

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2017

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. 2016AP1427-CR

Cir. Ct. No. 2014CM1589

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE L. PERKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
MICHAEL MORAN, Judge. *Affirmed.*

¶1 STARK, P.J.¹ Terrence Perkins appeals a judgment convicting him of second-offense operating a motor vehicle while intoxicated (OWI) and misdemeanor bail jumping. Perkins argues the officer who stopped his vehicle

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise stated.

lacked reasonable suspicion or probable cause to believe he had committed a traffic violation. We conclude the officer had reasonable suspicion to stop Perkins' vehicle, and, accordingly, we affirm.

BACKGROUND

¶2 Perkins was charged with second-offense OWI and misdemeanor bail jumping. He moved to suppress all evidence obtained as a result of Wausau police officer Nathaniel Stetzer's stop of his vehicle, asserting the stop was not supported by probable cause and Perkins "was not guilty of any traffic violations."

¶3 At the suppression hearing, Stetzer testified he was on duty at 2:32 a.m. on the night in question. While driving his squad car, he made a right turn off of Third Avenue in Wausau and began driving west on Sherman Street. He observed a vehicle in front of him, at the intersection of Fourth Avenue and Sherman Street, whose driver was later identified as Perkins. According to Stetzer, Perkins' vehicle "proceeded through the stop sign [controlling traffic on Fourth Avenue] without stopping, passed the crosswalk, and approximately the middle of the intersection, and backed up to allow a car to pass, and then continued through the intersection." Stetzer testified this was a violation of WIS. STAT. § 346.46, which required Perkins to stop "prior to [the] crosswalk at [the] stop sign." Because of this violation, Stetzer drove past the intersection of Fourth Avenue and Sherman Street, turned around, and proceeded to stop Perkins' vehicle.

¶4 Stetzer confirmed his squad car has a video recording device that activates when he turns on the vehicle's red and blue flashing lights. He further testified the device records events beginning thirty seconds before it is activated. Stetzer testified the squad car video from the night Perkins was stopped showed "a

car coming at me, and ... the vehicle that I stopped backing up behind the stop sign and then making a right-hand turn after the car had passed.” When asked by the circuit court whether the squad car camera “record[ed] the stop sign violation,” Stetzer responded, “The original portion of it where he was in the middle of the intersection, it did not. However, it did record him backing up behind the stop sign and then allowing the car to pass.”

¶5 Based on Stetzer’s testimony, the State argued there was “evidence that [Perkins] did go past the part of the stop sign or area [where] he was supposed to stop.” In response, the defense argued Stetzer’s testimony was “incredible,” “ma[de] no sense,” and was not supported by the squad car video. Perkins’ attorney asserted he would have produced the video for the court, but he “discovered that sometime after [he] watched it the video became damaged and is no longer playable.”

¶6 The circuit court denied Perkins’ suppression motion. The court stated:

The officer has testified that he observed a vehicle pull out past the crosswalk, which isn’t that far into the intersection. I am not clear about how far into the intersection the vehicle was, but it appears to have crossed over the crosswalk, outside of the crosswalk into the intersection from what the testimony says, and that the vehicle, according to the officer, backed up, allowed a vehicle to go by.

Presumably, according to the testimony, the vehicle’s front end was outside of the crosswalk area at least somewhat in the lane of a vehicle coming toward it. I am making that observation from the testimony; at least from the testimony from the officer, and that the individual backed up. At the same time, it would appear the officer’s testimony is that his car had turned from Third and onto Sherman. In the course of a block he was able to observe the vehicle come forward, stop, and back up.

¶7 The circuit court conceded the timing of the events described by Stetzer seemed “awfully odd”—namely, that Stetzer testified he observed the stop sign violation while traveling a one-block span on Sherman Street, but he also testified the squad car video, which recorded events beginning thirty seconds before he activated his vehicle’s lights, did not record the initial stop sign violation. However, the court stated “that may be explainable by the fact that, according to the testimony, ... Perkins blew a stop sign right as the officer was turning the corner and observed it.” The court further noted it had not seen any evidence contradicting Stetzer’s testimony. As a result, the court concluded Stetzer had reasonable suspicion to stop Perkins’ vehicle for a stop sign violation.

¶8 Perkins subsequently retained new counsel, who moved for reconsideration of the circuit court’s ruling on the motion to suppress. Counsel argued the video recording from Stetzer’s squad car was, in fact, viewable and contradicted Stetzer’s suppression hearing testimony. Specifically, counsel asserted that, at the beginning of the video, Perkins’ vehicle can be seen “in a legal stopping position” at the corner of Fourth Avenue and Sherman Street. Accordingly, counsel argued any violations of WIS. STAT. § 346.46 “would have to [have occurred] prior to the video turning on.” However, counsel asserted that was not possible because, given the location of the building on the corner of Third Avenue and Sherman Street, Stetzer would not have been able to see Perkins’ vehicle before Stetzer completed his right turn onto Sherman Street. Counsel explained that, based on the squad car video, Stetzer’s vehicle was about seventy-five feet west of Third Avenue when the video began. Counsel asserted it would have taken Stetzer somewhere between 2 and 3.4 seconds to cover that seventy-five-foot distance. Counsel argued, “That is not enough time for the officer to observe the defendant’s vehicle go past the stop sign, come to a complete stop in

the middle of the intersection, reverse back to the stop sign, and stop again (as the video shows the defendant's car stopped at first).”

¶9 The circuit court addressed Perkins' reconsideration motion during the final pretrial hearing. After indicating it had watched the squad car video “many, many times,” the court first found that the video clearly showed Perkins' vehicle backing up. The court explained, “[A]nd I say that because I can see the car backing up, and I can see the car, when it backs up it shakes a little bit and pulls forward.” The court emphasized it had watched the video “many times to make sure we weren't having some kind of effect, like when you are driving by with the video and it makes it look like it's backing up.”

¶10 The circuit court then indicated it had timed the video and determined that thirty seconds elapsed between the start of the video and the point when it appeared Stetzer activated his squad car's lights. The court stated, “It makes perfect sense that the video, in comparison to when the lights were turned on, would not have caught anything prior to what we see on the video.”

¶11 Next, the circuit court addressed Stetzer's testimony at the suppression hearing that Perkins' vehicle was “halfway into the intersection.” After noting it was not sure what Stetzer meant by that statement, the court stated, “I find it hard to believe [Perkins] was in the middle of the street. I don't think that happened.” Regardless, the court indicated it was “not sure” that it made a difference whether Perkins was “all the way into the intersection or into the intersection a bit” for purposes of determining whether Stetzer had reasonable suspicion to stop Perkins vehicle. However, the court acknowledged “[i]t may make a difference as far as credibility.”

¶12 Ultimately, the circuit court explained there was one issue it could not reconcile after watching the squad car video: “Why was Mr. Perkins backing up? ... [W]hy would there be a vehicle backing back into a[n] intersection in the first place?” The court reasoned:

I have never been given an explanation other than the fact that maybe Mr. Perkins crossed the crosswalk potentially into the intersection itself and realized he should back up. That’s the only conclusion that I can come to. I don’t agree in the motion that at the time Mr. Perkins was at a complete stop, and a legal complete stop. I don’t think it bears with the video itself, and I have watched it, and I have watched it, and watched it again to make sure that I really got a sense for what it was.

I have to find Mr. Perkins was at least to some point into the intersection. How far, I don’t know, and realizing that backed up into an area that would have been legal. An officer seeing that could have found or did find that there was a potential violation, and given there was a potential violation ... the stop itself would be a legal stop.

....

I watched the video ... and I simply cannot find, given the standard that’s out there, that the officer was unlawfully stopping Mr. Perkins. I find the reason was he was well into the—over the crosswalk, probably somewhat into the intersection, and I think that’s the reason for it.

¶13 Because it determined, based on the squad car video, that reasonable suspicion supported the stop of Perkins’ vehicle, the circuit court denied Perkins’ motion for reconsideration. Perkins was ultimately convicted of both second-offense OWI and misdemeanor bail jumping. This appeal follows.

DISCUSSION

¶14 A traffic stop is constitutionally permissible when the officer has reasonable suspicion to believe a crime or traffic violation has been or will be committed.² *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. “The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion” of the stop. *State v. Young*, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997). “The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *Id.* at 424.

¶15 Whether there was reasonable suspicion for a traffic stop 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 uphold the circuit court’s findings of historical fact unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. *Id.*

¶16 The circuit court concluded Stetzer had reasonable suspicion to stop Perkins’ vehicle for violating WIS. STAT. § 346.46. As relevant here, § 346.46(1) provides that, except where otherwise directed by a traffic officer or traffic control

² In his motion to suppress, Perkins argued the stop of his vehicle was unconstitutional because it was not supported by probable cause. On appeal, Perkins argues Stetzer had neither reasonable suspicion nor probable cause for the stop. In *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143, our supreme court clarified that “reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops,” *id.*, ¶30, including stops for “observed violation[s],” *id.*, ¶28. Consistent with *Houghton*, the circuit court considered whether Stetzer had reasonable suspicion to stop Perkins’ vehicle. Perkins does not argue on appeal that the circuit court employed the wrong legal standard.

signal, “every operator of a vehicle approaching an official stop sign at an intersection shall cause such vehicle to stop before entering the intersection.” More specifically, at an intersection like the one in this case where there is no clearly marked stop line, “the operator shall stop the vehicle immediately before entering the crosswalk on the near side of the intersection.” Sec. 346.46(2)(b). Based on the squad car video and reasonable inferences from it, the circuit court found that Perkins’ vehicle was “well ... over the crosswalk, probably somewhat into the intersection.” The court further found the video clearly showed Perkins’ vehicle backing up from that position.

¶17 Perkins argues these factual findings are clearly erroneous. *See State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (we apply the clearly erroneous standard of review when reviewing a circuit court’s factual findings based on a video recording). We disagree. Having independently reviewed the squad car video, we conclude it shows that the front of Perkins’ vehicle was approximately even with the curb on Sherman Street when Stetzer’s squad car camera began recording. The video therefore supports the circuit court’s finding that Perkins’ vehicle was well over the crosswalk and “somewhat” into the intersection. The video also clearly shows Perkins’ vehicle backing up from that position before making a right turn onto Sherman Street from Fourth Avenue. While Perkins suggests that what appears to be backing up may actually have been caused by a change in the camera angle, he cites no evidence in support of that assertion. Moreover, “a factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record.” *See State v. Wenk*, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417. Based on the squad car video, the circuit court’s findings that Perkins’ vehicle passed the crosswalk and subsequently backed up from that position are not

against the great weight and clear preponderance of the evidence and, accordingly, are not clearly erroneous. See *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748.

¶18 We acknowledge the circuit court’s findings do not conclusively demonstrate that Perkins violated WIS. STAT. § 346.46 because it is possible that, prior to the driving shown on the video, Perkins legally stopped his vehicle before entering the crosswalk and only thereafter proceeded forward into the crosswalk in order to obtain a better view of the cross-traffic on Sherman Street. For two reasons, however, this possibility does not convince us the circuit court erred by denying Perkins’ suppression motion.

¶19 First, as the circuit court recognized, if Perkins’ vehicle was legally stopped at the beginning of the squad car video, there would have been no reason for Perkins to back up from that position before turning right onto Sherman Street.³ The court therefore inferred that Perkins “backed up into an area that would have been legal” because he realized he was not legally stopped. That reasonable inference is supported by the squad car video and, as such, is not clearly erroneous.

¶20 Second, in order to stop Perkins’ vehicle, Stetzer did not need to have conclusive evidence that Perkins violated WIS. STAT. § 346.46, or even probable cause to believe such a violation had taken place. Rather, the stop was constitutionally permissible if a reasonable officer in Stetzer’s position could have

³ The squad car video shows that a vehicle traveling south on Sherman Street drove past Perkins’ vehicle as Perkins was waiting to turn right onto Sherman Street. However, the video also shows it was not necessary for Perkins to back up in order to allow that vehicle to pass his vehicle.

reasonably suspected Perkins violated the statute. *See Young*, 212 Wis. 2d at 424. Based on the squad car video, the circuit court found Perkins' vehicle was positioned past the crosswalk and into the intersection of Fourth Avenue and Sherman Street. The court further concluded the video showed Perkins' vehicle backing up from that position. We have already concluded neither of those findings is clearly erroneous. Together, they would have permitted a reasonable officer in Stetzer's position to suspect Perkins had violated § 346.46.⁴

¶21 Perkins emphasizes that, after viewing squad car video, the circuit court found Stetzer's testimony incredible. However, as the foregoing discussion shows, reliance on Stetzer's testimony is not necessary to support a conclusion that reasonable suspicion existed to stop Perkins' vehicle. As explained above, the squad car video in and of itself demonstrates that a reasonable officer in Stetzer's position could have reasonably suspected Perkins violated WIS. STAT. § 346.46. The credibility or incredibility of Stetzer's testimony is therefore immaterial.

¶22 Perkins also asserts the circuit court erroneously found that it made sense the squad car video "would not have caught the traffic violation." However, what the court actually found was that it "makes perfect sense that the video, in comparison to when the lights were turned on, would not have caught anything prior to what we see on the video." Contrary to Perkins' suggestion, there was reasonable suspicion for the stop of Perkins' vehicle based solely on the driving

⁴ There is no evidence in the record that Stetzer saw Perkins stop prior to the crosswalk. Stetzer did not testify that he saw Perkins stop before entering the crosswalk, and the squad car video does not show Perkins doing so. Moreover, Perkins argues there is "no way" Stetzer could have observed Perkins "doing anything not captured by the video," given Stetzer's testimony "that he first had sight of [Perkins'] vehicle after [Stetzer] turned onto Sherman from Third Avenue."

shown in the squad car video. Whether it was possible for Stetzer to observe additional conduct constituting a violation of WIS. STAT. § 346.46 before the squad car camera began recording is therefore irrelevant.

By the Court.—Judgment affirmed.

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

