

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2009

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. 2008AP2389

Cir. Ct. No. 2006CV3729

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VILLAGE OF MCFARLAND,

PLAINTIFF-RESPONDENT,

v.

SHARON R. CARROLL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
JOHN W. MARKSON, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Sharon R. Carroll appeals the judgment of conviction 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)(g) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicant, in violation of WIS. STAT. § 346.63(1)(a) (OWI). She contends the circuit court erred in denying her motion to suppress evidence because, she asserts, the arresting officer did not have the requisite reasonable suspicion to stop her vehicle for a violation of WIS. STAT. § 346.072, Passing Stopped Emergency Vehicles. We conclude the circuit court did not err and we therefore affirm.

BACKGROUND

¶2 John Miller, a police officer for the Village of McFarland Police Department, issued Carroll a citation for OWI and operating with a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b), based on evidence he obtained after stopping her vehicle. The issue at the motion hearing was whether the officer's stop of Carroll's vehicle was based on a reasonable suspicion that Carroll had violated WIS. STAT. § 346.072(1). This statute provides:

(1) If an authorized emergency vehicle giving visual signal ... is parked or standing on or within 12 feet of a roadway, the operator of a motor vehicle approaching such vehicle ... shall proceed with due regard for all other traffic and shall do either of the following:

(a) Move the motor vehicle into a lane that is not the lane nearest the parked or standing vehicle ... and continue traveling in that lane until safely clear of the vehicle.... This paragraph applies only if the roadway has at least two lanes for traffic proceeding in the direction of the approaching motor vehicle and if the approaching motor vehicle may change lanes safely and without interfering with any vehicular traffic.

(b) Slow the motor vehicle, maintaining a safe speed for traffic conditions, and operate the motor vehicle at a reduced speed until completely past the vehicle.... This paragraph applies only if the roadway has only one lane for traffic proceeding in the direction of the approaching motor vehicle or if the approaching motor vehicle may not change lanes safely and without interfering with any vehicular traffic.

¶3 The only witness at the hearing was Officer Miller, who testified as follows. On October 8, 2005, at approximately 12:16 a.m. he was assisting his partner on a traffic stop on the northbound lanes of Highway 51 in the Village of McFarland. Officer Miller's patrol car and his partner's patrol car were parked on the shoulder of the highway with the emergency lights activated. After returning to his patrol car, Officer Miller observed in his rear-view mirror that two vehicles were approaching the officers from behind, traveling northbound on the highway. When the officer first observed the approaching vehicles, both were in the right lane, the lane closest to the patrol cars. He estimated that the vehicles were one mile to one-and-one-half miles away when they came into his view.

¶4 Still watching in his rear-view mirror, Officer Miller observed that one of the vehicles moved from the right lane into the left lane. The other vehicle, the one driven by Carroll, remained in the right lane and he did not see any attempt by her vehicle to move into the left lane. When the two vehicles passed the officers' patrol cars, the two vehicles were side by side. Officer Miller did not see any other vehicles driving northbound at the time.

¶5 Based on what Officer Miller observed, Carroll's vehicle could have clearly moved into the left lane prior to reaching the location of his squad car. After the vehicles passed his location, Officer Miller, with the emergency lights of his squad car already activated, pulled in behind the vehicle to initiate a traffic stop.

¶6 On cross-examination, Officer Miller acknowledged that he had previously testified that the vehicles were one-half to three-quarters of a mile away when they first came into view and that this shorter distance may have been more accurate. He agreed that he did not know whether the vehicle that had moved into

the left lane had been “the first vehicle in line or the second vehicle in line.” He also agreed that, while Carroll’s vehicle did not appear to make any attempt to get into the left lane, she did slow her speed to 45-50 miles per hour when she passed the patrol cars. Officer Miller was unable to say at what point he believed it became unsafe for Carroll to move into the left lane, but he agreed that, by the time the vehicles passed his patrol car, it was too late for Carroll to do so.

¶7 Carroll’s attorney played a copy of a videotape that Officer Miller had recorded that showed the vehicles immediately after they had passed the patrol cars. The clock on the videotape showed that sixteen or seventeen seconds had elapsed between the time Officer Miller had gotten back to his car and when the two vehicles passed him.

¶8 On redirect, Officer Miller testified he did not recall observing either vehicle making any erratic changes in speed, such as slowing down, then speeding up.

¶9 The circuit court denied the motion to suppress, finding that the State carried its burden to show that a reasonable officer in Officer Miller’s position could have reached the conclusion that Carroll could have safely changed lanes before passing the patrol cars. The court credited the officer’s opinion that Carroll could have safely moved her vehicle to the left lane, finding that he was an experienced officer, he continuously kept his eyes on the two vehicles as they approached, and his concern for his own safety would have likely prompted him to be observant. The court then considered whether the officer’s opinion was supported by his testimony of what he observed and the evidence of the tape. The court found that, regardless of which of the officer’s estimates the court used or how far away the vehicles were when he first saw them, the reasonable inference

from the officer's testimony that Carroll slowed her speed and from the sixteen or seventeen seconds shown on the videotape is that she had enough time to move into the left lane before reaching the patrol cars. The court rejected the argument that the fact that the vehicles were side by side at the time they passed the patrol cars meant that Carroll could not safely change lanes prior to reaching the patrol cars. The court reasoned that, because there were no other vehicles traveling in that direction at the time, Carroll could have slowed down and pulled into the left lane behind the other car, and there was time for her to do so before reaching the patrol cars. Because the court found that a reasonable officer could have concluded that Carroll could have safely moved into the left lane, the court concluded that there was a reasonable suspicion that she had violated WIS. STAT. § 346.072.

DISCUSSION

¶10 On appeal, Carroll contends the circuit court erred when it concluded the officer had reasonable suspicion to pull her over for a violation of WIS. STAT. § 346.072. According to Carroll, the record does not establish that she could have safely pulled into the left lane and the officer's statement that she could have safely changed lanes is conclusory and an impermissible basis for determining there was reasonable suspicion. Therefore, she continues, her only obligation was to slow down, and she did that. Carroll also argues that the record does not demonstrate that the patrol cars were within twelve feet of the roadway and thus does not establish the applicability of § 346.072.

¶11 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative stop is a seizure within the meaning of the Fourth Amendment. *State v. Post*, 2007 WI 60, ¶10,

301 Wis. 2d 1, 733 N.W.2d 634. In order to be constitutional an investigative stop must be reasonable, meaning that there must be specific and articulable facts, which, taken together with the rational inferences from those facts, warrant a reasonable police officer, in light of his or her training and experience, to suspect that a crime has been, is being, or is about to be committed. *Id.*, ¶¶12-13. This is also the standard for an investigative stop involving a traffic violation. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394.

¶12 In reviewing a circuit court’s order denying a motion to suppress evidence, we accept the circuit court’s findings of fact unless they are clearly erroneous. *State v. Kramer*, 2008 WI App 62, ¶8, 311 Wis. 2d 468, 750 N.W.2d 941. It is the circuit court’s role to make credibility determinations and that includes deciding which portions of a witness’s testimony to accept and which to reject. *State v. Baudhuin*, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987). Whether the facts found by the circuit court and the undisputed facts fulfill the constitutional standard is a question of law, which we review de novo. *State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶13 Turning to Carroll’s first argument, we agree that the record establishes that she did slow down. Slowing down and operating at a safe and reduced speed until “completely past the vehicle ...” satisfies the statute only if “the roadway has only one lane for traffic proceeding in the direction of the approaching motor vehicle or if the approaching motor vehicle may not change lanes safely and without interfering with any vehicular traffic.” WIS. STAT. § 346.072(1)(b). There is no dispute that there were two lanes for northbound traffic. Thus, the issue is whether a reasonable officer could believe that Carroll could have safely moved into the left lane without interfering with traffic.

¶14 We reject Carroll’s argument that the court improperly considered the officer’s testimony that she could have safely moved into the left lane. Carroll relies on the statement in *State v. Kyles*, 2004 WI 15, ¶39, 269 Wis. 2d 1, 675 N.W.2d 449, that “[a]n officer’s legal and subjective conclusions are ... not determinative of the validity of the frisk; a court applies an objective standard to the facts known to the officer.” The court goes on to say that “[t]he officer’s fear or belief that the person may be armed is but one factor in the totality of the circumstances that a court may consider in determining whether an officer had reasonable suspicion to effectuate a protective weapons frisk.” *Id.*

¶15 The officer’s testimony that Carroll could have safely moved into the left lane is not a legal conclusion but an opinion based on the officer’s observations. Although Carroll’s ability to move safely into the left lane is an element of the statutory violation, the testimony that she was able to do so is not thereby transformed into a legal conclusion. The legal conclusion on this motion is that there was—or was not—reasonable suspicion to believe Carroll violated the statute.

¶16 The officer’s testimony that Carroll could have safely moved into the left lane is also not a subjective belief of the type addressed in *Kyles*—the officer’s fear or belief that his or her safety or that of others is in danger. *See id.* However, assuming without deciding that it is “subjective” because it is an opinion of the officer based on his observations and the inferences he drew from what he observed, the court may properly consider it as part of the totality of the circumstances, as long as it is not considered determinative. *See id.*

¶17 The circuit court here did not view the officer’s testimony that Carroll could have safely moved into the left lane as determinative. Rather, it

expressly tested the officer's testimony against the details of what the officer observed and what the videotape showed. The court drew its own inferences from this evidence after resolving conflicts by using a distance and a length of observation time that favored Carroll. It found that it was reasonable for the officer to infer that Carroll could have safely changed lanes.

¶18 We accept the court's credibility assessments, resolution of conflicts in the evidence, and reasonable inferences drawn from the evidence and find no error in the court's factual findings. Based on the court's findings, we conclude there were specific and articulable facts and reasonable inferences from those facts that warranted a reasonable police officer in Officer Miller's position to believe that Carroll violated WIS. STAT. § 346.072. The officer observed no traffic other than the two vehicles, he observed the other car move safely into the left lane, and he observed no reason Carroll could not have slowed down and pulled into the left lane behind the other car. Based on the officer's estimate of her slowed speed and the court's assumption of the minimum distance and time, a reasonable officer could believe there was time for her to safely change lanes before reaching the patrol cars without interfering with traffic.

¶19 We next consider Carroll's argument that she is entitled to a reversal because there is no evidence that the officers' patrol cars were "parked or standing on or within 12 feet of [the] roadway," which is a prerequisite to the applicability of WIS. STAT. § 346.072. The State responds that Carroll waived this issue because she did not raise it in the circuit court. Carroll replies that, because she raised by motion the issue whether there was reasonable suspicion to believe she violated § 346.072, it was the State's burden to establish that there was reasonable suspicion, whether or not she alerted the State that the location of the patrol cars was an issue.

¶20 We disagree with Carroll. “Although the State has the ultimate burden of proof on suppression issues, the defendant has the burden of production and must produce some evidence that makes a prima facie showing that the State violated one of [her] rights.” *State v. Jackson*, 229 Wis. 2d 328, 336, 600 N.W.2d 39 (Ct. App. 1999) (citations omitted). Just as with any other motion, the movant on a suppression motion must raise an issue with sufficient specificity so that the circuit court knows the factual findings it must make and the State has the opportunity to present evidence to meet its burden. See *State v. Caban*, 210 Wis. 2d 597, 604-08, 563 N.W.2d 501 (1997) (applying the waiver rule to a suppression motion after noting that “when a party seeks review of an issue that it failed to raise before the circuit court, issues of fairness and notice, and judicial economy are raised”).

¶21 We conclude Carroll waived the issue of the location of the patrol cars by failing to raise it in the circuit court. Carroll’s motion lays out in considerable detail her argument that there was no reasonable suspicion to believe she had violated WIS. STAT. § 346.072 because she slowed down and the officer had no basis for believing she could have safely moved into the left lane. There was no mention in the motion or at the hearing that she was also challenging the applicability of the statute because of the location of the patrol cars. The officer testified at trial that the patrol cars were stopped on the shoulder of the road and that they were not on “the roadway,” but there was no further inquiry into the distance of the patrol cars from “the roadway.” The court was not asked to make findings on their exact location, and it did not do so.

¶22 Although we have the discretion to address on appeal an issue that was not raised in the circuit court, *Caban*, 210 Wis. 2d at 609, we are satisfied that this is a proper case in which to apply the waiver rule. Had the State been alerted

to this issue, it could have asked Officer Miller how far from the roadway the patrol cars were, and, if there were any factual disputes, the circuit court could have resolved them.² Because Carroll did not raise this factual issue in the circuit court, thereby giving the State and the circuit court a chance to address it, we conclude she is not entitled to a reversal on this ground.

CONCLUSION

¶23 The circuit court correctly denied Carroll's motion to suppress evidence because the stop, based on a violation of WIS. STAT. § 346.072, was supported by reasonable suspicion. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

² We agree with the State that, based on the current record, it is reasonable to infer that the patrol cars, parked on the shoulder, were within twelve feet of the roadway. Indeed, it may be the only reasonable inference because it is difficult to imagine a shoulder so wide that a car parked on it is more than twelve feet from the roadway. While this may be an alternative ground on which to resolve this issue, we choose to resolve it based on waiver.

