COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP821-CR **Cir. Ct. No. 2006CT1278**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. HAANSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Reversed.*

¶1 BROWN, C.J.[1] In this case, where Brian J. Haanstad was ultimately convicted of operating a vehicle while intoxicated—second offense, the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

sole evidence supporting the stop of Haanstad's vehicle was the arresting officer's observation that the vehicle "cross[ed] the fog line on two different occasions" at 1:00 a.m. This is simply not enough to create a "reasonable" suspicion that Haanstad was driving erratically and we must reverse.

¶2 The law is clear that law enforcement officers are permitted a brief, warrantless detention of drivers reasonably suspected of violating noncriminal traffic ordinances. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W. 2d 541 (1999). 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 subject to de novo review. *See* ***State v. Miller***, 2004 WI App 117, ¶20, 274 Wis. 2d 471, 683 N.W.2d 485.

¶3 Haanstad argues, as he did in the circuit court, that the officer lacked reasonable suspicion to stop his vehicle. He renews his primary argument that crossing the fog line is not illegal activity as a matter of law and he therefore did not break any traffic laws prior to the investigatory stop. In his view, the only statute upon which the State can rest its case is WIS. STAT. § 346.13(3), which provides that drivers "shall drive in the lane designated." But Haanstad argues that neither this statute nor any other part of WIS. STAT. ch. 346 states that the fog line is a boundary line for a lane, such that driving beyond it is illegal conduct.

¶4 The argument is a red herring. In ***Waldner***, our supreme court definitively stated that unlawful conduct, whether it be in the nature of a violation of the traffic code or the criminal code, is not a condition precedent to a legal investigatory stop. *See* ***Waldner***, 206 Wis. 2d at 58-59. The supreme court expressly rejected the argument that lawful conduct cannot form the basis for reasonable suspicion, holding that, if this were correct, "there could never be investigative stops unless there [were] simultaneously sufficient grounds to make an arrest. That is not the law." ***Id***. at 59. So, whether crossing the fog line is legal or illegal is totally irrelevant to our analysis.

¶5 What is relevant is the "totality of the circumstances." ***State v. Allen***, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999). In other words, we must ask, in light of the totality of the circumstances, would a reasonable police officer have reasonably suspected that Haanstad was driving illegally? To answer this question, we are mindful that the question of what constitutes reasonableness is a "common sense test." ***Waldner***, 206 Wis. 2d at 56.

¶6 So, here is what we have and all we have. The officer saw, in the space of a half-mile, that the vehicle crossed the fog line twice at 1:00 a.m. In cases far too numerous to cite, there were significant observations made by the officer in addition to crossing the fog line, which, taken together, showed "reasonable suspicion." For example, officers observed weaving within the lane, or suddenly speeding up or slowing down, or going way over or way under the speed limit. Common sense would tell a reasonable police officer that the drivers of these vehicles would be reasonably suspected of lacking the necessary control of their vehicles such that they are driving recklessly under WIS. STAT. § 346.62, or may be under the influence of alcohol or drugs contrary to WIS. STAT. § 346.63. The apparent lack of control or reckless driving is what justifies the stop.

¶7 But in this case, we simply cannot tell from the scant evidence before us *how* Haanstad was driving. So, we cannot know whether the reasonable police officer would form a commonsense impression that the driver of the car being observed was having control problems. To the contrary, common sense would suggest that two instances of tires going over the fog line, no matter what time of day or night, does not—without more information—signal that the driver was having a problem controlling the vehicle. If we had been told, for example, that Haanstad strayed over the fog line for several seconds each time before pulling his vehicle back into the lane, this would be sufficient for us to conclude that a reasonable officer would see this as uncommon behavior. Or, if we had been told that the driver jerked or swerved the vehicle back into the lane, then the evidence would be sufficient for us to assess the commonsense conclusion of the reasonable police officer. But again, we do not have the information with which to assess whether the officer's opinion derived from a commonsense impression of articulable facts.

¶8 This is especially so here where the first instance of going over the fog line occurred just after Haanstad had entered Highway 16 from an on-ramp. There are probably a multitude of drivers every day who do not negotiate an entrance to a freeway without going over the fog line. Yet their driving is not suspect.

¶9 So, even though the officer's hunch resulting in an arrest for driving while intoxicated turned out to be a good hunch, it was not based on facts from which we can find "reasonable" suspicion. The law requires this. We must reverse.

By the Court.—Judgment reversed.

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