COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1170-CR **Cir. Ct. No. 2009CT3016**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN M. EATON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] John Eaton appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), second offense, contrary to WIS. STAT. § 346.63(1)(b). Eaton argues the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

court erred when it denied his motion to suppress evidence obtained as a result of the investigatory stop of his vehicle because the arresting officer lacked reasonable suspicion to stop his vehicle. We disagree and affirm.

BACKGROUND

¶2 On June 5, 2009, at approximately 2:18 a.m., Joel Stelter, a police officer for the City of Madison, observed a vehicle driven by Eaton, traveling eastbound on East Washington Avenue in Madison. Stelter was traveling eastbound on East Washington Avenue at approximately 32 miles per hour, observed Eaton's vehicle approach his vehicle from behind "at a high rate of speed," which he estimated to be approximately 45 miles per hour. According to Stelter, Eaton's vehicle "caught up to [his vehicle] … very quickly and then slowed very suddenly until [] the front of [Eaton's] vehicle reached the driver's side door of [Stelter's] squad car." At that point, Stelter slowed his vehicle down. Eaton also slowed his vehicle down along with Stelter's vehicle until Stelter reached a speed of approximately 18 miles per hour, at which point Eaton "resumed traveling around the speed limit." According to Stelter, the slowing of Eaton's vehicle led him to suspect that Eaton was attempting to prevent him from obtaining information from Eaton's rear license plate.

¶3 Stelter followed behind Eaton's vehicle after it resumed traveling at a speed near the posted speed limit and observed Eaton's vehicle "slowly weaving within its lane." According to Stelter, Eaton's vehicle would "drift[] several feet to the right and to the left." Stelter continued to follow Eaton's vehicle and observed Eaton approach an intersection marked by a yellow flashing light. As Eaton approached the intersection, he "put his turn signal on, [moved to] the furthest right lane, came to a complete stop, [and] sat there for a second or two"

before he "deactivated the turn signal and proceeded straight through the intersection." Following this observation, Stelter initiated a traffic stop of Eaton's vehicle based on his belief that Eaton was operating his motor vehicle while impaired, and was cited for operating a motor vehicle while intoxicated, second offense, contrary to WIS. STAT. § 346.63(1)(a), and PAC, second offense.

¶4 Eaton moved to suppress evidence which was obtained as a result of his detention and arrest on the basis that Stelter did not have reasonable suspicion to stop his vehicle. The circuit court denied Eaton's motion. Following the denial of his motion to suppress, Eaton pled no contest to PAC, second offense, and a judgment of conviction was entered by the court. Eaton appeals.

DISCUSSION

¶5 For an officer to initiate a traffic stop without violating an individual's Fourth Amendment rights to the United States Constitution, an officer must have either probable cause or reasonable suspicion to believe that the individual is committing, is about to commit, or has committed a crime. ***State. v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. An officer has a reasonable suspicion if he or she is "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***Id***. (citing ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). "[W]hat constitutes reasonable suspicion is a common sense 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).

¶6 Whether Stelter had reasonable suspicion to stop Eaton's vehicle is a question of constitutional fact, which presents a mixed question of fact and law.

Post, 301 Wis. 2d 1, ¶8. We will uphold the circuit court's factual findings unless they are clearly erroneous, but will independently review the application of those facts to constitutional principals. ***Id.***

¶7 Eaton contends that Stelter did not have reasonable suspicion to stop his vehicle under the totality of the circumstances. He argues that the circuit court "should have [] completely discounted" Stelter's testimony at the suppression hearing regarding the speed he was driving his vehicle and that the court should not have taken into consideration the fact that Eaton slowed his vehicle down when he approached Stelter's vehicle. Even assuming for the sake of argument that Eaton is correct with respect to both arguments, we conclude that Stelter's observations nevertheless gave rise to reasonable suspicion justifying the stop.

¶8 First, Stelter observed Eaton's vehicle weave in a "pronounced" manner within its own lane of traffic. Eaton argues that the circuit court's factual finding that he weaved within his lane of traffic is unsupported by the record because at the suppression hearing Stelter was not able to observe the weaving on a video he recorded of the incident. However, Stelter testified unequivocally that he observed Eaton's vehicle weaving. He also testified that the video recording had a "significant blurry glare" and that he was not able to see everything on the video recording that he observed in person. The circuit court found Stelter's testimony regarding the issue of weaving to be credible. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (the circuit court is the ultimate arbiter of a witness's credibility). Having reviewed the video, we cannot say that the court's credibility finding was clearly erroneous.

¶9 Second, Stelter observed Eaton's vehicle come to a complete stop at a yellow blinking light, which Stelter testified is a "possible indicia of impaired

driving." Eaton correctly points out that his conduct was not illegal. However, conduct need not be illegal to form the basis for reasonable suspicion. *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Although not illegal, coming to a complete stop for a few seconds at a yellow blinking light is not typical behavior.

¶10 Third, Stelter's observations took place around bar time. *See* ***Post***, 301 Wis. 2d 1, ¶36 (driving deviations taking place at "bar time" can lend credence to a suspicion that a driver is intoxicated).

¶11 We conclude that the totality of the circumstances provide Stelter with reasonable suspicion to initiate a traffic stop. The pronounced weaving of Eaton's vehicle, the fact that he unnecessarily came to a complete stop, and the fact that these events took place around bar time, were adequate to give rise to a reasonable suspicion that Eaton was driving under the influence of intoxicants. *See, e.g., id.* (suggesting that investigatory stop is reasonable when officer observes vehicle weaving within its own lane of traffic around bar time). Accordingly, we affirm the circuit court's denial of Eaton's motion to suppress and the judgment of conviction.

By the Court.—Judgment affirmed.

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