COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP259-CR **Cir. Ct. No. 2004CF219**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LYNN A. GNATZIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Lynn Gnatzig appeals a judgment convicting him of a fifth or subsequent offense of operating a motor vehicle with a prohibited alcohol concentration. Gnatzig challenges an adverse suppression ruling on the grounds that the testimony of the arresting officer was not credible and that it was

insufficient to establish reasonable suspicion for the traffic stop. We reject Gnatzig's arguments and affirm.

BACKGROUND

¶2 At the suppression hearing, Reedsburg Police Officer Patrick Cummings testified that he was at a stop sign facing southbound at the intersection of Main Street and South Albert Avenue when he first observed Gnatzig's vehicle traveling about fifteen to twenty miles per hour in a twenty-five mph zone at about 1:30 in the morning. The officer watched the vehicle travel eastbound on Main for approximately two blocks, then turn southbound onto South Albert Avenue. The officer saw the vehicle cross about two or three feet over the double yellow center line for approximately ten or fifteen feet on South Albert starting about five to ten feet after the intersection. The officer began following the vehicle and observed it traveling slightly side to side within its lane. The officer then activated his squad lights and pulled Gnatzig over.

¶3 On cross-examination, the officer acknowledged that defense photos showed the yellow double line on South Albert was faded near the intersection, and could not be seen clearly until about fifteen feet back from the intersection, where blacktop began. The officer maintained, however, that he could see Gnatzig cross the yellow center line from his squad car's position about seventy-five feet away. The officer thought the yellow paint might have reflective qualities that would have made it more visible at night than the daylight pictures showed.

¶4 Gnatzig testified that he had slowed down on Main only to make the turn; that he had never crossed the center line on South Albert; and that the only

weaving he had done was when he had started to pull over to allow the squad car to pass him, before realizing that he was the one being pulled over.

¶5 The trial court found the officer to be more credible than Gnatzig, and concluded that the officer's observations that Gnatzig was traveling at an unusually slow speed on Main, crossed the yellow line on South Albert, and then traveled side to side somewhat within his lane provided reasonable suspicion to stop the vehicle.

¶6 Gnatzig moved for reconsideration and the court allowed him to present additional evidence. At the reconsideration hearing, the Reedsburg director of public works testified that the yellow paint used on the roads was not reflective in and of itself. Instead, glass beads were sprayed on top of the paint to give some reflective ability. Therefore, once the paint had faded, the glass beads would also be gone. The city official further explained that the center lines were usually painted once a year all the way up to the stop line at the intersection, and would normally have been painted about one or two months before the traffic stop at issue. The official did not know the last time that particular intersection had actually been painted, however.

¶7 Gnatzig testified that he had taken the pictures introduced at the suppression hearing showing the faded lines about a month after the traffic stop. Gnatzig presented additional pictures attempting to show that the squad car would have to have been parked over the crosswalk on South Albert in order to have a view of more than a block on Main. Gnatzig also presented diagrams and speed/distance calculations attempting to show that the officer could not have caught up to Gnatzig's car as quickly as he claimed.

¶8 The trial court denied reconsideration with little discussion. Gnatzig then entered a no contest plea and now appeals the suppression ruling.

STANDARD OF REVIEW

¶9 WISCONSIN STAT. § 971.31(1) (2005-06)[1] authorizes review of a suppression determination notwithstanding a subsequent plea of no contest. When reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). Similarly, we defer to credibility determinations made by the trial court unless the underlying testimony was incredible as a matter of law. ***Hallin v. Hallin***, 228 Wis. 2d 250, 258-59, 596 N.W.2d 818 (Ct. App. 1999). To be incredible as a matter of law is to be inherently or patently incredible; that is, "in conflict with the uniform course of nature or with fully established or conceded facts." ***Estate of Neumann v. Neumann***, 2001 WI App 61, ¶27, 242 Wis. 2d 205, 626 N.W.2d 821. Once the facts are established, we will independently determine whether they satisfy applicable statutory and constitutional provisions. *See* ***State v. Ellenbecker***, 159 Wis. 2d 91, 94, 464 N.W.2d 427 (Ct. App. 1990).

DISCUSSION

¶10 Although Gnatzig frames his first issue as whether there was reasonable suspicion to support the traffic stop, he conceded at the reconsideration hearing that if the officer had actually observed him driving slowly for about two

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

blocks and then crossing the center line after making a turn, the stop would be justified. He does not argue otherwise on appeal. Rather, his argument is that key portions of the officer's testimony relating to those two points were incredible as a matter of law and if the challenged testimony were set aside, the remaining evidence would be insufficient to establish reasonable suspicion. Therefore, the entire appeal really boils down to credibility issues.

¶11 Gnatzig contends first that the officer's testimony that he observed Gnatzig's vehicle cross the center yellow line within five to ten feet of the intersection is incredible as a matter of law because the defense photos conclusively establish that there was no yellow line visible that close to the intersection. There are multiple flaws in Gnatzig's argument, however. First of all, the defense photos were not dated and the court did not have to accept Gnatzig's claim that they were taken about a month after the traffic stop. Moreover, even if the photos were in fact taken only a month later, it does not follow that they accurately showed the condition of the center line on the date of the traffic stop. The city official testified that lines need to be repainted annually and wear off more quickly on a high volume intersection. Therefore, it is conceivable that the center line could have been considerably more visible even a month earlier than the date upon which the pictures were taken. Finally, and most fatally to Gnatzig's position, it was not necessary for the trial court to accept all of the officer's testimony in order to accept some of it. In other words, the court could reasonably have found that the officer had misjudged the distance in terms of feet or how close to the intersection the center line began, but still had seen Gnatzig's vehicle cross a visible yellow center line slightly farther back. It does not "conflict with the uniform course of nature" to see a painted center line set back somewhat from the opposite side of an intersection.

¶12 Gnatzig next contends that the officer's testimony that he caught up with Gnatzig's vehicle by the time it reached the next intersection was inherently incredible because the officer would have needed to travel in excess of 70 mph to reach a car traveling about twenty-two and one-half miles per hour within that distance. However, the record does not support Gnatzig's premise that he was traveling twenty-two and one-half miles per hour from the moment he turned onto South Albert until the moment he was stopped. The officer testified that, during the time he was behind Gnatzig on West Albert, Gnatzig was traveling "under 25 miles an hour." Moreover, Gnatzig himself testified that he had slowed down to make the turn and had also briefly attempted to pull to the side of the road to let the officer pass him; the trial court noted that that would have been reasonable. Gnatzig's calculation does not take either of these slow down periods into account. In short, regardless of exactly what speeds either vehicle was traveling, we see nothing inherently incredible about an officer being able to quickly catch up to a vehicle that turned directly in front of the officer at the intersection where his squad car was stopped, even if the officer did not start to follow until after observing the lane deviation.

¶13 Finally, Gnatzig contends that the officer's testimony that he observed Gnatzig's vehicle driving slowly for a period of approximately two blocks on Main was inherently incredible because the photos Gnatzig introduced showed that there was less than a block of visibility along Main from behind the white stop line on South Albert. However, the officer did not testify specifically where in relation to the intersection his squad car was stopped when he first observed Gnatzig's vehicle on Main. Therefore, it would not contradict "fully established or conceded facts" to infer that, if the officer could see approximately two blocks, he must have pulled up beyond the white stop line into the crosswalk.

Consequently, we cannot conclude that the officer's testimony that he observed Gnatzig's car driving slowly for two blocks was inherently incredible or contrary to the physical evidence.

¶14 In sum, we are not persuaded that the officer's testimony was incredible as a matter of law. Therefore, the trial court was within its discretion to accept the officer's testimony, and the testimony was sufficient to support the court's determination that there was reasonable suspicion for the traffic stop.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.