

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 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 No. 2016AP385-CR

Cir. Ct. No. 2014CT121

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY JACOB UDELHOFEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
CRAIG R. DAY, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Jeffrey Udelhofen appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), third offense. Udelhofen challenges the denial of his suppression motion,

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

arguing the arresting officer did not have reasonable suspicion to stop his vehicle. For the reasons discussed below, I affirm.

BACKGROUND

¶2 Udelhofen was charged with operating a motor vehicle while under the influence of an intoxicant and PAC, both as third offenses, following a traffic stop on October 17, 2014. Udelhofen moved to suppress evidence obtained from the traffic stop on the ground that there was no reasonable suspicion for the initial stop. The circuit court denied Udelhofen's motion following a hearing, concluding that the arresting officer had probable cause to stop Udelhofen's vehicle. Thereafter, Udelhofen pled no contest to third offense PAC. Udelhofen appeals.

DISCUSSION

¶3 In order for an investigatory stop to be constitutionally valid, an officer must have at least reasonable suspicion to believe that a crime or traffic violation has been or will be committed. *See State v. Popke*, 2009 WI 37, ¶¶10-11, 317 Wis. 2d 118, 765 N.W.2d 569. 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.

¶4 Whether reasonable suspicion exists to stop a vehicle is a question of constitutional fact 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.*

¶5 WISCONSIN STAT. § 346.05 provides that all vehicles are to be driven on the right side of the roadway except in certain enumerated exceptions, none of which are at issue here. In *State v. Puchacz*, 2010 WI App 30, ¶20, 323 Wis. 2d 741, 780 N.W.2d 536, this court held that an officer had probable cause to stop a motor vehicle for violation of § 346.05 after the officer observed the vehicle cross the center line.

¶6 At the hearing on Udelhofen's motion, the sole witness to testify was Police Officer Mark Schwartz. Officer Schwartz testified that at approximately 9:52 p.m. on October 17, 2014, he observed a vehicle driven by Udelhofen stopped in a lane of traffic on Stage Road, a two-lane road in Grant County. Officer Schwartz testified that the vehicle began moving and after it passed Officer Schwartz's vehicle, Officer Schwartz began to following the vehicle. Officer Schwartz testified that while he was following the vehicle, he observed the vehicle cross into the left lane.

¶7 Officer Schwartz testified that although Stage Road is a two-lane roadway, there are no markings on the road which designate north and southbound traffic or fog lines. Officer Schwartz testified, however, that had the centerline been marked, half of the vehicle would have been in the oncoming traffic lane. A video of Udelhofen's vehicle traveling on Stage Road and of the traffic stop was admitted into evidence at the hearing. The video shows that prior to initiating the traffic stop, while the vehicle was driving on what appears to be a straight portion of the road, Udelhofen's vehicle traveled down the center of the roadway.

¶8 Udelhofen argues that the evidence at the hearing was insufficient to establish that Officer Schwartz had reasonable suspicion to stop his vehicle because the State did not specify until its closing arguments that WIS. STAT. § 346.05 was the traffic violation that Officer Schwartz reasonably believed that Udelhofen violated, and because the State failed to present evidence of the actual width of Stage Road. Udelhofen also points out that Officer Schwartz did not testify that he observed Udelhofen's vehicle swerving, and also Udelhofen's vehicle remained within the narrow roadway at all times.

¶9 Udelhofen misunderstands the burden for reasonable suspicion to justify a traffic stop. For an initial stop to be valid, the officer must have at least reasonable suspicion, under the totality of the circumstances, to believe that a crime or traffic violation has been or will be committed. *Popke*, 317 Wis. 2d 118, ¶10, and *Walli*, 334 Wis. 2d 402, ¶8. The constitutionality of an initial stop does not depend on when the State specifies at a suppression hearing the statute the officer believed was violated, nor does an actual violation have to have occurred.

¶10 In this case, Officer Schwartz testified that he observed Udelhofen's vehicle cross the center of the road into the left lane of traffic, and the video admitted at the hearing shows that Udelhofen's vehicle drove down the center of the roadway for approximately five seconds. I conclude that Officer Schwartz had at least reasonable suspicion to believe that Udelhofen had violated WIS. STAT. § 346.05, and therefore affirm.

By the Court.—Judgment affirmed.

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

