

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 9, 2005**

Cornelia G. Clark  
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. 2005AP785  
STATE OF WISCONSIN**

Cir. Ct. Nos. 2004TR2839  
2004TR2840

**IN COURT OF APPEALS  
DISTRICT III**

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**COUNTY OF BAYFIELD,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL EMIL SULLA,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> Michael Sulla appeals judgments of conviction for passing on the left, contrary to WIS. STAT. § 346.09(4), and operating with a prohibited alcohol concentration (PAC), contrary to WIS. STAT. § 346.63(1)(b), as

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

well as an order denying his motion to dismiss. Sulla challenges the validity of the traffic stop, arguing the officer who stopped him was himself improperly positioned for a left turn, thus negating any probable cause for the stop. This court disagrees and affirms the judgments and order.

### **Background**

¶2 On November 6, 2004, around 12:15 a.m., Sulla and his passenger, Ray Leaf, were traveling on Old County Highway K and approached its intersection with State Highway 13. Highway K intersects Highway 13 at a thirty-five- to forty-five-degree angle.

¶3 Red Cliff police officer Lucas Cadotte was stopped in his squad car at the intersection. He testified that, because of the angle of Highway K, he had actually stopped perpendicular to Highway 13 for a better view. Cadotte had his left turn signal on, and he testified he was stopped for approximately five to ten seconds.

¶4 According to Leaf, however, Cadotte appeared to be on the shoulder of the road, with his passenger-side tires off the roadway itself. Leaf further testified that they could see the squad car stopped for ten to fifteen seconds while Sulla was still approaching and ten to fifteen additional seconds after Sulla stopped behind him. Leaf testified he believed Cadotte planned to make a U-turn and advised Sulla to pull around the squad on the left. After Sulla did so, Cadotte stopped him and issued a citation for violating WIS. STAT. § 346.09(4). During the stop, there was evidently also a basis for Cadotte to cite Sulla for both

operating while intoxicated and with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(a) and (b).<sup>2</sup>

¶5 Sulla challenged the stop, filing a motion to dismiss and arguing Cadotte was improperly positioned for the left turn, contrary to WIS. STAT. §§ 346.31 and 346.34, and therefore could not have stopped him for passing on the left. After the trial court denied the motion, Sulla pled no contest to the WIS. STAT. § 346.09(4) violation and the PAC violation while reserving the right to appeal the order denying the motion to dismiss.

### **Discussion**

¶6 WISCONSIN STAT. § 346.09(4) states in relevant part that “the operator of a vehicle shall not overtake and pass on the left any other vehicle which, by means of signals as required by s. 346.34(1), indicates its intention to make a left turn.” WISCONSIN STAT. § 346.34 states: “No person may ... [t]urn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in s. 346.31.” WIS. STAT. § 346.34(1)(a)1. Finally, WIS. STAT. § 346.31(3)(a) describes the position for a left turn: “The approach for a left turn shall be made in that lane farthest to the left which is lawfully available to traffic moving in the direction of travel of the vehicle about to turn left.”

¶7 Sulla contends he was not violating WIS. STAT. § 346.09(4) because Cadotte was not following WIS. STAT. § 346.34. He suggests this case is resolved by statutory interpretation. Statutory interpretation is a question of law this court

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<sup>2</sup> Sulla only challenges the initial basis for the traffic stop on appeal. Indeed, almost no facts regarding the PAC citation and conviction are included in the briefs.

reviews de novo. *Hutson v. State of Wis. Personnel Comm'n*, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212. Sulla claims resolution of this case depends on the definition of “in” as used in WIS. STAT. § 346.31’s language that the “approach for a left turn shall be made *in* that lane farthest to the left.” (Emphasis added).

¶8 This court disagrees that this case hinges on a legal question. Rather, Sulla essentially disputes the court’s factual findings. The court explicitly held, despite some concern that Cadotte’s position and intent were perhaps not entirely clear, that Cadotte was “in the lane farthest to the left” in accord with WIS. STAT. § 346.31(3)(a) when Sulla passed him. The position of the vehicle, relative to the center line, the shoulder, and other features of the road, is an ultimate factual question, not a legal question. Factual determinations are not disturbed by this court unless clearly erroneous. WIS. STAT. § 805.17(2).

¶9 In addition, Sulla appears to stress Leaf’s testimony that Cadotte was stopped for up to thirty seconds. Cadotte, however, testified that it was only five to ten seconds. To the extent the trial court’s determination relies on Cadotte’s testimony instead of Leaf’s, the trial court is in the best position to observe witness testimony and demeanor and we charge it with resolving discrepancies and determining witness credibility. *See In re Estate of Dejmál*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Sulla may disagree with Cadotte’s recitation of events, but that dispute is not for this court to resolve.

¶10 Thus, the trial court determined that Cadotte was properly in the lane and signaling to make a left turn. Sulla violated WIS. STAT. § 346.09(4) when he passed Cadotte on the left, allowing Cadotte to initiate a traffic stop. The motion to dismiss was properly denied.

¶11 Finally, Sulla raises an entrapment argument, but does not show he raised such a defense at trial. He contends “the record that was developed in the trial court sufficiently raised, at least circumstantially, the issue of entrapment.” He does not, however, provide a record cite to so demonstrate in either of his briefs. This is contrary to the requirements of WIS. STAT. RULE 809.19(1)(e). Moreover, it is the appellant’s burden to show an issue was raised in the trial court. *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). This court does not consider issues raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

*By the Court.*—Judgments and order affirmed.

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

