

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2012

Diane M. Fremgen
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. 2012AP793-CR

Cir. Ct. No. 2011CT406

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TIMOTHY W. BASTIAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Reversed and cause remanded for further proceedings.*

¶1 MANGERSON, J.¹ The State appeals an order granting Timothy Bastian's suppression motion based on an allegedly improper traffic stop. The

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

State argues the officer lawfully stopped Bastian's vehicle. We agree and reverse and remand for further proceedings.

BACKGROUND

¶2 The State charged Bastian with operating while intoxicated and operating with a prohibited alcohol concentration, both as third offenses. Bastian filed a suppression motion, asserting the officer unlawfully stopped his vehicle.

¶3 At the motion hearing, officer Steven Valk testified that, at approximately 12:00 p.m. on August 30, 2011, he was parked in a "cut-out area" along River Prairie Drive. His squad car was perpendicular to the road, and he was watching traffic pass while working on reports.

¶4 Valk observed a vehicle traveling toward him that "was angling almost towards my squad car." He observed the vehicle for approximately fifty yards and became concerned that the vehicle was going to hit his squad car. Valk could see that the driver was not looking straight ahead, and was looking down and to the right. The vehicle came within a couple of feet of Valk's vehicle. After the vehicle passed Valk's squad car, the driver pulled hard on the steering wheel, jerking the vehicle to the left. Valk stopped the vehicle. The driver was identified as Bastian.

¶5 The circuit court found Valk stopped Bastian after observing him "looking towards the passenger seat and basically jerked the vehicle back in a left motion somewhere 2 to 4 feet." After making these factual determinations, the court granted Bastian's suppression motion, reasoning Valk lacked "probable cause" to stop the vehicle because:

[T]here was no articulable suspicion of any other wrongdoing other than that of there being ... what the police officer thought was probable cause for inattentive driving, that is the driver looked away, and then there was a jerking of the car somewhere between the 2- to 4-foot range. This was the only driving that was observed to be out of the ordinary.

The State appeals.

DISCUSSION

¶6 To conduct a lawful traffic stop, an officer needs to have probable cause to believe a traffic violation has occurred or have reasonable suspicion that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶¶13, 23, 317 Wis. 2d 118, 765 N.W.2d 569. Whether there is probable cause or reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *Id.*, ¶10. We uphold the circuit court's factual findings unless they are clearly erroneous; however, we independently apply those facts to constitutional principles. *Id.*

¶7 On appeal, the State argues the circuit court erred by determining Valk needed probable cause to stop the vehicle. It asserts a stop based on reasonable suspicion is sufficient. The State also contends that, irrespective of the standard used, Valk had both reasonable suspicion and probable cause to stop Bastian's vehicle.

¶8 Bastian responds the circuit court correctly determined Valk needed probable cause to stop his vehicle. He relies on *State v. Longcore*, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999), *affirmed by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620, for the proposition that, if an officer acts upon a violation being committed in his presence, as opposed to acting upon a

suspicion warranting further investigation, the officer must have probable cause instead of reasonable suspicion to effectuate the stop. Bastian argues that Valk needed probable cause because Valk specifically stopped him for inattentive driving. Bastian also contends that Valk's observations do not amount to probable cause to believe he was driving inattentively.

¶9 We conclude Valk had probable cause to stop Bastian for inattentive driving. Consequently, we do not need to resolve the parties' dispute about whether Valk needed probable cause to stop or whether reasonable suspicion was sufficient. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶10 WISCONSIN STAT. § 346.89, titled "Inattentive driving," provides in relevant part: "No person while driving a motor vehicle shall be so engaged or occupied as to interfere with the safe driving of such vehicle." WIS. STAT. § 346.89(1). Probable cause to stop exists when the officer has "reasonable grounds to believe that the person is committing or has committed a [violation]." *Popke*, 317 Wis. 2d 118, ¶14 (citation omitted). The evidence to support probable cause "need not establish proof beyond a reasonable doubt or that ... guilt is more probable than not, but rather, probable cause requires that 'the information lead a reasonable officer to believe that guilt is more than a possibility.'" *Id.* (quoting *Johnson v. State*, 75 Wis. 2d 344, 348-49, 249 N.W.2d 593 (1977)).

¶11 Here, Valk observed that, while Bastian's attention was diverted to his passenger seat, Bastian's vehicle veered to the right and then swerved to the left two to four feet. These observations could lead a reasonable officer to conclude that Bastian was "so engaged or occupied as to interfere with the safe

driving of ... [his] vehicle.” See WIS. STAT. § 346.89(1). Valk therefore had probable cause to stop Bastian for inattentive driving.

¶12 Bastian asserts Valk’s observations do not amount to probable cause. He argues the evidence shows that “it is actually more probable that ... Bastian was in fact doing exactly what the law requires as far as maintaining a careful lookout.” He faults Valk for failing to make additional observations about his driving and demeanor, and he contends that looking away from the road does not automatically mean he was driving inattentively. Finally, Bastian argues that, because he did not deviate from his traffic lane or get into an accident, he did not drive inattentively.

¶13 We reject Bastian’s arguments. First, Bastian cites no legal authority in support of his assertion that drivers have a duty to look at their passenger seats while driving. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). To the extent Bastian is suggesting that he was not looking down at his passenger seat but scanning along the roadway, his argument ignores the circuit court’s factual determination that Bastian was “looking towards the passenger seat.” This factual determination is supported by the record and therefore not clearly erroneous. See *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

¶14 Next, in regard to Bastian’s contention that looking away from the road does not mean he was driving inattentively, Bastian’s argument overlooks that he did more than merely glance away from the road. Specifically, while his attention was diverted to his passenger seat, Bastian steered his vehicle toward Valk and then swerved to correct his direction of travel. It was the cumulative effect of his actions, not merely the fact that he looked away, that gave Valk

probable cause to believe Bastian's diverted attention interfered with the safe operation of his vehicle. *See* WIS. STAT. § 346.89(1).

¶15 Finally, WIS. STAT. § 346.89(1) does not provide that, before a violation can occur, the driver must get into an accident or deviate from his or her traffic lane. The statute only prohibits a driver from diverting his or her attention such that it interferes with the safe operation of his or her vehicle. Here, it was enough that Valk observed Bastian angle and drive his vehicle toward him while looking down at his passenger seat and swerve.

By the Court.—Order reversed and cause remanded for further proceedings.

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

