

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2006

Cornelia G. Clark
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. 2005AP1253

Cir. Ct. No. 2004TR28719

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN D. HAYDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Reversed and cause remanded.*

¶1 DYKMAN, J.¹ Alan Hayden appeals from a judgment of conviction of operating a motor vehicle while under the influence of an intoxicant (OWI),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

first offense. WIS. STAT. § 346.63(1)(a) (2003-04).² Hayden contends that the trial court erred in denying his motion to suppress evidence because the stop of his vehicle was not based on a reasonable suspicion that he was engaged in unlawful conduct. Because we agree with Hayden that the trooper lacked sufficient facts to support a suspicion that Hayden was violating a traffic law when the trooper made the stop, we reverse and remand for further proceedings.³

Background

¶2 The following facts are uncontested. On December 4, 2004, at approximately 1:30 a.m., Wisconsin State Trooper Adrian Logan was driving southbound on County Trunk N north of State Highway 12 and 18 in Dane County. Logan observed a vehicle approaching him that was operating with its passenger's side tires over the unbroken white fog line. Logan turned his squad car around and accelerated to catch up to the vehicle. He noticed that the vehicle's passenger's side tires were not to the right of the fog line as before, but were on the fog line. Logan later testified at the suppression hearing that he believed that such driving behavior was a traffic violation.

¶3 Logan activated his lights and pulled the vehicle over. Upon approaching the vehicle, he noticed the driver's window was already rolled down and he detected a slight odor of intoxicants. Logan identified the driver as Alan Hayden and observed that a passenger was also in the vehicle. Hayden admitted

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ Because we conclude that the stop was not supported by reasonable suspicion, we need not address Hayden's alternate claim that the administration of field sobriety tests impermissibly expanded the scope of the investigatory stop.

to Logan that he had been drinking, but stated it had been three hours since his last drink. Logan administered multiple field sobriety tests and then arrested Hayden for driving under the influence. An intoximeter test showed that Hayden's blood alcohol content exceeded the legal limit of .08. Hayden was later charged with first offense OWI.

¶4 Hayden made an initial motion to suppress evidence that was denied without a hearing for failure to allege sufficient facts. Hayden submitted an amended suppression motion alleging that the investigatory stop was not supported by reasonable suspicion and that, by administering field sobriety tests, Logan expanded the investigatory scope of the stop beyond that which was permissible for a lane deviation. After an evidentiary hearing, the circuit court denied Hayden's motion, and Hayden was convicted of first-offense OWI on a plea of no contest. He appeals.

Discussion

¶5 In a review of a grant or denial of a motion to suppress evidence, we will uphold a circuit court's factual findings unless they are clearly erroneous. *State v. Knight*, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 606 N.W.2d 291. Here, the facts are undisputed. However, whether the trial court's findings of fact satisfy a particular statutory or constitutional standard is a question of law that we review de novo. *See State v. Hughes*, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621.

¶6 Hayden contends the traffic stop was not supported by reasonable suspicion that a traffic violation occurred because driving on or over the fog line is

not a violation of WIS. STAT. § 346.13⁴ or any other law. The State responds that that the stop was based on a reasonable suspicion that Hayden violated § 346.13(3), which provides that “the operator of a vehicle shall drive in the lane designated.” Driving on or over the fog line is not driving in a designated lane, the State contends. Even if § 346.13 does not prohibit such driving behavior, the State argues that the totality of the circumstances nonetheless gave rise to a reasonable suspicion that Hayden was violating a criminal or traffic law.

¶7 The Fourth Amendment provides that “[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause” U.S. Const.

⁴ WISCONSIN STAT. § 346.13 provides:

Whenever any roadway has been divided into 2 or more clearly indicated lanes, including those roadways divided into lanes by clearly indicated longitudinal joints, the following rules, in addition to all others consistent with this section, apply:

(1) The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.

(2) Upon a 2-way roadway which is divided into 3 lanes the operator of a vehicle shall not drive in the center lane except when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn, or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is marked or posted to give notice of such allocation.

(3) Notwithstanding sub. (2), when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.

Amend. IV.⁵ The United States Supreme Court carved out an exception to the probable cause requirement in *Terry v. Ohio*, 392 U.S. 1, 22 (1968), which permits brief, warrantless detention of persons for investigatory purposes when officers possess specific and articulable facts supporting a reasonable suspicion that criminal activity is afoot.⁶ In Wisconsin, this rule also applies to investigatory traffic stops where the driver is reasonably suspected of violating a non-criminal traffic ordinance. See *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999).

¶8 When determining whether reasonable suspicion exists, we examine the cumulative effect of the facts in their totality. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). An investigatory stop may be justified on observations of lawful conduct when reasonable inferences drawn from the conduct indicate that criminal activity is afoot. *Id.* at 57. The test is an objective one, and the focus of our inquiry is reasonableness: “What would a reasonable police officer reasonably suspect in light of his or her training and experience[?]” *Id.* at 56. Whether the undisputed facts meet a legal standard is a question of law

⁵ Article I, § 11 of the Wisconsin Constitution also protects “the right of the people ... against unreasonable searches and seizures.” For purposes of this opinion, we treat the protections of this provision as coextensive with those of the Fourth Amendment to the U.S. Constitution. See *State v. Fry*, 131 Wis. 2d 153, 172-173, 388 N.W.2d 565 (1986).

⁶ The Wisconsin legislature codified *Terry v. Ohio*, 392 U.S. 1 (1968), in WIS. STAT. § 968.24, which provides:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person’s conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

subject to de novo review. *See State v. Miller*, 2004 WI App 117, ¶20, 274 Wis. 2d 471, 683 N.W.2d 485.

¶9 We first address Logan’s belief that Hayden violated a traffic ordinance by driving over and on the fog line. At the suppression hearing, Logan testified that he made the stop because he believed that Hayden violated a traffic ordinance. Specifically, the State contends that Hayden violated WIS. STAT. § 346.13(3). We disagree. Subsection (3) of § 346.13 provides that drivers “shall drive in the lane designated” but neither it nor any other part of Chapter 346 states that the part of a roadway to the right of and including the fog line is outside of a designated lane.⁷ Further, we find no published cases holding that driving over or on the fog line is contrary to § 346.13 or any other statute. Logan’s belief that Hayden violated a traffic ordinance may have been a reasonable mistake made in good faith. However, reasonable suspicion cannot be based on an officer’s reasonable but mistaken view of the law *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999), *aff’d by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. *See also United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999), and *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000) (holding that an investigative stop made in good faith but based on a mistaken view of the law is not reasonable). We therefore conclude that Logan

⁷ Neither “lane” nor “fog line” is defined by statute. *See* WIS. STAT. §§ 346.01(1) and 340.01. WISCONSIN STAT. § 340.01(54) defines a “roadway” as “that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder. In a divided highway the term ‘roadway’ refers to each roadway separately but not to all such roadways collectively.” No statute suggests that vehicles are prohibited from traveling on an improved highway to the right of the fog line.

lacked reasonable suspicion to stop Hayden on the basis that he committed a traffic violation.

¶10 However, “[a]s long as there was a proper legal basis to justify the intrusion, the officer’s subjective motivation does not require suppression of the evidence or dismissal.” *State v. Baudhuin*, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987). Thus, the stop may have been justified no matter Hayden’s subjective intent as long as under the totality of the circumstances a reasonable officer would have reasonably suspected that Hayden was engaged in unlawful conduct. “We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn.” *Waldner*, 206 Wis. 2d at 58.

¶11 The State notes that Logan testified that he has been a state trooper for nine years, and that during that time he has performed hundreds of driving while intoxicated investigations. The State asserts that Hayden would have known from his experience that many people drive home from the bars at around 1:30 a.m. Based on the time of day and Logan’s observation of Hayden’s vehicle driving over and then on the fog line, the State contends Logan had a legal basis to stop Hayden. The State argues this case is similar to *Waldner*, where reasonable suspicion was found to exist based on the cumulative effect of several innocent facts. There, the defendant was spotted driving slowly through town at 12:30 a.m.; stopped briefly at an unmarked intersection; turned onto a cross-street and accelerated at a high rate of speed; then pulled into a curbside parking place and poured a mixture of ice and liquid onto the roadway. *Waldner*, 206 Wis. 2d at 53.

¶12 We conclude that the cumulative effect of the facts here does not give rise to a reasonable inference that Hayden may have been violating a traffic

law. As a result, Logan did not have a legal basis to stop Hayden's vehicle. Compared to *Waldner*, the "building blocks of fact" in this case are few and fail to support a reasonable suspicion of impaired driving or any other traffic violation. Logan observed Hayden driving over the fog line, then later on the fog line, at approximately 1:30 a.m., and Logan is experienced in detecting impaired driving. Viewed objectively, these facts do not allow a reasonable officer to reasonably suspect that unlawful conduct was afoot. Moreover, the record does not establish that a reasonable officer would conclude that driving over or on the fog line was indicative of driving while impaired, or even that such driving behavior was unusual.

¶13 We conclude that Logan did not have reasonable suspicion to stop and detain Hayden's vehicle. On this basis, the circuit court erred in denying Hayden's motion to suppress evidence. We therefore reverse Hayden's conviction and remand to the circuit court for further proceedings.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

