COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP446-CR **Cir. Ct. No. 2007CT230**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. POPKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Reversed*.

¶1 HIGGINBOTHAM, P.J.[1] Michael L. Popke appeals a judgment against him for 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)(d) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

intoxicant as a third offense contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(g)3. Popke pled no contest to the charge following the trial court's denial of his motion to suppress evidence. Popke argues that the arresting officer had neither probable cause to pull him over for violating WIS. STAT. § 346.05 nor reasonable suspicion under the totality of the circumstances to initiate a stop for some other traffic or criminal violation.[2] Because we conclude that neither probable cause existed to justify the stop for a violation of § 346.05 nor reasonable suspicion existed to believe that Popke committed any other traffic or criminal violation, we reverse the order to suppress evidence and the judgment of conviction.

Background

¶2 The following facts are taken from the motion to suppress hearing and are undisputed. On July 8, 2007, at approximately 1:30 a.m., Sergeant Jeff Schlueter, an officer with nearly twelve years of experience, was stationed at the intersection of Beckert Road and Pershing Road in New London. Schlueter observed a truck driven by Popke approaching from the west on Pershing Road, and turn left in front of him onto Cedarhurst Drive. Schlueter pulled his squad car out to follow the truck. Schlueter observed three-quarters of Popke's vehicle go left of the center of the road immediately after it made the left turn. Cedarhurst Drive is divided by a black strip of tar that Schlueter used to identify the middle of

[2] WISCONSIN STAT. § 346.05 provides in relevant part:

> (1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway.

the road. The left turn from Pershing Road onto Cedarhurst Drive is a ninety-degree turn.

¶3 Schlueter observed Popke's vehicle move quickly from its momentary position just left of the center of the road to the right side of the road where it almost hit the curb. Moments later, he observed Popke's truck fade back toward the center of the road and almost hit a median at the center of the road near the intersection of Cedarhurst Drive and Brynnwood Terrace. Schlueter then initiated a traffic stop of the vehicle and subsequently arrested Popke for operating while intoxicated.

¶4 The circuit court denied Popke's motion to suppress because it determined that Schlueter observed a traffic code violation when Popke crossed the center of the road, providing him with legal justification to make the stop. Popke subsequently pled no contest to the operating while intoxicated charge, and the court sentenced him to seventy-five days in jail, fined him $3,491, and revoked his license for thirty-six months. Popke appeals.

Discussion

¶5 Whether a police officer has reasonable suspicion that justifies a warrantless search implicates the constitutional protections against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution.[3] ***State v. Williams***,

[3] The Fourth Amendment to the United States Constitution provides:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

(continued)

2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Determining whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. ***Id***. We apply a two-step standard of review to questions of constitutional fact. ***Id***. First, we review the circuit court's findings of historical fact, and uphold them unless they are clearly erroneous. ***Id***. Second, we review the determination of reasonable suspicion de novo. ***Id***.

¶6 We begin our analysis by reviewing the principles underlying investigative traffic stops. While investigative stops are seizures within the meaning of the Fourth Amendment, police officers may conduct stops even in some circumstances when there is no probable cause to make an arrest. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." ***Whren v. United States***, 517 U.S. 806, 810 (1996). If an officer does not have probable cause to believe a traffic violation occurred, an officer can still make a stop if the officer has reasonable suspicion, under the totality of the facts and circumstances, to believe that a traffic or criminal code

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> particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 11 of the Wisconsin Constitution provides:

> [t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

We ordinarily interpret art. I, § 11 of the Wisconsin Constitution in accordance with the United States Supreme Court's interpretation of the Fourth Amendment. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998).

violation has occurred. *See* ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶7 On appeal, Popke argues that the circuit court erred in concluding that legal justification existed for a stop. First, Popke claims Schlueter lacked probable cause to believe that he violated WIS. STAT. § 346.05 because his conduct was not of the sort prohibited by the statute. Second, he contends that under the totality of the circumstances, Schlueter lacked reasonable suspicion to believe that Popke was in violation of any other traffic or criminal law.[4] We begin with Popke's first argument.

¶8 WISCONSIN STAT. § 346.05 provides that, upon all roadways of sufficient width, drivers "shall drive on the right half of the roadway." The interpretation of statutes is a question of law, which we review de novo. ***State ex rel. Steldt v. McCaughtry***, 2000 WI App 176, ¶11, 238 Wis. 2d 393, 617 N.W.2d 201. Statutory interpretation "begins with the language of the statute." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). If the meaning of the statute is plain, we ordinarily stop the inquiry and apply that meaning. ***Id***.

¶9 The State argues that Popke's conduct is proscribed by WIS. STAT. § 346.05 because the statute requires motorists to "drive on the right half of the

[4] Popke also argues that Schlueter's alleged observation was not possible considering his vantage point and the lack of a yellow centerline on the road. However, the circuit concluded that Schlueter clearly observed Popke drift over the centerline and that nothing blocked his view. We must uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Moreover, as we explain later, even accepting the circuit court's factual findings, Schlueter's observations do not meet the totality of the circumstances test.

roadway" and Popke was "driv[ing]" when three-quarters of his vehicle crossed over the center of the road. The State notes that the word "drive" is defined in WIS. STAT. § 346.63(3)(a)[5] as "the exercise of physical control over the speed and direction of a motor vehicle while it is in motion." Thus, the State argues that even Popke's momentary shift to the left violates the statute. We disagree.

¶10 We conclude that the plain language of WIS. STAT. § 346.05 simply establishes the following basic rule of the road: When driving in Wisconsin, motorists must travel on the right side of the road.[6] Popke's conduct did not

[5] The state turns to another section of the Motor Vehicle Code, WIS. STAT. § 346.63, because "drive" is not defined in WIS. STAT. § 346.05. Here, the State takes the definition from the section covering operating under the influence of an intoxicant or other drug. Statutory language is interpreted in the context in which it is used and in relation to the language of surrounding or closely related statutes. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

[6] Six statutory exceptions to this rule are set forth in WIS. STAT. § 346.05(1), none of which are applicable in this case. They are as follows:

> (a) When making an approach for a left turn under circumstances in which the rules relating to left turns require driving on the left half of the roadway; or
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> (b) When overtaking and passing under circumstances in which the rules relating to overtaking and passing permit or require driving on the left half of the roadway; or
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> (c) When the right half of the roadway is closed to traffic while under construction or repair; or
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> (d) When overtaking and passing pedestrians, animals or obstructions on the right half of the roadway; or
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> (e) When driving in a particular lane in accordance with signs or markers designating such lane for traffic moving in a particular direction or at designated speeds; or
>
> (f) When the roadway has been designated and posted for one-way traffic, subject, however, to the rule stated in sub. (3) relative to slow moving vehicles.

constitute driving down the wrong side of the road within the meaning of § 346.05. Three-quarters of Popke's vehicle momentarily crossed the center of the road and quickly shifted back. The State cites no reported Wisconsin cases, and we are not aware of any, holding that momentarily crossing the center of the road and quickly shifting back violates this statute. Therefore, Schlueter did not have probable cause that Popke committed a traffic violation justifying the traffic stop.

¶11 Having concluded that probable cause did not exist to believe that Popke violated WIS. STAT. § 346.05, we turn to whether Schlueter had reasonable suspicion to believe that Popke committed some traffic or criminal violation under the totality of the circumstances.[7] The State has the burden of establishing that an investigative stop is reasonable. ***Post***, 301 Wis. 2d 1, ¶12. We must decide whether the State has shown "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. ***Terry***, 392 U.S. at 21. While individual facts standing alone may be insufficient to create reasonable suspicion, we look to the totality of the facts taken together. ***Post***, 301 Wis. 2d 1, ¶16.

¶12 Popke argues that under the totality of the circumstances, the officer's brief observations of his driving did not create a reasonable suspicion that a traffic or criminal code violation occurred. He claims that the brevity of the officer's observation—Schlueter observed Popke's vehicle for approximately two blocks before initiating the stop—was an insufficient period of time in which a

[7] The State did not brief the totality of the circumstances test, instead choosing to argue only that Schlueter had probable cause to believe Popke violated WIS. STAT. § 346.05. Nonetheless, we will consider whether the circuit court's decision can be affirmed on these grounds.

reasonable inference of criminal activity could be formed. He contends that the three observed deviations are not uncommon on a narrow residential road. He argues that this type of driving only meets the totality of the circumstances test when it is observed to occur over a longer period of time.

¶13 We conclude that the State has not shown "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop under the totality of the circumstances. ***Terry***, 392 U.S. at 21. The supreme court's recent decision in ***Post*** is illustrative here. In ***Post***, an officer observed the defendant driving partially in the parking lane of a road that measured approximately twenty-two to twenty-four feet from the yellow centerline to the curb, including the parking lane. ***Post***, 301 Wis. 2d 1, ¶3. The officer observed the defendant's car make a "smooth motion toward the right part of the parking lane and back toward the center line." ***Id***., ¶5. The officer testified that the car moved approximately ten feet from right to left, coming within twelve inches of the center line and within six to eight feet of the curb. ***Id***. Applying the totality of the circumstances test, the court determined that the officer observed specific and articulable facts, which taken together with rational inferences from those facts, gave rise to the necessary reasonable suspicion. ***Id***., ¶37.

¶14 Here, Schlueter observed a brief crossover into the left lane immediately after a sharp left turn, followed by two deviations within a narrow lane over approximately two residential blocks, while the officer in ***Post*** observed repeated weaving within a doublewide lane. We cannot say it is at all uncommon for a vehicle to momentarily cross the middle of the road on a narrow residential street with no yellow dividing line. *See* ***id.***, ¶19 (weaving within a single lane may, under the totality of the circumstances, fail to give rise to reasonable suspicion, especially if weaving is minimal or occurs very few times over a long

distance); *see also* ***United States v. Lyons***, 7 F.3d. 973, 976 (10th Cir. 1993), *overruled on other grounds by* ***United States v. Botero-Ospina***, 71 F.3d 783, 786-87 (10th Cir. 1995) (allowing weaving to justify a vehicle stop might subject many innocent people to investigation).

¶15 Further, Schlueter's testimony did not establish how close Popke came to hitting either the curb or median. The court accepted as true that Popke's truck was approximately six-and-a-half feet wide and Cedarhurst Drive was eleven feet wide at the point where Popke nearly hit the median. We note that photographs of the median in the record show that it is an island with a sloped curb. It is unclear from testimony whether Schlueter observed Popke drive on the sloped curb or nearly hit the sloped curb. Popke offered several photographs into evidence that showed numerous tire marks along the median. While Schlueter did not have to rule out innocent explanations for driving behavior, *see* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996), the facts viewed objectively do not support a reasonable inference of unlawful conduct.

¶16 Moreover, Schlueter did not describe the weaving or driving as "erratic." We do not know if Popke's motions were smooth or abrupt. *See* ***People v. Greco***, 783 N.E.2d 201, 206 (Ill. App. 2003); ***State v. Dorendorf***, 359 N.W.2d 115, 117 (N.D. 1984) ("erratic" weaving or driving sufficient to justify an investigative stop) (noted in ***Post***, 301 Wis. 2d 1, ¶25 n. 8). Schlueter did not observe repeated weaving and only witnessed three movements over a short period of time. *Cf.* ***State v. Bailey***, 624 P.2d 663, 664 (Or. App. 1981) (continuous weaving that took place over "substantial distance" sufficient to justify investigative stop) (noted in ***Post***, 301 Wis. 2d 1, ¶25 n. 9).

¶17 We also note that in this case the time of night (1:30 a.m.) and the officer's experience (just under twelve years) argue for the reasonableness of the stop. Each of these factors represents a building block in the totality of the circumstances test. *See* ***State v. Allen***, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999). However, these facts taken with the three irregular movements on a relatively narrow, residential road do not add up to reasonable suspicion. *See* ***Post***, 301 Wis. 2d 1, ¶16 (to show reasonable suspicion, the sum of the whole must be greater than the individual parts). Therefore, we conclude that the totality of the specific and articulable facts presented, taken with all rational inferences thereof, do not support a reasonable suspicion that a violation occurred necessary to justify an investigative stop.

¶18 In sum, we conclude that the traffic stop was unconstitutional because Schlueter had neither probable cause to believe that Popke violated WIS. STAT. § 346.05 nor a reasonable suspicion to believe that Popke committed a traffic or criminal violation. Accordingly, we reverse the order to suppress and the judgment of conviction.

By the Court.—Judgment reversed.

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