 70th Avenue, Hembel’s act of stopping or parking on that road would have been prohibited by another statute. However, because the State does not argue Kastens had probable cause to believe Hembel violated any statute other than § 346.54, we assume without deciding that § 346.54 governed his conduct.

¶11 Based on the evidence introduced at the suppression hearing, we conclude Kastens lacked probable cause to believe Hembel violated WIS. STAT. § 346.54. Section 346.54(1)(a) sets forth three requirements for parking on streets where traffic is permitted to move in both directions simultaneously and where angle parking is not clearly designated:<sup>5</sup> (1) a vehicle must be parked parallel to

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<sup>4</sup> The only factual finding the court made regarding the area where Hembel stopped was that it was “a rural area.”

<sup>5</sup> No evidence was introduced at the suppression hearing to demonstrate that traffic is permitted to move in both directions simultaneously on the section of 70th Avenue where Hembel stopped his vehicle or to show that angle parking is not clearly designated at that location. The parties and the circuit court simply assumed those conditions were satisfied, such that WIS. STAT. § 346.54(1)(a) applied. Because neither party raises any argument to the contrary, we likewise assume § 346.54(1)(a) applies.

the edge of the street; (2) it must be headed in the direction of traffic; and (3) it must be on the right side of the street.

¶12 Kastens' testimony demonstrates that Hembel complied with each of these requirements. First, Kastens testified Hembel's vehicle was positioned parallel to the center line. The only reasonable inference from that testimony is that the vehicle was also parallel to the edge of the road. Second, reading Kastens' testimony as a whole, it is clear Hembel's vehicle was heading in the direction of traffic. Third, Kastens specifically testified Hembel's vehicle was positioned on the right side of the road. Thus, the evidence demonstrates Hembel complied with § 346.54(1)(a).

¶13 WISCONSIN STAT. § 346.54(1)(d), in turn, sets forth additional requirements for parallel parking. As relevant here, § 346.54(1)(d) provides that, in parallel parking, when a vehicle is parked on the right side of the road, it must be parked facing in the direction of traffic with its right wheels within twelve inches of the curb or edge of the street.

¶14 With respect to the first requirement of WIS. STAT. § 346.54(1)(d), Kastens' testimony indicates Hembel's vehicle was facing in the direction of traffic. However, it is impossible to determine whether Hembel complied with the second requirement of the statute because Kastens did not testify regarding the distance between the right wheels of Hembel's vehicle and the edge of the street. Kastens' only testimony about the position of Hembel's vehicle was that the vehicle was on the right side of 70th Avenue, centered in the lane of traffic. The State did not provide any evidence about the width of 70th Avenue that might have permitted an inference, based on Kastens' testimony, that the wheels were not within twelve inches of the road's edge. All we know, based on the record, is

that Hembel was stopped in a “rural” area. Consequently, any inference that Hembel’s vehicle was not parked within twelve inches of the road’s edge would be based upon sheer speculation. As a result, the State failed to meet its burden to prove Kastens had probable cause to believe Hembel violated § 346.54(1)(d). *See State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973) (“Where a violation of the fourth amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state.”).<sup>6</sup>

¶15 The evidence introduced at the suppression hearing was therefore insufficient to establish probable cause for the stop of Hembel’s vehicle. Accordingly, we affirm the order granting Hembel’s motions to dismiss and suppress, albeit on different grounds from those relied upon by the circuit court. *See State v. Gaines*, 197 Wis. 2d 102, 109 n.5, 539 N.W.2d 723 (Ct. App. 1995) (“[W]e may affirm a judgment or order supported by the record even though the [circuit] court may have reached the same result for a different reason.”).

*By the Court.*—Order affirmed.

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

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<sup>6</sup> The parties did not cite WIS. STAT. § 346.54(1)(d) to the circuit court and do not address it in their arguments on appeal.



