COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2183-CR **Cir. Ct. No. 2014CT1413**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SABRINA MARIE HEBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Sabrina Hebert appeals a judgment of conviction for second-offense operating a motor vehicle with a prohibited alcohol concentration. She contends the circuit court erred when it denied her motion to suppress because

[1] 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.

its findings of fact were clearly erroneous, and there were no reasonable grounds for law enforcement to conduct a traffic stop of her vehicle. We disagree and affirm.

BACKGROUND

¶2 Hebert was arrested for operating a motor vehicle while intoxicated and later charged with operating with a prohibited alcohol concentration. At the hearing on the motion to suppress, deputy Marc Shield of the Brown County Sheriff's Department testified he was on patrol at 2:30 a.m., when he observed the tires of a vehicle ahead of him, later determined to have been driven by Hebert, touch the center dividing line of a four-lane thoroughfare—i.e., two lanes in each direction with no dividing median. Shortly thereafter, Shield activated his squad car video feed and continued to observe the vehicle as Shield drove in the right-hand lane and Hebert drove in the left-hand lane closest to the center line.[2]

¶3 Shield testified that, over the course of his observations—only a portion of which occurred while his squad car video was operating—he watched Hebert's vehicle partially touch the center line three times. In particular, Shield testified that when he observed Hebert touch the center line a third time, "both [driver side] tires were completely touching the centerline." Concerned about the potential for a head-on collision after witnessing this, Shield activated his emergency lights and conducted a traffic stop of Hebert's vehicle. Once Shield approached the vehicle, he noticed Hebert exhibited signs of intoxication and conducted field sobriety tests that led to her arrest.

[2] The squad car video that recorded the traffic stop was played before the circuit court during Shield's testimony.

¶4 Hebert also testified at the hearing, saying she did not recall touching or crossing the center line. She also testified that she was holding her phone in her hand for navigational use during the period in which Shield observed her vehicle.

¶5 The circuit court denied Hebert's suppression motion. In reference to the squad car video, the court found that Hebert made at least one "very clear" and quick movement from the left edge of the lane to the right side when she was approached by a vehicle in the nearest oncoming lane. The court also found that Hebert was "touching the centerline or coming very close to the centerline." The court concluded, based on Shield's testimony regarding his training and experience, the time of night, and the fact Hebert's vehicle was approaching a center line with oncoming traffic and touched or came very close to the center line, that Shield could reasonably conclude the vehicle was being operated by someone who was impaired. The court also concluded Shield possessed probable cause, based upon his observations, that Hebert committed a "violation of encroaching on the other lane" when her vehicle was touching or coming close to the center line. Immediately following the motion hearing, Hebert pled no contest to operating a motor vehicle with a prohibited alcohol concentration. She now appeals the denial of her motion to suppress pursuant to WIS. STAT. § 971.31(10).

DISCUSSION

¶6 Hebert argues Shield did not possess reasonable suspicion to believe she was operating a vehicle while intoxicated.[3] Whether a traffic stop was reasonable is a question of constitutional fact to which we apply a two-step standard of review. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles. ***Id.***

¶7 Traffic stops by law enforcement are considered seizures under the Fourth Amendment. ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. A law enforcement officer may conduct a traffic stop when he or she possesses reasonable suspicion that, "in light of his or her training and experience," a crime or other unlawful offense has been or may be committed. ***Post***, 301 Wis. 2d 1, ¶13. Specific, articulable facts must serve as a basis for reasonable suspicion. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). If an officer may draw a reasonable inference of unlawful activity from those facts, the stop is lawful, even if the underlying facts by themselves represent innocent conduct. ***Id.***

[3] The State on appeal raises an alternative argument that the officer had probable cause to believe Hebert violated WIS. STAT. § 346.13(3) for deviating outside her designated lane. We need not reach this argument. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate court need not reach multiple issues if one is dispositive). On this point, however, we also observe that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." ***State v. Houghton***, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143.

¶8 We first reject Hebert's claim that the circuit court's findings of historical fact were "clearly erroneous." *See* ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (appellate court will evaluate findings of circuit court under clearly erroneous standard when those findings are based upon review of a video recording and conflicting testimony). We uphold the circuit court's findings of historical fact "unless that determination goes against the great weight and clear preponderance of the evidence." ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621.

¶9 Hebert contends the circuit court clearly erred when it found her vehicle "was touching the center line or coming very close to the center line." Hebert alleges a lack of clarity in both the video and Shield's testimony. While at one point she claims the squad car video "directly contradicts" Shield's testimony that he saw Hebert cross the center line, in other portions of her argument she contends only that the video "was not clear enough" and did not "unequivocally show" Hebert's vehicle touching or crossing the center line.

¶10 We reject Hebert's argument. Hebert is essentially inviting us to make findings of fact, which this court does not do. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). More specifically, we cannot accept Hebert's invitation to consider whether Shield's observations were inherently unreliable, and that her own testimony was correct, simply because the squad car video does not unambiguously support a portion of Shield's testimony. *See* ***Walli***, 334 Wis. 2d 402, ¶14. An appellate court cannot independently reach a factual finding from its review of a video recording when the circuit court's findings of fact rely upon evaluating the witnesses presented to the court in combination with any observations of the video. *See* ***id.*** The circuit court had the opportunity to hear testimony from both Shield and Hebert, and it was entitled to

resolve any factual dispute that may have arisen between their accounts. *See* ***id.***; s*ee also* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987) ("The credibility of witnesses and weight to be given their testimony are matters for the trial court to decide."). Moreover, Hebert's argument in this regard ignores Shield's testimony that some of the driving behavior he observed occurred before the video began. Having reviewed the record, including the squad car video, we conclude the circuit court's factual findings are not clearly erroneous.

¶11 We next reject Hebert's contention that Shield did not observe any articulable facts that would lead to a reasonable suspicion the driver of the vehicle was operating it while intoxicated. She argues that, regardless of the circuit court's factual findings, her touching of the center line, without more, cannot be a basis for a suspicion of intoxication. On this point, Hebert correctly notes ***Post*** rejected the bright-line rule that "weaving within a single lane may alone give rise to reasonable suspicion." ***Post***, 301 Wis. 2d 1, ¶20. ***Post***, however, also rejected the notion that "weaving within a single lane must be erratic, unsafe, or illegal to give rise to reasonable suspicion." ***Id.***, ¶26. We instead must "look to the totality of the facts taken together" to determine if a common sense inference of intoxication could be drawn from them. ***Id.***, ¶16 (quoting ***Waldner***, 206 Wis. 2d at 58).

¶12 Shield observed several factors that, when considered in context, permitted a reasonable inference that Hebert was driving while intoxicated. Hebert was consistently weaving in her lane, as Shield observed her partially touch the center line several times within a short period of time. This included at least one instance where Shield observed Hebert touch the center line with both of her driver-side tires. The record is thus consistent with the circuit court's finding that Hebert was "touching the centerline or coming very close to the centerline."

The circuit court additionally found upon reviewing the video that Hebert, when approaching the center line on one occasion, quickly corrected her movement when "confronted by the headlights of the vehicle in front of her" from the oncoming left lane. Shield could reasonably infer from this quick course correction that Hebert was having difficulty focusing on her driving.

¶13 While these factors taken alone may not necessarily appear "erratic," a series of such similar movements at that time of night, plus a near move into a lane with more than one directly oncoming vehicle, lends itself to a reasonable suspicion that the driver may have been intoxicated. After being in a position to observe the driving behavior and reactions of the vehicle's driver, including the fact that the vehicle's tires touched or crossed the center line, Shield was not required to hypothesize various innocent explanations which may have explained the deviations, much less ignore the dangers posed therefrom. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Whatever the actual cause, Shield, upon witnessing suspicious driving conduct, was allowed to investigate further and ascertain the reason for these movements. *See* ***Waldner***, 206 Wis. 2d at 59-60 ("Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity.").

¶14 Hebert maintains her driving behavior was less suspicious than that of the driver in ***Post***, who drove in a continued "S-pattern … over two blocks" that was "neither erratic nor jerky" between a traffic lane and a parking lane. ***Post***, 301 Wis. 2d 1, ¶5. She also distinguishes several cases cited by the State involving vehicles "aggressively" or "rapidly" accelerating, and claims her driving behavior exhibited no such similar factors. *See, e.g.*, ***State v. Anagnos***, 2012 WI 64, ¶6, 341 Wis. 2d 576, 815 N.W.2d 2d 675; ***Waldner***, 206 Wis. 2d at 53. Hebert's

reliance on these characteristics is misplaced. Whether driving behavior is erratic, illegal, or unsafe is not, in and of itself, determinative in the totality of the circumstances. *See* ***Post***, 301 Wis. 2d 1, ¶23 (citing ***Waldner***, 206 Wis. 2d at 53).

¶15 To that point, Hebert's driving behavior, taking into account the surrounding facts, could allow a reasonable inference of suspicious driving conduct. Shield observed late at night three actual or near lane deviations within a minute, one in which Hebert reacted due to oncoming traffic, and another in which she touched or came very close to crossing the center line. Nearly diverging from a lane of traffic is one thing, but doing so in the specter of oncoming traffic, with no dividing median, at 2:30 in the morning is quite another. Reasonable suspicion does not require Shield to wait until Hebert had made a more-dangerous movement that actually affected oncoming traffic. *See* ***id.*** Given the troubling driving behavior exhibited by Hebert, Shield conducted a traffic stop at the point he did, and we conclude he was permitted to do so.

By the Court.—Judgment affirmed.

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