COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP2232-CR **Cir. Ct. No. 2005CM368**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTY K. BACKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

¶1 BROWN, J.[1] Kristy K. Backs appeals her conviction for driving while intoxicated, second offense, on grounds that the officer had no reasonable suspicion to stop her vehicle. She observes that the sheriff's deputy only saw her vehicle "hit" the center line on one occasion and dismisses the fact that she slammed on her brakes, almost causing the officer to run into her, as a response to his tailgating—which she claims was justifiable behavior on her part. We conclude that the deputy had sufficient information to stop her vehicle and affirm.

¶2 The facts necessary to resolve this case are brief. On February 17, 2005, at about 2:56 in the morning, the deputy was following Backs' vehicle from the time it turned on to County Road JF from Highway 83 when he observed the vehicle's driver's side tires "hit the centerline" of the highway. County Road JF is a two-lane road divided by a visible centerline. The deputy moved his car from four or five car lengths to three lengths behind Backs' vehicle so as to obtain the license number before commencing a stop. At this time, Backs slammed on her brakes to either a full stop or just about a full stop. In order to avoid a collision, the deputy then slammed on his brakes. The deputy then activated his squad lights and made the stop. When the deputy confronted her and asked her why she slammed on the brakes, she responded that it was because she thought the deputy was following too closely.

¶3 Backs argued before the trial court and argues here that the facts were not sufficient for the deputy to stop her. She points out that there was no evidence of weaving within the lane or of tires actually crossing the center line.

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

She points out that she only "hit" the center line on one occasion and asserts that the deputy observed no other erratic behavior. As for the slamming on the brakes incident, she argues that the deputy had already decided to stop her before this event occurred and it therefore should not be factored into the reasonable suspicion analysis. She alternatively argues that she did nothing wrong because this is "a common response to another vehicle suddenly accelerating and coming up close to the rear end of a person's vehicle." In support, she cites ***State v. Brown***, 107 Wis. 2d 44, 318 N.W.2d 370 (1982), for the proposition that when a citizen commits a traffic violation only to avoid erratic driving behavior on the part of police, the citizen should not be penalized.

¶4 We start our discussion, as we always do, with the pertinent case law. The purpose of the ***Terry*** rule is to allow police to stop citizens when police have reasonable suspicion that "criminal activity may be afoot." ***State v. Williams***, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). "The question of what 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).

¶5 Of particular importance to this appeal, when considering whether reasonable suspicion exists, police officers are not required to rule out the possibility of innocent behavior before initiating a ***Terry*** stop; suspicious conduct, by its very nature, is ambiguous, and the principle function of the investigative

stop is to quickly resolve that ambiguity. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990); U.S. CONST. amend. IV; WIS CONST. art. 1, § 11; WIS. STAT. § 968.24. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a violator to escape.

¶6 It is true that all the deputy saw was the vehicle's tires on the driver's side "hit" the center line. This could well have been innocent conduct. But it could also have been the result of impaired judgment on the part of the driver. Certainly, an officer on patrol would well take note of the event because, if repeated at a point in the near future when a vehicle was coming from the other direction, a dangerous situation might arise. Better to investigate than to shrug one's shoulders and go on with routine patrol. Given the ambiguity of the situation, the deputy in this case decided to execute a stop so as to investigate and rule out other-than-innocent behavior. That is what ***Terry*** is for. So, even if the slamming on the brakes incident had not occurred, the deputy would have had grounds to stop Backs on a rural country road at 2:56 in the morning after he saw this centerline conduct.

¶7 The slamming on the brakes incident, however, made Backs' driving behavior even more suspicious. First of all, it makes no difference that the deputy had already decided to stop her vehicle before the incident occurred. As cogently pointed out by the State, we look at all information gathered by the deputy before the stop and seizure actually takes place and not the deputy's subjective belief as to when exactly he thought he had enough information. *See* ***State v. Kramar***, 149 Wis. 2d 767, 781-82, 440 N.W.2d 317 (1989). Second, regardless of the fact that

some drivers in this state respond to tailgating by slamming on the brakes, it is dangerous behavior and not, we repeat, not, a lawful response in this state.

¶8 It does not make things more lawful if the tailgating happens to be caused by a law enforcement officer. To that end, Backs' citation of ***Brown*** is completely off the mark. Again, the State provides the cogent response. In its brief, the State cites to ***Brown***, which in pertinent part, reads as follows: "the actor may claim the defense of legal justification if the conduct of a law enforcement officer causes the actor reasonably to believe that violating the law is *the only means of preventing bodily harm.*" ***Brown***, 107 Wis. 2d at 55-56 (emphasis added). Here, Backs' braking was not designed to prevent bodily harm. Rather the conduct not only endangered the officer, it endangered her as well. This conduct, putting the occupants of both cars in danger, was further cause to stop her vehicle.[2]

¶9 Again, maybe had she not been drunk and told the officer that she acted out of panic in an attempt to get the deputy to stop tailgating her, the deputy may have passed it off as the product of a good citizen who just made a bad choice. But, of course, that is not how the events unfolded after the stop. The deputy was doing his job in investigating her suspicious driving behavior and we therefore affirm the trial court's denial of her suppression motion. The judgment of conviction stands.

[2] We further wonder whether Backs has even proven that the deputy was tailgating, as that term is commonly applied. The deputy was three car lengths behind when Backs slammed on her brakes. We do not know how fast the vehicles were traveling at the time of the incident. But, one car length for every ten miles per hour is generally considered to be a safe distance to stay behind another vehicle. Since the allegation of tailgating is supposedly her affirmative defense for her actions, she had the obligation to put into the record how fast the vehicles were traveling when the event occurred. The record, however, is silent in that regard.

By the Court.—Judgment affirmed.

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