

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 9, 2008

David R. Schanker
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. 2007AP2536-CR

Cir. Ct. No. 2007CT173

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER L. CARROTHERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

¶1 NEUBAUER, J.¹ Walter L. Carrothers appeals from a judgment convicting him of operating a motor vehicle while under the influence of an

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.

intoxicant (OWI), third offense. He argues that the trial court erred in denying his motion to suppress evidence because the officer lacked probable cause to initiate a traffic stop. We reject Carrothers' argument. We conclude that the proper constitutional standard for evaluating the initial investigatory stop in this case is reasonable suspicion, not probable cause. We uphold the trial court's denial of Carrothers' motion to suppress. We affirm the judgment.

¶2 We recite the facts from the transcript of the suppression hearing, where the sole witness was the arresting officer, Wisconsin State Patrol Trooper Luke Kraemer. Kraemer is a seven-and-one-half-year veteran of the state patrol. At approximately 6:30 p.m. on January 20th, 2007, Kraemer was on patrol in a marked state patrol car, driving west on Kohler Memorial Drive in the right lane.² Kraemer observed Carrothers' vehicle make a left-hand turn onto Kohler Memorial Drive from 14th Street into the left lane directly in front of Kraemer's vehicle. Kraemer noticed that Carrothers' vehicle was following another vehicle "very closely." Kraemer then observed Carrothers' vehicle drift into and strike the raised center median between 14th and 15th Street and then jerk back into his lane.

¶3 Kraemer pulled in behind Carrothers and activated his police lights at Kohler Drive and 17th Street to stop Carrothers based on the observed tailgating and striking the curb. Carrothers was in the process of initiating a left turn onto 17th Street, which he completed. Carrothers continued driving for a block and a half on 17th Street, passing what Kraemer identified as viable places to stop, before pulling over. Kraemer informed Carrothers that he had been following too

² Kohler Memorial Drive has two westbound lanes, separated from the eastbound side at the point in question by a raised curb median.

closely and that he had hit the curb. During the ensuing stop, Carrothers admitted that he had hit the curb and that he had consumed “two beers” at the Sheboygan Outboard Club. Carrothers subsequently failed field sobriety tests and was arrested for drunk driving. Blood test results placed his blood alcohol level at .16 percent at the time of the incident.

¶4 Carrothers filed a motion to suppress any and all evidence resulting from the traffic stop on the grounds that the stop was unsupported by reasonable suspicion and thus illegal. After a hearing, the court concluded that the stop and investigatory detention of Carrothers were legally justified and denied the motion to suppress. Carrothers pled no contest to the OWI charge and now appeals.

DISCUSSION

¶5 Carrothers’ motion to suppress argued the validity of the stop based on the standard of reasonable suspicion and the court made a determination that the stop and investigatory detention were justified. Carrothers advances on appeal that the correct standard is probable cause and that Kraemer lacked probable cause to initiate a traffic stop for violations of WIS. STAT. § 346.13 (lane deviation) and WIS. STAT. § 346.14 (following too closely).³ The State aptly notes in its brief that Carrothers seeks to elevate the legal standard on appeal. We reject

³ WISCONSIN STAT. § 346.13 governs “driving on roadways laned for traffic” and provides in relevant part at subsec. (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.”

WISCONSIN STAT. § 346.14 governs the distance between vehicles and provides in relevant part at subsec. (1): “The operator of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.”

Carrothers' argument that Kraemer needed probable cause to initiate an investigatory traffic stop. It is clear from the facts found at the suppression motion that the issue turns on reasonable suspicion.

¶6 At the suppression hearing, Kraemer testified that he observed Carrothers' vehicle "following another vehicle very closely." In clarifying what he meant by "very closely," Kraemer testified that "legal following distance is four seconds. He was I would say half a car length which is less than a second." Kraemer testified that he was traveling at approximately twenty miles per hour. Kraemer additionally testified that he continued to follow behind Carrothers and then observed Carrothers strike the median and jerk back into his lane.

¶7 In its ruling, the trial court found:

The vehicle was observed by the officer to hit the median and snow in the median and the vehicle then jerked back into the proper lane of traffic, also the State Patrol Officer observed the same vehicle traveling approximately one-half car length behind the vehicle in front of it, as a result of the observed violation of Section 346.14.

The trial court concluded that "the stop and the investigatory detention of the defendant's motor vehicle was legally justified."

¶8 In reviewing a trial court's ruling on a motion to suppress evidence, we uphold the court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). We review the application of constitutional standards to these facts de novo. *Id.*

¶9 Under the facts of this case, the correct legal standard is that of reasonable suspicion and not probable cause. Carrothers relies on our decision in *State v. Longcore (Longcore II)*, 2001 WI App 15, 240 Wis. 2d 429, 623 N.W.2d

201, for the proposition that Kraemer needed probable cause to stop him based on a traffic violation. However, the question in *Longcore I* was whether the officer had probable cause to make an *arrest* for an equipment violation when the officer's interpretation of the law was incorrect, not whether the officer had reasonable suspicion to temporarily detain the vehicle.⁴ *State v. Longcore (Longcore I)*, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. Indeed, *Longcore I* observed that “[a] brief detention ... is not ‘unreasonable’ if it is justified by a *reasonable suspicion* that the motorist has committed, is committing, or is about to commit an offense.” *Id.* at 6 (citation omitted).

¶10 Here, Carrothers' argument overlooks that Kraemer did not stop Carrothers based solely on his belief that Carrothers was following another vehicle too closely.⁵ While Kraemer testified that this caught his attention and that he believed the distance between the vehicles to be less than the legal standard, he did not indicate a decision to stop Carrothers based on that observation alone.

⁴ The issue in *State v. Longcore (Longcore I)*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620, turned on whether the arresting officer had correctly applied the safety glass statute to a driver who had placed a plastic sheet over a window of his vehicle. The officer had stopped Longcore based on his belief that the plastic window covering constituted an equipment violation and was not acting on a suspicion that warranted further investigation. *Id.* at 8–9. Here, Kraemer's observations involved potential traffic violations that implicated the ability of the driver to operate the vehicle.

⁵ However, based on Kraemer's testimony and the trial court's findings, we have little doubt that Kraemer had probable cause to stop Carrothers based on a violation of WIS. STAT. § 346.14. Pursuant to WIS. STAT. § 345.22, “A person may be arrested [and therefore stopped] without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.” See *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977) (Reasonable grounds and probable cause are synonymous.).

¶11 The law of investigative stops allows a police officer to stop a person upon less than probable cause. *State v. Waldner*, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). An officer may make an investigatory stop of a vehicle based on a reasonable suspicion of a noncriminal traffic violation. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). The constitutional standard for reasonable suspicion as set out in *Terry*⁶ is codified in WIS. STAT. § 968.24:

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.

When reviewing a determination of reasonable suspicion, we must consider the totality of the circumstances. *State v. Williams*, 2001 WI 21, ¶¶21-22, 241 Wis. 2d 631, 623 N.W.2d 106. We apply a commonsense 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. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Applying this constitutional standard to the facts, we conclude that Kraemer had the requisite reasonable suspicion to conduct an investigatory stop.

¶12 Kraemer, an experienced member of the state patrol, testified that he first noticed Carrothers, who was already traveling in front of him, “following another vehicle very closely.” However, Kraemer did not initiate a stop at that

⁶ *Terry v. Ohio*, 392 U.S. 1 (1968).

point. Kraemer, now traveling alongside Carrothers' vehicle, then observed Carrothers' vehicle strike the curb and jerk back into the lane. It was then that Kraemer initiated the stop based on both observations. Carrothers further failed to pull over for a block and a half after Kraemer activated his lights, despite what Kraemer perceived as opportunity to do so.⁷

¶13 Kraemer observed Carrothers engaged in conduct that could constitute multiple violations of state traffic statutes in a very brief span of time and which posed a danger to other drivers. He articulated these facts in detail both to Carrothers and to the trial court. Those events taken together provided Kraemer with reasonable suspicion justifying an investigative stop of Carrothers' vehicle. *See Waldner*, 206 Wis. 2d at 58. We agree with the trial court that the stop and investigatory detention were legally justified, and the resulting denial of Carrothers' motion to suppress for lack of reasonable suspicion was appropriate.

By the Court.—Judgment affirmed.

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

⁷ WISCONSIN STAT. § 346.04(2t) provides, “No operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits.”

