

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2007

David R. Schanker
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. 2007AP467-CR

Cir. Ct. No. 2005CT430

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS A. KOHLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
DANIEL W. KLOSSNER, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Douglas Kohls appeals the judgment of conviction for operating while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a) (OWI), third offense. He contends the court erred in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

denying his motion to suppress evidence and his motion for reconsideration because, he asserts, the arresting officer did not have reasonable suspicion to stop his vehicle. For the reasons we explain below, we affirm.

BACKGROUND

¶2 Kohls was stopped by City of Watertown police officer Brad DeGrow on the evening of July 12, 2005, after he drove his truck through a section of a city street that was under construction. The officer subsequently arrested him for OWI. Kohls moved to suppress evidence on the ground that the officer did not have reasonable suspicion to stop him because the street was not clearly marked as closed, it was open to the public for passage, and the officer knew it was not closed.

¶3 At the hearing on Kohls' motion, the officer testified as follows. He was on duty on that evening, watching a section of a street in the City of Watertown that was under construction. This section of the street was not paved at the time; its surface was dirt and some gravel. At each end of the section under construction there were orange and white striped barricades with signs that said "road closed." The officer was parked in the area under construction. At 8:58 p.m. he observed a truck driving northbound through the closed area and he began to follow it. He intended to stop the truck because it was driving through the barricaded area in violation of a city ordinance. As he followed the truck, he "paced" it as having a speed between thirty and thirty-two miles per hour in an area that had a posted speed of twenty-five miles per hour; "pacing" means that he kept an even distance between his squad car and the truck and observed the speedometer on his squad car.

¶4 The officer followed the truck through the construction area and stopped it beyond that area. The driver of the truck, Kohls, told the officer that he was on his way home and his home was not located within the construction area. The officer asked Kohls if he had seen the construction sign and Kohls said he did not think the road was closed because there was enough room to get through and he always goes through that portion of the road on his way home.

¶5 On direct examination, the officer testified he could not remember the exact location of the barricades on that day—whether they were on the left, right, or middle of the road because that depended on what construction equipment had been moved through that day; he did know that they were placed so that the residents and traffic for the business on that section could get through.

¶6 On cross-examination, the officer testified that he was not one-hundred percent sure that there was a barricade at the north end of the construction zone and that if Kohls were to testify there was not, he could not say that was not true. He did know there was one at the south end. The officer disagreed that, if there were a barricade on the south end but not the north end of the construction zone, that would mean that the section of the street was open going in one direction but not in another; that “[didn’t] make any sense to [him].”

¶7 Kohls did not testify. The court accepted that if he did testify he would state there was no barricade on the north side of the section under construction. Kohls’ attorney also made an offer of proof that his client would testify that during the day when he had driven in that general area “the road closed signs were ... in front of the road” and they had been moved off to the side at night. In addition, Kohls’ attorney stated that his client would testify that he was certain he was traveling below the speed limit because he had purchased his truck

three months earlier and he did not want the gravel to “kick up” and wreck the paint on his new vehicle.

¶8 The court asked for briefing on any statutes governing how a road is properly closed. Kohls’ brief argued that WIS. STAT. § 86.06² governed the requirements for closing a road, including the placement of the barricades and lighting at night, and the officer had a mistaken view of the law because he believed the barricades were sufficient to close the road even though they did not meet the statutory requirements. Kohls relied on *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), to argue that reasonable suspicion for a stop cannot be based on a mistaken view of the law. The State responded that the officer had reasonable suspicion both that Kohls drove a vehicle on a closed road

² WISCONSIN STAT. § 86.06 provides:

Highways closed to travel; penalties. (1) Whenever any highway is impassable or unsafe for travel or during the construction or repair of any such highway and until it is ready for traffic the authorities in charge of the maintenance or construction thereof may keep it closed by maintaining barriers at each end of the closed portion. The barriers shall be of such material and construction and so placed as to indicate that the highway is closed and shall be lighted at night.

(2) Any person who, without lawful authority, removes, takes down, alters the position of, destroys, passes over or beyond any barrier so erected, or travels with any vehicle upon any portion of a highway closed by barriers as in this section provided, or walks or travels in any manner upon the materials placed thereon as part of the repair or construction work, shall be liable to a fine of not less than \$10 nor more than \$100, or to imprisonment not less than 10 nor more than 60 days, or both, and in addition thereto shall be liable for all damages done to the highway, said damages to be recovered by such governmental agency.

in violation of WIS. STAT. § 346.04(2)³ and reasonable suspicion that he violated the speed limit in WIS. STAT. § 346.57(4)(e).⁴

¶9 The circuit court concluded in a written decision and order that the officer did not need to ascertain that the barricades met all the statutory requirements in order to have reasonable suspicion to stop Kohls because this section of the street was posted with “road closed” signs and Kohls nonetheless drove through that section and exceeded the speed limit in doing so.

¶10 Kohls moved for reconsideration, repeating his argument that the officer made a mistake of law in believing the barricades were adequate to close the section of the street. The court denied the motion. Kohls subsequently pleaded “no contest” to OWI, third offense.

³ WISCONSIN STAT. § 346.04(2) provides:

(2) No operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer.

⁴ WISCONSIN STAT. § 346.57(4)(e) provides:

(4) Fixed limits. In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs:

....

(e) Twenty-five miles per hour on any highway within the corporate limits of a city or village, other than on highways in outlying districts in such city or village.

DISCUSSION

¶11 On appeal, Kohls renews his argument that the officer had a mistaken view of the law because the barricades' placement and lack of lighting meant that, as a matter of law, there was no statutory violation in driving through the area under construction. The State responds that the officer did not need to know that the barricades met all the statutory requirements in order to have reasonable suspicion and that the officer had an independent basis to stop Kohls because he was speeding. Kohls replies that the State is precluded from arguing that speed was an independent basis for stopping him because his counsel offered to have him testify on this issue, the "court did not wish to hear from Mr. Kohls," and the court did not cite vehicle speed as a basis for its written decision or in its oral decision on Kohls' motion to reconsider.

¶12 The temporary detention of individuals during the stop of an automobile by the police constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment.⁵ *Whren v. United States*, 517 U.S. 806, 809-10 (1996). An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. *Id.* at 810. A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, *id.*, or have grounds to reasonably suspect a violation has

⁵ Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. In general, the Wisconsin Supreme Court follows the United States Supreme Court's interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the state constitution. *State v. Fry*, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986).

been or will be committed. See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

¶13 Probable cause exists when, under the circumstances, the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed an offense. See *State v. Woods*, 117 Wis. 2d 701, 710-11, 345 N.W.2d 457 (1984). "When an officer observes unlawful conduct[,] ... the observation of unlawful conduct itself gives the officer probable cause for a lawful seizure." *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Probable cause exists where the facts and circumstances within the arresting officer's knowledge, of which he or she has reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed. *Draper v. United States*, 358 U.S. 307, 313 (1959).

¶14 Under the lower reasonable suspicion standard, the law does not require an officer to observe unlawful conduct; rather, under the totality of the circumstances, the officer must consider all the facts together and "as they accumulate," draw "reasonable inferences about [their] cumulative effect." *Waldner*, 206 Wis. 2d at 58.

¶15 We uphold the trial court's findings of fact unless they are clearly erroneous. See *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987). However, whether the facts as found by the circuit court, or the undisputed facts, are sufficient to fulfill the constitutional standard is a question of law, which we review de novo. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶16 We disagree with Kohls that the State is precluded from arguing on appeal that his speeding provided an independent and constitutionally permissible basis for the stop, and we conclude the officer had probable cause to believe that Kohls was violating WIS. STAT. § 346.57(4)(e) by driving in excess of the speed limit.

¶17 Kohls was not prevented by the circuit court from testifying on his speed. At the beginning of the motion hearing, Kohls' counsel stated that he had not yet decided whether he was going to call Kohls as a witness and was "going to base that on the testimony of the officer." While the officer was still on the stand and being cross-examined by Kohls' counsel about the barricades, the court asked both attorneys questions about the law governing the closing of a road. That led to argument by both counsel, interspersed with more questions and comments from the court, during which the court stated that the officer could step down. There was no objection from Kohls' counsel.

¶18 Toward the end of this interchange, the prosecutor argued that the court could rule then, without further briefing, because the officer's testimony established that he reasonably believed the road was closed and there was a speeding violation. While acknowledging that "it's not a huge amount of speed," the prosecutor contended that the officer "could have been pulling him over as well for a speeding violation." At this point, Kohls' counsel stated that he was "more than happy to put Mr. Kohls on to testify" and that Kohls "would have testified" as we have described above in paragraph 7—that he was certain he was traveling below the speed limit because his truck was new and he did not want the gravel to damage it. Counsel also said he "would have cross-examined [the officer]" on the speed because the officer's report mentioned the thirty to thirty-two miles per hour but not the "pacing" method the officer used.

¶19 The court responded to these comments by first stating that “[t]he issue for me is whether the road is closed or not” and then proceeding to comment on Kohls’ proffered testimony on his speed, expressing skepticism that someone would drive below the speed limit to protect a new truck from gravel but still drive unnecessarily through a construction area where there was gravel. The court then turned to the matter of the briefing schedule and the hearing came to an end.

¶20 It is clear the court did not say it was not going to consider what Kohls would have testified to on speed; indeed, its comments indicate it was accepting that he would so testify. It is also clear that Kohls’ counsel, after hearing the court express skepticism about the credibility of the proffered testimony, did not ask to have Kohls testify in an attempt to persuade the court that he was credible.

¶21 Kohls is arguing that he, or his counsel, understood the court’s statement that “[t]he issue for me is whether the road is closed” to mean that the court did not view the officer’s testimony on Kohls’ speed to be a basis for stopping him. While we grant that the meaning of that statement is ambiguous, Kohls’ counsel could have requested a clarification, especially after the court’s comments immediately following on the credibility of the proffered testimony.

¶22 As noted above, the State argued in its post-hearing brief that there was reasonable suspicion to stop Kohls because he was violating the speed limit. This informed Kohls that, even if he had believed the court was not going to consider his speed, the State was arguing his speed as an independent ground; and if he wanted to supplement the factual record on that issue, he needed to make a request at that time. He did not make a request.

¶23 The court’s written opinion *did* consider Kohls’ speed. It recited as fact that the officer observed Kohls’ vehicle “drive through the closed section of the road, traveling between 30 and 32 mph.” The court’s concluding sentences were: “In this case, it is apparently undisputed that this section of North Fourth Street was posted with ‘road closed’ signs, and that Defendant drove through that section (and exceeded the speed limit in doing so). This constitutes reasonable suspicion for the stop.” We thus do not agree with Kohls’ statement in his reply brief that the court did not “cite the vehicle speed as part of the basis of his written decision.” If Kohls believed that he had passed up the opportunity to testify based on a mistaken belief the court was not going to consider his speed limit and he still wanted the court to hear his testimony, he could have raised this issue in his motion for reconsideration. But he did not.

¶24 We acknowledge that the precise role of Kohls’ speed in the court’s analysis is not clear from its written decision; it may be the court did not view his speed as an independent basis for the stop. However, because we review *de novo* whether, based on the facts as found by the circuit court, the applicable constitutional standard is met, *see Krier*, 165 Wis. 2d at 676, we are not bound by the circuit court’s legal analysis. For this reason, too, the court’s failure to mention Kohls’ speed at the hearing on the motion for reconsideration does not preclude our review of the issue—indeed, since Kohls did not mention the issue of his speed in his motion or at the hearing, it is not surprising the court did not.

¶25 We are satisfied that Kohls had adequate notice in the circuit court that the State was arguing that his speed was an independent basis for the stop and that he had adequate opportunity to present testimony on this topic if he wanted to. We therefore conclude that this issue is properly before us and we turn to the merits.

¶26 The court in its written opinion found that the officer observed Kohls traveling between thirty and thirty-two miles per hour, as the officer testified. It is not clear from the opinion whether the court considered Kohls' proffered testimony to the contrary and found the officer's testimony more credible, although the court's skepticism expressed at the hearing suggests this is the case. However, even if the court considered the officer's testimony to be the only testimony on this point because Kohls did not testify, we have already concluded that Kohls had an adequate opportunity to present his testimony. We therefore accept the court's finding that the officer observed Kohls traveling between thirty and thirty-two miles per hour.

¶27 The officer testified that the posted limit was twenty-five miles per hour and there was no testimony and no offer of proof to the contrary. Therefore, based on the facts as found by the circuit court and the undisputed evidence, a reasonable officer could believe that Kohls was violating WIS. STAT. § 346.57(4)(e). This constitutes probable cause that a traffic violation has occurred. *See Draper*, 358 U.S. at 313. Accordingly, the stop was lawful on this ground and it is unnecessary to decide whether the barricades provided an independent basis for a lawful stop.

By the Court.—Judgment affirmed.

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

