

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2006AP104

Cir. Ct. No. 2005TR8480

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL
OF BRYAN P. WEILER:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRYAN P. WEILER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ROBERT DE CHAMBEAU, Judge. *Reversed.*

¶1 DYKMAN, J.¹ Bryan Weiler appeals from an order revoking his driving privileges for one year because his refusal to submit to a chemical test under WIS. STAT. § 343.305(2)² was improper. Weiler argues that the refusal was proper for two reasons. First, Weiler asserts that the officer who arrested him unlawfully stopped him because she lacked reasonable suspicion to believe that he had committed an offense. Second, Weiler contends that even if the initial stop was lawful, the evidence obtained by the officer at the time of his arrest did not establish probable cause that he was operating a vehicle while under the influence of intoxicants. Because we agree with Weiler that the officer lacked a reasonable suspicion that Weiler was violating a traffic law when the officer stopped him, we reverse.³

Background

¶2 On May 15, 2005, at approximately 1:28 a.m., Officer Truli Bertram was on duty driving south on Lake Street in Madison, Wisconsin. She stopped for

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

² WISCONSIN STAT. § 343.305(2) provides in part:

Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer

³ Because we conclude the initial stop was not supported by reasonable suspicion, we need not address Weiler's second claim that the evidence obtained at the stop did not establish probable cause.

a red light at the intersection of Lake Street and Johnson Street. Johnson is a four lane,⁴ one-way street that runs East. To Bertram's left was a red car in the left-hand turn lane waiting to turn left onto Johnson Street. When the light turned green, Bertram proceeded straight and the red car turned into a middle lane of Johnson Street. Bertram heard a car accelerate behind her and saw a gold car also turn left onto Johnson Street. The gold car was later determined to be Weiler's. During direct examination, Bertram described the events as follows:

Bertram: At 1:28 a.m., I was on North Park Street, facing southbound at the intersection of West Johnson Street.

Assistant District Attorney (ADA): And what did you observe at that point in time?

Bertram: I was stopped at a red light and the vehicle next to me in the eastbound turn lane for West Johnson Street was a red car.

ADA: And what happened then?

Bertram: The light, traffic light for traffic on North Johnson Street turned green. I proceeded straight southbound. I was driving approximately 5 miles per hour when I heard a loud acceleration noise.

ADA: And it doesn't exactly ... make sense. You were on a cross street and you say yet when the light turned green for traffic on Johnson Street you proceeded?

Bertram: No. When the light turned green for traffic on Lake Street, at the intersection of West Johnson Street, I proceeded straight.

ADA: And were you on Lake or Park Street?

Bertram: I was on North Lake Street.

⁴ The trial court accepted the State's stipulation that Johnson Street is four lanes wide at the intersection in question. However, there is a dispute in the trial transcript over whether these are four legal traffic lanes or whether one is a bus lane or a right-turn lane.

...

ADA: So now as the light turns green for traffic on Lake Street, you proceed ahead. What about the vehicle on your left, the red car?

Bertram: The red car was turning eastbound onto West Johnson Street.

ADA: And what happened then?

Bertram: I heard a loud acceleration noise coming from behind me. I turned and looked and I observed the red car having to turn into the middle lane and a gold car turning with—making the same turn with the red car, causing the red car to have to move into the middle lane, essentially cut the red car off.

....

ADA: What did the red car do?

Bertram: The red car, prior to finishing the turn, I saw the brake lights come on, and then it continued on.

....

ADA: What about the gold-colored car?

Bertram: The gold-colored car continued to turn, ended up in the northernmost lane of West Johnson Street, and continued straight.

¶3 Weiler's testimony confirmed that he made a left turn into the northernmost traffic lane of Johnson Street, but he disagreed as to when each vehicle entered the intersection. He also disagreed with Bertram's testimony that he had caused the red car to move into another lane. During direct examination by the ADA, Weiler described the events as follows:

Weiler: I approached the light. I had a green light. I got into the dedicated left turning lane. I signaled. I looked for oncoming traffic. There was none. I looked for pedestrians. There were none. A car had already completed a turn two car lengths ahead of me into the middle lanes of West Johnson. I then proceeded, knowing

that it was safe to do so, to make a left turn into the leftmost lane of West Johnson.

ADA: Did you ever see that vehicle put on its brake lights and stop?

Weiler: I saw a green⁵ vehicle, which I believe was a Subaru wagon, apply its brakes when it was in the right middle, the middlemost lane.

¶4 After observing the red car's brake lights, Bertram followed Weiler in the northernmost lane of Johnson Street and pulled him over near the next intersection. During her conversation with Weiler, Bertram noticed an odor of intoxicants, slurred speech and watery, bloodshot eyes. Bertram asked Weiler to step out of his vehicle for a field sobriety test. Weiler refused and asserted that Bertram had no reason to pull him over. Bertram informed Weiler of Wisconsin's Implied Consent Law and made several more requests for Weiler to exit his vehicle. After these requests were met with the same response, Bertram informed Weiler that he was under arrest for operating a motor vehicle under the influence of intoxicants, contrary to WIS. STAT. § 346.63(1)(a). Officer Bertram also issued Weiler a citation for deviating from a traffic lane, contrary to WIS. STAT. § 346.34(1)(a)3.

¶5 At the police station, Officer Bertram read Weiler the Informing the Accused Form and asked Weiler to take a breath test. Weiler refused. After a customary twenty-minute observation period, Officer Bertram again offered Weiler a breath test and again he refused. Consequently, the officer issued a

⁵ Weiler described the other car involved in this alleged incident as a "green" throughout his trial testimony. However, Weiler's brief describes the car as red and for clarity we will refer to the other car as a red car throughout this opinion.

Notice of Intent to Revoke Operating Privilege, pursuant to WIS. STAT. § 343.305(9)(a).

¶6 Weiler requested a hearing on the breathalyzer refusal and pled not guilty to operating a motor vehicle while under the influence and to deviating from a traffic lane. At trial, the court found Weiler not guilty of deviating from traffic lane and not guilty of operating a vehicle under the influence of intoxicants. However, the trial court found that Weiler had unreasonably⁶ refused a breathalyzer test. The court issued an order revoking Weiler's operating privileges for one year and required him to participate in an assessment. Weiler appeals from the trial court's determination that he improperly refused to take a breath test.

Discussion

¶7 Under Wisconsin's Implied Consent Law, "[u]pon arrest of a person for violation of [WIS. STAT.] s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith ... a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine" WIS. STAT. § 343.305(3)(a). If the person refuses, "the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke ... the person's operating privilege." Section 343.305(9)(a). The person can then request a hearing on the revocation. Section 343.305(9)(a)4. One of the issues determined at the hearing is whether the officer had probable cause to

⁶ The circuit court's bench ruling found that the refusal was "unreasonable." While "reasonableness" was the previous test for determining the validity of a refusal, under the current statute, the test is whether the refusal was proper. *See* WIS. STAT. § 343.305(10) (referring to an "improper" refusal).

believe that the person was driving under the influence. Section 343.305(9)(a)5.a.⁷ If the arrested person prevails on any of the issues at the hearing, the refusal was proper and the court must order that no action be taken on account of the person's refusal to take the chemical test. Section 343.305(9)(d).

¶8 The State relies on facts obtained as a result of Weiler's initial traffic stop to establish probable cause that Weiler was driving under the influence. Temporarily detaining a person during a traffic stop constitutes a "seizure" under the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). For the State to use information obtained from the initial stop in establishing probable cause, the stop must have been lawful because evidence obtained in violation of one's constitutional rights is inadmissible.⁸ *Hoyer v. State*, 180 Wis. 407, 415, 193 N.W. 89 (1923); *State v. Longcore*, 226 Wis. 2d 1, 6, 593 N.W. 2d 412 (Ct. App. 1999) ("Detaining a motorist for a routine traffic stop constitutes a 'seizure' and, if the seizure was illegal, then evidence obtained as a result is inadmissible."). Therefore, we turn to the issue of whether Bertram lawfully stopped Weiler.

⁷ Under WIS. STAT. § 343.305(9)(a)5., the issues at a refusal hearing are limited to: (a) whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of intoxicants; (b) whether the officer complied with section (4) of this statute by reading the Informing the Accused Form; and (c) whether the person refused the test.

⁸ The exclusionary rule established in *Hoyer v. State*, 180 Wis. 407, 415, 193 N.W. 89 (1923), is also applicable in civil proceedings when the evidence sought to be excluded was obtained in violation of an individual's constitutional rights. See e.g., *State ex rel. Peckham v. Krenke*, 229 Wis. 2d 778, 787, 601 N.W.2d 287 (Ct. App. 1999).

¶9 The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause” U.S. Const. amend. IV. In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the United States Supreme Court recognized an exception to the probable cause requirement when it held that brief, warrantless detentions for investigatory purposes are permissible when police officers have reasonable suspicion that criminal activity is afoot.⁹ In Wisconsin, this rule is applicable when a police officer has a reasonable suspicion to believe that a driver has violated a non-criminal traffic ordinance. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999).

¶10 When determining whether a traffic stop was based on reasonable suspicion we apply a common sense test and look to the totality of the circumstances of each case. *State v. Waldner*, 206 Wis. 2d 51, 55-58, 556 N.W.2d 681 (1996). The arresting officer’s suspicion that an individual has committed or was about to commit a crime must be based on “specific, articulable facts and reasonable inferences from those facts” *Id.* at 56 (citation omitted). Whether the officer had reasonable suspicion to make an investigatory stop is a question of constitutional fact and we apply a two-step standard of review. *State v. Williams*,

⁹ Wisconsin codified the holding of *Terry* in WIS. STAT. § 968.24, which provides:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person’s conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We will uphold the trial court's findings of fact unless they are clearly erroneous. *Id.* But whether the trial court's findings of fact support the constitutional standard of reasonable suspicion is a question of law we review de novo. *Id.*

¶11 The State asserts that Bertram had reasonable suspicion to stop Weiler based on four alleged traffic violations. Although the State conceded and the trial court found that the State failed to meet its burden on Bertram's citation for deviating from a lane of traffic contrary to WIS. STAT. § 346.34(1)(a)3,¹⁰ the State maintains that Bertram had reasonable suspicion to stop Weiler for lane deviation.¹¹ However, according to the testimony of Bertram and Weiler, considered in the light most favorable to the State, there is no evidence to sustain even the lesser burden of reasonable suspicion that Weiler deviated from his traffic lane. Bertram testified that the red car turned into a middle lane on Johnson Street, and Weiler turned into the northernmost lane and continued straight. Unlike the red car, Weiler turned into the proper lane for a left-hand turn onto a one-way street. Section 346.31(3)(a). Shortly thereafter, Bertram activated her lights and stopped Weiler in the northernmost lane of Johnson Street. We conclude Bertram lacked reasonable suspicion to stop Weiler for deviating from his traffic lane.

¹⁰ WISCONSIN STAT. § 346.34(1)(a)3. provides: "No person may ... [t]urn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety."

¹¹ According to WIS. STAT. § 345.45, "[t]he standard of proof for conviction of any person charged with violation of any traffic regulation shall be evidence that is clear, satisfactory and convincing." This is a higher burden of proof than the burden to sustain a finding of reasonable suspicion.

¶12 Next, the State argues that there was reasonable suspicion that Weiler violated WIS. STAT. 346.09(4)¹² for passing the red car on the left after the red car signaled its intention to make a left turn. To reasonably suspect that Weiler violated this statute, there must be evidence that the red car signaled its intention to turn before Weiler allegedly passed the red car. However, the State concedes that Bertram was probably not in a position to see the red car's signal because the red car was directly on her left. Furthermore, Bertram did not testify that she saw the red car signal. Thus, Bertram could not have reasonably suspected that Weiler violated WIS. STAT. § 346.09(4) because she was not able to see whether the red car signaled its turn.

¶13 Third, the State contends that WIS. STAT. § 346.18(1) provides grounds for reasonable suspicion. This statute provides, in part: “[W]hen 2 vehicles approach or enter an intersection at approximately the same time, the operator of the vehicle on the left shall yield the right-of-way to the vehicle on the right.” The State argues that Weiler and the red car entered the intersection at approximately the same time and Weiler was on the left. The State maintains that Weiler forced the red car to deviate into a middle lane and thus failed to yield to the car on his right. However, § 346.18(1) deals with vehicles approaching an intersection from two different roads. In addition, the State's argument lacks a factual basis. Bertram testified that the red car and Weiler's car did not approach the intersection at the same time, but rather that the red car was next to Bertram

¹² WISCONSIN STAT. § 346.09(4) provides in part: “[T]he 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.”

and Weiler's car was behind them both. Therefore, Bertram lacked reasonable suspicion that Weiler violated § 346.18(1).

¶14 Lastly, the State asserts that Officer Bertram had reasonable suspicion that Weiler violated WIS. STAT. § 346.34(1)(a)3. for failing to make a turn with reasonable safety. According to the State, Weiler passed the red car on the left while the red car turned left onto West Johnson. The State asserts that Weiler's turn forced the red car into a middle lane and was therefore unsafe. But the State's position lacks a reasonable factual basis. An officer must articulate specific facts and provide reasonable inferences to support reasonable suspicion. *Waldner*, 206 Wis. 2d at 56. Bertram's testimony leaves too much uncertainty as to what occurred at the intersection of West Johnson and Lake Street. The record lacks specificity as to how Weiler's turn was unsafe given the position of the cars and geography of the intersection. It is not clear from the record into which lane the red car turned and even more unclear when and if Weiler's turn caused the red car to hit its brake lights. Therefore, we conclude that Officer Bertram lacked reasonable suspicion that Weiler had made an unsafe turn.

¶15 Even without a specific traffic violation to support reasonable suspicion, we can look to the totality of the circumstances in deciding whether Bertram reasonably suspected Weiler committed or was about to commit an offense. *See Waldner*, 206 Wis. 2d at 58. However, the facts of this case simply do not reach reasonable suspicion because the record lacks clarity and specific, articulable facts to uphold a finding of reasonable suspicion. Viewing the facts in the light most favorable to the State, we are simply unable to determine what happened. Perhaps Officer Bertram had other reasons for stopping Weiler, but the record does not show them.

¶16 To revoke a person's operating privileges for improperly refusing a chemical test under WIS. STAT. § 343.305(9)(a)5.a., the court must find that the arresting officer had probable cause to believe that a person was operating a vehicle while under the influence of intoxicants. *See also* § 343.305(9)(d). We conclude that Bertram did not have reasonable suspicion to stop Weiler. Therefore, the State cannot use information obtained after the stop, such as the odor of intoxicants or Weiler's slurred speech, to establish probable cause because Bertram obtained that evidence in violation of Weiler's constitutional right. *See Longcore*, 226 Wis. 2d at 6. Without this information, the record lacks evidence to support probable cause that Weiler was operating a vehicle while under the influence. The trial court erred in finding that the State satisfied the probable cause element required under § 343.305(9)(a)5.a. We therefore reverse the trial court's order that Weiler's refusal was improper.

By the Court.—Order reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

