

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 30, 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. 2008AP666**

**Cir. Ct. No. 2007TR2418**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**CITY OF RHINELANDER,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK A. PLAUTZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Oneida County:  
FRED W. KAWALSKI, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> Mark Plautz appeals a judgment of conviction for operating while intoxicated, first offense. Plautz argues the circuit court erred

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

when it found there was reasonable suspicion to stop his vehicle and denied his motion to suppress. We disagree with Plautz and affirm the judgment.

### **BACKGROUND**

¶2 Officer Josh Pudlowski was stationed in a driveway when he observed Plautz’s vehicle at approximately 2:29 a.m. in mid-July. As Plautz’s vehicle drove past him, Pudlowski noticed its side and rear windows were fogged up to the extent he could not see into the car other than to make out a silhouette. However, the wipers had cleared the condensation from the windshield. Pudlowski pulled out behind the vehicle and was unable to see into the vehicle with his headlights like he typically could.

¶3 Pudlowski testified he observed Plautz’s vehicle “swaying” back and forth within its lane about five or six times over a distance of three hundred to four hundred yards. Pudlowski believed the vehicle’s “drifting” may have been caused by impaired visibility out the windows and he initiated a traffic stop. When Pudlowski walked up to the vehicle, he still could not see in as he stood next to it. He noticed the condensation was on the exterior of the windows.

¶4 The circuit court determined there was reasonable suspicion for the traffic stop based on the fogged windows and denied Plautz’s motion to suppress. Plautz was found guilty of operating while intoxicated after a trial to the court.

### **DISCUSSION**

¶5 Traffic stops are seizures under the Fourth Amendment and thus subject to the constitutional imperative that they be reasonable under the circumstances. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Generally, traffic stops are reasonable when the police have probable cause to believe a

traffic violation has occurred. *Id.* at 810. If an officer does not have probable cause to believe a violation occurred, an officer can still make an investigatory stop if reasonable suspicion exists, under the totality of the circumstances, that a traffic violation or crime has occurred. *State v. Post*, 2007 WI 60, ¶¶10, 13, 301 Wis.2d 1, 733 N.W.2d 634. But, “[w]hen an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure.” *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

¶6 Probable cause exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the seizure would lead a reasonable police officer to believe a violation has occurred. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The evidence need not establish guilt beyond a reasonable doubt or even that guilt is more likely than not. *Id.*

¶7 In reviewing a denial of a motion to suppress, we will uphold the circuit court’s findings of fact unless they are against the great weight and clear preponderance of the evidence. *Waldner*, 206 Wis. 2d at 54. Whether those facts satisfy the constitutional requirement of reasonableness is a question of law we decide independently. *Id.*

¶8 The circuit court relied solely on the condition of the vehicle’s windows when it determined Pudlowski had reasonable suspicion to stop Plautz for a violation of WIS. STAT. § 346.88(4). That section provides: “The windshield, side wings and side and rear windows of a motor vehicle shall be kept reasonably clean at all times.” Plautz contends Pudlowski did not have reasonable suspicion for an investigatory stop based on the fogged windows and weaving within his lane.

¶9 We agree with the circuit court that Pudlowski was legally authorized to stop Plautz’s vehicle for an apparent violation of WIS. STAT. § 346.88(4). However, we conclude the stop was supported by not only reasonable suspicion, but by probable cause, that Plautz violated the statute. Plautz does not dispute his windows were so fogged that Pudlowski could not see into his vehicle. Instead, he argues the windows were *reasonably* clean because the condensation was on the exterior of the windows.<sup>2</sup>

¶10 At the suppression hearing, both Pudlowski and the court acknowledged windows could fog as one drove down the road. Additionally, because he observed the windshield wipers had been effective, Pudlowski was aware the condensation was on the exterior of the windows before he initiated the stop. But, Plautz did not testify. Thus, there was no evidence the windows were clean but then fogged as he drove. Similarly, Plautz did not explain why he could not have opened and closed one or more of his side windows to clear them as he drove. There is also no evidence Pudlowski’s windows fogged up as he drove after Plautz, under the same atmospheric conditions.

¶11 Regardless, the issue at the suppression hearing was not whether Plautz was guilty of the traffic violation, but whether the stop was constitutionally reasonable. We conclude the stop was reasonable because Pudlowski had

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<sup>2</sup> Plautz also cites a partial dictionary definition to argue the term “clean” in the statute only refers to dirt on the windows. This is an untenably narrow reading of the statute. While the meaning of the statute is plain on its face, we also note the statute is entitled “Obstruction of operator’s view....” Further, frost on the windows falls under the purview of the statute. *See Baier v. Farmers Mut. Auto. Ins. Co.*, 8 Wis.2d 506, 510-11, 99 N.W.2d 709 (1959). Regardless of the proper parameters of the statute, this court is satisfied that it is violated where a law enforcement officer cannot view the inside of the vehicle when standing next to it.

probable cause to believe Plautz was violating WIS. STAT. § 346.88(4) when Pudlowski observed the vehicle drive by with severely fogged windows.

¶12 Plautz also argued that, pursuant to *Post*, a vehicle's weaving within the lane does not constitute reasonable suspicion for a traffic stop for driving while intoxicated. Although we need not reach this argument because we uphold the stop based on the obstructed window violation, we note there might also have been reasonable suspicion to stop Plautz for driving while intoxicated. The *Post* court suggested an investigatory stop might be warranted if the weaving was observed at bar time, as was the case here. *Id.*, ¶36; *see also State v. Allen*, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999). Additionally, a relatively large number of deviations within the lane over a short distance might contribute to reasonable suspicion.<sup>3</sup> *Post*, 301 Wis. 2d 1, ¶25.

*By the Court.*—Judgment affirmed.

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

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<sup>3</sup> We recognize that although Pudlowski testified to an estimated number of deviations, the circuit court felt the number was questionable.

